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International Concurrent Jurisdiction: Dealing with the Possibility of Parallel Proceedings in the Courts of More than One Country

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INTERNATIONAL CONCURRENT JURISDICTION:
DEALING WITH THE POSSIBILITY OF
PARALLEL PROCEEDINGS IN THE
COURTS OF MORE THAN
ONE COUNTRY

by

BERND ULRICH GRAF

A Thesis Submitted to the Graduate Faculty
of The University of Georgia in Partial Fulfillment
of the
Requirements for the Degree

MASTER OF LAWS

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I. INTRODUCTION

"At least two fora will be available in any major legal action with transnational elements."¹ This statement by an international scholar reflects the implications and significance of the phenomenon of international concurrent jurisdiction.² In the same dispute, the courts of more than one country may (and do) assume jurisdiction, suits may be brought in different countries, and in more than one country. Examples of parallel proceedings abound, and many are well known because of their impact on important legal issues and developments.³ The Laker controversy, which went through the newspapers and law reviews extensively, may be mentioned here as the example of recent times.⁴ Leading to quite serious tensions between the United States and England, it clearly, though in an unfortunate way, showed the danger of conflicts inherent in a setting of concurrent jurisdiction. The focus of this thesis is on how legal systems deal with the setting of multiple assumptions of competence or jurisdiction over one dispute.

Let us have a brief look at the scenario of litigation which may occur in a setting of concurrent jurisdiction. First, the plaintiff has the choice between more than one forum. Where should he commence a suit? At this point, the
notions of "forum shopping" enter the stage.\textsuperscript{5} The plaintiff will choose a forum with favorable substantive\textsuperscript{6} and procedural law.\textsuperscript{7} He will look for low costs of proceedings, and take into account the enforcement possibilities (does the defendant have sufficient assets in the forum state, or will the judgment be enforceable in the state where the assets are located?).\textsuperscript{8} In the eyes of a plaintiff, the United States are, using the words of the Supreme Court, "extremely attractive."\textsuperscript{9} Lord Denning of the English Court of Appeal expressed the same notion in a somewhat sarcastic way: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."\textsuperscript{10} The latter, understandably, may not please the defendant. Since "[e]ach of the litigants prefers to fight on favorable territory"\textsuperscript{11}, the defendant might decide on instituting a countersuit in a forum he considers as favorable, and where he may try to preempt the outcome of the dispute by initiating a declaratory judgment proceeding. Even if this might not avoid or reduce liability, it is likely to delay "the moment of truth" and payment.\textsuperscript{12} The second court might not accept the suit because proceedings are pending in the same matter in another jurisdiction. The plaintiff may try to enjoin the defendant from instituting foreign proceedings. The defendant may want to do the same. Will courts issue injunctions in support of the parties' wishes? Finally, if one proceeding is completed and a judgment rendered, will the other
jurisdiction recognize the foreign judgment and reject new suits or stop a pending suit in the same matter? These are only some of the questions interesting a lawyer in transnational litigation, but they may suffice for the purpose of introducing into the scenario of transnational litigation.

Concerns which result from concurrent jurisdiction include the potential interference of one jurisdiction with another, and the possibility that conflicting judgments may evolve. This thesis will examine how legal systems deal with the phenomenon of multiple assumptions of jurisdiction over the same dispute. We will first look at public international law rules on jurisdiction, regulating (or not regulating) conflicting states interests, which will give only modest guidance. In view of those rules, the subsequent chapters will deal with various institutions of national laws relating to the possibility of parallel proceedings in the courts of more than one country, and thus the possibility of the emergence of conflicting orders or judgments. Of course, this thesis does not attempt to provide a comprehensive coverage of all legal systems and their relevant institutions, but can only highlight some selected and seemingly important parts of the whole. This limitation applies to both the selection of topics and the selection of national laws to be looked at. The emphasis will be laid on United States law, supplemented by some European features.

As law in general, using the words of the legal philosopher Ronald Dworkin, is "sword, shield, and menace," the
Various institutions of national laws will be classified into aggressive (for example injunctions restraining foreign proceedings), defensive (doctrines of forum non conveniens, lis pendens, and recognition of foreign judgments), and precautionary institutions (choice of forum and arbitration clauses). This classification should help systematize a confusing variety of institutions.

It will appear that the use of aggressive institutions is not desirable as concerns proper relations between nations. Defensive institutions are more favorable in this regard, because they try to avoid conflicts and the emergence of conflicting judgments by restraining domestic proceedings rather than foreign proceedings. Wide recognition of precautionary institutions which allocate the resolution of a dispute to one exclusive forum would avoid conflicts and conflicting judgments to a great extent. On the whole, the various institutions of national laws can be employed in a way that shows that concurrent jurisdiction does not necessarily lead to conflicts.
II. PUBLIC INTERNATIONAL LAW ON JURISDICTION

States accept that there are rules of international law and that those rules are binding on them. Thus, it is recognized that international law can impose rules on the exercise of jurisdiction by states.\textsuperscript{15} The question therefore is, to what extent does international law limit the exercise of jurisdiction.

As opposed to an internal United States situation we will find relative freedom from rules, since "no international constitution limits the jurisdiction of courts."\textsuperscript{16} Yet, this statement on the absence of rules of international law should not be taken literally, as international law does impose general limitations on the right of states to assert jurisdiction. This results from a fundamental principle of international law, the principle of sovereign equality. Jurisdiction is just an aspect or emanation of sovereignty.\textsuperscript{17} F.A. Mann accurately described the relationship between sovereignty and the exercise of jurisdiction as follows:

"Since every State enjoys the same degree of sovereignty, jurisdiction implies respect for the corresponding rights of other States. ... jurisdiction involves both the right to exercise it within the limits of the State's sovereignty and the duty to recognize the same right of other States."\textsuperscript{18}
The subsequent considerations will first cover bases of jurisdiction and then deal with limitations on the exercise of jurisdiction "backed" by a valid basis.

A. Bases of Jurisdiction

1. The Lotus Case

Historically, the problem of jurisdiction arose in the field of criminal law.19 The only decision of an authoritative international tribunal directly on the question of jurisdiction is the decision of the Permanent Court of International Justice in the Lotus case.20 The court held that Turkey had not violated international law in assuming criminal jurisdiction over a French officer in command of a French ship, which collided with a Turkish ship on the high seas, killing several Turkish citizens. The decision was mainly based on the ground that the French ship's act could be considered to have had its effect on the Turkish ship, which is to be seen as an extension of Turkish territory, and that therefore the assumption of jurisdiction was supported by traditional principles.21 Although the court was divided, both "halves" recognized that jurisdiction "could only be claimed upon one of the recognized bases."22 The "burden of proof", however, was cast on the challenger of jurisdiction. The six dissenting judges disagreed with this proposition.23 Some often cited obiter dicta of the majority seem to proclaim a principle of presumptive freedom of state action:
"... a State ... may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial. ... It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad ... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."24

But these sentences are not as far-reaching as is sometimes assumed,25 because the court goes on and refers to limits under international law:

"In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction."26

Far from being clear, the court at least acknowledged that there are certain limitations. What these limits are, remained rather uncertain. At least the court tried to link, and thereby "justify,"27 Turkey's exercise of jurisdiction to one of the "recognized bases" by referring to the effects on Turkish "territory."28 This effort to justify the assertion of jurisdiction would not have been necessary had the court taken the presumption of freedom literally.

One point of major importance of the case may be seen in its recognition of concurrent jurisdiction:

"The conclusion at which the court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown. ... Neither the exclusive jurisdiction of either State, nor the
limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two states. It is only natural that each should be able to exercise jurisdiction and to do so in respect to the incident as a whole. It is therefore a case of concurrent jurisdiction."

It should be noted for later, that the court referred to the protection of the "interests of the two states".

2. Traditional Bases

Traditional principles of international law allow the exercise of jurisdiction on several bases, which are territoriality, nationality, protective principle and universality.

a. territorial principle

This is the oldest and most established base of jurisdiction under customary international law. It was already embraced by the old Dutch jurists whose views were cited and adopted by Story. The concept that a state has the right to regulate conduct or activity within its physical boundaries may indeed be regarded as "axiomatic". One emanation of the territorial principle is the so-called "objective territorial principle" or the "effects doctrine", which is described by the new Restatement of the Foreign Relations Law of the United States as covering "conduct outside its territory which has or is intended to have substantial effects within its territory." This principle, which plays an important part in United States anti-trust jurisdiction,
and was already indicated in the Lotus case, has in recent years been strengthened by its adoption by the EEC and Germany. Its extent is, however, controversial.

b. nationality principle
There is wide agreement that, in principle, a state has the right to regulate activity by its nationals within or outside its territory.

c. protective principle
A state is entitled to protect its security by exercising jurisdiction over certain conduct (also outside its territory and by persons not its nationals) "which is directed against the security of the state or a limited class of state interests."

d. universality principle
Certain crimes are so universally condemned that all states have jurisdiction to try and punish these offenses. The prime example is piracy, but beyond that the coverage of this base is less clear.

3. Genuine Link Theories Regarding Bases of Jurisdiction
The traditional bases, which were developed in the field of criminal jurisdiction, are not necessarily appropriate as regards areas other than criminal law. For example, as concerns jurisdiction in commercial law, multinational corporations may easily shift their "nationality" by transferring their center of business, and thus avoid undesirable
jurisdiction. Writers sought for a general principle underlying the traditional bases.

F.A. Mann was the "first to free himself entirely from the bonds of international criminal law" and apply a different approach. Realizing the history and inter-relation between the conflict of laws and public international law as regards the reach of jurisdiction or legislation, he proposed a "search for the State or States whose contact with the facts is such as to make the allocation of legislative competence just and reasonable." According to this view, a state has legislative jurisdiction if there is a substantial connection or a genuine link to justify its exercise.

Other authors adopted similar concepts asking for a meaningful contact, or a substantial and genuine or bona fide connection.

All these concepts may be supported by an analogy to the views of the International Court of Justice in the Nottebohm case, which concerned the competence of states to confer nationality on individuals. The Court made a state's exercise of diplomatic protection over its nationals subject to the existence of a genuine link. However, due to the narrow subject before the court, the court's holding does not mean that the International Court adopted a genuine link theory as to jurisdiction in general.

Besides the problem whether the theory is already part of international law, there is also the problem what constitutes a genuine link. Different areas of law may also
require different "connecting factors".\textsuperscript{55} Thus, criminal law may well keep the traditional bases, whereas antitrust regulation may possibly be based on a state's "enlightened self-interest."\textsuperscript{56}

B. Application of Jurisdictional Theories of International Law to Proceedings of Courts

Courts are state organs, and a state exercises jurisdiction through courts as well as through legislatures or administrative agencies. Consequently, the exercise of jurisdiction through courts should also be subject to the limitations of international law.

1. Jurisdiction to Adjudicate

So far we have mainly spoken of legislative jurisdiction or, in the terminology of the Restatement, of jurisdiction to prescribe.\textsuperscript{57} We are, however, mainly interested with acts of courts, with the assumption of jurisdiction by courts. The Restatement includes a separate section entitled "jurisdiction to adjudicate"\textsuperscript{58}, which tries to state specific rules for adjudication, we might say special connecting factors. But, on principle, this is "not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate."\textsuperscript{59} Whether a court may rightly assume jurisdiction under international law is not separable into issues such as personal or subject matter jurisdiction in
United States law. Both aspects have to be seen together, since we are concerned with the assumption of jurisdiction by courts over all, not only with personal or "curial" jurisdiction. For an "order" to be internationally valid "not only its making, but also its content must be authorized by substantial rules of legislative jurisdiction." The introduction of a law and the entry of a judgment do both regulate human behavior, wherefore it is correct to say that 

"a State's right to regulate is exercised by legislative jurisdiction which includes adjudication. ... both aspects of jurisdiction are co-extensive."

Thus, the rules we have discussed so far apply to the assumption of jurisdiction by courts as well.

2. Civil, Criminal and Regulatory Jurisdiction

Some writers argue that, contrary to the rule in the area of criminal and regulatory jurisdiction, "there are no rules of international law limiting the legislative jurisdiction of States in questions of what might loosely be described as private law." They try to base their proposition on the fact that there are no recorded diplomatic objections by states to the assumption of civil jurisdiction on bases showing little real connection with the forum. The opposite extreme position states that "there is no room for distinguishing between criminal, public and private laws." Neither of these extremes appear to be convincing. Since the main consideration behind jurisdiction is sovereignty,
decisive factor should be whether the exercise of jurisdiction is a manifestation of state policy. This approach is espoused by Bowett when he says that

"where the civil jurisdiction of the state is an instrument of state policy, used as a means of exercising control over activities or resources in the interests of the state, then in principle such jurisdiction ought to be subject to the same governing rules of international law."69

A prime example of civil jurisdiction as an instrument of state policy is the civil action under United States antitrust law. Areas of civil jurisdiction which concern only the enforcement of private rights (what we may call "purely civil jurisdiction") would "remain very much within the discretion of the state."70 But even then one would look for "any link."71 The following will show some illustrations.

C. Examples of "Exorbitant" Bases of Jurisdiction

This section will give some examples showing on which broad grounds states assert jurisdiction in civil matters.

1. United States

The United States approach is on its face quite analogous to the above discussed "links approach." Since International Shoe jurisdiction has to be based on certain "minimum contacts" between the defendant and the forum state.72 The problem is the application of the principle. In some decisions the United States "long arm" reached rather far.73 One
has to keep in mind that the minimum contacts doctrine is a constitutional doctrine, not a doctrine for international law purposes. Unfortunately, the courts so far applied the same standards whether they dealt with an internal United States interstate setting or an international setting. A turning point might have come with the Asahi case, which left open whether the stream of commerce theory is applicable to foreign defendants, or whether closer connections are required in international cases. The sometimes "concerningly grasping" assumption of jurisdiction by United States courts gave rise to some criticism.

2. England

England, in the tradition of the Common Law, still adheres to the principle of presence unlimited by a minimum contacts doctrine as is the case in the United States. Thus, anyone can validly be served when he is present in the country, even if he or she is only changing planes at London Airport. Another critizised practice is the assumption of jurisdiction over disputes involving a contract governed by English law.

3. France

Under Art. 14 Code Civil, jurisdiction over disputes concerning obligations concluded by the defendant with a French person depends alone on the fact that the plaintiff is a French national, even if the defendant is a non-resident
foreigner. Art. 15 Code Civil, in a sort of reverse manner, confers jurisdiction over French defendants, even if they are not resident or domiciled in France, in matters of obligations contracted by them in a foreign country.

French courts have even extended the reach of these sections by interpreting the referred to "obligations" to include non-contractual situations like torts. Especially Art. 14 has understandably given rise to many criticisms, even within France.

4. Federal Republic of Germany

§ 23 of the Federal Code of Civil Procedure confers personal jurisdiction over anyone having property in Germany. The action does not have to be related to the property and is not limited to the value of the property. This "unfortunate" basis has lead to sharp criticism by scholars from within and outside Germany.

5. The Impact of the European Convention

No official protests by states objecting to those "exorbitant" bases have been recorded. In any case, these bases are probably not violative of international law in the area of "purely civil" jurisdiction where "any link" presumably suffices. It is, however, interesting to note, that the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters abolishes the exorbitant bases. Art. 3 (2) of the Convention gives a catalogue
of provisions and grounds on which jurisdiction over domiciliaries of another contracting party may not be based. The catalogue includes Art. 14, 15 Code Civil, § 23 ZPO, and the transitory presence rule of English law. This exclusion of exorbitant bases by the Convention, together with the concerned criticisms of writers, suggests that these bases should be looked at with uneasiness. However, the very fact that the Convention expressly excluded those bases would appear to suggest that they are not unlawful under general international law.

D. Multiple Jurisdiction

International law recognizes the possibility of concurrent or multiple jurisdiction over the same conduct. This was expressly acknowledged in the Lotus case. And it implicitly follows from the principles on bases of jurisdiction, which allow some overlap because they are discrete and independent bases of jurisdiction. For instance, the same activity may provide a basis for exercise of jurisdiction both by the territorial state and by the state of the nationality of the actor. This possibility of overlap is even more true for the area of "purely civil" jurisdiction, where the bases are very broad and far-reaching. The European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters also recognizes concurrent jurisdiction. This follows from the variety of
adopted bases under Art. 5 and 6 of the Convention, which bases concur with the general base of domicile under Art. 2 of the Convention.\textsuperscript{96} After all, it is no wonder that some writers state that "concurrent jurisdiction is the rule rather than the exception."\textsuperscript{97}

Whether and how international law limits the exercise of concurrent jurisdiction will be dealt with in the subsequent chapter.

E. Exercise of Concurrent Jurisdiction

1. Comment on the System of Approach
Before we try to establish criteria by what to assess the propriety of the exercise of jurisdiction by one state in view of concurrent jurisdiction of another state, some systematic remarks seem appropriate. We, quite naturally it appears, espouse an approach distinguishing between bases of jurisdiction and limits on the exercise of concurrent jurisdiction. Firstly, one looks for a basis justifying the assumption of jurisdiction in the first place, and secondly, one asks whether the exercise of jurisdiction in a given situation would be appropriate or reasonable and does not "[encroach] on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State."\textsuperscript{98} Not all authors agree with such a two-step approach, because they see no use in constructing two "prohibitory zones" (namely bases and exercise of jurisdiction justified by a
base), where all relevant aspects can be covered by one category of rules on the exercise of jurisdiction only (one-step approach). This objection seems to go along with the proponents of the "abuse of rights" theory, who assume that international law only prohibits the abuse of the generally existing right of jurisdiction. Some genuine link theories seem to coincide with abuse of rights theories in this respect and also try to encompass all aspects in one wide concept of "reasonableness" of the link.

Here we see, that the matter is one of terminology rather than substance. For one can easily separate the concept of reasonableness from the finding of links or bases, as was done in the Restatement (Revised). Clarity makes our two-step approach preferable. There is also the substantive reason that one should not presuppose a right of jurisdiction (what one-step approaches necessarily do) in all cases, as we have seen in our discussion of the Lotus case.

2. Rules on the Exercise of Concurrent Jurisdiction
a. general considerations - toward a "balancing of interests"

The question is whether jurisdiction should be exercised by state A rather than state B where both states can invoke one or another of the bases to support their claim. There is a case to be made for allowing either state to assume jurisdiction in certain cases. Multinational enterprises do not consider it as extraordinary that their activities are
subjected to the jurisdiction of several states in which they actually operate. The problem is

"that the jurisdiction assumed by state A may involve unwarranted interference in matters which have little or nothing to do with state A and are more properly the concern of state B and therefore more properly left to its jurisdiction." Private parties might invoke that concurrent jurisdiction subjects them to many inconveniences. However, international law does not deal with the interests of private parties. It has to be emphasized that general inconvenience to private parties is not a factor in international law, but only state interests are what matters. We will recall that the International Court in the Lotus case also referred to "the interests of the two states." By what criteria should the interests of the "competing" states be assessed?

Reliance on different bases of jurisdiction does not help finding an answer, since there is no order of supremacy between the different bases. An answer might be found if one looks at the "basics" of international law, where we have the principles of sovereign equality and non-intervention or non-interference. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States formulates these concepts as follows:

States have the right "freely to determine, without external interference ... their political status and to pursue their economic, social and cultural development ... No state ... has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, ... all ... forms of interference ..... against the
personality of the state or against its political, economic and cultural elements, are in violation of international law ..."112

These principles evidently have implications for jurisdiction,113 because the exercise of jurisdiction may interfere with another state's "affairs." While these general concepts of international law do not provide a "clear-cut answer,"114 it is possible to infer from these general principles a principle of "balancing of interests."115 How such a balancing test might operate can be illustrated by looking at the views of the Restatement of the Foreign Relations Law of the United States.

b. the Restatement

§ 40 of the old Restatement (Second) of the Foreign Relations Law of the United States116 adopted a balancing test whereby a state "is required by international law to consider ... moderating the exercise of its ... jurisdiction" taking into account various factors including state and individual interests. The latter, such as personal hardship, are, as mentioned above, irrelevant for deciding sovereignty conflicts between states.117 The new Restatement (Revised)118 adopted a somewhat stricter approach: Pursuant to its § 403 a state "may not exercise jurisdiction ... when the exercise of such jurisdiction is unreasonable," what is to be decided in light of a list of factors similar to, but more extensive than the one of the old Restatement. It supposedly reflects recent case law of United States courts,119 which have become increasingly sensitive to resentments.
abroad against their using the "effects" doctrine to assume
an extraterritorial reach for their jurisdiction (primarily
in antitrust matters). The line of cases runs from the
unrestrictive Alcoa case over Timberlane to Mannington
Mills, which adopted the Timberlane balancing process
approach and identified a list of 10 factors to be consi-
dered:

"1) Degree of conflict with foreign law or policy;
2) Nationality of the parties;
3) Relative importance of the alleged violation of con-
duct here compared to that abroad;
4) Availability of a remedy abroad and the pendency of
litigation there;
5) Existence of intent to harm or affect American com-
merce and its foreseeability;
6) Possible effect upon foreign relations if the court
exercises jurisdiction and grants relief;
7) If relief is granted, whether a party will be placed
in the position of being forced to perform an act il-
legal in either country or be under conflicting re-
quirements by both countries;
8) Whether the court can make its order effective;
9) Whether an order for relief would be acceptable in
this country if made by the foreign nation under simi-
lar circumstances;
10) Whether a treaty with the affected nations has ad-
dressed the issue."

This list of factors is essentially similar to the one adop-
ted by the Restatement (Revised). The problem is that the
courts did not necessarily implement international law, but
rather referred to notions of "comity." Thus, it is
doubtful whether these decisions constitute state practice
as regards a potential rule of international law. However,
some writers say that "as so often, comity may in truth mean
public international law," "comity is only another word
for international law." The Restatement (Revised) also
considers comity in this context as being "understood not merely as a matter of discretion but reflecting a sense of obligation among states."\textsuperscript{130} This has lead some authors to speak of a change from (mere) comity in the old Restatement, which is open to political resolution, to a matter of strict legal rules of competence in the Restatement (Revised).\textsuperscript{131} However, it should be noted that § 403 (3) of the Restatement (Revised)\textsuperscript{132} recognizes the possibility that more than one jurisdiction might be found to be reasonable under its § 403 (2). For those cases, subsection (3) returns to a standard similar to the soft "should consider" concept of the old Restatement.\textsuperscript{133} § 403 (3) only imposes an obligation to "evaluate" the relevant states' interests, and requires that a state "\textit{should} defer to the other state if that state's interest is clearly greater."\textsuperscript{134}

c. criticisms

F.A. Mann decidedly rejects any concept involving the balancing of interests concept stating that

"it is not the subjective or political interest, but the objective test of the closeness of connection, of a sufficiently weighty point of contact between the facts and their legal assessment that is relevant. The lawyer balances contacts rather than interests."\textsuperscript{135}

He seems to let the closest contact decide.\textsuperscript{136} This is not necessarily much different because interests may be regarded as conferring contacts. One might assume that a state is interested in a particular set of facts only if these facts have certain contacts to the state; otherwise its interests would not be involved. Also, the task of weighing contacts
is not always easier than weighing interests. But it has to be admitted that courts are ill-suited to "evaluate the economic and social policies of a foreign country" in implementing a balancing of interests test as required by *Mannington Mills*. For that reason some United States courts have declined to follow this approach. Besides the decisional difficulties it is probably too much to expect of a national court to impartially balance home state and foreign state interests. It must also be recalled that in the context of jurisdiction, private interests, which are also part of the criticized balancing list, are not a factor under public international law. After all, a scholar appears to be right in stating that the rule of *Timberlane* and *Mannington Mills* is not "operable on the level of international law." 

d. the remaining rules

What remains is that the principles of sovereign equality and non-interference require a balancing of state interests, which is quite open as regards practical consequences. The implications of the balancing requirement are probably reflected in the "shall consider moderating the exercise of jurisdiction" standard of the old Restatement (except that only state interest factors have to be considered). Language similar to that in the old Restatement was adopted by the International Law Association, which requires that "[i]n the event of there being concurrent jurisdiction of two or more states ... each state shall, in applying its own
law to conduct in another state, pay due respect to the major interests and economic policies of such other state." More recently, the OECD member states adopted a statement on Conflicting Requirements Imposed on Multinational Enterprises, which urges the member states "to take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries." All these formulations indicate that international law at the present stage does not appear to prescribe clear-cut balancing answers yet, but only some balancing of interests and taking into account of foreign interests at all.

In the context of purely civil jurisdiction even these rather vague standards are probably not part of international law, yet. There, jurisdiction is supposed to be very much within the discretion of the states, which are arguably not so much concerned as regards enforcement of private rights only. Therefore, state interests are not so much at stake and conflicts not as likely to arise as in the areas of regulatory (and criminal) jurisdiction. But even as to civil jurisdiction we have to face concerns, as has been shown in the section on exorbitant bases. As soon as state interests come into play (and this transition might be fluent), the obligation to moderate the exercise of jurisdiction arises.
F. Conclusion

Multiple bases of jurisdiction lead to concurrent jurisdiction of more than one state. As concerns the exercise of concurrent jurisdiction, international law imposes somewhat modest obligations to moderate the exercise of jurisdiction by taking into account the interests of the other state(s), which are protected under the principles of sovereign equality and non-intervention. A balancing of interests test serves to implement these obligations, but practical consequences are rather open. In the field of purely civil jurisdiction, the exercise of concurrent jurisdiction is - at the present stage of international law - even more within the discretion of the state. Whether the pessimistic statement that "conflicts of jurisdiction are likely to remain with us for a long time to come"¹⁵¹ is realism, remains to be seen. For concurrent jurisdiction and conflicts of jurisdiction do not have to lead to real conflicts for states. Also, they do not have to lead to conflict situations for the private parties. In the next chapters we will see how institutions of national laws deal with the possibility of concurrent jurisdiction, and how they try to implement the modest rules of international law, or at least try to mitigate possible conflicts. And conflict avoidance certainly is one objective of international law. As mentioned earlier, we will classify the institutions according to defensive, aggressive and precautionary institutions.
III. DEFENSIVE INSTITUTIONS

This chapter deals with institutions of national laws which are defensive in character. The term "defensive" relates to the fact that these institutions may be invoked as a defense against the bringing of a suit in a certain forum, as well as to their effect of restraining domestic proceedings rather than interfering with concurrent foreign proceedings.

A. Forum Non Conveniens

1. In General

"Because the statutory jurisdictional laws in many countries have traditionally provided little or no flexibility for the courts to decline jurisdiction, even in cases when the plaintiff has filed suit in a distant forum that has no significant ties to the facts underlying the cause of action, the courts in several countries have developed or adopted the doctrine of forum non conveniens." The defendant may invoke this doctrine as a defense against the plaintiff's bringing a suit in "this" forum. Although having jurisdiction, a court may decline to exercise its jurisdiction because it considers another forum, usually having concurrent jurisdiction, to be more convenient to handle the dispute.
2. The United States Doctrine of Forum Non Conveniens

The United States doctrine goes back to *Gulf Oil Corp. v. Gilbert*\(^{153}\) where the Supreme Court laid down the following rules:

1. The decision to decline to exercise jurisdiction is discretionary.
2. The court should consider "the private interest of the litigant ... [such as] relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive ... [including] enforcibility of a judgment if one is obtained."
3. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum is rarely to be disturbed."
4. Factors of public interest to be considered include "[a]dministrative difficulties ... in congested courts ... [the] local interest in having localized controversies decided at home," the inappropriateness of imposing jury duty on "people of a community which has no relation to the litigation.... [the] appropriate[ness] of having the trial of a diversity case in a forum that is at home with the state law that must govern the case ...."\(^{154}\)

As may be seen from the language applied, *Gulf Oil* only dealt with an interstate setting. However, its guidelines were soon applied to international situations as well.\(^{155}\) In 1981, the Supreme Court decided an international case in *Piper Aircraft Co. v. Reyno*,\(^{156}\) and held that the forum choice of the plaintiff deserved less deference if he was a foreigner.\(^{157}\) Courts sometimes also considered additional public interest factors in international settings, recognizing concerns that "an inappropriate assertion of jurisdiction not only unduly burdens the forum state's courts but also infringes on the regulatory prerogatives of the more
appropriate forum. Piper also held that a court could dismiss a suit on forum non conveniens grounds even if the other forum's laws were less favorable. All the last mentioned factors facilitate the application of the doctrine in international cases. However, it should be noted that Piper does not help a foreign defendant who is sued by an American plaintiff.

The basic element of the forum non conveniens test is the existence of an adequate alternative forum. As mentioned above, a less favorable law does not render the foreign forum inadequate. Although in principle forum non conveniens questions arise when there is another forum having concurrent jurisdiction, sometimes the jurisdiction of the or any other forum may be doubtful. In such cases the court may condition dismissal on the defendant's submission to jurisdiction in the alternative forum. A recent example was the decision in the tragic gas leak disaster at Bhopal. The Indian plaintiffs sued Union Carbide, the 50.9 percent parent of the Indian company operating the plant, in the United States. The Court of Appeals confirmed the decision that India was an adequate alternative forum and that a balance of public and private interests favored litigation there, and upheld the imposition of the condition that Union Carbide submit to the jurisdiction of the Indian courts. Some critics foresee that foreign plaintiffs might be encouraged to bring actions in the United States against United States parent companies in order to obtain
conditions and thus improve their prospects for recovery abroad. Another condition that might be imposed to assure that an adequate remedy is available, is that the defendant waive any statute of limitations defenses.

The consequences of granting a forum non conveniens motion are outright dismissal, dismissal on certain conditions, or stay of dismissal until the court is satisfied that the imposed conditions are met.

3. European Convention

The Convention does not provide for a forum non conveniens defense. On the contrary, every discretion in applying its jurisdiction rules is excluded. Where a court has jurisdiction under Art. 2, 5 or 6, it cannot decline jurisdiction in favor of an allegedly more convenient forum. The jurisdictional rules of the Convention apply as regards suits against domiciliaries of a contracting party. In actions against other persons outside the realm of the Convention the relevant laws of the member state apply, and they may provide for a doctrine of forum non conveniens. Let us look at two token member states' laws, namely English and German law.

4. England

English law made considerations similar to forum non conveniens considerations part of a decision to deny
jurisdiction but they were not labeled *forum non conveniens*. The entitlement to initiate proceedings in England is "subject to a [inherent] power in the court to stay such proceedings in a proper case so that similar proceedings might be brought in another jurisdiction." Earlier decisions justified staying an action on the grounds of "oppressive" or "vexatious" conduct. The Atlantic Star and Mac Shannon liberalized the rule, and in the latter case Lord Diplock introduced the following formula establishing criteria similar to the United States doctrine:

"In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

Although the closeness to the Scottish doctrine of *forum non conveniens* was recognized, it took another case, The Abidin Daver of 1984, for Lord Diplock to admit that - and we should note the use of the term comity -

"judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of *forum non conveniens*." That judicial chauvinism stood "at a discount" is also reflected by the notion of a "need to avoid comparison between English and foreign courts."
Although English law "went Scotch"\(^{181}\), Lord Goff hesitated to use the Scotch label "\textit{forum non conveniens}" in the recent case \textit{Spiliada},\(^{182}\) because "the question is not one of [mere practical] convenience, but of the suitability or appropriateness of the relevant jurisdiction."\(^{183}\) He nevertheless formulated the latest position of the law as follows:

"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."\(^{184}\)

He also reaffirmed that the general burden of proof is cast upon the defendant.\(^{185}\) Similar to \textit{Piper}\(^{186}\) the mere fact that a stay would deprive the plaintiff of an advantage in proceedings in England, such as higher damages or discovery rules, "cannot be decisive."\(^{187}\)

5. Federal Republic of Germany

In Germany the doctrine of \textit{forum non conveniens} is disputed. The Bavarian Supreme Court categorically stated that "the principle of 'forum non conveniens' does not exist in German law."\(^{188}\) However, some family courts decline jurisdiction when, for special reasons, a foreign court appears to be more "suitable."\(^{189}\) The Bundesgerichtshof\(^{190}\) has not dealt with this question yet. But some decisions indicate that the concept of an "inherent competence" limits the extent of jurisdiction. Thus, jurisdiction may be declined where the foreign law which had to be applied would demand court
action which is totally different from the inherent scope of activity of a German court. In a case where the foreign law to be applied by the German court was the Italian law on "separation of table and bed," the Bundesgerichtshof held the application of these Italian rules not to be totally different from the activity of a German court applying the German rules on "divorce." The limitation by inherent competence may obviously only apply in very rare circumstances.

6. Evaluation

The *forum non conveniens* doctrine is criticized by some American scholars who think that it is too discretionary and unpredictable, that the same considerations could be applied at another stage of determining court-access in formal jurisdictional doctrine or that there is "no valid continuing role for *forum non conveniens*, only a repetitive one," because the relevant private and public factors "are best considered in the jurisdictional contexts" of personal jurisdiction and subject matter jurisdiction (for example *Timberlane*).

Contrary to these objections, there is a distinct function for *forum non conveniens*, because it is an "important tool with which courts can fashion wise decisions on the exercise of jurisdiction." And what is wise is not necessarily required by international or constitutional law.

Thus, the doctrine allows the moderation of the exercise of
jurisdiction even where international law would not impose limits. One can only agree with the statement of one scholar that the forum non conveniens doctrine "cuts down local parochialism as regards judicial adjudication, and is consistent with a spirit of international legal cohesion and integration." It provides at least the opportunity to avoid potential conflicts by excluding parallel proceedings as between the two fora concerned. It is only to be hoped that the doctrine will not be applied one-sidedly, that is lead to dismissal in favor of a home state defendant and to retention of jurisdiction in favor of a home state plaintiff.

B. Lis Pendens Theories

1. In General
Recognition of foreign lis pendens means that where a suit is pending in one forum "the other" forum will not accept or proceed with a (second) suit brought before it in the same dispute. A typical situation may be that the defendant in the foreign forum sues in his domestic forum for a declaratory judgment denying the rights assumed by the plaintiff in the foreign forum.

Differing philosophies or views as to parallel proceedings in general influence the establishment of any kind of lis pendens doctrine. Views differ even among various United States courts. Some want to "discourage redundant suits,
both to save the time consumed by the resultant multiplicity of actions, and to avoid the unnecessary annoyance and expense to litigants in prosecuting or defending independent suits comprehending the same subject matter. Others do not want to interfere with the plaintiff's forum choice, or generally think that "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." The latter reservation helps to avoid conflicting judgments, but there are still the concerns of double cost and use of court resources. Also, as has been recognized in an English decision, there might be "an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata or issue estoppel in the latter." This "ugly rush" may mean that every party will try to push the proceedings in the country where his chances to win are allegedly more favorable, and conversely try to delay the proceedings in the other country. Much seems to speak in favor of some kind of lis pendens theory.

2. Distinct Procedural Approach

Here, we will look at approaches dealing with the pendency of litigation in a foreign forum in a separate legal institution, as opposed to concepts making pendency only one factor in a decision on the exercise of jurisdiction.
pursuant to other concepts, which will be the subject of subchapter 3 below.

a. United States

In the United States there is an approach which may be labeled "stay because of pending action." This encompasses "merely a temporary cessation" of proceedings awaiting the outcome of foreign proceedings (which may lead to resumption of the domestic proceedings if the foreign court does not render a judgment that may be pled as res judicata). It has to be distinguished from "abatement" which applies within the same state jurisdiction only and leads to complete dismissal. Thus, a foreign lis pendens will not bar a new action, but the court may stay the proceeding in the forum. The decision to stay is not a matter of right but of discretion. Considerations to be taken into account are whether all the relief sought is obtainable in the other forum so that there is no legitimate interest of the plaintiff to bring two actions, whether the parties and the issues are the same so that the eventual foreign judgment would be recognized and bar a domestic suit, that the domestic suit has not been commenced prior to the foreign suit. The underlying rationale is the protection of the defendant from vexatious and harassing litigation, the prevention of (unnecessary) multiplicity of actions, and also judicial comity. An interesting aspect, countering the pro-parallelists' argument of non-interference with the plaintiff's choice and understanding the implications of
a setting of multiple jurisdiction, has been formulated by
the Delaware Supreme Court:

"as a general rule, litigation should be confined to
the forum in which it is first commenced, and a defen-
dant should not be permitted to defeat the plaintiff's
choice of forum in a pending suit by commencing litiga-
tion involving the same cause of action in another
jurisdiction of its own choosing; ... that these con-
cepts [of stay] are impelled by considerations of com-
ity and efficient administration of justice."216

Some of the considerations resemble the criteria applied in
a forum non conveniens decision. The relationship between
forum non conveniens and the power to stay because of pend-
ing action was convincingly discussed in the same Delaware
decision: Where the foreign suit has been commenced prior to
the domestic suit, the court may grant a stay by reason of a
prior action pending in another jurisdiction; where the do-
meric suit was instituted first, the forum non conveniens
standards apply.217

As mentioned above, both judicial and doctrinal views
in the United States are not uniform, and some courts have
denied the power to stay because of pending action.218 Espe-
cially where an action is pending in a foreign country, the
law appears to be quite uncertain, because most of the case-
law deals with an interstate setting. Nevertheless the
courts use language which could equally apply in an interna-
tional context, such as "between sovereign jurisdictions ... a
matter of comity,"219 but jurisdiction is meant to cover
other states (not nations). An older New York case excluded
the application of the stay concept to cases "pending in a
country in which the system of jurisprudence was not so closely analogous to our own [as the English system.]"220
This somewhat chauvinistic view has been relinquished or at least mitigated. Recently a New York court considered a stay with regard to a pending action in Mexico (and denied it on grounds of non-identity of the actions).221 But it is probably still true that systems in the tradition of English law are preferentially treated. This is partly due to the relation between the concept of stay and the law on recognition of foreign judgments. In Hunt v. BP Exploration Co. (Libya) Ltd.222 the court discussed in detail the Texas law on recognition and that the elements are "more likely to be met ... for judgments from favored systems [like the English model system]."223 After having concluded that the English judgment would be recognized, the court stayed the Texas proceedings because the English proceedings were not terminated yet, since an appeal pending. It should be noted that the court, without further considerations, just adopted the reasoning of earlier decisions on stay of proceedings pending an appeal in the "other" forum in a context of inter-state or state and federal courts concurrent jurisdiction, and applied it to the international case before it.224

Concluding, we may say that United States law recognizes a concept of *lis pendens*, which is in principle and increasingly in praxi also applicable to an international situation.225
b. European Convention

(1) Art. 21 of the Convention\textsuperscript{226} sets forth the rules on \textit{lis pendens}. Pursuant to Art. 21 (1), "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court." Only termination or discontinuance of the first action enables the "second" court to exercise jurisdiction.\textsuperscript{227} As opposed to this non-discretionary rule, Art. 21 (2) gives the court discretion to "stay its proceedings if the jurisdiction of the other court is contested."

(2) Probably in recognition of potential difficulties in determining the identity of proceedings,\textsuperscript{228} Art. 22 provides for discretionary stay or dismissal of non-identical but related actions by the court subsequently seised.

c. France

Under French law the pendency of an action abroad traditionally was no valid defense to a suit,\textsuperscript{229} as French law equally was hostile to recognition of foreign judgments.\textsuperscript{230} This is probably due to the French courts' desire to "extend their own competence as far as possible."\textsuperscript{231} More recently, some turn of the trend has been indicated by decisions and writers.\textsuperscript{232} The new trend to facilitate recognition of foreign \textit{lis pendens} probably ensued from the abandonment of the restrictive "revision au fond" as concerns recognition of foreign judgments.\textsuperscript{233} The evolution is still going on, but
at least as concerns judgments of courts of countries with which France has entered into treaties on competence or jurisdiction the "exception de litispendence" seems to be recognized.234

d. Federal Republic of Germany

Instead of a sound doctrine of forum non conveniens, German law provides for non-discretionary dismissal of actions in cases of a foreign lis pendens. Prerequisite for such a dismissal is that the expected foreign judgment would be recognized in Germany.235 Also, parties and subject matter must be the same in both proceedings.236 An interesting exception to the general recognition of lis pendens should be noted. In a divorce case the defense of foreign lis pendens was rejected, because the proceedings pending at the Italian court did not proceed at all (were pending for over 4 years) and the rights of the husband must not be affected in an unreasonable way, since the principles of good faith and unconscionability apply to procedure, too.237 The reasonableness was measured according to the relief obtainable at the home forum. This resembles the United States law requirement that the other forum must provide complete relief.238

3. "One among other factors" Approach

Here, the pendency of litigation in another forum is not recognized in a distinct institution of lis pendens but is
just made one factor in a decision on the exercise of jurisdiction under other concepts.

a. United States

We have already mentioned the Mannington Mills balancing test as to whether (extraterritorial) antitrust jurisdiction should be exercised or not. One of the factors to be considered in making the balancing test decision is the pendency of litigation abroad. This may lead to dismissal because of a decision not to exercise jurisdiction.

b. England

English law considers the pendency of proceedings in another forum one factor in determining whether to stay proceedings on (now) forum non conveniens grounds. It will "often be a very weighty factor," leading in most cases to a stay of proceedings. But the discretionary character of the decision should be kept in mind. In the realm of the European Convention, the strict lis pendens rules of Art. 21 of the Convention apply.

4. Evaluation

Recognition of foreign lis pendens certainly avoids potential conflicts - between states or the parties because of conflicting judgments - because there is only one proceeding allowed to go on. Reasonable considerations of consistency within the own domestic system and of (international) conflict avoidance strongly suggest that a foreign lis pendens should be recognized where the forum would recognize the
expected foreign judgment, since in that situation the domestic action (that is the part of the proceedings until the foreign judgment is rendered and can be pled as res judicata) will have been in vain anyway.244 This argument at least applies to those systems where a domestic lis pendens does not bar the recognition of foreign judgments.245 Where the eventual foreign judgment may be pled as res judicata in a domestic action, it seems to be commended by logic and common sense not to waste judicial resources, but rather stop the domestic proceedings in the beginning. The dependance of the recognition of foreign lis pendens on the recognition of the eventual judgment is part of some approaches, both discretionary (United States) and non-discretionary (Germany) ones. It raises the problem of predicting whether recognition will be granted or not.246 Also, it is not always easy to determine whether subject matter and parties are identical in both actions. To counterbalance any uncertainty, it appears preferable to only stay the domestic action. This is also the approach of the Convention when jurisdiction is contested.247 For otherwise there is the risk that the plaintiff be deprived of his rights by dismissal, where a statute of limitations has run before the bar of lis pendens has been removed and wherefore a new action can no longer be successful.248

The recognition of foreign lis pendens is a good way to avoid that two fora deal with a certain dispute at the same time, and thus to avoid conflicting orders or judgments.
C. Recognition of Foreign Judgments

1. Res Judicata Effect of Foreign Judgments
   a. In general
   In a situation of concurrent jurisdiction the "loser" of a suit may try to start a new suit in the other jurisdiction. The doctrine of res judicata eliminates this possibility by recognizing and accepting the earlier foreign judgment as a bar to a new suit. Public international law does not require a state to recognize foreign judgments, which is understandable because states are quite free to assume jurisdiction in civil matters. Courts may assume jurisdiction and render judgments in circumstances where the recognizing state would perceive the assertion of jurisdiction to be overreaching and therefore not be willing to recognize the rendered judgment. An obligation to recognize all judgments rendered by another state would only be accepted by states if the foreign court rendering a judgment had assumed jurisdiction according to agreed upon or accepted standards of jurisdiction, as was done on a regional plane in the European Convention. There is no such harmonization on the international plane. Recognition thus lies within the "friendly discretion" of the nations.
   b. United States
   "Under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties ... bars a second suit based on the same cause of action." This
statement of the Supreme Court referred to a situation within the same jurisdiction. The Full Faith and Credit Clause of the United States Constitution generally requires recognition of sister state judgments, but it is not applicable to foreign country judgments. However, this does not mean that the policies underlying the recognition of sister state judgments do not - at least partially - apply to foreign country judgments as well.

"Public policy dictates that there be an end of litigation." This consideration behind res judicata applies to all judgments, whether they are local or foreign. The Supreme Court took the same view as early as 1821, and the doctrine of res judicata as to foreign judgments was also espoused by the dissenting four justices in Hilton v. Guyot. The majority opinion did not consider the res judicata doctrine but made recognition and enforcement subject to international comity and certain conditions (shortly to be dealt with). But in fact there is no difference as to results: the proponents of the res judicata doctrine also employ new policy factors at the foreign judgments level, taking into account the diversity existing between the various legal systems. These considerations lead to generally the same defenses or limitations as are applicable under the comity approach. Since in effect all give res judicata effect to foreign judgments, also Hilton, the concept and label of res judicata appear to be preferable.
Some limitations are inherent in the concept of *res judicata*. The cause of action, and the parties must be the same. Other limitations are more independent. The foreign court must have had jurisdiction, which will be determined not only by the foreign law but also under United States jurisdictional notions of fairness and due process. Similarly, there must have been an actual opportunity for the party to be heard, that is a full and fair trial. Justice to the parties also requires that the judgment be not contrary to natural justice or procured by fraud. Fraud means only "extrinsic" fraud, which could not have been passed upon by the foreign court. A typical example is that the plaintiff fraudulently induces the defendant not to defend himself by saying that the action is being withdrawn. If not already covered by the other exceptions dealt with, the foreign judgment must not be contrary to public policy. The mere difference of laws applicable in the two fora cannot render a judgment contrary to public policy; the cause of action the judgment is based on must violate "our fundamental notions of what is decent and just." Reese suggests that

"only a real necessity to safeguard American citizens or institutions will be sufficient to override the compelling reasons behind the doctrine of *res judicata*."

The most controversial exception to recognition is the element of reciprocity, which was first asserted in *Hilton*. Newer state court and federal court decisions in
non-federal-question cases have refused to follow *Hilton*. This refusal implies that recognition is a matter of state law. The better arguments speak in favor of rejecting reciprocity as a precondition to recognition. For, using the words of the Minnesota Supreme Court, "*Hilton* mandates a misplaced retaliation against judgment creditors for acts of foreign states irrelevant to their cases and over which they had no control." Also, the objective of bringing an end to litigation and conserving judicial energies should prevail. The Restatement on the conflict of laws also rejected the reciprocity doctrine, and stated that the great majority of state and federal courts have done so. After all it seems justified to say that reciprocity was only a "temporary adventure."

The Uniform Foreign Money-Judgments Recognition Act (1962) has been adopted by sixteen states as of 1988. It purports to state what is believed to be the United States common law rule. Reciprocity is not a precondition of recognition under the Act. The United States is not party to any bilateral or multilateral conventions on the recognition of foreign country judgments.

There remains the question of the finality of the foreign judgment. The Uniform Act considers final a judgment even though an appeal is pending in the foreign jurisdiction. The consequence in such a situation is stay of proceedings rather than dismissal because of *res judicata*. Stay is also the consequence of the doctrine of *lis pendens*.
in the United States. The situation that an appeal is pending appears to belong to the concept of *lis pendens*. Both the legal consequence of stay and the obvious relationship to the doctrine of *lis pendens* make it advisable to deal with the situation of a pending appeal already in the context of *lis pendens* theories.

Summing up, we may say that United States courts in general give *res judicata* effect to foreign country judgments under very much the same liberal conditions that apply to sister state judgments.

c. European Convention

The European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters follows the German approach of "automatic" recognition giving *res judicata* effect without formal procedure. The grounds for refusal of recognition are exhaustively enumerated in Art. 27, including the public policy reservation, or that the judgment was given in default and the defendant was not properly (timely) served. Art. 29 prohibits any review as to substance. As a change from traditional rules on recognition, the foreign judgment may not be reviewed as to jurisdiction, which is expressly stated in Art. 28 (3). One reason might be the confidence in the clear and uniform rules on jurisdiction under the Convention. However, an oddity arises because pursuant to Art. 28 (3) and Art. 4 (2) the rule of non-jurisdictional-review applies also to judgments (by member states) against defendants not domiciled in a
member state, which are rendered according to the local rules of jurisdiction including any exorbitant bases which the Convention abolished as to member state domiciliaries. This "unfortunate" result is understandably criticized, since the non EEC domiciled defendant is "at the mercy of the judgment granting court and cannot get any relief on jurisdictional grounds at the [recognition and] enforcement stage."  

d. England
An English scholar has stated that English courts "uphold the principle of res judicata, to the inherent absurdity of enforcing a foreign judgment which is known to be contrary to English law." Indeed, the power of English courts to reopen foreign judgments is strictly limited. Judgments are recognized if they are not procured by fraud, not contrary to public policy or natural justice (including due process notions), and if the foreign court asserted jurisdiction on a basis recognized in England. This looks quite similar to the United States rules. It should be noted that the concept of fraud is not limited to extrinsic fraud, and that reciprocity is not required.

e. France
French law traditionally was hostile to the recognition of foreign judgments. An ordinance of 1629 prohibited the execution of foreign judgments and demanded that the matter be litigated anew. Later, judgments became enforceable but were subject to examination of the merits. This doctrine
of "revision au fond," which required a French court to re-view the merits of the foreign judgment to be recognized, was strongly criticized and finally relinquished by Munzer v. Dame Jacoby-Munzer in 1964.\textsuperscript{301} Instead a concept of "contrôle" was established\textsuperscript{302} and it requires the following:
- the foreign court had jurisdiction over the case (both international jurisdiction according to French standards and internal jurisdiction according to the foreign forum's standards)\textsuperscript{303}
- the court applied the proper law according to French choice of law rules\textsuperscript{304}
- the enforcement of the judgment will not violate French "ordre public" (public policy)\textsuperscript{305}
- no legal fraud is involved (meaning for example the chang-ing of nationality or domicile in order to influence the choice of law).\textsuperscript{306}

Except as to the choice of law requirement these are some-what familiar elements.

f. Federal Republic of Germany

§ 328 (1) of the Code of Civil Procedure (ZPO) sets forth the grounds for refusing recognition. Despite numerous criticisms by legal writers\textsuperscript{307} the conflict of laws reform 1986 has retained the reciprocity requirement in § 328 (1) No.5 ZPO. At least, the Federal Supreme Court has liberal-ized the application of the reciprocity requirement over the years: The foreign country does not have to have the same conditions for recognition as Germany, but it suffices that
the terms of the foreign country in recognizing a German judgment are as a whole essentially equivalent or less stringent than the respective German ones.\textsuperscript{308} Also, it is not necessary that all types of German judgments be recognized abroad.\textsuperscript{309} Partial reciprocity as to the particular class of judgment at issue is sufficient.\textsuperscript{310} As regards money judgments from the United States, the only states which would not pass the reciprocity test are probably Montana, Florida and Mississippi.\textsuperscript{311}

The other requirements for recognition correspond to the common law rules, including elements such as jurisdiction of the foreign court (measured by German standards), adequate service of process, and public policy.\textsuperscript{312}

2. The So-Called "Second Lis Pendens Theory"

As an exception to the rule of recognition of foreign judgments, the "second lis pendens theory" poses the question whether a domestic \textit{lis pendens} may bar the recognition of a foreign judgment. This presupposes that parallel actions have been taken in the recognition forum and abroad.\textsuperscript{313}

One view refuses recognition of the foreign judgment when a domestic suit is pending, irrespective of which suit was initiated first. This approach is taken by Art. 797 (1) No.6 of the Italian Code of Civil Procedure,\textsuperscript{314} and it probably is the French rule as well.\textsuperscript{315} This apparent preference for domestic proceedings bars recognition even if the foreign suit was started first, which is "open to serious
objections." For once, this enables a party to avoid or postpone the recognition of a foreign judgment by merely suing in the recognition forum on the same matter before the foreign decision becomes *res judicata*. It deprives the concept of recognition of foreign judgments of a great part of its role in avoiding duplicate proceedings. Moreover, it appears inconsequent if one accepts the *lis pendens* theory. The following approach seems preferable: One should distinguish as to whether the domestic or the foreign suit was instituted first. In the former case the foreign judgment should not be recognized, in the latter case it should. It is only consistent to demand observance of its own *lis pendens* and refuse recognition to judgments rendered in disregard thereof, and on the other hand not to deny recognition if the foreign suit was started first. This rule was adopted by the 1966 Hague Convention on the recognition and enforcement of foreign judgments. Thus, the action first instituted should receive preference in a situation where one action is pending and the other has already led to a judgment. United States law probably follows the same approach that the action first initiated prevails.

3. Worst Case Scenario: Two Conflicting Judgments

Since not all countries employ the same rules or doctrines to avoid duplicate proceedings, it might happen that the parties are confronted with inconsistent judgments from different countries. If the plaintiff seeks recognition and
enforcement, which judgment should prevail? A comparative study concluded that there is a "lack of a general agreement" on the question whether the first or the last judgment is to be honored. It is no wonder that there is a lack of agreement, since even systematic deliberations face a dilemma: A consequent solution as concerns lis pendens theories would require that the proceedings first instituted be given preference, as was suggested with regard to the "second lis pendens theory" above. On the other hand, one has to consider the res judicata effect of the judgment first rendered, which would suggest a first-in-time-judgment rule. A third consideration leads to even another solution, namely that the res judicata effect of the first judgment was considered in the second proceedings and that the decision there constitutes res judicata as to the res judicata effect of the first judgment. Corresponding to these somewhat inconciliable considerations it is understandable that different countries have adopted different rules. Yet another factor has to be taken into account. As we have already seen, the policy of some systems prefers domestic judgments. In looking at some approaches, we should distinguish two situations, namely whether enforcement is sought in one of the judgment countries or in a third country.

a. recognition and enforcement in one of the countries having rendered one of the judgments

A general proposition is that a foreign judgment will not be recognized if it conflicts with a prior adjudication in the
recognition state.\textsuperscript{325} This was justified long ago on the grounds that foreign judgments may not be binding on the internal legal regime if they deny internal acts of state (that is internal judgments).\textsuperscript{326} In this sense, French courts supposedly give preference to their own judgments if they were rendered prior to the foreign judgment, since the later foreign judgment inconsistent with the already rendered domestic judgment is held to be contrary to public policy.\textsuperscript{327}

Some countries generally prefer their own forum judgments irrespective of when they were rendered. This is the law in the Germany as stated in the newly revised\textsuperscript{328} § 328 (1) No.3 ZPO,\textsuperscript{329} and in Italy, pursuant to Art. 797 No.5 of the Italian Code of Civil Procedure.\textsuperscript{330} English law is the same.\textsuperscript{331} Further Art. 27 (3) of the European Convention\textsuperscript{332} excludes recognition if the judgment conflicts with a judgment rendered in the recognition state irrespective of the time it was rendered.\textsuperscript{333} This preference for home country judgments furthers "domestic legal security,"\textsuperscript{334} but it was rightly criticized as not serving "comity nor judicial economy."\textsuperscript{335}

United States law does not follow any domestic judgment preference rule, but applies a last-in-time rule irrespective of the country of origin. The last-in-time rule as to inconsistent sister-state judgments was established by the Supreme Court in Treinies v. Sunshine Min. Co.\textsuperscript{336} on the grounds that the later decision had disposed of the issue of
res judicata effect of the former judgment (which reflects our third systematic consideration above). That the later court evidently failed to accord res judicata effect to the first judgment is outweighed by the fact that this issue could be raised in the second action and the determination by the second court is authoritative (res judicata effect as to the issue of res judicata of the first judgment). Some find it uncertain whether this rule also applies where foreign country judgments are involved. But there are a few decisions holding so. Two cases illustrating both a prior domestic and a prior foreign judgment situation, are Perkins v. Benguet Consol. Mining Co., giving res judicata effect to a New York judgment that held that a prior Philippine judgment would not be recognized because of fraud, and Perkins v. De Witt, giving preference to a later Philippine judgment over a prior New York judgment. It should be noted that the logic employed by the United States courts is faulty if the later judgment was rendered by a forum that does not apply res judicata, and arguably in these situations the last judgment should not control.

b. recognition and enforcement in a third country

This paragraph deals with the situation where two foreign judgments "compete" for recognition in a third country and a domestic judgment preference argument accordingly cannot apply.

As mentioned, the United States last-in-time rule applies uniformly to all situations of conflicting judgments
irrespective of the country of origin. An example of the application of the last-in-time rule where the United States is the third country, is *Ambatielos v. Foundation Co.*,\(^3\) giving preference to a later English judgment over a prior Greek one.

On the side of the first-in-time rule as regards two conflicting foreign judgments we find Art. 27 (5) of the European Convention,\(^4\) which precludes recognition if a prior decision of a nonmember state (which is recognizable) conflicts with the decision seeking recognition. In the event of two conflicting judgments of two other member states the Convention is silent, but some suggest that the earlier judgment should prevail.\(^5\) Against criticisms by few writers\(^6\) German law also adheres to the first-in-time rule as recently confirmed in § 328 (1) No.3 ZPO.\(^7\) For a first-in-time rule speaks that it "deters post-judgment forum shopping."\(^8\)

Whatever the rule as to conflicting judgments is, for the sake of international cooperation and equality one should follow the proposal of one author demanding that "it ought to apply equally to foreign and domestic judgments."\(^9\) Unfortunately, quite some systems still apply a domestic judgment preference policy that is reflected in our distinguishing the two situations a. and b. above.

c. "enforcement shopping"

As we have seen, the rules on enforcement in a situation of conflicting judgments are different in different countries.
This opens the stage for "enforcement shopping" because the plaintiff may look for a country with favorable rules. Of course, first he has to consider the availability of assets of the defendant in the country where he wants enforcement to take place. Whether the defendant can interfere with this process will be seen later.351

4. Evaluation

The dubious notion that impeding recognition of foreign judgments will somehow benefit local judgment debtors and indirectly the state granting recognition,352 fortunately appears to find fewer and fewer proponents as time passes. Reciprocity is still a requirement for recognition in some systems, but instead of raising the general standard of behavior (by inducing states to grant recognition if they want their own judgments to be recognized), reciprocity probably tends to generalize a lower standard.353 For the "chain"354 of reciprocity cannot be broken if no country is prepared to be the first to grant recognition without reciprocity. Thus, the fact that England, France and most United States courts have relinquished the reciprocity requirement is welcome news. An interesting proposal made by some scholars sets forth a connection between recognition and the law of jurisdiction and suggests that in order to avoid possible conflicts with other jurisdictions a forum should assume jurisdiction only where its judgment would be recognized by foreign countries.355 If this were followed, a uniform
standard of jurisdiction would be likely to evolve, facilitate recognition, and minimize conflicts. It was rightly said that recognition of foreign judgments and jurisdiction of foreign courts are "branches of the same tree," and the one may influence or even constitute state practice as to the other. As far as we have seen, state practice is on the way to a liberal recognition practice which avoids conflicts and conflicting judgments which nobody desires.
IV. AGGRESSIVE INSTITUTIONS - MEANS FOR COUNTERING SUITS
COMMENCED BY OPPOSING PARTIES

This chapter will deal with institutions which allow a party to counter proceedings instituted by the opposing party in a foreign country. The Common Law antisuit injunction is the main institution to be looked at. Civil law achieves equivalent effects by means of a substantive law action for an order to discontinue foreign proceedings. Other means are anti enforcement injunctions, and actions for a declaratory judgment denying the benefits of the foreign proceedings. These institutions are called aggressive because they are employed to counter foreign proceedings and tend to interfere with the activities of foreign courts.

A. Antisuit Injunctions

1. In General
The term "antisuit injunction" is meant to cover injunctions requiring a party not to commence, or not to continue proceedings in a foreign court. Such injunctions are a Common Law institution, going back to the conflicts between Equity and the Common Law. At the time of Henry VI. it had become clear that the law could not be modified by equitable
principles, unless the Chancellor, or the Court of Chancery, could restrain parties from proceeding "at law." This was, of course, opposed by the Common Law courts. But since James I. issued an order in favor of the Chancery in 1616, the latter's equitable power to issue such injunctions seemed to be established. The equitable remedy of antisuit injunctions was ready to develop and became a device for restraining foreign proceedings.

2. The English Doctrine

In the old decision Lord Portarlington v. Selby, the court granted an injunction restraining a person from bringing an action in Ireland in regard of a dishonored bill of exchange given in respect of a gambling debt which would be invalid by English law. In justifying the decision Lord Brougham, L.C. stated:

"... the injunction was not directed to the foreign Court but to the party within the jurisdiction here. ... If the Court can command him to bring home goods from abroad, ... in precisely the like manner it can restrain the party ... from doing anything abroad ..."360

The more recent case Castanho v. Brown & Root assimilated the criteria for granting a forum non conveniens stay and for granting an injunction. Lord Scarman said:

"The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."363

Thus, if it could be established that England was the more convenient forum, an injunction would issue, provided that
the plaintiff in the foreign court would not be deprived of a legitimate advantage. 364 This approach of issuing an injunction constituting a kind of binding forum non conveniens decision as to the other forum appears rather "arrogative," 365 considering the broad discretion for a forum non conveniens decision. 366 It fails to recognize the difference between controlling proceedings before English courts and interfering with proceedings subject to the jurisdiction of a foreign court. 367 Understandably, the House of Lord felt somewhat uneasy with this, and in South Carolina Insurance Co. 368 Lord Brandon stated that the High Court has power to issue antisuit injunctions, but that "[s]uch jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned." 369

In the recent S.N.I.A.S. case, 370 the Privy Council took the opportunity of clarifying, redeveloping (looking at old cases) and restating the English law in this area. 371 It departed from any forum non conveniens assimilations, and Lord Goff stated the new approach to be:

"[w]here a remedy ... is available both in the English ... court and in a foreign court, the English ... court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English ... court ... provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an
injunction if ... it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."372

Special rules apply to "single forum" cases, that is where there is no cause of action in the English court. These are particularly sensitive as regards the plaintiff, because if the action begun abroad can be heard only in the foreign court, it is a strong thing to enjoin the foreign proceedings.373 As regards state interests, however, there is no difference to the normal "alternative fora" cases, since the fact that there is no cause of action in England reflects English regulatory policy and is exercise of jurisdiction as well.374 As to such cases, the ruling of the House of Lords in the Laker case375 is still authoritative.376 For an injunction to issue, the party must show a right not to be sued in the foreign court. This right may be derived from a contract (for example an exclusive jurisdiction clause377) or from the fact that to sue would constitute "unconscionable" conduct in the eye of English law.378 The difference between unconscionable and vexatious conduct is hard to detect, and it has been suggested that in substance the rules in alternative and single forum cases are at least remarkably similar.379

3. United States Law

United States courts appear even more reluctant than their English counterpart to issue injunctions restraining foreign proceedings.380 This is the rule at least under the approach
as applied by Judge Wilkey in the American side of the Laker case. \textsuperscript{381} In simplified terms, \textsuperscript{382} the case went as follows: The British airline Laker Airways brought an action under antitrust laws in a United States court against British, American, and other companies. Other airlines obtained an injunction from the English Court of Appeal enjoining Laker from pursuing similar proceedings in United States courts against them. \textsuperscript{383} Then, the United States court enjoined United States and other airlines from joining the English proceedings perceived to frustrate the proceedings in the United States. \textsuperscript{384} This state of conflicting injunctions was finally resolved when the House of Lord discharged the injunction granted by the Court of Appeal in the decision mentioned above. \textsuperscript{385}

Judge Wilkey, in affirming the United States antisuit injunction, thoroughly elaborated on the United States law on such injunctions. Despite the actual clashes across the Atlantic, the language applied is quite restrictive. At the outset, he makes clear that because of the indirect interference with the foreign court's jurisdiction

"only in the most compelling circumstances does a court have discretion to issue an antisuit injunction." \textsuperscript{386} Therefore, \textsuperscript{387} factors to be considered in a \textit{forum non conveniens} decision, such as the prevention of duplicative and therefore vexatious litigation, which call for dismissal of the "own" proceedings, are not sufficient grounds to restrain foreign proceedings:
"The policies underlying this rule ... do not outweigh the important principles of comity that compel deference and mutual respect for concurrent proceedings. Thus, the better rule is that duplication of parties and issues alone is not sufficient to justify issuance of an antisuit injunction."388

However, this principle of mutual respect on the other hand

"authorizes the domestic court to resist the attempts of a foreign court to interfere with an in personam action before the domestic court."389

Besides these counter antisuit injunctions (or paradoxically called "defensive antisuit injunctions") to protect the forum's jurisdiction, the use of an antisuit injunction is also considered proper "to prevent litigants' evasion of the forum's important public policies."390 This was analogized to the rule permitting nonrecognition of foreign judgments contravening crucial public policies of the recognition forum.391 Contrary to the English rule, an antisuit injunction does not issue in "single forum" cases, where there would be no cause of action in a United States court.392

Applying these principles to the facts, Judge Wilkey confirmed the lower court's injunction enjoining the appellants from taking part in the foreign action in order to permit the United States claim to go forward free of foreign interference.393 The dissent of J. Starr seems more consequent. He perceives the injunction to be "unduly sweeping in light of considerations of comity"394 and would, therefore, remand the case for consideration of narrowing the order so as to enjoin appellants

"only from seeking countersuit injunctive relief ... thus allowing them to follow the example of Lufthansa
and Swissair in bringing declaratory judgment ac-
tions.\textsuperscript{395}

This arguably corresponds to J. Wilkey's view, who just wan-
ted to protect the forum's jurisdiction, because the

"British and American actions are not parallel proceed-
ings in the sense the term is normally used. ... Rather, the sole purpose of the English proceeding is to terminate the American action."\textsuperscript{396}

Given this reasoning, it would have been sufficient to adopt J. Starr's proposal of a more narrow injunction.

Decisions after Laker appear to follow J. Wilkey's re-
strictive language and adhere to the concept that "[o]nly in
exceptional situations should a trial court issue an [an-
tisuit] injunction."\textsuperscript{397}

4. Evaluation

Courts have always\textsuperscript{398} emphasized that their antisuit injunc-
tions are directed to the party concerned, not to the
foreign courts.\textsuperscript{399} That this argument is some sort of
"sophistry"\textsuperscript{400} has been expressly admitted by some courts:
they recognized that, because injunctions bar a party from
taking procedural steps in the foreign forum, they "effec-
tively restrict the foreign court's ability to exercise ju-
risdiction."\textsuperscript{401} This kind of "interference" certainly is not
desirable, although it can hardly be called contrary to
(public) international law, given the continued state prac-
tice by common law jurisdictions. But it is agreed by most
courts and writers that antisuit injunctions are "exception-
al remedies inconsistent with the normal relations between
Is there really a need for antisuit injunctions? Most of the job could be done by defensive institutions. Thus, it is proposed that any issues of vexation or unconsciounability and other challenges to the application of a state's law to a transnational controversy should be raised in a motion for **forum non conveniens** where the proceedings are taking place. This is, of course, only possible where the foreign court applies a **forum non conveniens** type doctrine allowing the stay or dismissal of proceedings before it. If this is the case, why should a domestic court preempt the **forum non conveniens** decision of the foreign court? An extremely "intrusive" decision in this sense is *Metall und Rohstoff A.G. v. ACLI Metals (London) Ltd.*, where the English High Court issued an injunction to terminate the American proceedings only a few days before the ruling of the American judge on a **forum non conveniens** motion was expected. On the other hand, if the foreign court has already dismissed a **forum non conveniens** motion, it is hard to see why the domestic court should overrule this decision. Arguably, the foreign court decision on this issue should be entitled to **res judicata** effect, even if it is not literally the same issue but just the other side of the coin. Also, if both countries believe to be the appropriate forum, instead of issuing antisuit injunctions it is still less intrusive
to simply let both proceedings go on and seek a solution at the recognition and enforcement stage, when one judgment can be pled *res judicata*.\textsuperscript{407} If the foreign adjudication was against domestic public policy, the domestic forum may refuse recognition.\textsuperscript{408}

Similarly, in a counter antisuit injunction situation, the domestic forum may just refuse to recognize the foreign injunction on public policy grounds.\textsuperscript{409} If the foreign court is determined to exercise jurisdiction, a counter antisuit injunction would anyway not be of great help, because the foreign forum would not recognize the domestic injunction. Thus, there only remains the "deterrent value of enforcement in the domestic forum,"\textsuperscript{410} which is limited to assets and interests there. Instead of injunctions, this deterrence may also be achieved through a suit for damages for breach of contract\textsuperscript{411} or for malicious prosecution.\textsuperscript{412}

Between countries which adhere to a strict rule of *lis pendens* the problem of antisuit injunctions cannot arise. For the dispute resolution would be allocated exclusively to the forum first seized.\textsuperscript{413} This applies evidently to the regime of the European Convention,\textsuperscript{414} where moreover the spirit of the Convention should exclude any power to order antisuit injunctions in a cause within the scope of the Convention.\textsuperscript{415}

Thus, there remains not much room left for a justification of antisuit injunctions. Unfortunately, it is to be expected that the real tough conflicts rooting in a
perceived exorbitant extraterritorial assertion of jurisdiction (as between America and Britain) remain a terrain for antisuit injunctions, \textsuperscript{416} unless there will be a resolution of this issue by convention, which is not in sight. Thus, one has to apply to the reason and "friendly common sense" of nations. A very restrictive use of antisuit injunctions will reduce frictions in a system of interdependent sovereign states, and will prevent policy conflicts (which necessarily exist in such a system) from "eroding the basis of the international legal system." \textsuperscript{417}

B. Anti Enforcement Injunctions

The injunctive power of American and English courts also extends to restraining attempts to enforce in the forum state or abroad a judgment obtained in foreign legal proceedings. \textsuperscript{418} The classic English case is \textit{Ellerman Lines, Ltd. v. Read}, \textsuperscript{419} where a party successfully undertook fraudulent arrestment proceedings in Turkey the enforcement of which was to be prohibited. Scrutton L.J. stated:

"I cannot conceive that if an English Court finds a British subject taking proceedings in breach of his contract in a foreign Court, supporting those proceedings, and obtaining a judgment, by fraudulent lies, it is powerless to interfere to restrain him from seeking to enforce that judgment." \textsuperscript{420}

The injunctive power to restrain foreign proceedings was simply considered to comprise all kinds of proceedings, including enforcement proceedings. \textsuperscript{421} Parallel to the
situation of "normal" antisuit injunctions, the court emphasized that it does not seek "to assume jurisdiction over the foreign court ... but has regard to the personal attitude of the person who has obtained the foreign judgment." 422

As concerns fraudulent foreign judgments, American courts also appear to have equitable jurisdiction "to restrain proceedings on the judgment which cannot be conscientiously enforced." 423 Taking into account the rules on recognition of foreign judgments one should consider that the injunctive decree takes precedence over the prior judgment, since in the event of inconsistent judgments or orders United States law applies the last-in-time rule. 424

C. "Substantative Law Action" For an Order to Discontinue Foreign Proceedings

This may be called a civilian law counterpart to the Anglo-American antisuit injunction. Since civil law courts do not have inherent equitable powers, the approach is strictly substantive. It should be recalled that the House of Lords came close to such a substantive approach in its Laker decision, introducing the concept of a "right not to be sued abroad." 425

One German case of 1938 is known, which has a rather singular background. A German husband instituted divorce proceedings against his German wife in a Latvian court, the
then "divorce paradise." The German courts held this to be tortious conduct "contra bonos mores," and entered judgment against the husband on a tort theory. The damages, or compensation respectively, which the husband had to "pay," were held to be the husband's discontinuing the Litvian proceedings.426 The judgment seemed to be limited to situations where the "unconscionable" commencement of an action resulted from a double domicile situation (the husband was domiciled both in Germany and Litvia) leading to the application of Litvian law under the Litvian conflict of laws rules contrary to German conflict of laws rules.427 This substantive approach is rarely to apply. Indeed, this is the only case known in German law.428

D. Action for a Declaratory Judgment Denying or Reducing the "Benefits" Awarded or to Be Awarded in the Foreign Proceeding

The situation is as follows: Plaintiff commences an action in one forum. Thereafter, defendant goes to another forum and institutes an action there, seeking a declaratory judgment that the claim asserted by the plaintiff in the first action does not exist. Such a subsequent declaratory action is not available in a forum which recognizes a foreign lis pendens.429 If both proceedings are allowed to go on, the resolution comes at the recognition and enforcement stage. We can refer to our considerations on recognition, the
"second lis pendens theory," and on conflicting judgments.430

E. Evaluation

These comments can be kept brief, because the main considerations have already been pointed out in section A above on the evaluation of antisuit injunctions. The same considerations similarly apply to aggressive institutions in general, whereby the declaratory judgment category should not be regarded a real aggressive institution, since it does not really interfere with the jurisdiction or proceedings of foreign courts. It is just a source of potentially conflicting judgments.

The effects of aggressive means are usually limited to the issuing country because of the public policy reservations in the laws on recognition of foreign "judgments." Aggressive means, as their name suggests, are not desirable from an international point of view, because they interfere with the activities of foreign courts. Although those means do not appear to be contrary to international law, one should always keep in mind that "overly aggressive adjudication can disrupt commerce and peace between nations much more than it can between states."431
V. PRECAUTIONARY INSTITUTIONS

This chapter deals with forum selection and arbitration clauses. By agreeing upon a certain forum or arbitral tribunal parties can take precautions against disputes over jurisdictional questions and jurisdictional conflicts. Nations which recognize such agreements can avoid jurisdictional conflicts where parties make use of such "precautionary institutions."

A. In General

Certainty\(^{432}\) and conflict avoidance make it desirable that there be only one exclusive forum or tribunal designated to deal with a certain matter. This designation can be made by the parties, by including choice of forum or arbitration clauses in their contract. Some have called this "preventive forum shopping,"\(^{433}\) and it indeed prevents conflicts which may arise between the parties (and possibly between states) if there is more than one forum available. Of course, this works only if such clauses are honored by the courts or laws in the different countries. As concerns the forum prorogatum, that is the chosen forum, this means that such a clause should cut off a jurisdictional or forum non conveniens
defense there. As concerns the forum derogatum, that is the non-chosen forum, any proceedings instituted there should be dismissed or stayed.

States are not obliged under international law to accept any prorogation or derogation. Nevertheless, there is a growing trend towards accepting and already a "fairly wide acceptance of the effectiveness of such agreements subject, of course, to certain qualifications."

B. Recognition of Choice of Forum Clauses

1. United States
The traditional common law rule did not give effect to the parties' choice of forum, because such agreements were perceived to "oust" otherwise competent courts of jurisdiction and thus violate public policy. The newly emerging consensus of United States courts was expressed by the Supreme Court in The Bremen v. Zapata Off-Shore Co., where the court found that the

"elimination of all ... uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."

Noting that the

"expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts"

the court adopted a "more hospitable attitude toward forum-selection clauses" and held
"that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."442 Circumstances rendering enforcement unreasonable are "fraud, undue influence, or overweening bargaining power,"443 which make the agreement a non-freely negotiated one, and enforcement may not "contravene a strong public policy of the forum."444 In the case before it, the court remanded for consideration of potential unreasonableness (as to which the burden of showing is cast on the contestant), before the action instituted in federal court in Florida contrary to a clause referring all disputes to the United Kingdom, would be dismissed. The exclusiveness of the choice is determined by interpreting the language of the clause,445 and thus it is desirable to state that the choice of forum is exclusive.446 In recent years, United States courts have rarely taken jurisdiction over cases in which the parties had chosen a different forum; they have generally enforced the choice of forum clause.447 As to the jurisdiction conferring function of such a clause, it should be noted that since 1984 New York's forum non conveniens rule, N.Y. Civ. Prac. L. & R. § 327 (b),448 will sustain jurisdiction based on a forum selection clause in a "big commercial contract" (for at least $250,000 consideration) if the controversy is for more than $1 million, irrespective of any connection of the transaction to New York.449
2. European Convention

Art. 17 of the Convention\(^{450}\) provides that\(^{451}\) a choice of forum clause, if at least one of the parties is domiciled in a member state, renders the chosen forum the exclusive forum.\(^{452}\) An interesting aspect is added by Art. 17 (3): if the agreement is concluded for the benefit of only one of the parties, this party has the right to bring the case before any other court which has jurisdiction under the Convention. As the European Court has recently clarified, this may only be assumed if it is clearly shown that both parties wanted the agreement to benefit one party (not just that one party is benefitted by choosing his home forum), because Art. 17 purports to respect the intentions of the parties.\(^{453}\)

3. England

English courts have sustained jurisdiction if they were selected by the parties even if the transaction had few or no connection with England.\(^{454}\) On the other hand, an action brought before an English court contrary to an exclusive forum selection clause is likely to be stayed and not dismissed.\(^{455}\) This is a discretionary decision where the courts take into account considerations similar to those in a forum non conveniens decision,\(^{456}\) such as the relative convenience and expenses of trial in the foreign country and England, the parties' contacts with the respective countries, and
whether "the plaintiffs ... would be prejudiced by having to sue in the foreign court..."457

4. France
French law accepts forum selection clauses to exclude local jurisdiction. Such a clause is perceived to be a waiver of French jurisdiction, respected even as to Art. 15 code civil jurisdiction.458

5. Federal Republic of Germany
Under German law it is well established that, in the realm of the law of property and the law of obligations,459 exclusive forum selection clauses in international contracts are to be respected.460 "Businessmen parties" can validly choose a forum according to § 38 (1) ZPO. Other parties can validly agree on a forum pursuant to § 38 (2) ZPO, if at least one of the parties is not domiciled in Germany and the agreement is in writing or confirmed by writing.461 An exception is made for agreements in conflict with rules on exclusive jurisdiction under German law.462 It is worth noting that for suits against the party whose home forum has been chosen in the clause, this choice is assumed to be exclusive.463 If the defendant invokes a forum selection clause as defense to an action brought contrary to it, he must do so before pleading on the merits because otherwise he is taken to have consented to suit there.464
6. Evaluation

Almost all Common Law jurisdictions and most Western European states with civilian legal systems respect forum selection clauses. However, since not all countries honor the clauses, a situation may arise where the forum derogatum does not recognize the clause but the forum prorogatum does, as in a recent case before the Netherland Hoge Raad. One party had instituted attachment proceedings as to a ship in Bahrain contrary to a clause exclusively selecting Netherland courts. Bahrain allowed the proceedings. The Hoge Raad entered judgment against the "faulty" party and ordered that it procure the release of the ship in Bahrain. Moreover, the English courts have issued antisuit injunctions where the commencement of foreign proceedings, contrary to forum selection clauses, was perceived to be oppressive or vexatious (which is quite likely to be found so as to restrain a breach of contract). Since such measures, attempting to enforce forum selection clauses, do or might interfere with the jurisdiction of the foreign court, the considerations developed as to aggressive institutions apply, and care should be employed. A less intrusive way to deal with such conflicts in connection with choice of forum clauses ("connected" conflicts), is to indirectly enforce an exclusive choice of forum clause by refusing to recognize foreign judgments rendered in disregard of such a clause. There is also another "remedy" not interfering with foreign court proceedings: If the foreign proceedings instituted
contrary to a forum selection clause have led to pecuniary loss (for example, resulting from a sequestration order in a foreign court), it would appear to be possible to recover in an action for breach of contract.

C. Recognition of Arbitration Clauses

1. In General
Because "a foreign party will tend to view another nation's judicial system as inherently untrustworthy," and if they could not agree on a supposedly neutral third country forum, parties may agree to private arbitration instead. Parties often perceive an arbitral tribunal to be more impartial and to have greater expertise in certain commercial matters. Another reason for choosing arbitration is that to some extent the preferences of the parties as concerns procedures and laws to be applied may be included in an arbitration clause, and that the proceedings are concluded in private, thus protecting commercial interests. Like choice of forum clauses, arbitration clauses also allocate the dispute resolution to one exclusive forum.

2. Acceptance
Countries which respect choice of forum clauses generally also accept arbitration clauses. The close relationship between these two institutions, resulting in equal or similar
treatment, was ably expressed by the United States Supreme Court in Scherk v. Alberto Culver Co.:475

"An agreement to arbitrate before a specified tribunal is, in effect, a special kind of forum-selection clause ... The invalidation of such an agreement ... would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts."

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The court again emphasized the importance of certainty in an international setting, because a refusal to enforce a "truly international" arbitration agreement "would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."478

The courts' traditional hostility towards arbitration agreements, which were perceived to unduly displace their jurisdiction,479 was overcome with the 1925 Federal Arbitration Act.480 The policy of favoring arbitration was reapproved and extended in 1970 when the United States became a party to the 1958 United Nations Convention.481 Art. II of the Convention deals with the recognition of arbitration agreements as follows:

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

3. The court of a contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds the said agreement is null and void, or incapable of being performed.
This has been implemented by chapter 2 of the Federal Arbitration Act. The Act did not explicitly impose any subject matter restrictions; and consequently the question arises as to the circumstances in which public policy renders a matter non-arbitrable. The arbitrability of a claim under the 1934 Securities Exchange Act arising under an international contract with an arbitration clause was at issue in Scherk. Although its prior decision in Wilko v. Swan prohibited the arbitration of a 1933 Securities Act claim arising under a domestic contract, the Supreme Court enforced the international arbitration clause. The same notion that "domestic policy concerns may become moot in an international context" became important in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. This decision held that even antitrust claims under the Sherman Act are arbitrable under an arbitration clause in an international commercial transaction. Considering the relative importance of antitrust laws within the framework of United States commercial policy, the Supreme Court might have gone too far, as was alleged by some writers. From a standpoint of conflict avoidance between nations it can only be welcomed, because the area of public laws, or non-purely civil matters which have regulatory aspects, is the very area where conflicts are more likely to arise, and the allocation of the dispute to one tribunal eliminates this danger. In any case, the Supreme Court decision is further evidence for the pro-arbitration attitude in the United
States. As of 1986, arbitration statutes based on either the Federal Arbitration Act or the Uniform Arbitration Act, had been adopted by forty-three states. Most recently Georgia passed an Arbitration Act, which incorporates quite progressive rules as concerns international arbitration.

Enforcement of the arbitration agreement means the following: When a party brings an action in a United States court, the court has power to stay this action (pending the completion of arbitration) if the dispute is within the scope of the (valid) arbitration clause. In this instance a United States court usually additionally issues an order compelling arbitration (unless the adverse party voluntarily proceeds to arbitration), which constitutes the remedy of specific performance.

The trend towards respecting arbitration clauses is not limited to the United States. As already indicated in the beginning of this chapter, countries which accept exclusive forum selection clauses will generally also respect arbitration agreements. In England, arbitration agreements are given similar deference as choice of forum clauses. In France, the reform by way of the Decree of May 14, 1980 clarified the law, and requires courts to decline jurisdiction contrary to an arbitration agreement that is not "manifestly null." It also conferred the so-called "kompetenz-kompetenz," that is the power to pass upon its own jurisdiction and the validity of the contract, on the arbitral
tribunal, as is the rule in Germany\textsuperscript{499} and similar in the United States.\textsuperscript{500}

Some speak already of a trend towards a "worldwide system of dispute resolution."\textsuperscript{501} The United Nations Convention has been acceded to by some seventy nations, including the main trading countries.\textsuperscript{502} Another important step was the adoption of the UNCITRAL model law on arbitration in 1985, which is intended to make international practice more uniform.\textsuperscript{503} It is to be hoped that these efforts of achieving widespread recognition of arbitration clauses at somewhat uniform terms will be honored by the international community.\textsuperscript{504}

3. Evaluation

The importance of arbitration clauses in international settings should have become clear. Widespread acceptance and recognition of such agreements will most likely avoid conflicts of jurisdiction, because the resolution of disputes is allocated to one exclusive tribunal. Yet, because not all states recognize arbitration clauses, in general or under certain circumstances, there are situations where conflicts may arise.

For instance, on the one hand, a party might oppose arbitration (for example because the agreement is allegedly invalid or the dispute not arbitrable) and try to get a court order staying the arbitration.\textsuperscript{505} Or, on the other hand, the arbitral tribunal might be asked for an order that
the other party withdraw an action instituted before a national court, or at least obtain a stay of a hearing that is part of the action in the national court.\textsuperscript{506}

Besides those conflicts between arbitral tribunals and national courts, we can also imagine conflicts between courts of different nations to occur in connection with arbitration clauses ("connected" conflicts). This can happen where a party commences a suit in a country which does not respect the arbitration clause. The opposing party might try to get help from a court of another state that does recognize the arbitration clause. Similar considerations apply as have been developed with regard to measures attempting to enforce choice of forum clauses.\textsuperscript{507} English courts, for instance, may issue prohibitive injunctions restraining foreign court proceedings instituted contrary to contractual clauses, not only for the protection of English courts selected in a choice of forum clause,\textsuperscript{508} but also for the protection of arbitral tribunals selected in an arbitration clause.\textsuperscript{509} This aggressive mean of restraining foreign proceedings in order to enforce an arbitration clause should only be employed in exceptional circumstances because of the interference with foreign courts' activities.\textsuperscript{511} Corresponding to the considerations as regards the enforcement of choice of forum clauses,\textsuperscript{512} it appears preferable to only indirectly enforce an arbitration clause by not recognizing foreign orders and judgments rendered in disregard of the clause. Also, it would appear that a court recognizing an
arbitration clause could grant recovery in an action for breach of contract, if the foreign proceedings instituted contrary to the clause had led to pecuniary loss (for instance resulting from a sequestration order in the foreign court).513

It remains to be repeated, that the recognition of arbitration agreements is highly desirable so as to avoid potential conflicts by allocating the dispute to one exclusive "forum." Connected conflicts will disappear as more nations recognize arbitration clauses.
VI. CONCLUSIONS

A scholar has said,

"[i]f one law suit is bad, two are worse."\textsuperscript{514}

This is not necessarily true for all cases, but conflicts are likely to arise when two, or more, proceedings in the same matter are allowed to go on. These conflicts may affect the private parties only, who do not wish to end up with conflicting judgments, but also the states concerned, since conflicting state interests and policies may govern the different proceedings.

Public international law allows concurrent or multiple jurisdiction among states, but sets limits to the exercise of concurrent jurisdiction. These requirements, whose purposes are to balance the state interests involved and to pay due respect to foreign states interests, become less and less precise the more we enter the field of purely civil matters, where state interests disappear.

A variety of institutions of national laws deals with the setting of concurrent jurisdiction, and for the most part these institutions try to avoid conflicts and the emergence of conflicting judgments.

Some approaches want to avoid conflicts from the beginning on by restraining the proceedings in one country. The
doctrine of **forum non conveniens** stops the domestic proceedings, if the other (or another) concurrent forum seems to be the more appropriate forum to deal with the dispute at issue.\footnote{515} This is a discretionary decision giving a court the opportunity to "fashion wise decisions on the exercise of jurisdiction."\footnote{516} In a similar defensive way, the doctrine of **lis pendens** does not allow domestic proceedings in a dispute when the same dispute is already pending in the court of another country. This approach to a great part operates on the basis that the expected foreign judgment would be recognized by the domestic forum. In this case the commencement of duplicate domestic proceedings would be a waste of judicial resources, since the eventual foreign judgment could be pled **res judicata** in the domestic action.\footnote{517} Some systems apply a discretionary rule of **lis pendens**,\footnote{518} some systems a strict non-discretionary one.\footnote{519} If one action is already completed and has evolved into a judgment in one country, the doctrine of **res judicata** and recognition of foreign judgments will bar a new second suit in the same matter.\footnote{520}

A more aggressive way to avoid duplicative proceedings in the beginning is the issuance of injunctions restraining a party from pursuing foreign proceedings.\footnote{521} However, as is recognized by courts, such injunctions should be issued with care and in exceptional circumstances only, because they interfere with the activities of foreign courts.\footnote{522} From an international point of view one should rather restrain the
domestic proceedings than restrain the proceedings of a foreign court.

If both proceedings are allowed to go on, the resolution comes at the recognition and enforcement stage. One waits until judgment is rendered by one of the courts. If the requirements for recognition of foreign judgments are met, the other court will stop its proceedings, where the foreign judgment may be pled res judicata. The so-called "second lis pendens theory" poses the question whether the pendency of a domestic action in the same dispute will bar the recognition of the foreign judgment. Indeed, some countries employ a policy which gives preference to the domestic action and bars recognition of the foreign judgment. The more reasonable approach, which is consistent if one accepts the institution of lis pendens, lets the action first initiated prevail: The domestic action will bar recognition of the foreign judgment only if the domestic action was first instituted.

Not all countries employ the same rules to avoid duplicate proceedings, and if rules on recognition do not stop a second suit in the same matter, conflicting judgments might emerge. When it comes to recognition and enforcement in a situation of inconsistent judgments, some systems generally give preference to their own forum judgment. If two foreign judgments compete for recognition, according to one view the first-in-time judgment should be recognized, whereas another view gives preference to the judgment
last-in-time. Whatever rule is adopted, it should equally apply to foreign and domestic judgments, and not generally prefer domestic judgments. The United States applies its last-in-time rule "non-discriminatory." Parties can contribute to avoiding conflicts by agreeing on choice of forum or arbitration clauses. By their allocating the dispute resolution to one exclusive "forum" they take precautions against jurisdictional disputes and conflicts from the beginning on. Courts in countries which respect these "precautionary" clauses will assume or reject jurisdiction according to whether they are the selected or the derogated forum, respectively. Since not all countries honor forum selection and arbitration clauses, conflicts may arise where one country does not respect a clause, and the other does respect it and employs measures to enforce the clause ("connected" conflicts). For instance, the "enforcing court" might issue an injunction enjoining a party from pursuing foreign proceedings contrary to a forum selection or arbitration clause. Still, conflicts are less likely to occur with such clause than in a situation without them. Such connected conflicts will disappear as more and more nations recognize choice of forum and arbitration clauses.

After all, there are quite some institutions of national laws which try to avoid duplicate proceedings and the emergence of conflicting judgments. Thus, despite a setting of international concurrent jurisdiction, conflicts between different jurisdictions do not necessarily have to occur.
The various institutions of national laws can be applied in a manner taking due regard to friendly relations between interdependent sovereign states preserving the "basis of the international legal system."
REFERENCES


2. See similarly the statement of Morrison, Conflicts of Jurisdiction, 29 Germ. Y.B. Int'l L. 417 (1986): "With the growing economic interdependence of Western nations, potential conflicts of jurisdiction promise to expand geometrically, both in numbers and in importance."


6. Because the rules of conflict of laws (or private international law) are not the same in every country, different fora may apply different substantive laws.

7. Since courts apply the lex fori, the plaintiff has a choice in a concurrent jurisdiction situation. See already J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, §§ 556 et
It is universally admitted and established, that the forms of remedies, and the modes of proceeding, ... are to be regulated solely and exclusively by the laws of the place, where the action is instituted; or, as the civilians uniformly express it, according to the lex fori. ..."; more recently Siehr, supra note 5, at 133; Graveson, Choice of Law and Choice of Jurisdiction in the English Conflict of Laws, in 1 COMPARATIVE CONFLICT OF LAWS 99, 105 (1977).

8. In the context of commercial shipping this might lead to "asset hunting". There the creditor tries to arrest the ship of the debtor-shipowner (which is often the latter's only asset) when he finds it in a port with an effective judiciary, in order to "nail" the asset on transit in the locus fori. See Kerr J. in Siskina (Cargo Owners) v. Distos S.A., [1979] A.C. 210, 216 (Q.B.); Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., [1980] 1 All.E.R. 213 (C.A. 1975) establishing the famous "Mareva injunction", which is now codified in the Supreme Court Act 1981 (1981 c. 54) section 37.

9. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981)(see also the deliberations in footnote 18 there). Against "automatic" selection of an American jurisdiction see von Mehren, Transnational Litigation in American Courts: An Overview of Problems and Issues, 3 Dick. J. of Int. L. 43, 66 (1984), where he points out some advantages of other (especially civil law) jurisdictions, e.g.: "... trial of the matter to a judge ... may well lead to a more effective and less costly judicial proceeding than would a trial by jury. ...if the plaintiff does not need wide-ranging discovery, the advantages of avoiding such discovery by litigating in an alternative foreign forum should be considered."


11. Baade, supra note 1, at 204.

12. Id., at 195.

13. This is not to be wondered at, since international law is not as coherent a legal system as a domestic one, and "[t]he decentralized making of international law ... is therefore bound to offer a more modest yield of legal
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15. Some even say that international law is supreme, it has the "Kompetenz-Kompetenz." See H. KELSEN, THE LAW OF THE UNITED NATIONS 771 (1950): "There is no matter that cannot be regulated by a rule of customary or contractual international law." See also E. NEREP, 2 EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW 356, 653 (1983). This is true, even if it seems that international law has sometimes been "far away" from courts, as the following statement by B.N. Cardozo shows: "If there is any law which is back of sovereignty of the state, and superior thereto, it is not law in such a sense as to concern the judge or the lawyer, however it concerns the statesman or the moralist. The courts are creatures of the State and of its power, and while their life as courts continues, they must obey the law of their creator." B.N. CARDozo, THE GROWTH OF THE LAW 49 (1924). It is true that the power of international law within the municipal law system depends on the latter, but nevertheless, international law is supreme in the sense that a state is responsible for its violations as against other states on the international level; see BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 285 (2d ed. 1973).

16. Baade, supra note 1, at 193.

17. Which was nicely put this way: "... 160 sovereign nations jealously guard their sovereignty and consider the prescription and application of their substantive and procedural norms a reflection of that sovereignty." NANDA & PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS vii (Introduction)(1986).


20. The Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10.

22. Morrison, supra note 2, at 420.

23. See HENKIN, PUGH, SCHACHTER, SMIT, INTERNATIONAL LAW 54 (1987). Also many writers condemned the principle of presumptive freedom, see MANN, supra note 21, at 26 with references.


25. Cf. MANN, supra note 21, at 27.


27. Id., at 23: "Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. ... a prosecution may ... be justified from the point of view of the so-called territorial principle." (emphasis added).

28. Id.

29. Id., at 30-31.

30. Although the terminology may differ from author to author.

31. Morrison, supra note 2, at 419. These principles have also been adopted by the RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986)(§§ 402, 404).

32. See MANN, supra note 21, at 18 et seq.; Laker Airways Ltd. v. Sabena 731 F.2d 909, 921.
33. Such as Ulrich Huber. See e.g. STORY, supra note 7, at § 543: "... every nation may thus rightfully exercise jurisdiction over all persons within its domains."


35. RESTATEMENT (REVISED), supra note 31, § 402 (1)(c).


37. See supra II.A.1.

38. Bowett, supra note 34, at 560.


40. See Art. 98 (2) of the Federal Republic's Act against Restraints on Competition.

41. See Mann, supra note 18, at 86 et seq.; Germany's Federal Supreme Court rightly said that "[i]n order to prevent the limitless extension of the international field of application ... of the cartel law ... it is necessary to delimitate and specify the relevant domestic effects...", BGHZ 79, 322, 325 (1979)(translation by Mann id.).

42. Cf. RESTATEMENT (REVISED), supra note 31, § 402 (2); Bowett, supra note 34, at 560, with references.

43. RESTATEMENT (REVISED), supra note 31, § 402 (3). See also Bowett, supra note 34, at 562 (as to doubts relating to the scope of the principle), with references.

44. See Bowett, supra note 34, at 563. The RESTATEMENT (REVISED), supra note 31, § 404 mentions also slave trade,
hijacking, war crimes, perhaps terrorism, but these are more
doubtful examples, see Bowett id.

45. K.M. MEESSEN, VÖLKERRECHTLICHE GRUNDSÄTZE DES INTERNATIONALEN KARTELLRECHTS 99-100 (1975). This depends, of
course, on the criteria determining nationality.

46. NEREP, supra note 15, at 485.

47. This goes also back to Story and the Dutch school, cf.
MANN, supra note 21, at 18 et seq.; also Mann, supra note
18, at 28.

48. MANN, supra note 21, at 34.

49. MANN, supra note 21, at 34 et seq., esp. at 39: "... if
its contact with a given set of facts is so close, so sub-
stantial, so direct, so weighty, that legislation in respect
of them is in harmony with international law and its various
aspects (including the practice of States, the principles of
non-interference and reciprocity and the demands of inter-
dependence). A merely political, economic, commercial or
social interest does not in itself constitute a sufficient
connection."

50. "Sinnvolle Ankniipfung", MEESSEN, supra note 45, at 101;
B. GROßFELD, INTERNATIONALES UNTERNEHMENSGEREcht: DAS OR-
GANISATIONSRECHT TRANSNATIONALER UNTERNEHMEN 13 et seq.
(1986); VERDROSS/SIMMA, UNIVERSelles VÖLKERRECHT 571 (1976);
"sinnvoller Ankniipfungspunkt", G. DAHM, 1 VÖLKERRECHT 256
(1958).

51. BROWNLIE, supra note 15, at 291, 302. The RESTATEMENT
(REvised), supra note 31, § 403 adopted a principle of
reasonableness, which leads to similar results. But sys-
tematically this concept has to be placed to the limits on
the exercise of jurisdiction when a bases exists. The same
reservation might be true as to Mann's theory, the sys-
tematic place of which is not totally clear, see below at
note 101. Meessen's meaningful connection, however, belongs
clearly to the question of bases of jurisdiction, see Mees-
seen supra note 13, at 801.

52. Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J.
4, 24, 26.
53. Id. at 20 ("... it must be determined whether that unilateral act by Liechtenstein [i.e. granting nationality] is one which can be relied upon against Guatemala in regard to the exercise of [diplomatic] protection.")

54. Cf. MEESSEN, supra note 45, at 103.

55. Cf. Mann, supra note 18, at 29; NEREP, supra note 15, at 462.

56. See Meessen, supra note 13, at 800.

57. See RESTATEMENT (REVISED), supra note 31, § 401, 402.

58. RESTATEMENT (REVISED), supra note 31, § 421.

59. Mann, supra note 18, at 67.

60. Cf. MANN, supra note 21, at 128-29: "The mere fact that a State's judicial ... agencies are internationally entitled to subject a person to their personal or 'curial' jurisdiction, does not by any means permit them to regulate by their orders such person's conduct abroad. This they may do only if the State of the forum also has substantive jurisdiction to regulate conduct ...."

61. Id. at 129.

62. Cf. NEREP, supra note 15, at 461-62. See also MANN, supra note 21, at 61: "A judgment, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action. It cannot claim validity except if and in so far as it keeps within the limits which public international law imposes."

63. Mann, supra note 18, at 67.

64. Courts do not only render judgments but also enforcement orders, such as service of writs, production of witnesses and documents. This lead some authors to the creation of a category of "jurisdiction to enforce." The terminology is not quite clear, since some authors include all acts of
courts in this category (e.g. Bowett, supra note 34, at 555; the older view of MANN, supra note 21), others do not (e.g. the newer view of Mann, supra note 18, the RESTATEMENT (REVISED), supra note 31, § 421, 431.) In our context this is only a marginal problem, since we are concerned with the assumption of jurisdiction to render judgments in possibly parallel proceedings. Anyway, jurisdiction to enforce can only be exercised if the state also has legislative jurisdiction (e.g. Bowett id.). This has lead one author to consider the distinction to be of "no legal moment" (NEREP, supra note 15, at 461, the only relevant distinction being between jurisdiction physically exercised in the territory of another state, and jurisdiction exercised within the territory of the exercising state.)

65. Akehurst, Jurisdiction in International Law, 1972-73 Brit. Y.B. Int'l L. 145, 187. Similarly Schlochauer cited by NEREP, supra note 15, at 483 (as regards civil laws states are free in principle to exercise jurisdiction); also carefully HENKIN, PUGH, SCHACHTER, SMIT, supra note 23, at 822, 883.

66. Cf. Akehurst, supra note 65, at 187; HENKIN, PUGH, SCHACHTER, SMIT, supra note 23, at 821-22; Bowett, supra note 34, at 557 (as to Akehurst's view).

67. Mann, supra note 18, at 21; also RESTATEMENT (REVISED), supra note 31, § 403 comment f ("... apply to criminal as well as to civil law") and § 421 comment b ("criminal as well as civil jurisdiction").

68. See supra at note 17.

69. Bowett, supra note 34, at 557.

70. Id.; this is probably also the real meaning of Akehurst's view when he speaks of "private law", supra at note 65.

Probably similar to the here proposed approach NEREP, supra note 15, at 501: "It is a rather significant feature of all Conflict of Law cases that the jurisdiction exercised by one state more or less affects other states as well as the individuals. The difference in this respect between civil law jurisdiction and criminal jurisdiction is one of degree only."


73. E.g. In re Marc Rich & Co. AG v. United States, 707 F.2d 663 (2d Cir. 1983)(sufficient that foreign company had violated a substantial interest of the U.S., namely "injuriously affected ... its revenue laws," at 667). Also, the concept of "doing business" within the U.S. has sometimes been interpreted quite broadly: Neumann v. Rudolf Wolff & Co., Ltd., 619 F.2d 1189, 1193 (1980) held a "defendant's participation in the state in substantial preliminary negotiations leading to the contract in issue" to constitute sufficient contacts.

74. It shall protect the defendant against the burden of litigating in an inconvenient forum (due process), and ensure that the states do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system (federalism); see World-Wide Volkswagen, supra note 72, at 291-92.

75. And therefore not necessarily coming up to the level of international law demands, cf. Mann, supra note 18, at 72.

76. See Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984), which made nothing of the fact that the relevant events and parties occurred outside the U.S.; see L. BRILMAYER ET AL., AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 290-92 (1986).

77. Asahi Metal Industry Co. v. Superior Court of California, 107 S.Ct. 1026 (1987). 4 justices held against 4 justices that as to foreign defendants it is not enough to show that goods were placed into the stream of commerce in a foreign country knowing that the goods would be sold to the American market. They required that it be shown that the foreign defendant intended to target the American market. The matter was dealt with as a question of constitutional
due process requirements, which might be different as concerns foreign defendants. For a different due process standard in international cases also Born, Reflections on Judicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 28 et seq., esp. 34 (1987): "... in international cases ... the Due Process Clause ... should require closer connections between the forum and the defendant than are necessary in domestic cases."

78. GROßFELD, supra note 50, at 140-41 ("beunruhigend 'zupackend'").

79. Esp. abroad. Most sharply see Mann, supra note 18, at 72, 95 (the U.S. "has gone astray").

80. See supra at note 72. Mere presence may be a sufficient minimum contact. Thus, the minimum contacts doctrine in the U.S. did not necessarily abolish transient jurisdiction, but it is argued that it should at least do so in international cases, see Born, supra note 77, at 35-36. One limit under International Shoe is that isolated contacts which are unrelated to the cause of action would not be sufficient, 326 U.S. at 319. See NANDA/PANSIUS, supra note 17, at 1-8 et seq..

81. Mann, supra note 18, at 70. Not too long ago the Court of Appeals appeared more restrictive and held that "there was no basis in law for the proposition that where a defendant was served with proceedings when on a short visit to England the presumption arose that the proceedings were oppressive", H.R.H. Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein, [1972] 2 Q.B. 283, 284. Within the realm of the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters this practice is abolished, see infra at note 90.

82. See Mann id.

84. de Vries/Lowenfeld, supra note 83, at 317.

85. See id. at 320-21; also STEINER/VAGTS, supra note 83, at 45.

86. Cf. sharply MANN, supra note 21, at 67: "it far exceeds the recognized limits of jurisdiction: it is impossible to think of a single argument in favour of the proposition that a State has jurisdiction over the whole world merely because it has entered into a contract with one of such State’s nationals." Already in 1887 it was criticized in France by CH. DAGUIN, DE L'AUTORITE ET DE L'EXECUTION DES JUGEMENTS ETRANGERS EN MATIÈRE CIVILE ET COMMERCIALE 117 (1887): "L`art. 14 ... est ... contraire aux vrais principes du droit des gens modernes, qui tendent à l'extension des bons rapports de peuple à peuple." (also cited in Nagel, supra note 71, at 420.)


88. E.g. J. SCHRODER, INTERNATIONALE ZUSTÄNDIGKEIT 375 (1971) ("eine der schlimmsten Fehlleistungen, die im zwischenstaatlichen Verkehr überhaupt vorstellbar sind."); Nagel, supra note 71, at 420 ("vom internationalen Gesichtspunkt ungünstigen deutschen Beispiel"); even the Federal Supreme Court called the provision "internationally undesirable" ("im internationalen Rechtsverkehr unerwünscht", BGHZ 52, 251, 256 (1969)); see also STEINER/VAGTS, supra note 83, at 48; Mann, supra note 18, at 69 labeled it "an exorbitant jurisdiction in the most literal sense of the term."

It should be noted, however, that recent decisions try to interprete § 23 restrictively. Thus, the Circuit Court of Appeals (Frankfurt) held that § 23 does not apply when enforcement measures as to the appertaining property are impossible, OLG Frankfurt, in 1982 Recht der internationalen Wirtschaft 439, 440.

89. See supra at notes 70, 71; and Nagel, supra note 71, a 421 ("Damit verstoßen solche Vorschriften aber noch nicht gegen eine allgemeine Regel des Völkerrechts. Es ist nicht bekannt geworden, daß Deutschland oder Frankreich hieraus wegen eines Völkerrechtsverstoßes belang wären.") Also Born, supra note 77, at 19: "... assertions of exorbitant jurisdiction by national courts undercut suggestions that
state practice clearly reflects a rule prohibiting such claims."


91. See supra II.A.1.; although the Lotus case only dealt with criminal jurisdiction, the notion of concurrent jurisdiction should a fortiori apply to civil jurisdiction.

92. See RESTATEMENT (REVISED), supra note 31, § 402 comment b; Bowett, supra note 34, at 565.

93. Id.; see also the example of Laker Airways v. Sabena, 731 F.2d 909, 922 (under international law, territoriality and nationality often give rise to concurrent jurisdiction), and at 926 (the sufficiency of jurisdictional contacts with both the U.S. and England results in concurrent jurisdiction to prescribe).

94. "any link", see supra at note 71.

95. Supra note 90.

96. All bases are founded on connecting factors of equal value, see Kohler, Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States, 34 Int'l & Comp. L.Q. 563, 573 (1985). The recognition of concurrent jurisdiction also implicitly follows from Art. 21 of the Convention dealing with the effects of foreign lis pendens (as to this institution see infra III.B.).

97. Meessen, supra note 13, at 801 as regards antitrust cases containing foreign elements. See similarly NEREP, supra note 15, at 481: "Jurisdiction today is certainly not exclusive, but very much concurrent." Also Bowett, supra note 34, at 565 ("situations of concurrent jurisdiction are normal enough"), Morrison, supra note 2, at 419 ("Clearly the international legal order creates a possibility of competing jurisdictions."), Nagel, supra note 71, at 410 ("Verschiedene Staaten können also durch ihre Prozessvorschriften für denselben Rechtsstreit unter denselben
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Personen ihre Gerichte für zuständig erklären.

98. Sir G. Fitzmaurice in the Case concerning Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 105. His complete relevant dictum also reflects a two-step approach (a) and (b):

"It is true that under present conditions international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters [namely bankruptcy jurisdiction] (and there are of course others - for instance in the fields of shipping, "anti-trust" legislation, etc.) ... It does however (a) postulate the existence of limits - though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by the courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."

99. NEREP, supra note 15, at 530; also at 562-63 ("Whether there is a basis for jurisdiction is really of no significance.... The only meaningful question, from the standpoint of international law, is ... whether or not jurisdiction is properly exercised.")

100. Cf. only NEREP, supra note 15, at 522 et seq. with ample references. According to the abuse of rights theory, states are generally free to assume jurisdiction in any case. Only the abuse of this right to exercise jurisdiction is prohibited. The abuse of rights theory appears to be much too permissive, since an abuse can be invoked in exceptional circumstances only (at 527.)

101. Cf. Mann, supra note 18, at 28-29 ("arbitrariness is essentially the same as unreasonableness"). See also text in supra note 51.

102. Supra note 31, § 402 v. § 403.

103. Supra II.A.1.; Riedweg, discussion, 51 ILA 304, 306 (1964) spoke of putting "the cart before the horse." Of
course, one should not overlook the interrelationship between bases and exercise of jurisdiction in so far as a firm practice of interest balancing (see infra II.E.2.) may lead to new bases of jurisdiction, see MEESSEN, supra note 45, at 232, who adheres to a two-step analysis also in Meessen, supra note 13, at 801. Also Bowett, supra note 34, at 572-73: "So the question really becomes one of deciding whether, assuming a valid basis for jurisdiction to exist, it would be reasonable or proper for one state to exercise its jurisdiction in a particular way."

104. Bowett, supra note 34, at 565.

105. Id.

106. Id.

107. As long as the international minimum standard of rights is not affected, which is not conceivable in normal proceedings.


109. Supra at note 29.

110. See supra at note 92-3.


112. Id. at 248.

113. Bowett, supra note 34, at 566; MEESSEN, supra note 45, at 200 et seq.

114. Bowett, supra note 34, at 568.

115. Id.; MEESSEN, supra note 45, at 403; cf. also NEREP, supra note 15, at 558, 559, 563.

117. See supra at notes 107, 108; also MEESSEN, supra note 45, at 207.

118. Supra note 31.

119. See RESTATEMENT (REVISED), supra note 31, § 403 reporters' note 6; and § 415 reporters' note 4 (the Timberlane and Mannington Mills [infra notes 122, 123] "approach and method were those indicated in § 403 (2)").

120. Bowett, supra note 34, at 569.

121. Supra note 36.


124. Id. at 1297-98. Cf. similarly Timberlane, supra note 122, at 614.

125. Cf. RESTATEMENT (REVISED), supra note 31, § 403 (2). See also supra note 118.

126. Timberlane, supra note 122, at 609 did even expressly reject any influence of international law.

127. Id. at 612; Mannington Mills, supra note 123, at 1296.

128. Mann, supra note 18, at 31.

129. Id. at 87. The opposite view is well expressed by SIR F. PIGOTT, FOREIGN JUDGMENTS AND JURISDICTION, Part I 412 (1908): "the rules of comity are what the individual
countries choose to make them," cited in Nagel, supra note 71, at 414.

130. RESTATEMENT (REVISED), supra note 31, § 403 comment a.

131. Morrison supra note 2, at 423, 429. See also the express intent of the reporters in RESTATEMENT (REVISED), supra note 31, § 403 reporters' note 10: "In contrast to prior § 40, reasonableness in all the relevant circumstances is understood here not as a basis for requiring that states consider moderating their enforcement of laws which they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state has jurisdiction to prescribe."

Some criticize that the new approach would create "regulatory havens" for multinational corporations because a "negative competence conflict" becomes possible (Morrison id. at 431 et seq.): The judicial determination in country A that A has no jurisdiction, would not assure that a court in country B would assume jurisdiction (Morrison id. at 431). Therefore, some activity might remain unregulated, although country A only declined to exercise jurisdiction because it thought that country B would assume jurisdiction. However, the phenomenon of "regulatory havens" should not give rise to criticisms, since the non-exercise of (regulatory) jurisdiction may in itself be seen as a sovereign decision how to exercise jurisdiction, which has to be respected (see the Declaration on Principles, etc., supra at note 111, and Bowett, supra note 34, at 568. Thus, the statement that an international "laissez-faire" in cases of a negative competence conflict is "ill-suited to modern conditions"(Morrison, supra note 2, at 417), neglects the basic notions of sovereign equality and non-interference).

132. Supra note 31.


134. RESTATEMENT (REVISED), supra note 31, § 403 (3) (emphasis added).

135. Mann, supra note 18, at 31.

136. Id. at 89: "asks with which country it has the closest contact."
137. See In re Uranium Antitrust Litigation, 480 F.Supp. 1138, 1148 (N.D. Ill. 1979): "Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy ... It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions." Also Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948 et seq., esp. 950 (1984) referring to the Uranium case.

138. Supra note 124.

139. See supra note 137.

140. Bowett, supra note 34, at 570.

141. Compare No.s 4 and 7 of the Mannington list, supra at note 124.

142. See supra at notes 107, 108. One cannot assume that the interests of a state's national reflect also the interests of that state. Of course, private interests may be taken into account supplementarily, but this is not required by international law, and they can never outweigh the result of a state interest analysis.

143. Meessen, supra note 13, at 802, with reference to the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, as an example that under international law not every aspect of a case is relevant.

144. Cf. supra at notes 18, 111.

145. See supra at notes 116-117.


147. OECD, Comm. on Int'l Investment and Multinat'l Enterprises, The 1984 Review of 1976 OECD Declarations and

148. Similarly Morrison, supra note 2, who adheres to the old Restatement (Second) standard. See also Meessen, supra note 13, at 803 ("state practice suggests that there is an international law obligation to pay respect to foreign state interests," the degree or practical consequences of paying respect are rather open, though; in the field of antitrust law he proposes a balancing test, at 805.)

149. See supra at note 70.

150. Supra II.C.. The present stage in this field is quite well expressed by Born, supra note 77, at 19-20: "The proposition that international law presently imposes a 'reasonableness' requirement on the exercise of judicial jurisdiction is arguably somewhat overstated. ... developments testify to an emerging principle of international law requiring assertions of judicial jurisdiction to be reasonable." His "reasonableness" means our "paying respect to foreign states interests", and his statement on "judicial jurisdiction" arguably applies to our concept of purely civil jurisdiction as well, although he probably only meant to cover personal or "curial" jurisdiction (the distinctive treatment of which does not really make sense from an international law point of view, cf. supra at notes 59-61).

151. Bowett, supra note 34, at 574.


154. Id. at 508-09. Before this Supreme Court decision the doctrine had already been applied by some state courts, see e.g. id. at 509 as to New York law. As of 1971, twenty-two states had expressly adopted the doctrine of forum non conveniens, Berger, Zuständigkeit und Forum Non Conveniens im Amerikanischen Zivilprozess, 41 RabelsZ 39, 68 (1977).
155. See Note, supra note 152, at 138 with references to cases in note 152.


157. Id. at 255-56, 261 ("The District Court properly decided that the presumption in favor of the plaintiff's forum choice applied with less than maximum force because the real parties in interest are foreign.") This has lead some commentators to say that the "presence of a few American claimants may well tip the balance in favor of retention of jurisdiction"(Tompkins, The Doctrine of Forum Non Conveniens in the Litigation of Foreign Aviation Tort Claims in the United States, 2 Notre Dame Int'l & Comp. L.J. 19, 56 (1984)). Others have more directly said that U.S courts should "overcome their extreme reluctance to apply the doctrine of forum non conveniens when the plaintiff is a forum resident"(R.J. WEINTRAUB, COMMENTARIES ON THE CONFLICT OF LAWS 150 § 4.10 (3rd ed. 1986)), or spoke of "discrimination against foreign citizens"(Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L.R. 781, 836 (1985)).

158. Stein, supra note 157, at 842. The international concerns are well expressed in Harrison v. Wyeth Laboratories, 510 F.Supp. 1, 4 (E.D. Pa. 1980), aff'd mem., 676 F.2d 685 (3d Cir. 1982): ". . . these cases would be more conveniently and appropriately heard in the courts of the United Kingdom. . . . Each country has its own legitimate concerns . . . The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country." That the applicable law would anyway be the law of the U.K.(id. at 5) is not necessarily decisive since "[t]he question is not simply what law to apply, but also who ought properly to apply it"(Stein, supra note 157, at 842.) See similarly In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F.Supp. 842, 865 (S.D.N.Y. 1986): "This Court . . . thinks that it should avoid imposing characteristically American values on Indian concerns. The Indian interest in creating standards of care . . . is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology," or at 867: ". . .to retain the litigation in this forum . . . would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation." It is to be hoped that these considerations would also apply as to an American plaintiff, and not only in
favors of an American defendant. As to some doubts about that see supra note 157.

159. 454 U.S. 235, 254 ("Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight...").

160. See supra note 157.

161. WEINTRAUB, supra note 157, at 214 § 4.33.

162. at note 159.

163. Supra note 158.

164. In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2nd Cir. 1987), US cert. den. in 108 S.Ct. 199. The Court of Appeals also upheld the condition that Union Carbide waive its defenses based on statute of limitations.


167. See only WEINTRAUB, supra note 157, at 215 § 4.33.

168. Supra note 90.

169. Kohler, supra note 96, at 571.

170. See Art. 4 (1) of the Convention, excepting certain exclusive jurisdictions pursuant to Art. 16 of the Convention.


174. Supra note 171.

175. Id. at 812.

176. See id. at 811 ("That would be to admit by the back door a rule that your Lordships consider cannot be welcomed at the front.")

177. [1984] 1 A.C. 398 (H.L.(E.).)

178. Id. at 411.

179. Carter, Jurisdiction to stay proceedings, 55 Brit. Y.B. Int'l L. 351, 355 (1984). See also Lord Reid in The Atlantic Star, supra note 173, at 453 criticizing the "rather insular doctrine" of Lord Denning: "... that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races."


182. Spiliada Maritime Corp. v. Cansulex Ltd., [1986] 3 W.L.R. 972 (H.L.(E.)).

183. Id. at 984.

184. Id. at 985.

185. Id.
186. Supra note 156.

187. Spiliada, supra note 182, at 991.


189. See e.g. OLG Frankfurt, judgment of November 15, 1982, in 1983 IPRax 294.

190. Federal Supreme Court.


192. Id.

193. See also Jayme, Forum non conveniens und anwendbares Recht, 1984 IPRax 303.

194. Kennelly, Choice of Laws, Jurisdiction and Forum Non Conveniens, 1982 Tr. Law. Guide 260, e.g. 271-72: "One thing is clear, that the laws pertaining to in personam jurisdiction, forum non conveniens and choice of laws, are unclear." Also Currie, Change of Venue and the Conflict of Laws, 22 U. Chi. L. Rev. 405, 416 (1955)("notoriously complex and uncertain").

195. Stein, supra note 157, at 843, 846 ("transformation ... into a doctrine of forum conveniens").

196. Supra note 122.

198. WEINTRAUB, supra note 157, at 213 § 4.33.

199. As WEINTRAUB, id. puts it as concerns constitutional law, "forum non conveniens appears to be necessary to guide the exercise of jurisdictional power when what is constitutional is not desirable."


201. As to such concerns see supra note 157.

202. Translated from Latin into English this is "pendent litigation."


204. Conrad v. Buck, 21 W.Va. 396 (1883): "in no case will the pendency of a suit in a foreign court ... bar the right of the plaintiff ... to prosecute another suit in this State for the same cause of action .... Nor will a stay be allowed for such cause."

205. Laker v. Sabena, 731 F.2d 909, 926-27 (1984), making the reservation that proceedings in rem are usually restricted to one forum (id. in note 48). Another caveat is that this statement has been made in the context of antisuit injunctions, and there is quite a difference between restraining the own proceeding and restraining foreign proceedings, see infra IV.A..

206. See BRILMAYER, supra note 76, at 310.


209. So WEINTRAUB, supra note 157, at 228 § 4.38.
210. See Annotation, Stay of civil proceedings pending determination of action in another state or country, 19 ALR2d 301, 303.

211. See BLACK'S LAW DICTIONARY: the action is dead and cannot be revived except by commencing a new action.


213. See Annotation, supra note 210, at 306-07.

214. Id. at 306.

215. Supra at note 204.


217. Id. at 283-84. The decision in Abkco Ind., Inc. v. Lennon, 377 N.Y.S. 362, 368 (1975) mixed up the two concepts in an international setting pending an action in England.

218. See supra note 204. As to more decisions, see Annotation, supra note 210, at 309 et seq.


221. Rocha Toussier y Asociados, S.C. v. Rivero, 457 N.Y.S.2d 798, 800 (A.D. 1983)("We find no similarity that would warrant a dismissal or a stay of this action.")

222. 492 F.Supp. 885 (N.D. Tex. 1980). As to the systematic treatment of the concept of stay in cases of a foreign appeal pending within the lis pendens theories see infra chapter III.C.1.b. at note 289.
223. Id. at 895.

224. See id. at 904-05.

225. Siehr, supra note 5, at 124 simply assumes that U.S. law recognizes lis pendens, saying that the plaintiff in the English Castanho case (supra note 3) gave a notice of discontinuance in England "so as to avoid the defense of lis pendens in the American proceeding" (um für den amerikanischen Prozess den Einwand der Rechtshängigkeit derselben Sache bei einem anderen Gericht zu beseitigen) which he had subsequently started to recover higher damages.

226. Supra note 90. For an example of its application see [1984] E.C.R. 2397, a summary of which can be found in European Court of Justice, Digest of case-law relating to the European Communities, D Series, I-21 - A1.

227. See Kohler, supra note 96, at 573.

228. See e.g. Ditta Armet di Giovanni Ferronato v. Barth & Pohl KG Elektrowerke, in Digest, D Series, supra note 226, case I-21 - B1.

229. See Palsson, supra note 208, at 70 with references.

230. See infra chapter III.C.1.e.

231. Palsson, supra note 208, at 71.

232. Cf. Palsson, supra note 208, at 72 et seq., who refers to Holleux, 1962 Recueil Dalloz 719 (the traditional view is "absolument deraisonnable et contraire a un juste esprit de collaboration juridictionelle de pretendre ignorer uniformement toute instance estrangere"), a note to the decision of the Cour de cassation of May 5, 1962 which indicated a possible turn of the trend.

233. Cf. Palsson, supra note 208, at 73; see also infra at note 301.
234. See H. BATIFFOL/ P. LAGARDE, 2 DROIT INTERNATIONAL PRIVE 403 et seq. § 676 (1976). A search for newer decisions on litispendence in the international context did not reveal any change as to the position given by Batiffol/Legarde in 1976.

235. Repeatedly decided by the Federal Supreme Court, see e.g. BGH, judgment of March 18, 1987, in 1987 Neue Juristische Wochenschrift 3083 with references to older cases. Cf. also Dickson, The Reform of Private International Law in the Federal Republic of Germany, 34 Int'l & Comp. L.Q. 231, 244 (1985) with references; and the standard treatise L. ROSENBERG/K.H. SCHWAB, ZIVILPROZESSRECHT 578 et seq. (13th ed. 1981). As to the conditions of recognition see infra chapter III.C.1.f.

236. BGH and ROSENBERG/SCHWAB, supra note 235.


238. Compare supra at note 213.

239. See supra note 124.

240. See supra at note 124, factor 4 of the quote.

241. Cf. supra at notes 171-185, as to the development of the doctrine to stay "vexatious" and "oppressive" proceedings to the doctrine of forum non conveniens. Lis alibi pendens was already a factor under the old doctrine, see Palsson, supra note 208, at 75 with references.

242. Carter, Jurisdiction to stay proceedings, 55 Brit. Y.B. Int'l L. 351, 354 (1984). This view can be based on the following statement of Lord Diplock in The Atlantic Star, supra note 173, at 411-12: "Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of
legal proceedings to be pursued concurrently in two dif-
ferent countries ... can only be justified if the would-be
plaintiff can establish objectively by cogent evidence that
there is some personal or judicial advantage that would be
available to him only in the English action that is of such
importance that it would cause injustice to him to deprive
him of it."

243. See supra note 90, and at notes 169-70.

244. Cf. Palsson, supra note 208, at 87, 98.

245. See infra chapter III.C.2. as to the "second lis pen-
dens theory."

246. As to that problem see in detail Palsson, supra note
208, at 89 et seq.. The major factor to be looked at should
be the jurisdiction of the foreign court as is required to
ensure recognition.

247. Art. 21 (2), supra note 90.


249. We are here only concerned with this effect of a
foreign judgment, not with the problem or procedure of en-
forcing the foreign judgment. As to this distinction between
"recognition" and "enforcement" see already STORY, supra
note 7, at § 598, and von Mehren, supra note 9, at 56.

250. Akehurst, supra note 65, at 238 ("The practice ... sug-
gests that the recognition and enforcement of foreign judg-
ments are marked by so many inconsistencies that it is vir-
tually impossible to argue that recognition and enforcement
are required by public international law."); STORY, supra
note 7, at § 540 ("Whatever authority should be given to
such judgments, must be purely ex comitate."); Sangiovanni
Hernandez v. Domenicana de Aviacion, 556 F.2d 611, 614 (1st
Cir. 1977) ("Unless bound by treaties to the contrary, the
courts of no nation are obliged to recognize and respect the
judgments of the courts of another nation."); Smit, Inter-
national Res Judicata and Collateral Estoppel in the United
States, 9 U.C.L.A. L. Rev. 44, 53 (1962) (there is no public
international law rule demanding recognition.)
251. See supra chapter II.

252. Lawlor v. National Screen Service, 349 U.S. 322, 326, distinguishing it from the doctrine of collateral estoppel which "precludes relitigation of issues actually litigated and determined in the prior suit."


254. NANDA/PANSIUS, supra note 17, at 11-2; e.g Cooper v. Newell, 173 U.S. 555, 567-68 (1899).


256. Baldwin v. Iowa State Travelling Men's Ass'n, 283 U.S. 522, 525 (1931)(in a situation between two federal courts where the Full Faith and Credit Clause does not apply!) See also Akehurst, supra note 65, at 236: "interest rei publicae ut sit finis litium."


258. If more as to the special aspect of collateral estoppel, Hopkins v. Lee, 19 U.S. (6 Wheat.) 109, 113-14 (1821): "It is not denied as a general rule, that a fact which has been directly tried, and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. ... The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation. It is, therefore, not confined, in England or in this country, to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries."

259. 159 U.S. 113, 229 (1895).

260. Such as an "ordering principle" ordering the relations between nations and between individuals, Peterson, Res

261. Reese, supra note 257, at 785.

262. Hilton v. Guyot, 159 U.S., at 202-03: "the merits of the case should not ... be tried afresh ..."

263. Supra at note 252.

264. See Peterson, supra note 260, at 311, NANDA/PANSIUS, supra note 17, at 11-5, both with further references. The Supreme Court in Griffin v. Griffin, 327 U.S. 220, 227 (1946) has stated in a dictum that recognition shall not lie as "to a judgment elsewhere acquired without due process." As to U.S. law on jurisdiction see supra II.C.1.

265. Hilton, supra note 262, at 202; NANDA/PANSIUS, supra note 17, at 11-5.

266. Hilton, supra note 262, at 202; NANDA/PANSIUS, supra note 17, at 11-7; Reese, supra note 257, at 793-94.

267. Peterson, supra note 260, at 317 with references; also Reese, supra note 257, at 794.


269. E.g. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F.Supp. 161, 168 (E.D. Pa. 1970): "It is a well-established rule of law that a court will not enforce a foreign judgment, be it of a sister state or foreign nation, if to do so would violate the forum's public policy." Adopted by Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F.2d 611, 614 (1st Cir. 1977).


272. Reese, supra note 257, at 798.

273. Supra note 262, at 210, 226-28. The holding in Hilton was strictly limited to in personam cases and to cases where Americans are sued in the foreign court, see Reese, supra note 257, at 797. At least that is the way Hilton was interpreted by later decisions, e.g., Bata v. Bata, 163 A.2d 493, 505 (S.Ct. Del. 1960).

274. E.g. Nicol v. Tanner, 256 N.W.2d 796, 797-801 (S.Ct. Minn. 1976) (with a most thorough examination of Hilton and the policies underlying a reciprocity doctrine, explicitly rejecting the Hilton reciprocity doctrine); also New York courts have explicitly rejected reciprocity, see Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121, 122-23 (N.Y. 1926), which is still followed today, see e.g. Fairchild, Arabatzis & Smith, Inc. v. Prometco Co., 470 F.Supp. 610, 615 (S.D.N.Y. 1979); cf. also Bata v. Bata, supra note 273.


277. Nicol v. Tanner, 256 N.W.2d 796, 800 (S.Ct.Minn. 1976). See also Reese, supra note 257, at 793 ("... the creditor is not to blame ...")

278. Nicol v. Tanner, id. at 800-01. Another argument is that it might be "impossible to break a chain both believe should be broken," see A.F. Lowenfeld, 1 INTERNATIONAL PRIVATE TRADE 94 (2d ed. 1981).

279. RESTATEMENT, SECOND, CONFLICT OF LAWS § 98 (1986 Revisions).
280. Id. Comment f.

281. Peterson, supra note 260, at 299.

282. For a list of the jurisdictions having adopted the Uniform Act see 13 U.L.A. 261 (master ed. 1986); there have been no further adherences to the Act as of the 1988 Supplement. The text of the Act starts at 13 U.L.A. 263.


284. See §§ 3 and 4, 13 U.L.A. at 265, 268 respectively. It should be noted, however, that the non-uniform enactment in Georgia requires reciprocity pursuant to its § 4 (10) version of the Act, cf. 13 U.L.A. at 269.

285. See von Mehren, supra note 9, at 57.

286. Supra note 282 at § 2.

287. § 6 of the Uniform Act, supra note 282; also Hunt v. BP Exploration Co., supra note 222.

288. See supra III.B.2.a.

289. See supra at note 222. The same systematic approach has been employed in Pesquera del Pacifico, S. de R.L. v. Superior Court, 201 P.2d 553, 555 (C.A. Cal. 1949).

290. Similarly RESTATEMENT, SECOND, CONFLICT OF LAWS § 98 Comment b.. The United States is not party to any bilateral or multilateral conventions on the recognition of foreign country judgments, see von Mehren, supra note 9, at 57.

291. Art. 26 (1), supra note 90; Kohler, supra note 96, at 575.

292. See Kohler, supra note 96, at 575; also Woodward, Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European

293. Similarly Kohler, supra note 96, at 578.

294. See Kohler, supra note 96, at 580 with references.


296. GRAVESON, supra note 7, at 113.

297. See id. at 113-114; NANDA/PANSIUS, supra note 17, at 12-19 et seq.; Woodward, supra note 212, at 306 et seq., all with references.

298. See NANDA/PANSIUS, supra note 17, at 12-20.

299. See STORY, supra note 7, § 615.

300. Id. at § 617.


302. See also the Bachir decision, 1968 Dalloz Jurisprudence 95, note Mezger.

303. The details are somewhat disputed. See G.J. ROMAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN VARIOUS FOREIGN COUNTRIES 6-9 (publ. in 1984 by the Library of Congress Law Library); and NANDA/PANSIUS, supra note 17, at 12-12.

304. See ROMAN, supra note 303, at 6 and 9-10.

305. See NANDA/PANSIUS, supra note 17, at 12-12-13; ROMAN, supra note 303, at 10-11.
306. See ROMAN, supra note 303, at 11.

307. See e.g. Martiny, Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, 35 Am. J. Comp. L. 721, 749 (reciprocity is "only an obstacle to international cooperation and a burden on the parties") with references. Various references can also be found at ROSENBERG/SCHWAB, supra note 235, at 956-57.

308. See BGH judgment of Nov. 15, 1967, BGHZ 49, 50.

309. Martiny, supra note 307, at 751.

310. Von Mehren, supra note 9, at 60; BGH judgment of 1969, BGHZ 52, 251, 255. See as to further details of relaxations Martiny, supra note 307, at 750-51.

311. See Martiny, supra note 307, at 751 in note 163.

312. For a good brief overview on the elements of § 328 (1) ZPO in English, see NANDA/PANSIUS, supra note 17, at 12-3 et seq.

313. Palsson, supra note 208, at 62. It presupposes that foreign lis pendens (see supra III.B.) has been disregarded and second proceedings have been allowed.

314. Art. 797 (1) No.6 codice di procedura civile provides for recognition under the condition "che non e pendente davanti a un giudice italiano un giudizio per il medesimo oggetto e tra le stesse parti, istituito prima del passaggio in giudicato della sentenza straniera."

315. See BATIFFOL/LAGARDE, supra note 234, at 497 § 727 with ample references to case law and writers in note 38. In this situation French courts order a stay of "exequatur" (the recognition and enforcement proceedings) in order to avoid any inconsistent decisions. It has to be noted, however, that there are only statements as to the situation before the "revision au fond" was abolished (as to the latter see supra at note 301).

316. Palsson, supra note 208, at 81.
317. See id.; and ROMAN, supra note 303, at 27.

318. See supra III.B.

319. So a decision of the Bavarian Supreme Court, OLG München, judgment of April 2, 1964, in 1964 Neue Juristische Wochenschrift 979, 980 (the nonrecognition of the domestic lis pendens by the foreign forum violates domestic public policy).

320. See Palsson, supra note 208, at 82 with references.

321. See Palsson, supra note 208, at 107.

322. Art. 5 of the Convention provides in part:

Recognition and enforcement of a decision may nevertheless be refused ...
(3) if proceedings between the same parties, based on the same facts and having the same purpose-
(a) are pending before a court of the state addressed and those proceedings were the first to be instituted ...(emphasis added).

For the English text of the Convention, see 15 Am. J. Comp. L. 362 (1966/67).

The 1968 European Convention (supra note 90) does not expressly deal with this problem. It would appear that the strict rule of lis pendens in Art. 21 of the Convention demands the same approach that the action first initiated should prevail.

323. Cf. Illinois Life Ins. Co. v. Young, 235 P. 104, 110 (S.Ct.Kan. 1925), stating that the commencement of another action in another jurisdiction over the same matter, which other action is still pending and undetermined, does not affect the judgment of the court of prior jurisdiction: "That [second action] is of no present consequence...although the present judgment may be effectively pleaded as a bar to that action..." The priority rule is also suggested by the use of language that the judgment of a "prior foreign action" might bar "subsequent" domestic litigation; see An-notation, 13 ALR Fed 208, 235. However, the author could not find a case denying res judicata effect because the domestic proceedings were first initiated.

325. Juenger, supra note 324, at 25.


327. See BATIFFOL/LAGARDE, supra note 234, at 497 § 727: "est contraire à l'ordre public tout jugement étranger inconciliable avec une jugement français précédemment rendu."

328. Revision 1986.


330. Art. 797 (1) No.5 cod.proc.civ. grants recognition of a foreign judgment provided "che essa non e contraria ad altra sentenza pronunciata da una giudice italiano" (without referring to the time the respective judgments were rendered).


332. Supra note 90.

333. Because of Art. 21, which demands recognition of foreign lis pendens (supra III.B.2.b.), Art. 27 (3) should be of limited practical significance only, see Lane, supra note 295, at 635.


337. Supra III.C.3.. See also Bata v. Bata, 163 A.2d 493, 506. On a similar line a recent Supreme Court decision, Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525 (1986, unanimous court): "Even if the state court mistakenly rejected respondent's claim of res judicata, ... [the
federal court should] give the state court's resolution of
the res judicata issue the same preclusive effect it would
have in another court of the same state."

338. See BRILMAYER, supra note 76, at 180.

339. See Juenger, supra note 324, at 25; RESTATEMENT
(SECOND) ON THE CONFLICTS OF LAW § 114 comment d. (1971).
The UFMJRA (supra note 282) is silent, its § 4 (b)(4)
provides for discretionary nonrecognition.

340. Besides the following cases in the text, cf. recently
1986): "When the determination [as to the res judicata
defense of lacking jurisdiction] is by a court of a foreign
country, that judgment is still recognized. ... The 1983
British Columbia decision held that the 1981 Minnesota judg-
ment was not subject to attack based on lack of personal
jurisdiction. This ... was fully litigated. ... He cannot
now relitigate this issue."


342. 111 N.Y.S.2d 752 (1st Dep't 1952): "... as the Philip-
pine judgment is a subsequent judgment, we think that defen-
dant is entitled to assert it as a defense to the present
action."

343. See Bata v. Bata, 163 A.2d at 506; also NANDA/PANSIUS,
supra note 17, at 11-15 in note 88.


345. Supra note 90.

346. Cf. Lane, supra note 295, at 636 with reference to
Hartley.

347. See KEGEL, INTERNATIONALES PRIVATRECHT 654 (1986), who
proclaims the last-in-time rule because the last determi-
ation is the best and "the last order is holy."
348. See further Martiny, supra note 307, at 743.

349. Juenger, supra note 324, at 25.


351. See infra IV.B. as to anti-enforcement injunctions.

352. Juenger, supra note 324, at 39. Probably the contrary is the case, because a hostile recognition practice might put foreigners on guard against domestic debtors, ruin his credit, or provoke retaliatory measures by foreign courts, id.


354. LOWENFELD, supra note 278, at 94.


356. MANN, supra note 21, at 63.

357. See South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" NV, [1987] A.C. 24, 40; and Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C.Cir. 1984), expressly using the term "antisuit injunction".

358. As to the whole history, see SIR W. HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 459-65 (7th ed. 1959).


360. Id. at 611-12.

362. See supra chapter III.A.2.

363. Castanho, supra note 3, at 574, referring to The Atlantic Star and MacShannon.


365. So the Privy Concil, infra note 370, at 73.

366. See Hartley, supra note 364, at 492, and Spiliada, supra note 182.


368. Supra note 357.

369. Id. at 40.


371. Although Privy Council decisions are only persuasive authority in England, the S.N.I.A.S. decision can be taken as the statement of English law on the subject. This is suggested by Lord Goff himself stating that in this area "no material distinction is to be drawn between the law of Brunei and the law of England" (id. at 70), and by "the air of finality about the judgment," so Briggs, Restraint of Foreign Proceedings, 1987 Lloyd's Marit. & Comm. L.Q. 391.


374. Except where the absence of a corresponding cause of action is not reflecting regulatory policy, but is due to oversight or lack of concern. Cf. Note, supra note 367, at 1061 at note 123.

376. See Briggs, supra note 371, at 395.

377. See infra chapter V.

378. [1985] A.C. at 81. In the case at hand, the House of Lords could not find a right not to be sued abroad, wherefore it discharged the antisuit injunctions issued by the Court of Appeals.


380. Hartley, supra note 364, at 496.


382. For a detailed outline of the Laker controversy, see e.g. Hartley, supra note 364, at 587-89; and Schröder, The Right not to be Sued Abroad, in FESTSCHRIFT FÜR GERHARD KEGEL (75. GEBURTSTAG) 523, 524-28 (ed. H.J. Musielak/K. Schurig 1987).

383. British Airways Board v. Laker Airways, Ltd., [1983] 3 W.L.R. 545 (C.A.). The court acted in large part in response to British Government orders under the Protection of Trading Interests Act, which prohibited the production of certain documents and information in the U.S. action, making this action untriable in the British court's view. The simultaneously instituted negative declaratory action (that Laker had no antitrust claims against defendants) was finally disposed of by declining jurisdiction to apply U.S. antitrust laws.


385. Supra notes 383 and 375. The House of Lord did not find Laker's conduct to be unconscionable, there were sufficient contacts to the U.S. market. See [1985] A.C. at 86-87, Schröder, supra note 382, at 542. The case lay different as
concerned Laker's suit against the British bank Midland, whose involvement at issue was restricted to British territory, see Midland Bank v. Laker Airways Ltd., [1986] Q.B. 689 (C.A.).

386. Laker 731 F.2d at 927.

387. Please note the similarity to the English approach in the Privy Council decision, supra note 370.

388. 731 F.2d at 928, rejecting more "liberal" case law (cited in footnote 55).

389. Id. at 929.

390. Id. at 931. In the case at hand, "the district court's injunction properly prevented appellants from attempting to escape application of the antitrust laws to their conduct of business here in the United States," id. at 932. Hartley, supra note 364, at 496, identifies a third case, namely where the forum court gives judgment before the foreign action is commenced, but this does not seem quite clear, see 731 F.2d at 928.

391. Note, supra note 367, at 1053.

392. E.g. Stein Associates v. Heat and Control, Inc., 748 F.2d 653, 658 (Fed.Cir. 1984) (injunction only if "resolution of the domestic action will dispose of the foreign action"); for further cases see Hartley, supra note 364, at 496 in note 43.

393. See 731 F.2d at 915, 916.

394. Id. at 957.

395. Id. at 958.

396. 731 F.2d at 930 (emphasis in the original).
397. Gannon v. Payne, 706 S.W.2d 304, 308 (S.Ct.Tex. 1986). The court evidently recalled the Laker litigation when observing that comity required restraint, because one of the courts might respond to the issuance of an antisuit injunction by doing the same, thereby deadlocking the litigation, see Leigh, Antisuit injunction-parallel litigation in U.S. and Canadian courts-comity, 80 Am. J. Int'l L. 967, 968 (1986).

See also the restrictive view in Kempe v. Ocean Drilling & Exploration Co., 1987 U.S.Dist. Lexis 3994 (E.D.Louis., judgment of May 14, 1987) ("Such an ephemeral threatened injury could hardly outweigh the harm ... to the comity which exists among courts of different nations which would result from interference with the jurisdiction of a foreign court"). Cf. also Black & Decker Corp. v. Sanyei America Corp., 650 F.Supp. 406 (N.D.Ill. 1986) (at 408 referring to the Laker view and the "more casual view of comity" supposedly followed by the 7th circuit).

398. See e.g. Lord Portarlington, supra note 359, at 611; Cole v. Cunningham, 133 U.S. 107, 121 (1890) (injunction "is not directed to the courts of the other State, but simply to the parties litigant"); Laker, 731 F.2d at 927.

399. That the latter would be clearly contrary to public international law is beyond question. One state cannot order another state (or its organs, such as courts) what to do. "Par inter pares non habet jurisdictionem."

400. Hartley, supra note 364, at 506.

401. Laker, 731 F.2d at 927. See also the quote of Lord Brandon, supra at note 369.

402. RESTATEMENT (REVISED) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 Reporters' note 7 (1986).

403. See id.; Hartley, supra note 364, at 509; Schröder, supra note 382, at 544; Note, supra note 367, at 1068.


405. See Hartley, supra note 364, at 507 at note 91.
406. Id. at 507.

407. The principle of ending disputes does not go as far as to allow a court to "terminate" the proceedings in a foreign court.

408. See supra chapter III.C.; Note, supra note 367, at 1068.

409. See e.g. 42 Am.Jur.2d § 227 for the American rule that "[n]either the full faith and credit clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction against the prosecution of a local action." This applies a fortiori as to foreign country injunctions, as was rightly stated by Judge Wilkey, 731 F.2d at 934, and 939. Generally see Schröder, supra note 382, at 547; too restrictive, because implicitly denying that the injunction could be recognized, Siehr, supra note 5, at 137 ("Sicher ist, daß es im Ausland keine Wirkungen entfaltet und lediglich im Inland die betroffene Partei sich einer Ordnungsstrafe aussetzt").

410. Note, supra note 367, at 1069. Cf. also HENKIN/PUGH/ SCHACHTER/SMIT, supra note 23, at 880 commenting on this "game of judicial daring": "the actual confrontation does not occur until the court that issued the injunction imposes some sanctions for its disobediance. Thus far, no court has taken this ultimate step. It is generally recognized that this type of confrontation is to be avoided as incompatible with proper relations between members of the world community."

411. See infra chapter V. as to forum selection clauses and suits for damages.

412. See Note, supra note 367, at 1069.

413. Cf. Schröder, supra note 382, at 544.

414. See supra III.B.2.b. and Art. 21 of the Convention.


417. Note, supra note 367, at 1070.

418. This goes also back to the conflict between Chancery and common law; see HOLDSWORTH, supra note 358, at 459: "...restraining the parties from proceeding at law, or, if they had already done so, from enforcing judgment."


420. Id. at 152-53.

421. See id. at 152.

422. Atkin L.J. id. at 155.

423. J. N. POMEROY, 4 A TREATISE ON EQUITY JURISPRUDENCE § 1364 (5th ed. 1941). See also the RESTATEMENT (SECOND) ON THE CONFLICT OF LAWS § 113, which denies enforcement of a judgment if the holder of the judgment has been permanently enjoined from enforcing the judgment.

424. See RESTATEMENT (SECOND), supra note 423, § 113 comment b. As to the last-in-time rule see supra chapter III.C.3.

425. See supra at notes 375 et seq.


428. See Siehr, supra note 5, at 137. On the other hand, Schröder, supra note 382, at 539 et seq. seems to take this as an established institution, although he does not refer to any other case.
429. See supra III.B. For a U.S. case in an interstate setting see Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952) (patent owner started infringement suit in Illinois; Delaware court stay of subsequent declaratory judgment suit claiming that the patents were invalid was no abuse of discretion); and for a federal - state court setting see Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942) (at 495: "...claim[ed] that since another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated, a declaratory judgment in the federal court was unwarranted. The correctness of this claim was certainly relevant in determining whether the District Court should assume jurisdiction and proceed to determine the rights of the parties. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."
See generally Siehr, supra note 5, at 137-38 (with reference to Italian cases).

430. See supra chapter III.C.

431. BRILMAYER, supra note 76, at 289, referring to states of a federal entity, esp. the U.S..


433. Siehr, supra note 5, at 138 ("préventives forum shopping").

434. In the context of arbitration this question does normally not arise.


438. WEINTRAUB, supra note 157, at 223 § 4.35.


440. Id. at 13-14.

441. Id. at 9.

442. Id. at 10.

443. Id. at 12.

444. Id. at 15.


446. Cf. Herold/Knoll, supra note 436, at 948.

447. RESTATEMENT (REVISED) ON THE FOREIGN RELATIONS LAW, supra note 31, at § 421, Reporters' note 5. For a long list of cases declining jurisdiction in obedience to forum-selection clauses, see WEINTRAUB, supra note 157, at 223 in note 29. In situations where the chosen forum had undergone a revolution or other major political change courts have refused to enforce choice of forum clauses on grounds that no adequate remedy would be available (Itek Corp. v. First National Bank, 511 F.Supp. 1341 (D.Mass. 1981), vacated on other grounds, 704 F.2d 1 (1st Cir. 1983) as to an Iranian forum), or that it would be futile to bring a case in the chosen (Iranian) forum (American Bell International v. Islamic Republic of Iran, 474 F.Supp. 420 (S.D.N.Y. 1979)), or "because of changed circumstances in the forum state"
Federal courts have extended the Zapata ruling to non-admiralty and domestic cases, see NANDA/PANSIUS, supra note 17, at 7-6 with references to case law. Nevertheless, some courts still adhere to the traditional view (probably because they perceive the Zapata decision as being limited to federal district courts sitting in admiralty, and to international situations), e.g. Redwing Carriers, Inc. v. Foster, 382 So.2d 554, 556 (Ala. 1980) ("We consider contract provisions which attempt to limit the jurisdiction of the courts of this state to be invalid and unenforceable as being contrary to public policy"; however, this was an interstate not an international situation), or, employing an interesting approach, Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1980) (derogation clause does not deprive Iowa court of jurisdiction but is only one factor to be considered in a forum non conveniens decision).

448. In connection with General Obligations Law § 5-1402.

449. See Herold/Knoll, supra note 436, at 950 note 28.

450. Supra note 90.

451. Subject to certain formal limitations: generally the agreement must be in writing or confirmed in writing.

452. Id., Art. 17 (1).


454. See the companion case to the U.S. Zapata case (supra note 439), Unterweser Reederei GmbH v. Zapata Off-Shore Company, [1968] 2 Lloyd's L. Rep. 158, 163 (Ct. App.): "... in the absence of strong reason to the contrary ... [the court's discretion] will be exercised in favour of holding parties to their bargain."

456. See supra III.A.4.

457. "because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial," The Eleftheria, [1970] P. 94, 100; as to a brief survey of other factors see id., NANDA/PANSIUS, supra note 17, at 7-19-20 with references, and Pryles, supra note 436, at 558 et seq.. See also the Trendtex case in the prior note.


459. Dickson, supra note 235, at 244.

460. Martiny, supra note 307, at 737.

461. This is modeled after Art. 17 of the European Convention.

462. § 40 (2) ZPO. See generally as to the law on forum selection clauses Martiny, supra note 307, at 737-38; ROSENBERG/SCHWAB, supra note 235, at 95, 184 et seq..


464. § 39 ZPO. See Pryles, supra note 436, at 569-70.

465. Herold/Knoll, supra note 436, at 949. See also NANDA/PANSIUS, supra note 17, at 7-20 with a short list.


467. See Briggs, supra note 371, at 396.

469. supra IV.A.4. and IV.E.

470. So the German approach, see Martiny, supra note 307, at 737; see also Juenger, supra note 324, at 19; the UFMJRA, supra note 282, § 4(b)(5) provides for discretionary non-recognition in such situations.

471. Compare as regards proceedings contrary to an arbitration clause the decision of the English Court of Appeal in Mantovani v. Carapelli S.p.A., [1980] 1 Lloyd's Rep. 375, 382 (quoted infra note 513); see also Briggs, supra note 371, at 397.


473. See VAGTS, supra note 458, at 161; Note, International Commercial Arbitration: A Comparative Analysis of the United States System and the UNCITRAL Model Law, 12 Brooklyn J. Int'l L. 703 (1986). The arbitrators are agreed upon by the parties, either directly or indirectly by referring to an arbitral institution to act as an appointing authority.

474. See the references in supra note 473, especially Note, at 703 in note 3.

475. 417 U.S. 506, 519 (1974), citing the Zapata case (supra note 439) on choice of forum clauses.

476. Id.

477. Id. at 515.

478. Id. at 516-17.

479. E.g. United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915); for further references see Note, Arbitration - Arbitrability of


483. See Note, supra note 473, at 714.

484. 346 U.S. 427 (1953).


487. See e.g. Note, supra note 485, at 616 ("The presence of international business concerns in the arbitration do not outweigh the importance of this fundamental domestic policy."); Note, supra note 473, at 753-54 ;cf. also the dissenting opinion of JJ. Stevens, Brennan and Marshall, 473 U.S. at 640 et seq., and the lower Court of Appeal's decision, 723 F.2d 155, 162 (1st Cir. 1983). On the other hand see Park, Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration, 12 Brooklyn J. Int'l L. 629, 630 (1986)("...in transnational commercial matters the business community's need for neutral dispute resolution outweighs society's interest in supervising adjudication of public law claims.")

One might also be tempted to criticize that the Supreme Court expanded the scope of arbitration on the expense of the principle of non-review of the merits of an arbitral award, as the unclear language that

"the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement
of the antitrust laws has been addressed" (473 U.S. at 638) might indicate. Probably the court wanted to remain within the limits of the public policy reservation as to enforcement, as the later language that "[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them" (id.) suggests.

488. Cf. e.g. the Laker controversy, supra IV.A.3.

489. See Note, supra note 479, at 367: "Mitsubishi represents the latest development of a trend in the federal courts favoring arbitration. It is difficult to imagine a decision which could be more unqualified in its support of the enforcement of international arbitration agreements." See also Feigenbaum, supra note 472, at 880-81.


494. Note, supra note 485, at 600.

495. See Pryles, supra note 436, esp at 570 ("It can be seen, then, that as a general rule contractual exclusion of domestic jurisdiction is considered effective in Germany and France"); generally for a description of national arbitration systems in a variety of countries INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (P. Sanders ed. 1984).

496. NANDA/PANSIUS, supra note 17, at 7-20. More detailed Pryles, supra note 436, at 556-61.

498. Von Mehren, supra note 490, at 595. Before the reform agreements were accepted as a waiver of local jurisdiction, but the legality of advance arbitration clauses was somewhat unclear, cf. BATIFFOL/LAGARDE, supra note 234, at 427, and Carbonneau, supra note 497, at 55-56.

499. Which generally recognizes arbitration agreements like forum selection clauses, see Martiny, supra note 307, at 737.

500. See von Mehren, supra note 490, at 596; Carbonneau, supra note 497, at 56.


502. See VAGTS, supra note 458, at 177; Note, supra note 473, at 708.

503. Note, supra note 473, at 705 with references.

504. A brief note on enforcement of the award, since without an enforcement machinery it might be worthless: Enforcement must be sought through national courts, depending on where the assets are located, potentially outside the arbitral forum country (as to this case it has been suggested that suing at the respective state court is much speedier than seeking to enforce a foreign arbitral award incl. the time of the arbitral proceeding). The U.N. Convention requires enforcement subject to enumerated exceptions (Art. V states seven grounds for refusal); see e.g. Note, supra note 473, at 707-10.

505. See Note, supra note 492, at 347-48.
506. See Panacaviar, S.A. v. Iran, Iran-United States Claims Tribunal Interim Award No. ITM 64-498-1 (Dec. 4, 1986), in para. 13 speaking of "its inherent power to protect its own jurisdiction in cases where the risk of inconsistent decisions in parallel and duplicative proceedings instituted in other fora [in the present case the courts of Basel] have rendered this necessary," referring to E-Systems, Inc. v. Iran, Interim Award No. 13-388-FT (Febr. 4, 1982). As to the latter see Sohn, The Iran-United States Claims Tribunal: Jurisprudential Contributions to the Development of International Law, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 92, 102-03 (ed. R. Lillich 1983).

These kind of conflicts between arbitration and national tribunals are not subject to any international law rules, because arbitration tribunals do not (normally) act as organs of states. This might be a problem in the case of the Iran-United States Claims Tribunal established by treaty.

507. See supra V.B.6.

508. See supra at note 468.

509. See Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd., (1911) 105 L.T. 846, [1911-1913] All E.R. 209 (C.A.) as to English arbitration tribunals. For an extension to foreign arbitration tribunals, because the rationale is the protection of the rights of a plaintiff with access to English courts (not primarily the protection of English tribunals), see Thomas, Restraining concurrent foreign legal proceedings, 1983 Lloyd's Marit. & Comm. L.Q. 692, 693-94.

510. Supra IV.

511. See the chapter on antisuit injunctions supra IV.A.

512. Supra IV.B.6.

513. So the English Court of Appeal in Mantovani v. Carapelli, [1980] 1 Lloyd's 375, 382, where Lawton, L.J. stated: "It seems to me obvious that, where a party to an arbitration clause does obtain a sequestration order in a foreign Court, that sequestration order may cause the other party financial loss, perhaps in a substantial amount. I can see no reason in principle why such loss cannot be said to flow from the breach of the arbitration clause."

515. See supra III.A.

516. WEINTRAUB, supra note 157, at 213 § 4.33.

517. See supra III.B.4.

518. See the U.S. law on stay because of pending action, supra III.B.2.a.

519. See e.g. the German approach, supra III.B.2.d.

520. See supra III.C.

521. Or the civil law counterpart "substantive action for an order to discontinue foreign proceedings." See supra IV.C.

522. See supra IV.A.4. and IV.E.

523. See supra III.C.

524. For instance Italy, France, see supra III.C.2.

525. Cf. supra III.C.2.

526. So Italy, Germany, England, the European Convention, see supra III.C.3.a.

527. So Germany, the European Convention, see supra III.C.3.b.

528. So the United States, see supra III.C.3.b.

529. See supra at notes 336, 344.
530. See *supra* V.B.6 as to choice of forum clauses, and *supra* V.C.3. as to arbitration clauses.