



SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Anti-Suit Injunctions in Aid of Arbitration

The entry of an order enjoining a party from pursuing litigation in a foreign forum is a potent exercise of a federal court's authority. Although an antisuit injunction technically operates only against the litigants and not directly against the foreign court, such orders raise significant comity concerns because they effectively restrict the jurisdiction of a foreign sovereign's courts.

For this reason, the U.S. Court of Appeals for the Second Circuit has characterized the antisuit injunction as an "extreme measure" and admonished that such orders be issued sparingly and with great care and restraint.¹ As several recent cases in the U.S. District Court for the Southern District of New York demonstrate, however, where foreign litigation threatens to undermine federal court jurisdiction, particularly in the context of enforcing an arbitration agreement, the courts will not be deterred by principles of comity from entering antisuit injunctions to preserve their authority and the finality of their decisions.

Legal Framework—China Trade and Beyond

In its decision in *China Trade and Development Corp. v. M.V. Choong Yong*,² the Second Circuit noted that parallel proceedings in multiple jurisdictions are "ordinarily tolerable...and do[] not, without more, justify enjoining a party from proceeding in the foreign forum." The court then set out the test a district court should apply when considering whether to enter an antisuit injunction. As an initial matter, such cases must satisfy two requirements: (1) the parties to the federal case and the case to be enjoined must be the same; and (2) resolution of the federal case must be dispositive of the action to be enjoined. Once these threshold requirements are met, the court should then consider a series of additional factors, placing greatest emphasis on whether the foreign action threatens the jurisdiction of the enjoining court and whether there are strong public policy concerns that are threatened by the foreign action. Other



factors to be weighed include whether the foreign action is vexatious or threatens other equitable considerations, and whether adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency or a race to judgment.³

In its subsequent decision in *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc.*,⁴ the Second Circuit upheld an antisuit injunction issued to give effect to an order compelling arbitration of a dispute. Stressing the strong federal policy favoring liberal enforcement of arbitration clauses, the court stopped short of holding "categorically" that an injunction would always be appropriate to prevent foreign litigation designed to sidestep or evade an arbitration clause. It did hold, however, that where a court has already issued a decision upholding the arbitrability of a dispute, an antisuit injunction may be needed to protect that court's jurisdiction and ensure the applicability of *res judicata* to that judgment. It observed that despite the need for the district court to reconcile the protection of its own jurisdiction with respect for the foreign forum, where the court "has already reached a judgment—on the same issues, involving the same parties—considerations of comity have diminished force."⁵

The Second Circuit's most recent pronouncement on antisuit injunctions further refines its view of the "delicate touch" required in balancing the interest of promoting arbitration with principles of reciprocity and international comity. Just last month, in *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*,⁶ the court reiterated that the policy favoring arbitration is a strong one for the federal courts, but stressed that even where an antisuit injunction is appropriate, it must be narrowly drawn to restrain only those

parties that are before the court, and for the time period necessary to preserve the integrity of the arbitration and related court proceedings.

Recent District Court Cases

Parties in three recent cases have sought to cast foreign litigations as falling outside the *China Trade* requirements, and thereby avoid the imposition of an antisuit injunction to preserve an arbitration agreement. The courts in all three cases looked beyond the superficial circumstances of the foreign litigations, focusing on the underlying nature of the lawsuits and the impact each litigation would have on the arbitration, entering the requested injunctions in two instances, while declining to do so in the third.

Underlying Objective

In *In re Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*,⁷ Southern District Judge Thomas P. Griesa issued a broad antisuit injunction barring defendant Pertamina from pursuing litigation in any court which would interfere with judgments confirming and enforcing an arbitral award received by plaintiff KBC. KBC's request for that injunction followed protracted multiforum litigation arising out of the suspension of a joint venture between the parties for the exploration of geothermal energy resources in Indonesia. KBC obtained an award from a Swiss arbitration panel in 2000, which it confirmed or registered in a number of countries including the United States in an action to confirm brought in the U.S. District Court for the Southern District of Texas. After registering the Texas judgment in the Southern District of New York, KBC sought to execute on a number of accounts maintained in Pertamina's name in New York banks.

Following several years of litigation and appeals concerning the extent of Pertamina's ownership of the New York bank accounts, Judge Griesa issued an order directing the banks to turn over to KBC the amount of the arbitration award, plus interest. The Second Circuit affirmed that judgment in March 2006, and Pertamina petitioned the Supreme Court for certiorari. During a subsequent motion for sanctions, Judge Griesa pressed counsel for Pertamina as to whether Pertamina contemplated further litigation if the Supreme Court declined to hear the case. Pertamina's New York counsel assured the court, in writing, that Pertamina would

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not object to a turnover order. Yet, just over two weeks later, Pertamina commenced an action against KBC in the Cayman Islands alleging that KBC had falsely inflated the size of the geothermal resources at issue in the joint venture, and had relied on those falsehoods in the arbitration. Alleging that this fraud "vitiate[d] the Arbitral Award," Pertamina sought damages in the amount of that arbitration award as well as an injunction barring KBC from disposing of any sums it received in connection with the alleged fraud, or from commencing or continuing any proceedings to enforce the arbitration award.

Judge Griesa rejected Pertamina's claim that the Cayman Islands case was a "totally new fraud claim" rather than an action to set aside the arbitration award or interfere with proceedings in the U.S. courts. Judge Griesa observed that by seeking to prevent KBC from disposing of the money awarded it in the arbitration, the purpose of the Cayman Islands action "was and still is to halt, in whatever way is available, the judicial proceedings in the United States and the consummation of those proceedings."

Judge Griesa also rejected Pertamina's argument that an injunction would be improper under *China Trade*, noting that in contrast to *China Trade*, which concerned concurrent parallel litigation, in this case judgment had already been entered in the United States courts by the time the foreign action was commenced. He held that it would be appropriate to enjoin Pertamina from pursuing the Cayman Islands action both to protect the court's jurisdiction and to prevent Pertamina from avoiding settled law and policy governing the finality of judgments. He concluded that the main objective of Pertamina's Cayman Islands suit was to "reach out to the United States and frustrate the consummation of the long and difficult litigation in the United States," and entered an injunction prohibiting Pertamina from applying to any court for an order interfering with KBC's rights to dispose of the funds received in connection with the arbitration.⁸

Identity of Parties

In *Storm LLC v. Telenor Mobile Communications AS*,⁹ the plaintiff resisted imposition of an antisuit injunction blocking litigation in the Ukraine, asserting that *China Trade*'s threshold requirement that the parties be the same in both matters was not satisfied. The parties to the New York lawsuit were parties to a joint telecommunications venture in the Ukraine that had soured. The New York defendant, Telenor, commenced arbitration in New York claiming that Storm had violated the shareholders agreement. Storm participated in the arbitration to the extent of appointing an arbitrator and challenging the validity of the arbitration agreement. Concurrently, an entity controlled by Storm's ultimate corporate parent (and that itself owned 49.9 percent of Storm) commenced litigation in the Ukraine in which it succeeded in having the shareholders agreement, including its arbitration clause, declared invalid. Telenor was neither named in nor notified of the litigation, and Storm did not retain counsel or engage in any rigorous defense of it.

Notwithstanding the decisions of the Ukrainian courts, the New York arbitrators denied Storm's motion to dismiss the arbitration finding they had jurisdiction to hear Telenor's claims. Storm then moved in New York state court to enjoin the

arbitration. Telenor removed that action to the Southern District of New York and, after another Ukrainian court decision purporting to bar Storm and Telenor from proceeding with the arbitration, Telenor counterpetitioned to compel arbitration and enjoin further litigation in the Ukraine.

Storm opposed the antisuit injunction arguing that Telenor was seeking to enjoin litigation that did not involve the same parties as the Southern District action and stressing that it had not brought the Ukrainian litigation, but rather, that those proceedings had been brought against it. Southern District Judge Gerard E. Lynch recognized that this was not the "typical arbitration antisuit scenario...in which A seeks to compel arbitration against B in one jurisdiction while B seeks relief in the same dispute against A in a foreign court." He found, however, that the rule requiring that the parties be the same in both disputes is "not so strict in practice," and that where, as here, the real parties in interest are the same in both actions, the threshold requirement for entry of an antisuit injunction is met.¹⁰ He accepted Telenor's argument that Storm was in effect the plaintiff in the Ukrainian litigation, "having stimulated an action against itself in order to produce an order that serves its interests in the New York arbitration." Despite the fact that Telenor was not a party to the Ukrainian litigation, that court had issued an order purporting to influence the arbitration and to bind Telenor, making the real parties in interest the same in both actions.

Judge Lynch went on to find that the remaining *China Trade* factors favored an injunction, observing that attempts to interfere with arbitration of international disputes raised important policy concerns; that the litigation purporting to bind Telenor without giving it notice or a possibility to participate was vexatious; that the Ukrainian litigation threatened the jurisdiction of the federal court; and that it raised the specter of delay, inconvenience, inconsistency, expense and an unseemly race to judgment.

He noted however, that despite these considerations, "the entry of an antisuit injunction against the defendant in foreign litigation is both unconventional and...unprecedented." Relying on the overlapping corporate relationships between the nominally adverse parties in the Ukrainian cases, the fact that Storm's corporate affiliate argued the same position there that Storm asserted in the New York litigation, and that Storm interposed no meaningful defense, Judge Lynch found that Telenor was likely to prevail in showing that the Ukrainian litigation was collusive and not truly adversarial. Because the Ukrainian actions were actually brought in Storm's interests, Judge Lynch concluded that Storm and its corporate affiliates could be enjoined from continuing those actions.¹¹

Policy

The court declined to enter an order blocking foreign litigation in the third recent antisuit injunction case, *Comverse, Inc. v. American Telecommunications, Inc.*¹² The plaintiff had invoked an arbitration clause in an agreement under which defendant had contracted to distribute equipment and software provided by plaintiff. Shortly thereafter, defendant filed a claim against plaintiff's Chilean affiliate with a specialized court in Chile with jurisdiction over competition matters. That complaint served as a request that the Chilean national economic prosecutor investigate

defendant's claim and determine whether to bring a competition claim against the plaintiff. Plaintiff sought an order from the Southern District of New York enjoining the defendant from prosecuting the Chilean action.

Southern District Judge Peter K. Leisure noted several similarities between the factual claims in the Chilean action and the arbitration, including the defendant's claims in both proceedings that a noncompete provision in the parties' agreement was unenforceable; that the plaintiff had improperly approached defendant's customers directly; and that the plaintiff had improperly solicited defendant's employees to work for the plaintiff. Despite these overlapping factual predicates, Judge Leisure declined to enter an injunction blocking the Chilean proceeding primarily because the proceeding implicated a strong public interest in Chile. He noted that the Chilean action, if prosecuted, would be conducted not by the New York defendant, but by the national economic prosecutor, under a law designed to safeguard free competition in the markets. He concluded that "[a]lthough the determinations of the Chilean Competition Tribunal may well have implications for the private parties..., these are incidental to the tribunal's stated purpose of safeguarding the freedom of economic markets in the public interest."¹³

Judge Leisure also found that the Chilean action did not subject the plaintiff to irreparable harm because it would not deprive plaintiff of its contractual right to arbitrate its disputes with the defendant, and that it had no right to arbitrate any disputes with the national economic prosecutor who would be prosecuting the Chilean action. Accordingly, Judge Leisure denied the requested antisuit injunction.

Conclusion

As these cases demonstrate, there is ample room for a district court to reach into other jurisdictions to prevent foreign litigation which frustrates its jurisdiction, particularly in the context of arbitration of international disputes. But, as the Second Circuit recently stressed in *Ibeto*, that authority should be used sparingly, and antisuit injunctions must be narrowly tailored to avoid unnecessary interference with foreign proceedings.

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1. *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F3d 645, 652, 655 (2d Cir. 2004); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F2d 33, 35-6 (2d Cir. 1987).

2. *Id.*

3. *Id.* at 35; see also *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 2007 WL 106165 (2d Cir. Jan. 17, 2007); *Storm LLC v. Telenor Mobile Comm'ns AS*, 2006 WL 3735657 (SDNY Dec. 15, 2006) (Lynch, J.).

4. 369 F3d 645 (2d Cir. 2004).

5. *Id.* at 655.

6. 2007 WL 106165 (2d Cir. Jan. 17, 2007).

7. 2006 WL 3615063 (SDNY Dec. 8, 2006).

8. That order has been stayed pending appeal.

9. 2006 WL 3735657 (SDNY Dec. 15, 2006) (Lynch, J.).

10. *Id.* at *6 (citing *Paramedics*, 369 F3d at 652).

11. That order is currently being appealed.

12. 2006 WL 3016315 (SDNY Oct. 23, 2006) (Leisure, J.).

13. *Id.* at *4.