UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 18 | Number 2 Article 8

Winter 1993

Gau Shan Co. v. Bankers Trust Co.: What Should Be the Role of International Comity in the Issuance of Antisuit Injunctions

Thomas E. Burck

Gau Shan Co. v. Bankers Trust Co.: What Should Be the Role of International Comity in the Issuance of Antisuit Injunctions

Cover Page Footnote
International Law; Commercial Law; Law

Gau Shan Co. v. Bankers Trust Co.: What Should be the Role of International Comity in the Issuance of Antisuit Injunctions?

I. Introduction

As the world economy develops, the various participating nations become more interdependent.[1] Inevitably, disputes arise that encompass the jurisdiction[2] of more than one sovereign. This Note will focus on two questions that are certain to arise with increasing frequency as the United States continues to become more interdependent with other nations, namely: (1) when a case or controversy falls under both the jurisdiction of the United States and that of a foreign sovereign, under what circumstances should the United States try to assert exclusive jurisdiction; and (2) what should be the United States' response when the foreign sovereign attempts to assert exclusive jurisdiction? Examining the recent decision of the Sixth Circuit Court of Appeals in *Gau Shan Co. v. Bankers Trust Co.*,[3] this Note discusses the court's position in these matters and whether the federal court's positions are correct.

By examining the court's decision, this Note will discuss how the courts use the principle of comity[4] in situations where there is over-

---

[1] *See, e.g.*, Lewis D. Solomon & Louise Corso, *The Impact of Technology on the Trading of Securities: The Emerging Global Market and the Implications for Regulation*, 24 J. MARSHALL L. REV. 299 (1991); David J. Abrams, Note, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLUM. J. TRANSNAT'L L. 801 (1990).

[2] Jurisdiction in its broadest sense includes the pragmatic quality necessary for the court to enforce its decisions. Thus, "[j]urisdiction is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Pinner v. Pinner, 234 S.E.2d 633, 636 (N.C. App. 1977). Therefore, regardless of how foreign, or American, when courts purport to determine their jurisdiction, a necessary feature of their actual jurisdiction is that the court have "power" and "control" over the subject matter and the parties.

This requirement shows the circular relationship between recognizing a court's order or judgment and the court's actual jurisdiction in a situation where the parties and subject matter are beyond the court's scope of control and power. By recognizing the court's jurisdiction, and thus giving the court power and control over the subject matter and the parties, the court's jurisdiction is affirmed. If a court's judgment or order is not recognized on the rationale that the court does have proper jurisdiction, the court may be left powerless and effectively without jurisdiction.

[3] 956 F.2d 1349 (6th Cir. 1992).

[4] In a leading Supreme Court case on comity the Court stated that:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative,

lapping jurisdiction.[5] This Note will also examine the current split among the circuit courts concerning how comity should be applied in this situation. In conclusion, the author will argue that, contrary to current policy, only where there is a risk of violating international law or treaty provisions should United States courts attempt to obtain exclusive jurisdiction.

II. Statement of the Case

A. The Transaction Giving Rise to the Promissory Note

Gau Shan Company (Gau Shan) is a Hong Kong corporation, with its assets in Hong Kong,[6] that markets cotton to the People's Republic of China.[7] Julien Company (Julien) is a Tennessee corporation that uses Bankers Trust Company (Bankers Trust), an American corporation, as its primary source of financing its cotton sales.[8] Gau Shan sought assurances that Bankers Trust would provide the funds necessary for Julien to release cotton that Gau Shan wished to

---

> executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1894).

Comity is an elusive concept without a precise definition that is universally accepted. Joel R. Paul, Associate Professor, at the Washington College of Law, The American University, stated that:

> Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or "considerations of high international politics concerned with maintaining amicable and workable relationships between nations.

Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 1-2 (1991) (footnotes omitted).

Comity is defined in BLACK'S LAW DICTIONARY as follows:

> Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens. In general, [the] principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.

BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (citations omitted).

[5] While the concept of comity includes matters such as recognition of foreign judgments and orders in United States courts, this Note will limit its main focus to comity's role in deciding whether antisuit injunctions are issued, or should be recognized, in parallel proceedings in the United States and a foreign jurisdiction concerning the same in personam claim.

While this Note is concerned with the concept of comity as between the United States and foreign sovereigns, it should be noted that "the concept of comity also applies to the relations between other sovereign entities, including the federal and state governments in the United States." Richard W. Raushenbush, Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1064 n.141 (1985).

[6] *Gau Shan*, 956 F.2d at 1358.

[7] *Id.* at 1351.

[8] *Id.*

purchase from Julien and sell to the People's Republic of China.[9] In response to this request for assurances, Andrew Halle, a vice president of Bankers Trust, assured Gau Shan "that he 'would work something out.' "[10] Based on these assurances, Gau Shan agreed to sell 15,000 metric tons of cotton to China and contracted with Julien as a source of supply.[11]

Halle learned afterward that Julien had an overdue debt owed to LOR, Incorporated (LOR) that was unrelated to the contracts with Gau Shan. Because Julien did not have the funds to pay the overdue debt, Halle suggested that Julien pay the overdue debt with money that Bankers Trust would prepay to Julien for the cotton Julien agreed to sell to Gau Shan.[12] Halle then called Gau Shan in Hong Kong and told them "that Bankers Trust could not advance the necessary money to Julien unless Gau Shan signed a $20 million promissory note payable to [Bankers Trust]."[13] Under protest, Gau Shan signed the note.

Bankers Trust deposited $20 million in Julien's account and then wired the entire $20 million out of Julien's account to LOR's account in another bank in satisfaction of the unrelated overdue debt.[14] Halle anticipated that LOR, upon satisfaction of the debt, would release some certificated cotton that Julien was selling to yet another party. This unrelated sale was to produce funds that could be used to purchase the cotton that Julien contracted to supply to Gau Shan.[15] Things did not go entirely according to plan, however, and "[b]ecause of some problems with the release of the certificated cotton, Julien shipped to China only about 24% of the cotton it had agreed to ship on Gau Shan's behalf."[16] This resulted in Gau Shan only fulfilling part of its contractual obligation to the People's Republic of China.

B. The District Court's Action

Bankers Trust demanded payment on Gau Shan's note advising Gau Shan that if payment was not made by February 26, 1990, it

---

[9] The court's opinion in *Gau Shan* does not specify why funds had to be provided to Julien for the release of the cotton, only that "Gau Shan, sought assurances . . . that Bankers Trust would provide funds necessary for Julien to release, at Gau Shan's request, the cotton Gau Shan wished to sell to China." *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* While it is unclear from the opinion whether Julien had given Bankers Trust authority to wire the $20 million to LOR, Halle previously instructed Julien's chief administrative officer "that when the $20 million was credited to the Julien account she was to wire the money to Julien's creditor, LOR, Inc., to pay off that debt." *Id.*

[15] *Id.*

[16] *Id.*

would file suit in Hong Kong for collection on the note.[17] Rather than paying the note, however, Gau Shan filed suit in "the United States District Court for the Western District of Tennessee on February 23, 1990, asking for rescission of the note, alleging that it was induced to sign it by Halle's fraud."[18]

On February 23, the district court issued a temporary restraining order, followed at a later date by a preliminary injunction enjoining Bankers Trust from initiating a suit in Hong Kong regarding the note against Gau Shan.[19] The district court determined at the hearing for the preliminary injunction that:

> Gau Shan would be irreparably harmed if Bankers Trust sued Gau Shan in Hong Kong or if Bankers Trust exercised its rights under Hong Kong law to appoint a receiver for Gau Shan pursuant to Hong Kong judicial procedure or under a deed of charge governed by Hong Kong law.[20]

The district court also determined "that Gau Shan had demonstrated a strong likelihood that it could succeed on the merits of its underlying fraud claims."[21] The district court concluded that:

> [T]he dictates of international comity did not preclude the issuance of an injunction here . . . . [B]ecause parallel proceedings duplicate the parties and issues, the federal courts' important public policy of a just, speedy and inexpensive determination . . . would be evaded should Bankers Trust be permitted to sue Gau Shan in Hong Kong.[22]

C. The Sixth Circuit Court of Appeals' Decision

1. Deciding on the Standards

The Sixth Circuit Court of Appeals' opinion in *Gau Shan* held that "review of a trial court's order granting a preliminary injunction is whether the lower Court's decision was an abuse of discretion."[23] The Sixth Circuit court further stated that a district court abuses its discretion " 'when it improperly applies the law or uses an erroneous legal standard.' "[24] The court then began its analysis to determine the proper legal standard for international comity and antisuit injunctions.

---

[17] *Id.* at 1351-52.

[18] *Id.* at 1352. "Gau Shan also sought damages for common law fraud and deceit and for negligence, and claimed treble damages under TENN. CODE ANN. § 47-50-109, alleging that Bankers Trust induced Julien to breach its contract with Gau Shan." *Id.*

[19] *Gau Shan*, 956 F.2d at 1352. Because the district court's opinion is unpublished, all of the information concerning what is in the district court's opinion is from the published opinion of the court of appeals.

[20] *Id.*; *see infra* notes 37-39, 89-94 and accompanying text for discussion concerning Hong Kong law regarding appointment of receivers and the "Deed of Charge."

[21] *Gau Shan*, 956 F.2d at 1352.

[22] *Id.* at 1354.

[23] *Id.* at 1352 (citation omitted).

[24] *Id.* (quoting N.A.A.C.P. v. City of Mansfield, 866 F.2d 162, 166 (6th Cir. 1989) (citation omitted)).

In *Gau Shan*, the court of appeals started its analysis of international comity[25] by stating that "[i]t is well settled that American courts have the 'power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions.' "[26] The court next asserted, however, 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 [jurisdiction] which can be pled as res judicata in the other.' "[27]

The court of appeals stated the "[t]he circuits are split concerning the proper standards to be applied, in the context of considerations of international comity, in determining whether a foreign antisuit injunction should be issued."[28] After examining the different positions held by some of the circuits,[29] the court held that it would only consider two factors in determining whether Bankers Trust should be enjoined from proceeding with the parallel action in Hong Kong: (1) whether the court's jurisdiction is threatened by the foreign action; and (2) whether the court's important public policies are being evaded by the foreign action.[30]

2. *Is the Court's Jurisdiction Threatened?*

The *Gau Shan* court quoted the District of Columbia Circuit decision of *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*[31] for the premise that " '[c]ourts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants.' "[32] The court stated that threats to a court's jurisdiction are quite rare and have only arisen under two scenarios.[33]

Regarding the first scenario in which a court's jurisdiction is

---

[25] *See supra* note 4 for a discussion on the definition of comity.

[26] *Gau Shan*, 956 F.2d at 1352 (quoting Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984) (footnote omitted)).

[27] *Id.* (quoting *Laker Airways*, 731 F.2d at 926-27 (footnote omitted)). "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153-54 (1979) (citations omitted). The essential elements of the doctrine of res judicata "are generally stated to be (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." Nash Co. Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). The use of res judicata "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54 (citations omitted).

[28] *Id.* at 1352-53.

[29] *See infra* text accompanying notes 51-71 for a discussion of the different positions of the circuit courts on international comity.

[30] *Gau Shan*, 956 F.2d at 1355.

[31] 731 F.2d 909 (D.C. Cir. 1984).

[32] *Gau Shan*, 956 F.2d at 1355 (quoting *Laker Airways*, 731 F.2d at 927).

[33] *Id.* at 1356.

threatened, the court declared that "it has long been recognized that concurrent proceedings pose an inherent threat to a court's jurisdiction where the basis for that jurisdiction is in rem or quasi in rem."[34] The court explained that this type of situation represents a threat to a court's jurisdiction because "a concurrent proceeding in a foreign jurisdiction poses the danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter."[35] Because *Gau Shan* involved in personam proceedings, this was not a concern.

The second scenario in which a court's jurisdiction may be threatened, according to the Sixth Circuit, involves an in personam proceeding " 'if a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action.' "[36] Because of differences between American and Hong Kong law,[37] the possibility exists under Hong Kong law that Bankers Trust could appoint a receiver that "would have the power . . . to abandon any proceedings concerning Gau Shan's assets. Gau Shan contends that such an appointment could result in a dismissal of this lawsuit without ever reaching the merits of the controversy."[38] The court concluded, however, that "[t]he possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts; rather, it is merely a threat to Gau Shan's interest in prosecuting its lawsuit."[39] Because the court earlier stated that "Gau Shan offers no reason why this court should conclude that the Hong Kong courts would enter an antisuit injunction in this case,"[40] the circuit court held that "this court's jurisdiction is not threatened."[41]

3. Would Important Public Policies Be Evaded?

Once the court was satisfied that its jurisdiction was not threatened, it examined the second factor justifying an antisuit injunction, namely, whether "this court's important public policies are being evaded by the Hong Kong action."[42] Judge Ryan, writing for

---

[34] *Id.* (citation omitted).

[35] *Id.*

[36] *Id.* (quoting China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987)). *See infra* notes 46, 83, and text accompanying note 70.

[37] Under Hong Kong law, Bankers Trust could appoint a receiver of its choice pursuant to a "Deed of Charge." *Gau Shan*, 956 F.2d at 1356. "[T]his Deed of Charge . . . is contrary to the law of the United States." *Id.* "The Deed of Charge is directly analogous to an authorization to confess judgment that is given before the transaction in question even exists." *Id.* at 1356 n.1.

[38] *Gau Shan*, 956 F.2d at 1356.

[39] *Id.*

[40] *Id.* at 1356.

[41] *Id.* at 1356-57.

[42] *Id.* at 1355.

the court in *Gau Shan*, stated that "[a]n antisuit injunction may be appropriate when a party seeks to evade the forum's important policies by litigating before a foreign court."[43] The court then distinguished arguments that it considered more appropriate for a forum non conveniens dismissal than for an antisuit injunction.[44]

Gau Shan argued that because of differences between the law that would be applied in the respective jurisdictions, important public policies would be frustrated if the Hong Kong action reached judgment first and was asserted as res judicata in the American action.[45] The Sixth Circuit in *Gau Shan*, however, relied on the Second Circuit's decision in *China Trade*[46] and the District of Columbia Circuit's decision in *Laker Airways*[47] for the principle that:

> While an injunction may be appropriate when a party attempts to evade compliance with a statute of the forum that effectuates important public policies, an injunction is not appropriate merely to prevent a party from seeking 'slight advantages in the substantive or procedural law to be applied in a foreign court.'[48]Taking into account the fact that the action in the United States court was governed by state law, the court stated that "although evasion of an important national policy might outweigh certain principles of international comity, we question whether the public policy of one state could ever outweigh those principles."[49] The court found no other arguments persuasive and held that "international comity precludes the issuance of an antisuit injunction in this case."[50]

III. Background Law

A. The Circuits' Two Main Approaches Regarding the Issuance of an Antisuit Injunction

Although international comity has a long history in Supreme Court cases,[51] the exact criteria underlying the application of the concept has not been settled.[52] Currently, the circuits are split on what criteria or tests should apply when deciding whether an antisuit injunction should be issued.[53] While the two main approaches have

---

[43] *Id.* at 1357.

[44] *Id.* See *infra* notes 74-88 and accompanying text for further discussion of forum non conveniens criteria and antisuit injunctions.

[45] *Gau Shan*, 956 F.2d at 1357.

[46] China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987). *See supra* note 36; *see infra* note 83, and text accompanying note 70.

[47] Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

[48] *Gau Shan*, 956 F.2d at 1357 (quoting *China Trade*, 837 F.2d at 37 (quoting *Laker Airways*, 731 F.2d at 931 n.73)).

[49] *Id.* at 1358.

[50] *Id.*

[51] *See, e.g.*, *In re* Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819); Croudson v. Leonard, 8 U.S. (4 Cranch) 434 (1808); Fitzsimmons v. Newport Ins. Co., 8 U.S. (4 Cranch) 185 (1808).

[52] *See supra* note 4.

[53] *See, e.g.*, Raushenbush, *supra* note 5, at 1049-54 ("[T]wo distinct approaches con-

been labeled by at least one author as the "liberal" and the "conservative" approach,[54] the use of such labels may bias the analysis before it even begins. This Note will categorize the two approaches as the "restrictive view" and the "expansive view." The Sixth Circuit adopted the criteria of the restrictive view in deciding that an antisuit injunction was inappropriate in *Gau Shan*.[55]

B. The Expansive View

The Fifth Circuit in *In re Unterweser Reederei GMBh*[56] cited *Moore's Federal Practice*[57] for the position that a court of equity has the traditional power to enjoin parties properly before it from litigating in a foreign court when such foreign litigation would: "(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations."[58] The Ninth Circuit embraced these same criteria in the 1981 case of *Seattle Totems Hockey Club, Inc. v. National Hockey League*.[59]

Citing the Second Circuit opinion of *In re Bloomfield Steamship Co.*,[60] the Fifth Circuit stated in *Unterweser Reederei* that "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and would 'tend to frustrate and delay the speedy and efficient determination of the cause.' "[61] The view taken by these courts has been

---

cerning the use of antisuit injunctions to restrain proceedings in foreign courts have developed." *Id.* at 1049); *Gau Shan*, 956 F.2d at 1352-53 ("The circuits are split concerning the proper standards to be applied, in the context of considerations of international comity, [and] in determining whether a foreign antisuit injunction should be issued." *Id.*).

[54] Raushenbush, *supra* note 5, at 1049-51.

[55] *Gau Shan*, 956 F.2d at 1354.

[56] 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom.*, Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[57] *In re Unterweser Reederei*, 428 F.2d at 890 n.7 (citing JAMES MOORE, FEDERAL PRACTICE § 65.19 (2d ed. 1953)).

[58] *Id.* at 890 (citing JAMES MOORE, FEDERAL PRACTICE § 65.19 (2d ed. 1953)).

[59] 652 F.2d 852, 855-56 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

[60] 422 F.2d 728 (2d Cir. 1970). It is curious that the court in *Unterweser Reederei* cites *In re Bloomfield Steamship Co.*, which is a Second Circuit decision, for support of its expansive views. The Second Circuit takes the restrictive view regarding the issuance of foreign antisuit injunctions. *See infra* notes 64-71 and accompanying text. Neither of the phrases put in quotation marks by the *Unterweser Reederei* court in the quotation accompanying note 61 appear in *In re Bloomfield*. In addition, any statements that would support the expansive view in *In re Bloomfield* are clearly dicta because the Second Circuit in that case held that the district court was within its discretion for refusing to restrain a party from pursuing an action in the English courts. *Id.* at 733.

[61] *Unterweser Reederei*, 428 F.2d at 896 (citing In re Bloomfield Steamship Co., 422 F.2d 728 (2d Cir. 1970)); *accord* Cargill, Inc. v. Hartford Accident and Indem. Co., 531 F. Supp. 710, 715 (D. Minn. 1982). The district court for Minnesota is in the Eighth Circuit and stated in *Cargill* that: "An injunction [to enjoin one of the parties from proceeding with a foreign action] is in order when adjudication of the same issue in two separate actions will result in unnecessary delay, substantial inconvenience and expense to the par-

interpreted as calling for "injunctions curbing foreign litigation that is 'inequitable' solely because of its duplicative nature."[62] Indeed, the Sixth Circuit in *Gau Shan* stated that: "Thus, the Fifth and Ninth Circuits hold that a duplication of the parties and issues, alone, is sufficient to justify a foreign antisuit injunction."[63]

C. The Restrictive View

The Sixth Circuit in *Gau Shan* adopted the restrictive view as espoused by the Second Circuit and District of Columbia Circuit.[64] The restrictive view relies on the principle 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."[65] In support of this position are Supreme Court cases that affirm the concept of parallel proceedings in both the federal and state court systems.[66] The Court in *Kline v. Burke Const. Co.*[67] made the following statement regarding in personam jurisdiction:

> [A] controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed . . . without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.[68]

One of the leading cases following the restrictive view is *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*.[69] In *Laker Airways*, the District of Columbia Circuit Court of Appeals held that "only in the most compelling circumstances does a court have discretion to issue an antisuit injunction."[70] The court did, however, endorse the use

---

ties and witnesses, and where separate adjudications could result in inconsistent rulings or a race to judgment." *Id.*

62 Raushenbush, *supra* note 5, at 1050 (footnote omitted).

63 Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1353 (6th Cir. 1992).

64 *Id.* at 1354.

65 Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984); *accord* Canadian Filters Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 579 (1st Cir. 1969) ("[defendant in the American suit] has a right to prefer the [foreign] court even though this may be regarded as an inconvenience by [plaintiff] or, . . . be thought to involve duplication." *Id.*); *see supra* note 27 for a discussion concerning the definition and policies of res judicata.

66 *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466 (1939).

67 260 U.S. 226 (1922).

68 *Id.* at 230.

69 731 F.2d 909 (D.C. Cir. 1984).

70 *Id.* at 927.

of antisuit injunctions where "necessary to protect the jurisdiction of the enjoining court, or prevent the litigant's evasion of the important public policies of the forum."[71] The *Laker Airways* analysis was embraced by the Second Circuit in *China Trade and Development Corporation v. M.V. Choong Yong*,[72] where the Court held that: "Because the [foreign] litigation poses no threat to the jurisdiction of the district court or to any important public policy of this forum, we conclude that the district court abused its discretion by issuing the [antisuit] injunction."[73]

IV. Significance of the Case

Although the circuits continue to be split after the Sixth Circuit's opinion in *Gau Shan*, the case is significant because it recognizes the changing role of the United States in today's world economy as part of its rationale for adopting the restrictive view on issuing antisuit injunctions.[74] Because of the ever increasing interdependence among sovereigns,[75] questions concerning concurrent jurisdiction, and thus comity, will become increasingly frequent. The court in *Gau Shan* points out that the analysis of the lower court was "more properly the analysis to be used when considering a motion for dismissal of a case on forum non conveniens grounds rather than a motion for a foreign antisuit injunction."[76]

The *Seattle Totems* decision of the Ninth Circuit shows how courts taking the expansive view are using forum non conveniens criteria as part of their rationale for allowing the antisuit injunction. The court in *Seattle Totems* stated that "[a]judicating this issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses."[77] That such criteria is commonly used in evaluating forum non conveniens concerns is shown by the Supreme Court decision of *Gulf Oil Corp. v. Gilbert*:[78]

---

[71] *Id.* In *Laker* the plaintiff was attempting to apply United States antitrust laws to the conduct of British corporations. *Id.* at 915. The conflict in *Laker* involved the "fundamentally opposed national policies toward prohibition of anti-competitive business activity." *Id.* at 945. More specifically, "[t]he British government objects to the scope of the prescriptive jurisdiction invoked to apply the [United States] antitrust laws; the substantive content of those laws . . . and the procedural vehicles used in the litigation of the antitrust laws." *Id.* at 946.

[72] 837 F.2d 33 (2d Cir. 1987).

[73] *Id.* at 37. The situation leading up to the action in *China Trade* involved a ship that ran aground and whose cargo became contaminated by seawater. *Id.* at 34. The plaintiff commenced the action in *China Trade* for failure to deliver the cargo as agreed to by the parties. *Id.*

[74] Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992); *see infra* text accompanying note 97.

[75] *See supra* text accompanying note 1.

[76] *Gau Shan*, 956 F.2d at 1355.

[77] Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

[78] 330 U.S. 501, 508 (1947).

"[in] cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process."[79] The Court "developed a balancing test, consisting of 'private' and 'public' factors, which should guide a court in determining whether a forum non conveniens dismissal is appropriate."[80] Under *Gilbert*, "[d]ismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice."[81]

It is apparent that the criteria used in *Seattle Totems*, "unnecessary delay and substantial inconvenience and expense to the parties and witnesses,"[82] is encompassed by what the *Gilbert* Court held to be important private considerations in determining if forum non conveniens applies. The Supreme Court stated that the important private considerations used in determining if forum non conveniens applies are the following:

> 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. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.[83]

When a United States court issues an antisuit injunction, rather than using its discretionary power to decline to exercise its own jurisdiction, as under forum non conveniens,[84] the United States court is

---

[79] *Id.* at 506-07.

[80] Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 653 (1992).

[81] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 236 (1981) (citing Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947)). There are two unresolved questions that arise concerning forum non conveniens when state law is involved. First, "[s]hould federal courts sitting in diversity apply state or federal forum non conveniens rules?" Laurel E. Miller, Comment, *Forum non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1370-71 (1991). Second, is the federal government's interest in forum non conveniens involving foreign parties so strong that it controls in both state and federal courts? *See id.* at 1370. For a discussion concerning these two questions, see generally Miller, *supra*.

[82] *Seattle Totems*, 652 F.2d at 856.

[83] *Gilbert*, 330 U.S. at 508. The public interest considerations espoused by the *Gilbert* court "include alleviation of congested court dockets, jury duty unfairly imposed on those with no real relation to the outcome of the litigation, and the 'local interest in having localized controversies decided at home.'" Duval-Major, *supra* note 80, at 654 (quoting *Gilbert*, 330 U.S. at 508-09). It should also be noted that the Supreme Court has specifically held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." *Piper Aircraft*, 454 U.S. at 236 (citing Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932)).

[84] Hayes Indus., Inc. v. Caribbean Sales Assoc., 387 F.2d 498, 501 (1st Cir. 1968). "[T]he doctrines of forum non conveniens and abstention call for self-abnegation by the abstaining court. They are not to be imposed upon the other court by one which thinks

using its discretionary power to keep the parties from going before a foreign court. The logic, or arrogance, of an American court dictating to another sovereign that it may not hear a case because it would be inconvenient for parties who are subject to the foreign jurisdiction is questionable. Although technically an antisuit injunction is not against the foreign court, as Judge Pratt of the Second Circuit recognized: "The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity because such an order effectively restricts the jurisdiction of the court of a foreign sovereign."[85] Also, as one author observed,[86] the Supreme Court, as far back as 1849, warned that "if one [court] may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."[87]

The court in *Gau Shan*, by refusing to consider forum non conveniens arguments as justification for an antisuit injunction,[88] implicitly recognizes that such a decision is for the foreign court to make. As the court in *Gau Shan* pointed out, "[a]ntisuit injunctions . . . deny foreign courts the right to exercise their proper jurisdiction. Such action conveys the message . . . that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility."[89] A search of the case law reveals no rationale given by United States courts as to why they are in a better position to determine issues concerning forum non conveniens of the foreign jurisdiction than the foreign court, who has the parties properly before it and whose jurisdiction would be affected by the injunction.[90]

Not issuing an antisuit injunction can, however, in a case such as *Gau Shan*, lead to results that may differ depending upon the jurisdiction in which the case is decided. This may come about because the law to be applied in the case is different in the United States than in the foreign jurisdiction. In *Gau Shan*, under Hong Kong law, a Deed of Charge[91] would permit Bankers Trust to appoint a "receiver [that] would have the power to discharge Gau Shan's employees and to

itself superior." *Id.* (citation and footnote omitted). "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized." *Gilbert*, 330 U.S. at 507.

85 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987) (citations omitted). *See supra* notes 36, 46 and 70.

86 Raushenbush, *supra* note 5, at 1048 n.53.

87 Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1849).

88 Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992).

89 *Id.*

90 *See supra* note 83.

91 *See supra* note 20 and accompanying text.

abandon any proceedings concerning Gau Shan's assets."[92] There is no similar provision that could be applied by the United States district court.[93] The court dismisses this possibility because "Bankers Trust has represented to the district court and to this court that it will not exercise any of its receivership rights under Hong Kong law"[94] and that:

> The possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts; rather, it is merely a threat to Gau Shan's interest in prosecuting its lawsuit.[95]

However, as pointed out by Judge Jones in his concurring opinion:

> Among the receiver's powers would be the right to abandon any claims, including the instant action, concerning Gau Shan's assets. Thus, appointment of a receiver under Hong Kong law could result in the dismissal of this lawsuit and depletion of Gau Shan's assets before *any* court of competent jurisdiction reached the merits of Gau Shan's claims.[96] A related concern is that because a foreign judgment may be used as res judicata in a United States court, "[b]y allowing transnational business to choose legal systems imposing a lower regulatory burden than the United States, U.S. courts have effectively lowered regulatory standards."[97]

These concerns can be addressed with two interrelated concepts. First, there is no rationale for arguing that the United States standard is preferable to the foreign legal standard in the jurisdiction controlled by the foreign court. Indeed, it would seem probable that, at least to the foreign sovereign, the foreign standards are preferable to those of the United States. Second, the first concept must be tempered by the fact that as to the effects of the foreign court's decision in the United States, including any res judicata effect, a United States court "is not obligated to recognize foreign injunctions . . . . Although a United States court will generally enforce a foreign order or judgment, it need not uphold any ruling contrary to American public policy."[98] In addition, because a foreign sovereign is just that, a sovereign, the above analysis also applies to the foreign sovereign if the roles of the United States and the foreign sovereign are reversed.

V. Conclusion

The Sixth Circuit recognizes in *Gau Shan* that "[t]he United

---

[92] *Gau Shan*, 956 F.2d at 1356.

[93] *See supra* note 37.

[94] *Gau Shan*, 956 F.2d at 1356-57.

[95] *Id.* at 1356.

[96] *Id.* at 1359 (Jones, J., concurring).

[97] Paul, *supra* note 4, at 71 (footnote omitted); *see also* Duval-Major, *supra* note 80.

[98] Raushenbush, *supra* note 5, at 1053-54 (footnotes omitted). This author also correctly pointed out that "Although fears of an unseemly race to judgment may remain, a court may refuse to enforce a foreign judgment if it believes the foreign action was tainted by fraud or prejudice." *Id.* at 1040 n.4.

States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could. The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations."[99] Because foreign sovereigns are truly sovereigns, it must be further recognized that "the absence of an international consensus which can be attained only through the treaty making process . . . leaves the decree . . . clothed with domestic, not international recognition."[100]

United States courts still retain the power not to recognize foreign injunctions or judgments.[101] While no court has yet to go this far, it appears that other than in cases involving a conflict of treaty provisions or adjudication that would be in violation of international law, there is little justification for issuing an antisuit injunction. We must put our Ameri-centric arrogance aside and realize that if the situation is not covered by a treaty and the parties are subject to foreign jurisdiction, then that jurisdiction has as much right to adjudicate the case as does the United States court system. The right of the foreign court to adjudicate includes the right *of the foreign court* to dismiss the case under forum non conveniens in situations that it deems appropriate.

If the parties are not subject to foreign jurisdiction, then the question is moot. If the foreign judgment or injunction needs the United States courts to help in its enforcement, this would be an indication of enough of an American interest, coupled with actual American power, that would justify applying our standards of justice if our courts feel they are required. If the help of a United States court is not needed for enforcement of the foreign injunction or judgment, this would indicate that the foreign sovereign's interest in the subject matter and the affected parties is very strong and that the United States should not be trying to dictate its laws in such situations.[102]

A further reason for requiring the judiciary to refrain from issuing antisuit injunctions, except in the limited instances mentioned above, is that the issuance of injunctions based on other criteria clearly involves making policy. "[T]he judiciary should be enforcing policies set by the legislature,"[103] not making policy, especially policy concerning our relations with foreign sovereigns. Such policy making is better served through the treaty making process and international law, rather than through the judiciaries of the various

---

99 Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992).

100 In re Bloomfield S.S. Co., 422 F.2d 728, 736 (2d Cir. 1970).

101 *See supra* note 96 and accompanying text.

102 *See supra* note 2 for further discussion on jurisdiction, and power and control over the subject matter and the parties.

103 Paul, *supra* note 4, at 72.

countries.[104]

The Sixth Circuit in *Gau Shan* is moving in the right direction by holding that antisuit injunctions should generally be issued only when either: (1) the foreign litigation poses a threat to the jurisdiction of the American court; or (2) the foreign action threatens an important public policy of the United States.[105] Although the court in *Gau Shan* did not need to address it in its holding, courts in future cases must be willing to hold that foreign litigation seldom, if ever, poses a threat to United States jurisdiction as long as the United States retains the right not to recognize foreign injunctions or judgments. In addition, the courts must recognize that an attempt to effectively stop a foreign sovereign from exercising its proper jurisdiction, without a legislative or executive mandate, is itself a violation of important United States policy.[106]

The courts adopting the restrictive view in deciding when antisuit injunctions should be issued have laid the ground work necessary for the proper recognition of foreign sovereign jurisdictions. As future cases come before the courts, hopefully they will follow the arguments made by courts such as *Gau Shan* to their logical conclusion and recognize that foreign sovereigns are, indeed, truly sovereign.

THOMAS E. BURCK

---

104 *See* Paul, *supra* note 4, at 79.

105 *See supra* notes 29-30 and accompanying text.

106 The potential significance of attempting to dictate to other sovereigns can be seen by the following statement of the First Circuit: "Whatever may be the inconveniences, comity is to be preferred to combat." Hayes Indus., Inc. v. Caribbean Sales Assoc., 387 F.2d 498, 502 (1st Cir. 1968).