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Antitrust Injunctions in England, Germany and the United States: Their Treatment under European Civil Procadure and the Hague Convention

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Antisuit Injunctions in England, Germany and the United States: Their Treatment Under European Civil Procedure and the Hague Convention

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I. INTRODUCTION

To a civil law lawyer, some common law legal institutions are so alien they seem to come from another legal universe. In the last few years, German courts and scholars have confronted two "foreign world" common law institutions: punitive damages[1] and antisuit injunctions.

In 1996, German courts first faced the issue of whether an English antisuit injunction, preventing a German party from continuing a pending German lawsuit, had any legal effect in Germany.[2] This question arose under the Hague Convention.[3] In this instance, the Senior Master of the Supreme Court of Judicature, Royal Court of Justice, London, applied for an antisuit injunction against a German party.[4] The injunction was to ensure jurisdiction for the London Court of International Arbitration established by a forum selection and arbitration clause.[5]

The German Central Authority adjudicates whether injunctions are to be served.[6] It held that the proposed antisuit injunction would infringe upon German sovereignty.[7] Therefore, pursuant to Article 13 of the Hague Convention,[8] the Central Authority denied the Senior Master's application,[9] and the Düsseldorf Circuit Court of Appeals upheld the decision.[10] The Circuit Court

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1. *See generally* BGH Wertpapiermitteilungen [WM], (1992) 1451, *translated in* 32 I.L.M. 1320. The German Federal Supreme Court refused recognition of an American judgment awarding punitive damages because it violated German public policy. § 328(1) Nr. 4 Zivilprozessordnung [Civil Procedure Statute] [ZPO] (F.R.G.). Deterrence and punishment aspects are usually reserved to the state in criminal proceedings and not left to private parties to determine. *See* BGH WM, (1992), 1451, (1463). For a recent discussion on the recognition of U.S. punitive damages awards in Germany see Berhard Wegen & James Sherer, *Recognition and Enforcement of U.S. Punitive Damages Judgments in Germany*, 21 INT'L BUS. LAW 485 (1993); Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211 (1994).

2. *See* OLG Düsseldorf, Zeitschrift für den Zivilprozeß [ZZP], 109 (1996), 221.

3. *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 (entered into force Feb. 10, 1969) [hereinafter Hague Convention on Service Abroad].

4. *See* OLG Düsseldorf, ZZP, 109 (1996), 221.

5. *See id.* at 223.

6. *See* Hague Convention on Service Abroad, *supra* note 3, art. 2, 20 U.S.T. at 362.

7. *See id.* art. 13(1), 20 U.S.T. at 364.

8. *See id.*

9. *See* OLG Düsseldorf, ZZP, 109 (1996), 221 (223).

10. *See id.* at 222.

emphasized the freedom of the German courts to determine their jurisdiction over a lawsuit,[11] a power they viewed as essential for a constitutional civil proceeding.[12]

This article examines whether German Law allows a court to enjoin a party from commencing or continuing a foreign lawsuit. It discusses the law of antisuit injunctions in the United States and England and examines whether antisuit injunctions are consistent with the Brussels Convention and the Hague Convention. It concludes, that while antisuit injunction remedies may vary in substance and procedure, they are permissible in some form in these jurisdictions and are consistent with the recognized conventions.

II. ANTISUIT INJUNCTIONS IN THE UNITED STATES

Where a party is subject to *in personam* jurisdiction in the United States, federal courts have the power to issue an order enjoining that party from commencing or continuing a civil proceeding in a foreign court.[13] The federal courts have considerable discretion in issuing such an antisuit injunction. Nonetheless, the power to prevent parties from foreign litigation is not without limits.[14]

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11. *See id.* at 223.

12. *See id.* at 223-24.

13. It is not clear whether in personam jurisdiction is sufficient or whether subject matter jurisdiction is also required. *See* Seattle Totems Inc. v. National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981) (finding in personam jurisdiction over parties sufficient); Kaepa Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996) (finding federal courts have the power to enjoin persons subject to their jurisdiction); Computer Assoc. Int'l Inc. v. Altai, Inc., 950 F. Supp. 48 (E.D.N.Y. 1996) (holding that a federal court has the power to enjoin foreign suits by a person subject to its jurisdiction); United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985).

"A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987). *Id.* § 421(1).

"A state has power to exercise judicial jurisdiction to order a person, who is subject to its judicial jurisdiction, to do an act, or to refrain from doing an act, in another state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971); *see also* Haig Najarian, Note, *Granting Comity its Due: A Proposal To Revive The Comity-Based Approach To Transnational Antisuit Injunctions*, 68 ST. JOHN'S L. REV. 961, 961-62 (discussing that "states" power to exercise judicial discretion is "subject to [its] in personam jurisdiction").

14. *See* 28 U.S.C. § 2283. Section 2283 removes the equitable power of granting an injunction to stay state court proceedings from federal courts, but not the authority to enjoin parties from proceeding in foreign courts. Section 2283 provides: "A court of the U.S. may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect

The U.S. Court of Appeals are split regarding the criteria necessary to grant an antisuit injunction. The Second, Third, Sixth, and D.C. Circuits balance international comity with their power to issue antisuit injunctions; comity arguably outweighs issuance.[15] The First, Fifth, Seventh and Ninth Circuits, however, apply a multi-factor test. These Courts consider the unnecessary delay, the inconvenience of duplicative lawsuits, and the danger of inconsistent rulings when the same issue is adjudicated in separate actions.[16] Thus, where a foreign proceeding concerns the same issue and parties, an injunction is justified. [17]

A. The Multi-Factor Test: A Relaxed Standard

Judge Posner explained the multi-factor test in *Allendale Mutual Insurance*.[18] It involved a U.S. civil action for insurance proceeds, a French civil action in its commerce court, and a French criminal action.[19] This case not only exemplifies the application of the relaxed standard, it also provides an excellent example of the complexity of international litigation.

In 1989, Groupe Bull, a European manufacturer and its U.S. subsidiary, Bull Data Systems (BDS), purchased worldwide property insurance coverage from Allendale Mutual Insurance, a U.S.

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or effectuate its judgments." *Id.*; *see also Seattle Totems, Inc.*, 652 F.2d 852, 855.

15. *See* China Trade Dev. Corp. v. Coong Yong, 837 F.2d 33 (2d Cir. 1987); Campagnie des Bauxites de Guinee v. Insurance Co. of N. Am., 651 F.2d 877 (3d Cir. 1981), *aff'd* Insurance Co. of Ir. v. Compagnie de Bauxites de Guinee, 456 U.S. 694 (1982); Republic of the Phil. v. Westinghouse Elec. Corp., 43 F.3d 65 (3d Cir. 1994) (considering whether to grant an injunction restricting the power of the executive branch of a foreign nation, the court considered the same standards as those applied to an antisuit injunction); Gau Shan v. Bankers Trust, 956 F.2d 1349 (6th Cir. 1992), *appeal dismissed*, 1992 U.S. App. LEXIS 4035 (6th Cir. June 11, 1992); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Sea Containers v. Stena AB, 890 F.2d 1205 (D.C. Cir. 1989).

16. *See* Canadian Filters v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969); In re Unterweser Reederei v. M/S Bremen, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (5th Cir. 1971), *rev'd on other grounds sub nom.;* Bremen v. Zapata Off-Shore Co., 401 U.S. 1 (1972); *Kaepa* 76 F.3d 624; Allendale Mut. Ins. v. Bull Data Systems, 10 F.3d 425 (7th Cir. 1993); *Seattle Totem Inc.*, 652 F.2d 852, *cert. denied*, Northwest Sports Enters. v. Seattle Totems Hockey Club, 457 U.S. 1105 (1982).

17. Identity of parties and issues is not always explicitly formulated by the courts. Nonetheless, whenever a court addresses the problem of an antisuit injunction, the parties and the issues are invariably the same. *See China Trade*, 837 F.2d 33, 36 (requiring the parties to both suits be the same and that there be a final judgment in the first case before the enjoining court will dispositively enjoin the action).

18. *See generally Allendale Mut. Ins.*, 10 F.3d 425.

19. *See id.*

company. The insurance covered property warehouse, located in France. In addition, Allendale's British subsidiary, FMI, wrote a separate policy for the contents of the warehouse and all other property located in France. French law governed this contract and both contracts overlapped.

In 1991, the French warehouse burned down. BDS claimed a $100 million loss under the policies issued by Allendale and FMI. Allendale and FMI filed a lawsuit in the U.S. seeking a declaration that the cause of the fire was arson, and was committed by the insured. The purpose of the lawsuit was to exclude the loss from the insurance coverage, or in the alternative to limit it to $48 million, the contractual limit under the policy with FMI. BDS also filed a separate action in the same court against Allendale. The court consolidated the two actions and BDS filed a counterclaim against both Allendale and FMI.

Meanwhile, BDS sued FMI in the Court de Commerce of Lille in France. The Court stayed the criminal action until after the French criminal court completed the criminal investigation. In February 1993, prior to the conclusion of the French criminal investigation, BDS moved to lift the Court's stay and continue the civil proceeding in France.[20]

The U.S. district court enjoined BDS from litigating its case in the Court de Commerce.[21] BDS appealed.[22] The district court held that a simultaneous litigation in a foreign court would be vexatious and oppressive.[23] Moreover, the Court found it had equitable power to enjoin a foreign lawsuit which burdened a U.S. party.[24]

Other U.S. courts apply the relaxed standard in the same way.

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20. *See id.* at 427.

21. *See id.*

22. *See id.*

23. *See id.* at 431.

24. *See id.* Judge Posner characterized the Court de Commerce de Lille as a panel of arbitrators, composed of businessmen who devote part of their time to arbitrating. *See id.* at 429. He considered the French court badly equipped to manage the enormous documentary evidence uncovered in the U.S. discovery process and stated that the French court does not hear live testimony. *See id.* Because of these institutional shortcomings, he regarded the U.S. district court as the more appropriate forum. *See id.* at 430. In addition, he concluded it would be a clear prejudice for Allendale to go to trial in France, while Bull Data Systems would not be prejudiced by litigating its case in the United States. *See id.* These considerations, together with the fact the U.S. proceeding was already far along, convinced him an antisuit injunction represented the appropriate remedy. *See id.* at 431.

These courts emphasize that a duplicative foreign action results in: undue hardship; frustration and delays in the efficient adjudication of a case; substantial inconvenience and expense to the parties and witnesses; and potentially inconsistent rulings.[25] The Court thus considers international comity in conjuction with other factors to consider when determining whether to issue an antisuit injunction.[26]

In practice, the party filing the foreign action must prove "an injunction really would throw a monkey wrench into the foreign relations of the U.S."[27] It is not enough, however, to show that international comity will be impaired because the injunction restricts the jurisdiction of a foreign court. Instead, a party must show that international comity will be impaired in the case at bar.[28] The impairment of international comity can be proven by the U.S. State Department or its foreign counterpart.[29] If the party contesting the injunction can show evidence of diplomatic disgruntlement, however, it may be able to prevent the injunction.[30]

B. The International Comity Test or the Strict Standard

Starting with *Laker Airways*, U.S. courts have applied a stricter standard.[31] These courts consider international comity[32]

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25. *See* Seattle Totems, Inc. v. National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981); Bethell v. Peace, 441 F.2d 495, 498 (5th Cir. 1971); *In re Unterweser,* 428 F.2d 888, 896; Kaepa Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996).

26. *See* Brian Riley, *Antisuit Injunction held Against Suit in Foreign Country,* 23 SUFFOLK U.L. REV. 1234, 1237-38 (1988). A court should grant an antisuit injunction when at least two or three of several equitable considerations exist. These considerations apply when the foreign action: (1) is vexatious; (2) frustrates important domestic policies; (3) threatens the court's jurisdiction; or (4) contributes to delay, inconvenience, excessive costs or a race to judgment. *See id.; see also* China Trade Dev. Corp. v. Coong Yong, 837 F.2d 33, 34 (2nd Cir. 1987).

27. *See Allendale,* 10 F.3d 425, 431.

28. *See id.*

29. *See id.*; *see also* Phillips Med. Sys. Int'l v. Bruetman, 8 F.3d 600, 605 (7th Cir. 1993).

30. This argument, however, is only a theoretical exemption. For instance, would the plain spoken statement of the German Court of Appeals of Düsseldorf be sufficient? Should other proof in addition to the comment of a high judicial authority that injunctions infringe on foreign sovereignty can be demanded to prove the violation of international comity?

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

32. What international comity really means and its effect on a court's decision is not clear. Definitions seem to be the best way to present the idea of comity.

Comity, in the legal sense, is neither a matter of absolute obligation . . . nor of

the primary criteria in determining whether an antisuit injunction should be granted.[33] Parallel proceedings on the same claim are generally permitted; at least until one court enters a judgment which can be pleaded as *res judicata* in another proceeding.[34]

Courts following this strict standard recognize only two arguments sufficient to justify interfering with a state's foreign sovereignty.[35] First, courts will interfere where it is necessary to protect their jurisdiction.[36] For example, when a foreign court exercises its authority in an *in rem* or *quasi in rem* proceeding, it deprives the district court of its jurisdictional prerogative.[37] In an *in personam* proceeding, however, a parallel action can only threaten the district court's authority if the foreign court seizes exclusive jurisdiction over the action.[38] Second, courts will interfere to prevent a party from evading the forum's most compelling public policies.[39] This does not mean, however, the mere attempt by a party to seek "slight advantages in the substantive or procedural law to be ap-

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> mere courtesy and good will . . . [B]ut it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convience, and to the rights of its own citizens or of other persons who are under the protection of its law.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). "[I]nternational comity is the elusive doctrine—something more than mere international manners, but less than obligation—which attempts to mediate the frictions inherent in a community of sovereign states." Republic of Phil. v. Westinghouse Electric Co., 43 F.3d 65, 75 (3d Cir. 1994).

> Comity is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is the nation's expression of understanding which demonstrates due regard both to internantional duty and convenience and to the rights of persons protected by its own laws.

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

33. *See Laker Airways*, 731 F.2d 909, 934; China Trade Dev. Corp. v. Coong Yong, 837 F.2d 33, 36 (2d Cir. 1987); Gau Shan v. Bankers Trust, 956 F.2d 1349, 1354-55 (6th Cir. 1992); Berkshire Furniture Co. v. Uri Glattstein, 921 F. Supp. 1599, 1561 (W.D. Ky. 1995).

34. *See Laker Airways,* 731 F.2d 909, 926-27; Compagnie des Bauxites de Guinee v. Insurance Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981); *China Trade*, 837 F.2d 33, 36.

35. *See Laker Airways*, 731 F.2d 909, 927-33; *China Trade,* 837 F.2d at 36; *Gau Shan,* 956 F.2d 1349, 1355-58; *Berkshire Furniture Co.,* 921 F. Supp. 1599, 1561.

36. *See Laker Airways*, 731 F.2d 909, 927.

37. *See id.* 929.

38. *See id.* at 929-31. An English High Court of Justices issued an injunction enjoining a party to litigate its claim in the United States. The D.C. Circuit Court held the sole purpose of the English action was to terminate the American action and therefore the antisuit injunction was justified as a defense remedy to conserve the jurisdiction of the U.S. court. *See id.*

39. *See id.* at 929.

plied in the forum court."[40] This stricter approach recognizes the complex foreign relations characteristic of a world economy.[41] Moreover, it recognizes that the United States cannot expect to impose its point of view on the rest of the world.

An antisuit injunction restricts the jurisdiction of the foreign court and disregards the principles of international comity.[42] If both the U.S. and the foreign court issued antisuit injunctions, the parties could not obtain judicial relief. The injunction battle would paralyze the judicial process.[43] Furthermore, a willingness to issue antisuit injunctions suggests that U.S. courts mistrust foreign proceedings[44] and consider the foreign system incapable of adjudicating these disputes.[45] To prevent these negative impacts on international comity, a court should issue an antisuit injunction only under the most compelling circumstances.[46]

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40. *China Trade,* 837 F.2d 33, 37; *see also Gau Shan,* 956 F.2d 1349, 1357-58 (questioning whether only the national public policy and not the public policy of a state could outweigh the international comity).

41. *See Gau Shan,* 956 F.2d 1349, 1354; *see also* Laura Salava, *Balancing Comity with Antisuit Injunctions: Considerations Beyond Jurisdiction,* 20 J. LEGIS. 267, 269 (1994). The author agrees with the *Gau Shan* court's reasoning and proposes an amendment of the federal rules of civil procedure, section 65 as follows:

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

F.R.C.P. § 65.

42. *See Laker Airways,* 731 F.2d 909, 927; *Gau Shan,* 956 F.2d 1349, 1354; United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985).

43. *See Gau Shan,* 56 F.2d 1349, 1355.

44. *See* Michael Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach,* 45 BAYLOR L. REV. 499, 517 (1993). In contrast to the refusal to recognize a foreign decision which is the only regulation of the court's internal affairs, an antisuit injunction leaves the internal realm by prescribing the foreign tribunal to stay away from the solution to a dispute. The injunction offensively denied the foreign forum's ability to hear and adjudicate the case. *See id.*

45. *See Gau Shan,* 956 F.2d 1349, 1355.

46. *See Laker Airways,* 731 F.2d 909, 927; *Gau Shan,* 956 F.2d 1349, 1355; Computer Assoc. Int'l Inc. v. Altai Inc., 950 F. Supp. 48 (E.D.N.Y. 1996). Most scholars strongly support the stricter standard. Najarian uses the Foreign Sovereign Immunities Act as a guideline for antisuit injunctions: "Since judicial proceedings are public in nature, and are exercises of sovereignty, they should be extended comity, just as public acts of a foreign state are granted immunity under the FSIA." Najarian, *supra* note 13, at 983. Hartley proposes the following:

> [A]n antisuit injunction should not be granted on any ground on which the foreign court could on a proper showing be expected itself to stay or dismiss the

III. ANTISUIT INJUNCTIONS IN ENGLAND

The jurisdiction of the English courts to restrain a party from instituting or prosecuting a proceeding in a foreign country has long been recognized.[47] In 1834 Lord Brougham stated, "the power to grant an antisuit injunction is based not upon any pretension to the exercise of judicial . . . rights abroad."[48] Rather, the power arises because the enjoined party is subject to the *in personam* jurisdiction of the English court.[49] Although most cases involving antisuit injunctions also involve a pending substantive proceeding,[50] such proceeding is not a necessary prerequisite.[51] When the English court has *in personam* jurisdiction over the enjoined party, the court has the power to grant an antisuit injunction with-

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> proceedings before it . . . There would remain . . . situations in which injunctions would continue to be issued, . . . cases where mandatory legislation of the forum would not be applied by the foreign court and cases where the jurisdiction of the forum is under threat.

Trevor Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487, 509 (1987).

Because of the negative effect of an antisuit injunction on international comity and on public policy Schimek proposes that Texas courts should always refrain from issuing them. Schimek, *supra* note 44, at 534. His arguments for Texas courts are also applicable to federal courts. He points out that antisuit injunctions disrupt the relations among nations because they produce a high level of uncertainty in international commerce. For example, an international acting company doing business in the United States may not know in advance whether it can proceed with an action in a foreign forum, under foreign law, because of the possibility of an U.S. antisuit injunction. *See id.* at 520-22. Furthermore, Schimek elaborates that public policies do not favor the issuing of an antisuit injunction. First, an international company cannot escape its liability if the U.S. court allows the foreign proceeding to continue. If the foreign judgment violates public policy, the U.S. court can refuse to recognize the foreign decision. The deterrent effect of U.S. law will not be strengthened by preventing an additional foreign proceeding since the sanctions the foreign court imposes on the company are in addition to those of the U.S. court. If the foreign judgment contradicts the U.S. decision, the U.S. court can refuse to recognize it. *See id.* at 523-24.

47. *See* Hartley, *supra* note 46, at 490 nn.15 & 16 (reporting numerous decisions of the nineteenth century).

48. Lord Portarlington v. Soulby, 3 My. & K. 104, 108 (Ch. 1834).

49. *See id.*; Man (Sugar) Ltd. v. Haryanto (No. 2), 1 Lloyd's Rep. 429 (C.A. 1991). The basis for the *in personam* jurisdiction are Rules 24 to 30 and insofar as the defendant is domiciled in a Member State of the Brussels or Lugano Convention the Rules of this Conventions.

50. *See* Siskina (Cargo Owners) v. Distos Compania Naviera S.A., 1979 App. Cas. 210 (appeal taken from Eng.).

51. *See* Bank of Tokyo Ltd. v. Karoon, 1987 App. Cas. 45, 60 (appeal taken from Eng.); South Carolina Ins. Co. v. Assurantie N.V., 1987 App. Cas. 24, 45 (appeal taken from Eng.).

out deciding the merits of the dispute.[52]

The English courts' power to enjoin a party from suing abroad is based on the broad principle of equity.[53] Under the principle of equity, an injunction should be granted where the English court must intervene to prevent injustice.[54] The general power to grant injunctive relief is statutorily grounded in Section 37 of the 1981 Supreme Court Act 1981.[55] The Act empowers the English courts to issue an injunction "in all cases in which it appears to the court to be just and convenient to do so."[56] Thus, because the power to grant an antisuit injunction is an equitable power, the trial judge has discretion in exercising this power. The discretion is limited by legal standards developed over the last 100 years. Additionally, some categories are well established in the case law.

A. Multi Fora Cases

1. Normal Grounds

"Multifora cases" means either: (1) two simultaneous proceedings in different countries or (2) the availability to bring suits in two or more fora, even if at the moment, only one proceeding is pending. In contrast, a single fora case means there is only one forum available.

One line of multifora cases deals with the typical forum non conveniens situation: one proceeding is pending in England while the same proceeding is either before a foreign court or there is an attempt to bring it before a foreign court. The Court's early decisions applying the forum non conveniens doctrine from Scotland in the *Atlantic Star* [57] and *MacShannon v. Rochware Glass Ltd.*,[58] resulted in unclear criteria for granting an antisuit injunction.[59] In

52. *See* British Airways Board v. Laker Airways Ltd., 1985 App. Cas. 58 (appeal taken from Eng.); Midland Bank plc v. Laker Airways Ltd., 1 All E.R. 526 (C.A. 1986); Airbus Industrie GIE v. Patel, 2 Lloyd's Rep. 8 (C.A. 1997).

53. *See* British Airways Board, 1985 App. Cas. 58, 70.

54. *See id.* at 95; *see also* Castahno v. Brown & Root, 1981 App. Cas. 557, 573 (appeal taken from Eng.).

55. Supreme Court Act, 1981, § 37 (Eng.).

56. *Id.*

57. The Atlantic Star, 1974 App. Cas. 436 (appeal taken from Eng.).

58. MacShannon v. Rochware Glass Ltd., 1978 App. Cas. 795 (appeal taken from Eng.).

59. *See The Atlantic Star,* 1974 App. Cas. 436; *see also Rochware Glass Ltd.,* 1978 App. Cas. 795. These cases delineated the requirements of staying an English proceeding: (1) justice could be done in the foreign country at substantially less inconvenience and

1986, however, the Privy Counsel's decision in *Societe Nationale Industrielle Aerospatiale* established a two prong test which has been uniformly applied by subsequent courts.[60] If the dispute is only whether the English or foreign court is a more appropriate forum, the foreign court should decide the question based on the doctrine of forum non conveniens.[61] In exceptional circumstances, however, the English court can restrain a party from proceeding with a lawsuit in a foreign country if: (1) England is the natural forum for trying the action;[62] and (2) the foreign action would be vexatious and oppressive.[63]

In deciding whether the action in the foreign country would be vexatious or oppressive, the English court must strike a balance between the possible injustice to the defendant (of the foreign action) if the injunction is not granted and the possible injustice to the plaintiff if it is granted.[64] It seems that the "natural forum" inquiry and the "balancing of injustice" are sub-parts of a two prong test. Thus, even when the foreign forum is inappropriate, a balance favoring of the plaintiff in the foreign action could persuade the English court to deny an antisuit injunction.

In practice, this is not the way the English courts understand the test, and two different scenarios are possible. One scenario

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expense than in England; and (2) the stay would not deprive the plaintiff of a legitimate personal or juridical advantage. In *Castanho*, the House of Lords extended this test to antisuit injunctions. *Castanho,* 1981 App. Cas. 557, 557. In 1986, the House of Lords recast the doctrine of forum non conveniens. *See* Spiliada Maritime Corp. v. Cansulex Ltd., [1986] 3 W.L.R. 972. First, it determined which fora was the natural forum that had the most substantial connections to the action. *See id.* Second, it declared that the action may be brought in a court other than the natural forum only if justice so demands. *See id.* According to *Castanho,* applying this test to an antisuit injunction would give the English court complete discretion in deciding where an action should be tried. In *Société Nationale Industrielle Aerospatiale*, the court recognized that such an arrogant attitude of the English courts would be extremely contradictory to the notion of international comity and thus rewrote the criteria for issuing an antisuit injunction in the described way. *See Société Nationale,* 1987 App. Cas. 871, 871; *see also* Hartley, *supra* note 46, at 490-93 (providing a report on the development of the doctrines of forum non conveniens and the antisuit injunction).

60. *See Société Nationale*, 1987 App. Cas. 871, 895; Barclays Bank plc v. Homan [1992] B.C.C. 757, 773; E.I. Du Pont de Nemours & Co. v. I.C. Agnew (No. 2), 2 Lloyd's Rep. 240, 244 (C.A. 1988); The Erias EIL Actions, 1 Lloyd's Rep. 64, 79 (Q.B. 1995); Simon Engineering plc v. Butte Mining plc (No. 2), 1 Lloyd's Rep. 91, 95 (Q.B. 1996).

61. *See Société Nationale,* 1987 App. Cas. 871, 896.

62. To determine whether England is the natural forum, the standards set up by *Spiliada* apply. *See Spiliada,* 3 W.L.R. 972, 972.

63. *See Société Nationale,* 1987 App. Cas. 871, 896.

64. *See id.*

exists when both the English and the foreign forum are appropriate. The advantages to the plaintiff by continuing the foreign proceeding must be balanced against the disadvantages of leaving the foreign defendant to seek his rights abroad.[65]

A second scenario exists when the foreign country represents an inappropriate forum and the juridical and personal advantages the plaintiff could achieve in the foreign proceeding are prima facie illegitimate. The Court considers substantive and procedural advantages as injustices to the defendant and are therefore illegitimate.[66] The Court, however, does not consider illegitimate advantages when it balances the interests of the parties.[67]

In *Airbus Industrie*,[68] the English Court of Appeal confronted for the first time, the question whether they could restrain a party from litigating an action in one foreign court to protect the proceedings pending in another foreign court. In this case, several English citizens sued Airbus Industrie in both India and Texas to recover damages sustained in an air crash in India.[69] Airbus applied for an injunction in England restraining the English citizens from proceeding with the suit in Texas.[70] The English citizens were subject to *in personam* jurisdiction in the English court[71] yet had no opportunity to commence an action in England to recover damages.[72] The Court of Appeal concluded that where the foreign party, here the English plaintiffs, has no alternative to seeking the aid of the English court, the antisuit injunction should be granted based on principles of equity and the need to avoid injustice.[73] It

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65. *See Erias,* 1 Lloyd's Rep. 64, 84-86.

66. *See* Airbus Industrie GIE v. Patel, 2 Lloyd's Rep. 8, 16 (C.A. 1997).

67. *See id.* (finding Texas contingent fee system as parcel of the inappropriate forum is illegitimate advantage); Smith Kline & French Labs Ltd. v. Bloch, 1 W.L.R. 730, 738, 744 (C.A. 1983) (discussing examples of illegitimate advantages which cannot be attributed decisive weight in the critical equation; including trial by jury, expectation of higher damages, contingent fee arrangements and pre-trial discovery procedure); Simon Engineering plc v. Butte Mining plc (No.2), 1 Lloyd's Rep. 91, 100 (Q.B. 1996) (finding contingent fee system and pre-trial discovery are illegitimate advantages).

68. *See Airbus Industrie GIE,* 2 Lloyd's Rep. 8, 8.

69. *See id.* at 8.

70. *See id.* at 12.

71. *See id.* at 13.

72. *See id.* at 14.

73. The doctrine of forum non conveniens does not exist in Germany, like in other civil law systems. Therefore, these courts cannot grant a stay, even in a case where an English court would consider the foreign forum inappropriate. Is the English court in this situation always entitled to grant an antisuit injunction because only the English court can provide aid to the party sued in the inappropriate forum? The answer must be no! Inter-

held that the Court should then apply the same principles used in a Multi Fora case where England is one of the fora.

2. Contractual Obligation Not to Sue Abroad

When an exclusive jurisdiction clause or an arbitration clause confers jurisdiction to the English courts, a court will issue an order restraining a party from suing in a foreign forum.[74] In *Continental Bank v. Aeakos Compania Naviera,*[75] the Court of Appeal held that when an exclusive jurisdiction clause favors the English court, the continuance of a Greek proceeding is vexatious and oppressive conduct.[76] An antisuit injunction should be granted because a breach of contract claim would be ineffective where it is contrary to an exclusive jurisdiction clause.[77]

The Court of Appeal applied this reasoning to an arbitration clause in *The Angelic Grace.*[78] There, the court concluded the foreign judge would not regard an antisuit injunction as interference with international comity if a party was breaching an arbitration clause.[79] Thus, there was no need, as in the normal multi- fora cases, to give the foreign court the opportunity to decide whether the foreign forum is appropriate.[80]

Lord Justice Millet summarizes the law as followed:

> In my opinion the time has come to lay aside the ritual incantation that [the power to grant an antisuit injunction to enforce a contractual obligation not to sue abroad] is a jurisdiction which should only be exercised sparingly and with great caution. . . . Sensitivity to the feelings of a foreign Court has much to com-

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national comity requires deference to the legal system of the foreign state. *See, e.g.,* Haimo Schack, *Die Versagung der Deutschen Internationalen Zuständigkeit Wegen Forum Non Conveniens und Lis Alibi Pendens*, 58 RABELS ZEITSCHRIFT 40, 41-44, 57 (1994) [hereinafter Schack, *Versagung*]; Helene Gaudemet-Tallon, *Les Regimes Relatifs au Refus D'exercer La Competence Juridictionelle en Matiere Civile et Commerciale: Forum Non Conveniens, Lis Pendens*, 46 REVUE INTERNATIONALE DE DROIT COMPARE 423, 423-27 (1994).

74. *See* Continental Bank v. Aeakos Compania Naviera, 1 Lloyd's Rep. 505, 512 (C.A. 1994); A/S D/S Svendborg v. Wansa Estonian Shipping Co., 2 Lloyd's Rep. 559, 568-69 (Q.B. 1996).

75. 1 Lloyd's Rep. 505 (C.A. 1994).

76. *See id.* at 512.

77. *See id.*

78. *See* Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. [hereinafter The Angelic Grace] 1 Lloyd's Rep. 87, 94-95 (C.A. 1995); A/S D/S Svendborg, 2 Lloyd's Rep. 559, 568-70.

79. *See The Angelic Grace,* 1 Lloyd's Rep. 87, 93.

80. *See id.* at 95.

> mend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. . . . But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them. . . . The jurisdiction [to grant an antisuit injunction] is, of course, discretionary and is to be exercised as a matter of course, *but good reason needs to be shown why it should not be exercised* in any given case.[81]

Such "good reason" can be recognized when the party seeking the injunction voluntarily submitted to the jurisdiction of the foreign court and the foreign proceeding has progressed for a period of time, or where the foreign court dismissed the application for a stay of its proceeding, or when the application for an antisuit injunction before the English courts is delayed.[82]

B. Single Forum Cases

In rare circumstances, an antisuit injunction may be granted even where the plaintiff or the potential plaintiff of the foreign proceeding has no remedy in England so that the order restraining a party from suing in the foreign forum deprives this party of its only remedy. The House of Lords in *Laker Airways*[83] and the Court of Appeal in *Midland Bank*[84] held that an antisuit injunction can be issued in single forum cases if it would be unconscionable, vexatious and oppressive for the plaintiff to sue in the foreign court.[85] Of course, it is likely that other strong policy interests

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81. *Id.* at 96 (emphasis added). Would it be a good reason when a foreign jurisdiction, like the Court of Appeals of Düsseldorf, expresses the view that it considers the antisuit injunction as an infringement of its sovereignty?

82. *See A/S D/S Svendborg,* 2 Lloyd's Rep. 559, 570.

83. *See* British Airways Board v. Laker Airways Ltd., 1985 App. Cas. 58, 81, 95 (appeal taken from Eng.). The court rejected the argument that the American action was unconscionable. Thus, it did not grant the injunction because the airlines was sued by the liquidator of Laker Airways in the United States and it did business in the United States. *See id.* at 81. The Court did, however, state that a defense is available only under English law in a non-liability declaration action, but not under the foreign law, as this represents an unconscionable action. *See id.* at 95.

84. *See* Midland Bank plc v. Lakers Airways Ltd., 1 All E.R. 526, 526 (C.A. 1986). The court granted the injunction restraining the liquidator of Laker Airways from joining Midland Bank in the U.S. proceeding because Midland Bank did not have a connection to the pending action and if not enjoined it would therefore be an extraterritorial application of the U.S. antitrust law. *See id.* at 526.

85. The unconscionablity in the two actions resulted from the extraterritorial appli-

may justify an antisuit injunction in other single forum cases.[86]

IV. ANTISUIT INJUNCTIONS IN GERMANY

A. Basic Differences Between Common Law Systems and the German Legal System

As seen above, U.S. and English courts apply the same theory when granting an antisuit injunction. They exercise their broad equitable power to achieve just results. In those countries, an antisuit injunction is merely one of many equity-based remedies.

In contrast, German courts have no equitable power nor any authority to create a new remedy even when justice requires.[87] Rather, the civil procedure provisions are compulsory.[88] Judges may not deviate even if they think the procedural rules produce an unjust outcome.[89] In the context of antisuit injunctions, it is important to notice the jurisdictional rules in Germany are mandatory.[90] When a provision gives a court jurisdiction the court is required to exercise that jurisdiction.[91] The court has no discretion to dismiss or stay the proceeding based on forum non conveni-

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cation of the U.S. antitrust law.

86. *See* Hartley, *supra* note 46, at 495.

87. *See* ROMAN HERZOG, 2 KOMMENTAR ZUM GRUNDGESETZ, art. 20, ch. VI, ¶¶ 32, 36 (18th ed. 1980).

88. Rules on jurisdiction are only compulsory for the parties if a rule explicitly provides so by using terms like "exclusive jurisdiction" or "mandatory jurisdiction." *See* STEIN & JONAS ET AL., KOMMENTAR ZUR ZIVILPROZEßORDNUNG 1, § 1, ¶ 6 (21st ed. 1994). If a jurisdictional rule is not compulsory, then German Civil Procedure Code sections 38 and 40 permit parties to determine the forum for a law suit by forum selection agreements. *See id.*

89. German Constitution articles 20(3) and 97(1) provide that German courts are strictly bound by statutory law. *See* HERZOG, *supra* note 87, art. 20, ch. VI, ¶¶ 32, 36. This constitutional principle applies to procedural rules as well. *See* PETER GUMMER & RICHARD ZÖLLER, KOMMENTAR ZUR ZIVILPROZEßORDNUNG, § 1 GVG, ¶ 10 (20th ed. 1997); OTTO RUDOLF KISSEL, KOMMENTAR ZUM GERICHTSVERFASSUNGSGESETZ § 1, ¶ 110 (2d ed. 1994). A court has discretion only when the Civil Procedure Code explicitly confers discretion to it. One example is Civil Procedure Code section 938(1), which provides that the court at its discretion can determine which measures best serve the purpose of a preliminary injunction. *See id.*

90. *See* Schack, *Versagung, supra* note 73, at 41.

91. *See id.* at 45; OLG München, Praxis des Internationalen Privat- und Verfahrensrechts, 4 (1984), 319 (F.R.G.); RICHARD ZÖLLER & REINHOLD GEIMER, INTERNATIONALES ZIVILPROZEßRECHT ¶ 1075 (2d ed. 1993) [hereinafter ZÖLLER & GEIMER, INTERNATIONALES]. *But see* ULRICH WAHL, DIE VERFEHLTE INTERNATIONALE ZUSTANDIGKEIT 126 (1974) (applying the doctrine of forum non conveniens to restrict the international jurisdiction of German courts).

ens.[92]

This fundamental difference between the English and the U.S. legal systems on the one hand, and the German system on the other, makes it impossible to base an antisuit injunction in both systems on the same theory. That is not to say, however, that an order enjoining a party from suing abroad is unavailable under German law. It only means that because of the conceptual differences between the common law and the civil law systems, the legal basis for an antisuit injunction-like remedy differs.

To obtain a decision, or an order from a German court, a party must present a valid cause of action to the court.[93] The causes are almost always grounded in substantive law so that almost all remedies are legal remedies.[94] The lack of equity-based remedies is partly compensated by the fact that specific performance is preferred and often granted.[95] Under German law, specific performance is the norm and damages the exception. Nonetheless, a party attempting to obtain an antisuit injunction from a German court must present a cause of action which entitles it to restrain the other party from suing in a foreign forum.

The following section of this article examines what German law requires for a remedy similar to an antisuit injunction.

B. Antisuit Injunctions: A Rarity in Germany

German courts are reluctant to grant injunctions which potentionally interfere with foreign proceedings. If the paucity of court decisions granting an antisuit injunction indicates its availability, then antisuit injunctions are almost unknown in Germany.

Only a single Supreme Court decision exists where the court issued an injunction restraining a German party from continuing a foreign proceeding.[96] In this case, the parties were a husband and wife who were both German citizens.[97] They separated in 1927

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92. *See* Schack, *Versagung, supra* note 73, at 45.

93. *See* FRITZ BAUR & WOLFGANG GRUNSKY, ZIVILPROZEßRECHT ¶¶ 6-7 (8th ed. 1994); KLAUS SCHREIBER, ÜBUNGEN IM ZIVILPROZEßRECHT 25, 56 (2d ed. 1996).

94. *See* HANS BROX, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES ¶¶ 591-93 (20th ed. 1996).

95. *See id.*; HEINZ HÜBNER, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES ¶ 416 (2d ed. 1996); Georg Kleinfeller, *Der Begriff "Anspruch,"* 137 ARCHIV DER CIVILISTISCHEN PRAXIS 129 (1933).

96. *See* RGZ 157, 136 (136) (F.R.G.).

97. *See id.* at 136-37.

and began a Latvian divorce proceeding in 1935.[98] Latvian law permitted a divorce after a three years of marital separation.[99] Under German law, however, divorce was permitted only on the grounds of guilt and only if the person commencing the divorce proceeding was the non-guilty party.[100] The German Supreme Court found that the husband had attempted to evade the stricter German divorce law. This attempt was considered an intentional violation of *boni mores*, a tort under section 826 German Civil Code.[101] The Court upheld an order of the Court of Appeal ordering the husband to discontinue the divorce proceeding in Latvia and awarded the wife damages for the legal costs of the Latvian proceeding.[102]

In 1962, the Court of Appeals for the Circuit of Köln decided another case arising in the matrimonial context.[103] The Court did not enjoin a party from suing, but awarded damages for an unlawful action in a foreign court.[104] In this case, the West German Court ordered the husband, domiciled in West Germany, to pay maintenance to his wife and child living in East Germany (GDR). The husband commenced an action before a GDR court to amend the maintenance decision.[105]

As a consequence of the lawsuit in the GDR, GDR officials learned the wife had not disclosed receipt of West German currency–a crime under GDR law.[106] The wife, fearing criminal charges, escaped to West Germany with her child. The Court of Appeals determined that she had a damage claim pursuant to article 826 Civil Code for all damages caused by the escape.[107] The Court held the lawsuit by the husband was unconscionable because it lacked merit and was brought for the sole purpose of suing his wife in the courts of the GDR and potentially exposing her to im-

98. *See id.* at 137.

99. *See id.* at 139.

100. *See id.* at 140.

101. Section 826 of the German Civil Procedure Code provides: "A person who willfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage." § 826 ZPO (F.R.G.). For a translation of the German Civil Code in English, see SIMON GOREN, THE GERMAN CIVIL CODE (1994).

102. RGZ 157, 136 (140-41).

103. *See* OLG Köln, Zeitschrift Für das Gesamte Familienrecht [FamRZ], 9 (1962), 72.

104. *See id* at 72.

105. *See id.*

106. *See id.*

107. *See id.* at 72-73.

prisonment.[108]

In a more recent decision, a trial court did not issue an antisuit injunction but instead issued injunctions which interfered with U.S. proceedings.[109] Specifically, the German enterprise was subject to jury proceedings in Michigan where it was charged with fraud and bribery in connection with ship construction contracts.[110] The U.S. District Court issued subpoenas demanding that a German bank submit documents from the bank's branches in New York, as well as from branches in Frankfurt and Kiel.[111] In Germany, the company moved for a preliminary injunction restraining the Frankfurt and Kiel branches from submitting documents, and restraining the bank from permitting its officials to testify in the U.S. proceeding, unless ordered by a German court.[112] The German trial court granted the injunction.[113] It held that the contractual relationship between the bank and its customer obliged the bank to maintain confidentiality.[114] Furthermore, the German trial court reasoned that a U.S. District Court was not entitled to issue an order regarding a German enterprise not located in the U.S. and not a party to a U.S. proceeding.[115] The German court emphasized that it was neither reviewing, nor criticizing the District Court's decision.[116]

C. Reasons for the Relunctance to Grant Antisuit Injunctions

1. Antisuit Injunctions: An Unknown Remedy in Domestic Proceedings

One may ask why antisuit injunctions are so rare in Germany? Assumedly, German citizens and enterprises are subject to civil proceedings in foreign countries as are U.S. or English enterprises. Even more puzzling is the fact that German courts do not hesitate to order parties to perform acts in foreign countries, the converse

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108. *See id.*

109. *See* Landgericht [LG] Kiel, Praxis des Internationales Privat-und Verfahrensrecht [IPRax], 3 (1983), 146 (147); *see also* Ulrich Bosch, *Das Bankgeheimnis im Konflikt zwischen US-Verfahrensrecht und Deutschem Recht,* 4 IPRAX 127 (1984).

110. See LG Kiel, IPRAX, 4 (1984), 146 (147).

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

of antisuit injunctions.[117] Thus, the reluctance to issue antisuit injunctions is not based upon overwhelming comity concerns. Rather, antisuit injunction-like remedies are simply alien in domestic German civil proceedings. England and the United States developed the antisuit injunction to restrain a party from litigating before other domestic courts.[118] Once used to enjoin a party from litigating before a domestic court, it was a small step to enjoining a party from commencing, or from continuing an action in a foreign country.

There are two main reasons why an antisuit injunction-like remedy is completely unknown in domestic German proceedings: (1) lack of equitable power, and (2) compulsory jurisdictional rules.

2. German Courts Have No Power or No Need for Antisuit Injunctions

First, German courts lack equitable powers.[119] The Civil Procedure Code (ZPO) is a set of compulsory rules which does not allow the courts discretion.[120] Furthermore, the ZPO does not contain provisions which permit the courts to issue an antisuit injunction. Therefore, because the courts have no equity power, an equitable remedy, grounded in the same roots as the common law antisuit injunction, is unknown in Germany.

The lack of discretionary authority, however, is not the main

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117. For example, a German owner of Spanish real estate was required to built a fence on his real estate. *See* OLG Stuttgart, ZZP, 97 (1984), 487. An Italian domiciled in Italy was required to submit documents to the German plaintiff. *See* OLG Nürnberg-Fürth, Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts [IPRspr], 188 (1974). The possessor of the estate under the right of inheritance domiciled in a foreign country was required to disclose information as to the estate to the other heirs and had to execute a statutory declaration in lieu of an oath. *See* OLG Nürnberg, IPRspr, 144 (1980).

118. For an interesting commentary on the United States, see Comment, *Injunctions of State Courts Restraining Parties from Proceeding in the Tribunals of Other States*, 31 MICH. L. REV. 88 (1932); JAMES HIGH, 2 A TREATISE ON THE LAW OF INJUNCTIONS § 116 (4th ed. 1905). For an interesting commentary on England, see Hartley, *supra* note 46, at 489-90; Edward Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 DICK. L. REV. 369, 378 (1969); JÜRGEN KÜRTH, INLÄNDISCHER RECHTSSCHUTZ GEGEN VERFAHREN VOR AUSLÄNDISCHEN GERICHTEN 13-14 (1988) [hereinafter KURTH, INLÄNDISCHER].

119. *See* GUMMER & ZÖLLER, *supra* note 89, § 1, GVG ¶ 10; KISSEL, *supra* note 89, § 1, ¶¶ 111-12.

120. *See* GUMMER & ZÖLLER, *supra* note 89, § 1 GVG ¶ 10; KISSEL, *supra* note 89, § 1, ¶¶ 111-12.

reason for the non-existence of an antisuit injunction in a domestic action. Rather, combined with the statutory mandates, antisuit injunction is simply unnecessary in a German domestic proceeding. An antisuit injunction serves as an offensive forum non conveniens doctrine. Resolving jurisdictional problems in Germany with an antisuit injunction is senseless. The German jurisdictional rules[121] are conclusive in nature.[122] A court has no discretion in determining its jurisdiction. Rather, the rules of jurisdiction determine whether or not a court has jurisdiction. If a court has jurisdiction, the court must accept it.[123]

In the event a plaintiff brings an action before a court which lacks jurisdiction, the court's options are two-fold. If the plaintiff, recognizing its fault, moves for an order to transfer the proceeding to a competent court, the court will transfer the proceeding by virtue of ZPO section 281(1).[124] The order transferring the proceeding is binding on the court to which it is transferred.[125] The plaintiff must pay any costs, legal expenses and the defendant's attorney's fees, resulting from filing a lawsuit in a court lacking jurisdiction. If the plaintiff does not move for a transfer, the court will dismiss the suit based on lack of jurisdiction[126] and the plaintiff will bear the costs and the defendant's attorney's fees.[127]

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121. *See* §§ 12-40 ZPO (F.R.G.); §§ 22-23(c), 71 Gerichtsuer Fassungsgestz [Judicature Act] [GVG] (F.R.G.).

122. *See* Schack, *Versagung*, *supra* note 73, at 41.

123. For a list of the few exceptions when German courts can refuse to decide a lawsuit by applying the doctrine of forum non conveniens, see Schack, *Versagung*, *supra* note 73, at 41.

124. Section 281 ZPO provides:

> (1) If, by reason of the provisions on the territorial or material jurisdiction of the courts, the court is to be declared as lacking jurisdiction, the court concerned shall, insofar as the court having jurisdiction can be ascertained, declare itself, on the petition of the plaintiff, by a ruling, as lacking jurisdiction, and remit the case to the competent court. If several courts have jurisdiction, the case shall be remitted to the court chosen by the plaintiff.
>
> (2) No objection may be raised to the ruling; the litigation is deemed as pending before the court specified in the ruling as of the time when the ruling is notified. The ruling is binding on that court.
>
> (3) The costs arising from the proceeding before the concerned court shall be dealt with as part of the costs which arise in the court specified in the ruling. Any additional cost may be imposed upon the plaintiff even though he prevails in the main issue.

§ 281(1) Nr. 1 ZPO.

125. § 281(2) Nr. 5 ZPO (F.R.G.).

126. *See* LEO ROSENBERG ET AL., ZIVILPROZESSRECHT § 39 (II)(1) (15th ed. 1993).

127. ZPO Section 91(1) provides: "The failing party shall bear the costs of the lawsuit." § 91(1) ZPO (F.R.G); ROSENBERG ET AL., *supra* note 126, § 87 (III)(2); GUMMER

Therefore, because the jurisdiction rules are compulsory and the defendant is compensated for costs incurred, an antisuit injunction is unnecessary.[128]

D. The Right Not to be Sued in Domestic German Proceedings

Although the previous statements regarding German civil procedure law indicate that an antisuit injunction is entirely unavailable, that statement is only partially correct. For domestic proceedings an antisuit is unavailable; however, for international civil actions an antisuit injunction is available.

Recall that to receive an antisuit injunction from a German court, a party must present a claim entitling the party to restrain the opposing party from suing either before another German court, or before a foreign court. Before asking whether a cause of action exists to restrain a party from suing abroad, the question will be asked whether a party in a domestic proceeding can enjoin the opposing party from commencing a lawsuit in another German court.

Under German law, specific performance is the normal remedy.[129] For example, if a plaintiff has a claim requiring the defendant to convey movable goods, or to build a house, the court will enter a judgment for the plaintiff ordering the defendant to fulfill the contractual obligation.[130]

1. Duplicative Lawsuits

One of the situations in which the doctrine of forum non conveniens and the remedy of antisuit injunction play an important role is where one party commences a lawsuit which duplicates a pending action.[131] In Germany, the problem of duplicative lawsuits between the same parties is resolved by ZPO section 261(3)

& ZÖLLER, *supra* note 89, § 91, ¶ 2. Therefore ZPO section 281(3) is an exception to the general rule since the plaintiff has to pay the costs for his fault even if he wins. § 281(3) Nr. 2 ZPO (F.R.G.).

128. *But see* PETER SCHLOSSER, DER JUSTIZKONFLIKT ZWISCHEN USA UND EUROPA 38 (1985) [hereinafter SCHLOSSER, JUSTIZKONFLIKT] (proposing that a preliminary injunction is appropriate in a domestic proceeding when a party seeks to commence a lawsuit in violation of a jurisdiction agreement before court that does not possess jurisdiction).

129. *See* BROX, *supra* note 94, ¶ 591; HÜBNER, *supra* note 95, ¶ 416; Kleinfeller, *supra* note 95, at 129.

130. *See* BROX, *supra* note 94, ¶ 591; HÜBNER, *supra* note 95, ¶ 416; Kleinfeller, *supra* note 95, at 129.

131. *See supra* Parts II, III.A.1.

which provides that "during pendency, the subject matter may not be made pending *in any other manner.*"[132] This requires the court second seized to dismiss the lawsuit because of the prior lis pendens regarding the same subject matter.[133] Actions which are closely related to the subject matter of a previously commenced lawsuit, but which do not affect exactly the same subject matter, are permitted. There are no devices to prevent closely related actions from proceeding in another court.[134]

2. Tort-Based Cause of Action to Prevent a Party From Suing in Another German Court

If commencement of a proceeding before a German court constitutes a tort because the plaintiff acts unconscionably or in bad faith,[135] the court will dismiss the lawsuit.[136] The defendant

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132. § 261(3) Nr. 1 ZPO (F.R.G.) (emphasis added).

133. *See* ROSENBERG ET AL., *supra* note 126, § 100 (III)(1); OTHMAR JAUERNIG, ZIVILPROZESSRECHT, § 33 V(3), 40(II) (24th ed. 1993).

134. *See* JOHANNA ADELHEID LÜPFERT, KONNEXITÄT IM EUGVÜ, (1997); Ulrich Spellenberg, *Örtliche Zuständigkeit kraft Sachzusammenhang,* 79 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 89, 129 (1980).

135. Commencement of a proceeding can constitue a tort if the plaintiff acted unconscionably or in bad faith. The issue is: when can a party recover losses sustained as a consequence of a legal proceeding?

In 1919, the German Supreme Court held that the systematic and wilfull delay of a proceeding, by means of untrue objections and intentional acts by the delaying party to damage the other party was contrary to public policy. *See* RGZ 95, 310 (313-15). In general, the Supreme Court considers a wilfull and unsound intitiation or pursuit of a proceeding as violating public policy. *See id.* Moreover, it is the basis of a *contra bono mores* section 826 claim. The Court also identifies malicious use of process or deceitful plea as examples of actions contrary to public policy. *See* BGHZ 36, 18 (21).

The Court emphasized the mere initiation of a legal proceeding is never an unlawful act by virtue of Civil Code section 823(1), even if the defendant sustains costs and losses by the proceeding. *See* BGHZ 20, 168 (171-72). The court reasoned the defendant is protected by the procedural safeguards. The initiation of proceedings in and of itself is simply not contrary to public policy; it is the way the law intends people to resolve their disputes. Therefore, the plaintiff in a legal proceeding has no obligation to prove whether her cause of action is justified or whether she is entitled to initiate a legal proceeding. In recent judgments, the Court has generally affirmed this statement, holding a party acting in good faith when initiating a legal proceeding can claim that the procedural legality of a legal proceeding leads to the presumption of the party's lawful conduct. *See* BGHZ 74, 13-18; BGH, 38 NJW 1959, 1961 (1985). Any other approach would limit the free access to legal proceedings in a very questionable way. *See* BGHZ 74, 15; BGH, 38 NJW 1961 (1985); BGHZ 118, 206.

Nonetheless, the Court set up a restriction for the right of a party to error when the party initiates a legal proceeding or participates in a legal proceeding. The right to error ceases, however, if the procedural freedom to act is not unreasonably restricted by the imposed risk of liability. In one particular case, an attorney continued an enforcement proceeding although the defendant had already paid her debts. *See* BGHZ 74, 17.

has the option of bringing a tort cause of action; thus, a cause of action restraining the plaintiff from suing is not necessary. For situations where a party can help herself by pleading certain facts in a pending lawsuit, German procedural law contains a peculiar device to deny causes of action which would fulfill the same goal as the mere pleading. This procedural device is called "lack of need for judicial protection," and enables the court to dismiss an action based on an unnecessary cause of action.[137]

The Court held that the evidence the debtor had paid, would trigger a duty to investigate, if the investigation proved easily manageable. *See id.* Therefore, the failure to investigate constitutes a tort claim if the cause of action is unjustified. *See id.*

Furthermore, the Supreme Court ruled that these principles regarding the lawfulness of initiating a legal proceeding do not apply to a third party who does not take part in the proceeding, but who nontheless sustains losses from it. *See* BGHZ 118, 201 (206-07). These principles do not apply to third parties because they do not have access to the procedural safeguards. *See id.*

The Constitutional Court held that a violation of the German Constitution exists when a person in good faith demands the prosecution of a potential criminal, but is not capable of proving the charge. The result is fear of civil liability. *See* BGH, 40 NJW 1929 (1987).

The Supreme Court's jurisdiction has been criticized and alternative proposals have been made as to when the commencing or the continuance of a legal proceeding is to be viewed as unlawful within the meaning of Civil Code section 823(1). Some suggest that liability can be imposed only if a party acted willfully or grossly negligent. *See* JOSEF ESSER, BESPRECHUNG VON HOPT, SCHADENSERSATZ AUS UNBERECHTIGTER VERFAHRENSEINLEITUNG (1968); ZZP, 83 (1970), 348, 350-51; Hermann Weitnauer, *Schadensersatz aus unberechtigter Verfahrenseinleitung*, 170 ARCHIV FUR DIE CIVILISTISCHE PRAXIS [AcP] 437, 442 (1970).

Another author proposes the presumption of the lawfulness of a legal proceeding is restricted to the subject matter of the lawsuit and does not affect rights not involved in the proceeding. *See* KURTH, INLÄNDISCHER, *supra* note 118, at 87-91. It is also argued that the question of liability must be considered on a case-by-case basis. HORST KONZEN, RECHTSVERHÄLTNISSE ZWISCHEN PROZESSPARTEIEN § 299 (1976).

A separate question is whether a wrong decision can be cured by awarding the losses to the losing party who sustained them as a direct result of the decision. The problem is not only that a tort claim could deter a person from enforcing her claims in court, but also that a tort claim would contradict the court decision and thereby would run against the res iudicata of the decision. Because of the high value of the res judicata, a tort cause of action is only recognized when the winning party's conduct is contrary to public policy by virtue of Civil Code section 826. *See* RGZ 61, 359 (365); RGZ 78, 389 (393); BGHZ 101, 383; BGHZ 103, 46; STEIN & JONAS ET AL., KOMMENTAR ZUR ZIVILPROZEßORDNUNG § 322, ¶¶ 262-79 (20th ed. 1988) [hereinafter STEIN & JONAS ET AL., 1988].

136. *See* ROSENBERG ET AL., *supra* note 126, § 65 VI, VII; BGH, 38 NJW 2335 (1985); RGZ 34, 417; OLG Hamm, 40 NJW 138 (1987).

137. For the discussion of the "lack of need for judicial help," see *infra* part IV.F.1.

3. Violation of a Contractual Obligation Not to Sue

A further basis to enjoin a party from suing in a domestic German proceeding is a contractual duty not to sue.[138]

a. Forum Selection Agreements in Domestic Proceedings

Forum selection clauses are agreements by the parties to commence a lawsuit only before a particular court.[139] Exclusive forum selection clauses are the typical contract provision providing a valid claim not to sue in other jurisdictions. If the parties voluntarily contract for an exclusive German court as the forum for all disputes arising out of their contract or out of their business relationship, then they seemingly may not sue in any other court.[140] Surprisingly, almost all German scholars impliedly reject that an exclusive forum selection clause obligates the parties not to sue in court.[141]

Nonetheless, the legal effect of a forum selection clause is set forth in ZPO section 38 which provides: "a court of first instance, which by itself has no jurisdiction, becomes competent by express or implied agreement of the parties."[142] No further act is required to confer jurisdiction on a German court other than a valid jurisdiction agreement. Consequently, in the German system where jurisdiction rules are compulsory, forum selection clauses are self-executing.[143] Thus, the court is required to exercise jurisdiction.

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138. This discussion will be restricted to the most relevant contractual provisions in this context: forum selection clauses and arbitration agreements.

139. *See* ROSENBERG ET AL., *supra* note 126, § 37, I(5); FRIEDRICH STEIN & REINHARD BORK, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 38, ¶¶ 1, 61 (21st ed. 1992).

140. English courts take exactly this point of view when they state that an antisuit injunction based upon an exclusive forum selection clause in favor of the English courts constitutes a mere execution of a contract. This interpretation appears so normal to the English courts, that they do not question whether a forum selection clause contains an obligation not to sue abroad. *See* Continental Bank v. Aeakos Compania Naviera, 1 Lloyd's Rep. 505, 505 (C.A. 1994) (discussing the forum selection clause); *see also* The Angelic Grace, 1 Lloyd's Rep. 87 (C.A. 1995) (arbitration agreement).

141. *See* FRANZ MATSCHER, ZUSTÄNDIGKEITSVEREINBARUNG IM ÖSTERREICHISCHEN UND INTERNATIONALEN ZIVILPROZEßRECHT 21 (1967); GERHARD SCHIEDERMAIR, VEREINBARUNGEN IM ZIVILPROZEß 95, 100 (1935); STEIN & JONAS ET AL., KOMMENTAR ZUR ZIVILPROZEßORDNUNG § 38, ¶ 44, § 128, ¶ 246 (20th ed. 1984) [hereinafter STEIN & JONAS ET AL., 1984]; JAN KROPHOLLER, HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHT ¶¶ 168, 586 (1983); LEO ROSENBERG & KARL HEINZ SCHWAB, ZIVILPROZESSRECHT § 37(I)(6) (14th ed. 1986).

142. § 38(1), (2) ZPO (F.R.G.).

143. *See* Schack, *Versagung*, *supra* note 73, at 41-44, 57.

ZPO section 38 also applies to agreements which deny jurisdiction to courts that would otherwise have statutory based jurisdiction.[144] Similarly, agreements denying jurisdiction are ultimately self-executory and the court must decline jurisdiction if a party pleads the agreement. Therefore, an exclusive forum selection clause in a German domestic proceeding conferring jurisdiction solely on one domestic court is binding.[145]

The power of the forum selection clause is even broader than its self-executory status. As previously discussed,[146] plaintiffs bear the defendant's economic burdens when the suit is brought before a court without proper jurisdiction.[147]

The uniform approach of rejecting lawsuits in particular jurisdictions is thus not based on an interpretation of the forum selection clauses. Rather, the rationale is based on the treatment of domestic forum selection clauses in German procedural law. Therefore, antisuit injunction suits are unnecessary.

b. Arbitration Agreements

In a German domestic proceeding, each party in an arbitration agreement may invoke the agreement.[148] German courts will dismiss a lawsuit that violates an arbitration agreement. Pursuant to ZPO section 91(1), the costs and expenses of the dismissed lawsuit are imposed on the party that commenced the lawsuit.[149] Thus, arbitration agreements operate the same as forum selection clauses pursuant to German procedural law.

E. The Right Not to be Sued Abroad

A right not to be sued does not exist in German domestic proceedings. The ZPO enables parties to enforce an exclusive forum selection clause or an arbitration agreement. Thus, a duty not to sue is superfluous.

Arguably it would seem reasonable that the same is true for international litigation cases. This conclusion, however, is drawn too hastily. The question of whether a right not to be sued abroad

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144. *See* STEIN & JONAS ET AL., 1984, *supra* note 141, § 8, ¶ 63; MAX VOLLKOMMER ZIVILPROZEßORDNUNG § 38, ¶ 2 (19th ed. 1995).

145. *See* STEIN & BORK, *supra* note 139, § 38, ¶¶ 1, 61.

146. *See supra* Part IV.C.2.

147. *See* §§ 281(3), 91(1) ZPO (F.R.G.).

148. *See* § 1027a ZPO (F.R.G.). For the text of ZPO section 1027a, see *infra* note 174.

149. § 91 ZPO (F.R.G.). For the text of ZPO section 91, see *supra* note 127.

is available under German law is not pre-determined by the solutions applied in domestic proceedings. If the situation in international litigation cases differs sufficiently from the domestic proceedings, it may be possible to affirm a right not to be sued in a foreign forum.

If brought before a German court, exclusive forum selection clauses, which expressly restrain a party from suing abroad and requiring the parties to settle their disputes in German courts, will bind the parties.[150] The court will grant an order restraining a party from suing abroad. Contract terms expressly prohibiting litigation abroad, however, are not common.

In addition, parties can argue the proceeding constitutes a tort and can move to dismiss the action, thus eliminating the necessity for a tort-based duty not to sue. Therefore, a remedy to enjoin a person from suing abroad can derive from a contract or a tort.[151]

1. International Forum Selection Clauses

A domestic forum selection clause is self-executory and does not contain a duty not to sue in another jurisdiction. Despite this uncontested approach for clauses affecting only German domestic proceedings, a modern legal opinion assumes that the parties are obligated not to sue abroad when they have agreed the German courts are the exclusive forum for their disputes.[152]

a. Interpretation of the Agreement

The first step in determining whether a forum selection clause contains a right not to be sued abroad is interpretation. The goal of contract interpretation is to determine the intent of the parties.[153] A contract clause stating that German courts are the ex-

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150. To facilitate the discussion, it will be assumed that German law applies to all contractual rights and duties mentioned in the following text.

151. *See* WOLFGANG JAKOB HAU, POSITIVE KOMPETENZKONFLIKTE IM INTERNATIONALEN ZIVILPROZEßRECHT 202 (1996) [HAU, POSITIVE KOMPETENZKONFLIKTE]; Jochen Schröder, *The Right not to be sued Abroad*, *in* FESTSCHRIFT FÜR KEGEL 523, 531, 539 (1987); KURTH, INLÄNDISCHER, *supra* note 118, at 60, 82.

152. *See* Schröder, *supra* note 151, at 532; SCHLOSSER, JUSTIZKONFLICKT, *supra* note 128, at 37; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 66; Peter Gottwald, *Internationale Gerichtsstandsvereinbarungen*, *in* FESTSCHRIFT FÜR HENCKEL 295, 307-08 (1995) [hereinafter Gottwald, *Internationale*]; KURTH, INLÄNDISCHER, *supra* note 118, at 68-70; DIETER JASPER, FORUM SHOPPING IN ENGLAND UND DEUTSCHLAND 126-27 (1990).

153. This interpretation rule applies to procedural contracts as well. *See* BGHZ 22, 269; BGH 35 NJW 1174 (1982), 1174; STEIN & JONAS ET AL., 1984, *supra* note 141, § 128,

clusive forum for all disputes arising out of the relationship, is a clear indication that any lawsuit arising out of that particular contract was intended to be commenced before a German court. Therefore, bringing a lawsuit in a foreign court is contractually prohibited.

If legal rules exist which guarantee this goal, there is no need for an express or implied obligation not to sue abroad. The German law is a good example of this non-obligation based enforcement of a forum selection clause.

b. Applying the Same Rationale for International Forum Selection Clauses as for Domestic Clauses?

If all foreign courts accepted exclusive jurisdiction agreements and declined their jurisdiction in favor of the German courts to which the forum selection clause confers jurisdiction, then this approach would be reasonable in an international litigation setting.[154] The obligation not to sue abroad would be unnecessary because the clause would be self-executory. The Member States of the Brussels Convention exemplify acceptance of the exclusive jurisdiction rationale.[155]

The Brussels Convention, like German civil law, provides compulsory jurisdiction rules.[156] Article 17 of the Brussels Convention sets forth forum selection provisions similar to those in the ZPO section 38. It gives the parties the ability to confer exclusive jurisdiction by agreement, thereby denying jurisdiction to the courts of all other countries.[157]

The picture changes, however, if the court refuses to recog-

¶¶ 191-95.

154. *See* Schack, *Versagung, supra* note 73, at 19-20; STEIN & JONAS ET AL., 1984, *supra* note 141, § 38, ¶ 46; RAINER HAUSMANN, *Einheitliche Anknüpfung Internationaler Gerichtsstands—und Schiedsvereinbarungen*, *in* FESTSCHRIFT FÜR LORENZ 359, 364 (Paul Siebeck ed., 1991). The lex fori of the court, to which the agreement confers jurisdiction concerns whether the prorogation of jurisdiction is valid and what effect the prorogation has. The lex fori of the court deprived of its jurisdiction applies insofar as the validity and the effects of the derogation of jurisdiction is concerned. Contract law, applicable by virtue of the rules of conflicts of law, determines whether a valid contract exists. *See id.*

155. For the list of the Member States, see *infra* note 270. The same rules apply between the Member States of the Lugano Convention and between the Member States of the Lugano and Brussels Convention.

156. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 6, 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413, 1419-20 [hereinafter Brussels Convention].

157. For the text of Article 17 of the Brussel Convention, see *infra* note 310.

nize an agreement exempting the jurisdiction of a foreign court. A party could then presumably bring a lawsuit before that court and circumvent the forum selection agreement. If the foreign court enters a judgment in favor of the party that violated the jurisdiction agreement, Germany would not recognize it.[158] Non-recognition alone, however, does not extinguish the costs associated with court proceeding in the foreign court or avoid violating the forum selection clause. If the party relying on the clause has assets in the foreign country, the judgment can be enforced in that country, and the relying party must bear the costs of the proceeding.

There is a strong need for enforcement of forum selection clauses. Fear that the forum selection clause will not be honored nullifies the agreement because of the potentially burdensome costs. This fear is well founded. For example, Arab countries, do not honor foreign forum selection clauses which deprive them of their jurisdiction. They consider such agreements invalid.[159] Conversely, U.S. courts generally enforce jurisdiction agreements. Nonetheless, U.S. Courts will not accept agreements that are unreasonable or contrary to public policy.[160] China, however, will recognize a written forum selection agreement when the forum of

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158. ZPO section 328(1) provides: "The recognition of a foreign judgment is excluded if the courts of the state to which the foreign court belongs are not competent according to the Geman law." § 328(1) Nr. 1 ZPO (F.R.G). For a translation of the German Civil Procedure Code in English, see SIMON L. GOREN, THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY (1990). For the interpretation of ZPO section 328(1), see ZÖLLER & GEIMER, INTERNATIONALES, *supra* note 91, § 328, ¶ 91.

159. *See* Konrad Dilger, *Schiedsgerichtsbarkeit und Vollstreckung Ausländischer Entscheidungen in den Golfstaaten*, *in* VERTRAGSPRAXIS UND STREITERLEDIGUNG IM WIRTSCHAFTSVERKEHR MIT ARABISCHEN STAATEN (1981); Hilmar Krüger, *Verbot Von Rechtswahl, Schieds-und Gerichtsstandsklauseln nach Saudi-Arabischem Recht*, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW], 25 (1979), 737 (regarding Saudi Arabia).

160. *See* Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972). In *Zapata,* the U.S. Supreme court upheld the forum selection clause when it was freely negotiated, unaffected by fraud, undue influence and overwhelming bargaining power. *See id.* In *Scherk v. Alberto-Cluver Co.* and in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth,* the Supreme Court applied a narrow view as to the public policy restriction for international forum selection and arbitration clauses. *See* Scherk v. Alberto-Cluver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). In addition, in *Carnival Cruise Line*, the Supreme Court held that a forum selection clause is valid when it is reasonable, even though overweening bargaining power was present. *See* Carnival Cruise Line, Inc. v. Shute, 111 S. Ct. 1522 (1991).

The above quoted cases were federal cases. The question remains whether federal diversity cases and state cases will also apply the law applied in these cases. For further discussion, see EUGENE SCOLES & PETERS HAY, CONFLICT OF LAWS § 11.1-11.7 (2d ed. 1992); GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS 221 (2d ed. 1992).

the selected court has a "real connection" with the dispute.[161]

If a party brings a lawsuit in a country that does not accept the forum selection clause that favors Germany, the only way to establish German jurisdiction is to assume that a forum selection agreement contains an obligation not to sue abroad.[162] Thus, under German law, an exclusive jurisdiction agreement contains this obligation.[163]

c. Forum Selection Clauses as Procedural Contracts

There is one further hurdle before an obligation not to sue abroad can be enforced. A forum selection clause is considered to be a procedural contract agreement, having its main effects in a civil proceeding.[164] The procedural nature of an obligation,[165]

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161. Article 244 of the Chinese Civil Procedure Law provides:

> The parties to a dispute involving a foreign party over a contract or over rights and interests in property may, by *written agreement, select the jurisdiction of the court of the place with a real connection with the dispute.* If they elect to come under the jurisdiction of the People's Court of the People's Republic of China, such selection may not violate the provisions of this Law concerning jurisdiction by level and exclusive jurisdiction.

Chinese Civil Procedure Law, in DISPUTE RESOLUTION IN THE PRC, A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA 210, 212-13 (1992) (emphasis added).

162. *See* Schröder, *supra* note 151, at 532; SCHLOSSER, JUSTIZKONFLICKT, *supra* note 128, at 37; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 202-03; Gottwald, *Internationale, supra* note 152, at 307-08; KURTH, INLÄNDISCHER, *supra* note 118, at 68-70; JASPER, *supra* note 152, at 127-28.

163. *See* KURTH, INLÄNDISCHER, *supra* note 118, at 63; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 205.

164. For forum selection clauses, see MATSCHER, *supra* note 141, at 20-21; SCHIEDERMAIR, *supra* note 141, at 40; STEIN & JONAS ET AL., 1984, *supra* note 141, § 38, ¶ 44, § 128, ¶ 246; VOLLKOMMER, *supra* note 144, § 38, ¶ 4; Haimo Schack, *Derogation des Vermögensgerichtsstandes zwischen deutscher lex fori und ausländischem Prorogationsstatut,* 10 IPRAX 19 (1990); Gottwald, *Internationale, supra* note 152, at 296; BGHZ, IPRAX 10 (1990), 41 (42); OLG Bamberg, IPRAX 10 (1990), 105.

For arbitration agreements, see STEIN & JONAS ET AL., 1988, *supra* note 135, § 1025, ¶ 1; REINHOLD GEIMER ET AL., ZIVILPROZEßORDNUNG § 1025, ¶ 3 (19th ed. 1995) [hereinafter GEIMER ET AL., 1995]; BGHZ, 40 NJW 651 (652) (1987).

A minority approach, however, views a forum selection contract and an arbitration agreement as related to substantive law. *See* BGHZ 49, 384 (386-87) (F.R.G.) (forum selection contract); OLG München, IPRax 11, (1991) 46 (48); ADOLF BAUMBACH & JAN ALBERS, ZIVILPROZESSORDNUNG, § 38 Anm. 2 I(A) (50th ed. 1992) [hereinafter BAUMBACH & ALBERS, ZIVILPROZESSORDNUNG]; BGHZ 40, 320 (322) (F.R.G.) (arbitration agreement); ADOLF HARTMANN & PETER HARTMANN, ZIVILPROZESSORDNUNG, § 1024 Anm. 1(b) (50th ed. 1992) [hereinafter HARTMANN & HARTMANN, ZIVILPROZESSORDNUNG].

165. *See* Gottwald, *Internationale, supra* note 152, at 306-07 (considering the obligation

however, is no reason to deny the existence of that obligation. It is well established that other procedural contracts that discontinue either a lawsuit or an appeal create an obligation to fulfill the contract.[166] Furthermore, the civil procedure law itself sets forth procedural obligations.[167] This includes the obligations to tell the truth,[168] submit documents,[169] support and accelerate the proceeding, and a procedural obligation to act in good faith.[170] Therefore, the procedural nature of a jurisdiction agreement is no reason to deny an obligation not to sue abroad.[171]

Under the German law, an obligation not to sue abroad based on a forum selection agreement exists when: (a) the agreement confers exclusive jurisdiction to the German courts and deprives the courts of all other nations of their jurisdiction; or (b) if a country, whose jurisdiction is contractually excluded, does not accept the contractual exclusion.[172] If a party presents a valid forum selection agreement to a German court, the court must grant an order restraining the party that violated the agreement by suing abroad.[173]

2. Arbitration Agreements

An international arbitration agreement, establishing a German arbitration panel as the exclusive tribunal to hear the parties'

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not to sue abroad as related to the substantive law, even though he considers the jurisdiction agreement as a procedural contract).

166. *See* STEIN & JONAS ET AL., 1984, *supra* note 141, § 128, ¶ 247; SCHIEDERMAIR, *supra* note 141, at 179; KONZEN, *supra* note 135, at 199; GOTTFRIED BAUMGÄRTEL, WESEN UND BEGRIFF DER PROZEßHANDLUNG EINER PARTEI IM ZIVILPROZEß 274 (2d ed. 1972). A lawsuit will generally be dismissed on the ground of a "lack of the need for judicial help." A party, which violates a procedural contract mentioned (to discontinue a proceeding) in the text, acts in bad faith. If the other party pleads this fact in the court, the court will dismiss the lawsuit on the grounds of acting in bad faith. Since a pleading of bad faith can meet the party's needs, a separate lawsuit enforcing the agreement is not necessary. *See* BAUMGÄRTEL, *supra* at 274.

167. *See* BAUMGÄRTEL, *supra* note 166, at 80; ROSENBERG ET AL., *supra* note 126, § 2(III)(2).

168. § 138 ZPO (F.R.G.).

169. §§ 421, 423 ZPO (F.R.G.).

170. *See* ROSENBERG ET AL., *supra* note 126, § 2(IV); BGHZ 20, 231; BGHZ 112, 345 (349).

171. *See* KURTH, INLÄNDISCHER, *supra* note 118, at 68-69; Schröder, *supra* note 151, at 531-32; Gottwald, *Internationale, supra* note 152, at 306-07 (considering the obligation not to sue abroad as related to the substanive law).

172. *See* KURTH, INLÄNDISCHER, *supra* note 118, at 63.

173. *See id.* at 68-70; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 66-67; Jasper, *supra* note 151 at 126-27.

disputes, also creates a binding obligation to settle disputes in Germany. The parties contractually agree to have their disputes heard by a German arbitration panel which gives the parties the right to enforce the agreement before the courts if one party attempts to litigate the dispute.[174] The net effect is the arbitration agreement is considered a procedural contractlike the forum selection clause.[175] Arbitration agreements effectively exclude the courts jurisdiction.[176]

Other effects of the arbitration agreement are also recognized. These include the obligations: to appoint an arbitrator,[177] to make advance payments for the services of the arbitrator,[178] and to participate actively in the arbitration proceeding.[179]

Some scholars argue international arbitration agreements, which preclude parties from litigating the disputes in foreign jurisdiction, are not binding.[180] Others recognize a binding effect, but argue there is no need for judicial enforcement.[181] The mod-

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174. Merely pleading the existence of an arbitration agreement does not exclude a court's jurisdiction. The party wanting to enforce the agreement must move for a dismissal of the lawsuit on the ground of the exclusion of the court's competence by virtue of the agreement. *See* § 1027a ZPO (F.R.G.). "If redress is sought before the court in a legal dispute, concerning which the parties concluded an arbitration agreement, the court shall dismiss the complaint if the defendant invokes the arbitration agreement." *Id.*

175. For the definition of "procedural contract" see text *supra* Part IV.E.1.c. *See also* STEIN & JONAS ET AL., 1988, *supra* note 135, § 1025, ¶ 1 (viewing an arbitration agreement as a procedural contract); GEIMER, ET AL., 1995, *supra* note 164, § 1025, ¶ 3; KARL-HEINZ SCHWAB & GERHARD WALTER, SCHIEDSGERICHTSBARKEIT 62 (4th ed. 1990); BGHZ, 40 NJW 651 (652), (1987). For the view of an arbitration agreement as related to substantive law, see BGHZ 23, 198 (200); BGHZ 40, 320 (322); BAUMBACH & ALBERS, ZIVILPROZESSORDNUNG, *supra* note 164, § 1025, ¶ 3.

176. *But see* SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT ¶¶ 771-72 (2d ed. 1996) [hereinafter SCHACK, INTERNATIONALES]. *Compare* KROPHOLLER, *supra* note 141, ¶¶ 162, 586 (stating that the international forum selection clause contains no obligation not to sue abroad) *with supra* Part IV.E.1.a. (refuting this opinion).

177. *See* GEIMER ET AL., *supra* note 164, § 1025, ¶ 4; STEIN & JONAS ET AL., 1988, *supra* note 135, § 1025, ¶ 36; BGH, Neue Juristische Wochenschrift-Rechtsprechungs Report [NJW-RR], 1 (1986), 1059 (1060).

178. *See* STEIN & JONAS ET AL., 1988, *supra* note 135, § 1025, ¶ 36; Höchstrichterlicherliche Rechtsprechong [RG-HRR], 1929, 1399.

179. *See* BGHZ 77, 65 (66); STEIN & JONAS ET AL., 1988, *supra* note 135, § 1025, ¶ 36; ADOLF BAUMBACH & KARL SCHWAB, SCHIEDSGERICHTSBARKEIT 80 (2d ed. 1960).

180. *See* SCHÜTZE ET AL., HANDBUCH DES SCHIEDSVERFAHRENS ¶ 127 (1985). Only a procedural burden exists, not an obligation to receive an arbitration award. Having a procedural burden means that a party does not have an obligation to do anything. Noncompliance with the procedural burden, however can cause some negative effects for the party. *See* ROSENBERG ET AL., *supra* note 126, § 2(III).

181. *See* BAUMBACH & ALBERS, ZIVILPROZESSORDNUNG, *supra* note 164, § 1025 Anm. 3; SCHIEDERMAIR, *supra* note 141, at 107, 108; STEIN & JONAS ET AL., 1988, *supra*

ern approach recognizes a duty not to sue abroad, which is enforceable by an antisuit injunction.[182] This point of view is persuasive. An arbitration agreement obliges the parties not to sue in *any* court, domestic or foreign This is the primary goal of parties entering into arbitration agreements.[183] Any other interpretation violates the intent of the parties.

In a domestic German court proceeding, each party to an arbitration agreement many enforce the agreement according to ZPO section 1027a.[184] Yet, because the arbitration agreement is self-executing, an antisuit injunction is unnecessary.[185]

In most international cases, separate enforcement of an arbitration agreement by antisuit injunction is unnecessary. Most countries are Member States of the New York Convention on the Recognition and Enforcement of Arbitration Awards.[186] By virtue of the Convention, the courts of the Member States must recognize an arbitration agreement and dismiss a lawsuit brought before a court if it violates the arbitration agreement.[187] Thus, injunctive relief enforcing an arbitration agreement is only needed and available if a party commences a lawsuit in a court of a country which is not a Member State of the New York Convention, and the country's courts do not honor the arbitration agreement.

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note 135, § 1025, ¶ 36; BAUMBACH & SCHWAB, *supra* note 179, at 80.

182. *See* SCHLOSSER, JUSTIZKONFLIKT, *supra* note 128, at 37; Rolf Stürner, *Der Justizkonflikt zwischen Europa und den USA, in* DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA 52 (1986) [hereinafter Stürner, *Der Justizkonflikt*]; KURTH, INLÄNDISCHER, *supra* note 118, at 74; JASPER, *supra* note 152, at 127-28.

183. *See* The Angelic Grace, 1 Lloyd's Rep. 87 (1995). The Court of Appeal held an arbitration agreement brought forth an obligation to sue only in the arbitration tribunal provided for in the contract. It did not, however, consider whether the agreement itself represents the basis of an obligation.

184. For the text of ZPO section 1027a, see *supra* note 174.

185. Pursuant to German law. *See* § 1027a ZPO (F.R.G.).

186. Arbitration Act, 1975, ch. 3 (Eng.); Arbitration Act, 9 U.S.C.S. § 201 (U.S.); (1961) BGBl. II, 102, 122 (F.R.G.).

187. Article II(3) provides:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article (i.e. an arbitration agreement), shall, at request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is null and void, inoperative or incapable of being performed.

Convention on the Recognition and Enforcement of Foreign Arbitration Awards, Art. 11(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

For the text and the list of the Member States of the New York Convention on Recognition and Enforcement of Foreign Arbitratial Awards, June 10, 1958, see PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY, INTERNATIONAL AND COMMERCIAL ARBITRATION AND THE COURTS 443-50 (1990).

Saudi Arabia, for example, does not honor these international arbitration agreements.[188] Saudi policy ultimately subverts the parties intent rendering antisuit injunctions not only favorable, but necessary.

The right not to be sued exists in German law in cases where the foreign forum will not recognize the arbitration agreement.[189] This right can be enforced by a court order enjoining a party from suing before the foreign court.[190]

3. The Foreign Proceeding as a Breach of Contract

If a party commences a proceeding in a foreign court, the other party can recover the expenses and costs incurred by participating in the proceeding. The commencement or continuance of the suit is considered a breach of contract.[191]

4. Limits to the Contractual Rights Not to be Sued Abroad in Public International Law and International Comity

The discussion to this point has focused largely on the contractual right not to be sued abroad. A court order enjoining a party from suing abroad, however, gives rise to public international law concerns.[192] Are the courts of one country entitled to restrain a party from suing in another country? Moreover, are anitsuit injunctions barred by international public law or restricted by comity considerations? These questions arise when a court issues an injunction because it considers the foreign lawsuit unlawful, oppressive or vexatious.[193]

When the parties voluntarily contract to an exclusive forum selection clause or an arbitration agreement, however, the issue of international comity becomes less important. As Lord Justice Miller states in *The Angelic Grace*, "[i]n my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the de-

188. *See* Hilmar Krüger, *Verbot von Schiedsklauseln im International en Rechtsverkehr*, *in* VERTRAGSPRAXIS UND STREITERLEDIGUNG IM WIRTSCHAFTSVERKEHR MIT ARABISCHEN STAATEN 61, 69 (1981).

189. *See* HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 210-11.

190. *See* SCHLOSSER, JUSTIZKONFLIKTE, *supra* note 128, at 37; Stürner, *Der Justizkonflikt*, *supra* note 182, at 52.

191. *See* Schröder, *supra* note 151, at 530; *see also* ZÖLLER & GEIMER, INTERNATIONALES, *supra* note 91, ¶ 1718.

192. *See* HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 214-15.

193. *See infra* Part IV.E.5.c.

fendant has promised not to bring them."[194]

In the case of a forum selection clause, the German court will not ask whether the derogative effect, which deprives the foreign court of its jurisdiction, is valid. It is the substantive law of the foreign court which applies to that question.[195] Rather, the court will only assess whether German law permits jurisdiction and whether the contract is valid under the substantive rules of contract law.[196]

The same is true for arbitration agreements.[197] If the German court concludes that the agreement is valid, the award of an antisuit injunction is nothing more than an enforcement of a contractual duty. Since specific performance is the normal remedy under German contract law,[198] an antisuit injunction is not extraordinary.[199]

Whether a court should enforce a forum selection clause or an arbitration agreement by means of a court order, or whether considerations of international comity should restrict the enforcement, is simply a question of whether a German court can enforce a contract performed in a foreign country.

German courts recognize this power as arising from their jurisdiction over the parties.[200] Furthermore, German law explicitly permits international forum selection[201] and arbitration agreements, which imply their enforceability.[202] If they did not enforce these agreements, German courts would encourage parties to breach them. Honoring the breach of voluntary agreements will

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194. The Angelic Grace, 1 Lloyd's Rep. 87, 96 (1995).

195. *See* HAUSMAN, *supra* note 154, at 367.

196. *See* ROSENBERG ET AL., *supra* note 126, § 2(III).

197. *See* HAUSMANN, *supra* note 154, at 364.

198. *See* BROX, *supra* note 94, ¶¶ 591-93; HÜBNER, *supra* note 95, ¶ 416.

199. For an introduction in the German civil procedure system, see STEPHEN CROMIE, INTERNATIONAL COMMERCIAL LITIGATION 162 (1990).

200. *See* Peter Schlosser, *Extraterritoriale Rechtsdurchsetzung im Zivilprozeß*, *in* FESTSCHRIFT FÜR LORENZ 497, 499 (1991) [hereinafter Schlosser, *Extraterritoriale*]; SCHLOSSER, JUSTIZKONFLIKT, *supra* note 128, at 18; Peter Gottwald, *Grenzen zivilgerichtlicher Maßnahmen mit Auslandswirkung*, *in* FESTSCHRIFT FÜR HABSCHEID 119, 120-22 (1989) [hereinafter Gottwald, *Grenzen*]; SCOLES & HAY, *supra* note 160, § 10.3-10.5.

201. *See* § 38(2) ZPO (F.R.G.); *see also* Brussels Convention, *supra* note 156, art. 17, *reprinted in* 29 I.L.M. at 1414.

202. *See* § 1025 ZPO (F.R.G.); *see also* New York Convention, *supra* note 187, arts. 2, 3, 21 U.S.T. at 2519-20, 330 U.N.T.S. at 38-40.

destroy a legal system based upon freedom of contract.[203] Agreements which contain a duty not to sue in a foreign forum are, therefore, enforceable by injunction.[204] The exception is that the injunction will not be enforced if the recognition and the enforcement of the injunction are contrary to the foreign country's public policy. In that way, international comity is preserved.

5. Unlawful Commencement of a Foreign Legal Proceeding: Tort-based Right Not to be Sued Abroad

Under German law, a tort claim potentially offers damages as well as an injunction restraining a party from committing the harm. Therefore, tort claims are the second source of the right not to be sued abroad. The injunction is granted if the danger of the original harm or a repetition of a past harm is expected.[205] The crucial issue is at what point does the commencement or continuance of a legal proceeding becomes a tort.

a. Available Tort-Based Causes of Action Against Foreign Lawsuits

The right to enjoin a party from suing can be based upon two sections in the German Civil Code. Section 826 states that "[a] person who willfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage."[206] It requires willful conduct contrary to public policy to constitute a claim against the tortfeasor.[207]

Section 823(1) provides that "[a] person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or other rights of another is bound to compensate him for any damage arising therefrom."[208] It requires an infringement of a so called "absolute right." Not all conduct which causes loss to a per-

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203. *But see* HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT ¶¶ 771-72 (2d. ed. 1996) [hereinafter SCHACK, INTERNATIONALES]. *Compare* KROPHOLLER, *supra* note 141, ch. III, ¶¶ 162, 586 (stating that the international forum selection clause does not contain an obligation not to sue abroad) *with supra* Part IV.E.1.a (refuting this opinion).

204. *See* ZÖLLER & GEIMER, INTERNATIONALES, *supra* note 91 ¶¶ 1717-18.

205. *See* BGHZ, 4 NJW 843 (1951); BGHZ 30, 7; BGHZ 38, 206; OTTO PALANDT & HEINZ THOMAS, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 823, ¶¶ 16-24 (56th ed. 1997); WOLFGANG FIKENTSCHER, LEHRBUCH DES SCHULDRECHTS ¶¶ 1359, 1363 (8th ed. 1992).

206. § 826 ZPO (F.R.G.).

207. *Id.*

208. § 823(1) ZPO (F.R.G.).

son can be the subject of legal action under this section. A party must violate one of the listed rights, such as life, property or other rights. The only "right" which might be violated by a suit in a foreign country is the "right in a business enterprise," a right that is well recognized as an "absolute right" pursuant to section 823(1).[209]

b. Contract Claims Arising from Tortious Litigation

Every contract governed by German law contains an implied obligation of good faith.[210] Good faith requires parties to refrain from doing anything that would cause damage to the other party. Therefore, if commencing a foreign proceeding would constitute a tort claim, it also violates the contractual obligation of good faith. In these instances, the potentially damaged party has a contractual claim against the other party to prevent the suit.[211]

c. Special Restrictions for the Right Not to be Sued in a Foreign Forum.

Antisuit injunctions can be directed at either the foreign court or at the party suing in the foreign forum. If the injunction orders the foreign court not to exercise its judicial authority it is an intervention in the internal affairs of the foreign sovereign.[212] Part of the fundamental sovereignty of a state is the authority to exclusively entertain judicial power within its own territory.[213] The equality of sovereign nations is a recognized principle of public international law and foreign intervention in a country's internal af-

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209. *See* BGHZ 45, 296 (307); BGHZ 86, 152; 47 NJW, (1992), 41; PALANDT & THOMAS, *supra* note 205, § 823, ¶¶ 19-23; FIKENTSCHER, *supra* note 205, ¶ 1217.

210. *See* OTTO PALANDT & HELMUT HEINRICHS, KOMMENTAR ZUM BÜRGERLICHEN § 276 ¶¶ 104-128 (1997); FIKENTSCHER, *supra* note 205, ¶¶ 387; BGHZ 11, 80 (F.R.G.).

211. *See* Stürner, *Der Justizkonflikt*, *supra* note 182, at 53.

212. *See* Hartley, *supra* note 4647, at 506. "[A] court is in reality deciding whether the foreign court will hear the case. This is an interference with the foreign court which by its very nature runs counter to the idea of comity." *Id.*; *see also* Harold Baum, *Inländische Abwehrklagen gegen US-amerikanische Produkthaftungsklagen*, *in* HERAUSFORDERUNGEN DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 197 (1994) (international comity excludes tort-based claims not to be sued abroad); Gottwald, *Grenzen*, *supra* note 200, at 122-23 (antisuit injunction is an intervention in the judicial sovereignty, and in personam arguments that injunctions are only addressed to a party do not make sense).

213. *See* RUDOLF GEIGER, GRUNDGESETZ UND VÖLKERRECHT § 46 (2d ed. 1994); Dieter Leipold, *Lex fori, Souveränität, Discovery*, *in* GRUNDFRAGEN DES INTERNATIONALEN ZIVILPROZEßRECHTS 39-40 (1989).

fairs violates this principle.[214]

A court order restraining a party from suing in a foreign court is directed only against the party.[215] Notwithstanding this fact, the order restricts the foreign court's authority to adjudicate a lawsuit. If the party obeys the injunction, the court is deprived of the subjects it needs to entertain its judicial authority. Thus, even antisuit injunctions directed only against the party indirectly interfere with the competence of the foreign court. Nevertheless, the injunction is merely a judicial order to act or to refrain from acting in a foreign territory, an exercise of judicial authority not contrary to public international law.[216] Anitsuit injunctions, therefore, are likely permitted because they do not interfere with foreign sovereignty.

Antisuit injunctions, therefore, are not prohibited because, in the absence of an international treaty, only customary international law is a basis for the exclusion of an antisuit injunction. The creation of an international custom objectively establishes a general practice in the community of nations and subjectively influences the legal persuasion (*opino iuris vel necessitatis*) of the nations. It is incorrect, however, to assume that international law does not recognize the practice of issuing antisuit injunctions. This would ignore the long tradition in the common law countries, a tradition which, in this regard, precludes the creation of an international custom.[217]

Common law countries apply international comity to balance the interests of the parties in the issuance of an antisuit injunction against the interests of the foreign nations. The exact definition of international comity, however, is unclear. As the United States

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214. *See* GEIGER, *supra* note 213, § 59.

215. *See* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 927, 933 (D.C. Cir. 1984); SCHLOSSER, JUSTIZKONFLIKT, *supra* note 128, at 35; Schlosser, *Extraterritoriale*, *supra* note 200, at 505; ALBERT VENN DICEY & JOHN H.C. MORRIS, 1 THE CONFLICT OF LAWS 408 (12th ed. 1993); South Carolina Ins. Co. v. Assurantie Maatschsppij, 1987 App. Cas. 24, 40 (appeal taken from Eng.); HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 214-16.

216. *See Laker Airways*, 731 F.2d 909, 927; Gau Shan v. Bankers Trust, 956 F.2d 1349, 1354 (6th Cir. 1992); United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985); Schlosser, *Extraterritoriale*, *supra* note 200, at 120-22.

217. For examples of the use of antisuit injunctions in the United States and England, see *supra* Parts II, III. Canada also commonly uses antisuit injunctions. For Canadian examples, see JEAN GABRIEL CASTEL, CANADIAN CONFLICTS OF LAWS ¶ 137 (3d ed. 1994); Vaughn Black, *Antisuit Injunction Comes to Canada*, 13 QUEEN'S L.J. 103 (1988). For Australian examples, see PETER E. NYGH, CONFLICT OF LAWS IN AUSTRALIA 112-13 (6th ed. 1995).

Third Circuit Court of Appeal recently stated, "international comity is the elusive doctrine—something more than mere international manners, but less than obligation—which attempts to mediate the friction inherent in a community of sovereign states."[218] Nevertheless, the idea of international comity is well known and recognized. In both England and the United States, international comity is well developed in the context of an antisuit injunction.[219]

International comity, however, is a common law creation, and has no equivalent application in civil law countries like Germany. International comity, therefore, provides no guidelines for the interpretation of German claims to restrain a party from suing abroad.[220] In conclusion, then, there is no customary international law between the U.S., England, or Germany which precludes the use of antisuit injunctions.

d. Premises of a Tort-based Antisuit Injunction

1. Previously Proposed Solutions

Establishing clear principles for a right not to be sued in a foreign forum is neither desirable nor possible. It is not desirable because international litigation needs flexibility to find a just result in each situation. Even if it were desirable, however, it is not possible, because of the broad language of the pertinent claims (unlawful conduct and conduct contrary to public policy).[221]

Several standards have been offered to determine when a claim exists against unlawful commencement of a foreign lawsuit. First, it is determined on a case-by-case basis whether the party attempted to obtain jurisdiction surreptitiously.[222] Second, one could examine whether the result of the foreign proceeding was blatantly contrary to German public policy.[223] Finally, it is possi-

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218. *See* Republic of Phil. v. Westinghouse Electric Co., 43 F.3d. 65, 75 (3d. Cir. 1994). For the classic U.S. definition of international comity, see Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

219. For U.S. examples, see *Laker Airways*, 731 F.2d 909, 927; *Gau Shan*, 956 F.2d 1349, 1355. For English examples, see Société Nationale Industrielle Aerospatiale v. Lee, 1987 App. Cas. 871, 892, 895 (appeal taken from Brunei Darussalam).

220. *See* Schlosser, *Extraterritoriale*, *supra* note 200, at 507-08 ("judicial politeness in relation to foreign courts is not a binding principle in civil law countries"); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT §§ 5, 582 (3d ed. 1984).

221. *See* §§ 823(1), 826 ZPO (F.R.G.).

222. *See* KURTH, INLÄNDISCHER, *supra* note 118, at 97-101.

223. *See* Stürner, *Der Justizkonflik*, *supra* note 182, at 53.

ble to contend that only cases of obvious abuse constitute a right not be sued abroad.[224] These statements, however, are as broad as the statutory language in Civil Code sections 823(1) and 826 and do not further clarify the requirement for a claim.

A suggested standard for unlawfulness under Civil Code section 823(1) would render the foreign proceeding unlawful if Germany will not recognize the resulting decision.[225] The grounds for a refusal to recognize a foreign judgment include: (1) jurisdiction, (2) fair opportunity to defend, (3) irreconcilable judgments and lis pendens, (4) violation of public policy, and (5) assurance of reciprocity.[226] None of these reasons answer the question, whether the initiation of a legal proceeding in a foreign forum is conduct which must be viewed as unlawful.[227]

The legislature intended ZPO section 328 to prevent certain foreign court decisions from taking effect in Germany.[228] This section, however, is not intended to label foreign proceedings stemming from Civil Code sections 823 and 826 as unlawful. Thus,

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224. *See* KROPHOLLER, *supra* note 141, ¶ 175.

225. *See* Schröder, *supra* note 151, at 540; JASPER, *supra* note 152, at 131.

226. § 328 ZPO (F.R.G.).

227. *See* KURTH, INLÄNDISCHER *supra* note 118, at 92-93; HAU POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 205. Kurth proposed that the presumption of a legal proceeding's lawfulness is restricted to the subject matter of the lawsuit. *See* KURTH, INLÄNDISCHER, *supra* note 118, at 87-91. The procedural safeguards provide a justification for the legality of the parties' conduct only insofar as the interest and the rights are the subject of the proceeding. But if the preceding affects interests and rights not currently before the court, the judgment of the lawfulness of commencing a legal proceeding must be found on a case-by-case basis and by balancing all the interests of the parties.

228. ZPO section 328(1) provides:

> The recognition of a foreign judgment is excluded:
>
> 1. If the courts of the state to which the foreign court belongs are not competent according to the German law;
>
> 2. If the defendant, who has not participated, in the proceedings and raises this plea, has not been served with the written pleadings initiating the proceedings in the regular way or in a timely manner, so that he was not in a position to defend himself;
>
> 3. If the judgment is inconsistent with a judgment issued here or with an earlier foreign judgment subject to recognition or if the proceedings on which it is based are inconsistent with an earlier proceeding here which has become final;
>
> 4. If the recognition of the judgment would give rise to a result which is manifestly incompatible with the basic principles of German law, especially, when the recognition would be inconsistent with the constitution;
>
> 5. If reciprocity is not assured. intends to prevent that certain foreign court decisions come into effect in Germany.

§ 328(1) ZPO (F.R.G.).

a party cannot seek to enjoin a foreign lawsuit based solely on ZPO section 328. It is one thing to refuse to recognize a foreign decision. To categorize the proceeding as unlawful and restrain a party from pursuing the proceeding interferes with the foreign proceeding, jurisdiction, and sovereignty, even if only indirectly by influencing the party. A statute regulating the former situation, therefore, does not apply to the latter.[229]

2. Proposed Approach

There must be uniform requirements for a right not to be sued in a foreign court. The decision to restrain a foreign court proceeding is extraordinary, as is a determination that the commencement of the proceeding is cause for damages. Therefore, only situations which fulfill the requirements of section 826—willful conduct contrary to public policy—are sufficient to issue an antisuit injunction.[230]

The relevant inquiry is to determine when the party's conduct is unconscionable. This determination is difficult because forum shopping is generally permitted. The "game" of litigation involves taking advantage of the procedural devices and substantive law available in foreign fora. Under German law, an attorney must choose the most favorable forum to avoid liability for malpractice.[231] The determination that forum shopping is unlawful and unconscionable, therefore, is decided on a case-by-case basis. It is possible, however, to set up some guidelines. The guidelines should derive from a mix of procedural and substantive interests and policies.

ZPO sections 328 and 723[232] protect a party against foreign proceedings by refusing to recognize and enforce the foreign proceeding in Germany. The Code does not provide a rule for antisuit injunctions. Antisuit injunctions against foreign lawsuits, however, are not prohibited. The protections of an aggrieved

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229. *See* HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 205; KURTH, INLÄNDISCHER, *supra* note 118, at 92.

230. *See* Stürner, *Der Justizkonflik*, *supra* note 182, at 53; KROPHOLLER, *supra* note 141, ¶ 175; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 206.

231. *See* GEIMER, INTERNATIONALES, *supra* note 91, ¶ 1096.

232. By virtue of ZPO section 722(1) a foreign decision can only be enforced in Germany when a German court order states that it is enforceable. *See* § 722(1) ZPO (F.R.G.). ZPO section 723(2) provides that a German court has to dismiss a motion for a declaration of enforcement of a foreign decision if the decision will not be recognized according to section 328. *See* §§ 328, 723(2) Nr. 2 ZPO (F.R.G.).

party are not limited to the non-recognition of the decision.[233] Nonetheless, the scheme of sections 328 and 723 shows some resistance in German law to orders restraining a party from suing in a foreign forum.

Germany's strong preference for the first commenced lawsuit is a major factor when deciding whether commencing a foreign action is considered lawful. A domestic lawsuit commenced after an already pending action between the same parties and about the same subject matter will be dismissed by virtue of ZPO section 261(3).[234] If a German proceeding was commenced before a foreign lawsuit involving the same parties and subject matter, any judgment issued in the foreign proceeding will not be recognized pursuant to section 328(1).[235] If the foreign proceeding involving the same subject matter and parties is pending, before a German lawsuit is commenced, the decision of the foreign court is likely to be recognized. A later suit before a domestic court will be barred.[236]

A foreign proceeding is unlawful only when commenced in a foreign court after a domestic proceeding has been filed involving the same parties and subject matter. This lis pendens rule: (1) encourages the fast and efficient adjudication of a dispute, thereby saving judicial resources; (2) avoids inconvenience and expenses to the parties; and (3) prevents inconsistent judgments.[237]

The second factor in determining whether continuing a foreign proceeding constitutes conduct contrary to German public policy is tied to the parties' conduct. When a proceeding is commenced in Germany first, a party can be restrained from suing

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233. *But see* SCHACK, INTERNATIONALES, *supra* note 203, ¶ 773 (drawing this conclusion, restricting the section 826 claim to damages).

234. ZPO section 261(3) provides that pendency has the following effect: "during pendency, the subject matter may not be made pending in any other manner." § 261(3) Nr. 1 ZPO (F.R.G.). For the effect of lis pendens, see ROSENBERG ET AL., *supra* note 126, § 100(III)(1).

235. ZPO section 328(1) provides: "The recognition of a foreign judgment is excluded if the judgment is inconsistent with a judgment issued here or with an earlier foreign judgment subject to recognition or if the proceedings on which it is based are inconsistent with an earlier proceeding here which has become final." § 328(1) Nr. 3 ZPO (F.R.G.).

236. *See* GEIMER, INTERNATIONALES, *supra* note 91, ¶ 2688; STEIN & JONAS ET. AL., 1988, *supra* note 135, § 328, ¶ 321; BGH, 39 NJW 3083 (1987).

237. *See* ROSENBERG ET AL., *supra* note 126, § 100 (III)(1); RGZ 160, 338, (344). The rationale for the German lis pendens rule is the same as the rationale for issuing an anti-suit injunctions provided by a more relaxed U.S. approach. *See* text accompanying notes 12-13.

abroad or be ordered to discontinue a foreign suit when the parties' conduct is oppressive or vexatious. The most common case is when a second foreign lawsuit merely duplicates the first for no good reason.

The "good reason" exception must be applied generously to avoid conflicts in international litigation. The fact that German law exclusively protects the initial proceeding, does not prevent a party from commencing a second action. The lis pendens rule is directed to the court, and obligates the court to dismiss a second proceeding which merely duplicates the first one.[238] Thus, a prohibition on parties from suing abroad cannot be derived merely from the lis pendens rule. The prohibition requires evidence that the party commencing the second foreign lawsuit acts unconscionably, which is the case when the party has no reasonable justification to sue abroad.

There exist, however, situations in which a second lawsuit may be permitted. For example, when the German judgment will not be recognized in the foreign country where the second suit is pending. In addition, in situations in which one party has no assets or has insufficient assets in Germany, it may be necessary to file a second lawsuit. For a private party, a second lawsuit in a foreign country might be considered beneficial. Being sued abroad can burden the non-German party. A second suit in a non-German forum may be more convenient given the possible language problems, unfamiliarity with the culture and legal system, as well as the sometimes long distance to the German forum. If a private foreign party is sued in Germany and can prove that the German proceeding poses a hardship and that the second action in another country is far more convenient, an antisuit injunction should be denied. This excuse, however, only applies to the defendant in the German proceeding because the plaintiff is generally bound by her original choice.

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238. Procedural rules do not generally create obligations for the parties. *See* KONZEN, *supra* note 135, at 57; Frederick Lent, *Zur Unterscheidung von Lasten und Pflichten der Parteien im Zivilprozeß*, 67 ZZP 344 (1954); ROSENBERG ET AL., *supra* note 126, § 2(III)(1), (2). The lis pendens rule is not one of the few exceptions. For obligations based upon procedural rules, see ROSENBERG ET AL., *supra* note 126, § 2(III)(1), (2). The not-pending of an earlier lawsuit about the same subject matter between the same parties is one of the so-called "Prozeßvoraussetzungen." If a party fails to meet one of these procedural prerequisites of a lawsuit, the court will dismiss the action without determining the subject matter. *See id.* § 96(V)(6), § 100(III)(1); OTHMAR JAUERNIG, ZIVILPROZEßRECHT § 33(V)(3), § 44(II) (24th ed. 1993).

Where a business entity is the defendant in a German lawsuit, the "good reason" exception is unlikely to apply. An enterprise which participates in worldwide business must accept the possibility of being sued in a foreign country where it conducts business. An enterprise is not permitted to contradict the first lawsuit by commencing a second proceeding in a foreign forum.[239]

There are special cases, however, where an antisuit injunction is appropriate in German law even if Germany is clearly not the most natural forum, and the German court is the first one seized of the case. A German court may issue an antisuit injunction when they find the foreign plaintiff's only purpose in bringing the second suit is to harass the German party into settlement,[240] or in order to unduly influence the proceedings.[241] They may also issue an antisuit injunction in cases where the proceedings in the foreign country are unconnected to the subject matter of the civil proceeding and would be inimical to the life or freedom of the German party.[242]

The concept of an antisuit injunction based on the institution of lis pendens is functionally similar to the legal bases for antisuit injunctions in England and the United States. Both common law countries resolve jurisdiction problems with the doctrine of forum non conveniens. The antisuit injunction is an offensive application of the forum non conveniens doctrine. Like a "stay" in English proceedings and a "dismissal" in the United States, an anti-suit injunction requires the foreign proceeding be inappropriate, vexatious, or oppressive.[243] The German resolution for jurisdiction conflicts is the lis pendens rule which favors the initial proceeding.

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239. *See* HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 209 (distinguishing generally between the role of the parties in the German proceeding). Hau considers it vexatious if a plaintiff commences two proceedings. If the defendant of the German proceeding brings a second lawsuit before a foreign court, however, Hau does not consider the foreign suit vexatious. *See id.*

240. *See* Stürner, *Der Justizkonflikt*, *supra* note 182, at 53; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 210-11.

241. *See* A/S D/S Svendborg v. Wansa Estonian Shipping Co., 2 Lloyd's Rep. 559, 573-75. The plaintiff in a Sierra Leone lawsuit set up a scheme of fraudulent claims and that the plaintiff was able to manipulate Sierra Leone's legal system. *See id.*

242. *See* OLG Köln, FamRZ, 9 (1962), 72. For the facts and the holding, see *supra* Part IV.B.

243. *See* Allendale Mut. Ins. v. Bull Data Systems, 10 F.3d 425, 431 (7th Cir. 1993); Seattle Totems, Inc. v. National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981); *see also* Société Nationale Industrielle Aerospatiale v. Lee, 1987 App. Cas. 871, 892, 895 (appeal taken from Brunei Darussalam); Simon Engineering v. Butte Mining (No. 2), 1 Lloyd's Rep. 91, 95 (Q.B. 1996).

The concept advocated here for an antisuit injunction under German law adds restrictions to the lis pendens rule and creates an offensive lis pendens device.

e. Damages

Aside from the entitlement to an injunction saving a party from a suit abroad, a party can recover the expenses and costs[244] incurred by having to litigate a foreign suit.[245] If the foreign court enters a judgment against the German party entitled to the antisuit injunction, the question becomes does the German party have a claim to recover the losses incurred as a result of the foreign decision. This would clearly contradict the foreign decision, and might eradicate the res judicata effects of the foreign judgment.

The res judicata problem is, however, false. In cases where a right not to be sued abroad exists under German law, the foreign decision violating this right will not be recognized, either because the lis pendens of a German proceeding, first seized, excludes recognition pursuant to ZPO section 328(1), or the decision is contrary to German public policy pursuant to section 328 (1).[246] Since the decision will not be recognized, it has no legal effect in Germany and the res judicata doctrine will not prevent a damages claim.

6. "Anti"-antisuit Injunction

Some authors propose that the party against whom the moving party is seeking a foreign antisuit injunction has a right to an "anti"-antisuit injunction. This "anti" antisuit injunction would restrain the other party from seeking a foreign antisuit injunction.[247] The basis for an "anti"-antisuit injunction would be the guarantee under the German Constitution requiring German courts to adjudicate private rights.[248] This constitutional entitlement, however, only applies to a claim by a citizen against the government and not against another private person. Therefore, it is unsuitable as a ba-

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244. Pursuant to ZPO sections 823(1) and 826 and by virtue of the breach of contract claim, a party can recover the expenses and costs. *See* §§ 823(1), 826 ZPO (F.R.G.).

245. *See* Stürner, *Der Justizkonflikt*, *supra* note 182, at 53; ZÖLLER & GEIMER, INTERNATIONALES, *supra* note 91, ¶¶ 1123-25; KROPHOLLER, *supra* note 141, ¶ 175.

246. §§ 328(1) Nrs.3, 4 ZPO (F.R.G.).

247. *See* Stürner, *Der Justizkonflik*, *supra* note 182, at 52; SCHLOSSER, JUSTIZKONFLIKT, *supra* note 128, at 38.

248. *See* BVerfGE 3, 359 (364); BVerfGE 51, 146.

sis for an "anti"-antisuit injunction in civil matters. There are two scenarios when an "anti"-antisuit injunction is possible under German law: (1) the antisuit injunction would contradict the right to exclusively try the dispute in question before a German court; and (2) the standard for an antisuit injunction under Civil Code sections 823(1) and 826 is fulfilled.

F. Procedural Problems

1. Subsidiary Nature of the Antisuit Injunction: Need for Judicial Protection

An antisuit injunction should only be granted after the foreign court has had the opportunity to consider the grounds upon which the injunction will be based. Only then, is interference with the foreign court justified.

German civil procedure applies the principle of *Rechtsschutzbedürfnis,* the "need for judicial protection" to prevent unnecessary lawsuits.[249] Therefore, if a dispute can be resolved quicker and simpler in the foreign jurisdiction, the German proceeding will be dismissed without considering at the merits.[250] In applying the "need for judicial protection" to anitsuit injunctions, a German party must make a valid argument why the foreign proceeding should be dismissed before a German court will issue an injunction.[251] If the party fails to do so, the German court will not grant the antisuit injunction.

The fact that the foreign decision will not be recognized in Germany is not grounds to deny the need for judicial help, because

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249. *See* ROSENBERG ET AL., *supra* note 126, § 92(I), (II); STEIN & JONAS ET AL., 1984, *supra* note 141, Vor § 252, ¶ 101; WALTER ZEISS, ZIVILPROZEßRECHT ¶ 295 (7th ed. 1989).

250. *See* ROSENBERG ET AL., *supra* note 126, § 92 I, II; STEIN & JONAS ET. AL., 1984, *supra* note 141, Vor § 252, ¶ 101; ZEISS, *supra* note 249, ¶ 295.

251. *See* HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 210; KURTH, INLÄNDISCHER, *supra* note 118, at 132-34; Schröder, *supra* note 151, at 543-44. Geimer, however, denies the need for judicial protection for an order restraining a party from suing abroad and stating the party which suffers losses from the foreign lawsuit can only recover the damages. GEIMER, INTERNATIONALES, *supra* note 91, ¶¶ 1118, 1123-25. The party moving for an antisuit injunction is almost never obliged to plead the grounds for the antisuit injunction in the foreign proceeding, because even if she is successful she will have to pay attorney's fees and expenses. *See* JASPER, *supra* note 152, at 132. According to the approach taken above, a forum selection clause and an arbitration agreement represent only a basis for a duty not to sue abroad when the foreign forum will not accept the derogation of its jurisdiction. Thus, the application of "need for judicial protection" doctrine is superfluous. *See supra* Part IV.E.1, 2.

other effects of the proceeding—expenses, investment of time, infringement of reputation—are reasons to restrain the other party from suing abroad.[252] The chances of avoiding the foreign proceeding by pleading its unlawfulness or vexatious character are not so slight that the application of the doctrine of "need for judicial help" could be considered senseless.

In common law countries, the doctrine of forum non conveniens considers the vexatious or oppressive character of a lawsuit an important factor,[253] and the lis pendens objection in civil law countries can achieve a dismissal of the foreign proceeding without the threat of an antisuit injunction. Expenses sustained as a consequence of the foreign proceeding can be recovered as damages either for breach of contract or for the unlawful commencement of foreign proceedings.

2. Jurisdiction for an Antisuit Injunction

German courts have broad international jurisdiction to issue antisuit injunctions. A person can be sued before the court in the district he or she is domiciled.[254] Similarly operations of a branch of a business located in Germany confer jurisdiction on German courts with respect to matters related to the business of that branch.[255] Pursuant to ZPO section 23 a person not domiciled in Germany can be sued for monetary claims before a German court if she owns assets which are located in Germany.[256] Obligations not to sue abroad or to discontinue a foreign proceeding are not monetary obligations, so that section 23 does not apply.[257] Section 23 applies when a party brings a suit for damages before German courts. The Supreme Court has restricted section 23 to cases where the subject matter of the dispute has sufficient connections to Germany.[258]

ZPO Section 32 provides that claims arising from a tort can be brought before the court where the tortious act was committed. Section 32 also applies to injunctions restraining a party from act-

252. *See* Schröder, *supra* note 151, at 545.

253. *See* SCOLES & HAY, *supra* note 160, § 11.9-11.13.

254. ZPO sections 12 to 40 regulate the local jurisdiction, but are applied by analogy to international jurisdiction. *See* BGHZ 94, 156; ROSENBERG ET AL., *supra* note 126, § 20(II).

255. § 21(1) ZPO (F.R.G.).

256. § 23 ZPO (F.R.G.).

257. *See* Schröder, *supra* note 151, at 546.

258. *See* BGHZ 115, 90.

ing tortiously.[259] German courts, therefore, have jurisdiction to enjoin a tortious act when it will be committed in Germany,[260] or when the harmful effects of the act will be felt in Germany.[261] Section 32, therefore, applies to antisuit injunctions when the effects of a tortious foreign lawsuit will harm interests in Germany. The harm occurs in Germany when the foreign judgment involves "rights," pursuant to the meaning of Civil Code section 823(1) (life, business enterprise), or assets protected by section 826,[262] located in Germany.

Disputes arising under a contract confer jurisdiction on German courts, pursuant to ZPO section 29, when Germany is the forum selected by the parties in which to resolve their disputes.

3. Enforcement of the Right not to be Sued Abroad and Preliminary Antisuit Injunctions

The ZPO provides rules for the enforcement of an injunction enjoining the party from acting, or for court decisions commanding a party to act. These rules do not, however, exclusively apply in the case of an antisuit injunction. They are available for the enforcement of all injunctions.

Pursuant to ZPO section 890, a court can enforce an antisuit injunction by ordering coercive payment if one party violates the injunction. If the offending party sues, she will be fined up to 500,000 Deutsche Mark or detained up to six months.[263] If a party proceeds with the foreign action despite an injunction, the court upon motion will redetermine the amount of the payment or the detention. Pursuant to ZPO section 888[264] the same remedies are available to support an injunction ordering a party to discontinue a foreign proceeding.[265]

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259. *See* BGHZ, RIW, 40 (1994), 591 (593).

260. *See* HARTMANN & HARTMANN, ZIVILPROZESSORDNUNG, *supra* note 164, § 32, Anm. 3C.

261. *See* OLG Hamm, NJW-RR, 4 (1989), 305.

262. *See* OLG Koblenz, WM, 34 (1989), 622; SCHACK, INTERNATIONALES, *supra* note 203, ¶ 305 (restricting the jurisdiction pursuant to ZPO section 32 in the case of Civil Code section 826 to the place where the wrongdoer acted).

263. *See* § 890 ZPO (F.R.G.).

264. ZPO section 888 applies only to court decisions that command a person to act only when that person alone can fulfill the specific action. *See* § 888(1) ZPO (F.R.G). The painter obliged to paint a portrait represents the classic example.

265. ZPO section 894 enforces the obligation to express a party's will in a domestic proceeding. The will is deemed expressed after the decision is final. This provision only applies when a foreign forum recognizes an antisuit injunction and the foreign forum has

The ZPO also contains rules for preliminary injunctions. The provisions apply to the protection of any entitlement or right which would be imperiled without obtaining timely judicial support. Pursuant to ZPO section 940, a court can, upon motion by a party, grant a temporary restraining injunction ordering the party not to sue in the foreign country.[266] The party requesting the injunction must show prima facie evidence that she is entitled not to be sued abroad and that the other party will breach the obligation not to sue abroad. For a court to have jurisdiction to grant the temporary injunction, it must be able to grant the permanent injunction.[267] Thus, the same jurisdiction rules apply as described above.

The ZPO further provides that the court can issue an emergency temporary injunction without a hearing pursuant to section 937(2).

V. THE TREATMENT OF ANTISUIT INJUNCTIONS UNDER EUROPEAN CIVIL PROCEDURE

The nature of an antisuit injunction is to influence foreign proceedings. Thus, the issue arises: is an antisuit injunction inconsistent with an international treaty that regulates international problems.

This question wa recently addressed. This question was recently addressed. In two decisions, the English Court of Appeal upheld the antisuit injunctions issued by the lower courts.[268] In both cases, the English courts were second seized, and the court first seized was a Member State of the Brussels Convention.[269] In these situations, both the Brussels and the Lugano Conventions[270]

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similar rules because the lex fori of the state applies for enforcement proceedings. *See* KROPHOLLER, *supra* note 141, ¶ 175.

266. *See* SCHLOSSER, JUSTIZKONFLIKT, *supra* note 128, at 37-38; KURTH, INLÄNDISCHER, *supra* note 118, at 139.

267. § 937(1) ZPO (F.R.G.).

268. *See* Continental Bank v. Ackos Compania Naviera, 1 Lloyd's Rep. 505, 512 (C.A. 1994); The Angelic Grace, 1 Lloyd's Rep. 87, 94-95 (C.A. 1995).

269. *See* Brussels Convention, *supra* note 156, *reprinted in* 29 I.L.M. at 1413. This version is the 1989 Accession Convention which involves: Germany, Italy, France, Belgium, Netherlands, Luxemburg, Ireland, Denmark, United Kingdom, North Ireland, Spain, Portugal and Greece. For the history of the Brussels Convention, see KROPHOLLER *supra* note 141, ¶ 1; REINHOLD GEIMER, EUROPÄISCHES ZIVILVERFAHRENSRECHT, EINLEITUNG ¶ 4 (1997) [hereinafter GEIMER, EUROPÄISCHES].

270. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention].

applied. The result of these cases was surprising. Both Conventions contain special rules dealing with the problem of multiple fora proceedings.[271] They did not, however, provide for an antisuit injunction remedy. To answer the question whether an antisuit injunction is consistent with the Brussels Convention it is helpful to consider how the Convention approaches issues concerning jurisdiction, multi fora proceedings, and the recognition of judgments.

A. The Basic Structure and the Spirit of the Brussels Convention

The Brussels Convention views the courts of the different Member States as a single judicial system. All courts are considered equal parts of one European civil procedure system.[272] The jurisdictional rules distribute the lawsuits between these "European courts" because the same rules apply in all Member States. Since all courts are considered equal, it is possible to restrict instances of non-recognition of judgments by courts of another Contracting State to a few extreme cases. Implicit in the sys-

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The text of the Lugano Convention is quite similar to the Brussels Convention. When the Brussels Convention is mentioned, the Lugano Convention is implicitly mentioned as well. The Lugano Convention will only be addressed explicitly if the two Conventions differ. Aside from the Member States of the Brussels Convention the Lugano Convention is signed by: Ireland, Finland, Norway, Austria, Sweden and Switzerland. *See* KROPHOLLER, *supra* note 141, ¶ 46.

271. The relevant provisions of these special rules are contained in Articles 21 and 22. The relevant sections provide:

> Article 21(1): Where proceedings involving the same cause of action and between the parties are brought in the courts of different Contracting States, *any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.*
> (2) Where the jurisdiction of the court first seized is established, *any court other than the court first seized shall decline jurisdiction in favor of that court.*
>
> Article 22(1): Where related actions are brought in the courts of different Contracting States, any court other then the court first seized may, while the actions are pending at first instance, stay its proceedings.
>
> . . . .
>
> (3) For the purpose of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Brussels Convention, *supra* note 156, arts. 21(1), (2) & 22(1), (3), *reprinted in* 29 I.L.M. at 1423-24 (emphasis added).

272. *See* Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 1994: Quellenpluralismus und offene Konflikte*, 14 IPRAX 405, 412 (1994) [hereinafter Jayme & Kohler, *Europäisches 1994*]; Phillipa Rogerson, *English interference in Greek Affairs*, 53 CAM. L.J. 204, 243-44 (1994).

tem is a Member State's high level of confidence for the judicial system of any other Member State.[273] Therefore, discrimination and mistrust toward a foreign court violate the spirit of the Convention.[274]

The Convention's main subjects include uniform jurisdiction rules[275] and rules regarding the recognition and enforcement of judgments.[276] All other rules on civil proceedings are left to the Member States' own national legal systems[277] and are thus far from being uniform.

The underlying policies of the Convention are outlined in the preamble which states it is necessary "to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and to strengthen in the [European] Community the legal protection of person therein established."[278] To achieve these goals, the Convention provides a system of compulsory jurisdiction rules.[279] If a rule is met the court *must* exercise its jurisdiction.[280] As a creature of the civil law system the

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273. *See* Wolfgang Jakob Hau, *Durchsetzung von Zuständigkeits-und Schiedsvereinbarungen mittels Prozeßführungsverboten im EuGVÜ: Neuere Rechtsprechung des Court of Appeal zu obligation-based antisuit injunctions,* 16 IPRAX 44, 47-48 (1996) [hereinafter Hau, IPRAX]; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 218.

274. Pursuant to Article 1 of the protocol of interpretation of the Brussels Convention, the European Court of Justice has sole authority to interpret the Convention to ensure uniform interpretation by the Court of Justice regarding jurisdiction and the enforcement of judgments in civil and commercial matters. *See* Brussels Convention, *supra* note 156, protocol, art. 1, *reprinted in* 29 I.L.M. at 1440. Furthermore, articles 2 and 3 of the Protocol provide that the Supreme Courts of the Member States must refer questions regarding the interpretation of the Convention to the Court of Justice, while the appellate courts may directly address these issues. *See id.* protocol, arts. 2, 3, *reprinted in* 29 I.L.M. at 1440. For a more detailed discussion on the protocol see GEIMER, EUROPÄISCHES, *supra* note 269, ¶ 76.

275. *See id.* arts. 2-20, *reprinted in* 29 I.L.M. at 1418-23

276. *See id.* arts. 25-51, *reprinted in* 29 I.L.M. at 1424-33.

277. *See* KROPHOLLER, *supra* note 141, ¶ 14; GEIMER, EUROPÄISCHES, *supra* note 269, art. 2, ¶ 41.

278. Brussels Convention, *supra* note 156, pmbl., *reprinted in* 29 I.L.M. at 1417.

279. These rules as well as the Brussels Convention were developed by the first six Member States, all of them civil law countries: Italy, France, Belgium, Netherlands, Luxembourg and Germany. *See* KROPHOLLER, *supra* note 141, ¶ 1.

280. Although all jurisdiction rules regulate international jurisdiction, some rules regulate the territorial jurisdiction as well. For example Article 5(1) provides: "A person domiciled in a Contracting State may, in Another Contracting State, be sued . . . in courts for the place of performance of the [contractual] obligation. . . ." Brussels Convention, *supra* note 156, art. 5(1), *reprinted in* 29 I.L.M. at 1419. For a discussion see Schlosser-Report, 1979 O.J. (C-59) 71, 98, ¶ 81 [hereinafter Schlosser-Report]; JAN KROPHOLLER, EUROPÄISCHES ZIVILPROZEßRECHT, art. 2, ¶ 15 (5th ed. 1996) [hereinafter KROPHOLLER, EUROPÄISCHES].

Convention has not implemented any judicial discretion to determine whether a particular court is the appropriate forum to try the case.[281] Furthermore, the Convention does not accept the doctrine of forum non conveniens or similar common law institutions.[282] These institutions allow the court to determine jurisdiction by asking whether the factors connect the court's forum or another forum to the action, and balancing the factors.

The Convention has a simple but inflexible concept of jurisdiction which provides the advantage of legal certainty and predictability.[283] If the requirements of a jurisdictional rule are met, the court must adjudicate the action before it.[284] Expressed in terms of the forum non conveniens doctrine, every court which has jurisdiction under any rule of the Convention is the appropriate forum.[285] Especially in international litigation cases, the clear and quick decision regarding jurisdiction is invaluable. The parties need not fight a long and costly dispute, which may result in unforeseeable dismissal of the action by a discretionary decision of the court. The Convention's clear jurisdiction rules allow parties to predict which court will decide the dispute, without a long and annoying quarrel concerning preliminary procedural questions.[286]

Of course, even clear, compulsory jurisdictional rules cannot prevent opposing parties from suing in different Member States. Therefore, the Convention contains special provisions for multi-

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281. *See* Schlosser-Report, *supra* note 280, at 97, ¶ 76.

282. *See* GEIMER, EUROPÄISCHES, *supra* note 269, art. 2, ¶ 42; JASPER, *supra* note 152, at 77-79; KROPHOLLER, EUROPÄISCHES, *supra* note 280, art. 2, ¶ 19; SCHACK, RECHTSHÄNGIGKEIT IN ENGLAND UND ARTICLE 21 EUGVÜ IPRAX 1991, at 270, 273-74; Schack, *Versagung, supra* note 73, at 41; STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PROCEDURE ¶ 1.37, 44.42-44.44 (1994). Section 49 of the Civil Jurisdiction and Judgments Act of 1982 provides that an English court cannot stay any proceedings on the grounds of forum non conveniens or otherwise, when this would be inconsistent with the Brussels Convention. Section 49 includes stays on the ground of a foreign choice of jurisdiction clause or an agreement on arbitration. *See* GEOFFRY CHESIRE & PETER M. NORTH, PRIVATE INTERNATIONAL LAW 250, 339-40 (12th ed. 1990). If the lis pendens rule applies, then a grant of a stay would be inconsistent with the Convention where the Convention applies and where the defendant is not domiciled in a Contracting State. *See* Schlosser-Report, *supra* note 280, at 97, ¶ 78; Michele Angelo Lupoi, *Convenzione di Bruxelles ed esercizio discrezionale della giurisdizione*, 1995 REV. TRIM. DIR. CIV. 997. *But see* TREVOR HARTLEY, CIVIL JURISDICTION AND JUDGMENTS 78 (1984) (stating that the doctrine of forum non conveniens is available under the Brussels Convention).

283. *See* Jenard-Report, 1979 O.J. (C 59) 1, 15 (1979) [hereinafter Jenard-Report].

284. *See* GEIMER, EUROPÄISCHES, *supra* note 269, art. 2, ¶ 28.

285. *See id.* art. 2, ¶ 42.

286. And should that not be the reason why the parties seek judicial help?

fora actions. Article 21, the lis pendens rule, provides:

> (1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, the court second seized *must stay* its proceeding until the court first seized decided whether it has jurisdiction.
>
> (2) As soon as the jurisdiction of the court first seized is established, the court second seized *must* decline jurisdiction in favor of that court.[287]

The language, "must stay" and "decline," as well as the structure of Article 21 determine which court has the competence to determine the issue of jurisdiction in lis pendens situations. Section 1 provides that where the same actions are brought in the courts of different Member States, the court second seized has no discretion. There, the court must stay its proceeding until the court first seized decides whether it has jurisdiction.[288]

Article 22 deals with related actions.[289] Under article 22(1), however, if related actions are pending before courts of different Member States, the second court seized has discretion to stay its proceedings.[290]

The second major portion of the Convention contains rules for recognizing and enforcing foreign State's judgments. The basic rule of recognition is contained in Article 25(1), which provides

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287. *See* KROPHOLLER, EUROPÄISCHES, *supra* note 280, art. 21, ¶ 20, 23; Schlosser-Report, *supra* note 280277.

288. This is uncontested. *See* Wolfgang Lücke, *Die Zuständigkeitsprüfung nach dem EuGVÜ*, *in* GEDÄCHTNISSCHRIFT für Peter Arens 273, 274-82 (1993). In *Overseas Union Insurance,* the Court stated without prejudice that in the case where the court second seised has exclusive jurisdiction under the Convention and particularly under Article 16 thereof, "where the jurisdiction of the court first seised is contested, the court second seised may . . . only stay the proceedings and may not itself examine the jurisdiction of the court first seised." Case C-351/89, Overseas Union Ins. Ltd. v. New Hampshire Ins. Co., 1990 E.C.R. I-3317, 3350-51 (1991). The court gives two reasons why it is the court first seised which decides the jurisdiction issue. First, the court second seised is never in a better position than the court first seised to decide which court has jurisdiction. *See id.* at 3350, ¶ 23. Second, under Brussels Convention, Article 26, a court generally must recognize the judgments of a court of another Contracting State. The court is prohibited from reviewing the jurisdiction of a court of another Member State at the recognition stage, unless certain rules of exclusive and special jurisdiction apply. *See id.* at 3350, ¶ 24 (referencing articles 28 and 34 of the Brussels Convention).

289. For the full text of article 22, see Brussels Convention, *supra* note 269.

290. *See* GEIMER, EUROPÄISCHES, *supra* note 269, art. 22, ¶ 13; Markus Lenenbach, *Gerichtsstand des Sachzusammenhangs nach Art. 21 EuGVÜ?*, 6 EUROPÄISCHES ZEITSCHRIFT FÜR STEÜERRECHT 361, 367 (1995).

that the judgment given in one Contracting State shall be recognized in the other Contracting States, without involving special procedures. In other words, the judgment is automatically recognized.[291]

Articles 27 and 28 regulate the rare cases in which a Member State's judgment will not be recognized. Article 27(1) contains a public policy exemption to recognition. Article 28(3) provides that the determination of jurisdiction by the Member State court may not be reviewed and that a violation of a jurisdiction rule is not a violation of public policy, pursuant to Article 27(1). Rather, the public policy exemption is triggered only if the court did not comply with the rules of specific and exclusive jurisdiction, in which case its judgment shall not be recognized.[292]

B. Antisuit Injunctions under the Brussels Convention

In *Continental Bank* and *The Angelic Grace*, the English Court of Appeal considered situations where an exclusive jurisdiction or an arbitration agreement conferred jurisdiction on an English court as a paradigm case to grant an injunction restraining a party from breaching the agreement.[293] This was seemingly the only effective remedy for this type of breach of contract. The Courts did not doubt they had the power to grant an antisuit in-

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291. *See* Jenard-Report, *supra* note 283, at 43; Peter Bellet, *Reconnaissane et execution des decisions en vertue de la Convention du 27 Septembre 1968,* REV. TRIM. DIR. EUROP. 32, 36 (1975). Recognition under Article 26 means that the judgment has the same effect in the State where the enforcement is sought as it does in the State in which judgment was rendered. *See* Case, C 145/85 85, Hoffmann v. Krieg, 1988 E.C.R. 645, 666, ¶ 9; KROPHOLLER, EUROPÄISCHES, *supra* note 280, art. 26, ¶ 9; DIETER MARTINY, ET AL., HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS, at ch. II, ¶¶ 63, 70 (1984).

292. This exemption refers to jurisdictional matters relating to insurance, consumer contracts (Articles 7-15), or jurisdiction under Article 16. Article 16 mainly provides that in proceedings which have their object rights *in rem* in immovable property, the courts of the Contracting State where the property is situated have exclusive jurisdiction. *See* Brussels Convention, *supra* note 156, art. 16, *reprinted in* 29 I.L.M. at 1422.

293. *See* Continental Bank v. Aekas Co. Naviera, 1 Lloyd's Rep. 505, 512 (C.A. 1994); The Angelic Grace, 1 Lloyd's Rep. 87, 94-95 (C.A. 1995); Trevor Hartley, *Brussels Jurisdiction and Judgments Convention: Jurisdiction Agreements and Lis Alibi Pendens*, 19 EURO. L. REV. 549, 551-52 (1994) (stating that practical considerations support the opinion of the court); DICEY & MORRIS, *supra* note 215, at 49 (stating that injunction was appropriate because the Greek party's conduct was vexatious and oppressive); Roman Briggs, *Anti-European Teeth for Choice of Court Clauses*, Lloyd's M.C.L.Q., 1994, 158, 162-64 (stating that until harmonization of national protective measures, the anti-suit injunction is permissible for interim relief, and will be recognized pursuant to Article 24).

junction, even under the Brussels Convention.[294]

A majority of commentators vehemently, nonetheless, attacked the decisions upholding the injunctions. They argued that granting an antisuit injunction under the Convention violates the spirit of the Convention; or at least frustrates its purpose.[295] On the whole, however, it appears more appropriate to approach the question of the consistency of an antisuit injunction with the Brussels Convention by separating the different classes of cases, rather than totally rejecting the possibility of an antisuit injunction.

1. Lis Pendens Cases and Antisuit Injunctions: Another Approach

a. English Courts First Seized[296]

If there is identity of parties and claims pending before courts of different Member States, the Convention offers a clear rule: the court second seized must wait until the court first seized determines whether it has jurisdiction.[297] The structure and language of Article 21 vests competence in the court first seized to adjudicate whether it has jurisdiction. The court first seized can decide the question of its jurisdiction in its final judgment, or it can issue

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294. *See Continental Bank*, 1 Lloyd's Rep. 505, 512. In *Continental Bank*, the court did not consider whether an antisuit injunction violates the Brussels Convention to the European Court of Justice on the ground that an antisuit injunction is obviously permitted. *See id.* A court has the obligation to transfer an issue of interpretation arising under the Brussels Convention to the European Court of Justice. The solution of the issue of interpretation is so obvious, however, that only one interpretation can be viewed as correct. A court, thus, does not have an obligation to refer the issue. *See* KROPHOLLER, EUROPÄISCHES, *supra* note 280, ¶ 25.

295. *See* O'MALLEY & LAYTON, *supra* note 282, ¶¶ 1.51-1.52; CHESIRE & NORTH, *supra* note 282, at 250-51; Andrew Bell, *Anti-suit injunctions and the Brussels Convention*, 110 L.Q.R. 204, 208-09 (1994); Rogerson, supra note 272, at 243-44; Jayme & Kohler, *Europäisches 1994*, supra note 272, at 412; Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 1995: Der Dialog der Quellen*, 15 IPRAX 343, 351 (1995) [hereinafter Jayme & Kohler, *Europäisches 1995*]; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 216-19; Hau, IPRAX, *supra* note 273, at 47-48; Heinz-Peter Mansel, *Grenzüberschreitende Prozeßführungsverbote und Zustellungsverweigerung*, 7 ZEITSCHRIFT FÜR EUROPÄISCHES WIRTSCHAFTSRECHT [EuZW], 335, 337-38; Schack, *Versagung, supra* note 73, at 56; Schack, INTERNATIONALES, *supra* note 203, ¶ 773; Lesley Jane Smith, *Antisuit Injunctions, Forum non Conveniens und International Comity in*, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 802, 808 (1993).

296. The rules of the Brussels Convention apply to any Member State's court. Antisuit injunctions are only known in Great Britain and were, until recently, only granted by English courts. Thus, the English courts were chosen as representatives of all courts to facilitate the discussion.

297. *See* Brussels Convention, *supra* note 156, art. 21, *reprinted in* 29 I.L.M. at 1423.

an interlocutory decision.[298]

The availability of an interlocutory decision is not regulated in the Convention, rather it is governed by the national law of the Member States.[299] The ZPO, for example, contains a special provision for interlocutory orders on procedural issues.[300] This provision enables a German court, which is first seized within the meaning of Article 21, to rule on the question of jurisdiction before it enters the final judgment. ZPO Section 280, however only permits an order affirming jurisdiction. An interlocutory order declining jurisdiction is not available under the German civil procedure.[301]

An order of an English court first seized restraining a party from litigating in the court second seized can also be considered an interlocutory order determining the English court's jurisdiction.[302] As soon as the court first seized decides that it has jurisdiction, pursuant to Article 21(2) the court second seized must decline its jurisdiction. Hence, an English antisuit injunction does not usurp a power not contemplated by the Convention. Rather, an antisuit injunction executes a power vested in the court first seized pursuant to Article 21.

The difference between an English antisuit injunction and a German decision within ZPO section 280(2), is that the English injunction obligates the parties.[303] This difference is based upon the fact that the English civil procedure system is more party orientated, while the German system is court oriented. This struc-

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298. *See* ROSENBERG ET AL., *supra* note 126, § 39(I)(6).

299. As the European Court of Justice states:

> It should be stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments. . . . as regard to procedural rules, reference must be made to national rules applicable by the national court . . . [as long as they do] not impair the effectiveness of the Convention.

Kongress Agentur Hagen GmbH v. Zeehaghe BV, I E.C.R. 1845, 1865, ¶¶ 17-20; *see also* KROPHOLLER, EUROPÄISCHES, *supra* note 280, ¶ 14.

300. Section 280 provides:

> (1) The court may order a separate hearing on the admissibility of the claim.
>
> (2) If an interlocutory judgment is issued, it shall be deemed as a final judgment with regard to the appeal. The court may, however, order on petition that the main issue will be heard.

§ 280 ZPO (F.R.G.).

301. *See* BGH GZ, 102, 232 (234); ROSENBERG ET AL., *supra* note 126, § 59(III)(2).

302. *See* Rolf Stürner, *Anmerkung,* 109 ZZP 224, 228 (1996) [hereinafter Stürner, *Anmerkung*].

303. *See id.* at 228

tural difference, however, is not a reason to consider antisuit injunctions as inconsistent with the Convention.[304]

b. English Court Second Seized

The judgment of the antisuit injunction under the Brussels Convention changes if the English court is second seized. In this instance, the competence to determine jurisdiction vests in the court first seized. An antisuit injunction contradicts the distribution of power granted by the Brussels Convention, Article 21. Issuing an antisuit injunction, therefore, would violate Article 21 of the Convention.[305]

In *Continental Bank*, the Court of Appeal addressed this problem.[306] It concluded that an exclusive jurisdiction clause preempts Article 21.[307] Thus, a court possessing jurisdiction may is-

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304. *See id.*

305. *See id.* at 229, 231; O'MALLEY & LAYTON, *supra* note 282, ¶ 1.51 (focusing on arts. 21-23 as a general bar for antisuit injunctions); Bell, *supra* note 295, at 204; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 218.

306. The court's reasoning is based upon the 1978 Accession Convention. The 1989 Accession Convention altered an older version of the article. For the current text of article 21, see Continental Bank v. Aekas Co. Naviera, 1 Lloyd's Rep 505, 510 (C.A. 1994). By virtue of the older version, the court second seised had to decline its jurisdiction in favor to the court first seised where proceedings were pending before courts of different Member States. Unlike the current version of Article 21, the older version does not allow the court to merely stay its proceeding while awaiting the decision of the court first seised. *See* GEIMER, EUROPÄISCHES, *supra* note 269, art. 21, ¶ 43. The older version presents even more of an argument for the position that only the court first seised has competence and jurisdiction. For the text of the older version, see 2 BUNDEGESETZBLATT TEIL 744 (1974).

307. An arbitration agreement raises the question of the applicability of the Brussels Convention. Article 1(2) provides: "The Convention shall not apply to arbitration." Brussels Convention, *supra* note 156, art 1(2), *reprinted in* 29 I.L.M. at 1418. Thus, the question is the scope of this preclusion provision and more specificly whether the Convention applies when the issues concerning the arbitration agreement (validity, scope) are mere preliminary questions for a lawsuit whose merits do not pertain to arbitration agreements. Although the question is controversial, the majority rightly affirmed the applicability of the Brussels Convention. By assuming that this case is encompassed from the preclusion provision of Article 1(2) the mere pretension of an arbitration agreement would provide the defendant with a device to circumvent the Convention. *See* Stürner, *Anmerkung*, *supra* note 302, at 229; O'MALLEY & LAYTON, *supra* note 282, ¶¶ 14.32-14.33; MICHAEL HILL, THE LAW RELATING TO INTERNATIONAL COMMERCIAL DISPUTES 65 (1994); KROPHOLLER, EUROPÄISCHES, *supra* note 280, art. 1, ¶ 43; Schlosser-Report, *supra* note 280, at 92-93, ¶¶ 61-65 (describing the different points of view of the original six civil law Member States and the United Kingdom on the issue of the scope of article 1(2)); Case C 190/89, Mark Rich u. Co. AG v. Societa Italiana Impianti PA, 46 NJW 189 (1993) (proceeding to determine the appointment of an arbitrator is encompassed by article 1(2) and thus excluded from the Convention); OLG Celle, RIW, 2 (1979), 131 (132) (discussing that recognition and enforcement of an Italian judgment

sue an antisuit injunction, even if the court is second seized.[308]

The court's decision demonstrates a fundamental misinterpretation in both the structure and spirit of the Convention.[309] Exclusive jurisdiction agreements, regulated in Article 17, do not receive preferential treatment when compared to other "ordinary" jurisdictions.[310] In contrast to exclusive jurisdiction granted under Article 16, jurisdiction conferred by agreement does not override the jurisdiction of a court in which the defendant makes an appearance.[311] A violation of a jurisdictional agreement does not permit one to refuse to recognize a foreign judgment. One can, however, refuse to recognize a foreign judgment if it violates jurisdiction under Article 28.[312] Therefore, an English court second seized violates Article 21 by granting an antisuit injunction.[313] Moreover, the court is prohibited from issuing an antisuit injunction even if the court believes that an exclusive jurisdiction agreement or an arbitration agreement gives it jurisdiction.[314]

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cannot be refused because the Italian court considered an arbitration agreement as invalid, a perception the German court did not share). For the text and a list of the member states of the New York Convention, see PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COL. UNIV., INT'L AND COMMERCIAL ARBITRATION AND THE COURTS 443-48, 449-50 (1990).

The New York Convention of Recognition and Enforcement of foreign arbitration awards of June 10, 1958, of which all Member States of the Brussels Convention are parties, applies to the examination of the arbitration agreement.

308. *See Continental Bank*, 1 Lloyd's Rep. 505, 511-12 (explaining the exclusive jurisdiction agreement).

309. *See* Hau, IPRAX, *supra* note 273, at 46-47; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 218; Bell, *supra* note 295, at 219 (focusing on the potential an antisuit injunction has to overpower the allocation of jurisdiction the Convention enshrines).

310. Article 17 provides in pertinent part: "[i]f the parties . . . have agreed that a court or the courts of a Contracting State are to have jurisdiction . . . that court or those courts shall have exclusive jurisdiction." Brussels Convention, *supra* note156, art. 17, *reprinted in* 29 I.L.M. at 1422-23.

311. Article 18 provides: "[a]part from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction, . . . [unless] another court has jurisdiction by virtue of Article 16." *Id.* art. 18, *reprinted in* 29 I.L.M. at 1423.

312. *See* Hau, IPRAX, *supra* note 273, at 47.

313. *See* HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 218; Schack, *Versagung, supra* note 73, at 56.

314. *See* O'MALLEY & LAYTON, *supra* note 282, ¶¶ 1.51, 1.52 n.60; HAU POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 218. Even if the Court of Appeal had been correct, an antisuit injunction would still violate the Brussels Convention. The assumed preemption of article 21 by a jurisdiction agreement allows the court second seised to continue its proceeding while another proceeding is pending before the court first seised. In an extraordinary situation, the Convention permits two parallel proceedings concern-

2. Another Approach: Related and Unrelated Actions

Parallel proceedings between the same parties before courts of different Contracting States do not necessarily involve identical claims. Nonetheless, if actions are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings,"[315] the actions are considered "related" within the meaning of Article 22. As a result, the court second seized may stay its proceedings, pursuant to Article 22(1), as long as the actions are pending at first instance.[316] An antisuit injunction granted by the court first seized would deprive the court second seized of the discretion to stay the proceeding and thus would violate article 22(1).[317]

What if the court second seized, where the actions are related, wants to issue an injunction restraining the parties from continuing the action before the court first seized? Or if parallel actions are pending in which neither involve the same cause of action, nor are related within the meaning of Article 22 and one court grants an antisuit injunction? In the event a court believes that the court of another Member State has jurisdiction under an article of the Convention and a forum non conveniens analysis is inappropriate, an antisuit injunction is clearly prohibited. Every jurisdiction given by the Convention is appropriate and the doctrine of forum non conveniens is not available under the Brussels Convention.[318] A court may, however, consider issuing an antisuit injunction where it interprets a jurisdiction agreement as conferring exclusive jurisdiction on it.[319]

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ing the same parties and the same cause of action. The Convention, however, is grounded upon the persuasion that the court first seised will determine its jurisdiction correctly and that therefore an irreconcilable judgment will be avoided. If an irreconcilable judgment, however, does result from the parallel proceedings, Article 27(3) resolves the conflict. Article 27(3) provides that the enforcement of the jurisdiction agreement by an antisuit injunction should be set aside because it deprives the court first seised of an opportunity to determine its own jurisdiction—a competence of central importance in the system of the jurisdiction. In the event the court first seised declines its jurisdiction because of the jurisdiction clause, the party benefitted by the clause can bring an action for breach of contract recovering the costs of the foreign proceeding. *See* Bell, *supra* note 295, 207-08; Hau, IPRAX, *supra* note 273, at 48; Schack, *Versagung, supra* note 73, at 56.

315. Brussels Convention, *supra* note 156, art. 22, *reprinted in* 29 I.L.M. at 1423-24.

316. *Id.* art. 22(1), *reprinted in* 29 I.L.M. at 1423-24.

317. *See* Hau, IPRAX, *supra* note 273, at 47; O'MALLEY & LAYTON, *supra* note 282, ¶ 1.51; Stürner, *Anmerkung, supra* note 302, at 229.

318. *See* text, *supra* Part V.A.

319. This statement reflects Judge Gatehouse's view in the case of *Continental Bank*. He concluded that if parties do not meet either Article 21 or Article 22, the court may

The court with the pending action is competent to determine jurisdiction. Articles 27 and 28 prohibit a Member State from refusing recognition of a judgment of another Member State's court on the ground that they misjudged its jurisdiction.[320] Moreover, the Member State's court cannot reexamine the recognition of jurisdiction.[321] The finality of a court's jurisdiction ruling at the recognition stage implies the allocation of competence to determine jurisdiction in that court.[322]

This allocation of competence would be infringed by an English court if it indirectly declined another court's jurisdiction by restraining a party from commencing or continuing a lawsuit on the ground that the Member State lacks jurisdiction. This result is supported by the idea that the courts of all Member States are equal, and they trust each other to decide issues of jurisdiction.[323] Of course, there is no reason to believe a court of one Member State is more capable of determining jurisdictional problems than a court of another Contracting State.[324] But, an antisuit injunction is an attempt by a court to force its own interpretation of jurisdiction.[325]

If the court declines jurisdiction because of a jurisdiction agreement, the party favored in the agreement can bring a lawsuit for breach of contract and recover the damages sustained by the proceeding.[326] If the court determines that it has jurisdiction despite the jurisdictional agreement, two proceedings will be litigated. The latter will not result in an irreconcilable judgment because the two proceedings do not involve the same cause of action and are not irreconcilable within the meaning of Article 27(3).[327]

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issue an injunction enjoining a party from continuing an action pending before a court of another Member State to protect a jurisdiction agreement. *See* Continental Bank v. Aekos Co. Naviera, 1 Lloyd's Rep. 505, 510 (C.A.1994).

320. Brussels Convention, *supra* note 156, arts. 27, 28, *reprinted in* 29 I.L.M. at 1424-25.

321. *See id.* art. 28, *reprinted in* 29 I.L.M. at 1424.

322. *See* Hau, IPRAX, *supra* note 273, at 47; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 218; Mansel, *supra* note 295, at 337.

323. *See* Jenard-Report, *supra* note 283, at 46; Hau, IPRAX, *supra* note 273, at 47; Bell, *supra* note 295, at 207; Jayme & Kohler, *Europäisches 1995, supra* note 295, at 412.

324. *See* C 351/89, *Overseas Union*, 37 EC.R I, at 3350, ¶ 23; Bell, *supra* note 295, at 208; Briggs, *supra* note 293, at 160.

325. *See* Hau, IPRAX, *supra* note 273, at 48.

326. *See* Briggs, *supra* note 293, at 162.

327. The term "irreconcilable judgment" as used in Article 22(3) to define related actions and as used in Article 27(3) has a different meaning in each provision. Therefore, related cases which do not involve the same cause of action cannot result in irreconcilable

An antisuit injunction would not only contradict the power granted a court to determine its own jurisdiction, but it would also violate the spirit and the purpose of the Brussels Convention. Therefore, in the category of cases described, any order restraining a party from commencing a proceeding before a Member State's court or to an order to discontinue a proceeding is prohibited under the Convention.[328]

In short, under the Brussels Convention an antisuit injunction is only available when the court issuing the injunction is the court first seized within the meaning of Article 21. Furthermore, the Brussels Convention does not prohibit antisuit injunctions issued by a Member State's court to restrain a party from suing in a non-Member State.[329]

VI. SERVICE OF ANTISUIT INJUNCTIONS UNDER THE HAGUE CONVENTION ON SERVICE ABROAD

Another problem caused by an antisuit injunction in the context of an international treaty is the service of the injunction. The question is whether the service of an antisuit injunction must be provided under the Hague Convention on Service Abroad. This question arose for the first time in a German proceeding before

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judgments within the meaning of Article 27(3) and thus must be recognized. *See* Case C 406/92, Maciej Rataj/Tatry 1994, 5439 E.C.R. I-5439, 5478-79 ¶¶ 52-57; MARKUS LENENBACH, DIE BEHANDLUNG VON UNVEREINBARKEITEN NACH DEUTSCHEM, UND EUROPÄISCHEM ZIVILPROZEßRECHT 127 (1997).

328. Some scholars consider the antisuit injunction as a violation of public international law. *See* Gottwald, *Grenzen*, *supra* note 200, at 123. Others consider it a violation of Article 6(1) of the European Convention on Human Rights, which provides: "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by a . . . tribunal established by law." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221. The injunction is seen as infringing the entitlement of a European citizen to receive access to the courts. *See* Jayme & Kohler, *Europäisches 1995*, *supra* note 295, at 412; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 210-20. Article 6(1) grants a right to a judicial procedure for the cases mentioned there. *See* DIJKVAN HOOF, THEORY AND PRACTICES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 314, ¶ 10 (2d ed. 1990); Franz Matscher, *Der Einfluß der EMRK auf den Zivilprozeß*, *in* FESTSCHRIFT FÜR HENCKEL 593, 598-600 (1995). But if the idea that all courts of the Member States of the Brussels Convention are considered as parts of one single European judiciary, is seriously considered, then it is arguable that a party is given "free access" to a court, when she has the opportunity to bring her suit before any court of any Member State.

329. *See* DICEY & MORRIS, *supra* note 215, at 401; HAU, POSITIVE KOMPETENZKONFLIKTE, *supra* note 151, at 216.

the Court of Appeals of Düsseldorf.[330] The German Court decided that an English antisuit injunction restraining a German party from continuing an action before a German court infringed German sovereignty, within the meaning of Article 13(1) of the Hague Convention.[331] Hence, the German party can refuse the service of the injunction.[332]

In this case, the German trial court was first seized. The High Court of Justice issued an order enjoining the German party from continuing the German proceeding and from commencing any new proceeding in Germany. The High Court assumed an arbitration agreement conferred exclusive jurisdiction to the London Court of International Arbitration.[333]

The Court gave two reasons why the antisuit injunction infringed German sovereignty. First, the judicial sovereignty of Germany includes the power to determine whether a German court has jurisdiction or whether it must accept the jurisdiction of a foreign court or arbitration panel. The fact that the antisuit injunction addressed the parties, and not the court, does not change the judgment because the court is dependent on the parties' participation in the proceeding. Without the participation, the proceeding would deadlock and the antisuit injunction would have achieved its purpose.[334]

Second, a civil proceeding confers a constitutional right to the parties to have unrestricted access, and the opportunity to present all facts and legal opinions to the court.[335] The parties must also be able to file any motions they want. The German courts are obligated to protect the procedural rights of the parties.[336] Orders of foreign courts, affecting parties' rights before German courts, obstruct the German court's ability to fulfill its obligation.[337] The de-

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330. *See* OLG Düsseldorf, ZZP, 109 (1996), 221.

331. Article 13(1) of the Hague Convention provides: "Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security." Hague Convention on Service Abroad, *supra* note 3, at 364. Article 13(1) of the Hague Convention on Service Abroad uses the same language as Article 4 of the Hague Convention on Civil Procedure of July 17, 1905 and Article 4 of the Hague Convention on Civil Procedure of March 3, 1954.

332. *See* OLG Düsseldorf, ZZP, 109 (1996), 221.

333. *See id.*

334. *See id.* at 223.

335. *See id.*

336. *See id.*

337. *See id.*

termination of whether litigation of an action before a German court is permitted is vested exclusively in the German courts and must not be predetermined by orders of foreign courts.[338]

Article 13(1) of the Hague Convention on Service Abroad sets forth a public policy exemption which allows a Member State of the Convention to refuse a request for service of a document.[339] The same public policy provision is contained in Article 12(b) of the Hague Convention on Taking Evidence Abroad[340] and a similar one is found in ZPO section 328(1).[341] The interpretation of public policy provisions depends on their language. Also important, is the perceived and actual negative impact on the public policies of the foreign legal system which receives the service request.[342] The language of Article 13(1) of the Hague Convention on Service Abroad is deliberately narrow. It does not always permit a country to reject of a request to serve a document where the request violates a public policy, like ZPO section 328(1).[343] But, if the request negatively impacts the country's sovereignty, the political core of public policy is infringed and the country may reject the service request. Finally, the negative impact of service is minimal when compared to recognizing of a foreign decision. Thus, the impact, as well as the language, supports a narrow interpretation of Article 13(1).[344]

In addition, the purpose of the Hague Convention on Service Abroad leads one to conclude the phrase "infringement of sover-

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338. *See id.* at 224; MANSEL, *supra* note 295, at 336-37 (agreeing with the court's reasoning).

339. *See* Haugue Convention on Service Abroad, *supra* note 3, art. 13(1), 20 U.S.T. at 364.

340. Article 12(b) of the Hague Convention Taking Evidence Abroad provides: "The execution of a letter of request may be refused only to the extent that the State addressed considers that its sovereignty or security would be prejudiced thereby." Hague Convention on Taking Evidence Abroad in Civil or Commerce Matters, Mar. 18, 1970, art. 12(b), 23 U.S.T. 2555, 2562-63, 847 U.N.T.S. 231, 243.

341. Section 328(1) provides: "The recognition of a foreign judgment is excluded if the recognition of the judgment would give rise to a result which is manifestly incompatible with the basic principles of the German law, especially when the recognition would be inconsistent with the constitution." § 328(1) Nr. 4 ZPO (F.R.G.).

342. *See* Rolf Stürner & Astrid Stadler, *Zustellung von "punitive damage" Klagen an deutsche Beklagte nach dem Haager Zustellungsübereinkommen*, 10 IPRAX 157, 159 (1990); Karlheinz Authenrieth, *Der britische Protection of Trading Interest Act im System des Internationalen Kartellrechts*, 19 RIW 18 (1983); *see also* OLG München, NJW, 45 (1992), 3113.

343. *See* Mansel, *supra* note 295, at 336.

344. *See* Stürner & Stadler, *supra* note 342, at 159; Mansel, *supra* note 295, at 336.

eignty" must be construed narrowly. The Convention facilitates the service of legal documents in international litigation and guarantees that every party receives notice and the opportunity to be heard in the foreign court.[345] Nevertheless, the Convention requires a party to receive notice of a foreign proceeding. Service by publication, for example, is sufficient to commence a civil proceeding in Germany.[346] Therefore, it is in the interest of the Member State to restrict the instances it refuses to comply with a request to serve a legal document.[347] Thus, Article 13(1) is written to permit refusal of service only in extraordinary cases which infringe on the sovereignty of a foreign country.

As a model, service of a U.S. complaint alleging tort which requests punitive damages does not infringe the sovereignty of Germany within the meaning of Article 13(1).[348] Yet, a punitive damage award will generally not be recognized in Germany because it violates the public policy pursuant to ZPO section 328(1).[349] The Special Commission which drafted the Hague Convention on Service Abroad identifies other examples which exemplify the exceptional situations which meet the threshold requirement of Article 13(1). These include: a lawsuit instituted abroad against a national judge seeking damages arising from the exercise of his judicial authority and a summons to appear before a foreign court addressed to the national sovereign.[350]

The service of an antisuit injunction does not amount to a severe destruction of the German sovereignty, such that a refusal of service is justified.[351] A judicial order restraining a party from su-

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345. *See* Explanatory Report V. Taborda Ferreira, Actes et documents de la dixieme session, Tome III, 363-64; BVerfGE, EuZW, 6 (1995), 218 (219) (holding that the service of a complaint for a punitive damages award does not violate the German Constitution).

346. A service by publication against a foreign party is available under the German Civil Procedure Code. *See* §§ 203-07 ZPO (F.R.G.).

347. *See* Stürner, *Anmerkung, supra* note 302, at 232.

348. *See* OLG München, 45 NJW 3113 (1992); Stürner & Stadler, *supra* note 342, at 159-60; Herbert Kronke, Comment, 6 EuZW, 221-22 (1995); Harald Koch & Joachim Zekoll, *Zweimal amerikanische "Punitive Damages" Vor Deutschen Gerichten*, 13 IPRAX 288, 289 (1995). The Court did not address whether service of a foreign complaint violates the German Constitution, if the goal of the complaint obviously infringes the most basic principles of the Constitution, which are also set forth in the international conventions on human rights. *See* BVerfGE, EuZW, 6 (1995) 218 (220).

349. For the question of recognition, see *supra* note 1.

350. *See* PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION ON SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 36 (2d ed. 1992) [hereinafter HANDBOOK].

351. *See* Stürner, *Anmerkung, supra* note 302, at 232.

ing in a foreign court is unusual, but not totally unknown in Germany.[352] It would be difficult to explain why a German court claims the authority to enjoin a party from commencing a lawsuit before a foreign court and then denies the service of a similar foreign order in Germany. Furthermore, the only negative effect of the service of the antisuit injunction is the conveyance of official knowledge. Service is not needed to make sanctions for contempt of court available, which are triggered merely by private knowledge of the injunction.[353] Moreover, service does not determine recognition of the antisuit injunction.[354] Thus, the negative impact is too slight to infringe the sovereignty of Germany.[355]

Tactical considerations argue in favor of the above position. English courts are not willing to refer the question of whether the antisuit injunction violates the Brussels Convention to the European Court of Justice.[356] By refusing to serve an antisuit injunction, a Non-English Member State of the Brussels Convention loses the opportunity to refer the question to the European Court of Justice.

The European Court of Justice, however, has no authority to interpret the Hague Convention.[357] If the Court of Appeals of Düsseldorf permits the service of an antisuit injunction, the next issue would be whether the antisuit injunction is recognized in Germany. Yet, because the Brussels Convention applies, the issue should be interpreted under the Brussels Convention[358] and hence referable to the European Court of Justice.

VII. CONCLUSION

English, German, and U.S. courts can issue an order restraining a party from suing in a foreign country. The U.S. courts are split as to the prerequisites of such an order. The strict approach

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352. *See supra* Parts IV.E.1 (contract based antisuit injunction), IV.E.5 (tort based antisuit injunction).

353. *See* Stürner, *Anmerkung, supra* note 302, at 232.

354. *See* KOCH & ZEKOLL, *supra* note 348; HANDBOOK, *supra* note 350, at 36.

355. *See* Stürner, *Anmerkung, supra* note 302, at 232.

356. *See* Continental Bank v. Aeakos Compania Naviera, 1 Lloyd's Rep. 505, 512 (C.A. 1994).

357. Article 1 of the Protocol on the interpretation of the Brussels Convention. *See* Brussels Convention, *supra* note 156, protocol, art. 1, *reprinted in* 29 I.L.M. at 1436.

358. A further issue is whether the arbitration agreement, which confers jurisdiction to an English arbitration panel, precludes the applicability of the Brussels Convention. *See supra* note 307.

emphasizes the importance of international comity and permits antisuit injunctions only if the foreign lawsuit is an attempt to evade the United State's most important public policies, or is necessary to protect the forum's jurisdiction.[359] The relaxed standard permits orders enjoining a party from suing abroad to avoid duplicative foreign proceedings.[360]

English courts issue antisuit injunctions in situations where England is the natural forum and the foreign proceeding would be vexatious or oppressive. England also issues antisuit injunctions in cases where commencing a foreign action constitutes a breach of a forum selection clause or arbitration agreement.[361]

Concomitant to the aforementioned proposed approach, German courts can issue an order restraining a party from suing abroad when commencing a foreign proceeding is a breach of contractual duty.[362] German courts can also issue antisuit injunctions when the foreign lawsuit is duplicative, commenced after the German proceeding, and there is no good reason for the second proceeding abroad.[363] Ultimately, the three legal systems find similar results to the issue of when a party can be restrained from suing abroad.

Except for one line of the U.S. court cases, the focus under the stricter standard is the same. The focus is the relationship between the parties. The problem is determining when the relationship between the parties justifies preventing one from suing in a foreign forum. In contrast to other approaches, the stricter U.S. approach defers to international comity and restricts antisuit injunctions to cases where the court's jurisdiction or important policies are threatened.[364]

The difference between the two approaches can be traced to different views on the function of courts in civil proceedings, especially in international litigation. When emphasizing international comity, U.S. courts following the stricter standard view their main responsibility as taking care of foreign courts' authority. Only in cases where important U.S. policies are in danger do these courts consider an exception to comity. This consideration, how-

359. *See supra* Part II.B. and note 16.
360. *See supra* Part II.A. and note 15.
361. *See supra* Part III and notes 62, 79.
362. *See supra* Part IV.E.1, 2.
363. *See supra* Part IV.E.5.
364. *See supra* note 15.

ever, is unconnected to the parties relationship. Understandably, an opinion that tries to account for and stress the importance of foreign sovereignty is likely to be quite skeptical of issuing antisuit injunctions.

This caution ceases, however, when a court views its function not as protecting a foreign nations' sentiments, but as protecting private parties' rights and enforcing their duties. The question is then whether the commencing a foreign lawsuit constitutes conduct which infringes the rights of one party and, therefore, must be prevented. The latter party—oriented approach is more preferable. Civil courts are not diplomats; rather, their function is to enforce private rights and expectations; It is likely that a foreign court considers an antisuit injunction an interference with its authority.[365] The possibility, however, that a foreign legal system will not recognize a court decision is no reason not to issue the injunction. The court must protect the private parties' rights by providing judicial adjudication of these rights when the court's domestic law requires it. Whether this decision will be recognized in a foreign country is outside the control of a court. The court only needs to refuse enforcing private rights on the ground of courtesy to foreign nations' sovereignty when its decision would violate international treaties or public international law.[366] The foreign nation's sovereignty is safeguarded by its own law and by public international law. In making itself the foreign nation's advocate, a court deprives a private party of its rights. Only public international law justifies this deprivation.

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365. *See* OLG Düsseldorf, ZZP, 109 (1996), 221.

366. One example for such a treaty is the Brussels and the Lugano Convention. *See supra* Part V. The special committee on enforcement of judgments of the Hague Conference on Private International Law deliberated about a worldwide convention similar to the Brussels Convention during its meeting from June 4-7, 1996. It considered whether an antisuit injunction should be available under the future convention but postponed the answer to this question. *See* Report of Meeting No. 3, June 5, morning 1996, at 2. As elaborated in Part V in the context of the Brussels Convention, an antisuit injunction can cause great problems between the Member States of an international convention. Thus, it must be strongly recommended that courts regulate the question whether and under what conditions an antisuit injunction will be appropriate under the regime of a future convention.