11-1150-cv(L)

11-1264-cv(CON)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Appellants,

(Additional Caption on the Reverse)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF BUSINESS ROUNDTABLE AND INTERNATIONAL LAW SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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("INTERNATIONAL LAW SCHOLARS")

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, aka AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREGA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUNIDA, BEATRIZ MERCEDES GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUNIDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSÉ ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, JOSÉ GABRIEL REVELO LLORE, MARÍA CLELIA REASCOS REVELO, MARÍA MAGDALENA RODRIGUEZ, JOSÉ MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVÁEZ, LOURDES BEATRIZ CHIMBO TANGUILA, MARÍA HORTENCIA VIVEROS CUSANGUA, SEGUNDO ÁNGEL AMANTA MILÁN, OCTAVIO ISMAEL CÓRDOVA HUANCA, ELÍAS ROBERTO PIYAHUAJE PAYAHUAJE, DANIEL CARLOS LUSITANDE YAIGUAJE, VENANCIO FREDDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUAJE LUSITANDE, DELFÍN LEONIDAS PAYAGUAJE, ALFREDO DONALDO PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, FERMÍN PIAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTÍN PAYAGUAJE PIAGUAJE, EMILIO MARTÍN LUSITANDE YAIGUAJE, SIMÓN LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ÁNGEL JUSTINO PIAGUAJE LUCITANDE,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c)(1) of the Federal Rules of Appellate Procedure, *Amicus Curiae* Business Roundtable has no parent corporation nor stock held by any publicly held corporation.

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INTEREST OF *AMICI CURIAE*

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with nearly $6 trillion in annual revenues and more than 13 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $114 billion annually in research and development – nearly half of all private U.S. R&D spending. Our companies pay more than $179 billion in dividends to shareholders and give nearly $9 billion a year in combined charitable contributions. Business Roundtable was established in 1972, founded on the belief that in a pluralistic society, businesses should play an active and effective role in the formation of public policy. Uniting and amplifying the diverse business perspectives and voices of America's top CEOs, Business Roundtable innovates and advocates to help expand economic opportunity for all Americans.

The question presented in this case is of great importance to Business Roundtable. The Court is asked to determine the propriety of the antisuit injunction issued by the District Court to temporarily prevent Defendants-Appellants from seeking to enforce in multiple jurisdictions a foreign judgment procured by fraud and issued by a foreign court without the requisite independence and impartiality and in the absence of due process of law. Business Roundtable is very sensitive to the abuse of process in litigation and recognizes the need to

promote the international rule of law and facilitate the proper and orderly administration of justice in international trade and investment. Recourse to antisuit injunctions is, in appropriate and limited circumstances, an important tool to prevent unreasonable, vexatious, or oppressive conduct in foreign jurisdictions and to protect the legitimate interests and policies of a jurisdiction properly seized with a dispute. Business Roundtable is particularly concerned with any attempt to enforce foreign judgments that were procured by fraud, and fear for the repercussions to international trade and investment if the Defendants-Appellants' tactics are not subject to appropriate judicial restraint.

The international law scholars who are filing as *amici curiae*—Prof. Rudolf Dolzer, Prof. Burkhard Hess, Prof. Herbert Kronke, Hon. Davis Robinson, Prof. Christoph Schreuer, and Prof. Janet Walker ("International Law Scholars")—are experts in public international law, private international law, and international litigation. They are filing this brief because the instant case raises important issues regarding the legality of antisuit injunctions under international law and because they wish to confirm the propriety and legality of antisuit injunctions like the one issued by the District Court in this case.[2]

[2] The fees of Counsel and *amici* International Law Scholars will be reimbursed by the Business Roundtable. This brief was not authored in whole or in part by persons other than *amici curiae* and their Counsel. Affiliations are provided for identification purposes only.

SUMMARY OF ARGUMENT

Antisuit injunctions are well-established judicial devices recognized by countries around the world. Contrary to the position of Defendants' *amici International Law Professors* ("Anton Professors"), use of such injunctions does not violate public international law principles of non-intervention in the affairs of other states. Nor does the District Court's injunction implicate the "exhaustion of remedies" requirement or exceed international law limits on adjudicatory jurisdiction.

While antisuit injunctions do require sensitivity to concerns for international comity, recourse to an antisuit injunction in order to prevent fraud and injustice does not offend principles of international comity. International comity as applied in this Court is designed to protect amicable working relationships with other countries. The fact that New York is the natural forum and the court first seized with an enforcement action, and that there are no concurrent proceedings or objections from countries where other enforcement actions might be brought, supports a finding that the antisuit injunction does not offend international comity. Nor is international comity offended if the District Court refuses to recognize and enforce an Ecuadorian judgment that was procured by fraud or that otherwise does

not satisfy the traditional grounds for recognition and enforcement of foreign judgments.

The propriety of antisuit injunctions under international law and comity, especially to prevent fraud and injustice, is confirmed by the acceptance of such injunctions in jurisdictions around the world. Every major common law country in the world allows antisuit injunctions. These countries all recognize the legitimacy of issuing antisuit injunctions to prevent injustice, including measures to prevent the enforcement of foreign judgments procured by fraud.

Today civil law countries are inclined to recognize the use of antisuit injunctions by courts in common law countries to restrain proceedings in civil law countries. Civil law countries also have developed their own tools to achieve the equivalent of an antisuit injunction. To the extent courts in civil law countries are called upon to address an antisuit injunction such as that issued by the District Court in this case, they are well within their authority to recognize such an injunction under the balancing test that their doctrine of comity employs. EU law preventing antisuit injunctions as between Member States does not preclude recognition of antisuit injunctions issued by a court in a non-EU Member State.

ARGUMENT

I. Antisuit Injunctions Do Not Violate International Law or Comity

Antisuit injunctions are not prohibited by public international law. Contrary to the position of the Anton Professors, questions surrounding antisuit injunctions have nothing to do with the principle of non-intervention, the exhaustion of local remedies requirement, or a state's prescriptive jurisdiction. Rather, the injunctive powers of the Court in this case are generally governed by principles of private international law. To the extent international relations are relevant, it is international comity as applied in the Second Circuit that is implicated in this case.

A. The Principle of Non-Intervention Does Not Apply to Antisuit Injunctions

The principle of non-intervention in the "internal or external affairs of another" nation state has a long pedigree in public international law. As the Anton Professors note, the basic concept of non-interference in the domestic affairs of another state is deeply intertwined with the fundamental structure of the international legal system. We agree that "the pillars" of this system are "independence, autonomy, and equality of *states.*"[3] But we disagree with the

[3] Anton Professors Brief, at 6 (emphasis added).

Anton Professors that the principle of non-intervention has anything to do with this case.

The principle of "non-intervention" applies to forcible or coercive actions by one state against another state. Under international law the threshold for regarding an intervention as illegal is high, and typically requires either military force or other physically coercive measures that put pressure on a State to change its practices or policies. It has nothing to do with the actions by a domestic court regulating the conduct of private individuals within its jurisdiction.

Almost every major authority addressing the principle of non-intervention has involved actual or threatened military action. For example, the International Court of Justice held that the United States' covert military action against the Nicaraguan government violated this principle, as did Uganda's military intervention in the Congo's civil war.[4] As a leading commentator has noted, an illegal intervention "must be forcible or dictatorial, or otherwise coercive, in effect

[4] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14, 106; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, [2005] I.C.J. 168, 227.

depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention."[5]

If the principle of non-intervention applies only to coercive action in state-to-state relations, it follows that the action by the domestic court of one state enjoining the private individuals of another state in a civil dispute will not ordinarily implicate this principle. Courts in the United States and other countries commonly issue countless orders, judgments, and injunctions directed at foreign citizens, subjects or corporations. Such domestic judicial activity has never been thought to implicate the principle of non-intervention. In particular, a declaration concerning the enforceability of a judgment cannot be regarded as an intervention in what the Anton Professors describe as the "external domestic affairs"[6] of a state because no such concept exists in the law of foreign judgments.

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[5] OPPENHEIM, I INTERNATIONAL LAW 432 (9th ed. 1992). *See also* 1970 Declaration on Principles of Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28), Annex at 121, U.N. Doc A/5217 (1970) ("armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law."). Even when such alleged interventions are economic, scholars have concluded that such measures must have the "the objective … to liquidate an existing state or to reduce that state to the position of a satellite." Tom J. Farer, Political and Economic Coercion in Contemporary International Law, 79 AM. J. INT'L L. 405, 413 (1985).

[6] Anton Professors Brief, at 2.

Every example cited by the Anton Professors addressing the principle of non-intervention concerns military intervention or other coercive measures.[7] They do not cite to a single precedent linking the non-intervention principle to domestic judicial orders against private individuals. There does not appear to be any such authority applying the non-intervention principle to an antisuit injunction or other domestic judicial order against a private individual in the context of civil litigation.

The very fact that antisuit injunctions are known and widely recognized in the major legal systems of the world, and that international tribunals likewise resort to such procedures,[8] indicates that there is no state practice or *opinio juris* against their use under customary international law.

B. The International Law Obligation to Exhaust Local Remedies is Inapplicable

The Anton Professors argue that the international law principle of exhaustion of local remedies requires Chevron to exhaust all Ecuadorian appellate

[7] Anton Professors Brief, at 6-11. The U.N. Charter provisions cited by *amici* are likewise inapposite, addressing the threat or use of force by States, U.N. Charter, Art. 2(4), or intervention by the United Nations in domestic affairs. U.N. Charter, Art. 2(7).

[8] Order for Interim Measures, *Chevron Corporation v. Ecuador*, PCA Case No. 2009-23, (Feb. 9, 2011), at 3-4, available at http://www.chevron.com/documents/pdf/ecuador/TribunalInterimMeasuresOrder.pdf.

processes and pursue all local remedies before it can pursue litigation in this, or any, foreign court.[9]

The requirement to exhaust local remedies arises in cases involving claims alleging a violation of international law directed against States before an international tribunal. The underlying policy is to give the State an opportunity to remedy any violation before a claim is put forward against it on the international level.[10] The requirement to exhaust local remedies applies as a matter of customary international law in situations of diplomatic protection where a State espouses the claim of its national and pursues it against another State.[11] The exhaustion of local remedies is also required in certain treaty regimes, such as cases before international human rights tribunals,[12] but not in other treaty regimes, such as investment arbitration brought under the ICSID Convention.[13]

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[9] Anton Professors Brief, at 25-30.

[10] C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW, 61-63 (2d ed. 2004).

[11] *Interhandel Case*, [1959] I.C.J. 1, 6; *Elettronica Sicula S.P.A. (ELSI)*, [1989] I.C.J. 15.

[12] See, e.g., European Convention on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1955), art. 26; American Convention on Human Rights, 1144 U.N.T.S. 123 (1978), art. 46.

[13] CHRISTOPH SCHREUER, ET. AL. THE ICSID CONVENTION: A COMMENTARY, 403 (2d ed. 2009) (ICSID Article 26 "reverses the situation under traditional international law: the Contracting States waive the exhaustion of local remedies unless otherwise stated.")

No rule of exhaustion of local remedies applies to the instant case. The case does not involve the pursuit of claims for a violation of international law against a State in an international proceeding. It addresses claims against private parties alleging that a foreign judgment should not be recognized because it was procured by fraud. The Anton Professors provide no authority in this Circuit or elsewhere for the proposition that the well-established process for challenging the recognition and enforcement of foreign judgments must exhaust local remedies. The invocation of the principle of exhaustion of local remedies is entirely inapposite.

Nor do the Anton Professors address the New York Recognition Act's provision on finality that allows an action such as this to proceed notwithstanding the fact that an appeal is pending in the foreign jurisdiction.[14] This approach is consistent with other common law jurisdictions, which regard a judgment as final when the court that issued it is *functus officio*. The fact that the judgment is subject to appeal, or is under appeal, does not prevent it from being regarded as final and therefore enforceable in other common law jurisdictions.[15]

[14] N.Y. C.P.L.R. § 5302.

[15] L. COLLINS, ED. DICEY, MORRIS & COLLINS: THE CONFLICT OF LAWS, 14th ed. 2006) ("DICEY") at 14-024; J. WALKER, CASTEL & WALKER: CANADIAN CONFLICT OF LAWS, (6th ed. looseleaf 2006+) ("CASTEL"), at ¶14.5.

C. The District Court's Antisuit Injunction Did Not Exceed International Law Limitations on Adjudicatory Jurisdiction

The District Court's injunction did not exceed international law limits on its adjudicatory jurisdiction. The Anton Professors suggest that the injunction fails the "reasonableness" standard set forth in the Restatement (Third) of the Foreign Relations Law of the United States. But to the extent that the Restatement applies here, the proper test is found under Section 421's standards for adjudicatory jurisdiction rather than the Section 403 standards for prescriptive jurisdiction applied by the Supreme Court in *Hoffmann-La Roche*.[16] The Anton Professors conflate adjudicatory and prescriptive jurisdiction, and improperly combine Restatement Section 421 with the "reasonableness" factors of Section 403.[17]

Under the Section 421 standard, there seems little doubt that adjudicatory jurisdiction is appropriate in this case, given that the Defendants-Appellees, through their agents, "consented to the exercise of jurisdiction" in filing suit in New York, and "regularly carr[y] on business" and "activity" in New York, and have done so for nearly twenty years.[18]

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[16] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-165 (2004).
[17] Anton Professors Brief, at 15-17.
[18] Restatement (Third) of the Foreign Relations Law of the United States, § 421(2)(g)(h) and (i).

D. The District Court's Antisuit Injunction Does Not Offend International Comity

To the extent international norms are relevant to the issuance of antisuit injunctions, it is the principle of international comity—not non-intervention—that is relevant. Under the principle of comity the courts of each country are free to determine for themselves their own jurisdiction and to exercise that jurisdiction free from interference by other courts. Antisuit injunctions have the potential to raise sensitive issues of comity. Although they restrain only the persons to whom they are addressed—in this case, the judgment creditors—and do not apply directly to foreign courts, antisuit injunctions can have the effect of depriving foreign courts of the opportunity to determine their own jurisdiction and to exercise that jurisdiction.[19]

Accordingly, courts are cautious in issuing such injunctions, and do so in a manner sensitive to the concerns of international comity. The leading institute for promoting standards in private international law, the *Institut de Droit International*, issued a resolution in 2003 to this effect, stating that:

> Courts which grant antisuit injunctions should be sensitive to the demands of comity and in particular should refrain from granting such

[19] DICEY, *supra*, at 1–011.

> injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in such matters as the administration of estates or insolvency.[20]

But that Institute's resolution emphasized that "[n]othing in the following principles is intended to prevent the grant of bona fide provisional or protective measures by a court having a reasonable connection with the parties or the measures to be taken."[21]

As discussed below, courts around the world authorize the use of antisuit injunctions. They have done so since at least the fourteenth century.[22] But according to the jurisprudence of many leading jurisdictions—including the

[20] Institute de Droit International, Second Commission, *The Principles for Determining when the Use of the Doctrine of Forum Non Conveniens and Antisuit Injunctions is Appropriate*, Res. 5 (Sept. 2, 2003).
[21] Id.
[22] Eric Roberson, *Comity Be Damned: The Use of Antisuit Injunctions Against the Courts of a Foreign Nation*, 147 U. Pa. L. Rev. 409, 413 (1998) (Antisuit injunctions "are one of the most ancient and well-established forms of injunction.... Some of this device's early ancestors can be traced as far as Ancient Rome…. [I]n the latter part of the fourteenth century … this type of injunction emerged in its modern form."); David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 555-60 (1986) (discussing historical origins of antisuit injunctions in England to prevent vexatious and oppressive suits).

Second Circuit[23]—antisuit injunctions are available only in circumstances in which they do not offend international comity.

As applied in the Second Circuit, international comity has two forms.[24] "International comity comes into play when there is a true conflict between American law and that of a foreign jurisdiction"[25] or when "adjudication … by a United States court would offend 'amicable working relationships'" with another country.[26] There is, of course, no "true conflict" in this case. As for the Second Circuit's other comity test, harm to the working relationships of other countries cannot be resolved in the abstract where no specific country is yet affected by the District Court's action. The fact that New York is the natural forum and the court first seized with the question of enforcement, that there are no concurrent proceedings pending in any country, and that no country where such actions might be brought has objected to the antisuit injunction all undermine any argument that

[23] *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-36 (2d Cir. 1987).
[24] See Donald Earl Childress, *Comity as Conflict, Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 52-53 (2010).
[25] *Maxwell Communications Corp. v. Societe Generale*, 93 F.3d 1036, 1049, (2d Cir. 1996) citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993).
[26] *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006); *JP Morgan Chase Bank v. Altos Hornos de Mex. S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005).

the antisuit injunction offends comity or otherwise damages amicable working relationships with other countries.[27]

To the extent the antisuit injunction implicates the United States' relationship with Ecuador, those comity concerns will be addressed in the District Court's determination as to whether to recognize and enforce the Ecuadorian judgment under New York's Recognition Act.[28] The District Court will not offend international comity if it refuses to recognize and enforce an Ecuadorian judgment that was procured by fraud or that otherwise does not satisfy the traditional grounds for recognition and enforcement of foreign judgments.[29]

II. Antisuit Injunctions Are Accepted In Jurisdictions Around the World

The propriety of antisuit injunctions under international law and comity, especially in order to prevent fraud or injustice, is confirmed by their acceptance in jurisdictions around the world. Antisuit injunctions are a well-established judicial

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[27] See *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule…. Abdication of the obligation to decide cases can be justified … only in … exceptional circumstances…."); *Bigio*, 448 F.3d at 178-79 (discussing international comity and absence of expressed concerns by foreign country to the exercise of jurisdiction).

[28] N.Y. C.P.L.R. § 5304.

[29] *Hilton v. Guyot*, 159 U.S. 113, 202 (1895); RESTATEMENT (SECOND) OF CONFLICTS, § 98, cmt. c (1971).

tool in the common law world. Every major common law system follows the long-standing English tradition and authorizes the use of antisuit injunctions to prevent injustice. In some cases, such as bankruptcy, global antisuit injunctions are routine and granted automatically, enjoining the commencement of judicial proceedings and the enforcement of foreign judgments.[30] In other cases they are less common, and issued only in appropriate circumstances to protect legitimate interests. These interests include:

> [1] the prevention of highly inconvenient or vexatious litigation, [2] the vindication of a prior and independent obligation not to sue, and [3] preservation of the enjoining court's own jurisdiction or other local policy-based need to forestall foreign judicial proceedings.[31]

Civil law countries are different. Courts in these jurisdictions typically do not utilize antisuit injunctions, reflecting the "distinctive legal history" and "cultural

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[30] 11 U.S.C. § 362(a) (application for bankruptcy "operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor… ; [or] (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case."); 11 U.S.C. §§ 1515-1521 (automatic stay of proceedings based on recognition of foreign bankruptcy action); *see also UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, (1997) (Key elements of the relief under Model Law adopted by eighteen countries includes article 20 stay of actions of individual creditors against the debtor and enforcement proceedings concerning the assets of the debtor) available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[31] George A. Bermann, *The Use of Antisuit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 608 (1990).

differences" of the common law and civil law worlds.[32] However, civil law countries recognize the use of antisuit injunctions by courts in common law countries to restrain proceedings in civil law countries. Civil law countries also have developed other tools to achieve the equivalent of an antisuit injunction.

European Union law forecloses use of antisuit injunctions by and between EU Member States, but leaves EU Member States with complete freedom to use and recognize antisuit injunctions in other contexts, such as those that apply in the instant case.

A. Common Law Jurisdictions Utilize Antisuit Injunctions to Prevent Injustice

Where a judgment debtor is seeking a declaration in an appropriate forum that a judgment is unenforceable, common law courts do not regard it as contrary to comity to restrain the judgment creditor from seeking enforcement elsewhere pending the outcome of the judgment debtor's action.[33]

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[32] *Airbus Industrie G.I.E. v. Patel*, [1999] 1 A.C. 119, 131 (H.L.).

[33] DICEY, *supra*, at 12–078. While at one time it was considered normal procedure to wait for a foreign action to be commenced and for the foreign court to decline a stay before issuing an antisuit injunction, *see British Columbia (Workers' Compensation Board) v. Amchem Products Ltd.* [1993] 1 S.C.R. 897 (S.C.C.) *("Amchem")*, this is no longer accepted practice.

Absent international treaty obligations, the judgment of a national court is entitled to direct effect only in the country in which it has been issued.[34] The courts of other countries are entitled to determine what, if any, effect to give to a domestic judgment. Moreover, they are each entitled to determine for themselves what, if any, effect to give to a foreign judgment in accordance with their own laws.[35] Accordingly, injunctions restraining enforcement actions in other countries, like those restraining proceedings at first instance, have the potential to raise sensitive issues of comity for the courts of other countries in which the judgment creditors might seek to enforce the judgment.

Nonetheless, leading common law countries uniformly recognize the propriety of antisuit injunctions in the context of enforcement proceedings, in some cases describing them as "anti-enforcement injunctions."[36] The courts in common law countries will exercise their discretion to grant antisuit injunctions where doing so will not cause injustice. Provided that the action for the declaration in this case proceeds expeditiously and the judgment debtor waives the right to rely upon any statute of limitation defenses to enforcement actions in other countries that might

[34] DICEY, *supra* at 14R–001; CASTEL, *supra*, *at* ¶14.1.
[35] *Masri v. Consolidated Contractors*, [2008] 1 C.L.C. 887 (H.L.).
[36] 26 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 447 (2007); Marta Requejo Isidro, PROCESO EN EL EXTRANJERO Y MEDIDAS ANTIPROCESO (ANTISUIT INJUNCTIONS) 67, n. 131 (2000).

arise, the injunction would not prevent the judgment creditors from pursuing enforcement actions in other countries should the court lift the injunction after determining the judgment is not unenforceable. Under these circumstances the injunction would not cause injustice.

1. England and Wales

The courts of England and Wales grant antisuit injunctions in cases where they are the natural forum and where proceedings in the foreign court would be vexatious or oppressive.[37] An injunction restraining the enforcement of a foreign judgment is appropriate where the judgment is subject to impeachment, such as where it has been obtained by fraud.[38] Such antisuit injunctions against the enforcement of a foreign judgment procured by fraud may be issued on a global scale:

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[37] *Airbus Industrie GIE v. Patel* [1999] 1 A.C. 119 (H.L.); *SNI Aérospatiale v. Lee Kui Jak* [1987] A.C. 871 (H.L.) ("if … the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court."); *see generally* DICEY, *supra* at 12–067-079.

[38] *Masri v. Consolidated Contractors* [2008] 1 C.L.C. 887, 916 (H.L.) (There is "no general principle" against an English court granting an injunction "to prevent reliance abroad on, or compliance with, a foreign judgment." In "exceptional circumstances," such an injunction will be granted, "such as where party enjoined was a British subject and had obtained the judgment by fraud."); *see generally* DICEY, *supra* at 14–127-140; 14–151-160; CASTEL, *supra* at ¶14.8.

> If the English Court finds that a person subject to its jurisdiction … has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment … it will restrain him, … by saying that he is in conscience bound not to enforce that judgment…. In the interests of justice in this case it is essential that an injunction should be granted restraining the defendants from reaping any advantage from the judgment obtained in Turkey … by a gross fraud.[39]

2. Canada

Likewise, the courts in Canada grant antisuit injunctions in cases where they are the natural forum and where it would be unreasonable for a foreign court to refuse to decline jurisdiction upon application of *forum non conveniens* principles.[40] As the Supreme Court of Canada put it, "In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to *forum non conveniens* and that the foreign court's conclusion could not reasonably have been reached had it applied those principles" the court may issue an anti-suit injunction.[41]

3. Australia

Similarly, Australian courts grant antisuit injunctions against foreign proceedings to restrain unconscionable conduct. "If the bringing of legal

[39] *Ellerman Lines v. Read* [1928] 2 K.B. 144, 155-56 (C.A.).
[40] *Amchem, supra*; CASTEL, *supra*, at ¶13.4.
[41] *Amchem, supra.*

proceedings involves unconscionable conduct …, an injunction may be granted by a court in the exercise of its equitable jurisdiction in restraint of those proceedings no matter where they are brought."[42]

It is well-settled that Australian courts may enjoin vexatious or oppressive foreign proceedings. "The conduct of foreign proceedings which have a tendency to interfere with the due process of the domestic court may, in the circumstances of a particular case, generate the necessary equity to enjoin those foreign proceedings as vexatious or oppressive."[43]

4. Singapore

In a similar vein, courts in Singapore follow English courts and authorize the use of antisuit injunctions to prevent vexatious or oppressive foreign proceedings. Where foreign proceedings were vexatious or instituted to pressure and harass, "the ends of justice required than an injunction be granted restraining the respondent from continuing the prosecution of the proceedings."[44]

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[42] *CSR Ltd. v Cigna Insurance Australia Ltd.* (1997) 189 C.L.R. 345, 392; M. DAVIES *ET AL*, CONFLICT OF LAWS IN AUSTRALIA, ch. 9 (8th ed. 2010).
[43] *National Mutual Holdings Pty. Ltd. V. Sentry Corp.* (1989), 87 A.L.R. 539, 563.
[44] *Bank of America National Trust v. Djoni Widjaya* [1994] 2 S.L.R. 816 (C.A.); *Beckkett Pte Ltd v. Deutsche Bank AG*, [2011] 1 SLR 524 (Singapore) (antisuit injunction restraining re-litigation of the matter in other jurisdictions).

5. Preliminary vs. Permanent Antisuit Injunctions

Injunctions are commonly issued as protective measures to prevent foreign proceedings from interfering with a proceeding in the natural forum, particularly where the foreign proceedings are brought to pressure a party into compromising its position. This is so both in cases of claims at first instance and actions to enforce foreign judgments. However, a permanent injunction may also be warranted where the action is for the enforcement of a foreign judgment and it appears that a judgment creditor might use the threat of multiple enforcement actions to persuade the judgment debtor to compromise its position notwithstanding a court's finding that the judgment is unenforceable.

Accordingly, a permanent injunction restraining foreign enforcement actions would not offend comity where the judgment is found to have been obtained by fraud or in a manner contrary to natural justice.[45] As with preliminary injunctions, the issuance of a permanent injunction restraining the enforcement of a foreign judgment should be exercised with caution. "But if ever there was a case calling for such exercise" it is in cases such as this where "the judgment was ultimately obtained by a deliberate and flagrant misrepresentation. [The judgment debtors] in

[45] DICEY, *supra* at 14-127-140; 14-151-160; CASTEL, *supra* at ¶14.8.

those circumstances are entitled to all the protection which this Court can extend to them."[46]

B. Civil Law Countries Recognize Injunctions Against Foreign Proceedings to Prevent Injustice

Antisuit injunctions are rare in civil law countries. Nonetheless, leading civil law jurisdictions recognize antisuit injunctions issued by courts in common law countries, and utilize other devices to enjoin foreign proceedings or otherwise achieve results similar to antisuit injunctions. To the extent courts in civil law countries are called upon to address an antisuit injunction such as that issued by the District Court in this case, they are well within their authority to recognize such an injunction under the balancing test that their doctrine of comity employs.

1. Germany

As a formal matter, antisuit injunctions are unknown to the German law of civil procedure. From a comparative and historical perspective this is probably due to the fact that, although the country had a federal system at the political level, since the end of the 19th century the courts operated in a unitary and closed system of civil procedure, including rules on jurisdiction and venue based on fixed connecting factors and a rigid *lis alibi pendens* rule. In other words, there was no

[46] *Ellerman Lines*, *supra* at 158.

room—and no need—for developing flexible judicial mechanisms such as antisuit injunctions.

However, this does not imply that German civil procedure would oppose antisuit injunctions granted by foreign courts. Moreover, there are functional equivalents in German law to address situations such as that faced by Chevron in this case. Procedural fraud is a tort in Germany and entails civil liability pursuant to Section 826 of the Civil Code.[47] This tort allows the injured party to be compensated financially for a loss suffered by the fraudulent allegations or actions, or to pursue injunctive relief against the tortfeasor to prevent it from enforcing the judgment obtained.[48] It also authorizes German courts to issue preliminary and conservatory measures with a view to ensuring that a potentially tortious act will

[47] Section 826 of the German Civil Code reads: "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage." available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000P823 (visited on June 27, 2011).

[48] Bundesgerichtshof [BGH] [Federal Court of Justice] 24 September 1987, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 101, 380 (Ger.); BGH Bundesgerichtshof [BGH] [Federal Court of Justice] October 1992, 46 NEUE JURISTISCHE WOCHENSCHRIFT 1993, 1270, 1272 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] 29 June 2005, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2005, 2991, 2994 (Ger.).

not occur. Such actions under Section 826 apply to both domestic and international proceedings.[49]

Today there is a broad consensus that abusive litigation abroad entails civil liability.[50] The party exposed to such abusive litigation need not wait for the judgment abroad, but may, in exceptional circumstances, pursue injunctive relief.[51] In the quite extraordinary circumstances of the present case, it can be expected that a German court would also grant injunctive relief, although the legal basis for such relief would be substantive rather than procedural.[52]

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[49] Moreover, according to the case law of the *Bundesgerichtshof*, Section 826 permits the reversal of a judgment which has become *res judicata* if this judgment was obtained by fraud or similar conduct. See JAUERNIG & HESS, ZIVILPROZESSRECHT [Civil Procedure] (30th ed. 2011), § 64, p. 260-62.

[50] GEIMER, INTERNATIONALES ZIVILPROZESSRECHT No. 1013 (6th ed., 2009); SCHACK, INTERNATIONALES ZIVILPROZESSRECHT No. 862 (5th ed., 2010).

[51] Oberlandesgericht [Düsseldorf] [Court of Appeal], 18 July 1997, 12 NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGS-REPORT 1998. Such actions are brought under Section 1004 of the Civil Code, which provides that "If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction." German Civil Code, Section 1004, available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000P1004 (visited on June 27, 2011).

[52] German substantive law is applicable pursuant to Article 4 (1) Regulation Rome I (Reg. 864/2007/EC) which refers to the law of the country where the harm occurs. As the harm would occur at the place of enforcement, German law applies.

2. France

As with Germany, antisuit injunctions are, as a formal matter, unknown in French civil procedure. Nonetheless, French courts have used devices that look very much like antisuit injunctions. Thus, in an insolvency case, the French Supreme Court (*Cour de Cassation*) issued an order to desist from judicial proceedings abroad sanctioned by an "*astreinte,"* or monetary penalty to be paid for each day of a party's non-compliance with the order.[53]

French courts also recognize and enforce antisuit injunctions issued by courts in the United States. The *Cour de Cassation* recently held that an antisuit injunction issued by a state court in Georgia to protect a contractual choice-of-court clause against one party's attempt to frustrate that agreement did not violate French public policy and was therefore capable of being recognized and enforced.[54]

3. Belgium

Although Belgian civil procedure does not provide for antisuit injunctions,[55] a Belgian appellate court recently held that an antisuit injunction aimed at blocking

[53] Cour de Cassation [Cass.] [French Supreme Court for Judicial Matters],1re civ., 19 November 2002, Bull. civ. I, No. 275 (Fr.).
[54] Cour de Cassation [Cass.] [French Supreme Court for Judicial Matters],1re civ., 14 October 2009, Bull. civ. I, No. 207 (Fr.).

discovery proceedings in the United States was, in principle, available but that, in the instant case, the urgency required for it to be granted had not been proven.[56]

C. European Union Law Allows Antisuit Injunctions Issued by or Against Non-EU States

The European Union's approach to antisuit injunctions makes a sharp distinction between antisuit injunctions by and between EU Member States and antisuit injunctions involving non-EU Member States. The Brussels I Regulation provides for a comprehensive system of jurisdiction, *lis pendens* and the recognition and enforcement of foreign judgments.[57] With respect to *lis pendens* and recognition, the Regulation only applies to proceedings pending in the courts of EU Member States and to judgments rendered by the courts of EU Member States.

As between the Member States of the European Union, antisuit injunctions are not permitted. Such remedies are considered to be incompatible with the

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[55] *Englebert*, La demande d'injonction de ne pas introduire ou de ne pas poursuivre une procédure à l'étranger (antisuit injonction) est-elle admissible en Belgique?, 2006 Revue de Droit Commercial Belge 973, 976.
[56] *Cour d'appel de Bruxelles,* 21 October 2005, Revue de droit commercial belge 2006, 970.
[57] Regulation (EC) 44/2001, O.J. 2001 No L 12/1.

mutual trust among the courts of EU Member States.[58] According to Article 27 of the Regulation, in parallel litigation involving the same cause of action, the second court seized of the matter must stay its proceedings until the court first seized has decided whether it has jurisdiction or not. In *Turner*, the European Court of Justice held that this provision prohibits one Member State from issuing an antisuit injunction which would interfere with another Member State's jurisdiction to determine the dispute. According to the principle of mutual trust, Member State courts are presumed to apply the Regulation in such a manner that there is no need for an injunction prohibiting a party from bringing a claim before the courts of another EU Member State.[59]

The same principle does not apply when dealing with antisuit injunctions issued by courts outside the European Union. In European legal literature, there is a consensus that antisuit injunctions against vexatious litigation in third countries are available in the courts of EU Member States.[60] Those remedies depend on the respective procedural and substantive laws of each Member State.[61]

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[58] *Turner v. Grovit*, 2004 ECR 2004 I-3565, nos 24 - 26; *Allianz SpA v. West Tanker* ECR 2009 I-663.

[59] RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION (2010), paras. 15.109 – 15.110.

[60] BRIGGS & REES, CIVIL JURISDICTION AND JUDGMENTS (3d ed. 2002), no. 5.37; FENTIMAN, *supra* at para 15.100; HESS, EUROPÄISCHES ZIVILPROZESSRECHT [The Law of European Civil Procedure] (2010), no. 5.17; HEINZE & DUTTA,

As discussed above, antisuit injunctions or their equivalent are recognized in both common law and civil law countries within the European Union. Thus, EU Law allows antisuit injunctions to be issued by courts in EU Member States to enjoin a party from bringing proceedings in non-EU Member States. It also allows courts in EU Member States to recognize antisuit injunctions issued by courts in non-EU Member States to the extent that they concern the recognition of judgments.

To the extent that courts in civil law countries are called upon to address an antisuit injunction such as that issued by the District Court in this case, there is nothing in EU law to prevent such recognition by courts in the civil or common law countries of the EU.

CONCLUSION

The District Court's antisuit injunction does not violate the international law principles of non-intervention, the exhaustion of local remedies, or adjudicatory

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PROZESSFÜHRUNGSVERBOTE IM ENGLISCHEN UND EUROPÄISCHEN ZIVILVERFAHRENSRECHT [Anti-suit Injunctions in the English and the European Laws of Civil Procedure] 13 Zeitschrift für Europäisches Provatrecht 2005, 428, 459; KROPHOLLER & V.HEIN, EUROPÄISCHES ZIVILPROZESSRECHT [European Civil Procedural Law,Commentary](9th ed. 2011); Article 1 Regulation Brussels 1, no 45.

[61] CUNIBERTI, NORMAND & CORNETTE, DROIT INTERATIONAL DE L'EXÉCUTION no. 704 (2011).

jurisdiction. Nor does it offend principles of international comity as defined in this Circuit. Indeed, a survey of the practice of common law and civil law jurisdictions around the world reveals that antisuit injunctions are widely recognized and accepted where necessary to prevent injustice. This broad acceptance makes it clear that the District Court's antisuit injunction to prevent the enforcement of a fraudulent judgment is fully consistent with principles of international comity.

Dated: June 30, 2011

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,656 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief of Business Roundtable and International Law Scholars as *Amici Curiae* to be served on all counsel of record in this appeal via the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1.

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