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Dilemmas and Solutions in the Application of Anti-Suit Injunctions in Cross-Border Litigation of Standard Essential Patents

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Abstract. The intensive use of anti-suit injunctions in transnational litigation concerning standard-essential patents has become a focal point of judicial maneuvering among courts worldwide, vying for jurisdiction and the right to define rules. Since the Huawei v. Convinson case, which set a precedent in China's, the country has gradually developed anti-suit injunction rules centered on a "five-element analysis framework." However, these rules still face systemic dilemmas in four dimensions: legal basis, applicable requirements, international legitimacy, and implementation effectiveness. The root of these dilemmas lies in the inherent tension of using the conduct preservation system to bear the function of anti-suit injunctions, the broad interpretation of requirements, the dual challenges posed by international comity and TRIPs obligations, and the paradox of effectiveness in the anti-suit injunction game. The solution should unfold systematically through four levels: "concept—norm—requirements—coordination." Based on a principle of restraint, the approach should gradually transition from a stopgap measure of conduct preservation to a specialized system, introducing reverse presumptions and strict exceptions to constrain judicial discretion, and promoting a dual-track approach of domestic blocking mechanisms and dialogue with international rules, ultimately constructing a Chinese anti-suit injunction mechanism that is "beneficial domestically and justifiable internationally."

Keywords: Standard essential patents, injunctions, preliminary injunctions, international comity, restraint

1. Introduction

In recent years, cross-border litigation involving standard essential patents (SEPs) has transcended the scope of simple private disputes, evolving into a judicial game in which courts of different countries vie for jurisdiction and the right to set the rules. Since the UK courts first ruled on the global FRAND licensing rates for the portfolio of SEPs in the Unwired Planet v. Huawei case in 2017, major jurisdictions have successively joined this "courtroom competition," with injunctions becoming the most aggressive institutional tool in the game.

Chinese courts' practice in this area began in August 2020 with the Supreme People's Court's injunction in the case of Convence v. Huawei—prohibiting Convence from applying to the

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Düsseldorf Regional Court in Germany for enforcement of its first-instance injunction against infringement before the final judgment was rendered, with violators subject to a daily fine of 1 million yuan. The Shenzhen Intermediate People's Court and the Wuhan Intermediate People's Court subsequently issued injunctions or counter-injunctions in cases such as OPPO v. Sharp, Xiaomi v. Interactive Digital, Samsung v. Ericsson, and ZTE v. Convence, marking a shift in China's approach to SEP international parallel litigation from passive response to proactive action. However, this intensive application quickly triggered an international backlash: on February 22, 2022, the EU, citing relevant provisions of the TRIPS Agreement, requested consultations with the WTO regarding China's injunction rulings, and formally requested the establishment of a panel in December of the same year.

Regarding this emerging system, a debate has emerged in Chinese academia between "constructivism" and "caution": the former advocates using anti-suit injunctions to safeguard judicial sovereignty and the legitimate rights and interests of parties involved, while the latter worries about its weak institutional foundation and lack of restraint. This article focuses on the typical arena of SEP transnational litigation, following the logical thread of "phenomenon-dilemma-relief," analyzing the multiple dilemmas faced by China's in the application of anti-suit injunctions, and proposing a systematic solution for building an anti-suit injunction mechanism that is "beneficial domestically and justifiable internationally."

2. Observations on the application of anti-surrender injunctions in cross-border litigation of standard essential patents

2.1. Cross-border jurisdictional disputes triggered by SEP global rate tribunals

The key turning point in bringing the injunction to the forefront of SEP litigation was the UK courts' assertion of their authority to adjudicate global FRAND licensing rates. In the 2017 Unwired Planet v. Huawei case, the UK High Patent Court judge reversed its previous neutral stance in Vringo v. ZTE, which held that "regional licensing can also comply with FRAND principles," and instead determined that "negotiating licensing on a country-by-country basis is insane; a FRAND-compliant license must be a global license." Based on this, the court determined the global licensing rate for the patent portfolio in question [1]. In August 2020, the UK Supreme Court upheld the original judgment, clarifying that even if one party disagrees, the UK courts still have the power to adjudicate global FRAND licensing rates and can use an injunction to compel acceptance [2].

The UK court rulings have a clear "siphoning effect." Following this precedent, numerous lawsuits seeking global licensing rates, such as Optis v. Apple, Sisvel v. Xiaomi, and IDC v. Huawei, flooded the UK courts. The deeper logic lies in the fact that SEP holders' patent portfolios may cover dozens of countries, while standard implementers have global sales networks. Litigation in each country is costly, making global bundled licensing a commercial practice. However, whoever has the power to determine global rates holds substantial industry power. The global rates determined by the UK courts in Wireless Planet v. Huawei directly constrained the licensing fees Huawei paid to Wireless Planet for its products sold in China—continuing to refuse to determine global licensing conditions means that Chinese courts have completely lost pricing power in this field. It was under this pressure that the Shenzhen Intermediate People's Court and the Supreme People's Court responded in OPPO v. Sharp, confirming that Chinese courts also have the power to determine global licensing rates for SEP packages upon the request of one party. Thus, standard-essential patent disputes have escalated from civil competition between companies to "courtroom competition" and "litigation competition" between courts of different countries [3].

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2.2. Foreign court injunctions pose a dual threat to Chinese litigants and judicial sovereignty

The struggle over global tariff adjudication has led to the intensive use of injunctions. During the trial of Wireless Planet v. Huawei, a British court, at the plaintiff's request, issued an injunction against Huawei, forcing Huawei to withdraw its antitrust lawsuit against Wireless Planet in the Shenzhen Intermediate People's Court in October 2017. A similar scenario played out in the Convinson v. ZTE case; in August 2018, ZTE, under pressure from the British court's injunction, amended its claims twice in the Chinese court. Furthermore, after the Shenzhen Intermediate People's Court ruled in 2018 that Samsung had infringed Huawei's patent rights, Samsung applied for and obtained an injunction in the U.S. District Court for the Northern District of California, prohibiting Huawei from enforcing the Shenzhen court's judgment.

Although foreign courts have repeatedly claimed that anti-suit injunctions only bind the individual parties and are not directed against foreign courts, they constitute a substantial interference with China's judicial jurisdiction in fact. The deterrent effect of anti-suit injunctions stems from the serious legal consequences of violating the order, namely, hefty daily fines and even criminal prosecution for contempt of court. When Chinese parties still have significant interests outside of China's market, they are forced to succumb to this dilemma. This practice, which uses the guise of "targeting the parties" to actually "indirectly interfere with the judiciary of other countries," has been regarded as a hidden erosion of national sovereignty. Even more alarming is the emergence of preventative counter-anti-suit injunctions: in IP Bridge v. Huawei, the German court, without any parallel litigation, issued a counter-anti-suit injunction against Huawei at the request of the Japanese company IP Bridge, prohibiting it from applying for an anti-suit injunction in Chinese courts; similar situations occurred in Phillips v. OPPO and IPCom v. Lenovo [4]. This "preemptive" arrangement of anti-suit injunctions effectively deprives Chinese parties of the possibility of seeking judicial protection in their own country.

2.3. The practical development and judicial shift of China's anti-prosecution injunction rules

Faced with frequent suppression from foreign injunctions, China has shifted from passively accepting them to proactively responding. On August 28, 2020, the Supreme People's Court issued the first injunction-like injunction in Chinese litigation history in the case of Convinson v. Huawei, prohibiting Convinson from applying to the Düsseldorf Regional Court in Germany for enforcement of its first-instance judgment to stop infringement before the final judgment was rendered. Violators would be fined 1 million yuan per day. The groundbreaking significance of this case lies not only in the outcome but also in the Supreme Court's first-ever clarification of five factors to be considered when granting an injunction: the impact of the respondent's application for enforcement of a foreign court's judgment on Chinese litigation, whether the injunction is truly necessary, a reasonable balance of the interests of the applicant and the respondent, whether the injunction would harm the public interest, and consideration of international comity. This framework has provided guidance for subsequent judicial practice.

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3. The multidimensional dilemma of applying anti-surrenders in cross-border litigation of standard essential patents

3.1. The legal dilemma: the mismatch between the injunction system and the anti-prosecution order system

Under China's current legislative framework, an anti-suit injunction is not an independent legal concept. The Supreme People's Court, through an expansive interpretation of Article 103 of the Civil Procedure Law regarding injunctive relief, has incorporated anti-suit injunction practice into the scope of injunctive relief. While this approach of "implementing common law remedies based on civil law principles" is feasible when institutional supply is insufficient, the fundamental differences between the two cannot be ignored.

Injunctive relief is essentially a temporary measure, its legislative purpose being to prevent judgments from being difficult to enforce or to avoid harm to the applicant caused by the opposing party's actions; while anti-suit injunctions have substantive legal significance, aiming to reconcile jurisdictional conflicts between states. More importantly, injunctive relief typically targets only the private law actions of the parties, while anti-suit injunctions target the parties' litigation rights under the public law of another country, potentially involving a confrontation of judicial sovereignty between states. Professor Zhang Weiping cautiously points out that legislators "did not realize the implications of anti-suit injunctions" when formulating the provisions on injunctive relief. If injunctive relief is expanded from its narrow purpose of preventing harm to a measure against parallel litigation, it could be abused and restrict the parties' legitimate right to litigation [5].

Although the revised Civil Procedure Law of 2023 made significant adjustments to the section on foreign-related matters, it still failed to establish an independent anti-suit injunction system. This means that Chinese courts still rely on injunctive relief rules with limited systematization when issuing anti-suit injunctions. These rules lack clear scope of application and specific review standards for foreign-related contexts; they also lack independent remedies and specific arrangements for the legal consequences of violating anti-suit injunctions. This indirect legal basis is the systemic root cause of many subsequent difficulties.

3.2. The dilemma of applicability requirements: the logical tension and broad interpretation of the five-element framework

The five-factor analytical framework established by the Supreme People's Court in the Huawei v. Convinson case is the core of China's anti-suit injunction rules. However, a closer examination of its internal logic reveals several points worthy of discussion. The logical relationship between the second factor, "the necessity of the applicant's conduct preservation," and the first factor, "the impact of the enforcement of foreign judgments on Chinese litigation," and the third factor, "a reasonable assessment of the interests or predicaments of both parties," is not very clear. The fourth factor only considers whether the anti-suit injunction has a negative impact on the public interest, without addressing the crucial issue of whether foreign litigation circumvents important domestic public policies [6].

More substantive is the tendency towards a broad standard for recognizing parallel litigation. In mature practice in UK courts, parallel litigation is not a sufficient condition for issuing an anti-suit injunction, and its existence does not necessarily imply that the foreign litigation process is abusive or oppressive. In contrast, in Chinese practice, some cases have not used the actual existence of foreign parallel litigation as a condition for applying an anti-suit injunction: in Samsung v. Ericsson,

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the Wuhan Intermediate People's Court issued a preventative anti-suit injunction even though no parallel litigation existed in other courts; in OPPO v. Sharp, the Shenzhen Intermediate People's Court issued an anti-suit injunction at the request of OPPO, prohibiting the initiation of anticipated foreign litigation, even though foreign litigation had already been initiated. This "preventative" approach deviates from the inherent restraint that anti-suit injunctions should possess.

Furthermore, there are significant differences between Chinese practice and international mainstream practices in interpreting core elements such as the basis of jurisdiction and the suppression of frivolous litigation. Several factors considered by Chinese courts in applying anti-suit injunctions have not yet been interpreted rigorously, failing to effectively construct an anti-suit injunction system based on the principle of restraint [7]. This uncertainty in the interpretation of the elements makes it difficult to stably predict the reasonable boundaries of anti-suit injunctions.

3.3. The dilemma of international legitimacy: a dual test of international comity and TRIP obligations

Anti-suit injunctions face dual challenges to their external legitimacy from the perspectives of international comity and treaty obligations. On the level of international comity, an anti-suit injunction is essentially a court of one country using its judicial power to interfere in the public law activities of another country. It bypasses the public law barriers protecting the litigants' right to litigation in foreign countries, thus preventing or hindering foreign courts from fulfilling their functions. Even though Chinese courts in the Huawei v. Convinson case adequately considered international comity factors, specifying them as the order of case acceptance, the appropriateness of jurisdiction, and the appropriateness of the impact on the foreign court's trial and judgment, the factors considered by the Supreme People's Court—such as "the impact of applying for enforcement of a foreign court's judgment on this court" and "whether issuing the injunction itself is necessary"—are precisely the international comity factors considered by foreign courts when issuing anti-suit injunctions. This differs from the practice in common law countries of focusing on comparing the interests of their own courts with those of foreign courts.

At the TRIPS level, the EU formally requested the WTO to establish a panel in December 2022, which was established in January 2023. The EU's allegations in its written materials covered multiple levels: Chinese courts abused anti-suit injunctions to undermine the patent protection system stipulated in Article 28 of the TRIPS Agreement, depriving patent holders of their right to protect their proprietary rights in foreign courts; they created obstacles to legitimate trade by implementing global counter-injunctions, violating Article 44.1 of the TRIPS Agreement; and Chinese courts failed to apply relevant laws uniformly, fairly, and reasonably. Of course, the EU's allegations contain exaggerations; anti-suit injunctions are only temporary measures, and according to Article 1.1 of the TRIPS Agreement, each member state is free to determine the manner of implementing the agreement's provisions within its own legal system. However, the unresolved WTO dispute means that our country's anti-suit injunctions continue to face legal pressure at the international rule level.

3.4. The dilemma of implementation effectiveness: the paradox of validity in the game of anti-injunctions

The effectiveness of anti-suit injunctions also faces structural dilemmas. Their aggressive nature naturally induces a counterbalancing mechanism: when a court in one country issues an anti-suit injunction, courts in other countries are highly likely to apply for a counter-anti-suit injunction from

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the opposing party, thus creating a vicious cycle where the meaning of the anti-suit injunction is difficult to achieve. Zhang Huibin and Liu Shilei analyze this phenomenon using game theory, arguing that countries face a prisoner's dilemma in asserting jurisdiction—to avoid the worst outcome, all parties will choose to issue anti-suit injunctions, ultimately leading to the lowest overall benefit and the mutual issuance of anti-suit injunctions by both sides [8].

This predicament has already manifested itself in practice in our country. In the Xiaomi v. IDC case, the High Court of New Delhi in India and the Munich Regional Court in Germany successively issued counter-injunctions against Xiaomi; in the Samsung v. Ericsson case, the U.S. District Court for the Eastern District of Texas also issued a counter-injunction. Even more alarming is the extremely rapid speed with which foreign courts have issued counter-injunctions in some cases—in the OPPO v. Sharp case, the Shenzhen Intermediate People's Court issued an injunction, and the defendant obtained a counter-injunction through a German court only seven hours later.

The limitations in achieving effectiveness are equally evident. The deterrent effect of Chinese courts' use of fines and detention against parties who violate anti-suit injunctions is constrained by whether the party has seizable property or market interests within China's. When the respondent has a limited market share in our country or their global assets are primarily located outside of our country, the deterrent effect of daily accumulated fines is significantly reduced. Against the backdrop of the flexible interpretation of the principle of international comity by courts worldwide, the escalating prevalence of anti-suit injunctions indicates that international comity is gradually becoming a "girl to be dressed up as one pleases." [9] Anti-suit injunctions, intended as a tool to coordinate jurisdictional conflicts, may instead become a trigger for exacerbating conflicts through repeated bargaining—this is the deepest paradox facing the anti-suit injunction system.

4. Pathways to resolve the dilemma of anti-surrenders in cross-border litigation of standard essential patents

4.1. At the conceptual level: a return to a humble stance from "flexible application"

The core principle is the soul of a system. The fundamental problem with current anti-suit injunction practices in China lies in using general rules of injunctive relief to impose the extremely cautious function of anti-suit injunctions, causing their application to deviate from their inherent exceptional nature. Anti-suit injunctions are "an exceptional case within the mechanism of interstate jurisdictional coordination, not a general principle of interstate jurisdictional coordination," and their application should proceed in two steps—first, starting with a presumption of non-application, and then rigorously examining the requirements when justifiable grounds exist. The U.S. Restatement (Fourth) of Foreign Relations explicitly defines anti-suit injunctions as "an extremely exceptional mechanism," and the presumption of non-application is also established as a primary principle in common law practice. This comparative law experience is worth learning from.

The principle of restraint does not oppose the application of anti-suit injunctions, but rather opposes their expansionist tendency. Professor Zheng Lunxing introduces the concept of restraint into the analysis of anti-suit injunctions in FRAND (French, Liberated, and Conventional) litigation, arguing that restraint is not only a principle for the issuance of anti-suit injunctions, but also a methodological analytical paradigm for courts to decide whether to issue them [10]. Specifically, in Chinese practice, the return to restraint includes at least three levels of requirements: in terms of functional positioning, anti-suit injunctions should be limited to specific dimensions such as promoting reasonable dispute resolution, maintaining major public policies, and coordinating dispute resolution methods; in terms of scope of application, anti-suit injunctions should only be

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used in international or extraterritorial parallel litigation to avoid the excessive issuance of preventative anti-suit injunctions; and in terms of attitude, the "cautious but tit-for-tat" strategy proposed by Professor Cui Guobin should be adopted—that is, before the establishment of an effective international coordination mechanism, international overlapping litigation should be tolerated in principle, and anti-suit injunctions should only be issued when overlapping litigation may excessively harm the interests of domestic parties or substantially harm China's public policies; when a foreign court's anti-suit injunction threatens the jurisdiction of Chinese courts, a reciprocal anti-suit injunction can be issued.

4.2. Normative level: a gradual transition from expedient measures for behavioral preservation to an independent system

The implementation of these principles requires the support of regulations. Regarding the relationship between anti-suit injunctions and existing rules on injunctive relief, two approaches exist in academia. One is to improve the existing framework of injunctive relief through judicial interpretation; the other is to establish an independent anti-suit injunction system. Considering the cost of amending the Civil Procedure Law and the fact that the 2023 revision did not address anti-suit injunctions, a "tiered and progressive" transitional approach is more feasible.

In the short term, the "Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Review of Conduct Preservation Cases in Intellectual Property Disputes" can be revised to specifically address anti-suit orders in SEP transnational litigation, and relevant judicial interpretations can be used to clarify the specific implementation issues of anti-suit orders. This includes clarifying the specific circumstances under which anti-suit orders are issued based on conduct preservation measures (including situations where Chinese courts have exclusive jurisdiction, parties have entered into an exclusive jurisdiction agreement choosing Chinese courts, parties have clearly abused litigation procedures in foreign courts, foreign court litigation may produce conflicting judgments that make it difficult to enforce Chinese court judgments, and foreign court litigation harms China's sovereignty, security, or public interests); establishing practices for counter-anti-suit orders against foreign anti-suit orders; and clarifying the procedural differences between anti-suit orders and conduct preservation measures, particularly granting parties the right to appeal anti-suit order rulings instead of the "one-time application for reconsideration" stipulated in Article 111 of the Civil Procedure Law.

In the long run, a systematic anti-suit injunction system should be established at the legislative level. A general provision on anti-suit injunctions could be made separately under the "Preservation and Preliminary Execution" chapter of the Civil Procedure Law, with more specific details placed in the section on foreign-related civil litigation. Special needs in specific fields (such as maritime and intellectual property) could be addressed through relevant substantive laws or separate regulations. Alternatively, an independent injunction system could be established. Preservation of conduct is essentially a temporary measure, while anti-suit injunctions have substantive legal significance; modifying the preservation of conduct system would inevitably diminish its advantages. Regardless of the legislative form adopted, the core of the system should be the clarification of applicable requirements and the standardization of procedures.

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4.3. At the element level: from the internal logic of the five elements to the rigor of the element system

Cui Guobin advocates a reintegration of the existing five elements: adding new considerations such as "whether the extraterritorial litigation constitutes overlapping litigation," "whether overlapping litigation will cause excessive harm to the applicant," "the extent of the difficulties faced by both parties," "whether it harms public policy objectives," and "whether there are concerns about international comity." These are further divided into three groups: "potential for harm," "balance of difficulties," and "public interest," for comprehensive judgment [4]. This restructuring effectively resolves the problem of unclear logical relationships between the factors in the original five elements. In interpreting the specific requirements, a more stringent approach is needed, referencing mature Anglo-American legal practices: Regarding the determination of parallel litigation, the expansion of preventative injunctions should be avoided, limiting them to existing or soon-to-be-initiated extraterritorial litigation; the determination of excessive harm can draw on the English legal standard of "excessive inconvenience, disruption, or oppression"; and the determination of frivolous litigation should take into account the applicant's good faith.

Of particular note is the establishment of exceptions to anti-suit injunctions. Drawing on English legal practice, anti-suit injunctions can be subject to "reverse restrictions." If the applicant has engaged in "unjustifiable conduct" (such as delaying the application without just cause, voluntarily accepting the jurisdiction of a foreign court, or having breached a jurisdiction agreement prior to the application) or if the application of the anti-suit injunction would deprive the respondent of its substantive right to sue or a security interest in foreign proceedings, then the anti-suit injunction should not be applied. The establishment of such exceptions reflects both a balanced protection of the parties' interests and a reasonable constraint on judicial discretion. Furthermore, considering the unique nature of FRAND litigation, setting a precondition for an anti-suit injunction based on the exclusive jurisdiction rules of the patent registration country's courts is constructive in establishing the basis of jurisdiction.

4.4. Coordination level: establishing a dual-track system with internal and external linkage

Domestically, the key is to construct a defensive institutional framework centered on blocking. Referring to the "Measures for Blocking the Improper Extraterritorial Application of Foreign Laws and Measures" promulgated by the Ministry of Commerce in 2021, a special "Anti-Prosecution Injunction Blocking Law" could be introduced, applicable to situations where foreign courts issue anti-prosecution injunctions in violation of international law and the principle of international comity, prohibiting parties from engaging in litigation (or arbitration) in China. Specific measures include: penalizing parties applying for foreign anti-prosecution injunctions against Chinese parties in accordance with Chapter 10 of the Civil Procedure Law regarding coercive measures for obstructing civil proceedings; establishing a recourse system—if the respondent is penalized for non-compliance with a foreign anti-prosecution injunction, they can request compensation from the applicant for the amount of the penalty in Chinese litigation; refusing to recognize the validity of foreign anti-prosecution injunctions, refusing to assist in service of process, and refusing to recognize and enforce judgments and arbitral awards obtained under foreign anti-prosecution injunctions, etc. Simultaneously, the authority to issue counter-anti-prosecution injunctions should be delegated to the Supreme People's Court, various higher courts, and courts with centralized jurisdiction over foreign-related cases, and a system for reporting to higher courts and the Supreme

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People's Court should be established to reflect our country's prudent stance in issuing counter-anti-prosecution injunctions.

Externally, the focus should be on promoting dialogue and the construction of international rules. On the one hand, anti-suit injunctions can serve as a judicial pathway for rule-based dialogue. Faced with the difficulties of traditional trade negotiations on SEP international rules, anti-suit injunctions, with their multilateral nature, can become a new channel for countries to engage in dialogue on standard essential patent policies. On the other hand, a more fundamental task is to promote negotiations on international conventions for jurisdictional harmonization. Although the 1999 Hague Convention on Jurisdiction and Foreign Judgments (Draft) was shelved due to disagreements among countries, its established "first-to-file court principle," coupled with a flexible framework including exceptions such as forum non conveniens, exclusive jurisdiction, recognition of expectations and prevention of delays, and passive confirmation of rights, remains forward-looking in resolving the anti-suit injunction dilemma today. China can push for the resumption of negotiations on this project and propose more specific solutions to the SEP jurisdiction issue, such as an international SEP jurisdiction agreement. Only by advancing both internally and externally can we fundamentally escape the prisoner's dilemma of the anti-suit injunction battle.

5. Conclusion

The rise of anti-suit injunctions in SEP (Security Equity) cross-border litigation reflects a deeper issue: when multilateral mechanisms for coordinating international jurisdiction are still lacking, and courts in various countries are vying for global rate-based adjudication, anti-suit injunctions are both a necessary shield and a potential double-edged sword. Since the Convinson case, which set a precedent, China has initially developed local experience in exploring five key elements. However, the pressure of EU consultations, the resistance to anti-suit injunctions, and the limitations of the injunction system all indicate that this system is still in a stage of "dancing in shackles." Overcoming this predicament cannot rely on the strong expansion of unilateral systems, but should instead return to the inherently restrained nature of anti-suit injunctions. The basic principle is "minimum application." In terms of regulations, it gradually transitions from an expedient measure for behavioral preservation to a specialized system. In terms of requirements, it introduces reverse presumption and exception restrictions to constrain judicial discretion. In terms of coordination, it promotes the parallel development of domestic blocking mechanisms and dialogue on international rules. This is both a respect for the inherent logic of the anti-prosecution injunction system and an essential aspect of building a Chinese solution that is "beneficial domestically and reasonable internationally."

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