

中国国际私法 与 比较法年刊

CHINESE YEARBOOK
OF
PRIVATE INTERNATIONAL LAW
AND
COMPARATIVE LAW

2013
(第十六卷)

中国国际私法学会 主办
武汉大学国际法研究所



法律出版社
LAW PRESS • CHINA

中国国际私法 与 比较法年刊

CHINESE YEARBOOK
OF
PRIVATE INTERNATIONAL LAW
AND
COMPARATIVE LAW

2013
(第十六卷)

黄进 肖永平 刘仁山 主编



法律出版社
LAW PRESS • CHINA

图书在版编目(CIP)数据

中国国际私法与比较法年刊. 第16卷, 2013 / 黄进,
肖永平, 刘仁山主编. —北京: 法律出版社, 2015. 11
ISBN 978-7-5118-8680-4

I. ①中… II. ①黄…②肖…③刘… III. ①国际私
法—中国—2013—年刊②比较法—中国—2013—年刊
IV. ①D997-54

中国版本图书馆CIP数据核字(2015)第257442号

© 法律出版社·中国

责任编辑/陈妮 似玉 吴 镒

装帧设计/李 瞻

出版/法律出版社

编辑统筹/财经出版分社

总发行/中国法律图书有限公司

经销/新华书店

责任校对/杨昆玲

责任印制/吕亚莉

印刷/北京京华虎彩印刷有限公司

开本/720毫米×960毫米 1/16

印张/36.5 字数/816千

版本/2015年11月第1版

印次/2015年11月第1次印刷

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn

销售热线/010-63939792/9779

网址/www.lawpress.com.cn

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908

上海公司/021-62071010/1636 北京分公司/010-62534456 深圳公司/0755-83072995

书号: ISBN 978-7-5118-8680-4

定价: 111.00元

(如有缺页或倒装, 中国法律图书有限公司负责退换)

《中国国际私法与比较法年刊》

编辑委员会名单

顾 问	费宗祯				
主 编	黄 进	肖永平	刘仁山		
编 委	(按姓氏笔画为序)				
	丁 伟	王 瀚	王红松	卢 松	
	刘卫翔	刘仁山	吕岩峰	李玉泉	
	杜新丽	沈 涓	宋连斌	段洁龙	
	屈广清	金彭年	张明杰	赵相林	
	徐 宏	徐冬根	徐国建	郭玉军	
	高 菲	黄 风	黄 进	黄 瑞	
	黄丹涵	蒋新苗	谢石松	韩 健	
执行编委	郭玉军	宋连斌			
本期编辑	宋连斌	邹国勇	傅攀峰	周 园	
	彭丽明	樊 婧			

目 录

专 论

中国思想下的全球化管辖规则	陈隆修(3)
法律关系分析论	
——以法律选择为视角	方 杰(104)
论普通法民事诉讼中的“自然法院”	李 晶(129)
国际实体私法条约在我国的适用问题研究	彭丽明(141)
《海峡两岸经济合作框架协议》学科属性探究	王晓玲 芦 璐(151)

冲突法研究

冲突法的权利阐释:法律选择权论纲	江保国(175)
论本土冲突法理论的型塑	周 江(189)
涉外合同意思自治外情形下准据法的确定	
——我国部分法院实践的考察与分析	涂广建(211)
涉外民事关系法律适用中的强制规则的识别	李凤琴(228)
我国涉外离婚法律适用规则的新发展及反思	刘元元(239)
欧盟离婚冲突规则统一化的晚近发展	
——2010 年《罗马Ⅲ》介评	汪 晶(248)

国际民商事争议解决

中国商事仲裁年度观察(2012)	宋连斌 彭丽明(263)
英国海事仲裁中简易程序的发展与完善	
——快速低费仲裁目标的推进	邓 杰(290)
Seat Shopping in International Commercial Arbitration	Yang Fan(307)
仲裁的起源及其意义	[丹麦] 麦卡锡·林登 著 周 园 译 吴 卡 校(348)
日本国际民事诉讼管辖权规则	[日] 卢泽友直 译 杜 涛 校(360)

中韩国际私法论坛

- 韩国涉外诉讼管辖制度的发展 孙京汉(367)
- 韩国的涉外诉讼管辖及与中国管辖制度比较 卢泰岳(387)

评介与资料

- 2012年中国国际私法司法实践述评 黄进 周园 杜焕芳(403)
- 我国涉外知识产权案件法律适用的司法实践及其反思 郭玉军 樊婧(446)
- 国外国际私法发展前沿年度综述(2011~2012) 杜涛(469)
- 瑞士1987年12月18日《关于国际私法的联邦法》..... 邹国勇 译(501)
- 斯洛伐克共和国《关于国际私法与国际民事诉讼规则的法律》..... 邹国勇 译(540)
- 欧盟理事会2008年12月28日《关于扶养义务事项的管辖权、准据法、判决的承认与执行并进行合作的第4/2009号条例》..... 邹国勇 译(556)

Contents

Reviews

Globalization of Jurisdiction Rules Based on Chinese Philosophy	Chen Longxiu(3)
The AnalyticTheory on Legal Relation from the Perspective of Choice of Law	Fang Jie (104)
On the Natural Forum in Civil Litigation under Common Law	Li Jing(129)
A Study on the Application of International Substantive Private Treaties in China	Peng Liming (141)
The Inquiry on the Disciplinary Attribution of Cross-Straits Economic Cooperation Framework Agreement	Wang Xiaoling & Lu Lu(151)

Conflict of Law Studies

The Interpretation of Rights in Conflict of Laws: the Right for Choice of Law	Jiang Baoguo(175)
A Try of Shaping Indigenous Conflict-of-Law Theory	Zhou Jiang(189)
The Determination of the Applicable Law for Contracts without the Parties' Choice: an Empirical Study	Tu Guangjian (211)
The Qualification of Mandatory Rules in the Application of Law to Foreign-related Civil Relationship	Li Fengqin(228)
The Recent Development and Review of Applicable Law in Foreign-related Divorce in China	Liu Yuanyuan(239)
The Recent Developments of Unification of Conflict Rules for Divorce in the European Union: Comments on Rome III of 2010	Wang Jing(248)

Resolution of International Civil and Commercial Disputes

Annual Observations on the Commercial Arbitration in China in

2012	Song Lianbin & Peng Liming (263)
The Development and Improvement of Simple Procedure in British Maritime Arbitration; Advance of the Convenient and Economical Arbitration	Deng Jie(290)
Seat Shopping in International Commercial Arbitration	Yang Fan(307)
International Commercial Arbitration, its Origin, Development and Importance	written by Macassey Lynden, translated by Zhou Yuan, reviewed by Wu Ka(348)
Jurisdiction Rules of Japanese International Civil Litigation	translated by Tomonao Ashizawa, reviewed by Du Tao (360)

Sino-Korea Forum on Private International Law

Historical Development of Korean Law on International Jurisdiction	Kyung Han Sohn(367)
The Comparism between the Jurisdiction in Foreign-related Litigation in the Republic of Korea and there of in China	Lu Taiyue (387)

Comment and Information

Review of Judicial Practice in Chinese Private International Law in 2012	Huang Jin, Zhou Yuan & Du Huanfang(403)
The Judicial Practice of Application of Laws in Foreign-related Cases concerning Intellectual Property in China and its Reflections	Guo Yujun & Fan Jing(446)
Annual Review on the Development Frontiers of Overseas Private International Law (2011 ~ 2012)	Du Tao(469)
Federal Act of Switzerland on Private International Law of 18 December 1987	translated by Zou Guoyong(501)
The Act of the Slovak Republic on Private International Law and Rules of International Procedure	translated by Zou Guoyong (540)
Council Regulation (EC) No. 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations	translated by Zou Guoyong(556)

专 论

中国思想下的全球化管辖规则

陈隆修*

一、禁诉令、不方便法院、先系属优先

(一) 跨国管辖与禁诉令——“chickens talking to a duck; and if it is, it is pointless to say that one approach is right and the other is wrong.”

2008年第四届两岸国际私法会议于西安举行时,杜新丽教授对于实务上法院面对英国法院所作成之禁止诉讼命令(anti-suit injunctions)的裁决(这包含中间裁定及最后决定)之困扰,郑重地提出请求,希望其他同僚给予意见。英美法的禁诉令的确经常让大陆法的同僚“挑起对英美法怀疑的眉毛”。甚至阿德里安·布里格斯(Adrian Briggs)教授于评论大陆法与英美法同僚在禁诉令上之对话是如同:“鸡同鸭讲;并且如果如此,去论述一种方式是对的而他种方式是错,那就没有意义。”^①

尽管大陆法的同僚对禁诉令的普遍不满,甚至以“禁诉令是个核子炸弹”来加以形容,^②但有些年轻气盛的英美法同僚仍旧坚持:“但是在这个大陆法的鸡群与判例法的鸭群之对话中,是可以这样说的,应是鸡群已经穿过鸭群了。^③在现代禁止诉讼案例中之例

* 中国台湾东海大学教授。

① Adrian Briggs, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, *Zeitschrift für Schweizerisches Recht* 124 (2005) II 231, 234, 244. “chickens talking to a duck; and if it is, it is pointless to say that one approach is right and the other is wrong.”

② “L’antisuit injunction est une bombe nucléaire.” Renaud Carrier, *L’antisuit injunction*, *Centre de Droit Maritime et des Transports* 5 (2001), <http://junon.u-3mrs.fr/ad210w00/memoires/2001/m01care.html>.

③ Daniel Tan, “Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court’s Remedial Powers”, 47 *Va. J. Int’l L.* 545, 591, 592 (2007), “Suffice it to say that in this dialogue where civilian chickens talk to the common law ducks, it is the chickens who have managed to get through to the ducks. The mantra in modern antisuit cases is that because antisuit injunctions infringe judicial comity, they should only be issued in the most exceptional circumstances. Evidently, the civilian distaste for the injunction has permeated common law antisuit practice. This is not a good thing. The common law courts should not simply accept the ipse dixit of the foreign courts that these orders cause offense, but should instead examine whether their hostility is well founded. It may not be.”

行咒语是,因为禁诉令侵犯了司法礼谊,他们只能于最例外之情形下而被作成。^①很明显,大陆法对禁诉令的不喜欢已经影响判例法禁诉令的实施,这并不是一个好事。外国法院认为这些命令会造成侵犯是他们自己的说辞,判例法法院不应就如此的接受,而是应相反地去检验他们的敌意是否有良好的依据。它可能是没有的。”

这些年轻的英美法同僚将战鼓擂向大陆法,这种单向的敌意是否过于简化?由于以欧盟法院^②(European Court of Justice)为首的大陆法系,通常拒绝作成禁诉令或承认外国之禁诉令,故而事实上于英美法与大陆法间反而较为单纯。反而于实施禁诉令之英美法国家间战况较为诡谲。德国同僚即陈述:“因此在20世纪80年代早期之Laker案件诉讼期间,美国与英国法院间之禁止诉讼命令及反禁止诉讼命令于司法上升格为‘禁止命令之战争’……这是不可能于德国与美国法院间被重复”。^③ Laker Airways Ltd. 破产案及相关之其他案件为反托拉斯法及禁诉令上之经典案例,其于美国之相对案件为Laker

① Daniel Tan, note 161, Quak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F. 3d 11, 18 (1st Cir. 2004), “Issuing an international antisuit injunction is a step that should ‘be taken only with care and great restraint.’” [citing Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F. 2d 577, 578 (1st Cir. 1969)]; Laker Airways v. Sabena, Belgian World Airlines, 731 F. 2d 909, 927 (D. C. Cir. 1984), “Thus, only in the most compelling circumstances does a court have discretion to issue an anti-suit injunction.”; China Trade & Dev. Corp. v. M. V. Choong Yong, 837 F. 2d 33, 36 (2d Cir. 1987), “An anti-foreign-suit injunction should be ‘used sparingly’, and should be granted ‘only with care and great restraint’.”

② 于Turner v. Grovit, Case c-159/02, 2004 E. C. R. I-3536中,欧盟法院认定一会员国法院作成禁诉令以限制其他会员国法院之程序是违反《布鲁塞尔公约》(Brussels Convention)。但稍早之前法国最高法院(Cour de cassation)却维持下级法院禁止破产程序中之请求人再于西班牙提起破产程序。Cass. 1e civ., Nov. 19, 2002, Banque Worms v. Brachot, 92 Revue Critique de Droit International Privé [rev. crit. Dip] 816 (2003)。该案之讨论见Horatia Muir Watt, “Injunctive Relief in the French Courts: A Case of Legal Borrowing”, 62 Cambridge L. 573 (2003)。法国法院之可以作成禁诉令或许可能应是破产程序并非是布鲁塞尔公约及规则适用范围内之原因。但是鉴于欧盟法院对于英国在非会员国法院之管辖上行使不方便法院之裁量权,及不在公约及规则范围内之仲裁上行使禁诉令之限制,法国法院却得以在破产程序上行使禁诉令。个人以为或许法国法院之禁诉令是符合全球化法学之共同核心政策之故——亦即每个同梯次之债权人应得到相同比例之赔偿。参见Uncitral Model Law on Cross-Border Insolvency with Guide to Enactment Article 32. Rule of payment in concurrent proceedings。

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

③ Moritz Bälz and Felix Blobel, Collective Litigation German Style, in conflict of Laws in a Globalized World, edited by Eckart Gottschalk, Ralf Michaels, Giesela Rühl, Jan von Hein, p. 146, note 86, “Therefore, a judicial escalation of antisuit-injunctions and antiantisuit-injunctions into a ‘battle of injunctions,’ as fought between English and U. S. courts in the course of the Laker litigation in the early 1980s (see British Airways Board v. Laker Airways, [1985] AC 58 [House of Lords, 1984]) has no prospect of being repeated between German and U. S. courts.”

Airways Ltd. v. Sabena, Belgian World Airlines。^① 于 Laker 案中,英国法院作成禁止当事人于美国诉讼之命令,但之后美国联邦地院即作成反禁诉令以禁止当事人去执行英国禁诉令。因为涉及巨额之利益故引起其时里根总统及撒切尔首相之洽商,及甚多同僚之讨论。^② 于英美法院间之司法上之“禁止命令战争”,不但会以“反禁止诉讼命令”(anti-anti-suit injunction)之方式而进行,甚至偶会有“反反禁止诉讼命令”(anti-anti-anti-suit injunction)之情形发生。亦即申请人要求法院作成禁止命令,以禁止被申请人去要求外国法院去作成命令,而该外国法院之命令是意图限制申请人之申请对其加以禁止诉讼命令。^③

美国的《反禁令法》(Anti-Injunction Act)是美国最古老的条文之一,^④其禁止联邦法院去作成禁止命令以停止州法院之诉讼程序,“除非于国会有明示立法,或为了帮助其管辖权之必要情形,或为了保护或执行其判决”^⑤之情形。但正如大部分国际私法上之范围,美国国会尚未对国际上之禁止诉讼命令加以规范,因此有联邦上诉法院认为这是“完全属于地院之裁量权范围”。^⑥ 这个美国早期的国内规定,于国际场合上却有时会造成外交上的紧张关系。与其他英美法的国家偶尔会升级成为“司法上之禁止命令战争”,而与大陆法国家间之对话是形同“鸡同鸭讲”之情形。美国法院于惩罚性赔偿、反托拉斯法及集体诉讼之运作上,经常被德国同僚视为“法律帝国主义”及“霸权法律制度”;于禁诉令之运作上亦被视为“司法霸权主义”之一环。拉尔夫麦克斯(Ralf Michaels)教授即如此地表达欧洲同僚的不满:“因为美国法院会在忽视其他国家之情形下主张管辖权,欧洲人经常控诉美国法院的司法霸权主义。”^⑦

① 731 F.2d 909 (D. C. Cir. 1984).

② 里根总统并下令法务部调查该事件。See George A. Bermann, “The Use of anti-suit Injunctions in International Litigation”, 28 *Colum. J. Transnat'l L.* 589, 591-93, 608 n. 75 (1990).

③ Cf. Smith Kline French Laboratories Ltd. v. Bloch [1983] 1 W. L. R. 730 (CA). Shell UK Exploration and Production Ltd. v. Innes, 1995 S. L. T. 807; General Star International Indemnity Ltd. v. Stirling Cooke Browne Reinsurance Brokers Ltd. [2003] EWHC 3 (Comm.), [2003] 1 L. Pr. 314; national Australia Bank Ltd. v. Idoport [2002] NSWSC 623. 参见 Dicey and Morris, *The Conflict of Laws*, 14th ed., Sweet & Maxwell, 2006, p. 501, note 91.

④ 于 *Atl. Coast Line R. R. Co. v. Bhd. Of Locomotive Eng're*, 398 U. S. 281, 282 (1970) 中,美国最高法院陈述国会于 1793 年即通过《反禁令法》。

⑤ 28 U. S. C. § 2283 (1948), “except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

⑥ *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F. 2d 852, 855, “squarely within the discretion of the district courts.”

⑦ “Europeans frequently accuse U. S. courts of judicial hegemonialism, because U. S courts assert jurisdiction without regard to other countries.” See Ralf Michaels, “Two Paradigms of Jurisdiction”, 27 *Mich. J. Int'l L.* 1003, 1058 (2006).

切希尔(Cheshire)和诺思(North)^①说:“如果牵连相同当事人及相同争点之诉讼,是同时于两个不同国家间进行,这是被称为 *lis alibi pendens* 之案件。于这种案件时,英国法院所面对之问题并不只是去决定请求人应于哪一个可替代的法院去提起诉讼。反而于另一方面而言,其选择是在于英国之审判加上外国之审判(如果停止诉讼之请求是被拒绝),及于另一方面,于外国之审判(如果停止诉讼之请求是被允许)。于英国及外国同时有着诉讼是非常不好的;相较于若诉讼只是于一个国家举行,这对当事人而言牵涉更多的费用,极不方便;这亦可能造成两个相冲突的判决,导致当事人间会有着不良的竞争以企图去首先取得判决及后续产生禁反言之问题。”^② 通常是认为如果两个国家之一的诉讼是牵连到否认之诉(确认一方当事人对于一既存之诉讼并无责任),这种对同时诉讼的反对是更为强烈。”^③ 无论是在大陆法的国家或英美法的国家,平行诉讼(*parallel proceedings*)或复数诉讼(*multiple proceedings*),通常是不受欢迎的。^④

于 *Gubisch Maschinenfabrik KG v. Giulio Palumbo* 中欧盟最高法院(European Court of Justice, ECJ)解释《布鲁塞尔公约》第8段之第21条、第22条之目的为:“在本联盟适当的执行正义之利益下,本段条文是意图被用来防止不同订约国法院间之平行诉讼及去避免因此可能产生的判决间之冲突。这些规则因此是被设计来一开始就尽量排除第27(3)条所提及情况发生之可能,亦即与在该判决被请求承认之国家,对于相同当事人间所发生的纷争

① PM North, JJ Fawcett, *Cheshire and North's Private International law*, 13th ed., Butterworths, 1999, p. 347, “If litigation involving the same parties and the same issues is continuing simultaneously in two different countries, this is referred to as a case of *lis alibi pendens*. In such cases the issue facing the English court is not simply that of deciding to which of the alternative fora the claimant should have to go to bring his action. Instead, the choice is between, on the one hand, trial in England *plus* trial abroad (if a stay refused) and, on the other hand, trial abroad (if a stay is granted). It is very undesirable to have concurrent actions in England and abroad; this involves more expense and inconvenience to the parties than if trial were held in merely one country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel. The objection to concurrent proceedings is said to be even stronger if this involves in one of the two states proceedings for a negative declaration (a declaration that a person is not liable in an existing action).” 14th ed., pp. 440, 441.

② The *Abidin Dayer* [1984] AC 398 at 412 (per Lord Diplock), 423 – 424 (per Lord Brandon); The *Messiniaki Tolmi* [1983] 1 Lloyd's Rep 666 at 672.

③ First National Bank of Boston v. Union Bank of Switzerland [1990] 1 Lloyd's Rep 32 at 38 – 39. See also *saipem Spa v. Dredging V02 BV and Geosite Survrys Ltd.*, The *Volvox Hollandia* [1988] 2 Lloyd's Rep 361 at 371, CA; *sohio supply Co. v. Gatoil (USA) Inc.* [1989] 1 Lloyd's Rep 588 at 593. 有关否认之诉(即大陆法之确认之诉)与先系属优先,参见陈隆修:《2005年海牙法院选择公约评析》,台湾五南图书出版有限公司2009年版,第128页,第129页。

④ 陈隆修:《国际私法管辖权评论》,台湾五南图书出版有限公司1986年11月,初版,第84 ~ 101页。

所作成的判决不一致之理由而不承认该判决之情况。”^①欧盟法院是被有些英国同僚号称为“大陆法思想的堡垒”,^②其于解决会员国间之平行诉讼或复数诉讼,是以《布鲁塞尔公约》(Brussels Convention)第21条、第22条或《布鲁塞尔规则》(Brussels Regulation)第27条、第28条之先系属优先原则(lis pendens)。而英美法系统于解决国际诉讼上所可能发生之平行诉讼或复数诉讼上之问题,通常是以不方便法院(forum non conveniens)来停止法院地之诉讼,或作成“禁止诉讼命令”禁止当事人于外国法院提起诉讼。

或许是禁诉令的作成会间接影响到外国法院管辖权之运作,^③因而会牵涉国际礼谊(comity)之问题,故而通常英美法院会于较谨慎的情况下才会作成,大陆法有些年轻同僚会将大陆法的先系属优先原则直接与不方便法院原则对比,而有时忘了将禁诉令相提并论。^④事实上“禁诉令”亦是于国际诉讼上处理平行诉讼之重要(或有争议)工具之一。有美国年轻同僚将英美法之不方便法院与禁诉令区分如下:“当一个法院拒绝一个基于不方便法院而要求停止诉讼之请求时,其并未禁止一个于外国进行之诉讼,而只是保留自己之管辖(诉讼)而已。相对地,禁诉令主要是主张比起外国法院美国是更合适处理该案件,并且该外国诉讼因此应被禁止。基于不方便法院的驳回诉讼是顺从外国法院;而禁诉令是试图关闭外国法院的门。”^⑤事实上于英国禁诉令之作成是不能仅以“更

① Case C-144/86, 1987 E. C. R. 4861, “Article 21, together with Article 22 on related action, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.”

② Daniel Tan, “Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court’s Remedial Powers”, 47 *Va. J. Int’l L.* 545, 592 (2007). “Professor Briggs insightfully remarked that the European Court of Justice, a bastion of civil law thinking...”

③ 禁诉令之运作被大陆法视为对本国管辖权具有敌意之干涉,参见 Andreas F. Lowenfeld, “Forum Shopping, Antisuit Injunctions, Negative Declarations and Related Tools of International Litigation”, 91 *Am. J. Int’l L.* 314 (1997)。

④ Martine Stuckelberg, “Lis Pendens and Forum Non Conveniens at the Hague Conference”, 26 *Brooklyn J. Int’l L.* 949, 950, 951 (2001), “Linked with the question of forum non conveniens is the question of lis pendens. This is a rule applied in many civil law countries, giving the court first seised of a case a priority for deciding that case. Its primary goal is to avoid parallel proceedings in different courts. As both forum non conveniens and lis pendens deal with declining jurisdiction in certain circumstances, they had to be negotiated together in The Hague.”

⑤ Laural Eddleman Heim, *District of Columbia v. Heller*; Note: “Protecting Their Own?: Pro-American Bias and the Issuance of Anti-Suit Injunctions”, 69 *Ohio St. L. J.* 701, 737, “When a court denies a forum non conveniens dismissal it does not bar proceedings in a foreign court, it simply retains its own jurisdiction. In contrast, anti-suit injunctions essentially assert that the United States is in a better position than the foreign court to judge the action and that the foreign action should be barred as a result. Forum non conveniens dismissals defer to foreign courts; anti-suit injunctions attempt to shut the foreign courthouses’ doors.”

为合适”为理由,于 *Airbus Industrie GIE v. Patel* 中,高夫(Goff)法官认为通常欲作成禁诉令时,国际礼谊要求英国法院对该问题必须有足够之利益或关连,以便有正当之理由去间接地干扰外国法院。^①

禁诉令或许充满着争议性,并且基于国际礼谊应被谨慎(restrictive)的作成,但于国际贸易发达的今日它却是个日益重要的议题。不同于大陆法之先系属优先或英美法之不方便法院皆局限于不同国家间法院之平行诉讼或复数诉讼,禁诉令并不局限于法院间之平行诉讼或复数诉讼,它亦可以基于契约之仲裁条款而被作成。无论是英国判例法^②还是美国判例法,^③皆充满着法院作成禁诉令以限制违反仲裁协议之衡平救济。^④甚至事实上于国际仲裁上,已有仲裁协会在讨论仲裁庭是否可能作成禁诉令。^⑤有趣的是于 *Telenor Mobile Communication AS v. Storm LLC*^⑥ 中,联邦地院认为根据《纽约公约》(the New York Arbitration Convention)其只是第二顺位之管辖,故维持仲裁庭所作成禁诉令之效力,允许一挪威公司之请求,禁止一乌克兰公司于乌克兰提起诉讼。根据美国《第2新编》于判决上之第84条(Restatement 2nd of Judgments, s. 84),一个有效及最后之仲裁判

① [1991] 1 AC 119 at 138, “As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with foreign court which an anti-suit injunction entails.” 有关英国禁诉令,参见陈隆修、许兆庆、林恩玮、李瑞生著:《国际私法——管辖与选法理论之交错》,台湾五南图书出版有限公司2009年版,第244~247页。

② *Aggeliki Charis Compania Maritima S. A. v. Pagnan S. p. A. (The Angelic Grace)*, [1995] 1 Lloyd's Rep. 87, 96 (Eng. C. A.); *Welex A. G. v. Rosa Maritime Ltd. (The Epsilon Rosa II)*, [2002] 2 Lloyd's Rep. 701, para. 23. (Eng. Q. B.), *affd* [2003] 2 Lloyd's Rep. 509 (Eng. C. A.). 参见陈隆修、许兆庆、林恩玮、李瑞生著:《国际私法——管辖与选法理论之交错》,台湾五南图书出版有限公司2009年版,第247页。

③ *Paramedics Electromedicina Comercial v. GE Med. Sys. Info. Techs.*, 369 F. 3d 645 (2d Cir. 2004); *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876 (N.D. Ill. 2006); *Ibeto Petrochemiak Indus. v. M/T Beffen*, 412 F. Supp. 2d 285 (S.D. N.Y. 2005); *SG Avipro Fin. Ltd. v. Cameroon Airlines*, No. 05 Civ. 655 (LTS) (DFE), 2005 U.S. Dist. LEXIS 11117 (S.D. N.Y. June 8, 2005).

④ 禁诉令之作成是法院衡平管辖权之行使, *E & J. Gallo Winery v. Andinal Licores S. A.*, 446 F. 3d 984, 989, 993 (9th Cir. 2006), “Courts derive the ability to enter an anti-suit injunction from their equitable powers... involving equity jurisdiction”。参见Daniel Tan, “Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers”, 47 *Va. J. Int'l L.* 545, 612, 613 (2007), “In addition, as pointed out, the courts have used the equitable remedy of the antisuit injunction to restrain breaches of arbitration agreements. These cases further demonstrate how the courts liberally use extra-statutory equitable remedies to effectively enforce arbitration agreements. Moreover, as discussed, the federal courts have asserted an inherent power to stay court and arbitral proceedings in support of arbitration agreements. This power is wider than the statutory power to stay court proceedings in the FAA, and has been exercised in circumstances not explicitly envisioned by the FAA”。

⑤ *Int'l Arbitration Inst., Anti-suit Injunctions in International Arbitration* 115, 126 (Fmmanuel Gaillard ed., 2005)。

⑥ 524 F. Supp. 2d 332, 359, 363, 364 (S.D. N.Y. 2007)。

断,通常是与法院的判决一般具有一事不再理的效力。^①但亦有美国同僚认为《纽约公约》为美国所签订,故依《纽约公约》而作成之仲裁判断自然应有排除效力(preclusive effect),但其他仲裁判断则不见得会有排除效力。如果基于上述于禁反言(estoppel)之论述,对于非纽约公约之仲裁判断于禁诉令上是否应如同禁反言上应有区别?

个人并不以为法院基于仲裁条款而作成禁诉令前,必须先认定该仲裁判断是否为依纽约公约而被加以作成。如《第2新编》判决篇第84条注释(a)所说:“仲裁是决定法律纷争的一种方式,而方式是经由纷争之当事人间以契约所授权的。”^②正如当事人间所订定之法院管辖条款,整个仲裁或仲裁条款皆是以当事人间所协议的契约内容为依据,故而英美之法院亦是依据此当事人间之契约协议而作成不方便法院(停止法院之诉讼)或禁诉令(禁止违约之一方至其他法院提起诉讼)之决定。因此,于作成禁止令前法院所应确认的是仲裁条款协议之成立、存在、与效力,而非辨认该仲裁是否为《纽约公约》之仲裁。

(二)不方便法院与先系属优先

许多大陆法的国家于国内之平行诉讼上,采先系属优先原则,^③有趣的是这个国内法的做法亦为大陆法系适用至国际平行诉讼上。如大陆法同僚所述:“大部分大陆法的国家并没有一个不方便法院理论,他们亦不行使禁诉令。为了限制平行诉讼,他们采用一种称为先系属优先之原则。根据这个规则,如果对相同当事人间之纷争两个法院皆已系属,并且是牵连到相同之诉因,第二系属之法院必须停止或驳回该案件而以第一系属法院为优先,这就是‘第一及时规则’,亦即只是允许第一系属法院去决定案件之实体。”^④采用先系属优先原则最具代表性的自然就是欧盟《布鲁塞尔公约》的第21~23条,及《布鲁塞尔规则》的第27~29条。

欧盟与美国为当今全世界最具影响力之联邦,而欧盟的《布鲁塞尔公约》及《布鲁塞

① S. 84 Arbitration Award

(1) Except as stated in Subsections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

② Comment a. Scope. “Arbitration is a method of determining legal disputes that is authorized by contract between the parties to the dispute. There are forms of dispute-resolution procedure that are called ‘arbitration’ but which are made obligatory by law instead of being prescribed by contract, for example, some proceedings in ‘no fault’ insurance schemes. These procedures might perhaps better be regarded as adjudication before specialized tribunals.”

③ e. g. Societe A v. S., ATF 118 II 1888. Swiss Federal Supreme Court (1992) (in French).

④ Martine Stuckelberg, “Lis Pendens and Forum Non Conveniens at the Hague Conference”, 26 Brooklyn J. Int’l L. 949, 958 (2001), “Most civil law countries do not have a forum non conveniens doctrine, nor do they use antisuit injunctions. In order to limit parallel litigations, they apply a rule called lis pendens. According to this rule, if two courts are seized of a dispute between the same parties, involving the same cause of action, the court second seized must stay or dismiss the case in favor of the court first seized. It is a ‘first in time’ rule, allowing only the court first seized to decide the case on the merits.”