Second Circuit Clarifies Rule on Foreign Anti-Suit Injunctions

By Chris Dugan, James Berger and Victoria Ashworth

On September 7, 2007, the Second Circuit affirmed – with slight modifications – a decision of the United States District Court for the Southern District of New York granting a foreign anti-suit injunction in the matter of Karaha Bodas Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (“KBC v. Pertamina”). The Second Circuit’s decision clarifies the rule applicable to such injunctions, and held that its prior decision in China Trade and Dev. Corp. v. M.V. Choong Yong governs all determinations relating to anti-foreign-suit injunctions, regardless of whether such injunctions are sought in connection with parallel proceedings or to protect a judgment in a previously decided action.

While rare, foreign anti-suit injunctions constitute an important potential remedy to parties involved in international disputes, and are often sought in the context of enforcing foreign arbitral awards. A motion for a foreign anti-suit injunction is an application to a court requesting that it enjoin a party subject to its jurisdiction from prosecuting a lawsuit before a foreign tribunal. Such motions typically arise in either of two situations: 1) where the same parties are litigating the same dispute in two different countries concurrently (i.e., “parallel proceedings”); or 2) where one jurisdiction has ruled on an issue and the losing party attempts to nullify or undercut that decision by seeking relief in what it perceives to be a friendlier jurisdiction.

Foreign anti-suit injunctions represent extraordinary remedies. While such injunctions are imposed against a party (rather than against the foreign court that has been asked to provide relief), the consequence is to effectively prohibit a foreign court from adjudicating a dispute that has been brought before it and over which it has jurisdiction. As a result, such injunctions raise difficult considerations of international comity, and federal courts have therefore attempted to limit the availability of anti-foreign-suit injunctions in order to prevent unnecessary encroachment upon the authority of foreign tribunals.

CHINA TRADE

China Trade has represented the most definitive rule on foreign anti-suit injunctions for almost twenty years. China Trade involved a shipment of soybeans which China Trade sought to import from the United States. SsangYong, a Korean corporation, agreed to transport the shipment on its vessel, the M.V. Choong Yong. The vessel ran aground, however, and China Trade commenced an action in the Southern District of New York to recover damages for the loss of the soybean shipment. During the discovery phase of the New York action, SsangYong filed an action in the district court of Pusan, Korea, seeking a declaratory judgment that it was not liable for China Trade’s loss. China Trade then filed a motion for a foreign anti-suit injunction, seeking to preclude the Korean action.

As the Second Circuit noted in that case, “parallel proceedings are ordinarily tolerable” and courts with concurrent jurisdiction “will ordinarily not interfere with or try to restrain proceedings before the other.” Despite this general rule, however, the Court found that there are certain circumstances in which it is appropriate for a court to enjoin a party from proceeding in a foreign forum. The Second Circuit posited a multi-factor test to determine whether to permit the Korean action to go forward. The China Trade test has two threshold requirements and five discretionary elements.

First, a court must determine that: “(A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined.” These threshold requirements are fairly straightforward, as the identity of the parties is usually clear and the second requirement is generally met where the
issues of liability are the same (for instance, as in China Trade, where one party is seeking damages resulting from an event and the other party is seeking a declaration of no-liability for that same event).

Second, a court must turn to the discretionary factors:

(1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court’s in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment. It would be a rare case indeed where duplicative litigation wasn’t ‘vexatious’, ‘inconvenient’, ‘expensive’, and didn’t have implications upon ‘other equitable considerations.’ In this vein, the Second Circuit rejected the trial court’s analysis of the discretionary factors, finding that “since [vexatiousness and additional expense] are likely to be present whenever parallel actions are proceeding concurrently, an anti-suit injunction grounded on these additional factors alone would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions.” As such, the court went on to instruct that two of the five discretionary factors should be accorded greater significance. The two “more significant” factors are: whether the foreign action threatens the enjoining forum’s jurisdiction or its strong public policies.

In China Trade, the Second Circuit held that, while each of the two threshold requirements was satisfied, none of the secondary considerations was sufficiently implicated to warrant an injunction. Specifically, the Court found that the Korean courts were not trying to carve out exclusive jurisdiction such that the New York courts would be forced to enjoin the Korean action to protect their own jurisdiction over the suit. The Court further noted that while anti-suit injunctions may be appropriate where one party is seeking to evade the laws or important public policies of a particular jurisdiction, that is not the case where a party is merely seeking “slight advantages in the substantive or procedural law to be applied in a foreign court.”

**A DIFFERENT STANDARD EMERGES**

Despite establishing what appeared to be a “bright-line rule,” the application of China Trade in subsequent actions was somewhat inconsistent. A separate line of cases emerged setting forth the principle that the China Trade test only applies to parallel proceedings. For instance, in Farrell Lines Inc. v. Columbus Cello-Poly Corp., a case factually very similar to China Trade, a United States shipping company sought a declaratory judgment that its liability for certain damaged cargo was limited to $500 pursuant to the Carriage of Goods by Sea Act. Thereafter, several European insurers, subrogated to the rights of the allegedly damaged exporter, brought a damages claim in civil court in Livorno, Italy. Citing China Trade at length, the court nevertheless ruled that “a more lenient standard should be applied here because [it had] decided the merits of plaintiff’s declaratory judgment claim.”

China Trade created a high standard for anti-foreign-suit injunctions in deference to the important policies that such injunctions are disfavored and that parallel proceedings should generally be tolerated. In contrast, Farrell Lines and similar lower court decisions focused more directly on the issue of international comity, finding a more lenient standard to be appropriate as “comity considerations are less strong where the domestic court has rendered judgment on the merits because that judgment should be honored by the foreign court under the doctrines of res judicata or collateral estoppel.”

**KBC V. PERTAMINA**

China Trade’s scope was most recently tested in KBC v. Pertamina. KBC v. Pertamina is an international dispute between Karaha Bodas Company, L.L.C., a company formed by two major U.S. energy concerns to develop a geothermal resource in Indonesia, and Pertamina, the Indonesian state-owned oil and gas company. The former president of Indonesia issued a decree terminating the project in 1998, after which KBC filed an arbitration claim for damages and lost profits. In December 2000, the arbitral tribunal awarded KBC $261 million. Pertamina refused to accept or pay the arbitral award, forcing KBC to commence confirmation and enforcement proceedings in various countries, including the United States. Litigation ultimately took place in seven different countries, and the case gave rise to three separate applications for anti-foreign-suit injunctions – two in the
United States (each sought by KBC), and one in Indonesia (sought by Pertamina).

Following confirmation of the award by a federal district court in Texas, KBC sought to enforce the award by registering its judgment in the Southern District of New York and restraining and executing upon Pertamina assets in that forum. KBC’s New York execution efforts were ultimately successful, and a New York federal court ordered a New York bank to turn over the full amount of the judgment – which by that time exceeded $319 million as a result of accrued interest – to KBC in October 2006.

PERTAMINA’S CLAWBACK CLAIM AND KBC’S MOTION FOR ANTI-SUIT INJUNCTION

JUST PRIOR TO THE NEW YORK COURT’S ORDER DIRECTING TURNOVER OF THE JUDGMENT FUNDS TO KBC, PERTAMINA FILED A NEW LAWSUIT AGAINST KBC IN THE GRAND COURT OF THE CAYMAN ISLANDS. PERTAMINA’S CAYMAN ISLANDS SUIT ALLEGED THAT THE ARBITRAL AWARD RESULTED FROM FRAUDULENT CONDUCT ON THE PART OF KBC, AND SOUGHT, AS “DAMAGES,” TO RECOVER THE ENTIRE AWARD. IN ADDITION, PERTAMINA SOUGHT AN EXTRAORDINARY “MAREVA” INJUNCTION – A WORLDWIDE PREJUDGMENT ATTACHMENT AVAILABLE IN BRITISH COMMONWEALTH NATIONS – PREVENTING KBC FROM DISTRIBUTING THE JUDGMENT FUNDS TO ITS SHAREHOLDERS.

KBC IMMEDIATELY MOVED IN THE NEW YORK COURT FOR AN ANTI-FOREIGN-SUIT INJUNCTION PROHIBITING PERTAMINA FROM PROSECUTING THE CAYMAN ISLANDS SUIT. THE DISTRICT COURT IMMEDIATELY ENJOINED PERTAMINA FROM SEEKING THE MAREVA INJUNCTION. LATER, IN A LENGTHY WRITTEN DECISION, THE DISTRICT COURT RULED THAT IT HAD THE AUTHORITY TO – AND WOULD – ENJOIN PERTAMINA FROM PROSECUTING THE CAYMAN ISLANDS SUIT IN ITS ENTIRETY.11

THE DISTRICT COURT’S “MORE LENIENT STANDARD”

THE PRIMARY ISSUE BEFORE THE DISTRICT COURT WAS WHETHER TO APPLY THE CHINA TRADE TEST AND, IF SO, WHETHER KBC COULD SATISFY IT. AS NOTED ABOVE, MOTIONS FOR ANTI-FOREIGN-SUIT INJUNCTIONS ARISE WHERE ONE PARTY IS EITHER SEEKING TO ENJOIN A PARALLEL PROCEEDING (AS WAS THE CASE IN CHINA TRADE), OR WHERE A SUBSEQUENT SUIT IS DESIGNED TO UNDERMINE OR CIRCUMVENT A PRIOR JUDGMENT (AS IN KBC v. PERTAMINA). THE DISTRICT COURT MADE MUCH OF THIS DISTINCTION AND GRANTED KBC’S MOTION TO ENJOIN THE CAYMAN ISLANDS SUIT, HOLDING EXPRESSLY THAT CHINA TRADE DID NOT APPLY IN NON-PARALLEL PROCEEDING CASES. RELYING ON THE LINE OF CASES SUPPORTING THE VIEW THAT A “MORE LENIENT STANDARD” APPLIES WHERE A JUDGMENT HAS ALREADY BEEN MADE, THE DISTRICT COURT SPECIFICALLY ADOPTED THE STANDARD SET FORTH IN FARRELL LINES, WHICH PROVIDES THAT “AFTER JUDGMENT IN THE DOMESTIC LITIGATIONS, SOME SHOWING OF HARASSMENT, BAD FAITH OR OTHER EQUITABLE CIRCUMSTANCE IS SUFFICIENT TO SUPPORT ENJOINING THE FOREIGN LITIGATION.”12

SECOND CIRCUIT APPLIES CHINA TRADE

THOUGH THE SECOND CIRCUIT UPHOLD THE DISTRICT COURT’S RULING TO ENJOIN THE CAYMAN ISLANDS SUIT, IT FOUND THE DISTRICT COURT HAD NONETHLESS ERRED IN RULING THAT CHINA TRADE WAS INAPPLICABLE. CLARIFYING PRIOR CASE LAW, THE SECOND CIRCUIT HELD THAT CHINA TRADE APPLIES TO ALL APPLICATIONS FOR ANTI-FOREIGN-SUIT INJUNCTIONS, AND EXPRESSLY REJECTED THE DISTRICT COURT’S FINDING THAT THAT DECISION DID NOT GOVERN NON-PARALLEL PROCEEDINGS CASES.


THE COURT FOUND EACH OF THESE ARGUMENTS TO BE MERITLESS AND HELD THAT THE NEW YORK JUDGMENT WAS DISPOSITIVE OF THE ISSUES RAISED IN THE CAYMAN ISLANDS SUIT REGARDLESS OF THE FACT THAT IT WAS PLEADED AS AN ACTION SOUNDING IN FRAUD. FIRST, THE COURT FOUND THAT, BY REGISTERING THE TEXAS COURT’S CONFIRMATION OF THE AWARD IN NEW YORK, THE NEW YORK COURT WAS THEREBY
empowered to protect that judgment as though it had rendered it. Second, the Court found that the very nature of the relief sought in the Cayman Islands suit (i.e., recovery of an amount equal to the amount turned over to KBC) belied any claim by Pertamina that it was not merely attempting to vitiate the properly confirmed and enforced arbitral award. And, finally, the court found that, though the district court may only have secondary jurisdiction under the New York Convention such that it cannot dictate how other “secondary” jurisdictions can rule in an enforcement proceeding, “federal courts do have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigations in other jurisdictions.”

The decision also provided additional guidance concerning the role of the 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 affirmed that protecting a forum’s jurisdiction and strong public policies are the “more significant” factors. Applying those factors to Pertamina’s Cayman Islands suit, the Court concluded that the district court’s injunction was warranted. Specifically, it held that an injunction was necessary to protect the court’s jurisdiction as the Cayman Islands suit “threaten[ed] to undermine the federal judgments confirming and enforcing the award,” and also to protect the strong public policies in favor of international arbitration and the need for such disputes to be settled efficiently, “avoiding long and expensive litigation.”

With respect to the less significant of the discretionary factors, the Court held that the “vexatiousness” factor counseled “strongly in favor of the injunction.” The Second Circuit adopted the district court’s finding that, in light of the history of the litigation and the circumstances surrounding Pertamina’s eleventh-hour claim, the Cayman Islands suit seeking to nullify the arbitration award was, in fact, “entirely vexatious.”

Though the district court’s analysis did not utilize the appropriate rubric, the Second Circuit nevertheless found that the district court had considered the discretionary factors set forth in China Trade. Indeed, the district court even gave “more significance” to the considerations of jurisdiction and public policy, noting that “[i]n the present case, Pertamina is seeking to avoid the application of well-settled American law and policies about the limited methods which can be used to interfere with the normal finality of judgments.” In light of the record and the district court’s analysis with regard to these factors, the Second Circuit found that the China Trade test was indeed satisfied and, therefore, upheld the injunction.

The Second Circuit’s decision in KBC v. Pertamina provides a useful analysis of how the China Trade factors will be applied in individual cases, demonstrating that the discretionary factors will tend to weigh in favor of an injunction that is sought to protect a previously rendered federal judgment. In other words, if an action is brought in a foreign jurisdiction for the purposes of vitiating a proper federal judgment or avoiding a specific statute or public policy, a federal court has wider latitude to enjoin such an action in order to protect that judgment and the court’s authority. Reiterating the principle set forth in another similar case, the Second Circuit explained that “where one court has already reached a judgment – on the same issues, involving the same parties – considerations of comity have diminished force.”

**CONCLUSION**

While the Second Circuit has clarified the rule applicable to federal courts determining whether to grant an anti-foreign-suit injunction, it nevertheless remains clear that the posture in which such a motion is brought weighs heavily upon that determination. Where there are parallel proceedings, matters of international comity have a much stronger chance of influencing a court to permit the foreign suit to go forward. Where, however, a court is faced with having to protect a domestic judgment from frustration by a subsequent foreign suit, it is far more likely that an injunction will be deemed appropriate. While not a “more lenient standard” as the district court described it, the Second Circuit’s ruling makes clear that federal courts have the authority to enjoin foreign proceedings that seek to vitiate or undermine a federal judgment.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

**Hong Kong**
Victoria Ashworth  
852-2867-9934  
victoriaashworth@paulhastings.com

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

**Washington, DC**
Christopher F. Dugan  
202-551-1723  
chrisdugan@paulhastings.com

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1 ___ F.3d ___, 2007 WL 2537466 (2d Cir. Sept. 7, 2007).
2 837 F.2d 33 (2d Cir. 1987).
3 *China Trade*, 837 F.2d at 36 (citations omitted).
4 *China Trade*, 837 F.2d at 35.
5 Id. at 36.
6 Id.
7 Id. at 37.
9 Farrell Lines, 32 F. Supp. 2d at 131 (citing Laker Airways Ltd. *v.* Sabena, Belgian World Airlines, 731 F.2d 909, 928 (D.C. 1984) (“When the injunction is requested after a previous judgment on the merits, there is little interference with the rule favoring parallel proceedings in matters subject to concurrent jurisdiction. Thus, a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation.”)).
10 Id. at 131.
15 Id. at *8 (citing 28 U.S.C. § 1963).
16 Id. at *9 (citing *Ibeto Petrochemical Indus., Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d. Cir. 2007)).
17 Id. at *6 (citing *Ibeto Petrochemical*, 475 F.3d at 64).
18 Id. at *11 (citation omitted).
19 Id.
20 Id. at 12 (citing *Karaha Bodas*, 465 F. Supp. 2d at 300).