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Using Courts To Promote International Arbitration: The Rise Of The Anti-Foreign-Suit Injunction

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Consider this all-too-real hypothetical: A multinational manufacturer headquartered in the United States enters into a distributor contract with a distributor headquartered abroad. The contract contains a provision whereby all disputes relating to the agreement are to be arbitrated in the U.S. pursuant to the AAA's Commercial Rules. The manufacturer terminates the contract, and each party claims a breach by the other. The manufacturer commences arbitration proceedings per the contractual protocol. The foreign distributor refuses to participate in the arbitration, and instead commences an action in its local courts.

As international transactions proliferate, foreign parties' attempts to escape from their arbitration agreements and to force disputes into foreign courts are becoming commonplace. All too often, a party that thought it would be arbitrating international disputes – and that may have commenced

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arbitration in the agreed forum – may nevertheless find itself the target of foreign litigation.

While applicable law is still in its early days, U.S. federal courts are increasingly resistant to efforts to use foreign litigation to interfere with pending international arbitration, and are increasingly willing to brandish their injunctive powers to prevent such interference. Recent years have seen a growing number of federal cases in which principles of comity and deference to foreign proceedings have given way to strong U.S. and international policy favoring arbitrated resolution of international commercial disputes. These courts have been increasingly willing to grant “anti-foreign-suit” injunctions – enforced by threat of contempt against all parties subject to U.S. jurisdiction – against participation in vexatious foreign litigation brought to interfere with legitimate international arbitration.

A. The Anti-Foreign-Suit Injunction Doctrine

Outside the arbitration context, federal courts have adopted two divergent approaches to govern the issuance of anti-suit injunctions against participation in foreign litigation:

Under the “restrictive” approach, comity is paramount and dictates that parallel proceedings in the U.S. and abroad must continue until one proceeding concludes. Only final judgment in the first-concluding action bars continuation of the other(s). While courts adopting this “restrictive” approach acknowledge that anti-foreign-suit injunctions may be appropriate when the foreign litigation violates strong U.S. policy or undercuts the U.S. court’s jurisdiction, they suggest that such situations would be rare. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-6 (2d Cir. 1987); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992).

Conversely, the primary concern of the “liberal” approach is not with principles of comity, but with the vexatiousness of duplicative parallel litigations. “Liberal” courts allow anti-foreign-suit injunctions where foreign litigation: “(1) frustrate[s] a policy of the forum issuing the injunction; (2) [is] vexatious or oppressive; (3) threaten[s] the issuing court’s in rem or quasi in rem jurisdiction; or (4) . . . prejudice[s] other equitable considerations.” *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, 890 (5th Cir. 1970), *rev’d on other grounds*, 407 U.S. 1 (1971); *see also Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981); *Philips Med. Sys. Int’l B.V. v. Bruetman*, 8 F.3d 600 (7th Cir. 1993). Under this “liberal” approach, comity is often not considered a factor in determining whether to

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enjoin participation in foreign proceedings. See, e.g., *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996).

This circuit split, along with the growing internationalization of business disputes, suggests that the proper standard for anti-foreign-suit injunctions is ripe for Supreme Court resolution. Nevertheless, it is against this fractured backdrop that a line of cases has recently emerged to address a specific variant of such injunctions: anti-foreign-suit injunctions imposed in aid of international arbitration proceedings.

B. The Anti-Foreign Suit Injunction Doctrine In The Arbitral Context

While several earlier courts addressed the issue in glancing fashion, it was not until the seminal decisions issued in the case of *Paramedics Electromedicina Comercial Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 2003 WL 23641529 (S.D.N.Y. June 4, 2003), *aff'd* in relevant part, 369 F.3d 645 (2d Cir. 2004), that a circuit-level court developed the analytical basis for anti-suit injunctions against foreign litigation brought to thwart pending international arbitration.

The *Paramedics* case involved the grant of an anti-suit injunction against prosecution of Brazilian litigation, in support of arbitration pending before the Inter-American Commercial Arbitration Commission. The District Court, with the first lengthy discussion directly on point, incorporated general Second Circuit standards for grant of such injunctions – as stated in *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-6 (2d Cir. 1987) – into the specific context of anti-foreign-suit injunctions in support of international arbitration:

In order to obtain an anti-foreign-suit injunction, the moving party must first make two threshold showings: first, that the parties to both suits are substantially the same, and second, that the resolution of the case before the enjoining court would be dispositive of the enjoined action. If these requirements are established, the court should then consider: (1) whether the foreign litigation poses a threat to the enjoining court's jurisdiction; (2) whether the foreign litigation would frustrate important United States policies; (3) whether the foreign action is vexatious; (4) whether adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations, including the possibility of prejudice to either party if the foreign action were to proceed. *Id.* at *11 (quoting *China Trade*, 837 F.2d at 36).

However, unlike *China Trade* – which held that “parallel proceedings in multiple jurisdictions are ordinarily tolerable . . . and do [] not, without more, justify enjoining a party from proceeding in a foreign forum” (*China Trade*, 837 F.2d at 36) – the *Paramedics* court held that the foreign litigation should be enjoined in support of the IACAC arbitration. The something “more” which distinguished *Paramedics* from *China Trade* is clear from the District Court's decision: while *China Trade* involved only parallel litigations, the foreign litigation in *Paramedics* threatened “deprivation of [the party's] contractual right to arbitrate its claims, a right protected by international, federal and state law,” and interference with the United States' “well-established public policy of enforcing forum selection agreements and, in particular, arbitration agreements, and mandating the speedy removal of arbitral disputes from the courts.” *Paramedics*, 2003 WL 23641529, at *12-15. Accordingly, further prosecution of the Brazilian litigation was enjoined, and the plaintiff therein was ordered to immediately “take all steps necessary to cause [its] dismissal” *Id.* at 19-20.

Upon appeal, the Court of Appeals for the Second Circuit validated the District Court's approach. See *Paramedics*, 369 F.3d at 652-5. The Circuit Court endorsed the application of the *China Trade* standards in this context, and found that because the Brazil action was a “tactic to evade arbitration,” the strong U.S. policy favoring enforcement of arbitration clauses – which “applies with particular force in international disputes” – supported issuance of the anti-foreign-suit injunction. *Id.* Indeed, the Circuit Court even affirmed the District Court's imposition of civil contempt upon the enjoined party, which had not acted quickly enough to dismiss the Brazilian litigation. *Id.* at 655-6.

The Second Circuit's subsequent decision in *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194 (2d Cir. 2004) revealed the limits of its willingness to enjoin foreign proceedings in furtherance of arbitration. The *LAIF* court declined to grant an anti-suit injunction against Mexican litigation running concurrently with ongoing AAA arbitration. In *LAIF*, unlike in *Paramedics*, the party which commenced the Mexican litigation was fully participating in the arbitration, and had commenced the action not to interfere with or “sidestep[]” the arbitration, but rather to seek the views of the Mexican court on a limited question of Mexican law. *Id.* at 200-1. Because the foreign litigation posed no risk of interference with policies favoring arbitration, and because the Mexican court had a strong

interest in determining the question of Mexican law put to it, comity counseled against the anti-suit injunction on these facts. See *id.*

Despite *LAIF*'s reminder that comity still matters in the issuance of anti-foreign-suit injunctions in aid of arbitration, the Second Circuit has continued to amplify its jurisprudence on these issues in the past several months, speaking twice so far in 2007 to reaffirm the substance and spirit of *Paramedics*. In *Ibeto Petrochemical Indus. Ltd. v. MIT Beffen*, 475 F.3d 56 (2d Cir. 2007), the Second Circuit cautioned that “due regard for principles of international comity and reciprocity require a delicate touch in the issuance of anti-foreign suit injunctions,” but proceeded to uphold the District Court's grant of an anti-foreign-suit injunction against Nigerian litigation, in support of an order compelling London arbitration. *Id.* at 64-5.

Likewise, the Second Circuit's recent decision in *Kahara Bodas Co., LLC v. Pertamina*, 2007 WL 2537466 (2d Cir. Sept. 7, 2007) – although dealing with anti-foreign-suit injunctions in aid of enforcement of arbitral awards, not in aid of ongoing arbitral proceedings – reaffirmed the strong U.S. policy favoring arbitral resolution of international disputes, and the willingness of federal courts to defend this policy by enjoining participation in foreign litigation brought to undermine arbitral resolution. *Id.* at *11-12.

Recent federal district court decisions are in accord in continuing this trend. See, e.g., *Storm LLC v. Telenor Mobile Communications AS*, 2006 WL 3735657 (S.D.N.Y. Dec. 15, 2006) (granting anti-suit injunction against Ukraine litigation in aid of UNCITRAL arbitration); *SG Avipro Fin. Ltd. v. Cameroon Airlines*, 2005 WL 1353955 (S.D.N.Y. June 8, 2005) (compelling arbitration and issuing anti-suit injunction against litigation in Cameroon); see also *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876 (N.D. Ill. 2006); *Suchodolski Assocs, Inc. v. Cardell Fin. Corp.*, 2006 WL 3327625 (S.D.N.Y. Nov. 16, 2006); *Newbridge Acquisition I, LLC v. Grupo Corvi, S.A.*, 2003 WL 42007 (S.D.N.Y. Jan. 6, 2003).

Together, these authorities reflect the increasing willingness of U.S. federal courts to hold international parties to their arbitration agreements, and to prevent them from seeking refuge in litigation abroad. These federal courts continue to view arbitration as the favored mechanism for resolution of international disputes, and are increasingly willing to put aside concerns of comity and to grant anti-suit injunctions against foreign litigation brought to interfere with international arbitrations.