Anti-suit Injunctions and Anti-arbitration Injunctions in the US Enjoining Foreign Proceedings

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A Practice Note that provides guidance on the legal issues to consider when seeking an anti-suit or anti-arbitration injunction in the US to enjoin foreign proceedings. Specifically, this Note examines the legal and procedural requirements counsel must consider when seeking to enjoin international litigation or arbitration.

In the international arbitration context, an anti-suit injunction may be used to prevent a party from proceeding with litigation commenced in a foreign venue contrary to the terms of a valid arbitration agreement. An anti-arbitration injunction, on the other hand, may be used to prevent a party from proceeding with arbitration, generally because of the lack of a valid arbitration agreement between the parties.

Anti-suit and anti-arbitration injunctions do not seek to enjoin a foreign court or foreign arbitral tribunal, both of which would give little credence to an injunction from a US court targeted at their activities. Instead, these injunctions are directed at the parties to the proceedings, enjoining them from pursuing claims in a foreign court or before an arbitrator.

Depending on the procedural posture of a matter, a party may request an anti-suit or anti-arbitration injunction from a US court by filing either an independent petition or a motion in an ongoing litigation. The process for bringing these requests is similar to the way a party obtains a preliminary injunction, although they are brought under different rules. For more information about the documents needed and the procedure to obtain an injunction in federal court, see *Practice Notes, Preliminary Injunctive Relief: Drafting the Required Documents (Federal) (www.practicallaw.com/9-520-0532)* and *Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal) (www.practicallaw.com/3-520-9724)*.

This Note examines the main legal and procedural considerations counsel must take into account when seeking to enjoin foreign proceedings through:

- An anti-suit injunction (see *Anti-suit Injunctions*).
- A counter anti-suit injunction (see *Counter Anti-suit Injunctions*).
- An anti-arbitration injunction (see *Anti-arbitration Injunctions*).

ANTI-SUIT INJUNCTIONS

The need for an anti-suit injunction arises when a party commences a proceeding in a foreign court to gain a strategic or substantive advantage even though it has agreed to arbitrate the underlying dispute in a valid arbitration agreement.

Counsel seeking an anti-suit injunction must consider:

- Whether the court has the requisite jurisdiction to issue an anti-suit injunction (see *Jurisdiction to Issue Anti-suit Injunctions*).
- Where to seek an anti-suit injunction (see *Venue for Anti-suit Injunctions*).
- When to seek an anti-suit injunction (see *Timing of Anti-suit Injunctions*).
- The elements that must be shown to obtain an anti-suit injunction (see *Elements to Obtain Anti-suit Injunctions*).

JURISDICTION TO ISSUE ANTI-SUIT INJUNCTIONS

To issue an anti-suit injunction, the petitioned US district court must have personal jurisdiction over the party that has commenced, or would commence, the foreign litigation at issue, as well as subject matter jurisdiction to properly hear the request for the injunction (see, for example, *China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987)*; *Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996)*).

Personal Jurisdiction

Personal jurisdiction is a court's power to determine the rights and obligations of persons or entities with contacts in the state where the court is located. A US district court generally may obtain personal

jurisdiction over a defendant when the defendant has sufficient minimum contacts with the state so that the lawsuit does not offend the due process standard of "traditional notions of fair play and substantial justice" (*Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)*; and see *Practice Note, Commencing a Federal Lawsuit: Initial Considerations: Does the Court Have Personal Jurisdiction Over the Defendant? (www.practicallaw.com/3-504-0061)*). In state courts, personal jurisdiction is generally governed by the particular state's law, provided it does not supplant the limits of the US Constitution and federal common law.

US courts have developed additional rules for cases where foreign parties are before a US court sitting in federal question jurisdiction. In these cases, the court may have personal jurisdiction over a foreign defendant when:

- The case arises under federal law.
- The foreign defendant lacks sufficient contacts with any single state to subject it to personal jurisdiction in any state.
- The foreign defendant has sufficient contacts with the US as a whole to comport with constitutional notions of due process.

(See, for example, *URS Corp. v. Lebanese Co. for the Dev. & Reconstruction of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199, 215 n.20 (D. Del. 2007)*.)

Subject Matter Jurisdiction

US courts generally have federal question jurisdiction to hear requests for anti-suit injunctions because they have jurisdiction to enforce international arbitration agreements under the Federal Arbitration Act (FAA) (*9 U.S.C. § 4*) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), as codified in the FAA (*9 U.S.C. § 203*). Therefore, subject to the requirement of personal jurisdiction, a US court may issue an anti-suit injunction to prevent a party from pursuing a lawsuit in a foreign court in violation of a valid arbitration agreement (*China Trade, 837 F.2d at 35; Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004)*).

Diversity jurisdiction is not usually required for a court to issue an anti-suit injunction where international arbitration is implicated (*9 U.S.C. § 203*). For more information about subject matter jurisdiction, see *Subject Matter Jurisdiction Flowchart (www.practicallaw.com/4-507-0081)*.

VENUE FOR ANTI-SUIT INJUNCTIONS

A request for an anti-suit injunction is often paired with a motion to compel arbitration. Therefore, counsel should bring a request for an anti-suit injunction in a court at the place of arbitration, assuming that the court has personal jurisdiction over the party to be enjoined. Under US law, a court at the place or seat of arbitration is deemed to have primary jurisdiction over the matter, and therefore has preferential status compared to other courts, which have secondary jurisdiction. The court with primary jurisdiction is considered to be in the strongest position to issue an anti-suit injunction, even though a court with secondary jurisdiction may also issue this relief.

If there is primary jurisdiction in various US courts, counsel should consider the substantive standards that each court applies to the motion to compel arbitration when deciding where to bring the request for an anti-suit injunction because these standards may vary by court.

In some federal circuits, such as the Tenth Circuit, US district courts do not have the authority to issue an order directing parties to arbitrate in another district (see *Ansari v. Qwest Commc'ns Corp., 414 F.3d 1214, 1219-20 (10th Cir. 2005)* (holding that where parties have agreed to arbitrate in a particular forum, only a district court in that forum has authority to compel arbitration)).

TIMING OF ANTI-SUIT INJUNCTIONS

Because injunctions are an equitable remedy, courts take into account timing issues, such as delay and inconvenience, when considering whether to issue injunctive relief. Therefore, although there are no codified timing limitations, counsel should seek an anti-suit injunction as early as possible (see *Practice Note, Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal): Timing of Filing (www.practicallaw.com/3-520-9724)*).

ELEMENTS TO OBTAIN ANTI-SUIT INJUNCTIONS

It is usually unnecessary to prove the required elements typically associated with obtaining injunctive relief when seeking an anti-suit injunction (*Practice Note, Preliminary Injunctive Relief: Initial Considerations (Federal): Standard for Obtaining Preliminary Injunctive Relief (www.practicallaw.com/9-521-5760)*). Instead, a party requesting an anti-suit injunction to enjoin a foreign litigation must first show that:

- **The parties in the foreign and US proceedings are the same.** For example, in the US District Court for the Southern District of New York, this element is satisfied if the "real parties in interest are the same in both matters." (*Storm LLC v. Telenor Mobile Commc'ns AS, No. 06-13157, 2006 WL 3735657, at *6 (S.D.N.Y. Dec. 15, 2006)*.)
- **The issues in the foreign and US proceedings are the same.** It is unclear whether the issues in the case must be identical. Some courts, such as the US Court of Appeals for the Second Circuit, have held that this requirement means that the "resolution of the case before the enjoining court would be dispositive of the enjoined action." (*China Trade, 837 F.2d at 36*.)

If the party cannot show these threshold elements, the court must deny the request for an anti-suit injunction and the analysis goes no further. If the requirements are satisfied, the court will consider the particular facts and circumstances of the case to determine whether the requested injunctive relief is proper. A US court generally weighs matters of international comity against other discretionary factors, including the need to "prevent vexatious or oppressive litigation" (*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas bumi Negara, 335 F.3d 357, 366 (5th Cir. 2003)*; *Quaak, 361 F.3d at 18-19)* (see *Intermediate Approach*).

However, courts are inconsistent regarding the proper standard to determine whether to issue an anti-suit injunction. The differing judicial approaches can be understood in terms of whether the court applies a permissive, restrictive or intermediate standard.

Permissive Approach

Courts in the Fifth, Seventh and Ninth Circuits tend to be more willing to grant requests for anti-suit injunctions. Courts in these circuits generally issue anti-suit injunctions when a party can demonstrate that the litigation to be enjoined either:

- Is vexatious or oppressive.

- Would involve inequitable hardship.

These courts accord less weight to considerations of international comity. (See *Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886 (9th Cir. 2012)*; *Kaepa, Inc., 76 F.3d at 627-28*; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993)*; *Seattle Totems Hockey Club v. Nat'l Hockey League, 652 F.2d 852, 855-56 (9th Cir. 1981)*.)

For example, in *Kaepa, Inc.*, the US Court of Appeals for the Fifth Circuit held that an anti-suit injunction was proper where it determined that the foreign litigation was needlessly duplicative and presented an "unwarranted inconvenience, expense, and vexation." In its reasoning, the Fifth Circuit cited two earlier decisions which concluded that a district court may issue an anti-suit injunction when it has determined "that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.'" (*Kaepa, Inc., 76 F.3d at 627*).

Although the Fifth Circuit in *Kaepa, Inc.* noted that the concept of international comity is a factor to be considered, it declined to "require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action," and held that granting the injunction would not threaten relations between the US and Japan. (*Kaepa, Inc., 76 F.3d at 627-28*.)

Restrictive Approach

Courts in the Third, Sixth and DC Circuits are the least likely to grant requests for anti-suit injunctions. Courts in these circuits generally accord more weight to considerations of international comity and issue an anti-suit injunction to enjoin a foreign court proceeding only when either:

- *Res judicata* applies to bar the foreign proceeding.
- The foreign proceeding threatens an important public policy or the court's jurisdiction over the matter.

(See *Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160-61 (3d Cir. 2001)*; *Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354-55 (6th Cir. 1992)*; *Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-33, 937-39 (D.C. Cir. 1984)*.)

Intermediate Approach

Courts in the First and the Second Circuits follow an intermediate approach, granting requests for anti-suit injunctions if they find that the totality of the circumstances weighs in favor of issuing an injunction despite concerns regarding international comity. Courts in these circuits typically consider factors such as:

- The nature and procedural posture of the two actions.
- Whether adjudicating both actions would result in:
  - delay;
  - inconvenience;
  - additional expense; or
  - a race to judgment.
- The conduct of the parties, such as bad faith or vexatiousness.
- The importance of any public policies at stake, and whether proceedings in the foreign forum would prejudice equitable considerations.
- The extent to which the foreign action has the potential to undermine the US court's ability to reach a just and speedy result and pose a threat to the court's jurisdiction over the matter.

(See *Quaak, 361 F.3d at 18-19* (finding that considerations of international comity establish a rebuttable presumption against the issuance of an anti-suit injunction, but concluding that this presumption can be overcome based on the totality of the circumstances); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 119, 126-127 (2d Cir. 2007)* (applying intermediate approach and noting that threats to public policy or the court's jurisdiction are not the only considerations); see also *China Trade, 837 F.2d at 35* (listing the various factors to consider).)

COUNTER ANTI-SUIT INJUNCTIONS

If a party seeks to avoid an anti-suit injunction from a foreign court enjoining it from proceeding with an action in the US, it may request an injunction from a US court to enjoin the opposing party from seeking or enforcing the foreign anti-suit injunction. This is known as a counter anti-suit injunction or anti-anti-suit injunction.

For example, in *Laker Airways Ltd.*, Laker filed an antitrust action in the US against several domestic and foreign defendants. The foreign defendants sought and obtained an anti-suit injunction from a British court, enjoining Laker from pursuing the US litigation. In response, Laker sought a counter anti-suit injunction in US court, barring the remaining American defendants and certain foreign defendants Laker had named in a subsequent antitrust claim from "duplicating the foreign defendants' successful request for an English injunction." (*Laker Airways Ltd., 731 F.2d at 915*.) The US court held that issuing this counter anti-suit injunction was proper because:

- The British and US actions were not parallel proceedings where two courts proceed to separate judgments simultaneously under one cause of action. Instead, the sole purpose of the British proceeding was to terminate the US action.
- Enjoining the US action would strip the US court of its validly invoked jurisdiction over the matter.
- Enjoining the US action would violate US public policy.

(*Laker Airways Ltd., 731 F.2d at 929-32*.)

ANTI-ARBITRATION INJUNCTIONS

An anti-arbitration injunction is a tool to enjoin a party from commencing or continuing an arbitration to which a US court petitioner did not submit or agree. The need for an anti-arbitration injunction often arises when:

- There is no arbitration agreement between the parties.
- The compelled party is only related to a signatory (but is not itself a signatory) to the arbitration agreement.
- A party brings a dispute to an arbitral tribunal under an arbitration agreement, but the arbitration proceedings do not cover all of the claims contained in the notice of arbitration.
- A party has not met a condition precedent contained in the arbitration agreement.

Counsel seeking an anti-arbitration injunction must consider:

- Whether the court has the requisite jurisdiction to issue an anti-arbitration injunction (see *Jurisdiction to Issue Anti-arbitration Injunctions*).
- Whether to seek a stay of arbitration under state law (see *State Law*).
- The elements that must be shown to obtain an anti-arbitration injunction (see *Elements to Obtain Anti-arbitration Injunctions*).

JURISDICTION TO ISSUE ANTI-ARBITRATION INJUNCTIONS

Similar to an anti-suit injunction, a court must have personal jurisdiction over the party sought to be enjoined to issue an anti-arbitration injunction (see *Personal Jurisdiction*). However, while federal courts generally have the authority to issue an anti-suit injunction under the FAA, the basis for a court's authority to issue an anti-arbitration injunction is more complex. The FAA does not explicitly confer federal courts with the authority to issue anti-arbitration injunctions. Nevertheless, courts have found that they have the authority to issue these injunctions based on, for example:

- The facts specific to the case before the court (*In re Am. Express Fin. Advisors Sec. Litig., 672 F.3d 113, 139-42 & n.20 (2d Cir. 2011)*).
- Clearly established case law (*Tai Ping Ins. Co. v. M/V Warschau, 731 F.2d 1141, 1144 (5th Cir. 1984)*).
- The All Writs Act (*28 U.S.C. § 1651*) (*Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099, 1103 (11th Cir. 2004)*).
- A court's power that is "concomitant" to its authority to compel arbitration under the FAA or New York Convention (*Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co., 643 F.2d 863, 868 (1st Cir. 1981); Farrell v. Subway Int'l. B.V., No. 11-0008, 2011 WL 1085017, at *2 (S.D.N.Y. Mar. 23, 2011); Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P., 49 F. Supp. 2d 331, 342 (S.D.N.Y. 1999)*).

STATE LAW

A party seeking to enjoin an arbitration may also request to stay the arbitration, which essentially provides the same relief as an anti-arbitration injunction. A stay of arbitration may be grounded in a state statute authorizing this relief. For example, the New York Civil Practice Law and Rules (CPLR) provides for an application to stay arbitration on the ground "that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred" (*CPLR 7503(b)*).

Other US states have their own arbitration-related statutes based on the Revised Uniform Arbitration Act, which may be applied in seeking an anti-arbitration injunction or stay of arbitration. States that have adopted at least part of the Revised Uniform Arbitration Act include:

- California (*Cal. Civ. Proc. Code § 1281.2*).
- Illinois (*710 Ill. Comp. Stat. 5/2(b)*).
- North Carolina (*N.C. Gen. Stat. Ann. § 1-569.6(d)*).
- Colorado (*Co. Rev. Stat. Ann. § 13-22-206(4)*).
- New Jersey (*N.J. Stat. Ann. § 2A:23B-6(d)*).

ELEMENTS TO OBTAIN ANTI-ARBITRATION INJUNCTIONS

Anti-arbitration injunctions are usually sought through applications for preliminary injunctive relief (see, for example, *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 32 (2d Cir. 2010)*).

Therefore, the general requirements for obtaining an anti-arbitration injunction are consistent with the requirements for obtaining a preliminary injunction. For more information on obtaining preliminary injunctive relief, see *Practice Notes, Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal) (www.practicallaw.com/3-520-9724)* and *Preliminary Injunctive Relief: Drafting the Required Documents (Federal) (www.practicallaw.com/9-520-0532)*.

To obtain an anti-arbitration injunction, a party must show that:

- It has a substantial likelihood of success on the merits.
- It will suffer irreparable injury unless the injunction is issued.
- The threatened injury outweighs whatever damage the proposed injunction may cause to the opposing party.
- The injunction would not be adverse to the public interest.

(*Citigroup Global Mkts., Inc., 598 F.3d at 34.*)

At least one court has held that irreparable harm may be shown if not granting the anti-arbitration injunction would result in the arbitration of a dispute involving a party who is not covered by an arbitration agreement (*Md. Cas. Co. v. Realty Advisory Bd. on Labor Relations, 107 F.3d 979, 984-85 (2d Cir. 1997)*; but see *Klay, 376 F.3d at 1112 n.20* (arbitrating a non-arbitrable claim would not constitute irreparable injury)).

For more information about the elements a party must show to obtain injunctive relief, see *Practice Note, Preliminary Injunctive Relief: Initial Considerations (Federal): Standard for Obtaining Preliminary Injunctive Relief (www.practicallaw.com/9-521-5760)*.

For the links to the documents referenced in this note, please visit our online version at **http://us.practicallaw.com/3-560-2848**

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