Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements

John J. Barceló III*

W. N. Cromwell Professor of Law, Cornell Law School
Ithaca, New York, USA

An anti-foreign-suit injunction is controversial because it constrains judicial proceedings in another sovereign country. It does so indirectly by controlling the actions of private parties. The enjoining court in one country (F1) orders a private litigant before it to suspend or terminate a legal proceeding in another country (F2)--on pain of sanctions that F1 will impose on the private party for disobedience. Although formally there is no direct interference with, or order addressed to, a foreign judicial power, as a practical matter, the effect in the foreign jurisdiction can be substantial. If the enjoined party has assets in F1, or a thriving business there, or just attractive future business prospects in F1, it will not want to risk transgressing the F1 order. Thus, the litigant will comply and terminate (or not initiate) legal proceedings in F2.

As is well known, civil law jurisdictions generally find anti-foreign-suit injunctions offensive, even violative of international law.1 On the other hand, common law jurisdictions, especially courts in the United Kingdom and the United States, consider an anti-foreign-suit injunction appropriate under some circumstances. Although I agree with the view that courts should give considerable weight to “international comity” before issuing an anti-foreign-suit injunction and in general should use this remedy only sparingly, I argue in this essay that the remedy is appropriate and useful in a particular context.

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That context arises where the parties have agreed to arbitrate disputes in F1 and have chosen F1 law to govern the arbitration agreement. In that case, I argue an F1 court should have discretion to issue an anti-foreign-suit injunction to enforce the arbitration agreement.

I would make room for one major exception—where there are relatively strong (and appropriately applicable) public policy considerations in the alternative forum (F2) for avoiding the arbitration agreement. Ordinary issues of fact finding or contract construction to decide, for example, whether an arbitration agreement came into existence, would not suffice. On the other hand, relatively strong public policy considerations embedded in F2 law for disallowing arbitration should be respected (to the extent of not being thwarted by an anti-suit injunction)—even if the parties’ preference for arbitration is clearly expressed.

Two closely related arguments support this approach. First, the injunction merely effectuates the parties’ agreement to resolve all disputes through arbitration. The enjoined party, if it invokes judicial proceedings in F2, does something that it promised not to do. The injunction holds that party to its agreement. Second, the injunction is a particularly effective way of giving force to a principal goal of the New York Convention\(^2\)—ensuring that international arbitration agreements are honored and enforced.

The opposing view rejects all (even indirect) interference with foreign legal proceedings, because it considers such interference an offense against sovereignty. The injunction opponents do not disagree that parties should be held to their agreements and that arbitration agreements should be enforced. They look instead, however, to the courts of F2 to make that determination, not exclusively those of F1.

If the controversy were left at this level of generality, one might wonder what all the fuss is about. So many countries have become parties to the New York Convention\(^3\) that the convention’s support for enforcing arbitration agreements is now respected in all parts of the world. So why should F2 care if an F1 court issues an anti-suit injunction to enforce an arbitration agreement that F2 also has an obligation under the New York Convention to enforce? The court in F1 is simply protecting the pro-arbitration litigant from incurring the unnecessary and wasteful expense of litigating once again, this time in F2, to enforce the arbitration agreement. The parties presumably chose arbitration in the first place to avoid just such vexatious parallel proceedings in different national forums.

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\(^3\) There were 142 parties as of June 1, 2007. See http://www.uncitral.org for the latest count.