

International Dispute Resolution Update: Foreign Anti-Suit Injunctions

BY JAMES E. BERGER AND CHARLENE SUN

Introduction

Anti-suit injunctions – injunctions prohibiting a party from prosecuting litigation in a forum outside the enjoining court’s jurisdiction – are among the most extraordinary remedies a court can impose. Applications for anti-suit injunctions typically arise in a handful of circumstances. Domestically, anti-suit injunctions represent a fairly standard remedy to curb abusive litigation or to terminate proceedings that have been brought in connection with matters that have been resolved previously.¹ Foreign anti-suit injunctions, however, are often sought in the context of international commercial disputes, where parties commence claims in courts of different nations. While the power of U.S. courts to issue anti-suit injunctions against parties subject to their jurisdiction is well-established, courts have repeatedly recognized that because an anti-suit injunction has the effect of restricting a foreign court of exercising its lawful jurisdiction, the remedy is a draconian one that necessitates the balancing of several weighty factors.²

In its February 2009 decision in *West Tankers v. Allianz SpA*,³ the European Court of Justice (“ECJ”) held that national courts of EU Member States lack jurisdiction to issue anti-suit injunctions in connection with proceedings initiated in another EU Member State in violation of an agreement to arbitrate. The *West Tankers* decision has been the subject of extensive commentary (including in this publication),⁴ with some commentators questioning whether the decision would substantially curtail the availability of foreign anti-suit injunctions in international disputes. Two recent U.S. decisions, however, demonstrate that anti-suit injunctions remain an available remedy in U.S. courts, including – perhaps especially – in aid of arbitration.

Anti-Suit Injunctions in the U.S. – The Two Standards

While U.S. courts are in widespread accord that they possess ample authority and jurisdiction to enjoin a party before it from pursuing litigation in a foreign forum, a split exists among the federal courts regarding the specific circumstances under which anti-suit injunctions are appropriate.

1. The Conservative Approach

The “conservative” approach has been embraced by the First,⁵ Second,⁶ Third,⁷ Sixth,⁸ Eighth,⁹ and D.C.¹⁰ Circuits.¹¹ Under this standard, two threshold requirements must first be met before a court may consider issuing a foreign anti-suit injunction: 1) the parties must be the same in both matters; and 2) resolution of the case before the enjoining court must be dispositive of the action to be

enjoined.¹² If both of these requirements are satisfied, the court may move on to consider other discretionary factors relevant to determining whether the injunction should be issued.¹³ The most important of these discretionary factors are whether the foreign action threatens the jurisdiction or strong public policies of the enjoining forum.¹⁴

2. The Liberal Approach

In contrast, under the minority liberal approach, embraced by the Fifth,¹⁵ Seventh,¹⁶ and Ninth Circuits,¹⁷ a foreign anti-suit injunction may be issued based primarily on the consideration of equitable factors, such as the vexatiousness and oppressiveness of the duplicative foreign litigation. Under the liberal standard, no mandatory prerequisites exist, and a foreign anti-suit injunction may be issued to prohibit the prosecution of concurrent litigation of the same claim in a foreign court where the parallel litigation would result in “inequitable hardship” and “tend to frustrate and delay the speedy and efficient determination of the cause,” so long as the injunction would not actually threaten international relations.¹⁸

In *Karaha Bodas Co. LLC v. Pertamina* – a case which involved two applications for anti-suit injunctions before two different U.S. courts (as well as one before an Indonesian court)¹⁹ – the Supreme Court, in 2008, declined to grant *certiorari* to resolve this split of authority, and the two fundamental approaches persist. Two recent decisions from district courts in the Second and Eighth Circuits, however, provide an excellent illustration of the current state of the law and, more importantly, the way district courts confronted with applications for foreign anti-suit injunctions will approach their analysis.

Amaprop

On March 23, 2010, the U.S. District Court for the Southern District of New York issued a preliminary injunction requiring a party to dismiss a lawsuit it had commenced in India based on its finding that the Indian dispute was covered by a valid arbitration agreement. *Amaprop Ltd. v. Indiabulls Fin. Svces. Ltd.*²⁰ involved a dispute concerning a subscription agreement, which provided that all disputes arising thereunder would be subject to arbitration in New York. When a dispute arose, the claimant commenced arbitration in accordance with the agreement. The respondent initially appeared, but requested additional time to serve its statement of defense. Following the arbitral institution’s order granting the request for additional time, the respondent initiated *ex parte* proceedings in the Indian courts in which it successfully sought an injunction prohibiting the claimant from proceeding with the arbitration.

The claimant promptly commenced a proceeding in New York to compel arbitration and to enjoin the respondent from prosecuting the Indian suit. The district court granted both prongs of the motion. It noted at the outset of its analysis that the authority of federal courts to enjoin foreign proceedings in aid of arbitration was well-established, and noted further that the Second Circuit’s *China Trade* decision governed the analysis. With respect to the more critical of the *China Trade* threshold factors – that the injunction be dispositive of the action to be enjoined – the court, quoting the Second Circuit’s prior decision in *Paramedics*, held that where the injunction is sought in aid of arbitration, a finding that the underlying dispute is subject to arbitration is itself sufficient to satisfy this criteria, stating:

The case before the enjoining court here concerns the arbitrability of the parties’ claims; therefore the question is whether the ruling on arbitrability is dispositive of the [foreign proceeding], even though the underlying disputes are confided to the arbitral panel and will not be decided by the enjoining court. In short, the district court’s judgment disposes of the [foreign proceeding] because the [foreign proceeding] concerns issues that, by virtue of the district court’s judgment, are reserved for arbitration.²¹

With respect to the discretionary factors, the district court began by noting the strength of the U.S. policy favoring enforcement of agreements to arbitrate, and that because the Indian proceedings had “derailed the arbitration proceedings,” the Indian proceeding would frustrate that policy. The court found next that the Indian proceeding was necessarily vexatious, and that by commencing the Indian proceeding in a stealth manner while purporting to participate in the arbitration, the respondent had acted “in the utmost bad faith.” Finally, the district court held that the Indian action, if allowed to proceed, would cause delay (the court took note of expert testimony that, based on the caseload of the Indian court in which the matter had been brought, no resolution could be expected for 20 years), unnecessary expense, and create the risk of inconsistent judgments. Because the court found that all the discretionary factors weighed heavily in favor of the injunction, the court granted it.

In short, the district court’s analysis and decision in *Amaprop* leaves no question that courts in the Second Circuit will not hesitate to enjoin parties who commence foreign litigation in connection with disputes that they have agreed to arbitrate, and that where the obligation to arbitrate is clear, that obligation alone may tip each of the factors strongly in favor of injunctive relief.

Continental Casualty

On April 2, 2010, the U.S. District Court for the Western District of Missouri issued its decision in *Continental Casualty Co. v. AXA Global Risks (UK) Ltd.*²² The *Continental* court did not involve arbitration, but rather parallel court proceedings, and the court’s analysis demonstrates that such cases implicate international comity much more squarely.

Continental involved a dispute over a reinsurance policy. Continental, the plaintiff, denied an insurance claim, after which the insured sued Continental in Missouri state court. The Missouri state court entered judgment against Continental on the claim, and Continental appealed. While the appeal was pending, Continental sought reimbursement from its reinsurer (“Reinsurer”) for the Reinsurer’s share of the claim and related expenses. After refusing reimbursement, the Reinsurer commenced an action against Continental in the Commercial Court of London seeking a declaratory judgment to determine the rights and obligations of the parties under the reinsurance contract. Continental then commenced an action in the district court seeking monetary damages and declaratory relief under the reinsurance contract. Both the U.K. and district court actions were stayed pending the resolution of Continental’s appeal of the Missouri state court action concerning underlying insurance claim. The terms of the stay of the U.K. action, however, provided that the stay could be terminated upon 28 days written notice from one party to the other. Continental’s appeal was ultimately unsuccessful and, concerned that the Reinsurer would see an *ex parte* lift of the stay of the U.K. action, it moved for a temporary restraining order in the Missouri federal court to prevent the Reinsurer from prosecuting the U.K. action. Continental’s primary justification in support of its motion was that the Reinsurer would likely seek an immediate lift of the U.K. stay and then seek an anti-suit injunction against Continental in order to keep the action in the U.K., because the Reinsurer believed that U.K. law would be more favorable to its position.

While noting the continuing liberal-conservative circuit split, the district court followed the Eighth Circuit’s version of the conservative approach, set forth in *Goss*, which provides that an injunction may be issued only where (1) the foreign proceeding would prevent U.S. jurisdiction or threaten a vital U.S. policy, and (2) domestic judicial interests outweigh concerns of international comity,²³ and which stresses that “comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing *res judicata* to be pled in defense.”²⁴

The *Continental* court emphasized the importance of showing “a threat to vital American policy”²⁵ and offered as examples of such policy conflicts the unique nature of U.S. securities and antitrust laws, the

foreign versions of which may not be equally protective.²⁶ The court found that “[t]he possibility [that] a foreign court’s holding might threaten the United States plaintiff’s interest in prosecuting its lawsuit”²⁷ did not rise to the level of a threat to vital American policy. The court also noted that while the maintenance of the English proceeding was objectionable to Continental, that action did not threaten U.S. jurisdiction or any U.S. policy. It thus denied Continental’s motion for an anti-suit injunction.²⁸

While reaching different outcomes, the *Amaprop* and *Continental* decisions each demonstrate that U.S. courts – particularly those following the conservative approach – will generally refrain from issuing foreign anti-suit injunctions solely in order to save a party from even significant inconvenience or expense. Rather, as seen in the two *Karaha Bodas* decisions, the decisions each suggest that courts will look carefully for direct threats to their own jurisdiction or prior judgments or, alternatively, for the likelihood that maintenance of a foreign lawsuit is inimical to a fundamental U.S. policy. Enforceability of arbitration agreements is clearly such a policy; the *Amaprop* decision, like several others from courts in the Second Circuit, suggests that a party’s commencement of litigation in breach of an agreement to arbitrate will in almost every instance justify the issuance of a foreign anti-suit injunction, whereas the *Continental* decision demonstrates that where a party seeks to use an anti-suit injunction merely to preserve its ability to litigate in a U.S. forum, the need for injunctive relief is likely to be outweighed by the interest in maintaining comity.

Conclusion

The foregoing decisions demonstrate that, notwithstanding the ECJ’s decision in *West Tankers*, foreign anti-suit injunctions continue to represent a critical, if draconian, tool that U.S. courts will use to protect their jurisdiction, their orders, and the effectiveness of the laws and policies of the United States, including, the strong U.S. policy favoring arbitration. Indeed, the *Amaprop* decision demonstrates that litigation commenced in derogation of an agreement to arbitrate may constitute the paradigm for which the anti-suit injunction is best suited and for which it will be granted most readily. Given the fact-intensive nature of the anti-suit inquiry under U.S. law, the circuit-based standards are likely to undergo further evolution, and the Supreme Court may eventually decide to enter the fray. Until that time, practitioners confronted with parallel proceedings should consider carefully whether the foreign proceeding they wish to avoid implicates U.S. jurisdiction and/or public policy, as opposed only to their clients’ interests, as this inquiry is most likely to dictate the outcome of any application for a foreign anti-suit injunction.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

James E. Berger
212-318-6450
jamesberger@paulhastings.com

Charlene Sun
212-318-6703
charlenesun@paulhastings.com

¹ See, e.g., *Carr v. Tillary*, 2010 WL 1416007, *13 (S.D. Ill. Mar. 31, 2010).

- ² See, e.g., *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004) (although an anti-suit injunction is “leveled at the party bringing the suit, it nonetheless effectively restricts the jurisdiction of the court of a foreign sovereign”) (internal quotation omitted).
- ³ *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4.
- ⁴ “European Court of Justice Prohibits Anti-Suit Injunctions in Favor of Arbitration between National Courts of Member States,” *Stay Current*, Mar. 13, 2009.
- ⁵ *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17-19 (1st Cir. 2004).
- ⁶ *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).
- ⁷ *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 125, 128 (3d Cir. 2002).
- ⁸ *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352-54 (6th Cir. 1992).
- ⁹ *Goss Int’1 Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 361-63 (8th Cir. 2007).
- ¹⁰ *Laker Airways*. 731 F.2d at 939.
- ¹¹ See *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) (explaining that conservative standard for issuing anti-suit injunctions followed by Second, Third, Sixth, and D.C. Circuits); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) (describing Second, Sixth and D.C. Circuits as employing “more restrictive approach,” while Fifth, Seventh and Ninth Circuits applied a more liberal standard).
- ¹² *China Trade*, 837 F.2d at 35.
- ¹³ See *id.* (stating that courts should consider whether the parallel litigation would frustrate a policy in the enjoining forum, be vexatious, threaten the issuing court’s *in rem* or *quasi in rem* jurisdiction, prejudice other equitable consideration, or result in delay, inconvenience, expense, inconsistency or a race to judgment).
- ¹⁴ See *China Trade*, 837 F.2d at 36 (explaining that in the interest of comity, more significance should be attached to “(A) whether the foreign action threatens the jurisdiction of the enjoining forum, and (B) whether strong public policies of the enjoining forum are threatened by the foreign action.”).
- ¹⁵ *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996).
- ¹⁶ *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-33 (7th Cir. 1993).
- ¹⁷ *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981).
- ¹⁸ *Kaepa*, 76 F.3d at 626-27 (5th Cir. 1996).
- ¹⁹ *Karaha Bodas Co. LLC v. Perusahaan*, 264 F. Supp.2d 470 (S.D. Tex. 2002), *rev’d* 335 F.3d 357 (5th Cir. 2003); *Karaha Bodas Co. LLC v. Perusahaan*, 465 F. Supp.2d 283 (S.D.N.Y. 2006), *aff’d* 500 F.3d 111 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 2958 (2008). In *Karaha Bodas*, the plaintiff commenced a proceeding in federal court in Houston to enforce a Swiss arbitration award rendered against the Indonesian state-owned oil and gas conglomerate. Following issuance of the Houston court’s order confirming the award, the defendant commenced litigation in Indonesia to annul the same award. The Houston court enjoined the defendant from prosecuting this action, though the Fifth Circuit ultimately vacated the injunction, in sum finding that because the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) expressly permits multiple confirmation proceedings, and further because annulment of the award by an Indonesian court would not prevent the award from being enforced in the United States, the Indonesian action posed no threat to the Houston court’s jurisdiction or prior orders. Absent such a threat, the Fifth Circuit concluded that the injunction’s potential impact on international comity and relations between the United States and Indonesia compelled vacatur. Four years later, following lengthy execution proceedings before the Southern District of New York whereby the plaintiff successfully sought to attach and execute on the defendant’s bank accounts in New York, the defendant commenced suit against the plaintiff in the Cayman Islands, claiming that the arbitral award had been procured by fraud. The plaintiff again moved for an anti-suit injunction, this time before the New York federal court, and again the injunction was granted. The Second Circuit, applying the conservative approach set forth in *China Trade*, affirmed the injunction, noting that it was justified by the defendant’s attempt to use foreign judicial proceedings to “vitiate” the arbitration award and the U.S. judgments that had enforced it. The Supreme Court, after soliciting the views of the Solicitor General, denied *certiorari*. Paradoxically, in *Karaha Bodas* the Fifth Circuit, which subscribes to the liberal approach on anti-suit injunctions, vacated the injunction while the Second Circuit, which subscribes to the conservative view, upheld it. Despite the different tests each court employed and the different outcomes they reached,

the Fifth and Second Circuits each appear to have focused primarily on the actual threat that the foreign litigation posed to the U.S. court's orders and jurisdiction. Collectively, the decisions – like the decisions noted below – demonstrate that U.S. courts confronted with requests to shut down foreign proceedings are, unsurprisingly, far more inclined to exercise their authority to protect the sovereignty of the U.S. courts and U.S. policy than they are merely to protect litigants from having to proceed in multiple judicial fora.

²⁰ 2010 WL 1050988 (S.D.N.Y. Mar. 23, 2010).

²¹ *Amaprop*, at *5 (citing *Paramedics*, 369 F.3d at 653).

²² 2010 WL 1268038 (W.D. Mo. Apr. 2, 2010).

²³ *Id.* at *3.

²⁴ *Id.* (citing *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 939 (D.C. Cir. 1984)).

²⁵ *Continental Casualty Co.*, 2010 WL 1268038, at *3.

²⁶ *Id.*

²⁷ *Id.* at *4.

²⁸ Reinsurers had argued that because it filed U.K. proceeding prior to Continental's filing of the Missouri proceeding, the Missouri court should dismiss Continental's action or, in the alternative, stay it pending the outcome of the U.K. proceedings. The district court denied Reinsurers' motion, relying on Eighth Circuit law holding that "first filed is not a rule" that requires dismissal or stay of the later-filed action when two actions are pending before the courts of different sovereigns, and further noting that "first-to-file" operates as a factor in considering dismissal of the later-filed action primarily where the original court has already entered judgment. *Id.* at *4 (citing *Smart v. Sunshine Potato Flakes L.L.C.*, 307 F.3d 684, 687 (8th Cir 2002)).