Antisuit 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 antisuit injunctions typically arise in a handful of circumstances. Domestically, antisuit injunctions represent a fairly standard remedy to curb abusive litigation or terminate proceedings that have been brought in connection with matters that have been resolved previously.¹ Foreign antisuit injunctions, however, are often sought in the context of international commercial transactions, where disputes may lead to the commencement of related or even identical claims in courts of different nations. From a litigant’s perspective, an antisuit injunction may guarantee that a dispute is litigated in a favorable forum; from a judicial perspective, the remedy represents an important tool to prevent the waste of judicial resources and the risk of inconsistent judgments. From any perspective, the remedy is a draconian one that necessitates the balancing of several weighty factors.

Antisuit injunctions are supported by a court’s in personam jurisdiction over the parties before it. As a technical jurisdictional matter, there’s little, if any, dispute that courts have the right to impose them, because courts generally have the right to control the conduct of the parties before them.² Notwithstanding their solid jurisdictional basis, however, antisuit injunctions implicate substantial issues of comity and deference between sovereigns. While this generally isn’t a problem when the injunction’s effects are completely restricted to a nation’s own boundaries, foreign antisuit injunctions are different. Although they’re directed to a party rather than the foreign country or tribunal itself, foreign antisuit injunctions may have the practical effect of preventing a foreign court from considering otherwise proper proceedings over which it has jurisdiction under its governing law.³

In its February 2009 decision in West Tankers v. Allianz SpA,⁴ the European Court of Justice (ECJ) held that Council Regulation (EC) No. 44-2001⁵ deprives the EU member states’ national courts of jurisdiction to issue an antisuit injunction 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),⁶ with some commentators questioning whether the decision would substantially curtail the availability of foreign antisuit injunctions. Given the attention paid to foreign antisuit injunctions in the wake of West Tankers, this article discusses the state of the law relating to foreign antisuit injunctions in the United States, with particular attention to the circumstances under which such injunctions remain available to parties in U.S. jurisdictions.⁷

Antisuit Injunctions in the United States: Two Standards

In the United States, federal and state courts are in widespread accord that they possess ample authority and jurisdiction to enjoin a party before them from pursuing litigation in a foreign forum. There’s nearly identical consensus, however, that the authority to issue a foreign antisuit injunction is necessarily tempered by the principle of international comity and that injunctions restraining foreign litigation must be “used sparingly” and be “granted only with care and great restraint.”⁸ While there is consensus among American courts that foreign antisuit injunctions are an appropriate tool in certain circumstances, a split exists among the federal courts regarding specifically what those circumstances are.

The Conservative Approach

The “conservative” approach has been embraced by the First,⁹ Second,¹⁰ Third,¹¹ Sixth,¹² Eighth,¹³ and D.C.¹⁴ Circuits.¹⁵ Under this standard, two threshold requirements must first be met before a court may consider issuing a foreign antisuit injunction: the parties must be the same in both matters, and resolution of the case before the enjoining court must be dispositive of the action to be enjoined.¹⁶ 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.¹⁷ The most important of these discretionary factors is whether the foreign action threatens the jurisdiction or strong public policies of the enjoining forum.¹⁸

The Liberal Approach

In contrast, under the minority liberal approach, embraced by the Fifth,¹⁹ Seventh,²⁰ and Ninth Circuits,²¹ a foreign antisuit 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 antisuit injunction may be issued to prohibit the prosecution of concurrent litigation of the

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same claim in a foreign court where the parallel litigation would result in “in equitable hardship” and “tend to frustrate and delay the speedy and efficient determination of the cause,” so long as the injunction wouldn’t actually threaten international relations.22 This analysis has been criticized by those courts of appeals adhering to the majority approach for giving too little deference to international comity by allowing that consideration to be overridden by such other concerns as delay, inconvenience, expense, and the possibility of inconsistent rulings, which could likely result from any kind of parallel proceeding.23

**Karaha Bodas**

One relatively recent case provides an excellent illustration of how U.S. courts address the competing considerations that arise when a party seeks a foreign antisuit injunction. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*24 involved a party’s attempt to enforce a $261 million arbitration award. Pertamina, the award debtor, refused to pay the arbitral award, forcing Karaha Bodas Co. (KBC) to commence enforcement proceedings in several countries, including the United States. Litigation ultimately took place in seven different countries, and the case gave rise to three separate applications for foreign antisuit injunctions—two in the United States (sought by KBC), and one in Indonesia (sought by Pertamina).

**Injunction Proceedings in the Fifth Circuit**

Following issuance of the award, KBC commenced proceedings to confirm the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)25 in federal court in Houston, Texas. After the Texas court had confirmed the award, Pertamina filed a proceeding in Indonesia, seeking to annul it. KBC promptly sought and obtained a preliminary injunction prohibiting Pertamina from seeking annulment in the Indonesian courts.26 Pertamina prosecuted the Indonesian action notwithstanding the injunction; its application was granted, and the Central Jakarta District Court issued an order purporting to annul the award and providing that KBC would be fined $500,000 per day if it attempted to enforce the award anywhere in the world. Pertamina appealed the Texas court’s injunction to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit—which, as noted above, subscribes to the liberal view concerning foreign antisuit injunctions—vacated the injunction.27 In its decision, the Fifth Circuit undertook an in-depth analysis of the structure of the New York Convention to determine whether the Indonesian proceeding genuinely threatened the Texas court’s judgment confirming the award. In finding that the Indonesian proceeding posed no genuine threat to the Texas court’s judgment, the Fifth Circuit took note of the New York Convention’s express endorsement of multiple proceedings concerning the same arbitration award (as well as KBC’s own decision to pursue confirmation before multiple national courts), finding that this feature of the New York Convention minimized concern about delay or duplication. Furthermore, the Fifth Circuit noted that even if the Indonesian courts purported to annul the award, such a ruling wouldn’t foreclose recognition and enforcement of the award in the United States because the New York Convention permits a court of secondary jurisdiction to confirm an award notwithstanding its annulment by a court of primary jurisdiction.28 Finally, in response to the Indonesian court’s order providing that KBC would be fined $500,000 per day for any violation of its own injunction prohibiting KBC from seeking confirmation of the award, the Fifth Circuit accepted Pertamina’s pledge not to seek enforcement of that injunction, and noted its own doubts that any monetary penalties imposed on KBC could be enforced or collected.29

The Fifth Circuit then balanced these factors, which it characterized as the “scant vexatiousness and oppressiveness” of Pertamina’s acts, against the Texas injunction’s potential impact on international comity and found the likely impact to be substantial. Specifically, the court noted that because Pertamina is government-owned and the acts underlying the dispute were undertaken by Indonesia in its sovereign capacity, the dispute wasn’t “purely private.”30 Second, the Fifth Circuit found that the Texas court injunction could have a chilling effect on future New York Convention proceedings and that foreign courts might seek to use the Texas court’s injunction as a precedent to impose more nefarious injunctions in future cases. The Fifth Circuit appears to have concluded that because the Indonesian court’s injunction didn’t pose any genuine obstacle to the award’s enforcement in the United States, it was necessarily outweighed by the potential impacts on comity, and thus couldn’t be maintained.31

**Injunction Proceedings in the Second Circuit**

Four years later, the parties again became embroiled in antisuit proceedings, this time in New York. KBC ultimately sought to enforce the award by registering the Texas judgment in the Southern District of New York and by executing upon Pertamina’s assets there. Following more than two years of litigation concerning the ownership of Pertamina’s assets, the New York court ordered certain banks to turn over the full amount of the judgment and interest to KBC, subject to a stay designed to permit meaningful appellate review of its findings.

In September 2006—just prior to the U.S. Supreme Court’s denial of certiorari on the last of the ownership questions that would have terminated the stay of turnover—Pertamina commenced a suit against KBC in the Cayman Islands, where it’s headquar-
tered, alleging that the arbitral award resulted from fraudulent conduct on the part of KBC. The Cayman lawsuit sought to recover the amount of the entire award as “damages,” and Pertamina sought a Mareva injunction (a worldwide prejudgment attachment available in British Commonwealth nations) to prevent KBC from distributing the judgment proceeds to its shareholders. KBC immediately moved in the New York district court for an injunction prohibiting Pertamina from prosecuting the Cayman suit, and the New York court granted the motion.32

The Second Circuit upheld the district court’s ruling with minor modifications. The court first held that China Trade applied to all applications for foreign antisuit injunctions, and rejected the district court’s finding that that decision didn’t govern cases involving nonparallel proceedings.33 Next, the Second Circuit held that the two threshold requirements of China Trade—the identity of the parties and the dispositive nature of the relief in the original action—were met. Specifically, the Second Circuit held that because a registered judgment becomes a judgment of the registering court, the New York court was entitled to take action in aid of the Texas court’s judgment confirming the award.34 Furthermore, the Second Circuit held that because both the Swiss arbitral tribunal and the Texas court had considered and rejected claims by Pertamina that the award was procured by fraud, the actions of the U.S. courts enforcing the award were, in fact, dispositive of the claims in the Cayman Islands, notwithstanding Pertamina’s having pleaded new theories of fraud in the Cayman proceeding that it hadn’t articulated before the tribunal or the Texas court. In sum, because the substance of Pertamina’s Cayman claim was the same as the claim it had made in the arbitration and the Texas proceedings, the Second Circuit found that the Texas judgment was in fact dispositive of the Cayman claim, satisfying the second mandatory China Trade requirement.35

The Second Circuit’s decision also provided guidance concerning the role of China Trade’s discretionary factors. The Second Circuit emphasized that “all of the additional factors should be considered when determining whether an anti-suit injunction is warranted,” but nevertheless found that protecting a forum’s jurisdiction and its strong public policies are the “more significant” factors. Applying those factors to Pertamina’s Cayman suit, the court concluded that the injunction was necessary to protect the district court’s jurisdiction, as the Cayman suit “threaten[ed] to undermine the federal judgments confirming and enforcing the award,” and the strong public policies in favor of international arbitration and the efficient resolution of such disputes, “avoiding long and expensive litigation.”36 With respect to the less significant of the discretionary factors, the court held that the “vexatiousness” factor weighed “strongly in favor of the injunction.”37

The respective decisions of the Fifth and Second Circuits in Karabas Bodas demonstrate that, despite the existence of two competing approaches to foreign antisuit injunctions among the U.S. courts, the antisuit analysis is largely fact-driven and dictated chiefly by the potential threat the foreign proceeding poses to the U.S. court’s jurisdiction and U.S. public policies. The Fifth Circuit’s vacatur of the Texas court’s injunction rested almost exclusively on its view that, under the requirements of the New York Convention, an Indonesian court’s annulment of KBC’s arbitration award posed no real risk to KBC’s ability to enforce that award in the United States. That conclusion, notwithstanding the Fifth Circuit’s unmistakable disapproval of Pertamina’s actions and its view that the Indonesian proceedings were highly vexatious, rendered the risk of any affront to Indonesia from the issuance of the injunction unnecessary and unacceptable. By contrast, the Second Circuit’s analysis found that the Cayman lawsuit posed a significant risk to the prior judgment of the U.S. courts in that it could result in judicial clawback, in the guise of “damages,” of the proceeds of a U.S. judgment based on a substantive claim that had already been rejected by a U.S. court.38 Further, the Second Circuit’s analysis of the second mandatory China Trade factor demonstrated a willingness to look closely at the substance of the respective claims and instead of exalting the pleading of form over substance in determining whether the U.S. proceeding sought for protection is dispositive of the foreign claim sought for enjoinder.

In the end, while the two circuits recognize purportedly different tests for the issuance of a foreign antisuit injunction, each court’s analysis reflects an overriding (and likely dispositive) focus on the specific circumstances at issue and the potential of the foreign proceeding to interfere with U.S. public policy or the U.S. court’s ability to afford meaningful relief.

Recent Applications of the Standards

Two recent district court decisions demonstrate that courts continue to focus closely on the facts and circumstances of each case and prioritize the protection of U.S. public policy above the needs of the litigants.

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 because the Indian dispute was covered by a valid arbitration agreement. Amaprop Ltd v. Indiabulls Fin. Svs. Ltd39 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 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 it noted that China Trade governed the analysis. With respect to the more critical of the China Trade threshold factors—that the injunction be dispositional of the action to be enjoined—the court, citing 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. With respect to the discretionary factors, the district court essentially found, based on the strength of the U.S. public policy favoring arbitration, that any attempt to commence foreign litigation in breach of an arbitration agreement is necessarily vexatious, would cause delay and inconvenience, creates the risk of inconvenient judgments, and weighs heavily 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*. The Continental decision is notable for having identified “vital American policy” as a key factor in whether to enter a foreign antisuit injunction. The case 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 court entered judgment against Continental, and Continental appealed. While the appeal was pending, Continental sought reimbursement from its reinsurer for the reinsurer’s share of the claim and 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 underlying insurance claim. The terms of the stay of the U.K. action provided that the stay could be terminated upon 28 days written notice from one party to the other. Continental’s appeal was unsuccessful, and, concerned that the reinsurer would seek 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 antisuit injunction against Continental to keep the action in the United Kingdom, 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 conservative approach, stressing 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.” Notably, the district court emphasized the importance of showing “a threat to vital American policy” before issuing a foreign antisuit injunction citing “the incompatibility between United States antitrust laws and the British Protection Trading Interests Act” and “the public policy protecting investors against securities fraud” as sufficient examples of such a policy.

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” didn’t rise to the level of a threat to vital American policy, and thus it denied Continental’s motion for an antisuit injunction.

While reaching different outcomes, the *Amaprop* and Continental decisions both demonstrate that U.S. courts—particularly those following the conservative approach—will generally refrain from issuing foreign antisuit injunctions solely to save a party from even more 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, 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 almost always justify the issuance of a foreign antisuit injunction. In contrast, the Continental decision demonstrates that where a party seeks to use an antisuit 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 U.S. courts’ recognition that foreign antisuit injunctions continue to represent a critical, if draconian, tool to protect their jurisdiction, their orders, and the effectiveness of the laws and policies of the United States. Furthermore, notwithstanding the ECJ’s...
decision in West Tankers, U.S. courts continue to recognize the appropriateness of issuing foreign antisuit injunctions in aid of arbitration. Indeed, the Amprot decision demonstrates that litigation commenced in derogation of an agreement to arbitrate may constitute the paradigm for which the antisuit injunction is best suited and for which it will be granted most readily. Given the fact-intensive nature of the antisuit 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 to merely their clients’ interests, as this inquiry is likely to dictate the outcome of any application for a foreign antisuit injunction.

Endnotes

3. See, e.g., Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 655 (2d Cir. 2004) (although an antisuit injunction is “levied against the party bringing the suit, it nonetheless effectively restricts the jurisdiction of the court of a foreign sovereign”) (internal quotation omitted).
5. Regulation 44-2001 was adopted by the Council of European Community on December 22, 2000, for the purpose of promoting the enforcement of law and the free movement of judgments in civil and commercial matters throughout the European Union. (Council Regulation (EC) No 44/2001, Preamble, ¶ 6.) The regulation was intended to update and supercede the Brussels Convention, and share many of the principles set forth by the Brussels Convention.
7. While beyond the scope of this article, it’s noteworthy that the courts of EU member states have continued to recognize the appropriateness of foreign antisuit injunctions in circumstances involving parallel litigation, particularly with respect to claims being litigated outside the European Union. See, e.g., Skype Techs. SA v. Joltid Ltd, [2009] EWHC 2783 (Ch) (June 2009 order of English High Court of Justice, Chancery Division, granting antisuit injunction to enforce forum clause).
8. See, e.g., China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35–36 (2d Cir. 1987); see also Auerbach v. Frank, 685 A.2d 404, 406 (D.C. 1996) (“the general authority of trial courts to issue anti-suit injunctions appears well established”) (citations omitted); Forum Ins. Co. v. Bristol-Myers Squibb Co., 929 S.W.2d 114, 117 (Tex. App. 1996) (noting circumstances under which antisuit injunction is available under Texas law).
14. Laker Airways, 731 F.2d at 939.
16. China Trade, 837 F.2d at 35.
17. See id. (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).
18. See China Trade, 837 F.2d at 36 (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.”).
23. Goss, 491 F.3d at 366.
24. 500 F.3d 111 (2d Cir. 2007).
28. Under the New York Convention, the “primary jurisdiction” refers to the nation where, or under whose law, the arbitration is conducted. All other jurisdictions are “secondary jurisdictions.” Courts in the primary jurisdiction have authority to annul or vacate an arbitration award in accordance with the domestic laws of that nation, while courts in secondary jurisdictions are limited to recognizing, or refusing to recognize, the award in strict accordance with Article V of the convention. See, e.g., Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997).
29. Karaha Bodas, 335 F.3d at 367–71.
30. The dispute arose when the underlying energy project, which KBC was developing in accordance with an agreement with Pertamina, was canceled by the Indonesian government during the Asian monetary crisis of the late 1990s. See id. at 360. 31. Id. at 371–74.
34. Id. at 121 (citing 28 U.S.C. § 163).
35. Id. at 121–23.
36. Id. at 126.
37. Id. Pertamina petitioned the U.S. Supreme Court for a writ of certiorari on, among other topics, the proper standard for determining when the issuance of a foreign antisuit injunction is proper. Ultimately, the Supreme Court denied certiorari, leaving the Second Circuit’s decision undisturbed and the circuit split unresolved.
38. One additional factor cited by the Second Circuit in its ruling was that while the Texas judgment merely confirmed the award, the New York court’s turnover order determined that KBC was entitled to immediate turnover and payment of the full judgment. This distinction, coupled with the fact that by the time the New York court entered its judgment, several other courts had confirmed the award, led the Second Circuit to conclude that the New York court’s order was entitled to a heightened degree of protection. Karaha Bodas, 500 F.3d at 124.
41. Id. at *3.
43. Id.
44. Id. at *4.