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There are 'answers' to be found via foreign anti-suit injunctions

By: Michael P. Coakley, Esq., Frederick A. Acomb, Esq. and Wendy Wrosch Richards, Esq. in News Stories
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What do you do if a party opponent sues your client in a foreign country notwithstanding an agreement to arbitrate?

A motion for a foreign anti-suit injunction may be your answer.

This device enjoins a party to a federal court action from pursuing litigation in a foreign court. The 6th U.S. Circuit Court of Appeals has taken a conservative approach toward granting foreign anti-suit injunctions in cases involving parallel court actions. Although the 6th Circuit has not decided whether the device is appropriate in aid of international arbitration, recent case law suggests that it might rule that it does.

The U.S. circuit courts are split in their approaches to anti-suit injunctions. The 5th, 7th and 9th circuits have adopted a "liberal" approach. These circuits focus primarily on equitable considerations, such as whether the duplicative foreign litigation would be vexatious or cause unnecessary delay (*Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996); *Philips Med. Sys. Internat'l B.V. v. Breutman*, 8 F.3d 600, 604-605 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855-856 (9th Cir. 1981).

In contrast, the 1st, 2nd, 3rd, 6th, 8th, and D.C. circuits have applied a more restrictive "conservative" approach. These circuits grant anti-suit injunctions where the foreign action (a) threatens the enjoining court's jurisdiction or (b) threatens an important public policy (*Gau Shan Co. Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992); *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-161 (3d Cir. 2001).

Increasingly, courts in these "conservative" circuits recognize that enforcing arbitration agreements is an important federal public policy. In doing so, they grant anti-suit injunctions where a party breaches an arbitration agreement by filing a foreign suit (*Paramedics Electromedicina Comercial, Ltda v. GE Medical Sys. Information Tech, Inc.*, 369 F.3d 645, 654 (2d Cir. 2004); *Stolt Tankers BV v. Allianz Seguros, S.A.*, 2011 WL 2436662 (S.D.N.Y. June 16, 2011); *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876, 885 (N.D. Ill. 2006).

The 6th Circuit has not addressed whether a foreign anti-suit injunction is proper where a party breaches an arbitration agreement by commencing suit in a foreign court. The court has, however, declined to grant an anti-suit injunction where a party threatened parallel litigation in another country.

In *Gau Shan Co.*, a Hong Kong borrower sued an American lender in the U.S., seeking to enjoin the lender from filing suit in Hong Kong. The court found that "comity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest of cases" (Id. at 1354, citing *Laker Airways*, 731 F.2d 909 (D.C. Cir. 1984).

In embracing the conservative approach, the *Gau Shan* court found that an anti-suit injunction "conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." Thus, in that case, comity and

public policy militated against the foreign anti-suit injunction.

After *Gau Shan*, the 6th Circuit has not directly ruled on when a foreign anti-suit injunction might be appropriate. However, in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Internat'l*, 556 F.3d 459 (6th Cir. 2009), the 6th Circuit at least suggested that the device might be available in aid of international arbitration.

In *Answers*, the court affirmed the lower court's order compelling arbitration in light of an arbitration clause in an agreement between a U.S. corporation and its Australian affiliate. The U.S. and Australia both are signatories to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), an international treaty designed in part to facilitate the enforcement of arbitration clauses in commercial agreements between parties from different signatory countries. Congress implemented the New York Convention in Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 et seq.

Answers held that, when an arbitration agreement falls under the New York Convention, a U.S. court has no discretion and must compel arbitration. In *Answers*, the Australian affiliate sued its U.S. parent company in Australia. This prompted the U.S. parent company to sue its Australian affiliate in the Eastern District of Kentucky, where it filed motions to compel arbitration and to enjoin the Australian action. The district court compelled arbitration, but declined to issue an anti-suit injunction. The parties voluntarily agreed to suspend the Australian action pending the U.S. litigation.

On appeal, the Australian affiliate argued that the district court's order compelling arbitration violated principals of international comity. The 6th Circuit disagreed, finding that comity favors enforcement of international arbitration agreements, at least where the parties are citizens of countries that are signatories to the New York Convention. The court also found that compelling arbitration furthered domestic public policy — in particular, the "liberal federal policy favoring arbitration."

Although the *Answers* court compelled arbitration, it declined to address whether an anti-suit injunction would be appropriate. It thus remains unclear how the 6th Circuit would address a motion for a foreign anti-suit injunction in aid of international arbitration.

But recent decisions in other conservative circuits granting foreign anti-suit injunctions, and the statements in *Answers* that public policy favors enforcement of agreements to arbitrate, suggest that the court might be willing to award such an injunction.

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