The Anti-suit Injunction: Stopping Foreign Actions In Their Tracks

By Jason Pickholz

Many litigators have experienced it at one time or another. A client walks in your door or calls you on the telephone and tells you that they are being sued in the courts of some other State or a foreign country, but their contract with the other party requires them to arbitrate in your State. Or the client informs you that someone has filed an arbitration against them that is seated in another State or a foreign country, but, according to your client, the issue is not arbitrable and is properly brought in a courtroom proceeding in your State. Or maybe you have already filed suit in court or a statement of claim in an arbitration at home on behalf of your client, when you receive notice that the adverse party has just tried to "end run" your client by starting an arbitration or filing a lawsuit somewhere else. Now your client wants you to make the other party drop its foreign action and come to your State. What are your options?

Most American parties, at least corporate ones, and their lawyers are already familiar with the notion of going to a court to either compel or stay a domestic arbitration. In the international arena, there is a similar procedure under the New York Convention on the Enforcement of Foreign Arbitral Awards ("New York Convention")[1] for applying to a court to stay its own proceedings and compel arbitration. Less familiar, though, in both the domestic and international contexts, is the concept of the "anti-suit" injunction.

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What is an Anti-Suit Injuction?

One misconception is that an anti-suit injunction is an order by court X compelling another court Y to stay a lawsuit pending before it. Such an order would be of questionable jurisdictional authority and dubious enforceability,[2] whether in a purely domestic context or one having international implications. Rather, an anti-suit injunction is a form of equitable relief in which an injunction is entered by court X *directly against one of the parties* appearing before it.[3] The injunction essentially orders one of the parties to immediately cease, or even dismiss, a second action that it has brought in another forum Y. The injunction is enforced through the issuance by court X of contempt sanctions against the enjoined party in the action pending before it if that party does not stay or dismiss its foreign action.

United States Courts Have Recognized Anti-Suit Injunctions For Over A Century

Success in obtaining an anti-suit injunction will depend on the factual circumstances of the two cases (the local one and the one brought in another jurisdiction by the opposing party), and the extent of the overlap in the issues presented in each, considered in light of the enjoining jurisdiction's compelling public policy interests. The possibility of obtaining an anti-suit injunction therefore should be assessed on a case-by-case basis. It should be remembered that there is not necessarily a conflict in concurrent parallel proceedings simply because two lawsuits, or an arbitration and a lawsuit, are brought in different States.

In the event that the proceeding in one State results in a judgment, *res judicata* or collateral estoppel could be pleaded in the action in the second State to avoid inconsistent judgments or to preclude re-litigation of issues tried and decided once. In addition, the concept of comity may influence a court's decision as to whether to do something that would interfere with ongoing proceedings in another State.

The United States Supreme Court recognized the anti-suit injunction over 115 years ago.[4] They have been issued by courts as recently as one week prior to the writing of this article.[5]

In *Jay Franco*, the plaintiff, Jay Franco and Sons, filed suit in New York Supreme Court in June 2005 seeking

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the return of a $70,000 deposit that it had made pursuant to an alleged licensing agreement with the defendant, G Studios, that was apparently never executed. On October 11, 2005, G Studios moved to stay the New York litigation based on an arbitration provision in the unexecuted licensing agreement. The court denied G Studio's motion for a stay on March 24, 2006. Mere days later, on April 5, 2006, G Studios filed a complaint in the Superior Court of California that sought damages from Jay Franco and which, according to the New York court, was based on the same facts as set forth in G Studio's motion for the stay that had been denied. Pursuant to California law, G Studios also filed a certification in California court stating that its California complaint was "not related to another action or proceeding pending in any state".[6] The New York court called this representation "clearly false as the facts alleged in the [California] complaint [] were raised in support of [G Studios'] motion for a stay herein and are clearly the reasons why it has resisted the return of the deposit".[7] As explained by the New York court:

> While it has been said that the "general rule is that the courts of this State will decline to interfere by injunction to restrain its citizens from proceeding in an action commenced in the courts of a sister State," it was also noted that there "are exceptions to this rule, as where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the purpose of vexing, annoying and harassing the party seeking the injunction."[8]

The New York court also noted that trying the case in two different forums would result in duplicative litigation, waste of judicial resources, and unnecessary legal expenses to the parties.[9] As a result, the New York court enjoined G Studios from continuing to pursue its California action.

Anti-Suit Injunctions Implicating Actions Pending In Foreign Nations

The issue of an anti-suit injunction implicating a proceeding pending in a foreign nation often arises where one of the two actions involved is an arbitration. The United States adopted the Federal Arbitration Act ("FAA") in 1925.[10] Most American lawyers who represent international or multinational business entities, or companies that do business or make investments abroad, are familiar with the FAA, at least Chapter 1 pertaining to domestic arbitration. Less familiar are Chapters 2 and 3, which were added to the FAA as enabling legislation to the United States' ratification of the New York Convention and the Inter-American Convention on International Commercial Arbitration ("ICA"). Article II of the New York Convention contains a procedure similar to that in domestic arbitrations for applying to a court to stay its own proceedings and compel arbitration.[11]

The anti-suit injunction in the international context is a different remedy, though, born not of treaty but equity. As with domestic litigations and arbitrations, there is not necessarily a conflict in concurrent parallel proceedings simply because one action is brought in a foreign nation. In the event that the foreign proceeding results in a judgment, res judicata could be pleaded in the domestic action to avoid inconsistent judgments, as it could in purely domestic proceedings. The concept of comity also applies, and may be even stronger in an international dispute than in one that is solely domestic, which should be kept in mind when asking a court to do something that would interfere with a foreign sovereign's proceedings.

Nevertheless, in the past few years, opinions from the United States District Court for the Southern District of New York ("Southern District") seem to have resurrected the anti-suit injunction, or perhaps they signify a trend by litigants to resurrect it, at least in the context of international arbitrations. A prominent feature of these cases seems to be that a motion for an anti-suit injunction may have a better chance of succeeding where the parties are for practical purposes essentially the same in both litigations, the issues are the same, the foreign proceeding presents a threat to the jurisdiction of the domestic court, and important public policy and equitable considerations are implicated.[12]

In one of the Southern District cases, a Brazilian company, Tecnimed, refused a Request to Arbitrate before the Inter-American Commercial Arbitration Commission ("IACAC").[13] Instead of proceeding to arbitration, Tecnimed filed two lawsuits. The first suit it filed was in civil court in Brazil seeking a declaration that its agreements with the defendant were invalid, that the agreements had expired and therefore were unenforceable, and seeking rulings on the merits of the dispute. Approximately six months later, Tecnimed filed a petition in New York State Court to stay the IACAC arbitration, which the defendant removed to federal court. The defendant counterclaimed for an order compelling Tecnimed to arbitrate and for an anti-suit injunction enjoining the Brazilian lawsuit.

In granting the anti-suit injunction, the Southern District found that the defendant would suffer irreparable harm if it were denied its right to arbitrate, and if it were required to litigate both cases in Brazil and New York. In addition, the Southern District found that the parties were essentially the same in both actions, as were the underlying issues of arbitrability, liability, and damages. Furthermore, the Southern District found that the foreign lawsuit threatened its own jurisdiction and violated New York's public policy of enforcing arbitration agreements.

In another case decided that same year, the Southern District was again required to address an application for an anti-suit injunction.[14] In that case, through a series of agreements, Newbridge agreed to purchase a 50% interest in another company, La Corona, that had previously been wholly-owned by Groupo Corvi. In accordance with their agreements, the parties transferred their shares in La Corona to a trustee with certain instructions concerning how to vote those shares. Disputes arose after Newbridge made its investment. Groupo Corvi began an arbitration in New York, and then filed a lawsuit against Newbridge and the trustee in Mexico City seeking to void the trust agreement. Newbridge brought an action in the Southern District seeking an anti-suit injunction and to compel the arbitration.

The Southern District ruled that Groupo Corvi had no real dispute with the trustee, who was merely a stakeholder. Therefore, in part because the parties and issues in the Mexico lawsuit and the New York arbitration were essentially the same, the Southern District granted Newbridge's motion to compel the arbitration. Finding that the parties were essentially the same, the resolution of the arbitration would resolve the issues in the Mexico lawsuit, and that Groupo Corvi itself had instituted the New York arbitration, the Southern District granted the anti-suit injunction.

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The following year, the *Newbridge* court was again called upon to rule on an application for an anti-suit injunction, this time with different results.[15] This case concerned a corporate power struggle, involving the purchase of class C shares in a Mexican company, Axtel, by a Belgian company, Laif X. Laif X had acquired its right to purchase those shares pursuant to an assignment it had received from Laif IV. After Laif X's share purchase, Axtel and another Mexican company, Telinor, transferred their class A shares to Blackstone,[16] which converted those shares into C shares. The end result of these transfers was that Laif X no longer had a majority of Axtel's class C shares and so could not unilaterally elect a majority of Axtel's class C directors.

Laif X and Telinor then began filing a series of actions: (1) Laif X first filed a lawsuit in Mexico, which was dismissed, (2) Laif X instituted a AAA arbitration in New York seeking to nullify the issuance of the class C shares to Blackstone; (3) Telinor responded with a lawsuit in Mexico to nullify the assignment between Laif IV and Laif X.; and (4) Laif X in turn filed a lawsuit in the Southern District of New York seeking an anti-suit injunction and an order compelling arbitration.

The Southern District found that the questions of whether the assignment between Laif IV and Laif X was valid, and hence Laif X's share purchase was valid and whether it had rights as a shareholder, were different from the issues in the arbitration, namely whether the share transfers to Blackstone were valid. In addition, the issues involved in the Laif IV and X transfers, and Laif X's rights thereunder, were issues of Mexican law which should be decided by the Mexican court. Furthermore, the Southern District found that the Mexican lawsuit would not interfere with the AAA arbitration, and would not result in a material delay in the arbitration. Hence, this time the Southern District declined to enter an anti-suit injunction.

Common Threads

One theme running through all of the above cases seems to be that the courts, whether Federal or State, are willing to

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consider granting anti-suit injunctions where, among other factors, the parties and issues in the two actions are essentially the same.[17]

Another theme is that where an overriding public policy is implicated, the courts will not hesitate to grant an anti-suit injunction. One such public policy is that agreements to arbitrate are to be enforced, absent strong evidence that the arbitration clause itself does not cover the subject matter of the controversy or was itself procured through fraud or mistake, especially in the context of international agreements to arbitrate. While the policy in favor of arbitration can be said to be a national one, important local policies should not be overlooked. For instance, in affirming an anti-suit injunction requiring a former law firm partner to (1) cease prosecuting an action that he brought in Mexico against his former law firm, (2) "take all steps necessary to comply with" the anti-suit injunction, and (3) "refrain from taking further affirmative steps of any kind in connection with the aforesaid Mexican proceeding",[18] a New York appellate court stated that:

> ...we observe that the Court of Appeals urged us in *Ehrlich-Bober* to safeguard New York's "recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." This compelling interest is served by a policy favoring arbitration. Particularly in contracts between individuals or firms of different nationalities, parties stipulate to arbitration in New York largely for the purpose of controlling the risks of doing business by defining, in advance and by voluntary agreement, the forum and method of dispute resolution.... we reaffirm New York's long-settled law and policy favoring arbitration, thereby helping to maintain New York's central role in the economy of the nation and the world.[19]

Like New York, other States may have their own local public policy interests that are sufficiently strong that they might tip the scales in favor of the issuance of an anti-suit injunction under appropriate circumstances, if not on their own than in conjunction with one or more other strong public policy interests such as upholding agreements to arbitrate.

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Even where a non-complying party actually defies the local anti-suit injunction and prosecutes its foreign action to judgment, resulting in *res judicata* and a judgment of a sister State that is entitled to full faith and credit, "All reported cases have held that contempt sanctions are available in spite of the necessity to dismiss all or part of the [local] action".[20]

Conclusion

An anti-suit injunction is not a typical remedy. As many litigators and clients who have had to endure harassing and/or obstructionist discovery tactics from an opposing side can likely attest, contempt sanctions for the conduct of opposing parties are not lightly awarded. This is in part because, as the courts are aware, what one party views as vexatious, harassing, and contumacious to the other is tough legitimate advocacy. Nevertheless, counsel faced with an adversary intent on playing the forum shopping and rush-to-judgment game should consider whether the facts and issues of the two actions, and the parties involved in them, are sufficiently similar, and the possible public policy interests implicated sufficiently strong, that a court may entertain a motion for an anti-suit injunction.

If obtained, the anti-suit injunction can put an end to your adversary's duplicative foreign action and force it to litigate or arbitrate in the appropriate forum. It can also provide a powerful incentive in the form of contempt sanctions, not for conduct aimed at you or your client, but for violating an order

of the court— sanctions which may survive and continue to be available to redress injuries your client incurs even if the opposing party insists on pursuing its foreign action despite the court's injunction.[21]

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Endnotes

1. For enabling legislation to the New York Convention, see 9 U.S.C. § 2 *et seq.*

2. *See Brawer v. Pinkins*, 164 Misc.2d 1018, 1024, 626 N.Y.S.2d 674, 677-78 (Sup. Ct., N.Y. Co., 1995) ("In the face of an anti-suit injunction, there is no bar to a sister state's determination on the merits of a matter presented to it.... Courts in other states have uniformly held that a judgment issued by a sister state is entitled to full faith and credit even in the face of a local anti-suit injunction") (citing cases from Indiana, Illinois, New Mexico, and Pennsylvania).

3. *Id.*, 164 Misc. at 1024, 626 N.Y.S.2d at 677 ("It is well settled that an anti-suit injunction operates only to enjoin a party; it does not bind the courts of a foreign jurisdiction.") (citations omitted).

4. *See, e.g., Cole v. Cunningham*, 133 U.S. 107, 124, 10 S. Ct. 269, 274-75, 33 L.Ed. 538 (1890).

5. *See, e.g., Jay Franco and Sons, Inc. v. G Studios LLC*, No. 602236/05 (Sup. Ct., N.Y. Co., 2006), as reprinted in New York Law Journal (July 7, 2006).

6. *Id.*

7. *Id.*

8. *Id.*, quoting *Paramount Pictures, Inc. v. Blumenthal*, 256 App. Div. 756 (1st Dept. 1939).

9. *Id.*

10. 9 U.S.C. § 1 *et seq.*

11. *See* New York Convention, Article II, Sec. 3. Other nations have similar provisions contained within their own domestic arbitration laws and/or enabling legislation for the Convention. *See, e.g.*, England's Arbitration Act of 1996, sec. 9-11 (available at http://www.legislation.hmso.gov.uk/acts/acts1996/1996023.htm).

12. *See China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (emphasizing jurisdictional threat to enjoining court of foreign action and public policy considerations); *see also American Home Assur. Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984) (factors to be considered include, among others: (1) commonality of the parties; (2) *res judicata* effect of first action on issues to be resolved in the enjoined action; (3) public policy; (4) threat posed to issuing court's jurisdiction by the foreign action; (5) equitable considerations; and (6) whether the foreign action is vexatious).

13. *Paramedics Electromedicina Comercial LTDA v. GE Medical Systems Info. Techs.*, 2003 WL 23641529 (SDNY 2003).

14. *Newbridge Acquisition I v. Grupo Corvi*, 2003 WL 42007 (SDNY 2003).

15. *Laif X SPRL v. Axtel*, 310 F. Supp. 2d 578 (SDNY 2004).

16. There were three "Blackstone" entities involved: Blackstone Capital Parnters III Merchant Banking Fund, L.P., Blackstone Family Investment Partnership III, L.P., and Blackstone Offshore Capital Partners, L.P. The court referred to these three entities collectively as "Blackstone". *Id.*, 310 F. Supp. 2d at 579.

17. It should be noted, though, that at least one federal appellate court has allowed a party before it to stay the courtroom litigation pending the outcome of an ICC arbitration to which the litigant was only an interested third party. *Waste Mgmt. v. Residuous Industriales Multiquim*, 372 F. 3d 339 (5th Cir. 2004).

18. *Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales*, 308 A.D.2d 261, 276, 762 N.Y.S.2d 607, 613 (1st Dept. 2003).

19. *Id.*, 308 A.D.2d at 269-70, 762 N.Y.S.2d at 613 (citation omitted).

20. *Brawer*, 164 Misc.2d at 1026, 626 N.Y.S.2d at 678.

21. *See, e.g., id.*; *Paramedics Electromedicina Comercial, supra.*