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S.I. STRONG*

Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States†

INTRODUCTION

One of the prevailing myths of transnational litigation is that U.S. courts are not only ready but extremely willing to use anti-suit injunctions to preclude parties from filing or pursuing proceedings elsewhere in the world.¹ In fact, anti-suit injunctions (sometimes referred to as “stays” of litigation) are considered an extraordinary remedy in the United States, and the general rule is that “parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until judgment is reached in one which can be pled as res judicata in the other.”² While this approach, often referred to as the “first to judgment” rule because the first judgment to be rendered can bind the second court pursuant to the principles of res judicata, has its problems (for example, it can be difficult at times to determine whether and to what extent a particular decision should be given res judicata effect in both cross-border litigation³ and

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2. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984). However, “[t]his general rule may not apply in in rem or quasi in rem actions, where jurisdiction arises solely from the presence of property within the forum.” Walter W. Heiser, Using Anti-Suit Injunctions to Prevent Interdictory Actions and to Enforce Choice of Court Agreements, 2011 UTAH L. REV. 855, 856 n.7 (citing Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 633 (5th Cir. 1996), and China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987)); see also Weaver, supra note 1, at 998–99 (distinguishing between in personam, in rem, and quasi in rem actions).

3. U.S. courts typically consider actual duplication of issues; whether there was a “full and fair opportunity” to litigate; the existence of a decision on the merits in the prior proceeding; waste; the protection of the successful litigant from harassment; policy reasons; “stability and unity in international litigation;” and whether “the rendering court was the more appropriate forum.”

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arbitration), it avoids what is thought to be the unseemly “race to the courthouse” that is an inherent element of a first-to-file approach (lis pendens).5

Although U.S. courts may be loath to issue anti-suit injunctions, it can be difficult to anticipate when such motions will be granted, since the standards in this area of law are both ambiguous and fragmented.6 While a comprehensive analysis of all the relevant issues is impossible within the scope of this National Report, the following discussion nevertheless seeks to provide an overview of the relevant issues and authorities.


6. See infra notes 16–77 and accompanying text.

This Report is divided into two Parts, one focusing on anti-suit injunctions in purely judicial matters and one focusing on anti-suit injunctions in matters involving arbitration. Although anti-suit injunctions involving arbitration are often considered analogous to those arising solely in litigation, some differences do exist.

I. ANTI-SUIT INJUNCTIONS AND LITIGATION

A. Background

The U.S. approach to anti-suit injunctions can be traced back to medieval England, when common law courts used writs of prohibition to stop both litigants and other tribunals from proceeding with particular actions. During the same time period, the courts of equity (which were separate from the common law courts) used anti-suit injunctions to achieve essentially the same results, although anti-suit injunctions were then and continue to be directed only at litigants, not at other tribunals. The different procedures arose because common law courts were considered superior to courts of equity, which meant that the chancellor (the judge in equity) had no power to control the conduct of common law judges. Instead, the chancellor only had the authority to direct litigants over whom he had jurisdiction.

The U.S. Supreme Court has held that “the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789,” and “[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction.” However, lower federal courts have recognized that “[t]he suitability of an anti-suit injunction involves different considerations from the suitability of other preliminary injunctions” since “[a]n anti-suit injunction, by its nature, . . . involve[s] detailed analysis of international comity.”

8. See Waguespack, supra note 7, at 294–95.
9. See id. Compliance with anti-suit injunctions is ensured through the court’s contempt powers. See Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Tech., Inc., 369 F.3d 645, 655 (2d Cir. 2004) (“A party may be held in civil contempt for failure to comply with a court order if ‘(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.’” (citation omitted)).
10. See Weaver, supra note 1, at 996.
11. See id.
13. E. & J. Gallo Winery, 446 F.3d at 990; see also Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 883–84 (9th Cir. 2012).
Interestingly, much of the law relating to anti-suit injunctions has been developed by the lower federal courts, since the U.S. Supreme Court has been silent on a number of important issues. The influence of the district (first instance) courts is also felt because the highly deferential standard of review adopted by federal circuit (intermediate appellate) courts in cases involving anti-suit injunctions means that many federal district court decisions are not appealed, even though an immediate appeal is available under 28 U.S.C. § 1292(a)(1).

The standards associated with granting an anti-suit injunction in the purely domestic setting are roughly the same as they are in the cross-border context, although courts tend to go into more detail in international disputes. As a result, this Report will analyze the relevant standards in the section focusing on international disputes. Before moving to that discussion, it is important to consider a few distinctive issues relating to anti-suit injunctions in purely domestic settings.

B. Anti-Suit Injunctions in the Domestic Setting

Analysis of domestic disputes (i.e., those arising between two or more U.S. courts) can be somewhat complicated because the U.S. Constitution gives state and federal courts concurrent jurisdiction over a variety of matters, thereby making parallel litigation acceptable from a constitutional perspective. The situation is further exacerbated by the fact that the U.S. Supreme Court has held that there is no automatic priority given to the case that is filed first.

As a result, anti-suit injunctions can be sought in four different scenarios: (1) a federal court could seek to enjoin proceedings in state court; (2) a federal court could seek to enjoin proceedings in another federal court; (3) a state court could seek to enjoin proceedings in a federal court; and (4) a state court could seek to enjoin proceedings in another state court. Each of these scenarios is considered in turn below. When doing so, it is important to recognize that although these scenarios are described as domestic disputes, that term only

14. See Weaver, supra note 1, at 997.
15. See 28 U.S.C. § 1292(a)(1) (2017); E. & J. Gallo Winery, 446 F.3d at 989 (discussing the standard of review); Weaver, supra note 1, at 997 (noting that stays of litigation are seldom reviewed as a form of interlocutory relief and that most battles therefore take place in trial courts, not appellate courts); see also infra notes 47–48 and accompanying text. The procedures relating to a grant of injunctive relief are outlined in various rules of court. See Fed. R. Civ. P. 65.
17. Klein v. Burke Constr., Co., 260 U.S. 226, 230 (1922) (giving no priority to the suit filed first in time (lis pendens) and stating: “The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded” (citations omitted)).
refers to the courts at issue. In many instances, these domestic scenarios involve parties from outside the United States, but not in a matter involving a U.S. and a foreign court.  

1. Federal Courts’ Ability to Issue Anti-Suit Injunctions

Although federal courts have the power to issue an anti-suit injunction to preclude parties from pursuing an action in another federal court, such scenarios arise relatively infrequently, since the Federal Rules of Civil Procedure require parties to bring any counterclaims arising out of the same fact pattern at the time the initial action is filed. The situation is different in cases involving state courts, since federal courts are extremely limited in their ability to enjoin state actions as a result of the Antisuit Injunction Act (AIA) of 1793. Only a few exceptions to this general rule exist (for example, federal courts may enjoin state courts in cases involving insolvency), since Congress must explicitly authorize any deviation from the standard prohibition. In those cases where it is not possible for two cases to proceed simultaneously, federal courts typically apply one of several abstention doctrines that allow them to refuse to exercise what would otherwise be proper jurisdiction over a matter so that the state court action can proceed unfettered.

2. State Courts’ Ability to Issue Anti-Suit Injunctions

While it may be difficult for a federal court to issue an anti-suit injunction regarding a case proceeding in state court, it is impossible for state courts to enjoin litigants from undertaking an in personam

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19. See Fed. R. Civ. P. 13(a); Treviño de Coale, supra note 5, at 81–82. Other procedures can also be used to limit conflicts between two pending federal actions. See infra notes 96–105 and accompanying text.


22. See Treviño de Coale, supra note 5, at 83. Several different types of abstention doctrines exist, depending on the facts of the case. See 17A Wright et al., supra note 7, §§ 4241–4248 (discussing abstention doctrines generally); Pfander & Nazemi, AIA, supra note 7, at 59–71 (discussing equitable restraint (as described in Younger v. Harris and subsequent cases), Burford abstention, and Colorado River abstention).
action in federal court, according to the U.S Supreme Court in *Donovan v. Dallas*.²³ However, state courts are allowed to issue anti-suit injunctions to preclude parties from pursuing actions in other U.S. state courts. Analytically, this latter situation is analogous to litigation involving a U.S. and foreign court, since U.S. states are considered to be separate sovereigns within the U.S. constitutional order.²⁴

3. Full Faith and Credit Clause

One of the most difficult issues to arise in the domestic setting involves whether and to what extent an anti-suit injunction issued by one U.S. court must be enforced by other U.S. courts pursuant to the Full Faith and Credit Clause of the U.S. Constitution.²⁵ This question can arise not only in purely domestic cases (i.e., those involving an anti-suit injunction issued by a U.S. court in contemplation of another U.S. action) but also in international cases (i.e., those involving an anti-suit injunction issued by a U.S. court in contemplation of an action outside the United States).

If the Full Faith and Credit Clause were to operate as it does with regard to other types of judgments, courts—not just parties—would be precluded from allowing suits to proceed in the face of a U.S.-generated anti-suit injunction.²⁶ The U.S. Supreme Court has never addressed this issue, and state courts are split on how to proceed. For example, some state courts uphold injunctions from sister courts based on the Full Faith and Credit Clause,²⁷ while other states decline to give effect to the anti-suit injunction in question or


²⁴. See Treviño de Coale, supra note 5, at 84–85. Because U.S. states are considered separate sovereigns, parties cannot transfer cases between the courts of different U.S. states. However, transfers between different U.S. federal courts are possible, since the U.S. federal system is considered a single sovereign system.

²⁵. The Constitution requires state and federal courts to respect decisions rendered by U.S. state courts. See U.S. Const. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); 28 U.S.C. § 1738 (2017) (describing the procedures to be used to give effect to sister-state judgments). State courts are required to respect federal judgments and proceedings as a matter of federal common law. See 18B WRIGHT ET AL., supra 7, § 4468 (stating that state courts must respect federal judgments in cases where the federal rule of decision requires reference to state law).

²⁶. Normally, an anti-suit injunction acts only on the parties, not the courts. However, the Full Faith and Credit Clause is directed to courts, not parties. See U.S. Const. art. IV, § 1.

do so pursuant to principles of comity rather than pursuant to the terms of the Full Faith and Credit Clause.28

C. Anti-Suit Injunctions in the International Setting

Although parties can seek anti-suit injunctions in purely domestic cases, such requests may be more likely to arise in matters involving a parallel proceeding in another country. Notably, the criteria used to evaluate the propriety of an anti-suit injunction are the same, regardless of whether the second suit arises inside or outside the United States. As a result, the following discussion can be considered to apply to both domestic and international disputes.

As the subsequent paragraphs demonstrate, U.S. courts can vary greatly in how they analyze requests for an anti-suit injunction. However, the primary difference does not arise between state and federal courts but instead between different federal circuits, with a similar division appearing among the individual states.

Before considering the cases in detail, it is helpful to understand when an anti-suit injunction may be sought. Factually, five different scenarios arise:

First, a litigant in the United States can seek to prevent the opposing party from bringing or continuing the same dispute in a foreign court. Second, related claims may be “consolidate[d] . . . in the moving party’s preferred forum.” Third, a party may initiate an action in the U.S. court, requesting both an antisuit injunction and a “declaration of nonliability,” if it fears impending foreign litigation. Fourth, upon completion of an action in a U.S. court, the prevailing party can prevent re-litigation of the same dispute in a foreign court. Fifth, the court may prevent a party from obtaining an antisuit injunction in a foreign court.29

U.S. courts approach all five factual variations in a relatively similar manner. For example, virtually all federal courts require (1) the parties and the issues in the U.S. matter to be the same as in the foreign proceeding (often referred to as the “gatekeeping inquiry”) and (2) the resolution of the dispute in the U.S. court to dispose of the dispute in the foreign court.30 While these criteria are relatively

29. Fry, supra note 3, at 1078 (citations omitted).
30. See Heiser, supra note 2, at 857; Waguesprack, supra note 7, at 296.
straightforward as an analytical matter, some problems can arise in practice. For instance, it is sometimes difficult to ascertain whether the issues in the two proceedings are identical, particularly when the suits are brought in different countries. In those types of situations, U.S. courts adopt a functional analysis to determine whether and to what extent the proceedings are the same.

Although all courts require these first two elements be present, they are not themselves sufficient to justify an anti-suit injunction. Several additional elements must also exist, although courts differ as to what those elements are. The primary difference involves “the level of deference afforded to international comity in determining whether a foreign antisuit injunction should issue.”

Federal appellate courts in the First, Second, Third, Sixth, Eighth, and District of Columbia Circuits have adopted what is known as the “conservative approach,” which holds that an anti-suit injunction is only permitted if “(1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity.” These circuits also agree that anti-suit injunctions should be used “sparingly and only in the rarest of cases.”

The conservative approach can be contrasted to the “liberal approach” adopted by federal courts in the Fifth, Seventh, and Ninth Circuits. The Federal Circuit has also used the liberal approach on at least one occasion, although the unique nature of Federal Circuit

31. See Heiser, supra note 2, at 868.
32. See Applied Med. Distrib. Corp. v. Surgical, Co. BV, 587 F.3d 909, 914 (9th Cir. 2009); E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 991 (9th Cir. 2006).
33. See Waguespack, supra note 7, at 295.
34. See id.
35. Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359 (8th Cir. 2007).
36. Id. See also Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004); Gen. Elec., Co. v. Deutz AG, 270 F.3d 144, 161 (3d Cir. 2001); Gau Shan, Co. v. Bankers Tr., Co., 956 F.2d 1349, 1355 (6th Cir. 1992); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35–37 (2d Cir. 1987); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–34 (D.C. Cir. 1984). Some commentators classify the U.S Court of Appeals for the First Circuit as a conservative jurisdiction, while others claim that it has its own category referred to as “traditional.” Waguesprack, supra note 7, at 298.
37. Gau Shan, Co., 956 F.2d at 1354.
38. See Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 882–83 (9th Cir. 2012); E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989–91 (9th Cir. 2006); Karada Bodas, Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 557, 566–67 (5th Cir. 2003); Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626–28 (5th Cir. 1996); Allendale Mut. Ins., Co. v. Bull Data Sys., Inc., 10 F.3d 425, 430–33 (7th Cir. 1993); Heiser, supra note 2, at 863; Waguespack, supra note 7, at 298.
jurisdiction and procedure could mean that a different test would be used in other circumstances.\textsuperscript{39}

Advocates of the conservative approach believe it is preferable to the liberal approach as a matter of policy because the former

(1) “recognizes the rebuttable presumption against issuing international antisuit injunctions,” (2) “is more respectful of principles of international comity,” (3) “compels an inquiring court to balance competing policy considerations,” and (4) acknowledges that “issuing an international antisuit injunction is a step that should “be taken only with care and great restraint” and with the recognition that international comity is a fundamental principle deserving of substantial deference.”\textsuperscript{40}

In contrast, the liberal approach “places only modest emphasis on international comity and approves the issuance of an antisuit injunction when necessary to prevent duplicative and vexatious foreign litigation and to avoid inconsistent judgments.”\textsuperscript{41} Under this test, the primary concern is to avoid “the inconvenience, expense, delay, and potential inconsistency associated with parallel proceedings” and “promote judicial efficiency.”\textsuperscript{42} As a result, the liberal approach values efficiency rationales more highly than international comity, with the conservative approach taking the opposite view.\textsuperscript{43}

Although the conservative and liberal approaches both enunciate respect for international comity, the notion of comity is somewhat difficult to describe. The classic U.S. definition dates back to the nineteenth century and states that comity reflects “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens.”\textsuperscript{44} More recent tests refer to “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”\textsuperscript{45} However, U.S. courts

\textsuperscript{39} See Sanofi-Aventis Deutschland GmbH v. Genentech, Inc., 716 F.3d 586, 590 (Fed. Cir. 2013) (involving arbitration relating to a patent license). The U.S. Court of Appeals for the Federal Circuit hears appeals on patent disputes and typically applies the law of the regional circuit in which the appeal would normally lie in matters that are not unique to patent law. See id. Sanofi-Aventis would have normally been heard in the Ninth Circuit, so the court applied Ninth Circuit precedent. See id. A different rule may apply in cases that come from a circuit following the conservative rule.

\textsuperscript{40} Goss, 491 F.3d at 360 (quoting Quaak, 361 F.3d at 18).

\textsuperscript{41} Id.

\textsuperscript{42} Heiser, supra note 2, at 859.

\textsuperscript{43} See id.

\textsuperscript{44} Hilton v. Guyot, 159 U.S. 113, 164 (1895).

have struggled to identify a practical standard to use in the context of anti-suit injunctions and have instead adopted “a protean concept of jurisdictional respect.”

A recent case from the U.S. Court of Appeals for the Ninth Circuit (a liberal jurisdiction) may help identify the relevant features of this admittedly nebulous test. According to an opinion rendered in 2012, it is not necessary to calculate the precise quantum of the injunction’s interference with comity, but only . . . estimate whether any such interference is so great as to be intolerable. Such a flexible, fact- and context-specific inquiry accords both with the posture of deference to the district court that abuse-of-discretion review requires generally, and with the resistance of comity in particular to precise measurement. After all, comity, as many courts have recognized, is “a complex and elusive concept.” It “is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”

Nevertheless, our cases . . . do provide some objective guidance as to factors that may inform our comity inquiry in the anti-suit injunction context. For instance, comity is less likely to be threatened in the context of a private contractual dispute than in a dispute implicating public international law or government litigants. At one pole, where two parties have made a prior contractual commitment to litigate disputes in a particular forum, upholding that commitment by enjoining litigation in some other forum is unlikely to implicate comity concerns at all. At the other pole, if (hypothetically speaking) the State Department represented to the court that “the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States,” then comity would presumably weigh quite heavily against an anti-suit injunction. Between these two poles, courts must in their discretion evaluate whether and to what extent international comity would be impinged upon by an anti-suit injunction under the particular circumstances. The order in which the domestic and foreign suits were filed, although not dispositive, may be relevant to this determination depending on the particular circumstances.

47. See Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886–87 (9th Cir. 2012).
The scope of the anti-suit injunction is another factor relevant to the comity inquiry. In *Laker Airways*, which we have recognized as a “seminal case[] on anti-suit injunctions,” the D.C. Circuit explained: “Comity teaches that the sweep of the injunction should be no broader than necessary to avoid the harm on which the injunction is predicated.”

The court also recognized that the availability of an anti-suit injunction has never depended “on the merits of the foreign suit under foreign law.”

Although these tests have been generated by federal courts, state courts tend to consider the same types of principles and split along the same philosophical lines. For example, Judge Moreno of the California Supreme Court has said:

State courts have the power to issue antisuit injunctions; they can restrain litigants from proceeding in suits brought in a sister state or in a foreign nation.

State courts typically issue antisuit injunctions only in exceptional circumstances, but the state courts employ various different tests to determine whether an antisuit injunction is appropriate. Texas, for example, enjoins foreign suits “sparingly, and only in very special circumstances.” Texas courts apply a four-part test to determine whether an antisuit injunction is appropriate: “1) to address a threat to the court’s jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation.”

In Illinois, a foreign action can be restrained if it “will result in fraud or gross wrong or oppression; a clear equity must be presented requiring the interposition of the court to prevent manifest wrong and injustice.” An antisuit injunction is not issued “merely because of inconvenience or simultaneous, duplicative litigation, or where a litigant simply wishes to avail himself of more favorable law.” Further, the mere fact that a party filing in another state might benefit from a more favorable law does not mean that the party

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48. *Id.* (citations omitted). *Compare* Applied Med. Distrib. Corp. v. Surgical, Co. BV, 587 F.3d 909, 921 (9th Cir. 2009) (where the “subsequent filing” of a foreign action “raises the concern that [one party] is attempting to evade the rightful authority of the district court,” enjoining foreign action would not “intolerably impact comity”), *with* E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 994 (9th Cir. 2006) (when parties have a forum-selection clause, “one party’s filing first in a different forum would not implicate comity at all”).

49. *Microsoft Corp.*, 696 F.3d at 888.

has “avoided or defeated the laws of Illinois so as to require equitable interposition.” Illinois courts inquire whether the jurisdiction of the Illinois trial court is threatened, and whether the litigant has “avoided or defeated the laws of Illinois” by filing suit in a sister state.

Similarly, in New York, the use of injunctive power to restrain litigation in a foreign court is “rarely and sparingly employed, for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal. Accordingly, an injunction will be granted only if there is danger of fraud or gross wrong being perpetrated on the foreign court.”

In California, the key criteria is that there must be an “exceptional circumstance that outweighs the threat to judicial restraint and comity principles.” As a result, Californian courts will only give precedence to the first suit to be filed when the duplicate proceedings are in courts that are of the “same sovereignty,” meaning two California state courts, not a court in California and a court in another U.S. state or a foreign jurisdiction.

D. Categories of Anti-Suit Injunctions

The difficulties associated with the standard anti-suit analysis suggest the need for an alternative means of predicting whether and to what extent a U.S. court will issue an anti-suit injunction. For example, it might be possible to focus on the nature of the case in question rather than on the terms of the test itself. Thus, Professor Walter Heiser has claimed that “[r]egardless of which approach the jurisdiction has adopted, U.S. courts are very likely to grant an international anti-suit injunction in two categories of cases: (1) where the foreign action is interdictory [rather than parallel] in nature, and (2) where the foreign action is contrary to an exclusive choice of court agreement.”

This phenomenon can easily be explained on policy grounds. For example, in the case of interdictory actions, U.S. courts find anti-suit injunctions to be an appropriate defensive mechanism because interdictory actions seek to “prevent any court—including the U.S. court and the foreign court—from effectively reaching the merits of the U.S. claim.” Conversely, in cases involving choice of court

51. Id. at 711–12 (citations omitted).
52. Id. at 707.
53. Id.
54. See Heiser, supra note 2, at 861.
55. Id. (citing Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 20 (1st Cir. 2004)). An interdictory action is one that seeks to terminate a U.S. claim brought in a U.S. court. Id.
56. Id.
agreements, the thought is that “[i]n issuing an anti-suit injunction to enforce an exclusive choice of court agreement . . . the impact on international comity would not be intolerable.”

Indeed, “[a]nti-suit injunctions may be the only viable way to effectuate valid forum selection clauses.”

Heiser has argued that anti-suit injunctions will be seen with decreasing frequency in the context of forum selection clauses as a result of the Hague Convention on Choice of Court Agreements (COCA). However, COCA has not yet been widely adopted, and its status in the United States is somewhat tenuous, given that it has not yet been ratified. As a result, it is unlikely that COCA will affect the incidence of anti-suit injunctions in the United States in the foreseeable future.

Some commentators have suggested that U.S. courts will see an increasing number of motions for anti-suit injunctions in the coming years based on an anticipated rise in the number of parallel proceedings driven by the desire by some parties to take advantage of U.S.-style discovery. However, that scenario does not appear likely, given that parties to foreign or international proceedings can obtain discovery in the United States pursuant to 28 U.S.C. § 1782. U.S. courts also may be less likely to be involved in parallel litigation because of the U.S. Supreme Court’s increasingly narrow approach to personal jurisdiction.

While most anti-suit analyses adopt a trans-substantive perspective, some issues arise only or particularly in a specific area of law or fact. Thus, Professor Jason Waguespack has claimed that “the probability of being confronted with a situation wherein the grant of an anti-suit injunction may be appropriate is higher in the admiralty

57. Id. at 867.
61. See COCA, supra note 59.
62. See Fry, supra note 3, at 1075.
63. See 28 U.S.C. § 1782 (2017) (“The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . .”), Of course, 28 U.S.C. § 1782 only allows discovery of those within the United States, whereas discovery associated with a case pending in a U.S. court can reach beyond U.S. borders. See id.; Fed. R. Civ. P. 26; Vivian Grosswald Curran, United States Discovery and Foreign Blocking Statutes, 76 La. L. Rev. 1141, 1144 (2016).
and maritime realm than might otherwise be the case in litigation generally” due to the highly internationalized character of admiralty and maritime law.65

Anti-suit injunctions may also be common in matters involving interstate or international insurance, since some types of claims (such as those involving toxic torts) can generate a substantial amount of litigation nationally and internationally.66 Although parties to insurance disputes often seek to minimize parallel proceedings by moving to have competing actions dismissed on the grounds of forum non conveniens, that mechanism can be somewhat unpredictable.67 As a result, anti-suit injunctions remain an important tool in the insurance litigator’s toolbox.

A third area that sees a significant number of anti-suit injunctions is insolvency law.68 While the UNCITRAL Model Law on Cross-Border Insolvency is meant to limit the need for anti-suit injunctions in the international realm by increasing cooperation between national courts, such orders are occasionally considered to be necessary.69 Interestingly, there appears to be something of a circuit split regarding whether and to what extent a bankruptcy court must apply the standard federal anti-suit analysis when exercising its equitable powers under section 105 of the U.S. Bankruptcy Code.70 On the one hand, in In re Lyondell Chemical, Co., the Bankruptcy Court for the Southern District of New York did not conduct the type of inquiry normally adopted by U.S. federal courts, which suggests that the bankruptcy regime should be considered sui generis.71 However, the U.S. Court of Appeals for the Third Circuit held in Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V. that the Bankruptcy Court for the District of Delaware

65. Waguespack, supra note 7, at 294.
68. See Weaver, supra note 1, at 994–95 (noting these actions can involve insurance insolvency).
70. See 11 U.S.C. § 105(a) (2017) (granting bankruptcy courts the power to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title”); Petts, supra note 7, at 76.
had acted improperly when granting an injunction under section 105 without analyzing the applicability of the standard test for foreign anti-suit injunctions.\textsuperscript{72} Of the two approaches, the one in \textit{Stonington Partners} appears most appropriate from a policy perspective, given that an anti-suit injunction could not only affect private litigation but could also upset a foreign country's entire insolvency regime.\textsuperscript{73} As a result, it appears likely that U.S. bankruptcy courts must consider generally applicable norms when contemplating an anti-suit injunction.\textsuperscript{74}

These are just some of the subject-matter areas in which anti-suit injunctions may be particularly popular. However, there are times when an anti-suit injunction may be impossible or inappropriate. For example, the U.S. Court of Appeals for the Eighth Circuit held in \textit{Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft} that a federal court has no power to grant an anti-suit injunction after a party has satisfied the judgment of the court, since the court no longer possesses subject-matter jurisdiction over the dispute.\textsuperscript{75} However, the U.S. Court of Appeals for the Second Circuit held precisely the opposite in \textit{Karaha Bodas, Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara}, noting that while "an anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered," . . . where one court has already reached a judgment—on the same issues, involving the same parties—considerations of comity have diminished force."\textsuperscript{76} Although these decisions appear irreconcilable, the U.S. Supreme Court has thus far declined the opportunity to resolve the circuit split.\textsuperscript{77}

E. Special Procedural Issues

Practical and theoretical debate involving anti-suit injunctions becomes particularly vexed in two particular settings: anti-anti-suit injunctions and anti-enforcement injunctions. These matters are discussed separately below, along with a brief outline of alternatives to anti-suit injunctions.

\textsuperscript{72} See 11 U.S.C. § 105(a); Stonington Partners, Inc. v. Lernout & Hauspie Speech Prosds. N.V., 310 F.3d 118, 125–30 (3d Cir. 2002).
\textsuperscript{73} See Petts, supra note 7, at 77.
\textsuperscript{74} See id. at 76.
\textsuperscript{75} 491 F.3d 355, 364–66 (8th Cir. 2007).
\textsuperscript{76} 500 F.3d 111, 120 (2d Cir. 2007) (citations omitted); Piccirillo, supra note 7, at 1410.
1. Anti-Anti-Suit Injunctions

Anti-anti-suit injunctions (i.e., injunctions issued in response to an anti-suit injunction issued by another court) have long captured the minds of those specializing in transnational litigation. The best-known U.S. case regarding anti-anti-suit injunctions is *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, which is also the seminal decision on anti-suit injunctions more generally.\(^7\) The dispute involved novel questions of both substance (particularly with respect to the extraterritorial effect of U.S. antitrust laws) and procedure.\(^7\)

The issue of an anti-anti-suit injunction arose after an English court issued an anti-suit injunction prohibiting Laker Airways from pursuing any action in the United States against certain British airlines.\(^8\) While the U.S. Circuit Court for the District of Columbia recognized that both the United States and the United Kingdom had proper jurisdiction over the transactions at issue, the court upheld the anti-anti-suit injunction issued by the U.S. District Court for the District of Columbia, stating that

> [appellants characterize the district court’s injunction as an improper attempt to reserve to the district court’s exclusive jurisdiction an action that should be allowed to proceed simultaneously in parallel forums. Actually, the reverse is true. The English action was initiated for the purpose of Reserving exclusive prescriptive jurisdiction to the English courts, even though the English courts do not and cannot pretend to offer the plaintiffs here the remedies afforded by the American antitrust laws.

Although concurrently authorized by overlapping principles of prescriptive jurisdiction, the British and American actions are not parallel proceedings in the sense the term is normally used. This is not a situation where two courts are proceeding to separate judgments simultaneously under one cause of action. Rather, the sole purpose of the English proceeding is to terminate the American action [which had been filed first].\(^8\)

As noted earlier in this Report, U.S. courts are often inclined to provide injunctive relief in matters involving interdictory actions, and *Laker Airways* proves that to be true even in the context of an anti-anti-suit injunction.\(^8\) Other federal courts have also issued anti-anti-suit injunctions to protect the court’s own jurisdiction,

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78. 731 F.2d 909 (D.C. Cir. 1984); see also Shaknes, supra note 7, at 96.
79. *Laker Airways, Ltd.*, 731 F.2d at 915.
80. See id.
81. Id. at 930.
82. See id. at 926–34; see also supra note 55 and accompanying text.
as reflected in the 2010 decision in *Teck Metals, Ltd. v.Certain Underwriters at Lloyd’s, London.* Anti-anti-suit injunctions have also arisen in state courts, as seen in a series of cases arising in the Texas Courts of Appeals.

2. Anti-Enforcement Injunctions

Another issue that has caused a number of conceptual problems for both scholars and practitioners involves anti-enforcement injunctions, which are meant to preclude a party from enforcing a judgment that has been rendered by another court. Although these types of injunctions do not arise very frequently, the U.S. Court of Appeals for the Second Circuit was asked in *Chevron Corp. v. Naranjo* to consider a worldwide anti-enforcement action in the context of the Lago Agrio dispute, which involved an $8.6 billion judgment issued by an Ecuadorian court against Chevron for environmental damage incurred between the mid-1960s and the late 1980s. When deciding the matter, the court distinguished between an anti-suit injunction and an anti-enforcement injunction and indicated that the two actions "bear at most a passing resemblance" to each other. In particular, the court indicated that the test used for anti-suit injunctions was not appropriate for anti-enforcement injunctions.

Rather than relying on the equitable powers of the court (as in cases involving anti-suit injunctions), the court in *Naranjo* considered whether any statutory basis existed for the requested relief and concluded that it did not. First, the court held that the Foreign Judgment Recognition Act "nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor." Furthermore, “[c] onsiderations of international comity provide additional reasons to conclude that the Recognition Act cannot support the broad injunctive remedy" at issue. Second, the court declined to grant injunctive relief under the Declaratory

86. 667 F.3d 232, 240 (2d Cir. 2012). The damages award was increased by an additional $8.6 billion in punitive damages, bringing the total amount pending to $17.2 billion. See *id.* at 236.
87. *Id.* at 243.
88. See also *id.* at 240–45.
89. *Id.*
90. *Id.*
91. *Id.* at 240 (distinguishing an unreported case from California federal court); see also *id.* at 244 (noting that the court was considering the New York version of the Foreign Judgment Recognition Act).
92. *Id.* at 242.
Judgment Act, since research had generated no cases "in which a court undertook to use the DJA to declare the unenforceability of a foreign judgment before the putative judgment-creditor could seek it."\(^9\)

The U.S. District Court for Oregon took a different approach in \textit{Linscott v. Vector Aerospace}, which involved a request to enforce a Canadian judgment.\(^{94}\) In this case, the court conducted a standard anti-suit analysis, using the liberal approach that had been adopted by the relevant federal appellate court, and simply held "that authority to enjoin foreign litigation encompasses the power to prevent the enforcement of a foreign judgment in the United States."\(^{95}\)

3. Alternatives to Anti-Suit Injunctions

One reason why U.S. courts grant anti-suit injunctions so rarely is because parties can achieve a similar result through a number of procedural alternatives. For example, a writ of prohibition precludes both a litigant and another tribunal from proceeding with a second action.\(^{96}\) To obtain a writ of prohibition, the movant must generally demonstrate that: "(1) that some court, officer, or person is about to exercise judicial or quasi-judicial power; (2) that the exercise of such power is unauthorized by law; and (3) that it will result in injury for which there is no other adequate remedy."\(^{97}\) Writs of prohibition are similar to anti-suit injunctions in that both are considered extraordinary remedies, so the standard of proof is quite high for each element of the judicial test for a writ of prohibition.\(^{98}\)

The need for anti-suit injunctions is also minimized or eliminated in federal–state disputes as a result of various abstention doctrines.\(^{99}\) These doctrines clarify the relative competence of state and federal courts within the U.S. constitutional framework and restrict the ability of federal courts to interfere with ongoing litigation in U.S. state courts.\(^{100}\)

A third way to minimize the need for anti-suit injunctions is through consolidation and joinder of cases, which is relatively easy in

\(^{93}\) \textit{Id.} at 245.

\(^{94}\) No. CV05-682-HU, 2006 WL 1310511, at *3 (D. Or. May 12, 2006).


\(^{96}\) See \textit{Waguespack}, \textit{supra} note 7, at 294–95.


\(^{98}\) See \textit{63C Am. Jur. 2d Prohibition} § 8.

\(^{99}\) See \textit{supra} note 22 and accompanying text.

\(^{100}\) See \textit{Treviño de Coale}, \textit{supra} note 5, at 83.
the United States under various rules of civil procedure.\textsuperscript{101} It is also possible for the judicial panel on multi-district litigation (MDL) to coordinate or consolidate two or more federal cases under 28 U.S.C. § 1407(a) if the disputes involve common questions of fact and if doing so increases the convenience of the parties and promotes the “just and efficient conduct” of the actions.\textsuperscript{102}

Although these procedures are useful, they are not used all that frequently. Instead, the most common alternative to an anti-suit injunction is an order to dismiss or stay a case based on the doctrine of forum non conveniens, a discretionary device that allows a U.S. court to decline would otherwise be proper jurisdiction over a matter so as to allow another court, either inside or outside the United States, to hear the dispute.\textsuperscript{103} According to leading U.S. Supreme Court precedent and subsequent cases, the doctrine is invoked sparingly, and ruling on a forum non conveniens motion requires the district court to address three major considerations.

First, forum non conveniens is proper only when an adequate alternative forum is available. In other words, a court will not dismiss if the parties cannot seek justice in the courts of another sovereign.

Second, a balance of the relevant interests must weigh heavily in favor of dismissal to justify invocation of forum non conveniens. Here, the Gulf Oil case set forth a litany of nonexclusive “public interest” and “private interest” factors to be balanced. . . . On the private side, among other things, courts assess the relative access to sources of proof and availability of compulsory process. On the public side, for instance, they will look to administrative difficulties in hearing the case and enforcing a judgment. . . .

Third, the court must determine the degree of deference it should accord the plaintiff’s choice of forum. . . . [T]he degree of deference may vary according to the facts of the case.

Despite the identification of three major areas of inquiry, most courts appear to say that forum non conveniens


\textsuperscript{102} See 28 U.S.C. § 1407(a).

\textsuperscript{103} See Restatement (Second) of Conflict of Laws § 84 (Am. Law Inst. 1971) (“A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff”); 14D Wright et al., supra note 7, § 3828; Fry, supra note 3, at 1075; Treviño de Coale, supra note 5, at 81–82.
involves a two-step analysis, consisting of the first two points noted above. It is important to appreciate, though, that these courts do engage the third factor. . . . Most courts thus appear to inquire into the level of deference as part of their consideration of the *Gulf Oil* factors.104

While there are some variations among the different circuit courts (for example, the U.S. Court of Appeals for the Second Circuit begins with an analysis of the deference due to the plaintiff’s choice of venue), the factors are relatively common throughout the federal system.105

II. ANTI-SUIT INJUNCTIONS AND ARBITRATION

The relationship between anti-suit injunctions and arbitration has become increasingly important in recent years, although most of the contemporary controversy involves the interplay between arbitration and European Union law, particularly the Brussels I Regulation (now Brussels I Recast).106 However, this is still a comparatively undeveloped area of law in the United States, likely because the strong policy in favor of international arbitration leads relatively few parties to challenge the arbitral forum.107 Although much of the material contained in the preceding section can be applied to anti-suit injunctions in matters relating to arbitration, the arbitral analysis reflects a few distinctive elements that need to be discussed separately.108

Anti-suit injunctions can interact with arbitration in four different ways. First, a party may ask a court to issue an anti-suit

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injunction to preclude a litigation that seeks to go forward in contravention of a valid arbitration agreement. Second, a party may ask a court to issue an anti-arbitration injunction to preclude an arbitration from going forward. Third, a party may request an arbitral tribunal to issue an anti-suit injunction. Fourth, a party may ask a court to issue an anti-suit injunction to disallow parallel proceedings regarding enforcement of a foreign arbitral award. Each of these scenarios is considered in turn.

A. Anti-Suit Injunctions Regarding Litigation in the Face of an Arbitration Agreement

U.S. courts can issue anti-suit injunctions in aid of arbitration pursuant to the Federal Arbitration Act or a relevant state analogue.\footnote{109} Requests to enjoin litigation in contravention of a valid arbitration agreement are analytically similar to requests for an anti-suit injunction in cases involving an exclusive choice of court agreement and are thus relatively likely to be granted.\footnote{110} However, some commentators suggest that the standard litigation-oriented test is problematic to the extent it focuses on the interests of the foreign state, since international commercial arbitration is more properly considered as a private contractual matter.\footnote{111} While concerning, this potential difficulty is often offset in practice because those courts that have considered motions for an anti-suit injunction in the context of arbitration tend to do so in light of the strong pro-arbitration policy that exists in the United States, particularly in international cases.\footnote{112}

As strong as that policy is, it does not guarantee the approval of all requests for an anti-suit injunction. For example, if a party has made no attempt to evade an arbitral forum but is instead seeking

\footnote{109. See 9 U.S.C. §§ 16(a)(2), 208 (2017); Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-28 (Am. Law Inst., Tentative Draft No. 4, 2015); Mosimann, supra note 108, at 39. Most international and interstate arbitrations will proceed under the Federal Arbitration Act, as opposed to a state arbitration statute, but parties may choose to rely on state instead of federal law if they wish. See Strong, supra note 4, at 15.}

\footnote{110. See Mosimann, supra note 108, at 39; see also supra notes 55–58 and accompanying text.}

\footnote{111. See Mosimann, supra note 108, at 39. Analyses involving investment (treaty-based) arbitration likely lie somewhere in the middle, since they involve both state interests and private interests. See Seriki, supra note 106, at 132–33 (noting that although some states have sought to preclude arbitrations proceeding under an investment treaty, including various bilateral investment treaties (BITs) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), “arbitral tribunals have remained steadfast in their willingness to protect the arbitration agreement and/or BIT in question”).}

\footnote{112. See Paramedics Electromedica Comercial, Ltda., v. GE Med. Sys. Tech., Inc., 369 F.3d 645, 654 (2d Cir. 2004); Strong, supra note 4, at 42–44; Swanson, supra note 7, at 416–19; see also Mitsubishi Motors Corp., 473 U.S. at 638–40 (noting the strong pro-arbitration policy in international disputes).}
the assistance of a foreign court on a question of law, a court may decide that an anti-suit injunction is inappropriate.\footnote{See LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194, 200 (2d Cir. 2004).}

Courts may also refuse to issue an anti-suit injunction if there is some dispute regarding the validity of the alleged arbitration agreement, as seen in \textit{Dependable Highway Express, Inc. v. Navigators Insurance, Co.}, which involved a dispute about the validity of an arbitration agreement naming London as the arbitral seat.\footnote{See 498 F.3d 1059, 1062 (9th Cir. 2007).} After Dependable filed a claim against Navigators in California state court, Navigators sought and received an anti-suit injunction from the English Commercial Court to preclude Dependable from pursuing litigation in the United States, based on the language of the arbitration agreement in question.\footnote{See id. Navigators also removed the case from state to federal court. See id. at 1063.} Navigators then asked the U.S. District Court for the Central District of California to issue a stay so as to allow the arbitration to go forward in London.\footnote{Id.} Although the district court granted that request, issuing what was effectively an anti-anti-suit injunction, the U.S. Court of Appeals for the Ninth Circuit lifted the stay and remanded the case, indicating that the district court must first determine whether the arbitration agreement is valid.\footnote{See id. at 1068.}

In so doing, the appellate court demonstrated its willingness to apply the same sort of evaluative considerations in arbitration-related cases as in those that were purely judicial in nature.\footnote{Id.} For example, the court indicated that its refusal to respect the English anti-suit injunction was based on the notion that “the express purpose of an anti-suit injunction, be it offensive or defensive, is to block litigation in a separate forum. Comity is not required where the British action was filed after the U.S. action for the sole purpose of interfering with the U.S. suit.”\footnote{Id.}

In terms of timing, anti-suit injunctions involving litigation in the face of an arbitration agreement may arise most frequently at the beginning of a dispute, when it is necessary to protect the jurisdiction of the arbitral tribunal.\footnote{See MOSIMANN, supra note 108, at 39 (noting “there is a trend ... to use anti-suit injunctions to enforce arbitration agreements”); STRONG, supra note 4, at 31; S.I. Strong, \textit{Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration}, 2012 \textit{J. Disp. Resol.} 1, 14.} When evaluating such matters, courts must consider their affirmative duty to enforce arbitration
agreements under Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).  Although Article II is most frequently invoked to require courts to send a matter pending before them to arbitration, it can also be used to support anti-suit injunctions intended to protect arbitral proceedings, as the English Commercial Court did in Dependable Highway Express, Inc. However, a different outcome is likely necessary if an anti-suit injunction is sought at the end of the arbitral proceeding, as discussed below.

B. Anti-Suit Injunctions Regarding Arbitration (Anti-Arbitration Injunction)

Although many courts use the term “anti-suit injunction” to cover a range of procedural remedies, an anti-suit injunction is technically different than an anti-arbitration injunction, which involves an order from the court indicating that the parties should not pursue arbitration of a particular matter. Although relatively few U.S. courts have considered anti-arbitration injunctions, the issue is discussed in the draft Restatement (Third) of the U.S. Law of International Commercial Arbitration, which states:

A court may enjoin a party to an international arbitration agreement from proceeding with an arbitration to the extent that:

(a) the party seeking the injunction establishes a defense to the enforcement of the agreement under §§ 2-12 through 2-21; and

121. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(1), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention] (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”); see also id. art. II(3) (“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”). With 157 state parties, the New York Convention is one of the most successful commercial treaties in history. See New York Convention Status, UNCTRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

122. See New York Convention, supra note 121, art. II; Dependable Highway Express, 498 F.3d at 1068.

123. See New York Convention, supra note 121; Strong, supra note 120, at 14–15; see also infra notes 141–45 and accompanying text.

124. Some decisions can nevertheless be found. See Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-29, rep. note (b)(iv)–(v) (Am. Law Inst., Tentative Draft No. 4, 2015) (citing cases); Strong, supra note 4, at 44 (same).
(b) issuance of an injunction is appropriate after consideration of the following:

(1) the seat of the arbitration;

(2) whether circumstances exist that raise substantial and justifiable doubt about the integrity of the arbitration proceeding; and

(3) other principles applied by the forum court in determining whether to grant injunctive relief.125

According to the Restatement, anti-arbitration injunctions are an extraordinary form of relief that should be granted sparingly.126 Furthermore, U.S. courts should only issue an anti-arbitration injunction if the arbitration is seated in the United States, since the court at the seat of arbitration is generally considered to be the only court capable of governing arbitral proceedings.127

U.S. cases involving anti-arbitration injunctions can generally be broken into two categories. One set of cases involves allegations that the purported arbitration agreement is unenforceable,128 while the other set of cases involves multiple arbitrations, where one of those proceedings is said to violate a valid arbitration agreement.129 In considering these issues, U.S. courts analyze the interplay between the New York Convention, the Federal Arbitration Act or relevant state analogue, and case law, which can provide an important gloss on statutory provisions.130

C. Anti-Suit Injunctions Issued by an Arbitral Tribunal

Although parties seeking to limit litigation in the face of an arbitration agreement often seek an anti-suit injunction from a court,

125. Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-29. The full Restatement has yet to be finally approved by the American Law Institute. Restatements are of course only persuasive authority unless and until adopted by a particular court for a particular jurisdiction.

126. See id. cmt. d. Authority for this type of injunction is implicitly found in 9 U.S.C. § 16(a)(2) (2017).

127. See Belize Soc. Dev., Ltd. v. Government of Belize, 668 F.3d 724, 731 (D.C. Cir. 2012); Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-29 cmt. d; see also Strong, supra note 4, at 33–36 (discussing the concept of primary and secondary jurisdiction in terms of both choice of law and choice of forum).

128. See URS Corp. v. Lebanese, Co. for Dev. & Reconst. of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199, 207–08 (D. Del. 2007) (noting that under the arbitration agreement and rules in question, the question of arbitrability was for the arbitral tribunal).


130. See New York Convention, supra note 121; 9 U.S.C. §§ 201–208 (concerning actions arising under the New York Convention); Farrell, 2011 WL 1085017, at *1; URS Corp., 512 F. Supp. 2d at 207–08; Strong, supra note 4, at 14–18.
they also sometimes seek a similar order from the arbitral tribunal. At this point, there are very few U.S. decisions discussing the propriety of an anti-suit injunction issued by an arbitral tribunal, although the reason for that lacuna is unclear. For example, it may be that judges seldom discuss anti-suit injunctions issued by arbitrators because few such orders are actually issued. Alternatively, the shortage of judicial analysis could be explained by reference to the confidential nature of arbitration. Finally, the issue may be one of timing. Many anti-suit injunctions are sought at the beginning of a dispute, prior to the formation of the arbitral tribunal. As a result, courts have often been the only possible venue for a request for an anti-suit injunction. However, many arbitral institutions have recently adopted mechanisms that allow for the creation of an expedited tribunal to assist with emergency preliminary relief, which suggests that the international community may see more anti-suit injunctions issued by arbitral tribunals in the coming years.

Despite the minimal amount of judicial discussion to date, there is little doubt that such measures are proper as a matter of arbitration law. Arbitrators are often explicitly authorized to provide various types of injunctive relief through language contained in the arbitration agreement or in the arbitral rules that are chosen to govern the proceedings, and a number of jurisdictions, including the United States, give arbitral tribunals concurrent jurisdiction with courts over injunctive relief in arbitration as a matter of national law.

One question that has not yet been addressed by U.S. courts is whether and to what extent an anti-suit injunction issued by an arbitral tribunal is enforceable under the New York Convention. The problem is that the New York Convention only applies to “final” arbitral awards and “partial final awards,” meaning those awards that are final as to some aspect of the arbitral dispute, and it is not clear whether an anti-suit injunction issued by an arbitral tribunal

131. See Mosimann, supra note 108, at 175.
132. See Strong, supra note 4, at 42–44.
133. See id.
135. Sometimes parties will have no alternative but to seek an anti-suit injunction from the arbitral tribunal, as in cases where the lex arbitri does not provide courts with the authority to issue anti-suit injunctions. See Mosimann, supra note 108, at 173; Strong, supra note 4, at 98.
136. See Born, supra note 106, at 2429.
137. See 9 U.S.C. §§ 16(a)(2), 208 (2017); Strong, supra note 4, at 61.
138. See New York Convention, supra note 121, art. III; Mosimann, supra note 108, at 172.
can be framed in those terms. While no U.S. court in an international dispute has yet decided this issue, U.S. courts have enforced various types of arbitral injunctions in the domestic setting.

D. Anti-Suit Injunctions Regarding Enforcement of an Arbitral Award

The last item to discuss involves whether and to what extent an anti-suit injunction can be used to preclude enforcement of an arbitral award. These types of actions are extremely problematic as a matter of policy, since the international arbitral regime, as reflected in the New York Convention and related international instruments, clearly contemplates the possibility that parties may seek enforcement of a foreign arbitral award in multiple jurisdictions at the same time.

The U.S. Court of Appeals for the Fifth Circuit addressed this issue in Karaha Bodas, Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, noting that

[bly allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the [New York] Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award. For instance, Article (V)(1)(d) enables a losing party to challenge enforcement on the grounds that the arbitral panel did not obey the law of the arbitral situs, i.e., the lex arbitri, even though such a claim would undoubtedly be raised in annulment proceedings in the rendering State itself. In addition, this case illustrates that enforcement proceedings in multiple secondary-jurisdiction states can address the same substantive issues.]

The increasing use of anti-suit injunctions as a tactical measure worldwide has led at least one U.S. court to consider the need

139. See New York Convention, supra note 121, art. V(1)(e) (allowing nonenforcement of awards that “have not yet become binding”); Strong, supra note 4, at 62–63.
140. See Strong, supra note 4, at 63; see also Arrowhead Glob. Sols., Inc. v. Datapath, Inc., 166 F. App’x 39, 43 (4th Cir. 2006).
141. See Seriki, supra note 106, at 132.
142. See New York Convention, supra note 121, art. V(1)(e) (noting that an arbitral award may be refused enforcement if it “has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”); id. art. VI (noting suspension of enforcement proceedings in a secondary jurisdiction pending a set-aside proceeding in the primary jurisdiction is permitted but not required); Strong, supra note 4, at 63; Strong, supra note 120, at 13–15; Swanson, supra note 7, at 441 (indicating “[c]ourts should generally not enjoin an action to annul an award brought in a primary jurisdiction” since “[n]either the New York Convention nor the arbitration agreement provides any reason that special deference should apply to secondary courts”).
to impose an anti-anti-suit injunction in response to an anti-enforcement injunction relating to an arbitral award.\textsuperscript{144} In that case, the U.S. court declined to issue such an injunction, based on the fact that anti-suit injunctions are meant to protect the court’s jurisdiction and the anti-enforcement injunction issued by the other court did not affect the jurisdiction of the U.S. court, since the U.S. court had already entered judgment confirming the arbitral award in question and authorizing any necessary enforcement measures such as attachment of the award-debtor’s property.\textsuperscript{145} However, different facts may generate a different outcome.

\textbf{Conclusion}

As the preceding suggests, U.S. law concerning anti-suit injunctions is extremely complicated with respect to proceedings involving both litigation and arbitration. Although a strong consensus exists that this type of relief should be considered extraordinary and available in only the rarest of cases, there are times when U.S. courts and arbitral tribunals will issue such orders.

\textsuperscript{144} See \textit{BCB Holdings, Ltd.}, 232 F. Supp. 2d at 34–35.

\textsuperscript{145} See \textit{id.}