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Anti-Suit Injunction: An Important Self-Protection Tool for U.S. Companies Doing Business in Latin America

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Latin America, long considered the backyard of the United States, is one of the most important markets for U.S. manufacturers and distributors. But as they strive to achieve their business goals, U.S. companies need to be aware of the potential risk factors and legal dangers in dealing with their Latin American partners. While these relationships are often amicable and quite profitable, they can also sour very quickly. Economic downturns, changes in upper management and unstable political regimes, to name just a few factors, can transform a once friendly business relationship into a rancorous legal dispute.

Consider the following all-too-typical scenario. A U.S. supplier enters into a written distribution agreement with a company in South America to distribute its office products. The parties are both sophisticated and have enjoyed a decades-long relationship. In their most recent agreement, the parties include a forum selection clause, which provides, in no uncertain terms, that any disputes between them would be brought exclusively in a state or federal court situated within the State of Florida. Shortly after signing the agreement, a dispute arises. The South American distributor has failed to make timely payments for several shipments of goods it received from the U.S. supplier and is in significant arrears. Unable to collect payment, or reach a mutually acceptable accommodation, the U.S. supplier is forced to terminate its agreement with the foreign distributor. Almost immediately, the foreign distributor sues its former U.S. supplier in its home country. In its lawsuit, the foreign distributor claims millions of dollars in damages under a law designed to protect distributors from foreign suppliers like the U.S. company at issue here. Unfortunately, the U.S. supplier cannot ignore the foreign lawsuit. An adverse judgment may carry significant consequences, including a large damages award, injury to its reputation, and loss of market share. At the same time, the foreign lawsuit is in clear violation of the parties' forum selection clause, which designated Florida as the location for all lawsuits. What can the U.S. supplier do?

In this case, the U.S. supplier prudently included a forum selection clause in its contract with the South American distributor. By predetermining where any dispute will be resolved, parties on both sides of the agreement gained a measure of predictability and comfort. Indeed, courts in the United States recognized the businesses' ability to eliminate the uncertainties of litigation by

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"agreeing in advance on a forum acceptable to both parties [as] an indispensable element in international trade, commerce, and contracting."[1] As the U.S. Supreme Court has explained:

What if a foreign party simply thumbs its nose at the forum selection clause and initiates litigation in a forum not agreed upon by the parties?

[A choice-of-forum] provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. A parochial refusal by the courts of one country to enforce an international . . . agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [This would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.[2]

However, what if a foreign party simply thumbs its nose at the forum selection clause and initiates litigation in a forum not agreed upon by the parties? In fact, disgruntled parties frequently ignore forum selection clauses and run to their national courts seeking protection under protectionist statutes in their home countries when disputes arise under contracts with foreign parties. Fortunately, an anti-suit injunction provides a powerful tool for U.S. businesses faced with a foreign party choosing to ignore a forum selection clause.

The Origin and Development of Anti-Suit Injunction

Simply stated, anti-suit injunctions are used by courts to stop a party from commencing or continuing a lawsuit in a foreign forum. They do not target the foreign forum, but rather the party seeking to litigate in that forum.

Anti-suit injunctions are a creature of English law. They were first used by common law courts to curtail the expansive jurisdictional assertions of ecclesiastical courts.[3] By the 13th century, common law courts were criticized as being too rigid, technical, and overly formal. During this period, the Court of Chancery emerged to provide the equitable relief that common law courts were unwilling to dispense. Eventually, anti-suit injunctions were used to halt or prevent the commencement of proceedings in common law courts. Not surprisingly, the common law courts viewed this as a direct attack on their authority and legitimacy, resulting in a deep animosity between the dueling court systems. It was not until Chancellor Thomas More's tenure, from 1529 to 1532, that the Court of Chancery made a conscious effort to limit the use of anti-suit injunctions by creating requirements for their issuance.

By the time of the American Revolution, anti-suit injunctions were viewed with circumspection. In order to prevent conflict between state and federal courts, Congress enacted the Anti-Injunction Act[4] in 1793. Congress revised the Act in 1874 to specifically limit the power of

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federal courts to enjoin state court proceedings.[5] In 1948, Congress again amended the statute to its present form, which provides that a federal court cannot enjoin state court proceedings unless (1) expressly authorized by an Act of Congress, (2) where necessary to aid its jurisdiction, or (3) in order to protect or effectuate its judgments.[6]

While the Anti-Injunction Act defines the circumstances under which a federal court may enjoin state court proceedings, no similar statutory provision exists with respect to international anti-suit injunctions. Thus, the various federal Circuit Courts of Appeal have been left to their own devices when determining when an anti-suit injunction should issue to enjoin foreign proceedings. Unfortunately, the courts are not of one mind with respect to the factors that must be considered in enjoining foreign proceedings. The debate centers on the notion of comity,[7] and, more particularly, how much respect should be given to a foreign court, which presumably is as competent as a U.S. court to adjudicate contractual disputes.

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 injunction. As the Eighth Circuit of the U.S. Court of Appeals noted on Goss Int'l Corp. v. Man Roland Druckmaschinen A.G.,[8] all of the circuits having passed on the question agreed that federal courts had the power to enjoin parties subject to their jurisdiction from prosecuting foreign suits. The point of contention is rather along what lines this relief is appropriate. Regardless of the approach, as a threshold matter, a party must initially demonstrate that (1) the same parties are involved in both the U.S. and foreign proceedings, and (2) the U.S. action will be dispositive of the foreign action to be enjoined.[9]

Assuming the threshold requirements are satisfied, federal courts generally follow one of the two approaches in determining whether issuance of an anti-suit injunction is appropriate: the permissive approach, and the restrictive approach.

The Permissive Approach

The Fifth, Seventh, and Ninth Circuits of the U.S. Court of Appeal have adopted the permissive approach to granting anti-suit injunction. Under this approach, a court will issue an injunction if it determines that the foreign litigation: (1) would frustrate a policy of the enjoining court, (2) would be vexatious or oppressive, (3) would threaten the issuing court's in rem or quasi in rem jurisdiction, or (4) would prejudice any other equitable considerations.[10]

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The Restrictive Approach

The majority of courts, including the First, Second, Third, Sixth, Eighth, and D.C. Circuit Courts of Appeal, have adopted the "restrictive approach.[11] These courts believe that respect for comity requires that anti-suit injunctions be used sparingly and only in the rarest of cases. As a result, they 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, and will issue anti-suit injunction only when the foreign action threatens the jurisdiction of the U.S. court or when the U.S. interests significantly outweigh considerations of international comity.[12]

Judge Posner of the Seventh Circuit has summarized the differences between these two approaches as follows:

The strict cases presume a threat to international comity whenever an injunction is sought against litigating in a foreign court. The lax cases want to see some empirical flesh on the theoretical skeleton. They do not deny that comity could be impaired by such an injunction but they demand evidence . . . that comity is likely to be impaired in this case. When every practical consideration supports the injunction, it is reasonable to ask the opponent for some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States.[13]

Forum Selection Clause – A Special Case

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 consider a request for an anti-suit injunction to enforce a forum selection clause has granted it.[14]

For example, in E. & J. Gallo Winery v. Andina Licores, S.A., Gallo,[15] the U.S. supplier, entered into a written distribution agreement with Andina, a company in Ecuador. The distribution agreement contained a forum selection clause designating California as the forum for litigating all disputes.[16] Despite this clause, Andina sued Gallo in Ecuador, claiming $75 million in damages pursuant to a statute intended to protect Ecuadorians that acted as agents, distributors, or representatives of foreign companies.[17] When it learned of Andina's foreign lawsuit, Gallo commenced an action in California consistent with the forum selection clause in the parties' agreement.[18] Gallo further sought a preliminary injunction "because of Andina's potentially prejudicial, vexatious and oppressive proceedings in Ecuador."[19] Citing concerns over the impact of such an injunction upon comity, the district court refused to enjoin Andina's foreign lawsuit.[20]

On appeal, the Ninth Circuit reversed, holding that the foreign litigation would frustrate a policy of the United States by rendering the parties' forum selection clause "a nullity."[21] While acknowledging that competing notions of comity might caution against the entry of an antisuit

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injunction, the Ninth Circuit ultimately found that enforcing the forum selection clause would not offend the foreign forum:

In a situation like this one, 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. No public international issue is raised in this case. There is no indication that the government of Ecuador is involved in the litigation. Andina is a private party in a contractual dispute with Gallo, another private party. The case before us deals with enforcing a contract and giving effect to substantive rights. This in no way breaches norms of comity.[22]

Ultimately, the Ninth Circuit found that an antisuit injunction would be appropriate regardless of how much deference a court paid to the notion of comity.[23] In reaching that conclusion, the Ninth Circuit, a proponent of the permissive test, cited to the D.C. Circuit's decision in Laker Airways Ltd. v. Sabena, Belgian World Airlines[24] – the standard bearer for the restrictive approach – for the proposition that "when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an [anti-suit] injunction."[25] While proponents of the permissive and conservative approaches certainly differ on the degree to which respect for comity limits a court's ability to grant an anti-suit injunction, both sides agree that the existence of a forum selection clause presents a special circumstance which overwhelmingly favors action by U.S. courts to protect the contractually agreed to forum and its corresponding jurisdiction.

The only recent decision not to uphold a anti-suit injunction enforcing a forum-selection clause was issued by the Eleventh Circuit in Canon Latin America Inc. v. Lantech (C.R.) S.A.[26] 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 at those pending in the Florida federal court.[27]

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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.[28]

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Conclusion

So how to avoid the risk of being required to litigate in South America for doing business with South Americans? The best practice is to assure that there are clear, mandatory forum selection clauses in contractual documents. Where parties to an international contract have agreed in advance to litigate or otherwise resolve their disputes in a specified location – be it in the United States or abroad – the courts have a duty to honor and enforce that agreement. Indeed, the enforcement of forum selection clauses is so important that courts – whether applying the restrictive or permissive approach – routinely issue and approve of anti-suit injunctions to vindicate such clauses, particularly in international contracts.

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1 M/S Bremen v. Zapata Offshore Co., 407 U.S. 1, 13-14 (1972).

2 Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974).

3 For a general overview regarding the origins of anti-suit injunctions, see Eric Robinson, Comity Be Damned: The Use of Antisuit Injunctions Against the Courts of a Foreign Nation, 147 U. PA. L. REV. 409 (1998).

4 The statute simply provided that no "writ of injunction [shall] be granted to stay proceedings in any court of a state." Id. at 417. 5 Id. at 418.

6 See 28 U.S.C. § 2283 (West 2007).

7 While "comity" does not carry a precise definition, the U.S. Supreme Court defined it as "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, 164 (1895). 8 491 F.3d 355, 359 (8th Cir. 2007).

9 See E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 991 (9th Cir. 2006); Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc., 369 F.3d 645, 652 (2d Cir. 2004).

10 E. & J. Gallo Winery, 446 F.3d at 990; In re Unterweseri, Gmbh, 428 F.2d 888, 890 (5th Cir. 1970).

11 See, e.g., Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 361 (8th Cir. 2007); Quaak v. Klynveld Peat Marwik Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 18 (1st Cir. 2004); Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992); China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987); Compagnie Des Bauxites De Guinea v. Insurance Co. of N. America, 651 F.2d 877, 887 (3d Cir. 1981); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984).

12 Laker Airways Ltd., 731 F.2d at 926-27.

13 Allandale Mut. Ins. Co. v. Bull Data Systems, Inc., 10 F.3d 425, 431 (7th Cir. 1993).

14 See e.g. E. & J. Gallo Winery, 446 F.3d at 984; International Equity Inv. Inc. v. Opportunity Equity Partners Ltd., 441 F. Supp. 2d 552 (S.D.N.Y. 2006); Farrell Lines Inc. v. Columbus CelloPoly Corp., 32 F. Supp. 2d 118, 130 (S.D.N.Y. 1997).

15 446 F.3d at 987.

16 Id.

17 Id. at 987-88.

18 Id. at 988.

19 Id. at 990.

20 Id. at 988, 995.

21 Id. at 992.

22 Id. at 994.

23 Id. at 995.

24 731 F.2d 909 (D.C. Cir. 1984).

25 446 F.3d at 995 (citing Laker Airways, 731 F.2d at 927).

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26 508 F.3d 597 (11th Cir. 2007).

27 Id.

28 See e.g. Paramedics, 369 F.3d a6 654; Smith/Enron Cogeneration L.P. Inc., 198 F.3d 88, 99 (2nd Cir. 1999).

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