Kluwer Arbitration Blog

Antisuit Injunctions and International Law

Roger Alford (General Editor) (Notre Dame Law School) · Tuesday, July 5th, 2011

Last week I had the pleasure of working with Business Roundtable and a wonderful group of international law scholars–Rudolf Dolzer, Burkhard Hess, Herbert Kronke, Julian Ku, Davis Robinson, Christoph Schreuer, and Janet Walker–on a Second Circuit amicus brief addressing the propriety of antisuit injunctions under international law. The amicus brief addresses an appeal of Judge Kaplan of the Southern District of New York's preliminary injunction enjoining Ecuadorians and their lawyers from enforcing the $18 billion Ecuadorian judgment, concluding that their was a substantial likelihood that Chevron would prevail in its argument that the judgment was procured by fraud. Of course, the fact that an ICSID tribunal has issued an antisuit injunction order against Ecuador supports our position that such injunctions are permitted under international law. Here's our summary 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.
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> 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.
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> 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.
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> 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.

This brief was written largely in response to another amicus brief written by a group of international law professors supporting the Ecuadorian defendants-appellants, led by Donald Anton of the Australian National University College of Law. Here's their summary of argument:

> This case involves important international legal issues associated with the exercise of adjudicatory jurisdiction by the District Court in this case. The District Court's failure to consider and apply international legal obligations binding on the United States has resulted in reversible error. The preliminary injunction should be dissolved and the case dismissed.
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> First, the preliminary injunction granted in this case is framed in such a way so as to violate the ancient customary international law principle of nonintervention. It does this by illegally intruding into Ecuador's external domestic affairs by, in essence, prohibiting any other state from independently ruling on the issue of recognition and enforcement of the Ecuadorian judgment against Chevron.
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> Second, the assertion of jurisdiction by the District Court is prohibited by the customary international law limitation of reasonableness because the defendants in this case lack any internationally legally significant contact with the United States.
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> Third, the District Court's preliminary injunction cannot stop Ecuadorian defendants from seeking to enforce the judgment outside the United States. It cannot compel any other state from assuming jurisdiction and deciding for itself the issues of recognition and enforcement. It is accordingly a futile order and should be dissolved as improvidently granted.
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> Fourth, the District Court's injunctive relief offends basic standards of international comity because the preliminary injunction high handedly purports to stake out exclusive world-wide jurisdiction.
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> Fifth, the exhaustion of local remedies by Chevron in Ecuador is required by international law. Because the judgment in Ecuador is not final, the District Court should not have accepted jurisdiction.

Of course, the central focus of the Second Circuit's decision will not be international law, but rather the proper application of Second Circuit precedent on antisuit injunctions. Peter "Bo" Rutledge of Georgia Law School has a great amicus brief on behalf of the U.S. Chamber of Commerce addressing that issue. The briefs of the Ecuadorian defendants-appellants is here and Chevron's brief is here.

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