

NOTE

THE IMPACT OF WEST TANKERS ON PARTIES' CHOICE OF A SEAT OF ARBITRATION

Daniel Rainert[†]

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[†] B.A., University of Pennsylvania, 2005; Candidate for J.D., Cornell Law School, and Master en Droit, Université Paris 1 Panthéon-Sorbonne, 2011. I am indebted to Professor John J. Barceló III for exposing me to *West Tankers* and providing excellent advice and insight, as well as Josephine Djekovic, Zsaleh Harivandi, Colleen Holland, and all the other members of the *Cornell Law Review* for guiding this Note to publication. Special thanks go to my parents, Brad and Joan, my sister, Julia, the rest of my family, and my friends for their constant support and encouragement.

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INTRODUCTION

As more and more transnational agreements are formed, the need for dependable, impartial dispute resolution has never been greater. This need will only increase as the global economy becomes more integrated and improved communication technology lessens the importance of face-to-face dealings between commercial parties. If a party does not reflect carefully on what might go wrong with a transnational agreement and the cost of settling disputes, the heavy burden of litigating in unfamiliar territory has the potential to outweigh the prospective benefits of contracting with foreign parties. Parties of equal bargaining power that enter into transnational agreements are understandably loath to submit their disputes to the public courts of one party's home jurisdiction out of fear of, *inter alia*, bias, unfamiliar procedure, and the public disclosure of court proceedings. Arbitration, in theory at least, offers a neutral decision-making structure that preserves confidentiality and allows parties to choose the procedure to be followed and seek enforcement of arbitral awards worldwide.

Often, when negotiating agreements, overly optimistic parties do not dedicate sufficient time to thinking about how to settle disputes, should they arise. Such discussion usually takes place after the substantive details of a contract have been hammered out. If the interaction between parties has been contentious, they may not think it worth their time to discuss a deviation from a standard arbitration clause or submission to jurisdiction. On the other hand, if discussions have been friendly or in the context of an ongoing business relationship, parties may think that insisting upon specific provisions related to contract breakdown would show a lack of confidence that could damage the parties' relationship. Another consideration is that parties may simply be worried about the additional legal fees that they will incur if they negotiate details regarding potential disputes. For these reasons, parties choosing to submit their disputes to arbitration often do not construct their arbitration agreements in a careful manner. When disputes do arise, this lack of planning can lead to protracted legal battles that drag parties through not only arbitration but also public litigation in multiple forums, precisely the result that the parties were seeking to avoid by agreeing to arbitrate.

A party with savvy counsel sensitive to the current norms of arbitration across multiple jurisdictions will know the value of putting forth the effort necessary to craft an arbitration agreement that will, to the greatest degree possible, keep potential future disputes out of courts and in arbitration. The global standardization of the enforcement of arbitration agreements and arbitral awards, largely due to the

New York Convention,¹ provides a common starting point to understand how to go about forming an effective arbitration agreement. Nevertheless, due to the varied nature of countries' substantive and arbitration laws, parties must carefully consider their choices of governing substantive law, the law governing their arbitration agreement, and the seat of arbitration.

Parties' choice of a seat of arbitration² has especially important ramifications with respect to the law to be applied to disputes that may arise. As reflected in the New York Convention,³ the jurisdiction in which the seat of arbitration lies determines the *lex arbitri* to be applied, meaning that it is that jurisdiction's courts that will determine the existence, validity, and scope of the parties' arbitration agreement. Thus, the choice of a seat of arbitration, in addition to the choice of substantive law and the law to be applied to the arbitration agreement, will determine the tools available to a party to enforce an arbitration agreement and the costs associated with dispute resolution.

An antisuit injunction to enforce an arbitration agreement is one such tool that has been the subject of intense debate both between civil- and common-law jurisdictions and among circuit courts of the United States. When used to enforce an arbitration agreement, this type of injunction usually arises under the following scenario: Parties A and B enter into a contract that includes an agreement to settle any disputes in arbitration to be held in Country 1, which is often a neutral country. Party B, either ignoring the arbitration agreement or contesting its existence, validity, or scope, brings or threatens to bring a parallel proceeding in Country 2, which is likely to be Party B's home jurisdiction. In response, Party A petitions a court of Country 1 to enjoin Party B from continuing with its action in Country 2 on the basis of their arbitration agreement. Country 1's court may issue an antisuit injunction against Party B, meaning that it will hold Party B in contempt if it continues its Country 2 action. If Party B ignores the

¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. As of November 27, 2009, there were 144 countries party to the Convention. United Nations Comm'n on Int'l Trade Law, Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 27, 2009).

² "Seat" of arbitration should not be taken literally; it is possible for non-U.S. parties to choose New York as their "seat" of arbitration and have non-U.S. attorneys represent them in arbitral proceedings outside the United States. Thus, the choice of a "seat" can be more simply understood as a choice of *lex arbitri*.

³ See New York Convention, *supra* note 1, art. V(1)(e).

injunction, it puts any assets or future business prospects that it may have in Country 1 at risk.⁴

It is important to note from the outset that an antisuit injunction is not, strictly speaking, addressed to a foreign court; hence, it is not a *direct* interference with that court's jurisdiction. The effect of an anti-suit injunction to enforce an arbitration agreement is to encourage the party that brings a parallel action in violation of the arbitration agreement to submit to arbitration and to save the party seeking the injunction the costs of litigating that parallel action. An enjoined party may, at the risk of exposing itself to sanctions in the enjoining court's country, initiate a parallel proceeding in a foreign court. In practice, of course, this is a technical difference that does not quell the outcries of unjustifiable usurpation that courts of jurisdictions opposed to antisuit injunctions express. Even U.S. courts have recognized that antisuit injunctions "effectively restrict[] the jurisdiction of the court of a foreign sovereign."⁵

An examination of a case that the European Court of Justice (ECJ) recently decided, *Allianz SpA v. West Tankers Inc.*,⁶ better known simply as *West Tankers*, brings to the fore the fundamentally opposed views that civil- and common-law jurisdictions hold of antisuit injunctions in the context of international commercial arbitration. In February 2007, the United Kingdom's House of Lords referred to the ECJ the question of whether antisuit injunctions to enforce arbitration agreements were compatible with the Brussels Regulation.⁷ In September 2008, the Advocate General of the ECJ recommended that the court answer this question in the negative.⁸ In February 2009, the ECJ

⁴ The focus of this Note is the issuance of antisuit injunctions by courts as opposed to arbitral tribunals. Arbitral tribunals, depending on the power that parties choose to grant them, may issue antisuit injunctions to enforce arbitration agreements and prevent parallel proceedings. See generally Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, in INT'L ARBITRATION INST., ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 115-28 (Emmanuel Gaillard ed., 2005) (providing a brief overview of arbitrators' power to issue antisuit injunctions). Parties may, however, encounter difficulties in attempting to enforce antisuit injunctions issued by arbitral tribunals. See *id.* at 128-29 ("[A]rbitrators should always exercise utmost care before issuing anti-suit injunctions, as the effect of these anti-suit injunctions may be more harmful than the problem they are seeking to resolve. This will be the case, in particular, if the measure ordered prevents a party from exercising legitimate rights or if it leads to the annulment of the award on the ground that the arbitral tribunal has been the judge in its own cause and, hence, lacked impartiality.").

⁵ *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (citing *United States v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985)).

⁶ Case C-185/07, 2009 E.C.R. ___, 2009 WL 303723.

⁷ Council Regulation No. 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) [hereinafter Brussels Regulation]; *West Tankers Inc. v. Ras Riunione Adriatica di Sicurtà SpA* (The "Front Comor"), [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391, [25].

⁸ Opinion of Advocate Gen. Kokott, Case C-185/07, *Allianz SpA v. West Tankers Inc.*, 2009 E.C.R. ___, 2008 WL 4089512, para. 74.

followed the Advocate General's recommendation, putting an end to this common practice of English courts, at least with respect to other member states of the European Union.⁹ The ECJ's decision in *West Tankers* is consistent with the civilian view of antisuit injunctions as interference by one state's courts with the jurisdiction of another's and thus offensive to international comity.¹⁰

Looking to the other side of the Atlantic, the consensus is clear: antisuit injunctions are among the tools that a party may use to enforce an arbitration agreement.¹¹ This is the typical common-law outlook that the House of Lords fruitlessly espoused in *West Tankers*.¹² A divergence among U.S. courts, however, lies in the weight that courts should give to the "liberal federal policy favoring arbitration agreements."¹³ The circuit courts have enumerated two relatively clear but different standards to determine generally when a party may be enjoined from pursuing a parallel proceeding in a foreign jurisdiction.¹⁴ However, neither camp of circuit courts has pronounced a standard specifically tailored to the enforcement of arbitration agreements.

Every country containing a significant financial center has an interest in providing incentives for parties to seat arbitration within its borders and apply its law. The availability of antisuit injunctions to

⁹ *West Tankers*, 2009 E.C.R. ___, 2009 WL 303723, para. 34.

¹⁰ See John J. Barceló III, *Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2007, at 107, 107 (Arthur W. Rovine ed., 2008) ("[C]ivil law jurisdictions generally find anti-foreign-suit injunctions offensive, even violative of international law."). Since the founding of the ECJ, when inconsistencies between civil- and common-law practice have given rise to disputes between EU member states, the court has tended to adopt the former as "European law":

The ECJ is not only bound by the very civilian wording, internal coherence and objectives of the Brussels I instrument but also by the intentions of its civilian drafters; in addition the ECJ has shown that it unfortunately tends to adopt a "civil law based approach" and be theory driven rather than practice driven, and while its position is often informed by comparative law, it essentially relies on the position of the majority and of course the vast majority of EU Member States are civilian.

Aude Fiorini, *The Codification of Private International Law in Europe—Could the Community Learn from the Experience of Mixed Jurisdictions?*, 23 TUL. EUR. & CIV. L.F. 89, 107 (2008) (footnotes omitted).

¹¹ See Daniel Tan, *Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers*, 47 VA. J. INT'L L. 545, 561 (2007) ("Antisuit injunctions . . . are fast becoming the principal non-statutory remedy to vindicate breaches of arbitration agreements.").

¹² *West Tankers*, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391, [16].

¹³ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹⁴ The so-called "conservative" or "restrictive" standard has been adopted by the D.C., Second, Third, and Sixth Circuits. The Fifth, Seventh, and Ninth Circuits have adopted a "liberal" approach. Antisuit injunctions outside the context of enforcement of arbitration agreements are not within the purview of this Note. For a helpful general overview of this circuit split, see Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL. L. REV. 395, 412–15 (2006).

enforce arbitration agreements is one factor that may influence parties choosing a seat and the law that shall govern their arbitration.¹⁵ The House of Lords, when referring its question to the ECJ, pointed to the possibility that the European Union could lose some of its traditional appeal as a forum for international commercial arbitration.¹⁶ The European Commission, in a Green Paper published after *West Tankers*, acknowledged that “legal certainty” surrounding the interface between the Brussels Regulation and arbitration could be “enhance[d].”¹⁷ Indeed, after the ECJ’s decision in *West Tankers*, the United States could potentially become more attractive as a seat of arbitration for parties to transnational agreements interested in ensuring that they do not end up litigating their disputes in multiple jurisdictions.

This Note argues that in light of the ECJ’s decision in *West Tankers*, parties with concerns about vexatious parallel litigation should choose the United States as their seat of arbitration. This Note also advises parties to construct their arbitration agreements carefully to preserve the option of an antisuit injunction. In response to the ECJ ban on antisuit injunctions in the context of arbitration, parties and arbitration counsel in the United States should push for courts to establish a harmonized standard to which courts can refer when called to issue an antisuit injunction to enforce an arbitration agreement. Of course, just as a party may bring vexatious parallel litigation to delay the resolution of a dispute, there is a danger that parties could abuse the availability of antisuit injunctions by preventing valid litigation from going forward in a foreign jurisdiction. By enumerating clear criteria to be met before such an injunction will be issued, courts can steer clear of such danger, eliminate the confusion surrounding antisuit injunctions to enforce an arbitration agreement, and provide

¹⁵ See Barceló, *supra* note 10, at 117–18 (noting that countries might encourage their courts to adopt antisuit injunctions if the alternative is to “risk a decline in their arbitration business”).

¹⁶ *West Tankers*, [2007] UKHL 4, [2007] 1 Lloyd’s Rep. 391, [23] (“[I]t should be noted that the European Community is . . . competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will.”).

¹⁷ *Commission Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, at 8–9, COM (2009) 175 final (Apr. 21, 2009) (providing as one such possible enhancement “grant[ing] exclusive jurisdiction for [court] proceedings [in support of arbitration] to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties”). For an article highlighting some concerns of European arbitration practitioners regarding the Green Paper’s proposals, see Sarah Garvey, Allen & Overy LLP, *Brussels Considers Reforms to EU Civil Jurisdiction Rules*, June 2, 2009, <http://www.allenoverly.com/AOWEB/AreasOfExpertise/PrintEditorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=51636&prefLangID=410>.

guidelines for parties that desire access to such relief. Improved lucidity on the part of U.S. courts will increase the overall attractiveness of the United States as a place to conduct business in the competitive global market, reinforce the United States' position as a business-friendly financial center, and increase work for the American arbitration bar.

Part I of this Note examines the lead-up to the ECJ's *West Tankers* decision, tracing the case's path through English courts to the ECJ. The case provides a useful comparison of the civil- and common-law views of antisuit injunctions in the context of arbitration and is a clear statement by the ECJ that such injunctions will no longer be tolerated when one EU member state's court, seeking to enforce an arbitration agreement, enjoins a party from pursuing a parallel proceeding in another member state. Part II briefly describes some recent cases in the United States dealing with antisuit injunctions to enforce arbitration agreements, illustrating the current availability of such relief in U.S. courts. This Part also identifies some of the bases upon which courts issue antisuit injunctions. Part III identifies the class of parties for which the ECJ's decision in *West Tankers* and the availability of antisuit injunctions in the United States are most likely to be important factors in choosing a seat of arbitration and offers suggestions to parties that wish to keep antisuit injunctions among the arsenal of tools available to enforce an arbitration agreement.

I

WEST TANKERS: AN ANTISUIT INJUNCTION DOOMED FOR FAILURE

A. Factual and Procedural Background

The event that spurred the *West Tankers* arbitration and litigation occurred in August 2000. The *Front Comor*, a vessel chartered by an Italian oil company, Erg Petroli SpA (Erg), collided with a jetty at Erg's oil refinery in the Italian port of Syracuse.¹⁸ Erg's insurer, Ras Riunione Adriatica di Sicurta (RAS), paid Erg approximately €15.5 million under Erg's insurance policy for the damage Erg suffered in the form of repair costs, production losses, and demurrage liabilities to third parties.¹⁹ The charterparty between the shipowner, West Tankers, and Erg was to be governed by English law and contained a clause that called for arbitration of "[a]ny and all differences and disputes of whatsoever nature arising out of [the] charter" to be held in

¹⁸ *West Tankers Inc. v. Ras Riunione Adriatica di Sicurta SpA (The Front Comor)*, [2005] EWHC (Comm) 454, [2005] 2 All E.R. (Comm.) 240, [2] (Eng. Q.B.).

¹⁹ *Id.*

London “pursuant to the laws relating to arbitrations there in force.”²⁰ Soon after the accident, Erg began arbitration proceedings in London against West Tankers to collect its uninsured losses. Later, RAS, subrogating itself for Erg, also initiated proceedings against West Tankers seeking the €15.5 million it had paid to Erg. RAS argued, however, that it was not party to the arbitration clause in the charterparty and submitted its claim to a court in Syracuse, Italy,²¹ making the Italian court the “first-seized” court under the Brussels Regulation.²²

In an attempt to avert the unenviable situation of having two claims regarding the same accident pending against it, West Tankers sought and obtained an interim antisuit injunction from an English court against RAS prohibiting the insurer from proceeding with its claim in Italian court.²³ Despite this injunction, RAS proceeded with its Italian action and asked the English Commercial Court to discharge the injunction.²⁴ The Commercial Court denied this request and issued a permanent injunction.²⁵ Upon RAS’s appeal, the court certified the case to the House of Lords.²⁶

B. The House of Lords’ Referral to the ECJ

In an opinion by Lord Leonard Hoffmann, the House of Lords responded to RAS’s argument that an antisuit injunction to enforce the parties’ arbitration agreement was incompatible with the Brussels Regulation²⁷ by referring that question to the ECJ. Anticipating that the ECJ would answer unfavorably, Lord Hoffmann set forth a defense of the Commercial Court’s decision in an effort to preserve the availability of antisuit injunctions to enforce arbitration agreements in the United Kingdom.

At the outset of his opinion, Lord Hoffmann acknowledged that two previous decisions by the ECJ, *Gasser GmbH v. MISAT Srl*²⁸ and *Turner v. Grovit*,²⁹ demonstrated the ECJ’s strong aversion to one member state’s court restricting in any way the jurisdiction of another member state. *Gasser* held that a court of a member state upon which parties have conferred exclusive jurisdiction cannot issue an injunction to prevent a party from proceeding with an action in another

²⁰ *Id.* [3].

²¹ *Id.* [5], [9].

²² See *infra* notes 30–31 and accompanying text.

²³ *West Tankers*, [2005] EWHC (Comm) 454, [2005] 2 All E.R. (Comm.) 240, [1].

²⁴ *Id.* [9].

²⁵ *Id.* [76].

²⁶ *West Tankers Inc. v. Ras Riunione Adriatica di Sicurtà SpA (The “Front Comor”)*, [2007] UKHL 4, [2007] 1 Lloyd’s Rep. 391, [8].

²⁷ *West Tankers*, [2005] EWHC (Comm) 454, [2005] 2 All E.R. (Comm.) 240, [9].

²⁸ Case C-116/02, 2003 E.C.R. I-14693.

²⁹ Case C-159/02, 2004 E.C.R. I-3565.

member state if the latter state's courts were first seized of the matter.³⁰ This remained true even where actions in the first-seized member state's court often suffered considerable delays.³¹

Turner, another case that the House of Lords had referred to the ECJ, dealt squarely with antisuit injunctions. In that case, the ECJ decided that the Brussels Regulation precluded a member state from enjoining a party before it from bringing or continuing an action in another member state, "even where that party is acting in bad faith with a view to frustrating the existing proceedings."³² After the ECJ's decision in *Turner*, however, English courts continued to issue antisuit injunctions to enforce arbitration agreements. Lord Hoffmann pointed out that "[a]rbitration . . . is altogether excluded from the scope of the [Brussels] Regulation by article 1(2)(d)" and cited two ECJ decisions that he understood to uphold this exclusion and exempt arbitration from the Regulation³³: *Marc Rich & Co. AG v. Società Italiana Impianti PA*³⁴ and *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*.³⁵

The language of the arbitration exclusion in the Brussels Regulation leaves considerable room for interpretation, stating merely, "The Regulation shall not apply to . . . arbitration."³⁶ In *Marc Rich*, the ECJ shed some light on the meaning of this exclusion by determining that it applied not only to arbitration proceedings themselves but also to court proceedings where the subject matter is arbitration.³⁷ For Lord Hoffmann, *Van Uden* provided a strong basis for the legality of antisuit injunctions to enforce arbitration agreements, as it held that in a proceeding intended to protect the parties' choice to have a dispute settled by arbitration, arbitration is the subject matter.³⁸ Lord Hoffmann argued that the right at issue in *West Tankers* was precisely the type of right that the ECJ identified in *Van Uden*: "the contractual right to have the dispute determined by arbitration."³⁹ Lord Hoffmann effectively considered that allowing a party to bring parallel proceedings

³⁰ *Gasser*, 2003 E.C.R. I-14693, para. 54.

³¹ *Id.* para. 70.

³² *Turner*, 2004 E.C.R. I-3565, para. 31.

³³ *West Tankers Inc. v. Ras Riunione Adriatica di Sicurtà SpA (The "Front Comor")*, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391, [14]–[15].

³⁴ Case C-190/89, 1991 E.C.R. I-3855.

³⁵ Case C-391/95, 1998 E.C.R. I-7091.

³⁶ Brussels Regulation, *supra* note 7, art. 1(2).

³⁷ 1991 E.C.R. I-3855, para. 29 ("[T]he exclusion . . . extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.").

³⁸ *West Tankers*, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391, [14]; *see Van Uden*, 1998 E.C.R. I-7091, para. 24.

³⁹ *West Tankers*, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391, [16].

despite the existence of a valid arbitration agreement would interfere with party autonomy to choose a method of dispute resolution.

What Lord Hoffmann deemed “the most important consideration” surrounding the availability of antisuit injunctions to enforce arbitration agreements, however, was “the practical reality of arbitration as a method of resolving commercial disputes.”⁴⁰ In his view, such injunctions served “as an important and valuable weapon . . . [,] promot[ing] legal certainty and reduc[ing] the possibility of conflict between the arbitration award and the judgment of a national court.”⁴¹ London—and by extension, Europe—could lose its attractiveness as a seat for international commercial arbitration if the ECJ lost sight of the fact that “[t]he courts are there to serve the business community rather than the other way round.”⁴² Specifically, Lord Hoffmann pointed to New York, Bermuda, and Singapore as jurisdictions willing to issue antisuit injunctions in support of arbitration agreements and worried that Europe would “handicap itself by denying its courts the right to exercise the same jurisdiction.”⁴³

C. The Advocate General’s Opinion

After the House of Lords’ referral to the ECJ of the question of the appropriateness of antisuit injunctions to enforce arbitration agreements, there was much anticipation among practitioners, commentators, and students of arbitration surrounding the outcome.⁴⁴ The Advocate General’s opinion, delivered in September 2008, confirmed the premonition that most commentators had had. The Advocate General proposed the following answer to the House of Lords’ referred question:

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters precludes a court of a Member State

⁴⁰ *Id.* [19].

⁴¹ *Id.* [21].

⁴² *Id.* [22].

⁴³ *Id.* [23].

⁴⁴ *See, e.g.,* Barceló, *supra* note 10, at 116 n.15 (“The *West Tankers* case is likely to be best known in the future for the answer the ECJ gives to this important question.”); *Europe*, 42 INT’L LAW. 975, 994 (2008) (“The House of Lords is currently awaiting the ECJ’s determination on this important issue.”); Ben Steinbrück, *The Impact of EU Law on Anti-Suit Injunctions in Aid of English Arbitration Proceedings*, 26 CIV. JUST. Q. 358, 374 (2007) (“*The Front Comor* is likely to become the final knock-out for English anti-suit injunctions in European cross-border dispute resolution.”); Thiara Moraes & Adrien Oost, *English Courts Enforcing Arbitration Agreements in the European Context: The Last Refuge for Anti-Suit Injunctions?* 9 (June 2008) (unpublished Master 2 dissertation, Université Paris 1 Panthéon-Sorbonne) (on file with author) (“The significance of the ruling in *West Tankers* should not be underestimated. The previous judgments relating to anti-suit injunctions handed down by the ECJ have done more than affect discretion of English courts regarding equitable remedies.”).

from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement.⁴⁵

The Advocate General conceded that the London arbitration proceeding and the Italian court proceeding centered upon the same issue.⁴⁶ At the outset of her analysis, she stressed that the concept of mutual trust⁴⁷ provided the foundation for the ECJ's decisions in *Turner* and *Gasser*⁴⁸ and hinted that the court should apply that concept in the instant case as well.⁴⁹ Applying this concept somewhat broadly before addressing the merits of the parties' positions, she stated that "the principle of mutual trust can also be infringed by a decision of a court of a Member State which does not fall within the scope of the regulation obstructing the court of another Member State from exercising its competence under the regulation."⁵⁰ At this point in the opinion, those sympathetic to West Tankers' position could see the availability of antisuit injunctions to enforce arbitration agreements within the European Union fading quickly to black.

Before sealing the fate of such injunctions, the Advocate General entered into a useful discussion of the "dispute between the Anglo-Saxon and the continental European schools of law whether the [Brussels Regulation's] exclusion of arbitration should . . . be understood in [a] broad sense."⁵¹ Under the Anglo-Saxon, or common-law, view, arbitration is the only acceptable forum for resolving a dispute between parties that have an arbitration agreement, "irrespective of

⁴⁵ Opinion of Advocate Gen. Kokott, Case C-185/07, *Allianz SpA v. West Tankers Inc.*, 2009 E.C.R. ___, 2008 WL 4089512, para. 74.

⁴⁶ *Id.* para. 17 ("The main question in both cases is whether West Tankers can rely on the exclusion from liability for navigation errors in clause 19 of the charterparty or under the so-called Hague Rules.").

⁴⁷ See generally Felix Blobel & Patrick Späth, *The Tale of Multilateral Trust and the European Law of Civil Procedure*, 30 EUR. L. REV. 528 (2005) (providing an overview of the mutual-trust doctrine). In his House of Lords opinion, Lord Hoffmann anticipated this catchall policy that cuts against the issuance of antisuit injunctions to enforce arbitration agreements:

In proceedings falling within the Regulation it is right . . . that courts of Member States should trust each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of *Kompetenz-Kompetenz*) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate.

West Tankers, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391, [22].

⁴⁸ See *supra* notes 28–32 and accompanying text.

⁴⁹ Opinion of Advocate Gen. Kokott, *West Tankers*, 2009 E.C.R. ___, 2008 WL 4089512, paras. 23–26.

⁵⁰ *Id.* para. 34.

⁵¹ *Id.* para. 39.

the substantive subject-matter.”⁵² Contrastingly, the continental-European, or civil-law, view holds the subject matter to be primary. If the subject matter falls under the Brussels Regulation, a member state’s court is entitled to “examine whether the exception under Article 1(2)(d) applies and, according to its assessment of the effectiveness and applicability of the arbitration clause, to refer the case to the arbitral body *or adjudicate on the matter itself*.”⁵³

In perhaps the most tenuous portion of the opinion, the Advocate General applied to *West Tankers* the ECJ’s holdings in *Marc Rich* and *Van Uden*⁵⁴ to find that the subject matter of the Italian proceeding fell under the Brussels Regulation. The Advocate General argued that because RAS’s claim in the Syracuse court was “a claim in tort (possibly also in contract) for damages,” the claim fell “within the scope of Regulation No 44/2001, and not arbitration.”⁵⁵ This view would seem to fly in the face of the language from *Van Uden* that Lord Hoffmann had quoted in the House of Lords’ *West Tankers* opinion:

[P]rovisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.⁵⁶

The Advocate General’s subject-matter distinction becomes questionable when one imagines an alternative scenario: what if *West Tankers* had brought an action requesting that an Italian court compel RAS, in light of its subrogation for Erg, to honor the arbitration agreement, and RAS had brought a “tort” counterclaim against *West Tankers*? According to the Advocate General’s analysis, would the subject matter in that case fall under the Brussels Regulation? If not, then wouldn’t a race to the courthouse ensue where each party attempts to bring its claim before the other?

The firmest ground upon which the Advocate General based her recommendation to the ECJ was the overarching EU policy of harmonizing member states’ disparate legal rules regarding multijurisdictional issues to ensure that no member state’s court is unfairly denied jurisdiction. She adopted the European Commission’s view that the

⁵² *Id.* para. 43.

⁵³ *Id.* para. 44 (emphasis added).

⁵⁴ See *supra* notes 34–39 and accompanying text.

⁵⁵ Opinion of Advocate Gen. Kokott, *West Tankers*, 2009 E.C.R. ____, 2008 WL 4089512, para. 53.

⁵⁶ *West Tankers Inc. v. Ras Riunione Adriatica di Sicurtà SpA (The “Front Comor”)*, [2007] UKHL 4, [2007] 1 Lloyd’s Rep. 391, [15] (quoting *Case C-391/95, Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, 1998 E.C.R. I-7091, para. 33).

ECJ's decision in *Gasser*⁵⁷ protected the right of European courts to examine their own jurisdiction, including the right to examine the validity of an arbitration agreement as a preliminary issue to determine jurisdiction.⁵⁸ The principle of *effet utile*, or effective judicial protection,⁵⁹ identified by the Advocate General as "a general principle of Community law and one of the fundamental rights protected in the Community,"⁶⁰ played a large role in her conclusion. The fear was that a party could abuse the availability of antisuit injunctions to enforce an arbitration agreement, effectively denying the counterparty the opportunity to challenge an arbitration agreement in a court with proper jurisdiction to hear such a claim.⁶¹

In the final portion of the opinion, the Advocate General dismissed in a single sentence Lord Hoffmann's concerns that Europe could lose a competitive edge if the ECJ were to prohibit antisuit injunctions to enforce arbitration agreements: "To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law."⁶² Attempting to lessen the harshness of the opinion, the Advocate General insisted that parallel litigation in a forum other than the seat of arbitration would only ensue if the parties disagreed as to the validity and scope of their arbitration agreement.⁶³ From this point she made a rather large jump to say, "There is therefore no risk of circumvention of arbitration."⁶⁴ This statement makes light of the very real possibility that a party with superior resources to pay for a protracted legal battle in multiple forums might be inclined to bring parallel litigation simply to delay the arbitration proceedings or obstruct a future enforcement attempt by the other party. In the end, mutual trust and *effet utile* won out over such worries. The Advocate General did leave some consoling words for parties considering arbitration in an EU member state who now find themselves without recourse to an antisuit injunction to enforce an arbitration agreement: "If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in

⁵⁷ See *supra* notes 28–31 and accompanying text.

⁵⁸ Opinion of Advocate Gen. Kokott, *West Tankers*, 2009 E.C.R. ___, 2008 WL 4089512, paras. 57–58.

⁵⁹ See, e.g., Steinbrück, *supra* note 44, at 367–68 (explaining the difference between the common-law view of jurisdiction in terms of private-law rights and the civil-law view of jurisdiction in terms of public law, guaranteeing the right of access to courts).

⁶⁰ Opinion of Advocate Gen. Kokott, *West Tankers*, 2009 E.C.R. ___, 2008 WL 4089512, para. 58.

⁶¹ *Id.* paras. 57–58.

⁶² *Id.* para. 66.

⁶³ *Id.* para. 67.

⁶⁴ *Id.* para. 68.

accordance with the New York Convention.”⁶⁵ As any student of arbitration knows, this is easier said than done.

D. The ECJ Decision

Unsurprisingly, the ECJ followed the Advocate General’s recommendation and held antisuit injunctions to enforce arbitration agreements incompatible with the Brussels Regulation. As is typical in ECJ jurisprudence, the court did not enter into the same level of detailed analysis as had the Advocate General, and the court basically adopted the rationale that the Advocate General had enumerated. Two interesting points merit attention, however.

First, rather than focusing primarily on mutual trust or *effet utile* as the Advocate General had,⁶⁶ the court emphasized the nonarbitration subject matter of Allianz’s Italian action as essential in conferring the Italian court jurisdiction.⁶⁷ The validity of the parties’ arbitration agreement, a determination that on its face would be outside the scope of the Brussels Regulation because of the arbitration exception, was a “preliminary issue” to Allianz’s claim in tort, which clearly came within the scope of the Brussels Regulation.⁶⁸ Therefore, “it is . . . exclusively for [the Italian] court to rule . . . on its own jurisdiction.”⁶⁹

Second, although the court acknowledged Lord Hoffmann’s appeal to the importance of antisuit injunctions in maintaining the attractiveness of Europe as a seat of arbitration,⁷⁰ it did not dignify that practical argument with a response as the Advocate General had.⁷¹ Clearly, the court was unmoved by the possibility that Europe could lose out to other arbitration centers that offer antisuit relief to enforce arbitration agreements. Also, again unlike the Advocate General,⁷² the court did not attempt to cushion the blow to parties hoping for the continued availability of antisuit injunctions in the arbitration context by hinting that parties could guarantee recourse to arbitration through the clear drafting of an arbitration agreement.

After this decision by the ECJ, there is no longer any doubt that antisuit relief will not be a means by which parties who have chosen London as their seat of arbitration can avoid parallel litigation in other EU member states. To understand the impact this will have on

⁶⁵ *Id.* para. 73.

⁶⁶ *See supra* text accompanying notes 46–50, 57–61.

⁶⁷ *See* Case C-185/07, *Allianz SpA v. West Tankers Inc.*, 2009 E.C.R. ___, 2009 WL 303723, paras. 25–27.

⁶⁸ *Id.* paras. 26–27.

⁶⁹ *Id.* para. 27.

⁷⁰ *Id.* para. 17.

⁷¹ *See supra* text accompanying note 62.

⁷² *See supra* text accompanying note 65.

parties' choice of a seat of arbitration, it is first necessary to examine the current availability of antisuit relief in U.S. courts.

II

AVAILABILITY OF AND JUSTIFICATIONS FOR ANTISUIT INJUNCTIONS TO ENFORCE ARBITRATION AGREEMENTS IN THE UNITED STATES

A. The Second Circuit: A Standard in Flux

The most recent significant appellate cases influencing the availability of antisuit injunctions to enforce arbitration agreements were decided by the Second Circuit⁷³ within six months of one another in 2004. Judge Dennis Jacobs penned the opinions of both *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc.*⁷⁴ and *LAIF X SPRL v. Axtel, S.A. de C.V.*,⁷⁵ yet at first glance, it appears that the court employed differing standards in determining whether to issue an antisuit injunction to enforce an arbitration agreement. In *Paramedics*, the Second Circuit relied heavily on the federal policy in favor of arbitration⁷⁶ to enjoin a party from continuing its action in a Brazilian court.⁷⁷ In *LAIF X*, the same court gave much greater deference to comity concerns and rejected a party's request for an antisuit injunction to stop a Mexican action from proceeding.⁷⁸ An examination of these cases and their progeny reveals that antisuit injunctions are certainly available as a remedy to enforce an arbitration agreement.⁷⁹ Parties interested in ensuring the availability of such relief,⁸⁰ however, may have trouble deciphering the formula required to do so.

⁷³ This Part's focus on the Second Circuit is not intended to suggest that other circuits have not developed case law on antisuit injunctions to enforce arbitration agreements. It is true that the Second Circuit houses New York, the United States' most substantial hub of litigation arising from transnational agreements and the most commonly selected U.S. seat for international commercial arbitration, and has thus generated several important decisions in that domain. More importantly for the purposes of this Note, however, the Second Circuit is within the "conservative" camp of circuits with respect to antisuit injunctions enjoining parties from pursuing parallel proceedings in foreign venues. See *supra* note 14 and accompanying text. Exploring the Second Circuit's case law in this area, therefore, provides a picture of what is required to obtain such injunctions in a circuit that, relative to others, is reluctant to grant them.

⁷⁴ 369 F.3d 645 (2d Cir. 2004).

⁷⁵ 390 F.3d 194 (2d Cir. 2004).

⁷⁶ See *infra* Part II.B.1.

⁷⁷ *Paramedics*, 369 F.3d at 653–54.

⁷⁸ *LAIF X*, 390 F.3d at 199–200.

⁷⁹ See *Paramedics*, 369 F.3d at 652 ("It is beyond question that a federal court may enjoin a party before it from pursuing litigation in a foreign forum.").

⁸⁰ See *infra* Part III.A.

1. Paramedics: A Step in the Right Direction

Paramedics involved a dispute between GE Medical and its Brazilian distributor, Paramedics Electromedicina Comercial, also known as Tecnimed.⁸¹ The parties had included a broad arbitration clause in their agreements, and when a dispute arose between them, GE Medical notified Tecnimed that it was initiating arbitration proceedings.⁸² Rather than submitting to arbitration, Tecnimed filed a complaint with a court in Porto Alegre, Brazil.⁸³ Pursuing an aggressive strategy, Tecnimed also filed a petition for a permanent stay of the arbitration in New York State court.⁸⁴ GE Medical responded by removing the action to the U.S. District Court for the Southern District of New York and counterclaimed, requesting that the court compel arbitration and enjoin Tecnimed from proceeding with its Brazilian action.⁸⁵ GE Medical prevailed: the district court held the arbitration clauses valid and issued an antisuit injunction against Tecnimed.⁸⁶

The Second Circuit's opinion in *China Trade & Development Corp. v. M.V. Choong Yong*⁸⁷ provided the framework for Judge Jacobs's analysis in *Paramedics*. That decision enumerated the so-called conservative standard followed by the Second Circuit, which warned that antisuit injunctions are an extraordinary form of relief to be issued "with care and great restraint."⁸⁸ Judge Jacobs pulled from *China Trade* the threshold requirements for any antisuit injunction: that "(A) the parties [be] the same in both matters, and (B) resolution of the case before the enjoining court [be] dispositive of the action to be enjoined."⁸⁹ Over Tecnimed's objections, the Second Circuit upheld the district court's determination that both of these requirements had been fulfilled.

After the threshold requirements have been satisfied, other factors that a court will examine include whether the foreign suit at issue threatens the strong public policies or jurisdiction of the enjoining forum.⁹⁰ Before entering into analysis of these factors, Judge Jacobs reiterated the special nature of antisuit injunctions, borrowing language from the D.C. Circuit, another follower of the conservative standard: "an anti-suit injunction will issue . . . only when the strongest

⁸¹ *Paramedics*, 369 F.3d at 649.

⁸² *Id.* at 649–50.

⁸³ *Id.* at 650.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 650–51.

⁸⁷ 837 F.2d 33 (2d Cir. 1987).

⁸⁸ *Paramedics*, 369 F.3d at 652 (quoting *China Trade*, 837 F.2d at 36).

⁸⁹ *Id.* (citing *China Trade*, 837 F.2d at 35).

⁹⁰ *Id.* (citing *China Trade*, 837 F.2d at 36).

equitable factors favor its use.’”⁹¹ Nonetheless, this “ritual incantation”⁹² proved to be only that, as the Second Circuit upheld the district court’s antisuit injunction against Tecnimed.⁹³ The grounds upon which the court justified the injunction were the federal policy in favor of upholding arbitration agreements⁹⁴ and diminished comity concerns “where one court has already reached a judgment—on the same issues, involving the same parties.”⁹⁵ Here, the judgment to which the Second Circuit was referring was the district court’s granting of an antisuit injunction against Tecnimed.⁹⁶

Paramedics represented an important, seemingly clear separation between antisuit injunctions to enforce arbitration agreements and antisuit injunctions sought for other purposes, with the federal policy in favor of arbitration providing the boost necessary to clear the high hurdle of comity. Six months later, however, the Second Circuit cast into doubt the importance of the federal policy in favor of arbitration with its decision in *LAIF X SPRL v. Axtel, S.A. de C.V.*⁹⁷

2. LAIF X: Paramedics’ Progress Halted

The bylaws of Axtel, a Mexican telecommunications company, contained a clause requiring disputing shareholders to resolve their differences by negotiation followed by arbitration in New York under the rules of the American Arbitration Association (AAA).⁹⁸ LAIF IV, a company organized under the laws of Bermuda, assigned to LAIF X,

⁹¹ *Id.* at 654 (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931–32 (D.C. Cir. 1984)).

⁹² *Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. (The “Angelic Grace”)*, [1995] 1 Lloyd’s Rep. 87, 96 (Eng. C.A.) (Millett, L.J., concurring). This was the apt term that Lord Justice Peter Millett employed to describe the pronouncement ubiquitous in English antisuit-injunction decisions that such relief should be granted sparingly due to comity concerns.

⁹³ *Paramedics*, 369 F.3d at 658–59.

⁹⁴ *Id.* at 654 (“The federal policy favoring the liberal enforcement of arbitration clauses . . . applies with particular force in international disputes.”).

⁹⁵ *Id.* at 655.

⁹⁶ Daniel Tan has criticized this element of the Second Circuit’s reasoning, arguing that the federal policy in favor of arbitration was the court’s only valid ground for issuing the antisuit injunction:

[I]t is difficult to comprehend how a lower court’s decision could allay potential comity concerns that an appellate court could have in deciding whether to grant antisuit relief: An appellate court cannot bootstrap a lower court’s decision to bolster its own, but must instead review the lower court’s decision to see if it was correctly made. The Second Circuit’s approach of using the lower court’s grant of antisuit relief to bolster its own affirmation of that order would reduce the standard of issuance for antisuit injunctions on appeal, without any principled basis for this.

Tan, *supra* note 11, at 564.

⁹⁷ 390 F.3d 194 (2d Cir. 2004).

⁹⁸ *Id.* at 197.

its Belgian affiliate, subscription rights to purchase shares of Axtel.⁹⁹ In early 2003, LAIF X exercised these subscription rights, believing that it had become the controlling shareholder of one class of shares.¹⁰⁰ In response, Telinor, Axtel's previous controlling shareholder, acquired and converted enough shares in that class to prevent LAIF X from gaining the controlling stake that it believed it had rightfully acquired.¹⁰¹

After the required negotiation period elapsed without any resolution of the dispute, LAIF X filed a demand for arbitration.¹⁰² Telinor, before filing its answer with the AAA, brought suit in Monterrey, Mexico seeking a declaration that would render LAIF IV's assignment of shares to LAIF X invalid.¹⁰³ Telinor then filed an answer in the arbitration proceeding, requesting that the AAA hold the dispute nonarbitrable or, in the alternative, stay the arbitration pending Telinor's Mexican action.¹⁰⁴ Six days later, LAIF X requested that the U.S. District Court for the Southern District of New York compel Telinor to participate in arbitration and enjoin Telinor from pursuing its Mexican lawsuit. The district court denied relief.¹⁰⁵

Once again, Judge Jacobs authored the opinion that would determine whether antisuit relief was appropriate. *Paramedics* was cited as a controlling case, and the same factors determining whether an antisuit injunction should be granted were laid out at the beginning of the court's analysis of that issue.¹⁰⁶ Curiously, however, the opinion merely paid lip service to the federal policy in favor of arbitration that had been essential to *Paramedics*' holding and focused primarily on comity concerns to uphold the district court's ruling "because: (i) principles of comity counsel against issuing the anti-suit injunction; (ii) the United States federal courts have no interest in enjoining Telinor's Mexican lawsuit; and (iii) Telinor's Mexican lawsuit is not directed at sidestepping arbitration."¹⁰⁷ Judge Jacobs went as far as to imply that arbitration sited in New York "in no way implicates 'the strong public policies'" of a U.S. court.¹⁰⁸

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 197-98.

104 *Id.* at 198.

105 *Id.*

106 *Id.* at 199.

107 *Id.* at 200.

108 *Id.* (quoting *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004)).

Some commentators and practitioners have offered ways to make sense of this puzzling pair of Second Circuit decisions.¹⁰⁹ The only conclusion that could be drawn from these two cases was that the standard for granting antisuit relief was less than clear.

3. *Paramedics and LAIF X's Progeny: Making Sense of an Unclear Standard*

Perhaps somewhat predictably, since *Paramedics* and *LAIF X*, courts presented with the question of whether to issue an antisuit injunction to enforce an arbitration agreement have varied widely in the analysis employed to come to a decision. By identifying some of the common threads in the case law, a clearer picture of the availability of antisuit relief begins to form.

a. *Vexatiousness of the Parallel Litigation*

Although the federal policy favoring the enforcement of arbitration agreements and comity concerns were the central factors by which the Second Circuit determined whether or not an antisuit injunction was appropriate in *Paramedics* and *LAIF X*, whether the party bringing a parallel action in a foreign jurisdiction recognized the validity of the arbitration agreement also played a key role. In *Paramedics*, Tecnimed flatly refused to arbitrate and instead sought to resolve its dispute in a Brazilian court.¹¹⁰ In *LAIF X*, on the other hand, in denying antisuit relief, the court was influenced by the fact that Telinor “submitted itself to the arbitral forum . . . and invoked the discretion of the arbitral forum to stay proceedings in deference to the Mexican court on a point of Mexican law.”¹¹¹ The Second Circuit stopped short of holding that parallel litigation brought in bad

¹⁰⁹ See, e.g., Chris Karagheuzoff & Eric Epstein, *Navigating Muddy Waters: Anti-Foreign Suit Injunctions in Aid of Compelling Arbitration*, DISP. RESOL. J., May–July 2008, at 62, 66–69 (arguing that parties’ choice of an American jurisdiction’s substantive law renders the granting of an antisuit injunction to enforce an arbitration agreement more likely); Swanson, *supra* note 14, at 437–40 (identifying a federal policy favoring liberal enforcement of arbitration agreements and comity as two factors used in the balancing test); Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT’L L. 283, 323–24, 329–31 (2005) (suggesting that the crucial question in *Paramedics* and *LAIF X* is either the Second Circuit’s interest in granting antisuit relief, which was comparatively less in a case such as *LAIF X* where no U.S. parties were involved, or a party’s intent to commence parallel foreign proceedings).

¹¹⁰ 369 F.3d at 656 (“Tecnimed has not demonstrated a diligent attempt to comply with the district court’s orders [to submit to arbitration and have its Brazilian suit dismissed] in a reasonable manner. Tecnimed’s explanations as to why the case had to be suspended, rather than dismissed, are specious.”).

¹¹¹ 390 F.3d at 200.

faith would doom a party to an antisuit injunction, but it made clear that such a dilatory strategy would be viewed unfavorably.¹¹²

Several subsequent decisions in the Second Circuit demonstrate that parties bringing vexatious parallel litigation are more likely to face antisuit injunctions. In *Empresa Generadora de Electricidad ITABO, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales*,¹¹³ the defendant CDEEE, arguing that its dispute with Empresa Generadora was nonarbitrable, simultaneously filed an answer with the arbitral tribunal and brought an action in the Dominican Republic. The U.S. District Court for the Southern District of New York found that CDEEE did “not appear materially [to be] delaying, or even directly interfering with, the ongoing arbitration, for both are proceeding simultaneously”¹¹⁴ and denied Empresa Generadora antisuit relief.

*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*¹¹⁵ reads like an international litigation nightmare (or an international litigator’s dream). Karaha Bodas Company (KBC), a Cayman Islands company owned by American investors, entered into a joint venture with Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), an Indonesian government-owned entity, to develop geothermal energy resources in Indonesia. In 1998, following a dispute between the parties and pursuant to an arbitration clause in their contract, KBC obtained an arbitration award against Pertamina in Switzerland.¹¹⁶ Pertamina’s action to set aside the award in Switzerland failed, but it was able to convince an Indonesian court not only that the court had set-aside jurisdiction—which the court exercised to set aside the award—but also to enjoin KBC from pursuing its enforcement action filed in the U.S. District Court for the Southern District of Texas.¹¹⁷ In response, KBC successfully sought an anti-antisuit injunction from the district court, but the Fifth Circuit vacated that decision, citing comity principles and the fact that KBC had no assets in Indonesia vulnerable to the Indonesian court’s injunction.¹¹⁸ KBC ultimately prevailed in its enforcement action in the Southern District of Texas and brought that judgment to the U.S. District Court for the Southern District of New York for registration and enforcement.¹¹⁹ Pertamina, still unwilling to give up its fight almost ten years after the

¹¹² *Id.* at 199 (“[G]iven ‘[t]he federal policy favoring the liberal enforcement of arbitration clauses,’ an anti-suit injunction may be proper where a party initiates foreign proceedings in ‘an attempt to sidestep arbitration.’” (quoting *Paramedics*, 369 F.3d at 654)).

¹¹³ No. 05 CIV 5004 RMB, 2005 WL 1705080 (S.D.N.Y. July 18, 2005).

¹¹⁴ *Id.* at *9 (alteration in original) (internal quotation marks and citation omitted).

¹¹⁵ 500 F.3d 111 (2d Cir. 2007).

¹¹⁶ *Id.* at 113–14.

¹¹⁷ *Id.* at 114.

¹¹⁸ *Id.* at 114–15.

¹¹⁹ *Id.* at 116.

original dispute, brought a fraud action against KBC in the latter's home jurisdiction, the Cayman Islands.¹²⁰ Once again, KBC petitioned for an antisuit injunction, this time from the Southern District of New York, and the district court granted relief.¹²¹

Upholding the antisuit injunction against Pertamina's Cayman Islands action, the Second Circuit did little to mask its lack of sympathy for Pertamina:

Pertamina engaged in . . . six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the Court in New York.¹²²

These decisions, along with several other recent cases either before the Second Circuit or one of its district courts,¹²³ demonstrate that even courts that follow the so-called conservative standard for granting antisuit injunctions are willing to issue antisuit relief where the parallel litigation in question is obviously vexatious in nature. The fact that the federal policy favoring the enforcement of arbitration agreements underpins this willingness¹²⁴ bodes well for parties with valid arbitration agreements who wish to prevent costly parallel proceedings. It is also essential, however, to identify substantive bases for courts' determinations of whether antisuit relief should issue.

b. *Substantive Law of the Agreement*

Parties' choice of substantive law governing their agreement has also influenced the outcome of petitions for antisuit relief. Well before *Paramedics* and *LAIF X* were decided, the U.S. District Court for the Southern District of New York made this apparent in *PepsiCo Inc. v. Oficina Central de Asesoría y Ayuda Técnica, C.A.*¹²⁵ In that case, a dispute arose between the U.S. soft-drink giant and its Venezuelan bottling facilities when the latter committed the mortal sin of shifting its business to Coca Cola, and PepsiCo cried foul.¹²⁶ The parties' agreement included an arbitration clause that called for arbitration in

¹²⁰ *Id.* at 117.

¹²¹ *Id.* at 117–18.

¹²² *Id.* at 126–27 (quoting *In re Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283, 300 (S.D.N.Y. 2006)).

¹²³ See, e.g., *Mastercard Int'l Inc. v. Fédération Internationale de Football Ass'n*, No. 06 Civ. 3036(LAP), 2007 WL 631312, at *1 (S.D.N.Y. Feb. 28, 2007) (granting antisuit relief in an opinion that begins: "FIFA's latest actions demonstrate that it still does not govern itself by its slogan, 'fair play.'"); *Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 Civ. 13157(GEL), 2006 WL 3735657, at *9 (S.D.N.Y. Dec. 15, 2006) ("Where [vexatiousness] is present, little else is required to authorize an injunction.").

¹²⁴ See *supra* note 112.

¹²⁵ 945 F. Supp. 69 (S.D.N.Y. 1996).

¹²⁶ *Id.* at 70–71.

New York in which the arbitrators would apply New York substantive law in the event of any dispute between the parties.¹²⁷ The agreement also included a clause, however, that identified Venezuelan law as the governing law of the agreement.¹²⁸ The district court thus concluded that the parties intended to have Venezuelan law determine arbitrability and accordingly denied PepsiCo's petition to enjoin Oficina Central's action to determine arbitrability before a Venezuelan court.¹²⁹

The same district court further highlighted the importance of choice of law in *Suchodolski Associates, Inc. v. Cardell Financial Corp.*,¹³⁰ a case in which antisuit relief was granted. Notwithstanding an agreement to arbitrate in New York, Suchodolski commenced parallel proceedings in a Brazilian court, and Cardell sought an antisuit injunction from the U.S. District Court for the Southern District of New York. Unlike the situation in *LAIF X*, where the dispute was between shareholders in a company organized under the laws of Mexico, the parties in *Suchodolski* had chosen New York law to govern their agreement.¹³¹ The district court thus held that antisuit relief was warranted, as no questions under Brazilian law were relevant to the dispute at hand.¹³²

B. Bases for Antisuit Relief to Enforce Arbitration Agreements

1. *The Liberal Federal Policy Favoring the Enforcement of Arbitration Agreements*

In spite of the longstanding debate among U.S. circuit courts as to the proper standard for issuing antisuit injunctions in contexts other than arbitration,¹³³ the Second Circuit, a staunch member of the "conservative" camp, has exhibited its willingness to issue such relief in support of arbitration agreements. The "liberal federal policy favoring arbitration agreements"¹³⁴ is certainly one of the main catalysts of this readiness to enforce arbitration agreements with antisuit

¹²⁷ *Id.* at 70.

¹²⁸ *Id.*

¹²⁹ *Id.* at 72.

¹³⁰ Nos. 03 Civ. 4148(WHP), 04 Civ. 5732(WHP), 2006 WL 3327625 (S.D.N.Y. Nov. 16, 2006).

¹³¹ *Id.* at *2.

¹³² *Id.* ("Plaintiffs' reliance on *LAIF X* . . . is misplaced. . . . *LAIF* declined to enjoin the Mexican action in part because it involved questions arising under Mexican law. Here, the . . . claim is governed by New York law." (citation omitted)).

¹³³ Again, the intricacies of the "liberal" and "conservative" standards for antisuit relief in nonarbitration matters are not the focus of this Note. For an overview of the standards and empirical data concerning the issuance of antisuit injunctions, see Margarita Treviño de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79, 85-110 (1999).

¹³⁴ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

relief. Since Congress's adoption in 1970 of the New York Convention in the form of Chapter Two of the Federal Arbitration Act (FAA),¹³⁵ U.S. courts have progressively shown themselves to be more and more supportive of alternative dispute resolution in the form of arbitration.

The U.S. Supreme Court's 1985 seminal decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹³⁶ emphasized the federal bench's increasing willingness to send parties to arbitration. The Court held the parties' arbitration agreement to be valid, rejecting Soler's argument that a U.S. court, and not an arbitral tribunal, should decide certain antitrust issues, insisting that the "federal policy [favoring arbitration] applies with special force in the field of international commerce."¹³⁷ This decision was certainly a strong indicator that parties with arbitration agreements would be expected to honor them and compelled to do so if they did not. It is a logical progression for courts to use equitable relief in the form of antisuit injunctions to enforce arbitration agreements and to further the federal policy favoring arbitration.

2. *Antisuit Relief as the Enforcement of a Contractual Obligation*

American law students learn in their first contracts course that a court can grant damages or enjoin a party in order to enforce contractual obligations.¹³⁸ Although an arbitration agreement is certainly a particular type of contractual provision that engenders much dispute, there is no reason to enforce a party's adherence to such an agreement in a manner different from standard contract terms. Indeed, the U.S. Supreme Court has recently stated as much: "Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts."¹³⁹ The issuance of an antisuit injunction to enforce a contractual agreement to arbitrate is merely recognizing parties' wishes (at least at the time of the signing of the contract) to stay out of court and settle their disputes through arbitration.¹⁴⁰

¹³⁵ 9 U.S.C. §§ 201-08 (2006).

¹³⁶ 473 U.S. 614 (1985).

¹³⁷ *Id.* at 631.

¹³⁸ See, e.g., *Chicago Coliseum Club v. Dempsey*, 265 Ill. App. 542, 548 (1932) (enjoining a boxer who violated a contract with the venue from participating in any other boxing matches).

¹³⁹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) ("[P]assage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered . . .").

¹⁴⁰ See Tan, *supra* note 11, at 584 ("An antisuit injunction enjoining court proceedings commenced in breach of the arbitration agreement will be, in many instances, the only way to effectively vindicate the breach and uphold the agreement of the parties.").

This is precisely the justification that numerous English courts have given for issuing antisuit injunctions to enforce arbitration agreements. One such court issued an antisuit injunction for the declared purpose of “enforc[ing] the contractual bargain that there should be arbitration in London.”¹⁴¹ Effectively, this contractual view of arbitration agreements holds that parties, much like in forum-selection clauses, have agreed that there will only be one forum in which the parties may settle their disputes. An antisuit injunction seems to be an ideal medium by which a court may enforce such an agreement.¹⁴²

When antisuit relief is viewed from the angle of enforcement of a contractual promise to settle disputes exclusively by arbitration, it becomes difficult to understand the reason for the controversy that such relief often generates. A court that determines an arbitration agreement to be valid and then issues an antisuit injunction is merely forcing a party to keep its promise to submit to arbitration. Civilian courts and legal scholars have historically, however, expressed their bitter disdain for such measures and see them as unwelcome restrictions on the courts’ sovereign jurisdiction.¹⁴³ This difference may be an instance, however, where civil- and common-law jurisdictions will simply have to agree to disagree, as “part of the problem may simply be one of perception rooted in differences in legal culture.”¹⁴⁴ That is to say, based on common-law precepts, the issuance of an antisuit injunction is not inherently offensive to a foreign jurisdiction, as it merely up-

¹⁴¹ *Welex A.G. v. Rosa Maritime Ltd. (The “Epsilon Rosa”)* (No. 2), [2002] EWHC (Comm) 2033, [2002] 2 Lloyd’s Rep. 701, [23] (Eng. Q.B.), *aff’d*, [2003] EWCA (Civ) 938, [2003] 2 Lloyd’s Rep. 509 (Eng. C.A.).

¹⁴² *See Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. (The “Angelic Grace”)*, [1995] 1 Lloyd’s Rep. 87, 94–95 (Eng. C.A.) (“Proceedings in a foreign Court are in breach of contract, so an injunction can issue to restrain them. . . . [I]f [the foreign action sought to be enjoined continued], there would follow two parallel sets of proceedings where the arbitration clause had been contractually designed to ensure that there was only one.”).

¹⁴³ *See, e.g., West Tankers Inc. v. Ras Riunione Adriatica di Sicurta SpA (The Front Comor)*, [2005] EWHC (Comm) 454, [2005] All. E.R. (Comm.) 240, [43] (Eng. Q.B.) (“[S]uch injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts). Furthermore, foreign courts cannot issue instructions as to whether and, if so, to what extent (in relation to time-limits and issues) a German court can and may take action in a particular case.” (quoting *In re The Enforcement of an English Anti-Suit Injunction*, Oberlandesgericht [OLG] Düsseldorf [Regional Court of Appeal of Düsseldorf] Jan. 10, 1996, [1997] I.L. Pr. 320, para. 14 (F.R.G.)); *see also* Stephen M. Schwebel, *Anti-Suit Injunctions in International Arbitration: An Overview*, in INT’L ARBITRATION INST., *supra* note 4, at 5, 5 (asserting that antisuit injunctions “appear[] to violate conventional and customary international law, international public policy and the accepted principles of international arbitration”).

¹⁴⁴ Tan, *supra* note 11, at 591.

holds an agreement between parties to a contract.¹⁴⁵ Of course, if some important public policy of another country is at issue, the role of comity suddenly becomes more important, and a court should think long and hard before issuing antisuit relief.¹⁴⁶

With this picture of the current availability of antisuit injunctions to enforce arbitration agreements in the United States and their underlying justifications in mind, it is possible to point to steps that parties may take to increase the likelihood that a U.S. court will grant such relief in the event of a dispute. Before entering into this discussion, however, it is first necessary to identify the parties who will likely be most affected by the ECJ's holding in *West Tankers*.¹⁴⁷

III

POTENTIAL BENEFICIARIES OF ANTISUIT RELIEF FROM U.S. COURTS AND HOW PARTIES CAN ENSURE ITS AVAILABILITY

A. Potentially Interested Parties

As evidenced by the plethora of commentary that *West Tankers* sparked,¹⁴⁸ at the very least, arbitration counsel and parties drafting arbitration agreements should take into account the ECJ's holding that antisuit injunctions to enforce arbitration agreements are not permissible between EU member states. Of course, the availability of antisuit injunctions is only one of many factors that parties should consider before choosing the seat of their potential arbitration. It would certainly be hyperbole to state that *West Tankers* will result in an unprecedented geographical shift of arbitration. After all, Paris has historically been an epicenter of arbitration,¹⁴⁹ and French courts are typically civilian in their refusal to issue antisuit injunctions to enforce

¹⁴⁵ For a more complete discussion on why antisuit relief to enforce arbitration agreements does not usually implicate comity, see generally Tan, *supra* note 109.

¹⁴⁶ See Barceló, *supra* note 10, at 108 (“[R]elatively strong public policy considerations [in the country where a party has brought a parallel proceeding] . . . should be respected (to the extent of not being thwarted by an anti-suit injunction)—even if the parties’ preference for arbitration is clearly expressed.”).

¹⁴⁷ See *supra* Parts I.C and I.D.

¹⁴⁸ See, e.g., Tom Lidstrom, Linklaters, *View from Here: Much Ado About Nothing*, June 28, 2007, <http://www.legalweek.com/legal-week/analysis/1165601/view-much-ado>; Herbert Smith, *Arbitration E-Bulletin: AG Opines in West Tankers: Anti-Suit Injunctions in Support of Arbitration Agreements Incompatible with Brussels Regulation*, Sept. 5, 2008, <http://www.herbertsmith.com/NR/rdonlyres/7FE0F3D6-7DA5-4E1B-AE51-B79B60A14231/8306/WestTankerbulletin050908.html>; *supra* note 44 and accompanying text.

¹⁴⁹ See INT’L FIN. SERVS. LONDON, INTERNATIONAL DISPUTE RESOLUTION IN LONDON 2008, at 2–3 (2008), available at http://www.ifsl.org.uk/upload/PB_Dispute_Resolution_2008.pdf (giving statistics for International Chamber of Commerce (ICC) arbitration and identifying Paris as one of the most frequently selected sites since 2000 and the most popular site in 2007).

arbitration agreements.¹⁵⁰ Other factors that weigh heavily in parties' choice of a seat include geographic convenience, language, development of relevant areas of substantive law, and expertise of local counsel.

Before identifying parties that may want to consider choosing a U.S. city over cities within the European Union as a seat for potential arbitrations, it is important to recognize the legal limits of the ECJ's decision in *West Tankers*. The ECJ's jurisdiction only extends to the borders of the member states of the European Union. Therefore, an English court can still enjoin a party from pursuing parallel litigation in non-EU jurisdictions.¹⁵¹ Additionally, the ECJ's opinion is directed to the *courts* of EU member states, and parties may still grant arbitral tribunals the authority to issue antisuit injunctions.¹⁵² Obtaining such relief from an arbitral tribunal does not, however, always result in an enforceable arbitral award.¹⁵³

With these limits in mind, a discernable class of parties stands to benefit from choosing a location in the United States rather than Europe as a seat of arbitration because of the *West Tankers* decision. As a threshold matter, the contract in question must be commercial in nature and must not implicate any serious public policy.¹⁵⁴ Additionally, the parties must be in a financial position to participate in arbitration or litigation in either the United States or Europe. Quite obviously, regional European parties with little or no experience in the United States will be loath to participate in arbitration or seek enforcement of an arbitral award in a U.S. city because options such as Geneva, London, or Paris are far more convenient. The cost of participating in arbitration in the United States may well be prohibitive for such parties. For multinational corporations with greater resources and experience hiring counsel on both sides of the Atlantic, such a problem would not be present.

For an antisuit injunction to have its intended effect, both parties must also have somewhat substantial and nonfungible assets in both the United States and Europe. A party with no assets in the United States and no interest in developing business there will not necessarily be persuaded by an antisuit injunction issued by a U.S. court to cease

¹⁵⁰ Cf. Tan, *supra* note 11, at 590. *But see* Banque Worms v. Epoux Brachot, Cour de cassation [French Supreme Court], Cass. 1e civ., Nov. 19, 2002, Bull. civ. I, No. 275 (enjoining a party from pursuing parallel proceedings in Spain and compelling participation in French bankruptcy proceedings), *quoted in* Tan, *supra* note 11, at 596 n.175.

¹⁵¹ See, e.g., Shashoua v. Sharma, [2009] EWHC (Comm) 957, [2009] 2 Lloyd's Rep. 376, [35]–[39] (Eng. Q.B.) (stating that the ECJ's ruling in *West Tankers* does not apply to an antisuit injunction intended to enforce an agreement to arbitrate in London and to prevent parallel proceedings in India).

¹⁵² See Lévy, *supra* note 4, at 121–24.

¹⁵³ See *supra* note 4.

¹⁵⁴ See *supra* note 146 and accompanying text.

a parallel action in an EU member state. Again, multinational corporations with significant operations in the United States and Europe will easily fulfill this requirement.

Parties that satisfy these threshold criteria would do well to consider the United States as a seat for arbitration largely for the same reasons that parties choose arbitration over public litigation in the first place. Parties see the neutrality of arbitral tribunals as one of the main advantages of arbitration as compared to public litigation.¹⁵⁵ If parallel proceedings are brought in violation of an arbitration agreement in one party's home jurisdiction, suddenly the other party faces exactly the risk that it sought to avoid by agreeing to arbitrate: the risk of bias. It is conceivable that a U.S. party engaged in arbitration with a non-U.S. party might benefit from such bias in seeking an antisuit injunction from a U.S. court. This concern evaporates, however, if neither of the parties involved is American. In that situation, both the arbitral tribunal and the U.S. court entertaining a petition for antisuit relief would presumably be neutral.¹⁵⁶

Parties involved in long-term contractual relationships also often elect to settle their disputes through arbitration to avoid protracted legal battles and increase the likelihood that their partnership will last as long as it is in the interest of both parties. The specter of expensive multijurisdictional litigation threatens such long-term goals. By choosing a jurisdiction in which antisuit relief is among the available tools to ensure that a dispute will be settled by an arbitral tribunal, parties can enjoy greater certainty that their disputes will be settled quickly and efficiently.

Another reason for which parties may choose arbitration is preference for a compromise-type resolution process rather than the winner-take-all philosophy of public litigation.¹⁵⁷ By choosing a forum that offers antisuit injunctions that could potentially preclude the pos-

¹⁵⁵ See Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 25, 31 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (reporting that over eighty percent of survey respondents identified forum neutrality as highly relevant in their choice of arbitration to settle disputes).

¹⁵⁶ It is well established that U.S. courts will hear petitions for antisuit relief to enforce arbitration agreements even if neither party involved is American. See, e.g., *Victory Transp. Inc. v. Comisaría General de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964) ("By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaría General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York."), *cert. denied*, 381 U.S. 934 (1965).

¹⁵⁷ See, e.g., Bühring-Uhle, *supra* note 155, at 32–33 (labeling "amicability" as a "slight advantage[]" of arbitration over public litigation cited by survey respondents); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *CORNELL L. REV.* 1, 34 & n.96 (2008) ("[A]rbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators an interest in rendering decisions that will maximize the

sibility of epic multijurisdictional legal battles, parties can make it more likely that the spirit of their dispute resolution will be less contentious and increase the chances of their contractual relationship continuing, if they so desire.

Finally, parties with serious confidentiality or reputational concerns that have a strong incentive to stay out of public litigation¹⁵⁸ may hold the availability of antisuit relief to be important. Again, antisuit injunctions can actualize parties' desires to stay out of court and avoid potentially harmful publicity in several jurisdictions. A party can potentially gain peace of mind from the knowledge that, given a well-drafted arbitration agreement, any dispute arising from its contract is less likely to be aired publicly in multiple jurisdictions.

B. Maximizing the Availability of Antisuit Injunctions

After parties have determined that the availability of antisuit relief is an important enough factor to choose the United States for the seat of their potential arbitration, what can they do to increase the likelihood that, should a dispute arise, a U.S. court will enjoin any attempt to bring parallel proceedings in violation of the arbitration agreement? Unfortunately, as described in Part II, given the current state of the law regarding antisuit injunctions to enforce arbitration agreements, there is no guaranteed way to have access to antisuit injunctions. Taking a lesson from the recent antisuit-relief jurisprudence in U.S. courts, however, it would seem that there are some steps that parties can take.

Drafting an arbitration agreement is no simple task. To ensure that arbitration takes place as the parties envision, serious consideration must be given to drafting as airtight a clause as possible. Generally, and crucially in the case of parties specifically seeking the availability of antisuit relief in the United States, the arbitration clause must clearly enumerate the seat of arbitration.¹⁵⁹ Under the New York Convention, the law of the seat of arbitration serves as the *lex arbitri* and partially governs the enforceability of an arbitral award.¹⁶⁰ Thus, if parties are explicit in choosing a location within the United States as their seat of arbitration, U.S. courts will not hesitate to apply U.S. *lex arbitri* and will entertain the possibility of antisuit relief.

chances that they will be chosen again in future disputes. The result is an incentive to render compromised judgments that do not badly offend either party.”)

¹⁵⁸ See, e.g., Bühring-Uhle, *supra* note 155, at 32 (reporting that survey respondents identified “confidentiality of the procedure” as an “important advantage[]” of arbitration).

¹⁵⁹ See GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 61–67 (2d ed. 2006) (stressing the importance of identifying a seat of arbitration and giving examples of good and bad clauses doing so).

¹⁶⁰ See New York Convention, *supra* note 1, art. V(1)(e).

Parties interested in the availability of antisuit injunctions from U.S. courts may also want to specify that U.S. law governs the arbitration agreement itself.¹⁶¹ This specification will lessen the likelihood that U.S. courts will defer to other jurisdictions in determining the validity of the arbitration clause. As *PepsiCo* demonstrates,¹⁶² if parties choose another country's law to govern their contract and choose a seat of arbitration within the United States without specifying that U.S. law shall govern the arbitration agreement, a court will likely apply the law governing the container contract to decide whether the arbitration clause is valid. Moreover, a clause identifying the law governing the arbitration agreement will permit a court to regard an arbitration agreement purely as a contractual term and potentially reduce the concerns of comity that might enter into a court's calculus.¹⁶³ Parties could go even further and specify in their arbitration agreement that any proceedings contesting the existence, validity, or scope of the arbitration agreement shall be held in the courts of the chosen seat of arbitration. This detail would render courts of other forums incapable of complaining that their jurisdiction had been usurped,¹⁶⁴ unless a significant public policy issue was at stake.¹⁶⁵

Finally, as the cases discussed in Part II.A.3.b demonstrate, if parties choose the law of a U.S. jurisdiction as the substantive law governing their contract, a U.S. court will be less likely to permit parallel proceedings to continue in violation of an arbitration agreement. With the law of a U.S. jurisdiction governing the agreement, the diminished relevance of a foreign jurisdiction's input lessens comity concerns. Obviously, many considerations enter into the fray when parties choose the substantive law that will govern performance of a contract.¹⁶⁶ However, parties identified in Part III.A with commercial contracts that do not implicate a specialized domain of law in which the United States is not as highly developed as another jurisdiction

¹⁶¹ See BORN, *supra* note 159, at 75 (offering an example of such a clause: "This [Article X] and all arbitral proceeding [sic] conducted hereunder shall be governed by the laws of _____." (alteration in original)).

¹⁶² See *supra* notes 125–29 and accompanying text.

¹⁶³ See *supra* Part II.B.2.

¹⁶⁴ Cf. Barceló, *supra* note 10, at 110–11 ("[W]here [a court of the seat of arbitration (F1)], interpreting and applying its own, party-chosen law, finds a dispute arbitrable and enjoins a litigant from proceeding anew in [another forum (F2)], it is hard to see why F2 would be especially upset. . . . F2 could hardly quarrel with F1's interpretation and application of F1's own law.").

¹⁶⁵ See *supra* note 146 and accompanying text.

¹⁶⁶ See, e.g., Lidstrom, *supra* note 148 (identifying "the importance of English law as a product of choice in key business sectors" as a motivating factor for parties' choice of English law to govern their agreements).

may not hesitate to choose, for example, New York law over the commercial law of a European jurisdiction.¹⁶⁷

CONCLUSION

According to the ECJ, whatever benefit parties obtained from the availability of antisuit relief from English courts is outweighed by the need for uniformity among EU member states. *West Tankers* was thus a necessary result for the legal stability of the European Union, and antisuit injunctions have been sacrificed in the name of mutual trust and *effet utile*.¹⁶⁸ The actual effect of *West Tankers* on parties' choice of a seat of arbitration remains to be seen, but judging from all of the commentary generated by the Advocate General's opinion and the ECJ decision, international arbitration counsel have noticed the potential for a shift in the field. Thus far, commentators disagree about the impact that *West Tankers* will have on parties' choice of a seat of arbitration.¹⁶⁹ Most commentators have made general observations, without regard to how *West Tankers* will affect specific types of parties. With respect to the parties identified in Part III.A, however, from an intuitive, cost-based analytical standpoint, the United States has become a more attractive venue for arbitration.

Additionally, considering the attention that *West Tankers* has received, the bark of the ECJ decision may end up having more impact than its bite. It is not unimaginable that the reputational costs that London may suffer as an arbitration venue will be larger than they should be. Paradoxically, Lord Hoffmann's plea to the ECJ to preserve the availability of antisuit injunctions to enforce arbitration agreements¹⁷⁰ could actually do more harm than good to London's

¹⁶⁷ See, e.g., Dammann & Hansmann, *supra* note 157, at 35–36 (enumerating steps that New York State has taken to develop its commercial law and make itself attractive to parties choosing a forum to litigate commercial disputes).

¹⁶⁸ See *supra* notes 46–61 and accompanying text.

¹⁶⁹ Compare Fulbright & Jaworski L.L.P., *English Court Anti-Suit Injunctions and the ECJ Advocate-General's Opinion in West Tankers: The End of an Era?*, Sept. 16, 2008, at 3, available at <http://www.fulbright.com/images/publications/BRIEFINGEnglishCourtAntiSuitInjunction.pdf> ("The more likely negative impact for parties considering London as a venue for arbitration is the potential waste of time and costs in the event one party decides to commence tactical proceedings in the courts of another EU Member State, in breach of the arbitration agreement."), and Alex Spence, *Lawyers Fear West Tankers Ruling Could Harm London*, TIMES ONLINE, Feb. 10, 2009, <http://business.timesonline.co.uk/tol/business/law/article5703346.ece> ("London's position as a leading centre for high-value commercial disputes was dealt a blow today by one of Europe's highest courts."), with Lidstrom, *supra* note 148 ("The reasons for London's prominence as an arbitration venue are varied and complex: the importance of English law as a product of choice in key business sectors; the perceived quality of London-based counsel and arbitrators in those sectors; the emphasis (enshrined in the Arbitration Act 1996) on party autonomy; and the fact that London is geographically accessible and cosmopolitan. None of these attractions is diminished by the probable result in *West Tankers*.").

¹⁷⁰ See *supra* text accompanying notes 40–43.

status as an arbitration venue. The opinion gives arbitration counsel who argue that such equitable relief is important for parties wishing to avoid parallel litigation ammunition to convince their clients that the result of *West Tankers* is to make London a less arbitration-friendly venue. Thus, in the manner of a self-fulfilling prophecy, parties may choose jurisdictions that do offer antisuit relief not for substantive reasons, but simply because of Lord Hoffmann's prediction that parties would do so if the ECJ disallowed such relief.

Despite the lack of a clear standard in U.S. courts for the issuance of an antisuit injunction to enforce an arbitration agreement, parties can expend the resources necessary at the outset of their contractual relationship to ensure that antisuit relief will be available by drafting their arbitration agreements carefully. Presumably, if more parties choose to seat their arbitration in the United States as a result of *West Tankers*, U.S. courts will consider more petitions for antisuit relief. Perhaps this will push courts, in the interest of judicial expediency, to adopt a clearer standard to which parties can refer when crafting their arbitration agreements.

