

## **Enforcement of International Arbitration Agreements in U.S. Courts:**

### ***Foreign Anti-Arbitration Protectionist Statutes and Anti-Foreign-Suit Injunctions In Aid of International Arbitration***

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Consider this all-too-real hypothetical:<sup>1</sup> A multinational equipment manufacturer, headquartered in the United States, enters into a distribution contract with a distributor headquartered in Costa Rica. The distribution contract contains a provision whereby all disputes arising under or relating to the agreement are to be submitted for resolution by arbitration in New York, pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The equipment manufacturer terminates the contract, and each party claims a breach by the other. The equipment manufacturer commences arbitration proceedings, per the contractual protocol, in New York. The Costa Rican distributor refuses to participate in the New York arbitration and commences an action for breach of contract in the Costa Rican courts. The distributor claims that the arbitration clause is unenforceable, under both Costa Rican law and

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<sup>1</sup> This hypothetical is loosely based upon the facts of a case recently decided by the U.S. District Court for the Southern District of Florida, in Miami. The contract at issue in *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 2007 WL 2071270 (S.D. Fla. July 19, 2007), did not include an international arbitration clause, but rather a forum selection clause for resolution of disputes via litigation in Florida courts. However, *Lantech* vividly demonstrates the increasing invocation of local protectionist statutes in attempts to thwart contractual dispute resolution mechanisms and to obtain home-field advantage in local courts.

under the New York Convention, because of a Costa Rican distributorship statute which provides that "[t]he jurisdiction of the Costa Rican courts of justice and the rights of the representative, distributor or manufacturer, by virtue of this law, cannot be waived." Costa Rica "Law of Protection of Agents of Foreign Firms," Law 6209, Article 7. Accordingly, the distributor claims, the agreed-upon dispute resolution mechanism should be disregarded, and the manufacturer forced to pursue its claims and defenses in litigation in local Costa Rican courts.

Parties to international transactions have long preferred the certainties of international arbitration – pursuant to established international rules, and before established international arbitral bodies – to putting themselves at the mercies of local courts in far-flung lands. The manufacturer in our above hypothetical no doubt preferred the speed and certainty afforded by an international arbitration conducted according to established rules, over the length, procedural complexities, and local influences endemic to litigation in the many homes of its many foreign distributors. Accordingly, it – like most other sophisticated parties to international transactions – bargained for the certainty of arbitral resolution via established international procedures and protocols.

But the rise of local protectionist statutes like the Costa Rican statute cited above, requiring local judicial resolution of certain categories of international disputes, threaten this long-established paradigm. These statutes purport to limit the ability of sophisticated parties contractually to provide for orderly and predictable resolution of international disputes. A party that thought it would be arbitrating disputes regarding an international transaction – and that even may have commenced arbitration in the forum provided in the contract – may nevertheless find itself the target of local litigation in a foreign state. Contractual certainty in dispute resolution is replaced with the insecurity of litigating on another's home turf, and, with the

variations in efficiency, procedure, due process, and parochialism endemic in certain foreign systems. These vagaries are, of course, precisely what the parties agreed to avoid in the first place, by including a dispute resolution mechanism in their contract.

United States federal courts, however, are increasingly open for business on this issue, particularly where the federal court has jurisdiction over the parties to the agreement. The longstanding United States policy favoring arbitration for resolution of international disputes, and an increasing willingness of federal courts to exert injunctive power over parties seeking to avoid their arbitration agreements via litigation in foreign courts, makes for a potent – if occasionally uncertain – weapon in holding parties to their international arbitration agreements. While U.S. federal law in this area is still in a state of relative infancy, and while some inconsistencies among courts persist, principles of international comity<sup>2</sup> and deference to foreign proceedings are increasingly giving way to the strong U.S. and international interests in assuring that foreign courts are not used as vehicles to avoid or interfere with international arbitration agreements.

Assuming a basis for U.S. personal jurisdiction over the recalcitrant distributor – whether as a matter of contract or of U.S. contacts – our hypothetical manufacturer need not resign itself to abandoning its arbitration in favor of local litigation in Costa Rica or to spending the money to pursue parallel proceedings. Instead, it may seek the intervention of the U.S. federal courts, requesting the issuance of an order: (1) enforcing the international arbitral agreement and compelling the parties to arbitrate their claims in the arbitral forum they agreed to; and (2) enjoining the distributor from further prosecution of the litigation in the Costa Rican court.

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<sup>2</sup> According to the classic formulation of the U.S. Supreme Court, comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-4 (1895).

While issuance of such an order is hardly assured, recent cases out of several influential federal courts suggest that it will be granted in appropriate circumstances.

Accordingly, we discuss herein the current status of U.S. law on these important issues in the international arbitration arena. We begin by considering U.S. courts' likely unfavorable response to attempts by foreign parties to wield local protectionist statutes as a shield to avoid enforcement of the international arbitration they agreed to. We turn then to the availability of "anti-foreign-suit" injunctions in U.S. federal courts, as a means to halt vexatious foreign litigation brought to hinder and interfere with orderly arbitral resolution of international disputes.

## **I. Enforcement of International Arbitration Agreements in U.S. Federal Courts**

Chapter 2 of the Federal Arbitration Act (9 U.S.C. §§ 201-208) adopts and provides for enforcement of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Per Article II of the New York Convention, as implemented by the F.A.A., a written international commercial arbitration agreement will generally be enforced according to its terms. A United States federal court "when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article *shall*, at the request of one of the parties, refer the parties to arbitration, *unless* it finds that the said agreement is null and void, inoperative or incapable of being performed." New York Convention, Article II(3) (emphasis added). This directive to compel arbitration pursuant to an enforceable international arbitration agreement empowers a federal court to "direct that arbitration be held in accordance with the agreement at any place herein provided for, whether that place is within or without the United States." 9 U.S.C. § 206.

Article I of the Inter-American Convention on International Commercial Arbitration (the "Inter-American Convention"), as implemented by Chapter 3 of the F.A.A. (9 U.S.C. §§ 301-307), likewise provides for the enforcement of international arbitration agreements in signatory states.<sup>3</sup> While the Inter-American Convention does not contain an express exception to enforcement paralleling the New York Convention's exception for agreements that are "null and void, inoperative or incapable of being performed," commentators generally suggest that such an exception is implicit in Article I the Inter-American Convention, and that the standards of enforceability are parallel under both Conventions. *See, e.g.,* Gary B. Born, *International Commercial Arbitration in the United States*, at 321-22 (Kluwer 1994).

A lynchpin of enforceability of international arbitral agreements, then, is that such agreements must not be "null and void, inoperative or incapable of being performed." *See* New York Convention, Article II(3). It is this language of the New York Convention upon which those seeking an escape hatch from the international arbitration they agreed to have seized. And it is this language of the Convention upon which our hypothetical distributor will rely in arguing that the protectionist statute, in providing the Costa Rican courts with non-waivable jurisdiction over disputes between local distributors and foreign manufacturers, renders the arbitration agreement "null and void, inoperative or incapable of being performed." Our distributor – and those like him, who seek to rely upon protectionist foreign statutes to avoid U.S. enforcement of their arbitration agreements – will quickly discover that U.S. law in this area, while not extensively developed, is not in his favor.

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<sup>3</sup> Under the United States Federal Arbitration Act, absent agreement to the contrary, "[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply." 9 U.S.C. § 305(1). Otherwise, the New York Convention governs. *See id.* at § 305(2).

Speaking very closely to the issue at hand is the case of *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1<sup>st</sup> Cir. 1982). In *Ledee*, a terminated distributor from Puerto Rico attempted to avoid enforcement of the arbitration provision in its distributorship contract – which called for arbitration in Italy – by invoking a Puerto Rican statutory provision stating that “[a]ny stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy . . . regarding his dealer's contract outside Puerto Rico . . . shall be . . . considered as violating [public policy] . . . and is therefore null and void.” *Id.* at 186 (quoting 10 L.P.R.A. § 278b-2). The terminated dealer argued that, because of this local statute and Puerto Rico's public policy, enforcement of the Italian arbitration agreement was “null and void, inoperative [and] incapable of being performed,” and therefore that the agreement should not be enforced under the Convention. *Id.* at 187. The Court of Appeals squarely rejected this argument. Because the goal of the Convention “was to encourage the recognition and enforcement of international arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed,” allowing Puerto Rico's local protectionist statute to trump enforcement of an otherwise valid arbitration clause “would be antithetical to the goals of the Convention.” *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.10 (1974)). The First Circuit continued, in what remains the most forceful articulation of this principle by a federal court to date:

The parochial interests of [Puerto Rico], or of any state, cannot be the measure of how the 'null and void' clause is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation. Rather, the clause must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale.

*Id.* at 187. Accordingly, under *Ledee*'s formulation, only “internationally neutral” defenses may be invoked to avoid enforcement under the Convention. *Id.* State, and presumably foreign, laws

which single out international arbitration agreements for special disfavor – such as the Puerto Rico statute invoked by the distributor in *Ledee*, or the Costa Rican statute invoked by our hypothetical distributor – will simply not meet this standard. *See id.*

Other federal courts have, in varying contexts, consistently applied this principle from *Ledee* in enforcing international arbitration agreements over arguments that their enforcement would offend a local law of a foreign state. For example, in *Rhone Mediterranee Compagnia Francese Di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50 (3d Cir. 1983), the court held that an arbitration clause providing for Italian arbitration was enforceable under the Convention, notwithstanding its alleged incompatibility with an Italian law, which provided that "an arbitration clause calling for an even number of arbitrators is null and void . . ." *Id.* at 52-3. Like *Ledee*, the Third Circuit held that an international arbitration agreement is "null and void" under the Convention only where it offends an "internationally recognized defense" or "fundamental policies of the forum state." *Id.* at 53-4 ("The 'null and void' language [of the Convention] must be read narrowly . . . [because] signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption.").<sup>4</sup>

Similarly, in *In re Ferrara S.p.A.*, 441 F. Supp. 778 (S.D.N.Y. 1977), the court enforced an arbitration clause notwithstanding its alleged inconsistency with an Italian law rendering arbitration agreements unenforceable unless they appear above the signatures of the parties, characterizing the Italian statute as expressing a "parochial view" upon which enforcement under the Convention should not be denied. *Id.* at 781 (noting that "courts of signatory countries . . .

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<sup>4</sup> The *Rhone* court did, however, leave undecided the question of how it would rule if the arbitration agreement were alleged to offend not just a "procedural rule" but rather "an Italian public policy disfavoring arbitration . . ." *Id.* at 54.

should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements," *quoting Scherk*, 417 U.S. at 520-21); *see also Marchetto v. DeKalb Genetics Corp.*, 711 F. Supp. 936 (N.D. Ill. 1989) (arbitration agreement calling for Italian arbitration enforced under Convention, over objection that Italian law regarding parties to arbitration rendered clause null and void); *cf. Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023 (7<sup>th</sup> Cir. 2003) (no impediment under Convention to allowing arbitration to proceed per arbitration clause, notwithstanding *state* statute which arguably rendered arbitration clause unenforceable); *In re Arbitration Between the West of England Ship Owners Mut. Ins. Ass'n (Luxembourg) and American Marine Corp.*, 1992 WL 37700 (E.D. La. Feb. 18, 1992) (same).<sup>5</sup>

Foreign parties seeking to avoid their international arbitration agreements by invoking "local resolution" protectionist statutes are likely to struggle against the weight of this U.S. authority. These cases speak together in support of a proposition that parochial local laws cannot trump the strong pro-arbitration interests expressed in the international Conventions. Accordingly, under U.S. federal law as it currently stands, the proliferation of protectionist statutes – in Latin America and elsewhere - is unlikely to present a significant threat to U.S. enforcement of international arbitration agreements under the Convention.

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<sup>5</sup> Moreover, in an analogous context, the Southern District of Florida enforced a forum selection clause calling for Florida litigation, over the objection that such clause violated Costa Rican public policy as expressed in the "Law of Protection of Agents of Foreign Firms" (Costa Rica Law 6209, Article 7) detailed in our hypothetical. *See Canon Latin Am. Inc. v. Lantech (CR) S.A.*, 453 F. Supp. 2d 1357 (S.D. Fla. 2006), and 2007 WL 2071270 (S.D. Fla. July 19, 2007). The *Lantech* court concluded that Costa Rican public policy did not overcome the U.S. presumption favoring enforcement of forum selection clauses, and noted that "[b]y freely entering into the Agreement which contained the choice of forum . . . provisions, Lantech itself chose not to avail itself of the protection of litigating its action in a Costa Rican forum." *Id.*, 453 F. Supp. 2d at 1366, 2007 WL 2071270 at \*4. Significantly, three months before *Lantech* filed its Costa Rican action, the U.S. and Costa Rica entered into the Dominican Republic-Central American Free Trade Agreement. Under the terms of that agreement, Costa Rica had agreed to repeal the restrictive "local resolution" articles and further, under the new regime, distribution agreements would be presumed to be subject to arbitration. Although Costa Rica had not yet ratified the agreement, the signing of the agreement served to diminish *Lantech's* public policy arguments. *Id.* at \*5.

## **II. Anti-Suit Injunctions Against Foreign Proceedings In Support of Arbitration**

Courts in foreign jurisdictions that possess local resolution statutes, however, likely would not agree with their U.S. counterparts that their protectionist statutes have no bearing on the enforceability of international arbitration provisions. Indeed, it is precisely these provisions to which many of these protectionist statutes are directed. Accordingly, a party seeking to avoid an international arbitration clause and avail itself of the protectionist statute may, like our hypothetical Costa Rican distributor, opt to commence litigation in the local jurisdiction. The distributor's strategy is transparent: it hopes to prevail in its local courts playing by local rules, and to parlay this home-field advantage into a favorable judgment, either on the issue of non-arbitrability of the dispute or on the substantive contractual issues (or both). This Costa Rican judgment would then be employed by the distributor to resist – substantively and/or procedurally – the agreed arbitration.

However, several recent cases from influential U.S. federal courts suggest that this strategy is far from assured. Indeed, while the development of the law in this area is still in early days, U.S. federal courts appear increasingly resistant to parties' attempts 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 number of important cases in which federal courts have held that principles of comity and deference to foreign proceedings should, when such proceedings are used to interfere with legitimate international arbitrations, give way to strong U.S. and international policy favoring arbitrated resolution of international commercial disputes. Accordingly, these U.S. courts have been willing – in appropriate circumstances – to grant "anti-foreign-suit" injunctions against further participation

in such vexatious foreign litigation, and to enforce such injunctions with threat of contempt against all parties subject to the jurisdiction of the U.S. court.<sup>6</sup>

A. *The Anti-Foreign-Suit Injunction Doctrine*

Outside the arbitration context, two divergent approaches have arisen with respect to the willingness and ability of U.S. court to issue "anti-foreign-suit" injunctions against participation in proceedings pending in foreign states:

The United States Court of Appeals for the District of Columbia Circuit wrote the seminal opinion in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), adopting what has become known as the "restrictive" approach to granting anti-foreign-suit injunctions. In general, *Laker* held that when there are parallel proceedings in another country, comity dictates that a U.S. court must allow those proceedings to continue until either the foreign action or the United States action is complete. *Id.* at 939-45. At that point, the final judgment in the first action to conclude would bar the other action's continuation. While the *Laker* court did acknowledge a need for the issuance of an anti-foreign-suit injunction when the foreign action violated a strong U.S. public policy or served to undercut the U.S. court's jurisdiction, it suggested that such situations would be rare. *Id.* at 931-33. Several federal circuits adopted the D.C. Circuit's restrictive approach articulated in *Laker*, including the Second (*see China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-6 (2d Cir. 1987)), Third (*see*

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<sup>6</sup> We note that courts in other nations have likewise shown some willingness to issue anti-suit injunctions against foreign litigation employed to thwart agreed arbitral resolution. *See, e.g., Aggeliki Charis Compania Maritima SA v. Pagnan SpA*, [1995] 1 Lloyds Rep. 87 (Eng. C.A.) (upholding anti-suit injunction against Italian court proceedings on basis of arbitration agreement); *see also Companhia Paranaense de Energia (COPEL) v. UEG Araucaria Ltda.*, where the Court of Appeal of Parana, Brazil, overturned the lower court's anti-suit injunction preventing UEG from participating in an ICC arbitration in Paris against COPEL, a state-owned Brazilian company. COPEL sought the anti-suit injunction, arguing that the ICC arbitration clause was invalid absent the parties' express consent to submit their disputes to arbitration after they arose and that the disputes raised issues of public policy, thus rendering them unarbitrable. The Court of Appeal disagreed and referred the parties to arbitration. These non-U.S. developments, however, are beyond the scope of this article.

*Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002)), and Sixth (*see Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6<sup>th</sup> Cir. 1992)).

Contrary to this "restrictive" approach, the primary concern of the "liberal" approach is with the vexatiousness of duplicative parallel litigations, not with principles of comity. The Ninth Circuit stands as the standard-bearer for this "liberal" approach, holding in *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888 (5<sup>th</sup> Cir. 1970), *rev'd on other grounds*, 407 U.S. 1 (1971), that an anti-suit injunction against foreign litigation is available if the 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." *Id.* at 890. Indeed, in subsequent decisions, the Fifth Circuit has expressly diminished the need to consider comity as even a factor in the analysis of whether participation in foreign proceedings should be enjoined. *See, e.g., Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5<sup>th</sup> Cir. 1996). Several other circuits have either adopted or spoken favorably of this "liberal" approach to anti-foreign-suit injunctions, including the Ninth (*see Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9<sup>th</sup> Cir. 1981)) and the Seventh (*see Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600 (7<sup>th</sup> Cir. 1993)).

This split among the federal Circuits, along with the growing internationalization of business disputes, suggests that this issue of the proper standards for anti-suit injunctions against foreign proceedings is ripe for resolution by the U.S. Supreme Court. 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 against participation in foreign litigation, imposed to allow the unfettered progress of international arbitration proceedings.

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

As the above discussion suggests, much ink has been spilled in recent decades addressing the propriety of anti-foreign-suit injunctions against foreign proceedings in a "parallel litigation" context. Nevertheless, despite this extensive body of analysis and precedent, the earliest cases addressing the issuance of anti-suit injunctions against foreign litigation and in support of pending arbitration came not with a bang, but with a whimper. In several early decisions issuing from within the Second Circuit, courts followed up an order compelling the parties to arbitrate with an additional injunctive component enjoining the parties from continuing to litigate parallel actions in foreign courts. *See In re Laitasalo*, 196 B.R. 913 (Bankr. S.D.N.Y. 1996) (compelling Chicago arbitration, and enjoining further litigation of parallel action in Finland); *Smith / Enron Cogeneration LP, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88 (2d Cir. 1999) (affirming order compelling arbitration in New York and granting injunction prohibiting party from prosecuting litigation in Dominican Republic); *Smoothline Ltd v. North American Foreign Trading Corp.*, 2002 WL 273301 (S.D.N.Y. Feb. 27, 2002) (compelling AAA arbitration in New York and enjoining further litigation of parallel litigation in Liechtenstein). While anti-foreign-suit injunctions in support of arbitration were granted in each of these early cases, and while several briefly alluded to the general U.S. policy favoring arbitral resolution of international disputes, none engaged in a lengthy analysis specific to the grant of anti-suit injunctions in the arbitral context.

It was not until the 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 an anti-foreign-suit injunction accompanying an order compelling

arbitration.<sup>7</sup> The *Paramedics* case involved a request for an anti-suit injunction against further prosecution of a Brazilian litigation, in support of an order compelling participation in an arbitration pending before the Inter-American Commercial Arbitration Commission in Miami. The District Court began its analysis by citing the strong federal interest in favor of enforcement of arbitration provisions in the context of international business transactions:

Federal policy strongly favors arbitration as an alternative dispute resolution process. . . . The federal policy in favor of arbitration is even stronger in the context of international business transactions. Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.

*Id.* at \*6 (citations and quotations omitted). Applying these general principles to the clauses at hand, the District Court then granted the motion to compel the IACAC arbitration of claims being litigated in Brazil, finding the arbitration clause to be enforceable under the Inter-American Convention and the claims being litigated in Brazil to fall within the scope of the clause.<sup>8</sup>

The District Court, with the first lengthy discussion directly on the issue at hand, then granted the motion to enjoin further prosecution of the Brazil litigation, in order "[t]o assure

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<sup>7</sup> The courts of the Second Circuit – no doubt due to their extensive familiarity with resolution of disputes concerning the arbitrability of international disputes, and their status as a venue of choice in many international commercial contracts – have dominated the setting of applicable legal standards in this area. Indeed, the vast majority of recent cases addressing the issue of anti-foreign-suit injunctions in support of arbitration continue to originate in the Southern District of New York. While a very small handful of courts from other circuits have recently encountered their first cases in this area (see below), they have shown no signs of disagreement with the Second Circuit's developed analysis. We expect that, with this considerable jurisprudential "first mover" advantage, the Second Circuit analysis discussed herein will continue to control this field for some time.

<sup>8</sup> Tecnimed, the plaintiff/distributor in the Brazilian litigation, asserted 7 principal claims against the manufacturer in the Brazilian litigation, including, *inter alia*, claims seeking to void the contract on the grounds it was abusive, that it was not bound to arbitrate because the agreement had expired, and for wrongful termination. All of the claims were found by the District Court to be arbitrable under the contract at issue. *Id.* at \*10. Tecnimed also argued that its claim for moral damages arose from a tort claim unique to Brazilian law and therefore could not be resolved through arbitration. The District Court and Second Circuit disagreed, finding that the claim for moral damages was arbitrable. 369 F.23d at 653-54.

compliance with the Court's order compelling arbitration." *Id.* at \*11-18. The court acknowledged the authority of federal courts, per the above cases addressing anti-foreign-suit injunctions generally, "to enjoin foreign suits by persons subject to their jurisdiction . . ." *Id.* at \*11. The court then articulated the Second Circuit rule in *China Trade*, 837 F.2d at 35-6, applying the general standard for grant of an anti-foreign-suit injunction<sup>9</sup> to the specific context of anti-suit injunctions against foreign proceedings 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 noted 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 abundantly clear from the District Court's decision: while *China Trade* involved only parallel litigations, the foreign

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<sup>9</sup> The *China Trade* court had held that a Korean litigation should not have been enjoined, notwithstanding a parallel U.S. litigation, because no important policy of the US would be frustrated by allowing the Korean action to proceed, and because the Korean action posed no threat to the jurisdiction of the U.S. court. The *China Trade* court cautioned that, because an anti-suit injunction against foreign proceedings "effectively restricts the jurisdiction of the court of a foreign sovereign," principles of international comity counseled that an "anti-foreign-suit injunction should be used sparingly, and should be granted only with care and great restraint." *Id.* at 35-6 (citations and quotations omitted).

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. The District Court concluded that an injunction against the Brazil litigation was necessary to satisfy its obligations under the Inter-American Convention to enforce the arbitration agreement and to "ensure that the parties get what they bargained for – a meaningful arbitration of the dispute." *Id.* at 16 (quoting *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1053 (2d Cir. 1990)). Accordingly, the plaintiff in the Brazilian litigation was enjoined from prosecuting the litigation in Brazil and from pursuing any arbitrable claims "in any forum other than" the IACAC proceeding, and was further ordered to inform the Brazilian court of the injunction and immediately to "take all steps necessary to cause dismissal" of the Brazilian litigation. *Id.* at 19-20.<sup>10</sup>

Upon appeal, the Court of Appeals for the Second Circuit fully validated the District Court's approach, and affirmed its grant of the anti-foreign-suit injunction in support of arbitration. *See Paramedics*, 369 F.3d at 652-5. The Circuit Court endorsed and applied the *China Trade* standards for grant of a foreign anti-suit injunction, 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 injunction. *Id.* While the Appeals Court hesitated to "decide categorically

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<sup>10</sup> The district court took the additional step of backing up its broad anti-suit injunction with the threat of contempt. Indeed, the appellate decision in *Paramedics* reveals that stringent civil contempt sanctions were soon thereafter imposed against the enjoined party as a result of its failure to take sufficient steps to cause the dismissal of the Brazilian action, *see Paramedics*, 369 F.3d at 649, and the Court of Appeals affirmed the District Court's imposition of civil contempt. *See id.* at 655-6.

whether an attempt to sidestep foreign arbitration is alone sufficient to support a foreign anti-suit injunction," *id.* at 654, its language and thrust certainly suggests the affirmative. In any event, the Second Circuit's *Paramedics* decision makes clear that where a U.S. court has issued a decision upholding the arbitrability of a dispute (as the District Court did in that portion of its opinion compelling arbitration), "[a]n anti-suit injunction may be needed to protect the court's jurisdiction" and to ensure that *res judicata* effect is given to its judgment. *Id.* at 654. While "[p]rinciples of comity weigh heavily in the decision to impose a foreign anti-suit injunction . . . where one court has already reached a judgment – on the same issues, involving the same parties – considerations of comity have diminished force." *Id.* at 654-5.

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 federal courts' willingness to enjoin foreign proceedings in furtherance of enforcement of an arbitration agreement. Written by Second Circuit Judge Jacobs – the very same judge who drafted the Appeals Court's decision in *Paramedics* – the *LAIF* decision declined to grant an anti-suit injunction against litigation in Mexico which was running concurrently with ongoing AAA arbitration. In *LAIF*, unlike in *Paramedics*, the party which commenced the Mexican litigation was also fully participating in the arbitration, and had commenced the Mexican action not to interfere with or thwart the arbitration, but rather to seek the views of the Mexican court on a threshold question of Mexican law (the identity of shareholders in a Mexican corporation). *Id.* at 200-1 (concluding that the Mexican lawsuit "is not directed at sidestepping arbitration").<sup>11</sup> Because the foreign litigation posed no risk of interference with U.S. policies favoring arbitration, and because the Mexican

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<sup>11</sup> Also, in *LAIF*, unlike in *Paramedics*, there had been no determination that the claims submitted for arbitration were arbitrable. Rather, the arbitration agreement's applicability to the parties was subject to the determination of the Mexican court as to whether they were "shareholders" bound by the agreement. *Id.* at 197-8.

court had a strong interest in determining the question of Mexican law put before it, principles of comity counseled against issuance of the anti-suit injunction on these facts. *See id.*

Despite *LAI*'s reminder that comity still matters in the issuance of anti-foreign-suit injunctions in aid of arbitration, the U.S. Court of Appeals for 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 its *Paramedics* holding. In *Ibeto Petrochemical Indus. Ltd. v. M/T 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 a Nigerian litigation, in support of an order compelling London arbitration. *Id.* at 64-5 (affirming lower court's conclusion that the Nigerian litigation might frustrate the policy favoring arbitral resolution, and that "adjudication of the same issues in two separate actions would result in inconvenience, inconsistency, and a possible race to judgment").

Likewise, the Second Circuit's very 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 strength of U.S. public policy favoring arbitral resolution of international disputes, and the willingness of federal courts to defend this policy by enjoining participation in foreign proceedings intended to undermine arbitral resolution. *Id.* at \*11-12 (stating "[F]ederal courts are not obligated to sit idly by when a party engages in proceedings that undermine the regime . . . established by the Convention;" and further, in holding that the anti-suit injunction was supported by strong public policy, the Court stated that the important objectives of arbitration –

settling disputes efficiently and avoiding long and expensive litigation – would be undermined if it allowed a party "to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced."). If *LAIF* created any doubt, these 2007 Court of Appeals decisions indicate that the doctrine allowing anti-foreign-suit injunctions in aid of international arbitrations is alive and well in U.S. federal courts.

### C. Recent District Court Applications Of The Doctrine

Recent district court decisions applying this doctrine continue faithfully to recite the *China Trade* admonition that anti-foreign-suit injunctions are to be "used sparingly, and . . . granted only with care and great restraint." *China Trade*, 837 F.2d at 35-6. Notwithstanding this oft-repeated caution, however, most of the federal district courts addressing this issue in the past several years have exercised their discretion to enjoin participation in foreign litigations that threaten to interfere with pending arbitration proceedings between international parties.<sup>12</sup>

For example, in *Newbridge Acquisition I, LLC v. Grupo Corvi, S.A.*, 2003 WL 42007 (S.D.N.Y. Jan. 6, 2003), after compelling the ICC arbitration per the Inter-American Convention, the district court treated an injunction against further litigation of parallel Mexican litigation as a corollary to the order to arbitrate. The court cited the overlap of parties and issues between the

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<sup>12</sup> While we are aware of no cases where an anti-suit injunction has been issued against a foreign *arbitration* (as opposed to a foreign litigation) in favor of another international arbitration per the terms of the parties' agreement, the same analysis would likely apply. In any event, there is authority to suggest that an "anti-foreign-suit" injunction is, in appropriate circumstance, available against participation in foreign arbitral proceedings. *Cf. Mastercard Int'l Inc. v. Federation Internationale de Football Assoc.*, 2007 WL 631312 (S.D.N.Y. Feb. 27, 2007) (applying the *China Trade*, *Paramedics*, and *Ibeto* decisions, and granting anti-suit injunction against Swiss arbitration where issue sought to be arbitrated had already been decided in earlier permissible litigation); *Societe Generale de Surveillance S.A. v. Raytheon European Mgmt. and Sys. Co.*, 643 F.2d 863 (1<sup>st</sup> Cir. 1981) ("[W]ere the law read to prevent a court from enjoining an arbitration proceeding it might actually interfere with arbitration in the unusual case, arguably present here, where one such arbitration proceeding may interfere with another.").

arbitration and the foreign litigation as factors supporting the exercise of discretion to issue the anti-suit injunction, and went on to state that "[w]here to this is added the strong policy to uphold the parties' agreement to submit the underlying disputes to arbitration . . . the exercise of such discretion is *virtually mandated*." (emphasis added).

Likewise, in *Storm LLC v. Telenor Mobile Communications AS*, 2006 WL 3735657 (S.D.N.Y. Dec. 15, 2006), the district court compelled participation in a New York UNCITRAL arbitration, and granted an anti-suit injunction against parallel litigation pending in Ukraine. The court noted that the two *China Trade* threshold criteria were present because parties to the proceedings overlapped and because "the district court's judgment [on the motion to compel arbitration] disposes of the foreign action by determining the arbitrability of the issues." *Id.* at \*5-7. Citing the transparent nature of the Ukraine litigation as a means to thwart the arbitration, the court stated: "Attempts to interfere with arbitration of international disputes are so powerfully disapproved that the Second Circuit has suggested [in *Paramedics*], albeit not decided, that an attempt to sidestep arbitration might be sufficient to support a foreign anti-suit injunction. Where this factor is present, little else is required to authorize an injunction." *Id.* at 9 (quotation omitted). Like other courts considering this issue, the district court in *Storm* rested its decision to grant an anti-suit injunction in large part upon the strong federal policy favoring arbitration of international commercial disputes, upon the threats that the Ukraine litigation posed to the jurisdiction of the U.S. court, which held that the dispute was arbitrable, and upon the "distinct specter of delay, inconvenience, expense, inconsistency and an unseemly race to judgment" presented by forcing the parties to arbitrate in New York and litigate in Ukraine simultaneously. *Id.* at \*8-10.

Other recent federal district court decisions – while not containing the significant legal and factual analysis of the decisions considered herein at length – are in accord.<sup>13</sup> *See, e.g., SG Avipro Fin. Ltd. v. Cameroon Airlines*, 2005 WL 1353955 (S.D.N.Y. June 8, 2005) (compelling arbitration, and after application of the *China Trade* standards, issuing anti-suit injunction against further litigation of parallel pending litigation in Cameroon); *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876 (N.D. Ill. 2006) (compelling California arbitration per the terms of the parties' agreement, and applying *China Trade* standards to enjoin further participation in German litigation, where injunction necessary (1) to enforce the court's decision that the dispute is arbitrable; and (2) to avoid the burden of simultaneous proceedings in California arbitration and German litigation, where "the legal issues in the two cases are the same and . . . resolution of the arbitration will be dispositive of the action in Germany"); *Suchodolski Assocs, Inc. v. Cardell Fin. Corp.*, 2006 WL 3327625 (S.D.N.Y. Nov. 16, 2006) (granting anti-suit injunction against party's prosecution of Brazilian litigation, in support of order compelling AAA arbitration). Together, these authorities reflect the increasing willingness of U.S. federal courts – particularly those district courts often on the front lines of these disputes – to hold international parties to their arbitration agreements, and to prevent them from seeking refuge from their agreements in litigation abroad.

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<sup>13</sup> We are aware of only a very few recent district court decisions declining to grant anti-foreign-suit injunctions in this context. All are fully distinguishable from the paradigm cases discussed herein. For example, in *Comverse, Inc. v. American Telecommunications Inc.*, 2006 WL 3016315 (S.D.N.Y. Oct. 23, 2006), the court held that an anti-foreign-suit injunction was unavailable because the foreign proceedings were *enforcement proceedings* being brought by a state prosecutor, not civil litigation being brought by the signatory to the arbitration agreement. Also, in *Empresa Generadora de Electricidad Itabo, S.A. v. Corporacion Dominicana de Empresas Electricas Estatales*, 2005 WL 1705080 (S.D.N.Y. July 18, 2005), the foreign litigation sought to be enjoined would not dispose of the issues being arbitrated, and as such, the second *China Trade* threshold factor was absent. Accordingly, none of these few cases, reaching different results on their specific facts, diminish the clear trend in favor of granting anti-foreign-suit injunctions in the arbitral context.

### **III. Conclusion**

The proliferation (or continued existence) of "local resolution" protectionist statutes suggests that the regime of arbitral resolution of international commercial disputes is under attack. The above analysis of U.S. law, however, indicates that a party seeking to enforce its international arbitration agreement has significant defenses to such attack. U.S. federal courts continue to view arbitration as the favored mechanism for resolution of international disputes, and appear increasingly willing to put aside concerns of comity and deference to foreign procedures to enforce this strong policy preference in favor of international arbitration.

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