

International anti-suit injunctions

Circuits remain split on permissive versus restrictive approach in absence of forum-selection clause.

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THE GLOBAL MARKETPLACE depends on the smooth delivery of goods and services. While U.S. companies are eager to do business worldwide, they must also take care to safeguard their interests. Even the longest, most profitable of relationships can quickly sour. Economic downturns, changes in upper management and unstable political regimes, to name a few factors, can transform a once mutually beneficial business rela-

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tionship into a rancorous dispute.

While business may be global in nature, disputes are still very much settled on a local level. For U.S. businesses, the location of a potential lawsuit, arbitration or even mediation can be a significant factor in determining whether to contract with a foreign party. For one thing, many foreign jurisdictions have enacted laws to protect their home-grown companies. These laws may provide for damages that have no connection — other than retribution — to the dispute between the parties. For example, in some foreign jurisdictions, a local distributor may petition a court for an order barring the further importation of a U.S. suppliers' products into the country unless a large monetary bond is posted. Beyond questions of foreign law, U.S. businesses must evaluate the judicial landscape in foreign markets. Questions include whether the judicial system is transparent, whether it is rife with corruption and how well a foreign litigant will fare against a domestic party.

Enter the forum-selection clause. By predetermining where any disputes will be resolved, parties on both sides of a contract gain a measure of predictability and comfort. Of course, even the best laid plans sometimes flounder. At the moment of truth, a party may simply thumb its nose at the forum-selection clause and initiate litigation in a forum not agreed to by the parties. U.S.

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businesses, however, need not bow to the pressures of litigating in a foreign forum. The anti-suit injunction has developed into a powerful tool to protect U.S. businesses abroad.

Although anti-suit injunctions are widely accepted, U.S. courts cannot seem to agree on the correct standard for granting them. Indeed, a split among the circuits now exists that will eventually have to be resolved by the U.S. Supreme Court.

An anti-suit injunction is a specialized form of injunction whereby a court can bar a party from commencing or continuing with a proceeding in a foreign forum.

Though often seen as an effort to meddle with the jurisdiction of the foreign forum, anti-suit injunctions do not involve one court attempting to enjoin another. Instead, anti-suit injunctions are in personam in character and are directed to the litigants who are already within the jurisdiction of the issuing court. Federal courts derive the power to enjoin foreign proceedings from their general equitable power and the All Writs Act, 28 U.S.C. 1651. By their very nature, anti-suit injunctions are designed to protect the jurisdiction of the issuing court.

Anti-suit injunctions have deep roots in the common law, and can be traced back at least to 15th century England, when they first appeared in the form of writs of prohibition issued by common law courts to the ecclesiastical courts. In the United States, the anti-suit injunction originated as a means for courts with similar jurisdiction to block duplicative and vexatious litigation. In the context of international business disputes, anti-suit injunctions may be used to vindicate contractual forum-selection clauses that specify the jurisdiction or forum in which disputes arising between the parties will be resolved.

The circuit split

There is a clear division among U.S. courts as to the proper standard to be applied in deciding whether to issue an anti-suit injunction in the absence of a forum-selection clause. Critically, the issue is not the power of the federal courts to grant such injunctions. As the 8th U.S. Circuit Court of Appeals recently noted in *Goss Int'l Corp. v. Man Roland Druckmaschinen A.G.*, 491 F.3d 355, 359 (8th Cir. 2007), all of the circuits to have passed on the question agree that federal courts have the power to enjoin parties subject to their jurisdiction from prosecuting foreign suits. The point of contention, therefore, is not whether such injunctions may be granted, but along what lines this relief is appropriate.

Regardless of what approach is ultimately used, all courts begin with the same threshold inquiry: Do the proceedings at issue involve the same parties and the same claims? Yet, even this seemingly basic question has engendered significant debate. While some courts adhere to a strict identity requirement, others have ruled that the

Courts disagree over extent that comity concerns play a role.

threshold test will be satisfied so long as the parties and/or claims are "similar." Of course, this debate is not as significant as the disagreement over the extent to which comity concerns should play a role in granting injunctive relief.

More than a century ago, the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), defined comity as the recognition that one nation gives within its territory to the legislative, executive or judicial acts of another nation, having due regard to international duty, convenience and the rights of its own citizens or of other persons who are under the protections of its laws. U.S. courts uniformly recognize the importance of comity in determining whether to grant an anti-suit injunction. The courts part ways, however, on the question of how much regard to give concerns over comity when deciding whether relief should be granted.

The permissive approach

The 5th, 7th and 9th circuits have all adopted the permissive approach to granting anti-suit injunctions. In *In re Unterweser Reederei GmbH*, 428 F.2d 888, 896 (5th Cir. 1970), the 5th Circuit laid out the backbone of this approach. An anti-suit injunction is appropriate when the foreign litigation would frustrate a policy of the forum issuing the injunction; would be vexatious or oppressive; would threaten the issuing court's jurisdiction; or would result in separate actions causing delay, inconvenience, expense, inconsistency or a race to judgment. The *Unterweser* factors are disjunctive; the existence of any one of the four factors would warrant relief.

While recognizing that comity is a consideration, courts following the permissive approach generally will not presume a threat to comity without evidence of such a threat. As explained by the 7th Circuit in *Allendale Mut. Ins. Co. v. Bull Data Systems Inc.*, 10 F.3d 425, 431 (7th Cir. 1993), courts following the permissive approach "want to see some empirical flesh on the theoretical skeleton." These courts do not deny that comity could be impaired by such an injunction, but they demand evidence that comity is likely to be impaired in the particular case in which the anti-suit injunction is sought. Inherent in the permissive approach is the recognition that federal courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full and fair justice to litigants. As a result, when the

actions of a litigant in another forum threaten to paralyze the jurisdiction of the court, the permissive approach warrants the use of anti-suit injunctions to stop the foreign proceeding.

The restrictive approach

A majority of courts, including the 1st, 2d, 3d, 6th, 8th and D.C. circuits, have adopted the restrictive approach to anti-suit injunctions. These circuits observe the general principle that one court should not interfere with or try to restrain proceedings in another court. See, e.g., *Goss Int'l Corp. v. Man Roland Druckmaschinen A.G.*, 491 F.3d 355, 359 (8th Cir. 2007); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 34 (2d Cir. 1987); and *Compagnie Des Bauxites de Guinea v. Insurance Co. of N. America*, 651 F.2d 877 (3d Cir. 1981).

Courts adhering to the restrictive approach generally allow the litigation to proceed on a parallel basis in two forums until a judgment in one court can be pleaded as res judicata in the other court. Under this approach, courts will refrain from issuing an anti-suit injunction unless the foreign action threatens the jurisdiction of the enjoining court or a party attempts to evade an important public policy.

In *Laker Airways*, the D.C. Circuit announced what has become the gold standard for courts applying the restrictive approach. There, the D.C. Circuit affirmed the denial of an anti-suit injunction, finding that parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment was reached in one action that could be

D.C. Circuit set out 'gold standard' for Restrictive approach.

pleaded as res judicata in the other. The court reasoned that the mere filing of a suit in one forum did not cut off the pre-existing right of an independent forum to regulate matters subject to its prescriptive jurisdiction. For this reason, the court opined that injunctions restraining litigants from proceeding in courts should rarely be used. Even in the face of "vexatious" litigation, the D.C. Circuit found that an anti-suit injunction would not be appropriate. The court reasoned that the burden of litigating in multiple forums did not outweigh the notions of deference and mutual respect for concurrent foreign proceedings. Indeed, the *Laker Airways* court ultimately concluded that any questions of burdensome litigation could be easily resolved by way of a motion to dismiss on the ground of forum non conveniens. Whether such

a motion would be sufficient to address the myriad issues raised by a party pursuing parallel proceedings is a topic best left for another day.

Suffice it to say, a forum non conveniens motion would not be the appropriate method for challenging foreign litigation when, for example, the parties contracted to resolve their disputes in a specified jurisdiction or forum. There appears to be one area in which the courts — regardless of their preference for the permissive or restrictive approach — appear to agree. Virtually every court to have considered a request for an anti-suit injunction to enforce a forum-selection clause has granted it. See, e.g., *E&J Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006); *International Equity Inv. Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552 (S.D.N.Y. 2006), aff'd No. 05-2862-cv, et al., 2007 WL 2492139 (2d Cir. Aug. 30, 2007); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 130 (S.D.N.Y. 1997), aff'd, 161 F.3d 115 (2d Cir. 1998); *International Fashion Prods. B.V. v. Calvin Klein Inc.*, No. 95 CIV. 0982, 1995 WL 92321, at *2 (S.D.N.Y. March 7, 1995); and *Suchodolski Assoc. Inc. v. Cardell Fin. Corp.*, nos. 03 Civ. 4148, 04 Civ. 5732, 2006 WL 3327625, at *2 (S.D.N.Y. Nov. 16, 2006).

Most courts grant Injunctions if there is Forum-choice clause.

The only recent decision not to uphold an anti-suit injunction enforcing a forum-selection clause was issued by the 11th Circuit in *Canon Latin America Inc. v. Lantech (C.R.) S.A.*, 508 F.3d 597 (11th Cir. 2007). The *Canon Latin America* court never reached the question of whether to apply the permissive or restrictive approach — an issue of first impression in that circuit that remains unanswered. Instead, the court dispatched *Canon Latin America's* anti-suit injunction on the ground that the claims alleged in the foreign proceedings were not the same as those pending in the Florida federal court. Arbitration clauses, which are a type of forum-selection clause, have enjoyed similar protection. U.S. courts have routinely protected parties' contractual forum agreements in the arbitration context and have enjoined foreign proceedings that violated the parties' agreed-to arbitration clauses. See e.g., *Paramedics*, 369 F.3d at 654; *Smith/Enron Cogeneration L.P. Inc.*, 198 F.3d 88, 99 (2d Cir. 1999); *International Equity Inv. Inc. v. Opportunity Equity Partners Ltd.*, No. 05 CIV. 2745, 2006 WL 2060463, at *5 (S.D.N.Y. July 26, 2006); *Smoothline*

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Ltd. v. North American Foreign Trading Corp., No. 00 CIV. 2798, 2002 WL 273301 (S.D.N.Y. Feb. 27, 2002); *In re Laitasalo*, 196 B.R. 913, 924 (S.D.N.Y. 1996).

Together, these cases highlight not only the importance of forum-selection clauses, but the significant role anti-suit injunctions play in enforcing these particular contractual provisions. Notably, the 2d and 9th circuits — two courts at odds over the correct standard to apply in granting anti-suit injunctions — agree that injunctive relief is proper when a forum-selection clause exists. Thus, while comity concerns may generally mark a dividing line between adherents of the permissive and restrictive approaches, the presence of a forum-selection clause constitutes the exception to the rule. The 9th Circuit said it best when, in *Gallo*, it concluded that "where private parties have previously agreed to litigate their disputes in a certain forum, one party's filing first in a different forum would not implicate comity at all." *Gallo*, 446 F.3d at 994. Rather, the issue becomes

one of contract enforcement.

Reading the tea leaves

So, what happens next? What standard would the Supreme Court adopt if presented with the question already decided by nearly every circuit? Would the restrictive approach, with its emphasis on respecting the jurisdiction of foreign courts, prevail before a decidedly pro-business Supreme Court? Could the court embrace the permissive approach and its nominal consideration of comity? Or does the answer lie somewhere in the middle? Although neither approach seems ideal, U.S. business would benefit from the adoption of the permissive approach.

While comity is a wonderful theoretical construct with sound practical applications, U.S. businesses may be harmed by the restrictive approach's emphasis on comity. The goal is to promote international business, not create a breeding ground for opportunistic lawsuits filed in far-flung foreign jurisdictions.