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by

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All too often in international arbitration disputes, the party wishing to avoid arbitration or pursue litigation seeks to have arbitral proceedings enjoined. The trend has grown considerably over the last two decades. Typically, litigants will file actions in jurisdictions away from the arbitration in attempts to have a court enjoin the party seeking arbitration from compelling the arbitration to proceed. The remedy for the party seeking arbitration is an anti-suit injunction from the court having jurisdiction over the arbitral proceedings.

The early case of *Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.* ("*Canadian Filters*"),[2] pointed the way to the orderly handling of anti-suit injunctions by U.S. courts. Canadian Filters (Harwich) Limited ("Filters"), a Canadian corporation, filed an action in the U.S. District Court for the District of Massachusetts seeking a declaratory judgment against Lear-Siegler, Inc. ("LSI"), a Delaware corporation, that an LSI patent was invalid and was not being infringed by CFL's manufacture in Canada and sale in the United States of certain fans. LSI later sued Filters in the Exchequer Court in Canada for infringement of its Canadian patent. Filters moved in the U.S. district court for an injunction against the prosecution of the Canadian suit. LSI responded by moving for a dismissal of the portion of Filters' complaint that was

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2 412 F.2d 577 (1st Cir. 1969).

based upon the Canadian patent on the ground that the "act of state" doctrine[3] foreclosed the district court's jurisdiction to pass upon the validity of the patent. The district court enjoined the parties from proceeding further in Canada, but without passing on its own jurisdiction over the Canadian patent, reserving that issue until it had dealt with the United States patent. LSI appealed from the injunction. The First Circuit reversed, noting, "Filters sought the wrong relief. Rather than, in effect, attempt to strong-arm the Canadian court, it should have asked that court, if it thought it was so entitled, to postpone its proceedings until the United States court had taken action."[4]

Canadian Filters was followed by the seminal cases of *China Trade and Development Corp. v. M.V. Choong Yong* ("*China Trade*")[5] and *Laker Airways, Ltd. v Sabena Belgian World Airlines* ("*Laker Airways*").[6] In *China Trade*, the U.S. District Court for the Southern District of New York permanently enjoined Ssangyong Shipping Co., Ltd., from proceeding in the courts of Korea with an action against China Trade & Development Corp. and others, finding that "(1) the parties in the Korean action are the same as the parties in this action; (2) the issue of liability raised by Ssangyong in the Korean court is the same as the issue of liability raised here; (3) the Korean litigation would be vexatious to the plaintiffs in the United States action, which was commenced first; and (4) allowing the Korean litigation to proceed would result in a race to judgment." On appeal, the Second Circuit reversed, "[b]ecause no important policy of the forum would be frustrated by allowing the Korean action to proceed, and because the Korean action poses no threat to the jurisdiction of the district court, we conclude that the interests of comity

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3 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). The act of state doctrine precludes United States courts from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.

4 *Id*., at 579.

5 837 F.2d 33 (2d Cir. 1987).

6 731 F.2d 909 (D.C. Cir. 1984).

are not overbalanced by equitable factors favoring an injunction, and we hold that the district court abused its discretion when it enjoined Ssangyong, a Korean corporation, from proceeding in the courts of Korea." "It is well established that a federal court has the power to enjoin a foreign suit by persons subject to its jurisdiction; however, due regard for principles of international comity require that this power should be 'used sparingly.'" An anti-suit injunction should issue only if the parties are the same in both matters, the resolution of the case before the enjoining court is dispositive of the action to be enjoined, and the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum.[7]

In *Laker Airways*, Laker Airways, Ltd. ("Laker") filed an antitrust action in U.S. District Court for the District of Columbia against several domestic and foreign airlines. The foreign airlines filed suits in the High Court of Justice of the United Kingdom seeking an injunction forbidding Laker from prosecuting its American antitrust action against the foreign defendants. The High Court of Justice entered interim injunctions against Laker, and the British Court of Appeal issued a permanent injunction ordering Laker to take action to dismiss its suit against the British airlines. While the U.K. proceedings were ongoing, Laker sought injunctive relief in the U.S. District Court, arguing that a restraining order was necessary to prevent the remaining American defendants and the additional foreign defendants, KLM and Sabena, from duplicating the British defendants' successful request for an English injunction compelling Laker to dismiss its suit against the British airlines. The U.S. district court granted Laker's motion for a preliminary injunction restraining the remaining defendants from taking part in the foreign action. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed, observing:

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[7] See also *In re Unterweser Reederei GmBH*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). "[F]oreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or (4) where the proceedings prejudice other equitable considerations."

> Ordinarily anti-suit injunctions are not properly invoked to preempt parallel proceedings on the same in personam claim in foreign tribunals. However, KLM and Sabena do not qualify under this general rule because the foreign action they seek to join is interdictory and not parallel. It was instituted by the foreign defendants for the sole purpose of terminating the United States claim. The only conceivable benefit that KLM and Sabena would reap if the district court's injunction were overturned would be the right to attack the pending United States action in a foreign court. This would permit the appellants to avoid potential liability under the United States laws to which their business operations and treaty obligations have long subjected them. In these circumstances there is ample precedent justifying the defensive use of an anti-suit injunction.[8]

In *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*,[9] Vincent Abbey and Eldred Barnes, the owners of the Seattle Totems Hockey Club, began a private antitrust action against the National Hockey League and other defendants. Northwest Sports, one of the defendants, brought suit against Abbey and Barnes in British Columbia alleging breach of contract.[10] The district court granted Abbey and Barnes an anti-suit injunction restraining the Canadian proceedings.[11] The Ninth Circuit affirmed. "A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly. The issue is not one of jurisdiction, but one of comity."[12]

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8 *Id*. at 915.

9 652 F.2d 852 (9th Cir. 1981).

10 *Id*. at 853.

11 *Id*.

12 *Id*. at 855 (internal punctuation and citations omitted). *See also Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH v. Starcher*, 328 S.E.2d 492, 505 (W. Va. 1985). "[I]n the final analysis, the authority of the forum court having personal jurisdiction over a foreign national must prevail in order to preserve the interests of the forum state and it citizens."

It was not just U.S. federal courts which had to wrestle with the issues surrounding anti-suit injunctions. In *Shah v. Eastern Silk Industries, Ltd.*,[13] Shah was an Indian national who maintained his principal place of business in New York. He entered into a series of agreements with publicly owned corporations organized under the laws of India (collectively, "Eastern Silk Industries") engaged in the business of weaving and selling silk textiles. The corporations had the same officers, directors and stockholders, and were not authorized to do business in New York. The agreements contained broad arbitration provisions. The trial court granted Shah's motion for an attachment and denied Eastern Silk Industries' motion to dismiss and for an order compelling arbitration. The New York Appellate Division reversed and New York's highest court, the Court of Appeals, affirmed. It held that the dispute was governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[14] to which both the United States and India were parties. The Convention does not permit prejudgment attachments. The New York high court pointed out that "it was the intention of the Convention that there should be no significant judicial intervention until after an arbitration award has been made."

The strong U.S. position in favor of arbitration applies as well with respect to international agreements containing arbitration provisions. In *Murphy Oil USA, Inc. v. SR International Business Insurance Co.*[15] Hurricane Katrina caused an oil spill at Murphy Oil's ("Murphy") Meraux, Louisiana refinery. A class action lawsuit was filed against Murphy which was ultimately settled for $330 million. Murphy then sued its excess insurance carriers, alleging coverage for the settlement plus expenses. Murphy's excess insurance policies contained an arbitration provision requiring "that any dispute, controversy or claim arising out of or relating to

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13 67 N.Y.2d 632, 490 N.E.2d 548, 499 N.Y.S.2d 681 (1986).

14 *See* 9 U.S.C. §201 *et seq*.

15 Case No. 07-CV-1071, W.D. Ark., September 20, 2007, 2007 U.S. Dist. LEXIS 69732.

the policies or the breach of the policies shall be finally and fully determined in England under the provisions of the Arbitration Acts of 1950, 1975, and 1979."[16] The excess insurers demanded arbitration, but indicated they would consider staying the arbitration proceedings in favor of further negotiation, "provided that Murphy confirm in writing the following: (1) that Murphy accepts the policies' exclusive dispute resolution mechanism, which is found in the arbitration provision; (2) that Murphy will not contest the exclusive jurisdiction of the arbitral process; and (3) that Murphy take no action to undermine the arbitration process." In response, Murphy filed a coverage and bad faith action in the U.S. District Court for the Western District of Arkansas. Murphy then sought a preliminary injunction to enjoin the insurers from petitioning a court in England to compel arbitration or to otherwise prevent Murphy from proceeding with U.S. action. Citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.,*[17] the court noted that "[t]he grant or denial of a preliminary injunction 'involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties . . . .; (3) the probability that movant will succeed on the merits; and (4) the public interest.'"[18] Recognizing the strong U.S. policy favoring arbitration, the court denied the request for an anti-suit injunction.

Six years after the *China Trade* decision, the court in *Allendale Mutual Ins. Co. v. Bull Data Sys., Inc.*,[19] held that an anti-suit injunction is proper when allowing the two suits to

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16 *Id*., slip op. at *3-*4.

17 *640 F.2d 109, 114 (8th Cir. 1981).*

18 *Id*.

19 10 F.3d 425 (7th Cir. 1993).

proceed would be "gratuitously duplicative."[20] Bull Data Systems ("Bull Data")[21] lost $100 million dollars worth of computer inventory in a fire in one of its warehouses.[22] Allendale Mutual ("Allendale") and Factory Mutual International ("FMI"), the insurers of the Bull Data's inventory, sought a declaratory judgment that the cause of the fire was arson committed by the insured and that the loss was excluded from coverage.[23] After Allendale and FMI filed suit in the U.S. District Court for the Northern District of Illinois, Bull Data sued Allendale in a French commercial court. The French suit was stayed pending a criminal investigation, but the stay was lifted after Bull Data argued that the criminal investigation was on the verge of completion and would result in a conclusion that there had been no arson. The Seventh Circuit affirmed the district court's injunction against Bull Data's litigation in French court, reasoning that the French court - which was actually a panel of part-time arbitrators - was less equipped to do justice in the document intensive lawsuit and that duplicate litigation would unduly prejudice the plaintiffs.[24]

The same year saw a similar decision in *Philips Medical Sys. Int'l B.V. v. Bruetman*.[25] Dr. Martin Bruetman was a physician with U.S. citizenship who was born in Argentina. Through multiple corporations, he supplied high-tech medical equipment to clinics and other medical facilities in South America. Philips, a Dutch manufacturer of medical equipment,

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20 *Id*. at 431.

21 Compagnie des Machines Bull ("CMB"), the parent company of Groupe Bull, is a French corporation 90 percent of whose stock is owned by the French state. CMB bought Zenith Data Systems (ZDS), the former microcomputer business of Zenith Electronics Corporation. CMB's U.S. subsidiary, Bull Data, obtained from Allendale worldwide property insurance coverage for Groupe Bull. Allendale is a U.S. company and the insurance contract was negotiated and signed in the United States.

22 10 F.3d at 427.

23 *Id*.

24 *Id*. at 430.

25 8 F.3d 600 (7th Cir. 1993).

brought a RICO[26] suit, claiming that Bruetman had used his corporations to defraud Philips. A $19 million default judgment was entered against Bruetman and several corporations that he controlled because of Bruetman's refusal to cooperate in discovery and repeated failure to comply with the court's orders.[27] The court also ordered Bruetman to deposit in the court certain bills of exchange.[28] Bruetman argued that the order effectively enjoined a foreign lawsuit, because the bills were held in an Argentine court and the only way he could obtain them was by voluntarily dismissing an Argentine suit. The Seventh Circuit held the order was proper, recognizing that even under the stricter standard followed by other circuits, an anti-suit injunction was necessary to give effect to a district court's judgment.[29] The court dismissed concerns of international comity, stating, "If Argentina cares that [the defendant] is unable to defend against [the plaintiffs] suit in an Argentine court, we should expect to hear from either our State Department or the foreign office of Argentina."[30]

The early 1990s also saw attempts to use procedural devices to avoid the impact of anti-suit injunctions. In *LaFarge Coppee v. Venezolana de Cementos, S.A.C.A., C.A.*,[31] Lafarge Coppee and Financiere Lafarge Coppee (collectively, "Lafarge"), French corporations, were parties to agreements for the manufacture, sale, and distribution of cement and other construction products with V. Venezolana De Cementos, S.A.C.A., C.A.; Vencemos Pertigalete; Promotora

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26 Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§1961-1968.

27 *Id.* at 603.

28 *Id.* at 604.

29 *Id.* at 605.

30 *Id.*

31 31 F.3d 70 (2d Cir. 1994).

Nuevos Desarrollos, C.A.; and Delaban Holdings, Inc. (collectively "Cemex"). When a dispute arose concerning a planned transfer of control and management of a joint venture among the parties, Lafarge filed a request for arbitration by the ICC[32] in New York. Lafarge then filed a petition in New York Supreme Court for an injunction in aid of arbitration seeking to bar Cemex from taking any steps toward consummation of the planned transfer of control and management pending the Arbitral Tribunal's ruling on Lafarge's demand for interim relief. The State Court, acting *ex parte*, issued an order to show cause why the injunction should not be issued. Following the hearing, the court issued an injunction barring Cemex from taking further steps toward the consummation of the transfer of control and management, and from holding a shareholders' meeting, "insofar as the shareholders at such meeting may act upon the Cemex transfer." Cemex appealed the injunction to the Appellate Division. The Appellate Division denied Cementos' request for orders vacating or staying the injunction. At that point, Cemex removed the state court action to the U.S. District Court for the Southern District of New York. Lafarge moved to remand the action to state court. The district court granted the remand request on the ground that the removal had been untimely, and denied a request for a stay pending appeal. Lafarge appealed the remand order and moved for a stay. The Second Circuit dismissed the case for lack of jurisdiction, noting:

> [T]he case was improperly removed because it was not removed "before the trial." Though the proceedings in the State Court were brief, they resulted in an adjudication of the entirety of the claim that the plaintiffs tendered for decision. Their petition sought an injunction, in aid of arbitration, for the interim period between issuance of the injunction and "such time as the arbitrators are able to rule on petitioner's request for interim relief in the arbitration." . . . [T]here is no indication that any of the parties or the State Court considered the injunction as "preliminary" to a later "final" court injunction; for the interim period to which it applied, the injunction was "final." The hearing at which the decision was reached to issue that injunction was therefore the only "trial" that would be held in the State Court concerning the petition filed by the plaintiffs. Since the

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32 International Court of Arbitration of the International Chamber of Commerce ("ICC").

removal petition was not filed before this "trial," the case was not removable under section 205.[33]

Issues of comity are always present when proceedings involve different national jurisdictions. For example, in *Republic of the Philippines v. Westinghouse Electric Corp.*,[34] the Philippines sued Westinghouse Electrical Corporation and Westinghouse International Projects Company (collectively "Westinghouse") in connection with the construction of a nuclear power plant in Bagac, Bataan, alleging breach of contract, fraud, tortious interference with fiduciary duties, negligence, civil conspiracy, violations of state and federal racketeering statutes, and violations of the Robinson-Patman Act and the New Jersey Consumer Fraud Act. The district court determined that all but two of the counts against Westinghouse were subject to international arbitration.[35] In the remaining two counts, the Philippines alleged that Westinghouse and another defendant had conspired to bribe then-President Ferdinand Marcos in order to win the power plant contract, and had thus tortiously interfered with the fiduciary duties that Marcos had owed the people of the Philippines. When Marcos left the Philippines, the Aquino government suspended construction of the power plant. As a consequence, the Philippines "found itself with a partially completed plant which was producing no electricity, an ever worsening shortage of electrical power, and a huge foreign debt burden." Preparations for the trial of the tortious interference counts proceeded in New Jersey, and the arbitration of the other counts proceeded in Geneva. The arbitrators in a preliminary award found that the Philippines had failed to show that Westinghouse had bribed Marcos. Westinghouse moved for summary judgment in the district court, arguing that the arbitrators' preliminary award collaterally estopped the Philippines from litigating the bribery and tortious interference claims. The district court denied the motion and the New Jersey case went to trial. The jury returned a

33 *Id*. at 72-73 (citations omitted).

34 43 F.3d 65 (3d Cir. 1994).

35 *Republic of the Philippines v. Westinghouse Electric Corp*., 714 F. Supp. 1362 (D.N.J. 1989).

verdict for Westinghouse on the bribery and tortious interference counts. The Philippines sought certification to permit an interlocutory appeal, but the district court denied certification when it was disclosed that the Philippines had harassed and retaliated against Philippine officials who had testified on behalf of Westinghouse. The court later found that certain witnesses who had testified for Westinghouse had been "the target of vilification in the public press inspired by officials in the Philippines government and each has been the target of actual or threatened government action." The court found that the Philippines' actions "threaten[ed] both the integrity of a United States District Court and the foundations of our system of justice." The court (1) enjoined the Philippines from harassing any witness who had given evidence or will give evidence in this case or the arbitration proceeding; (2) directed the Philippines to renounce and abandon its retaliatory actions, and to advise the witnesses officially of its actions and intended actions with respect to certain personal income tax matters; (3) denied certification for an interlocutory appeal until the Philippines established that it was in compliance with the injunctive provisions of the court's order and that the proceedings against another witness were resolved "in a manner which cures the retaliatory actions"; and (4) directed that any settlement in the case must provide that the parties agree to the court's retention of jurisdiction to enforce the provisions of the order. The Philippines appealed the order. On appeal, the Third Circuit ruled:

> The Republic should be sanctioned for having retaliated against [the witnesses]. The district court moved with commendable expedition and firmness to address the trespass on its authority and integrity embodied in the retaliation by the Republic against [the witnesses]. An American court cannot tolerate litigants' intimidation of witnesses, regardless of whether a litigant happens to be a foreign sovereign. However, for the reasons given, we conclude that the central elements of the district court's order went too far, and, accordingly, that order will be vacated. On remand, the district court shall reassess what sanctions should be imposed upon the Republic consistent with international comity . . .

Comity also factored into the decision in *E. & J. Gallo Winery v. Andina Licores S.A.*[36] E & J Gallo Winery (Gallo) and Andina Licores S.A. (Andina), an Ecuadorian corporation, had a

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446 F.3d 984, 991 (9th Cir. 2006).

long distributorship relationship. The distributorship agreement provided that the "agreement is entered into under the laws of the State of California, U.S.A., and shall be construed thereunder, and any cause of action arising between the parties, whether under this agreement or otherwise, shall be brought only in a court having jurisdiction and venue at the home office of Winery."[37] When a dispute arose between them, Andina filed an action in the Second Civil Court in Guayaquil, Ecuador. Gallo filed an action for declaratory relief in the United States District Court for the Northern District of California and sought an anti-suit injunction. The district court denied the injunction and Gallo appealed to the Ninth Circuit. The Second Civil Court dismissed the action in Ecuador, holding that the forum selection clause was valid and that the claim should be heard in California. While various appeals were pending in Ecuador, the Ninth Circuit held that the district court abused its discretion in denying the anti-suit injunction. It observed that "[t]he suitability of an anti-suit injunction involves different considerations from the suitability of other preliminary injunctions. An anti-suit injunction, by its nature, will involve detailed analysis of international comity."

The situation becomes even more complex when the courts of two nations are simultaneously considering lawsuits between the same parties involving the same issues. In *General Electric Co. v. Deutz AG*,[38] General Electric entered into a contract with Deutz and MWM, two German corporations, for the design and manufacture of diesel engines and engine products. MWM was responsible for "all costs and expenses relating to the design, development and testing of the 632 Engine Family and the performance of MWM's other obligations"[39] and General Electric was responsible "for all its costs and expenses relating to the manufacture and

[37] *Id*. at 986.

[38] 129 F.Supp.2d 776 (W.D. Pa. 2000).

[39] *Id*. at 778.

testing of the Additional Prototypes."[40] Deutz agreed to provide MWM "with sufficient funds, by way of capital contribution, loan, or otherwise, to enable MWM or any such Affiliates to perform all of their respective obligations, commitments, undertakings, and covenants under this Agreement."[41] The agreement contained an arbitration provision which provided that "all disputes, controversies, and claims directly or indirectly arising out of or in relation to this Agreement"[42] were to be submitted to international arbitration. Swiss law was to apply. General Electric sued Deutz alleging that Deutz had failed "to provide MWM with sufficient funds to enable MWM to perform its obligations under the Contract." Deutz filed a motion to compel arbitration. The U.S. District Court for the Western District of Pennsylvania denied the motion on the ground that the contract was ambiguous as to whether Deutz and General Electric agreed to arbitrate their disputes. The issue was tried by a jury, which found that Deutz and General Electric had not agreed to arbitrate their disputes. Meanwhile, Deutz demanded arbitration against General Electric with the ICC. The ICC ruled that there was prima facie evidence of the existence of an arbitration agreement between the parties. An Arbitral Tribunal was nominated and confirmed and began its proceedings. While the issues were being considered by the Tribunal, Deutz filed an application in the High Court of Justice in England for an anti-anti-suit injunction restraining General Electric from seeking to enjoin Deutz from pursuing its arbitration claim until after the Arbitral Tribunal had ruled on the issues of res judicata and jurisdiction. The High Court issued a temporary restraining order *ex parte*, enjoining General Electric from pursuing its motion for an injunction in the U.S. court until the English court could hold a hearing on the issue of equitable relief. Following a hearing, the English court denied Deutz's request for an injunction. The U.S. court shortly thereafter permanently enjoined Deutz from taking "any further action in furtherance of its Request for

40 *Id.*

41 *Id.*

42 *Id.*

Arbitration . . . submitted to the International Chamber of Commerce Court of Arbitration at ICC Arbitration . . ., including the filing of an appeal of the forthcoming jurisdictional order of the Arbitral Tribunal to the English courts."[43]

A similar situation took place in *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V*.[44] Lernout & Hauspie Speech Products, N.V., ("L&H") was a Belgian corporation which did business in the United States. L&H filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware and almost immediately filed a second insolvency proceeding under the laws of Belgium. Stonington Partners, Inc. ("Stonington") was a creditor of L&H. When conflicts arose regarding choice of law and appropriate jurisdiction for the resolution of issues, the Delaware court resolved the issues in favor of L&H and the district court affirmed. Stonington appealed to the Third Circuit. The Third Circuit reversed. Noting that "the Bankruptcy Court did not simply make a 'choice-of-law determination,' but also imposed an 'anti-suit injunction,'" the court "strongly recommend[ed], in a situation such as this, that an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws."[45] The case was remanded to the district court for further proceedings.

Even disputes between U.S. state and federal courts have arisen. For example, in *Vulcan Chemical Technologies, Inc. v. Barker*,[46] Vulcan Chemical Technologies, Inc. ("VCT"), terminated Phillip Barker's chemical-products Distribution Agreement, which contained a

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43 *Id*. at 792-793.

44 310 F.3d 118 (3d Cir. 2002).

45 *Id*. at 133.

46 297 F.3d 332 (4th Cir. 2002).

provision for the arbitration of disputes under the California Arbitration Act. Barker sued VCI and its parent, Vulcan Materials Company (collectively, "Vulcan") in California state court for breach of contract and related claims. Vulcan filed a motion to compel arbitration, which the California court granted. The arbitrator ruled in favor of Barker, awarding him $21 million in damages. Vulcan then filed an action in the U.S. District Court for the Western District of Virginia seeking to vacate the arbitration award under the Federal Arbitration Act. While the Virginia action was pending, the California state court confirmed the arbitration award and denied Vulcan's motion to vacate it. Vulcan appealed to the California Court of Appeal. While Vulcan's California appeal was pending, the Virginia district court vacated the award that had been confirmed by the California court. Barker appealed to the Fourth Circuit, contending that the district court acted without jurisdiction or, alternatively, should have abstained. The Fourth Circuit agreed with Barker and ruled that the district court should have abstained from hearing and deciding this case. The Fourth Circuit vacated the district court's judgment and remanded with instructions to dismiss the action. The California Court of Appeal subsequently affirmed the Award to Barker.[47]

Courts may impose anti-suit injunctions when the court's jurisdiction is threatened. In *In re Hopewell International Insurance, Ltd.*,[48] Hopewell International Insurance Ltd. ("Hopewell"), a Bermuda company, reinsured captive insurers. It retained for itself a portion of the risk, and reinsured the remainder with retrocessionaires. Hopewell reinsured Gold Medal Insurance Company ("Gold Medal"), the captive insurer of General Mills, Inc. ("General Mills") under a reinsurance contract which provided that coverage disputes would be arbitrated under Minnesota law, where Gold Medal was located. General Mills submitted a formal claim against Gold Medal in the sum of $219 million in connection with a pesticide incident. Gold Medal

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See Barker v. Vulcan Chemical Technologies, Inc., No. C038586, Call. App., August 5, 2002 (unpublished), 2002 Cal. App. Unpub. LEXIS 7444.

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272 B.R. 396 (Bk. S.D.N.Y. 2002).

denied coverage. Coverage litigation in Minnesota resulted in a $203.5 million judgment against Gold Medal. Hopewell entered into a Scheme of Arrangement which provided that coverage disputes would be uniformly arbitrated in Bermuda under Bermuda law. When it came time to hold Hopewell's final meeting of creditors to consider approving its Scheme, Gold Medal's claim was unresolved, and it was given a nominal claim for voting purposes. Gold Medal's representative voted in favor of the Scheme, and the Scheme was approved by the unanimous vote of Hopewell's other creditors.[49] The Supreme Court of Bermuda approved Hopewell's Scheme of Arrangement, which was roughly comparable to a plan of reorganization in the United States. The U.S. Bankruptcy Court for the Southern District of New York entered an order (the "1999 Order") enforcing Hopewell's Scheme in the United States. Because of an intervening decision in England, Hopewell took the position that it was not bound by the Minnesota proceedings. Gold Medal believed that notwithstanding the provisions of the Scheme relating to arbitration under the governing law of Bermuda, the results of the ongoing Minnesota proceedings would not be reconsidered on the merits. Gold Medal thereupon threatened to ignore the Scheme and attempt to collect its claims directly against Hopewell's retrocessionaires in the United States. Gold Medal sought a modification of the 1999 Order. Hopewell filed papers in response, but prior to the hearing on the motion to modify, Hopewell obtained an *ex parte* injunction from the Bermuda court (the "2001 Injunction") prohibiting Gold Medal and its agents from "taking any step" to modify or vacate the 1999 Order or to violate the Scheme. Gold Medal also brought a proceeding under §304 of the Bankruptcy Code to enforce, in the United States, the Bermuda injunction and the Scheme of Arrangement itself. The U.S. bankruptcy court found that "Hopewell's anti-suit injunction is a direct infringement of this Court's jurisdiction and wholly at odds with the developing law of cooperation in international insolvencies." It held that, "at least until Hopewell desists from conduct that is in contempt of

49 *In re Petition of the Board of Directors of Hopewell International Insurance Ltd.*, 238 B.R. 25, 41 and 56 (Bankr. S.D.N.Y. 1999).

the appropriate jurisdiction of this Court, the 1999 Order, issued by this Court, should not be enforceable."

There are circumstances where non-signatories to an arbitration agreement between citizens of different countries can be compelled to arbitrate. Courts are necessarily wary of requiring non-signatories to arbitrate. For example, in *Amkor Technology, Inc. v. Alcatel Business Systems*,[50] Amkor Technology, Inc. ("Amkor") entered into an agreement with Alcatel Microelectronics N.V. ("AME") to sell mobile telephone components to AME. The agreement contained an arbitration provision requiring arbitration in Philadelphia, Pennsylvania, governed by Pennsylvania law. Amkor was sued in France by Alcatel Business Systems ("ABS") and Assurances Generales de France Iart ("AGF"), who claimed Amkoir had supplied defective products. Amkor filed an action in the U.S. District Court for the Eastern District of Pennsylvania seeking (1) an order compelling ABS, AGF and AME to arbitrate and (2) a declaratory judgment prohibiting the three defendants from prosecuting their claims in France. ABS and AGF were not signatories to the agreement between Amor and AME. After initially staying the action to permit jurisdictional discovery, the court denied the defendants' motion to dismiss, indicating the court was "inclined to compel ABS and AGF to arbitrate their dispute with Amkor pursuant to the arbitration clause to which AME committed itself -- thus engendering parallel proceedings in France and the United States."[51] Nevertheless, the court refrained from entering an order to that effect until the defendants had answered Amkor's complaint and filed submissions regarding the proper procedure to be followed to resolve the substantive claims in this case.

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278 F. Supp. 2d 519 (E.D. Pa. 2003).

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Id. at 526.

But in *Motorola Credit Corp. v. Uzan*,[52] the court found that the real parties in interest were the same, and so an anti-suit injunction was warranted. Motorola Credit Corporation ("Motorola") and Nokia Corporation ("Nokia") sued Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, Aysegul Akay, Antonio Luna Betancourt, Unikom Iletism Hizmetleri Pazarlama A.S., Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. (collectively "Uzan") in the U.S. District Court for the Southern District of New York (the "Motorola Action"). Uzan controlled Telsim Telekominkasyon Hizmetleri Anonim Sirketi ("Telsim") and Rumeli Telefon Sistemleri A.S. ("Rumeli"), which were non-parties to the Motorola Action. Telsim and Rumeli filed demands for arbitrations in Switzerland and France. Telism obtained an order from the Turkish Civil Court of First Instance for the District of Kucukcekmece attaching the property of Motorola Komunikasyon Ticaret ve Servis Ltd. Sti. ("Motorola Turkey") and Motorola Ltd., both of which were affiliates of Motorola. The defendants in the Motorola Action moved the U.S. court for an order compelling arbitration and Motorola and Nokia cross-moved for an anti-suit injunction to enjoin Uzan and those acting in concert with them, *i.e.*, Telsim and Rumeli, from pursuing the arbitrations. The U.S. court denied Uzan's motion and granted Motorola/Nokia's motion finding, *inter alia*, that the Swiss arbitrations had been "commenced in an effort to undercut the prior orders of, and proceedings before, this Court."[53] Over nine months after the initiation of the suit, Uzan filed a motion to stay the entire lawsuit pending appeal of the court's prior orders. The court denied the motion to stay, noting "a stay would only serve to advance the very machinations for which defendants [had] previously been found in contempt of court." Uzan and Telsiom next filed an *ex parte* petition in the Turkish Civil Court of Kucukcekmece against Motorola seeking to stay the Motorola Action and to vacate the injunction and attachment decisions issued in connection with the Motorola Action. Uzan and Telesim also moved to stay the ancillary proceedings in England, Germany, France,

52 No. 02 Civ. 666 (JSR), S.D.N.Y., January 7, 2003, 2003 U.S. Dist. LEXIS 111.

53 *Id.*, Memorandum Order, dated October 15, 2002, at 7.

Bermuda, and the Channel Islands. The Turkish Court issued an order granting the relief requested which purported on its face to enjoin, not Motorola/Nokia, but the U.S. court. Motorola/Nokia sought an order from the U.S. court enjoining Uzan from further pursuing the Turkish action and requiring them to terminate the Turkish action and dissolve the earlier-issued attachment. The court found that the two threshold requirements for issuance of an anti-foreign suit injunction were met, "to wit (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined."[54] The court found that the real parties in interest were the same in both the U.S. and Turkish matters, and so an anti-foreign suit injunction was warranted. The court directed Uzan, "their proxies, and all others in concert with them, to take all steps necessary to withdraw and cause to be dissolved the Turkish injunction . . . and the action on which it is premised," and enjoined Uzan "from initiating any similar proceeding" and barred Uzan from effectuating the attachment against Motorola Turkey and Motorola Ltd. in connection with the Swiss arbitration and required Uzan to seek immediate dissolution of the Swiss arbitration.

Where the laws of the different countries covering such things as patents and trademarks are different, the respective statutory schemes may render anti-suit injunctions inadvisable. For example, in *Microsoft Corp. v. Lindows.com, Inc.*,[55] the motion of Lindows.com ("Lindows") for an anti-suit injunction was but a step in years of litigation between Microsoft Corporation ("Microsoft") and Lindows. Microsoft sued Lindows in the U.S. District Court for the Western District of Washington alleging that the name "Lindows" was a violation of its trademark "Windows." In addition to the United States, Microsoft also sued Lindows to protect its foreign-registered trademarks in Finland, France, Sweden, the Netherlands, Canada, Mexico, Spain and the European Community. The Netherlands District Court in Amsterdam granted Microsoft's request for a preliminary injunction and enjoined Lindows' sale and distribution of Lindows

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54 *Id.*, citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

55 319 F.Supp.2d 1219 (W.D. Wash. 2004).

products within the Benelux countries. Lindows moved the U.S. court for an anti-suit injunction prohibiting Microsoft from continuing to pursue its foreign litigation, and a declaration of non-enforceability of the Dutch court's preliminary injunction. The U.S. court noted that "a trademark dispute is not the 'same' for purposes of an anti-suit injunction," since "trademark rights exist in each country solely according to that country's statutory scheme."[56] Lindows' motion was denied. The case eventually settled with Microsoft paying an estimated $20 million for the Lindows trademark. Lindows changed its name to Linspire.

The court in *Laif X Sprl* v. *Axtel S.A.*[57] gave a bright-line rule as to when anti-suit injunctions are proper. An anti-suit injunction should issue only if the parties are the same in both matters, the resolution of the case before the enjoining court is dispositive of the action to be enjoined, and the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum. The plaintiff in the case held shares in Axtel, a Mexican communications company. A dispute arose concerning whether the plaintiff or another company, Telinor, owned a majority of Axtel's shares.[58] The plaintiff initiated arbitration with Telinor pursuant to Axtel's bylaws.[59] Telinor answered plaintiff's arbitration demand and also filed a separate suit in Mexico.[60] Plaintiff then filed suit in the Southern District of New York, seeking to compel Telinor to arbitrate its claims and requesting an anti-suit injunction against Telinor's lawsuit in

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56 Citing *Person's Co. v. Christman*, 900 F.2d 1565, 1569 (Fed. Cir. 1990). See also *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1171 (S.D.N.Y. 1984) ("a trademark has a separate legal existence under each country's laws"); 4 J. Thomas McCarthy, *McCarthy on TradeMarks* §29:1 at 29-4 (4th ed. 1996) ("a trademark is recognized as having a separate existence in each sovereign territory in which it is registered or legally recognized as a mark.").

57 *390 F.3d 194, 199 (2d Cir. 2004).*

58 *Id*. at 197.

59 *Id*.

60 *Id*.

Mexico.[61] The district court declined to grant relief, and the Second Circuit affirmed.[62] It held that an order compelling arbitration was unnecessary because Telinor was already participating in the arbitration and that an anti-suit injunction was improper because the arbitrator should be the first to determine whether the arbitration should be stayed in favor of the Mexican lawsuit.[63]

Different U.S. circuit courts of appeal have espoused differing views as to when an anti-suit injunction is proper. In *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*,[64] Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren ("KPMG-B"), accepted an auditing engagement to audit a publicly-traded company, Lernout & Hauspie Speech Products, N.V. ("L&H"). L&H collapsed, resulting in a number of actions against KPMG-B and others in U.S. courts, alleging securities fraud. KPMG-B refused to produce relevant auditing records and associated work papers, asserting that to do so would violate Belgian law. Production was ordered by a U.S. court.[65] KPMG-B requested that a Belgian court impose substantial penalties on those who might "take any step of a procedural or other nature in order to proceed with the discovery-procedure." The plaintiffs in the U.S. case sought and obtained an anti-suit injunction enjoining KPMG-B from pursuing the Belgian action.[66] KPMG-B appealed and the First Circuit issued a partial stay of the anti-suit injunction. Following an expedited appeal, the First Circuit affirmed the district court's order. The court analyzed the approach taken by other circuits, observing that "courts of appeals have differed as to the legal standards to be employed in

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61 *Id.* at 198.

62 *Id.* at 200.

63 *Id.* at 199-200.

64 361 F.3d 11 (1st Cir. 2004).

65 *See In re Lernout & Hauspie Secs. Litig.*, 218 F.R.D. 348 (D. Mass. 2003).

66 *See Filler v. Lernout*, D. Mass., Dec. 12, 2003, 2003 U.S. Dist. LEXIS 22466, 2003 WL 22964378, at *2.

determining whether the power to enjoin an international proceeding should be exercised." The First Circuit, noted that "[t]wo basic views have emerged." The Fifth,[67] Seventh[68] and Ninth[69] Circuits were viewed as more liberal in granting anti-suit injunctions, while the Second,[70] Third,[71] Sixth[72] and District of Columbia[73] Circuits were seen as more conservative in granting anti-suit injunctions. The First Circuit adopted the more conservative approach, deeming "international comity an important integer in the decisional calculus -- and the liberal approach assigns too low a priority to that interest."[74]

Anti-injunction orders must state with specificity exactly who is enjoined and under what circumstances. That was the deciding factor in *Ibeto Petrochemical Industries, Ltd. v. M/T "Beffen"*.[75] Ibeto Petrochemical Industries, Ltd. ("Ibeto") sued M/T Beffen and its owner, the shipping company, alleging that base oil shipped from the U.S. to Nigeria arrived contaminated. Ibeto moved to voluntarily dismiss under Fed. R. Civ. P. 41(a)(2) while the shipping company opposed the motion and moved to dismiss or stay the suit in favor of arbitration, to enjoin the

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67 *Kaepa, Inc. v. Achilles Corp*., 76 F.3d 624, 626 (5th Cir. 1996).

68 *Philips Med. Sys. Int'l v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993).

69 *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855-56 (9th Cir. 1981).

70 *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987).

71 *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods*., 310 F.3d 118, 126 (3d Cir. 2002).

72 *Gau Shan Co. v. Bankers Trust Co*., 956 F.2d 1349, 1355 (6th Cir. 1992).

73 *Laker Airways, Ltd.* v *Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

74 *Id*., at 17-18.

75 412 F.Supp.2d 285 (S.D.N.Y. 2005), aff'd in part and modified in part, 475 F.3d 56 (2d Cir. 2007).

company from pursuing identical claims in Nigeria, and to limit the company's recovery pursuant to the Carriage of Goods by Sea Act ("COGSA").[76] The court found there was a binding arbitration clause between the parties. The court stayed the case, compelled arbitration, and enjoined Ibeto from pursuing the Nigerian action. Ibeto's motion for voluntary dismissal was denied, as was the shipping company's motion to limit the Ibeto's recovery. On appeal, the Second Circuit modified the district court order, noting "[t]he learned District Court wrote only that 'defendants' motion to enjoin the Nigerian action is granted.' . . . The injunction should be directed specifically to the parties, for it is only the parties before a federal court who may be enjoined from prosecuting a suit in a foreign country. . . . Moreover, there is no need for the permanent injunction that the District Court seems to have issued. The parties need to be enjoined from proceeding in the courts of Nigeria only until the conclusion of the London arbitration and the consequent resolution of the still-pending case in the District Court. The District Court should modify its injunction with a specificity consonant with this determination."

Changes in circumstances or additional evidence can result in the lifting or modification of an anti-suit injunction. In *Suchodolski Associates, Inc. v. Cardell Financial Corp.*,[77] Cardell Financial Corporation ("Cardell") loaned Deltec[78] $12.8 million pursuant to a Loan and Security Agreement (the "Loan Agreement"). To secure the loan, Cardell, Suchodolski Associates, Inc. ("SAI"), Consultadora Worldstar, S.A. ("Worldstar") and Metropolis Shipping and Business, Inc. ("Metropolis") executed a Stock Pledge Agreement (the "Stock Pledge Agreement") whereunder a default on the Loan would permit Cardell to foreclose against Deltec shares owned

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46 U.S.C. §30501, *et seq*. COGSA is the U.S. enactment of the International Convention Regarding Bills of Lading, commonly known as the "Hague Rules."

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Nos. 03 Civ. 4148 (WHP) and 04 Civ. 5732 (WHP), S.D.N.Y., January 3, 2006, 2006 U.S. Dist. LEXIS 3, later case, November 16, 2006, 2006 U.S. Dist. LEXIS 83169.

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"Deltec," as used herein, refers to Anastacio Empreendimentos Imobilarios e Participacoes Ltda., Compania City de Desenvolvimento, Deltec Empreendimentos e Participacoes Ltda., Financity Factoring e Representaceos Ltda., and Deltec Holdings.

by SAI, Worldstar and Metropolis. Both the Loan Agreement and the Stock Pledge Agreement contained arbitration provisions. When a default occurred, an arbitration was commenced. The U.S. District Court for the Southern District of New York issued a preliminary injunction against foreclosure pending the resolution of the arbitration initiated by Cardell.[79] The arbitration panel issued an Award which permitted Cardell to foreclose on the Deltec shares. Cardell foreclosed. SAI and Worldstar sued Cardell, Metropolis, Deltec, two Deltec Subsidiaries and several Deltec managers in the First Civil Court of Sao Paulo, Brazil (the "Brazilian Action"), alleging that prior to Deltec's default, Cardell breached its fiduciary duty to Deltec shareholders by undermining the real estate business of certain Deltec Subsidiaries[80] which prevented Deltec from making its payments under the Loan Agreement.[81] The Deltec Subsidiaries, Deltec Holdings and Cardell moved for a permanent anti-suit injunction preventing SAI and Worldstar from prosecuting the Brazilian Action. The U.S. court granted an anti-suit injunction, but permitted the claims based upon an improper auction of the Deltec securities to proceed in the Brazilian Action. Later the same year, in a subsequent proceeding, the U.S. court entered a broad anti-suit injunction covering all aspects of the Brazilian Action.

At least one court has indicated that there is a rebuttable presumption against the issuance of anti-suit injunctions. In *Athina Investments Limited v. Pinchuk*,[82] Athina Investments and others (collectively, "Athina") sued numerous defendants, including one Victor Vekselberg, in

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See Suchodolski Assocs. v. Cardell Fin. Corp., No. 03 Civ. 4148 (WHP), S.D.N.Y., Dec. 9, 2003, 2003 U.S. Dist. LEXIS 24933, 2003 WL 22909149, at *5 ("*Suchodolski I*").

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The "Deltec Subsidiaries" were Anastacio Empreendimentos Imobilarios e Participacoes Ltda., Compania City de Desenvolvimento, Deltec Empreendimentos e Participacoes Ltda., and Financity Factoring e Representaceos Ltda.

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The Brazilian Complaint also alleged that Cardell violated the terms of the Stock Pledge Agreement by failing to conduct the auction of the Deltec shares in a "commercially reasonable manner."

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443 F.Supp.2d 177 (D. Mass. 2006).

the U. S. District Court for the District of Massachusetts alleging violations of RICO.[83] A Russian business periodical ran a story about the case which prominently featured Vekselberg. Vekselberg filed a commercial defamation action in an Arbitration Court in Moscow, Russia, naming the business periodical and Igor Kolomoisky, a beneficial owner of each of the three plaintiff-corporations in the Massachusetts action. Athina moved the court for an anti-suit injunction barring Vekselberg from litigating the Moscow action. The court denied the motion, pointing out, "[t]he threshold question when determining the appropriateness of an international anti-suit injunction is whether the corresponding actions involve the same parties and issues." The court went on to observe that there is "a rebuttable presumption *against* issuing an injunction, . . ." The court analyzed some of the factors to be considered, to wit: (1) the nature of the two actions (*i.e.*, whether they are merely parallel or whether the foreign action is more properly classified as interdictory); (2) the posture of the proceedings in the two countries; (3) the conduct of the parties (including their good faith or lack thereof); (4) the importance of the policies at stake in the litigation; and (5) the extent to which the foreign action has the potential to undermine the forum court's ability to reach a just and speedy result.[84]

Considerations of public interest are almost always present when anti-suit injunctions are considered. An example is found in *Comverse, Inc. v. American Telecommunications, Inc. Chile S.A.*[85] Comverse, Inc. ("Comverse") moved for an order to show cause, for an order (a) compelling defendant American Telecommunications, Inc. Chile S.A. ("ATI") to proceed with a pending arbitration between the two parties and (b) enjoining ATI from prosecuting the action it initiated in the Tribunal de Defensa de la Libre Competencia (the "Chilean Competition Tribunal") as well as from commencing or prosecuting, in any other jurisdiction, any other court

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83 Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 *et seq*.

84 *Id*. at 179.

85 *No. 06 Civ. 6825(PKL), S.D.N.Y., October 23, 2006, 2006 U.S. Dist. LEXIS 76791.*

proceeding arising out of Comverse and ATI's Value Added Reseller Agreement (the "VAR"). The VAR contained an arbitration provision calling for "binding arbitration in New York, New York, in accordance with the then prevailing Rules of the American Arbitration Association." The court found that ATI was proceeding with the arbitration which had been commenced. A related proceeding in Chile before the Chilean Competition Tribunal was found to implicate the public interest, and while "the determinations of the Chilean Competition Tribunal may well have implications for the private parties involved in proceedings before it, these are incidental to the tribunal's stated purpose of safeguarding the freedom of economic markets in the public interest." The Comverse motion was denied.

It is typical for courts issuing anti-suit injunctions to retain jurisdiction and stay proceedings pending completion of an arbitration. In *Affymax, Inc. v. Johnson & Johnson*,[86] Affymax, Inc. sued Ortho-McNeil Pharmaceutical Corp. ("OMN") and Johnson & Johnson Pharmaceutical Research & Development L.L.C. ("PRD") to correct inventorship and ownership of patents under 35 U.S.C. §256 and for corresponding declaratory and injunctive relief under 28 U.S.C. §§2201-02. OMN and PRD counterclaimed against Affymax seeking a declaratory judgment that Affymax's claims were subject to arbitration and an injunction against further litigation of a related lawsuit pending in Germany. The court granted the defendants' motion to compel arbitration and to enjoin Affymax from pursuing further litigation in Germany related to the patent application. The court denied defendants' motion to dismiss the case and instead stayed the case pending arbitration.

Parties to international arbitration agreements are expected to act in good faith. Failure to so act can justify the imposition of an anti-suit injunction. For example, in *Mastercard International Inc. v. Federation Internationale De Football Assn.*,[87] MasterCard International

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86 420 F. Supp. 2d 876 (N.D. Ill., Eastern Div. 2006).

87 No. 06 Civ. 3036 (LAP), S.D.N.Y., February 28, 2007, 2007 U.S. Dist. LEXIS 14208.

Incorporated ("MasterCard") sued Federation Internationale de Football Association ("FIFA) for materially breaching MasterCard's first right to acquire post-2006 sponsorship rights contained in a sponsorship agreement between FIFA and MasterCard. MasterCard requested both "preliminary and permanent injunctive relief: (i) enjoining FIFA from performing under a purported sponsorship agreement with VISA or any other "financial services" partner other than MasterCard during the period from January 1, 2007 to December 21, 2014; and (ii) directing FIFA to specifically perform its obligation, . . . to grant to MasterCard the package of advertising and sponsorship rights reflected in a . . . sponsorship [agreement] offer for the 2007-2014 time period that was delivered to and accepted by MasterCard, in March 2006." FIFA moved to dismiss MasterCard's complaint on jurisdictional grounds, and also moved to compel arbitration based upon an arbitration provision in the sponsorship agreement which provided that the parties' dispute should be resolved exclusively through arbitration in Switzerland. FIFA's motions to dismiss for lack of personal jurisdiction and to compel arbitration were denied. The court determined that the court and not the arbitrators should decide whether the dispute was subject to arbitration based upon Swiss law and the arbitration provision, which provided for a non-breaching party to seek "any and all equitable relief including an injunction" in a court of competent jurisdiction. The court concluded that FIFA had materially breached the agreement and issued the requested injunction, observing:

> FIFA's latest actions demonstrate that it still does not govern itself by its slogan, "fair play." It has vigorously litigated MasterCard's request for injunctive relief in this Court and has lost, fair and square. Instead of observing the rules of the game and proceeding solely to appeal the judgment entered in this Court, it has, at the same time, sought a do-over with a different referee -- an arbitral tribunal in Switzerland. Even after judgment has been entered and with the appeal proceeding, FIFA continues to request that the arbitral referee undo each ruling of this Court -- a course of action our courts have recognized as the antithesis of fair play. MasterCard now seeks an anti-suit injunction to prevent a do-over with this different referee, and, . . . it is granted.[88]

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[88] *Id*.

Where a later proceeding may involve the same parties or the same issues, anti-suit injunctions will normally be denied. Such was the case in *Asian American Entertainment Corporation, Ltd. v. Las Vegas Sands, Inc.*[89] The case involved an alleged breach of contract by Las Vegas Sands ("LVS") in connection with an establishment in Macau. An original action brought in Nevada was dismissed with prejudice. Two years later, Asian American Entertainment Corporation, Ltd., commenced an action against LVS in the Judiciary Council of Macau. LVS sought an anti-suit injunction in Nevada against the prosecution of the Macau action. The court denied the injunction, noting "the [Macau] suit is not parallel and simultaneous, but a subsequent proceeding involving the same parties and claims."

Forum shopping is also disfavored. *Dandong v. Pinnacle Performance Ltd.*[90] was such a case. The district court granted in part and denied in part a motion by Pinnacle Performance ("Pinnacle") to dismiss.[91] It ruled that certain claims survived the motion to dismiss and granted an extension of time for the defendants to answer. One week before their answer was due, the defendants sought an expedited anti-suit injunction from the High Court of Singapore. The U.S. court noted that the defendants could not point to any statute, rule or precedent which was not available in New York that might lead the High Court to conclude that the plaintiffs could not in fact continue the present litigation in New York. "Defendants, simply put, are forum shopping, and 'equitable considerations such as deterring forum shopping favor [an anti-suit] injunction.'"[92] The court issued an anti-suit injunction which enjoined the defendants from any

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89 No. 2:07-CV-00144 JCM (PAL), D. Nev., June 14, 2012, 2012 U.S. Dist. LEXIS 82298.

90 No. 10 Civ. 8086 (LBS), S.D.N.Y., December 12, 2011, 2011 U.S. Dist. LEXIS 142948, aff'd in part and remanded sub nom., *Leng v. Pinnacle Performance Ltd.*, No. 11-5150-cv, 2d Cir., April 10, 2012, 2012 U.S. App. LEXIS 7118.

91 *See Dandong v. Pinnacle Performance Ltd.*, No. 10 Civ. 8086, S.D.N.Y. October 31, 2011, 2011 U.S. Dist. LEXIS 126552.

92 Citing *Ibeto Petrochemical Indus. v. M/T Beffen*, 475 F.3d 56, 65 (2d Cir. 2007).

other actions, including the anti-suit injunction before Singapore's High Court, which would impede or conflict with the New York litigation. On appeal, the Second Circuit affirmed the judgment of the district court as to certain defendants as to whom there was no jurisdictional question, and remanded the case for the district court to make personal jurisdiction findings as to Pinnacle. The anti-suit injunction was ordered to remain in place as to Pinnacle while the district court made the required findings.

Attempts to circumvent arbitration agreements through unfounded litigation can lead to sanctions. In *Novik & Co., Inc. v. Jerry Mann, Inc.*,[93] Novik sold 29,000 yards of denim fabric through a New York textile broker. The broker used a form of sales confirmation which provided for the arbitration of disputes in New York. When a dispute arose, Mann's wholly-owned subsidiary filed a lawsuit in California. Novik sought an order in the U.S. District Court for the Southern District of New York compelling arbitration. A witness for Mann claimed in an affidavit that the arbitration provision in the sales confirmation had never been seen or agreed to; however, the witness failed to appear, although the hearing was adjourned to enable him to travel to New York from California. The court found the affidavit to have been submitted in bad faith. As a result, the court ruled, "[i]n light of the bad faith reflected by the [the witness's] affidavit, and in light of the unnecessary and unjustifiable persistence with which respondents have pursued their state litigations, and with which they opposed arbitration, petitioner's request for attorney's fees and costs is granted."[94]

One of the most incredible disputes involving arbitration and anti-suit injunctions is the tale of the Pertamina cases. In 1994, Karaha Bodas Company ("KBC"), a Cayman Islands limited liability company, was formed by two U.S. power companies and subsequently entered into two joint venture contracts for the exploration of geothermal energy resources in the Karaha

93 497 F.Supp. 447 (S.D.N.Y. 1980).

94 *Id*. at 450.

area of West Java, Indonesia, with Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia. In 1997 the projects were suspended by Indonesian Presidential Decrees, and on April 30, 1998, KBC commenced an arbitration in Switzerland seeking damages for breach of contract by Pertamina. The arbitral tribunal awarded KBC $261.1 million.

Pertamina challenged the award in the Swiss Supreme Court, which denied Pertamina's application for failure to timely pay court fees. KBC brought proceedings in the U.S. District Court for the Southern District of Texas, and in the courts of Hong Kong, Canada and Singapore, to confirm the arbitral award. The Texas district court granted summary judgment in favor of KBC and confirmed the award.[95] Pertamina appealed to the U.S. Court of Appeals for the Fifth Circuit, but failed to post a supercedeas bond.

Pertamina next challenged the award in the Jakarta District Court in Indonesia. On February 22, 2002, KBC registered its Texas district court judgment with the U.S. District Court for the Southern District of New York, and commenced execution proceedings. The court issued *ex parte* writs of execution restraining the transfer of funds, which KBC served on a number of banks in New York where Pertamina maintained some twenty-four trust accounts.

The Ministry of Finance of the Republic of Indonesia then filed a motion to quash the restraining notices and the writs of execution arguing that it -- and not Pertamina -- owned the restrained assets. The court held that, with respect to fifteen of the twenty-four accounts, Pertamina only owned a portion of the funds in the accounts. Since the record was insufficient to determine ownership of the funds in all the accounts, the court certified its order for immediate appeal, preventing actual disbursement to KBC. The Second Circuit affirmed, but ordered the district court to continue the stay until the parties' rights in all of the funds were determined.

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95 *In the Matter of an Arbitration Between, Karaha Bodas Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp.2d 936 (S.D. Tex., Houston Div., 2001).

Meanwhile, the Jakarta court granted Pertamina's request to annul the award. Sometime later, the Canadian court granted summary judgment in favor of KBC and confirmed the award. On March 23, 2004, the Indonesian Supreme Court reversed the Jakarta District Court, and on the same day the Fifth Circuit affirmed both the district court's December 2001 judgment and the dismissal of a 2003 motion brought by Pertamina on the grounds of newly discovered evidence.[96] On October 4, 2004 the U.S. Supreme Court denied certiorari.

In New York, the court held that the funds restrained belonged to Pertamina and issued a final judgment ordering turnover of the funds plus interest to KBC, but stayed the award pending appeal. The Second Circuit summarily affirmed the judgment of the district court. Pertamina applied to the U.S. Supreme Court for certiorari, which was denied.

Pertamina then filed a Statement of Claim dated October 6, 2006, with the Cayman Islands court, alleging fraud, but the details of the claim had already been considered by the arbitral tribunal back in 2000. KBC filed a motion in the U.S. District Court for the Southern District of New York to enjoin Pertamina from pursuing litigation in other forums. The court granted KBC's motion by prohibiting Pertamina from pursuing the Cayman Islands action or any similar action in any court. The court went on to order that if Pertamina should for some reason obtain an order of the Cayman Islands court or any other court, based upon matters relating to the arbitral award, purporting to interfere with KBC's rights to dispose of the funds, KBC has no obligation to comply with such order. Pertamina was sanctioned in the U.S. District Court for the Southern District of New York in the amount of $500,000 for providing false testimony.[97]

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96 *Karaha Bodas Company, LLC v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 5th Cir., March 5, 2003, 2003 U.S. App. LEXIS 27765.

97 *In the Matter of an Arbitration Between Karaha Bodas Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* ("*Pertamina*"), No. 21 MC 98 (TPG), S.D.N.Y., April 30, 2007, 2007 U.S. Dist. LEXIS 31702.

The Second Circuit affirmed the anti-suit injunction and the Supreme Court denied certiorari, thus ending a long and tortured litigation.

An equally protracted and contentious litigation is that involving what has become known as the Lago Agrio litigation. In 1964, Texaco Petroleum Company ("TexPet"), a wholly-owned subsidiary of Texaco, began oil exploration and drilling in the Oriente region of eastern Ecuador. The following year TexPet started operating a petroleum concession for a consortium owned in equal shares by TexPet and Gulf Oil Corporation (the "Consortium"). The government of Ecuador granted an oil concession (the "Napo concession") to Gulf and the TexPet. Pursuant to the Napo concession, Gulf and TexPet signed a Joint Operating Agreement ("JOA") for the drilling of the Napo concession. Both Gulf and TexPet were American companies domiciled in Ecuador, and represented by local Ecuadorian counsel; however, the JOA was signed in Florida and provided that any disputes were to be settled by arbitration under AAA[98] rules in New York.

In 1972, Ecuador's military assumed control of the government.[99] In an effort to nationalize the country's oil industry, the government issued Supreme Decree No. 430 which required TexPet and Gulf to agree to new oil concession contracts with Ecuador and to relinquish a substantial percentage of the lands covered by the Napo concession. In 1974, Equador acquired a 25% interest in the concession through its state-owned oil company, PetroEcuador.[100] Ecuador informed TexPet and Gulf that PetroEcuador's 25% participation in

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98 American Arbitration Association.

99 On June 6, 1972, the military Government issued Supreme Decree No. 430. Decree 430 prescribed that the 1971 Hydrocarbons Law would be retroactively applied to all concession contracts entered into before the law had been issued. All concessionaires who had entered into contracts before the date of enactment of the 1971 Hydrocarbons Law were required to sign new contracts, within a year, consistent with the terms of the new law. *See Norsul Oil & Mining Company, Ltd. v. Texaco, Inc*., 703 F.Supp. 1520 (S.D. Fla. 1988).

100 The Ecuadorian state-owned oil company Compania Estatal Petrolera Ecuatoriana or CEPE, after reorganization became Petroecuador. The Republic of Ecuador and Petroecuador are used interchangeably herein.

the Napo concession would begin on June 6, 1974, "whether or not the Republic and the companies had reached an agreement on compensation. . . . Given this ultimatum and fearing complete expropriation of the Napo Consortium by the Republic if it did not comply, TexPet executed a contract or 'Acta' on or about June 14, 1974 (the "1974 Acta")."[101] "The 1974 Acta did not itself contain a clause providing for arbitration; it did, however, contain a clause stating that 'the totality of the activities that will develop in the Joint Operation will be regulated by an operating agreement entered into by the parties,' . . ."[102] PetroEcuador and Ecuador became the majority owner of the Consortium in 1976. In 1990, TexPet ceased operating a trans-Ecuadorian oil pipeline and withdrew from the Consortium's drilling activities. PetroEcuador assumed those functions.

On August 27, 1993, the United States and Ecuador signed a bilateral investment treaty ("BIT") concerning the encouragement and reciprocal protection of investments, which was to play a significant part in the future with respect to the Lago Agrio litigation. Later that year a group of some 30,000 Ecuadorians filed a purported class action (the "*Aguinda* litigation") in the U.S. District Court for the Southern District of New York against TexPet[103] seeking money damages and equitable relief arising out of TexPet's oil drilling activities. TexPet moved to dismiss the complaint or, alternatively, transfer the action to Ecuador.[104] The court declined to rule pending more information, which was to be obtained through discovery.[105]

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Republic of Ecuador v. Chevrontexaco Corporation, 376 F. Supp. 2d 334, 339-340, (S.D.N.Y. 2005) ("*ROE I*").

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Id., 376 F. Supp. 2d at 340.

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The named defendant was Texaco, which had not yet been acquired by Chevron to become ChevronTexaco. Texaco, TexacoChevron and TexPet are all named herein for convenience as TexPet.

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Aguinda v. Texaco, Inc., No. 93 Civ 7527, S.D.N.Y., April 11, 1994, 1994 U.S. Dist. LEXIS 4718.

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Aguinda v. Texaco, Inc., 850 F.Supp. 282 (S.D.N.Y. 1994).

Pertroecuador and the Ecuadorian government attempted to intervene in the *Aguinda* litigation, but were initially unsuccessful.[106] Attempts were made to disqualify the assigned judge,[107] but those were also unsuccessful.[108] After over six years of legal sparring, the court dismissed the case on the ground of *forum non conveniens*.[109]

In 2003, following the dismissal of the *Aguinda* litigation, a group of Ecuadorian plaintiffs sued Chevron in Lago Agrio, Ecuador (the "Lago Agrio litigation"). The Lago Agrio plaintiffs asserted claims for damages for deterioration of their health and the environment, and sought further remediation damages from Chevron. The *Aguinda* litigation and the Lago Agrio litigation were different. The *Aguinda* plaintiffs sought damages for bodily injury and environmental harm, while the Lago Agrio plaintiffs sought to recover not only for bodily injury, but also the cost of environmental remediation.

While the *Aguinda* litigation was ongoing, in 1995 the parties reached a settlement whereunder TexPet agreed to perform environmental cleanup in exchange for a release of claims by Ecuador and Petroecuador. By 1998, the 1995 settlement was declared to be fully performed and Ecuador and Petroecuador released TexPet and any related companies "from any liability and claims by the Government of the Republic of Ecuador, PetroEcuador and its Affiliates, for

106 *Aguinda v. Texaco, Inc*., 175 F.R.D. 50 (S.D.N.Y. 1997), rev'd by *Jota v. Texaco Inc*., 157 F.3d 153 (2d Cir. 1998).

107 *Aguinda v. Texaco, Inc*., 139 F.Supp.2d 438 (S.D.N.Y. 2000).

108 *Aguinda v. Texaco, Inc*., 241 F.3d 194 (2d Cir. 2001).

109 *Aguinda v. Texaco, Inc*., 142 F.Supp.2d 534 (S.D.N.Y. 2001).

items related to the obligations assumed by TexPet" in the 1995 settlement.[110] That was far from the end of the controversy.

The Lago Agrio litigation involving the individual plaintiffs proceeded in Lago Agrio, Ecuador. Notwithstanding the 1995 settlement, the question arose as to who would pay for the costs of any environmental cleanup which might be ordered by an Ecuadorian court in the Aguinda litigation. TexPet commenced an arbitration proceeding against Petroecuador before the AAA seeking indemnification for its costs and expenses in connection with the Lago Agrio litigation. The proposed "award was to be in the amount of 'the total value of their costs, fees, and any adverse judgment rendered in the Lago Agrio lawsuit, plus interest.'"[111]

In response to TexPet's demand for arbitration, Petroecuador commenced an action in New York state court seeking to stay the arbitration. TexPet removed the action to federal court and sought to compel arbitration. The district court denied TexPet's motion, which effectively ended the arbitration proceedings.

Relying on the 1993 BIT, in 2009 TexPet commenced an arbitration in the Permanent Court of Arbitration ("PCA") in the Hague seeking (1) a declaration that it had "no liability or responsibility for environmental impact . . . or for performing further environmental remediation"; (2) a declaration that Ecuador has breached both the BIT and the terms of its 1995 release agreement with TexPet; (3) an order requiring Ecuador to inform the Lago Agrio court that Chevron has "been released from all environmental impact . . . and that Ecuador and Petroecuador are responsible for any remaining and future remediation work"; (4) a "declaration that Ecuador or Petroecuador is exclusively liable for any judgment that may be issued in the Lago Agrio Litigation"; (5) an order "requiring Ecuador to indemnify, protect and defend in

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110 *See Republic of Ecuador v. Chevrontexaco Corporation*, 499 F.Supp.2d 452, 456-457 (S.D.N.Y. 2007).

111 *Republic of Ecuador v. Chevrontexaco Corporation*, 376 F.Supp.2d 334, 342 (S.D.N.Y. 2005).

connection with the Lago Agrio Litigation, including payment . . . of all damages that may be awarded against Chevron"; and (6) attorneys' fees, litigation costs, arbitration costs, "moral damages," and interest.[112] Chevron argued that any judgment issued against it would violate the terms of TexPet's 1995 settlement agreement with Ecuador.[113]

Ecuador filed a petition to stay the arbitration in the PCA and moved for summary judgment. Chevron moved to dismiss. The district court denied Ecuador's petition[114] and the Second Circuit affirmed.[115] The PCA arbitration continued.

The Lago Agrio litigation resulted in an $8.6 billion judgment against TexPet.[116] In September 2010, the Lago Agrio plaintiffs raised their damages assessment to $113 billion. Chevron filed an action against the Lago Agrio plaintiffs' lead counsel, Steven R. Donziger, alleging fraud on the part of Donziger and others. Bitter and protracted discovery battles ensued.[117] Chevron sought to have the Ecuadorian judgment set aside or rendered unenforceable.

Chevron sought and obtained a global anti-enforcement injunction against the Lago Agrio plaintiffs and Donziger prohibiting the latter from attempting to enforce an allegedly

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112 *Republic of Ecuador v. Chevron Corporation*, 638 F.3d 384, 390 (2d Cir. 2011).

113 *Id*. Chevron also argued that the Ecuadorian government "improperly interfered with the Lago Agrio proceedings. In particular, Chevron claimed that 'Ecuador's executive branch has publicly announced its support for the plaintiffs, and it has sought . . . to interfere with Chevron's defense,' and that 'Ecuador's judicial branch has conducted the Lago Agrio Litigation in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights."

114 *Republic of Ecuador v. Chevron Corporation*, Nos. 09 Civ. 9958 (LBS),10 Civ. 316 (LBS), S.D.N.Y., March 16, 2010, 2010 U.S. Dist. LEXIS 25487.

115 *Republic of Ecuador v. Chevron Corporation*, 638 F.3d 384 (2d Cir. 2011).

116 *See In re Application of Chevron Corporation*, 749 F.Supp.2d 141 (S.D.N.Y. 2010).

117 *See In re Application of Chevron Corporation*, 749 F.Supp.2d 141 (S.D.N.Y. 2010).

fraudulent judgment entered by an Ecuadorian court against Chevron in the U.S. District Court for the Southern District of New York under New York's Uniform Foreign Country Money-Judgments Recognition Act (the "Recognition Act"),[118] which allows judgment-creditors to enforce foreign judgments in New York courts, subject to several exceptions. On appeal, the Second Circuit reversed, holding:

> The [Lago Agrio plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets. There is no indication that they will select New York as one of the jurisdictions in which they will undertake enforcement efforts, and if they do, they will have to present their claim to a New York court which will then apply the standards of the Recognition Act before any adverse consequence may befall Chevron. It is unclear what is to be gained by provoking a decision about the effect in New York of a foreign judgment that may never be presented in New York. If such an advisory opinion were available, any losing party in litigation anywhere in the world with assets in New York could seek to litigate the validity of the foreign judgment in this jurisdiction.
>
> Such a regime would unquestionably provoke extensive friction between legal systems by encouraging challenges to the legitimacy of foreign courts in cases in which the enforceability of the foreign judgment might otherwise never be presented in New York. As Chevron's effort to secure injunctive relief illustrates, permitting such speculative declaratory relief would encourage efforts by parties to seek a res judicata advantage by litigating issues in New York in order to obtain advantage in connection with potential enforcement efforts in other countries. And while the declaratory judgment might definitively settle the question of enforcement in New York -- a question that in the ordinary course might never arise at all -- it would hardly "finalize" the larger dispute between the parties about the legitimacy of the Ecuadorian judgment or its enforceability in other countries. We thus agree . . . that a far better remedy is available: Chevron can present its defense to the recognition and enforcement of the Ecuadorian judgment in New York if, as and when the [Lago Agrio plaintiffs] seek to enforce their judgment in New York.[119]

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118 N.Y. C.P.L.R. §§5301-5309.

119 *Chevron Corporation v. Camacho*, 667 F.3d 232, 246 (2d Cir. 2012).

In February 2012, the PCA ordered Ecuador "to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments by the Provincial Court of Sucumbíos, Sole Division (*Corte Provincial de Justicia de Sucumbíos, Sala Unica de la Corte Provincial de Justicia de Sucumbíos*) of 3 January 2012 and of 13 January 2012 (and, to the extent confirmed by the said judgments, of the judgment by Judge Nicolás Zambrano Lozada of 14 February 2011) against [Chevron] in the Ecuadorian legal proceedings known as 'the Lago Agrio Case'; . . ."[120] Nevertheless, the arbitration and the litigation between Chevron, Ecuador and the Lago Agrio plaintiffs continues and shows no sign of abating anytime in the near future.

Governmental action seeking to thwart another nation's statutory provisions is not unknown. For example, in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*,[121] Goss International Corporation ("Goss"), a Delaware corporation, and Tokyo Kikai Seisakusho, Ltd. ("TKS"), a Japanese corporation, both manufactured newspaper printing presses and press additions. Goss dominated the U.S. market until the late 1990s. By the 1980s, TKS had obtained contracts with large U.S. newspapers, including *The Wall Street Journal, The Washington Post,* and the *Newark Star-Ledger.* Between 1991 and 2000, TKS began selling its products in the United States at prices substantially below the market value of its similar products in Japan. Goss lost contracts. Goss brought a civil action against TKS alleging violations of the Antidumping Act of 1916 (the "1916 Act").[122] A jury awarded Goss $10,539,949 in damages, which the district court statutorily trebled. Judgment was entered against TKS in the amount of $31,619,847, plus interest and costs. TKS appealed. While the appeal was pending, Congress prospectively repealed the 1916 Act. Because the repeal was

120 PCA Case 2009-23, Second Interim Award on Interim Measures dated 16 February 2012.

121 491 F.3d 355 (8th Cir. 2007), cert. denied sub nom., *Goss Int'l Corp. v. Tokyo Kikai Seisakusho*, 128 S.Ct. 2957, 171 L.Ed. 2d 885 (2008).

122 15 U.S.C. §72 (repealed 2004).

prospective, it did not affect Goss's judgment. Since Japan considered the prospective repeal to be inconsistent with the United States' obligations under World Trade Organization ("WTO") agreements,[123] Japan enacted the Special Measures Law, a clawback statute authorizing Japanese corporations and/or Japanese nationals to sue in Japanese courts for recovery of the full amount of any judgment, plus interest, attorney fees and costs, awarded under the 1916 Act.[124] TKS agreed not to file a lawsuit under the Special Measures Law until after it exhausted its appeal in the antidumping action. The Eighth Circuit affirmed the jury verdict and damages award in the antidumping action, and the U.S. Supreme Court denied certiorari. TKS notified Goss of its intent to file suit under the Special Measures Law. Goss filed a motion for preliminary and permanent anti-suit injunction to prevent TKS "from usurping the Court's jurisdiction and frustrating the Court's judgment." The district court granted Goss's motion for preliminary injunction, prohibiting TKS from filing suit in Japan under the Special Measures Law. TKS paid the judgment in full and filed an interlocutory appeal. The Eighth Circuit vacated the district court's preliminary injunction, holding:

> We are profoundly aware a judgment in favor of TKS under the Special Measures Law would effectively nullify the remedy Goss legitimately procured in the United States courts. Although such a result understandably is objectionable

123 The United States, Japan, and the European Communities ("EC") are members of the WTO, an international trade organization established in 1995 to administer trade agreements, provide a forum for trade negotiations, and handle trade disputes between member nations. The WTO's Dispute Settlement Body ("DSB") established dispute panels to review the EC's and Japan's complaints about the 1916 Act. The dispute panels concluded (1) the 1916 Act violated WTO covered agreements, including the General Agreement on Tariffs and Trade 1994 ("GATT"), the Anti-dumping Agreement, and the WTO Agreement. The panels' decisions recommended the United States "bring the 1916 Act into conformity with its obligations under the WTO Agreement." The EC and Japan reactivated arbitration when a bill was introduced in Congress providing for the *prospective* repeal of the 1916 Act. Congress subsequently repealed the 1916 Act, specifying the repeal "shall not affect any action under [the 1916 Act] that was commenced before the date of the enactment of this Act and is pending on such date." Pub. L. No. 108-429, §2006(a)-(b), 118 Stat. 2434, 2597.

124 Special Measures Law, art. 3, 6. The Special Measures Law held any wholly-owned parent companies and subsidiaries of the party that prevailed under the 1916 Act to be jointly and severally liable for the clawback judgment. Goss Graphic Systems Japan, located in Tokyo, was a wholly-owned subsidiary of Goss.

> to Goss, it does not threaten United States jurisdiction or any current United States policy. . . .
>
> [T]he matter before us did not begin as an international jurisdictional standoff. Rather, it arose out of the legislative policies of the United States and Japan, which resulted in "a head-on collision between the diametrically opposed antitrust policies of the United States and [Japan]." . . . [T]he present case involves no pending litigation between the parties (other than the present appeal) in the United States courts. Consequently, regardless of our approval or disapproval of clawback litigation in a particular foreign court, given the present posture of this case, it is beyond our limited jurisdiction and contrary to principles of comity to prevent TKS from seeking an action under the Special Measures Law in Japan. . .
>
> Although the Special Measures Law, like other clawback or blocking provisions, can be regarded as an affront to the laws and judicial rules of the United States, . . . the United States Executive and Legislative Branches, not the Judiciary, are the governmental bodies to address those diplomatic tensions, . . .

More recently, the Second Circuit in *Amaprop Limited v. Indiabulls Financial Services Limited*,[125] considered an award of sanctions against Indiabulls Financial Services Limited ("IFSL") because IFSL brought an action in India seeking to avoid arbitration. IFSL and Amaprop[126] entered into an agreement which created a joint venture between Amaprop and IFSL with the goal of financing initial public offerings in India. The agreement provided that if shares of the joint venture could not be sold publicly within 55 months, Amaprop would be entitled to force IFSL to buy Amaprop's shares in the joint venture. When the shares were not sold publicly within the required time, Amaprop exercised its right to the forced sale and concurrently commenced an arbitration in New York to enforce the sale, as provided by the agreement.

IFSL sought an *ex parte* injunction in the High Court of Judicature of Bombay. The Indian court granted an *ex parte* injunction against Amaprop's arbitration. Amaprop then filed an action in the U.S. District Court for the Southern District of New York to enjoin IFSL from

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No. 11-1291-cv, 2d Cir., May 25, 2012, 2012 U.S. App. LEXIS 10586 (Unpublished) ("*Amaprop III*").

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Amaprop's contractual predecessor was Amaranth LLC.

proceeding with the Bombay Court action and to compel arbitration. The district court granted Amaprop's request for an anti-suit injunction barring IFSL from pursuing any further action in the Bombay Court, and compelled IFSL to arbitrate in New York.[127] Thereafter, Amaprop moved for fees, and the district court granted that motion.[128] The district court rejected IFSL's argument that the issue of sanctions should be decided by the arbitration panel, noting the court's inherent power to assess attorneys' fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

On appeal, the Second Circuit affirmed. The court pointed out that "[a]n award of sanctions under the court's inherent power is proper when a party advances a claim lacking colorable basis and does so in bad faith."[129] "IFSL's sanctionable conduct in seeking to avoid the arbitration altogether was logically and legally separate from the ultimate outcome of the arbitration." The court observed that IFSL had improperly redacted part of the language of the agreement, and had sought and was granted additional time to file a statement of defense, "but used that additional time to 'appl[y] on an ex parte basis to [the Bombay Court] for an injunction barring the arbitration proceedings they had just appeared in from going forward.'"[130] IFSL "gave Amaprop no notice of [its] decision to seek injunctive relief in India, and after obtaining the injunctions [has] refused to even supply Amaprop with the underlying papers."[131] The court

127 *Amaprop Limited v. Indiabulls Financial Services Limited*, No. 10 Civ. 1853 (PGG), S.D.N.Y., March 23, 2010, 2010 U.S. Dist. LEXIS 27117 ("*Amaprop I*").

128 *Amaprop Limited v. Indiabulls Financial Services Limited*, No. 10 Civ. 1853 (PGG), S.D.N.Y., March 16, 2011, 2011 U.S. Dist. LEXIS 27035 ("*Amaprop II*").

129 *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, No. 11-1291-cv, 2d Cir., 2012 U.S. App. LEXIS 10586, slip op. at 3.

130 *Amaprop II*,2011 U.S. Dist. LEXIS 27035, 2011 WL 1002439 at *4, quoting *Amaprop I*, 2010 U.S. Dist. LEXIS 27117, 2010 WL 1050988 at *6.

131 *Id*., quoting *Amaprop I*, 2010 U.S. Dist. LEXIS 27117, 2010 WL 1050988 at *6.

went on to observe, “[s]ince a key benefit of an arbitration agreement is avoidance of court battles (and their associated costs and delays), we agree with the district court that the federal policy of enforcing sophisticated parties’ arbitration agreements weighs in favor of fee awards against parties who attempt, without legitimate legal basis, to circumvent arbitration.”

As long as international transactions continue to flourish and incorporate arbitration provisions, anti-suit injunctions will undoubtedly also be part of the dispute resolution scene.