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*Jennifer L. Gorskie*

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Kluwer Law International  
250 Waterloo Road  
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www.kluwerlaw.com

LCIA  
70 Fleet Street  
London EC4Y 1EU  
telephone: +44 (0) 20 7936 7007  
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# US Courts and the Anti-Arbitration Injunction

by JENNIFER L. GORSKIE\*

## ABSTRACT

*This article explores an important area of US arbitration law: whether a US federal court has the authority, under the Federal Arbitration Act, to enjoin an international arbitration. Despite New York's status as the preeminent US jurisdiction for lawsuits concerning the recognition and enforcement of international arbitration agreements and awards, there has been some lack of analytical consensus among the federal district courts of New York as to the basis for and propriety of granting an 'anti-arbitration injunction' in the international arbitration setting. The Second Circuit Court of Appeals has yet to rule on the issue. This Article discusses US federal court jurisprudence on the subject of anti-arbitration injunctions and proposes a framework by which US federal courts might analyze whether they can and should issue anti-arbitration injunctions of international arbitrations.*

## I. INTRODUCTION: THE STATE OF THE ANTI-ARBITRATION INJUNCTION IN US FEDERAL COURTS

More than 15 years after the US Supreme Court held in *First Options* that US courts should determine, in the first instance, whether parties have agreed to arbitrate, the question of whether US courts may enjoin an arbitration in the absence of such agreement remains controversial.<sup>1</sup> If a US court finds an

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\* The author is a senior associate at Chaffetz Lindsey LLP in New York specializing in international arbitration. The author thanks David Lindsey, James Hosking, and Peter Chaffetz for their comments on earlier drafts of this article, and their abiding mentorship. The author is grateful to Marc Goldstein for his excellent ideas and analytical suggestions. Finally, the author thanks Nazneen Mehta of Cleary Gottlieb Steen & Hamilton LLP for her assistance in researching and developing some of the ideas set forth in this article. The opinions set forth in this Article do not necessarily reflect the views of Chaffetz Lindsey LLP, and any errors are attributable to the author alone.

<sup>1</sup> According to *First Options*, the court must decide in the first instance whether a party has agreed to arbitrate, unless the parties' arbitration agreement 'clearly and unmistakably' requires the arbitrators to decide that question. *First Options v. Kaplan*, 514 U.S. 938 (1995). See also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (the question of 'whether the parties have a valid arbitration agreement at all' is a 'gateway matter[]' to be decided by the courts) (citations omitted).

agreement to arbitrate, the Federal Arbitration Act (the ‘FAA’)<sup>2</sup> provides the corresponding remedy: the court will compel arbitration, relying on the authority to compel expressly granted to it in the FAA. But what if the court finds no agreement to arbitrate? If the arbitration is already underway, the court might order the claimant not to proceed with the arbitration, issuing an ‘anti-arbitration injunction’. The propriety of such an injunction, however, – in particular where the arbitration is ‘international’<sup>3</sup> – is far from clear.

On a purely textual reading, there is no basis in the FAA, nor in the New York Convention or Panama Convention, for a court to enjoin arbitration. The rules of most arbitral institutions permit the arbitrators to decide their own jurisdiction, and the 2010 UNCITRAL Model Law on International Commercial Arbitration provides that ‘[t]he arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.’<sup>4</sup> In many countries that strictly apply the principle of competence-competence, courts refuse to issue anti-arbitration injunctions in nearly all circumstances, even where the court doubts the existence of the arbitration agreement. Given the strong US policy in favour of international arbitration, and the lack of textual authority in the FAA, it is perhaps unsurprising that US courts have expressed some hesitation in ruling definitively that they have the authority to enjoin an international arbitration.

This lack of clarity, however, is contributing to confusion in the case law, and may even threaten to expand the potential reach of the anti-arbitration injunction far past what our international brethren would consider appropriate. The problem is illustrated by recent jurisprudence in the federal courts of New York, the home to the majority of lawsuits involving international arbitration in the United States.<sup>5</sup> Among the federal district courts in the Southern District of New York (the ‘SDNY’), there has been a lack of analytical consensus as to whether injunctions of international arbitration are authorized under the FAA. The SDNY’s decisions on this issue reflect two schools of thought. Those decisions that have questioned whether there is power to enjoin have read the text of FAA Chapter 2 as limiting the court’s authority to the specific actions specified in the New York Convention – the power to compel arbitration, as set forth in FAA §206, and the power to confirm

<sup>2</sup> Federal Arbitration Act, 9 U.S.C. §1 et seq. (2012). Chapter 2 of the FAA codifies and incorporates the 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. 38 (‘New York Convention’). 9 U.S.C. §§201-208. Chapter 3 of the FAA codifies and incorporates the Inter-American Convention on International Commercial Arbitration (the ‘Panama Convention’). 9 U.S.C. §§301-307. The analysis in this Article of principles applicable to Chapter 2 arbitrations apply equally to Chapter 3 arbitrations. Where not otherwise specified, references to Chapter 2 can be assumed to also refer to Chapter 3.

<sup>3</sup> For the purposes of this Article, ‘international arbitration’ refers to those arbitrations that meet the definitional requirements of Chapters 2 or 3 of the FAA, as discussed in Section II. While they are rare, there are of course a small number of arbitrations that will fall under neither Chapter.

<sup>4</sup> UNCITRAL Model Law on International Commercial Arbitration (2010) (hereinafter ‘UNCITRAL Model Law’), art. 23(3).

<sup>5</sup> See Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, Vol. 2, No. 5 World Arbitration & Mediation Review 39 (2008) (comparing the number of Convention award cases handled by each of the U.S. circuit courts since the 1960s).

an arbitral award, as set forth in FAA §207.<sup>6</sup> In contrast, those decisions that have authorized anti-arbitration injunctions typically have found the court's power to enjoin to be implied, as 'concomitant' to the FAA's authority to compel arbitration.<sup>7</sup> In recent years, this has emerged as the majority position.

The US Court of Appeals for the Second Circuit (the 'Second Circuit Court of Appeals'), the intermediate appellate court for the SDNY, has acknowledged the lack of consensus among the lower courts but, until very recently, had declined to reach the issue of whether anti-arbitration injunctions are authorized under the FAA.<sup>8</sup> In November 2011, the Second Circuit squarely addressed the issue for the first time, in a case involving a domestic arbitration arising under Chapter 1 of the FAA. In *In re American Express Financial Advisors Securities Litigation* ('*American Express*'), the Second Circuit held that where 'the parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings'.<sup>9</sup> The court did not, however, find the source of its power to enjoin in the FAA itself. Instead, it cautioned that its decision that an injunction was proper was based on the unique procedural posture of the case, and declined to decide whether a court would have the power to issue an anti-arbitration injunction in a case arising under a different procedural posture. Thus, the *American Express* decision did not approve anti-arbitration injunctions as a general matter, nor did it determine whether courts should apply the same reasoning that permits injunctions of domestic arbitrations to international arbitrations, in particular those international arbitrations seated outside the United States.

An analytical framework establishing the authority of US courts to issue anti-arbitration injunctions in appropriate, limited circumstances would be an important clarification of US arbitration law. This Article begins with an overview of the relevant provisions of the FAA (Section II). It then identifies some of the important decisions in the SDNY and the Second Circuit Court of Appeals addressing the authority to enjoin arbitrations (Section III). Finally, the Article sets forth three questions a federal court should answer in analysing the anti-arbitration injunction, and suggests possible answers to each (Section IV): (1) What is the source of the court's authority to enjoin arbitration? (2) Assuming there is such authority, in what circumstances are anti-arbitration injunctions permissible under the New York and Panama Conventions? and (3) Must the party seeking the injunction demonstrate irreparable harm?

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<sup>6</sup> See e.g., *Ghassabian v. Hematian*, No. 08 Civ. 4400 (SAS), 2008 WL 3982885, at \*2 (S.D.N.Y. Aug. 27, 2008) ('Given this enumerated list of judicial powers... it is unreasonable to infer the existence of further remedies:').

<sup>7</sup> See e.g., *Farrell v. Subway Int'l, B.V.*, No. 11 Civ. 08 (JFK), 2011 WL 1085017 at \*2 (S.D.N.Y. Mar. 23, 2011) (holding that 'the court should have a concomitant power to enjoin arbitration where arbitration is inappropriate')(citation omitted).

<sup>8</sup> See *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 266 (2d Cir. 1996); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391 (2d Cir. 2011).

<sup>9</sup> 672 F.3d 113, 140 (2d Cir. 2011).

## II. BRINGING A MOTION TO ENJOIN INTERNATIONAL ARBITRATION IN US FEDERAL COURT

In the New York and Panama Conventions, Contracting States undertake to recognize arbitration agreements and to enforce foreign arbitral awards.<sup>10</sup> The prevailing view taken by courts and many commentators is that the ‘seat’ of the arbitration – i.e., the state on whose territory the arbitration is to be conducted, and where the arbitral award is made – has ‘primary jurisdiction’ over the arbitral award.<sup>11</sup> All other Contracting States are considered ‘secondary jurisdictions’.<sup>12</sup>

The New York Convention is incorporated into US domestic law through Chapter 2 of the FAA, which provides in relevant part:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.<sup>13</sup>

The Panama Convention is incorporated through Chapter 3 of the FAA, and applies in place of the New York Convention:

If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States. . . .<sup>14</sup>

This Article will refer to arbitration agreements or awards falling within these definitions as ‘international arbitrations’ or ‘Chapter 2/3 arbitrations’.<sup>15</sup> Chapter 1 of the FAA applies to ‘domestic’ arbitrations, typically those arbitrations brought within the United States between US parties.<sup>16</sup> Where they are not in conflict, US courts may apply the provisions of Chapter 1 to arbitrations falling under Chapter 2/3.<sup>17</sup>

<sup>10</sup> New York Convention, arts. II and V; Panama Convention, arts. I and V.

<sup>11</sup> See New York Convention, art. V(1)(a); see also W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* 113 et seq. (1992).

<sup>12</sup> *Id.* The U.S. Court of Appeals for the Fifth Circuit expressed this in the following terms: ‘Under the [New York] Convention, ‘the country in which, or under the [arbitration] law of which, [an] award was made’ is said to have primary jurisdiction over the arbitration award. All other signatory States are secondary jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.’ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004).

<sup>13</sup> 9 U.S.C. §202.

<sup>14</sup> 9 U.S.C. §305.

<sup>15</sup> Chapter 3 of the FAA incorporates nearly all of the substantive provisions of Chapter 2. See 9 U.S.C. §302 (‘Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ‘the Convention’ shall mean the Inter-American Convention.’).

<sup>16</sup> 9 U.S.C. §§1-16 (2012).

<sup>17</sup> 9 U.S.C. §208; 307. See generally Jarred Pinkston, *Toward a Uniform Interpretation of the Federal Arbitration Act: The Role of 9 U.S.C. 208 in the Arbitral Statutory Scheme*, 22 Emory Int’l L. Rev. 639 (2008).

All three chapters of the FAA confer power on courts to compel arbitration where there is an arbitration agreement between the parties. In FAA Chapter 1, the power to compel is set forth in §4.<sup>18</sup> In FAA Chapter 2, §206 provides the authority to compel: ‘A court having jurisdiction under this chapter *may direct that arbitration be held in accordance with the agreement* at any place therein provided for, whether that place is within or without the United States’.<sup>19</sup> FAA §303 provides an identically worded provision for Panama Convention arbitrations.

Section 206 codifies Article II(3) of the New York Convention, which provides in pertinent part:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, *refer the parties to arbitration*, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>20</sup>

In order to adjudicate a motion to compel, or any other action brought under the FAA, a US federal court must have both federal ‘subject matter jurisdiction’ over the action and personal jurisdiction over the parties. The most common way to establish subject matter jurisdiction in cases involving an international arbitration is through the diversity jurisdiction statute, which permits a US federal court to hear cases arising between citizens of different US states or between citizens of the US and foreign parties.<sup>21</sup> Where the arbitration arises under Chapters 2 or 3, however, the action itself may give rise to an independent basis for federal subject matter jurisdiction; Chapter 2 provides federal subject matter jurisdiction over all ‘actions or proceeding[s] falling under the [New York] Convention’.<sup>22</sup>

<sup>18</sup> 9 U.S.C. §4: ‘A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, *for an order directing that such arbitration proceed in the manner provided for in such agreement.*’ (emphasis added). Chapter 1 also provides that courts must stay litigation in favour of arbitration where there is an enforceable arbitration agreement. *See* 9 U.S.C. §3.

<sup>19</sup> 9 U.S.C. §206 (emphasis added); *see also id.* §303(a). Courts have recognized that a motion to compel brought under §206 is an action falling under the Convention which gives rise to original subject matter jurisdiction. *See* Alan Scott Rau, *The New York Convention in American Courts*, 7 *Am. Rev. Int’l Arb.* 213, 216-17 (1996).

<sup>20</sup> New York Convention, art. II (emphasis added). While the Panama Convention does not explicitly require courts to ‘refer’ parties to arbitration, it is generally understood that Article II of the Panama Convention can be read to encompass such a requirement. *See* Christian Leathley, *International Dispute Resolution in Latin America: An Institutional Overview* 88 (Kluwer 2007).

<sup>21</sup> 28 U.S.C. §1332(a) (2012). The diversity statute also requires that the amount in controversy in the dispute be greater than USD 75,000. There is no diversity jurisdiction in actions between two non-US citizens.

<sup>22</sup> Specifically, FAA §203 provides: ‘An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.’ 9 U.S.C. §203. In addition, FAA §205 provides that a defendant may remove an action to federal court ‘where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention.’ 9 U.S.C. §205 (emphasis added). Chapter 1 of the FAA does not provide an independent basis for subject matter jurisdiction. *See Vaden v. Discover Bank*, 129 S.Ct. 1262, 1271, n.9 (2009) (noting that Chapter 2 of the FAA differs from Chapter 1 in that the former expressly grants jurisdiction to federal courts for actions seeking to enforce an arbitral agreement or award).

None of the FAA, the New York Convention or the Panama Convention provides a basis to enjoin arbitration. Nonetheless, in the US and internationally, motions to enjoin arbitrations have been brought with increasing frequency in recent years.

### III. US FEDERAL COURT CASE LAW: THE MUDDY WATERS OF ANTI-ARBITRATION INJUNCTIONS

US case law analysing requests for injunctions of international arbitration reveals a lack of analytical consensus as to the basis for and permissibility of such injunctions. The problem is illustrated by recent jurisprudence from the federal courts of New York, on which this Section will focus.

#### (a) *SGS And Its Progeny*

Any discussion of federal court jurisprudence on anti-arbitration injunctions must begin with a 1981 decision issued by the First Circuit Court of Appeals', *Société Générale de Surveillance, S.A. v. Raytheon European Management and Systems Co.* ('SGS'),<sup>23</sup> authored by then-circuit court judge and now US Supreme Court Justice Stephen Breyer. In *SGS*, Société Générale, a French company, brought a motion in a federal district court in Massachusetts to enjoin a Boston-seated arbitration initiated by Massachusetts company REMSCO.<sup>24</sup> Prior to bringing arbitration in Massachusetts, REMSCO had also initiated an ICC arbitration in Switzerland under a different version of the parties' contract. Société Générale contested the validity of both arbitrations, but sought to enjoin only the arbitration seated in Massachusetts.<sup>25</sup> Société Générale relied on a Massachusetts state arbitration statute, which provides that a court may stay an arbitration if it finds there is no agreement to arbitrate.<sup>26</sup> The district court granted the injunction, and REMSCO appealed.

On appeal, REMSCO argued that, because the FAA does not expressly authorize anti-arbitration injunctions, it should pre-empt Massachusetts state law allowing them. The First Circuit rejected this argument. Stating that the FAA 'supplants only that state law inconsistent with its express provisions'<sup>27</sup> it held that '[t]o allow a federal court to enjoin an arbitration proceeding which is not called for by the contract interferes with neither the letter nor the spirit of [the FAA]'.<sup>28</sup> The court held further that the power to enjoin an arbitration is the 'concomitant

<sup>23</sup> 643 F.2d 863 (1st Cir. 1981).

<sup>24</sup> *Id.* at 866.

<sup>25</sup> *Id.*

<sup>26</sup> Mass. Ann. Laws ch. 251, §2 (2011) ('Upon application, the superior court may stay an arbitration proceeding commenced or threatened if it finds that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined, and if the court finds for the applicant it shall order a stay of arbitration; otherwise the court shall order the parties to proceed to arbitration.').

<sup>27</sup> *SGS*, *supra* note 23, at 867.

<sup>28</sup> *Id.* at 868.

of the power to compel arbitration' under §4 of Chapter 1 of the FAA.<sup>29</sup> It therefore concluded 'the district court had adequate authority *under Massachusetts law* to stay the Massachusetts arbitration'.<sup>30</sup> The court further justified the injunction by noting that the parallel pending arbitration would proceed in Switzerland, which it viewed as a more appropriate forum for the parties' dispute.

Importantly, the *SGS* court did not find its injunctive power in the FAA itself, but in Massachusetts state law, which the court held was not inconsistent with the FAA in this regard.<sup>31</sup> There is a similar provision of New York state arbitration law, New York Civil Procedure Law and Rules ('CPLR') Article 7503, authorizing a stay of arbitration in certain circumstances.<sup>32</sup> Yet many New York federal courts have adopted the First Circuit's 'concomitant' right theory without addressing whether the source of the authority to enjoin lies within the FAA or New York state law.

(b) *Establishing the Authority to Enjoin: Westmoreland and Satcom*

The Second Circuit's first significant comment on anti-arbitration injunctions was in 1996, in *Westmoreland Capital Corp. v. Findlay*,<sup>33</sup> a Chapter 1 case. The Second Circuit affirmed the district court's dismissal of a petition to stay arbitration under §4 of the FAA because there was no independent basis for the court's jurisdiction. In a footnote, citing *SGS*, the court stated that although it did 'not need to decide whether the FAA gives federal courts the power to stay arbitration proceedings . . . a number of courts have held that, in appropriate circumstances, §4 of the FAA may be applied to stay or enjoin arbitration proceedings'.<sup>34</sup>

*Westmoreland* was the Second Circuit's only comment on the subject of anti-arbitration injunctions for many years.<sup>35</sup> In the years following the decision, courts

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> This distinction was acknowledged by a court in the Western District of New York. See *Maronian v. American Communications Network, Inc.*, No. 07-CV-6314 (CJS), 2008 WL 141753, at \*5 (W.D.N.Y. Jan. 14, 2008) ('In addition to being dicta, the Second Circuit's footnote [in *Westmoreland*] mistakenly identified a First Circuit decision, [*SGS*], as having held that FAA §4 could be applied to stay arbitration. Actually, the Circuit Court in [*SGS*] did not make such a determination. Instead, it held that the FAA did not prohibit a Massachusetts district court from staying an arbitration proceeding pursuant to Massachusetts *state law*. . . . Consequently, the [*SGS*] decision provides strong support for the view that FAA §4 does not apply to motions to stay arbitration.') (citation omitted).

<sup>32</sup> N.Y.C.P.L.R. §7503(b) provides:

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

<sup>33</sup> 100 F.3d 263 (2d Cir. 1996) (overruled on other grounds).

<sup>34</sup> *Id.* at 266 n. 3.

<sup>35</sup> Several years before *Westmoreland*, in *Int'l Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 n.5 (2d Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989), the Second Circuit noted in a footnote that the district court had 'appropriately rejected' an attorney's arguments that jurisdiction could have been premised on the New York Convention, because the district court found 'the [New York] Convention [is] inapplicable in this case because the party invoking its provisions did not seek either to compel arbitration or to enforce an arbitral

in the SDNY reached varying conclusions on whether they had the power to enjoin arbitration, with some courts declining to find the authority to enjoin and others relying on *Westmoreland* to find that the FAA's authority to compel includes an implied or concomitant authority to enjoin an arbitration 'in appropriate circumstances'. The Second Circuit affirmed several decisions enjoining arbitration without articulating its rationale, leading some district courts to rely on these affirmations to assert anti-arbitration injunctive power with increasing confidence in later years.

Several years after *Westmoreland*, an SDNY court issued an anti-arbitration injunction of an international arbitration seated in the United States in *Satcom International Group PLC v. Orbcomm International Partners, L.P. (Satcom)*.<sup>36</sup> In *Satcom*, UK company Satcom first brought litigation against a Delaware company in New York federal district court, but later filed a demand for arbitration in New York with the American Arbitration Association ('AAA'), and sought to stay the US litigation pending the arbitration. The Delaware company cross-moved to stay the arbitration. The *Satcom* court held that Satcom, by pursuing litigation on the merits in the first instance, had waived its right to arbitrate. The court acknowledged that the FAA does not explicitly authorize stays of arbitration, and that the Second Circuit had declined to decide the issue in *Westmoreland*. Nonetheless, it found that the First Circuit had 'unequivocally recognized the power of federal courts to stay an arbitration' in the case of *SGS*.<sup>37</sup> The *Satcom* court held that the 'logic of *SGS*' that the power to enjoin an arbitration is the 'concomitant of the power to compel arbitration' under §4 of Chapter 1 of the FAA applied with equal force to §206 of Chapter 2.<sup>38</sup> It further held that a failure to exercise its authority to enjoin 'would frustrate the goals of arbitration, since there would be delay and increased expense as the parties litigated in both fora'.<sup>39</sup> The *Satcom* court qualified this holding, however, by noting that this was so 'particularly where, as here, the district court has a basis for subject matter jurisdiction *other* than the Convention and has personal jurisdiction over the parties'.<sup>40</sup> The *Satcom* court did not acknowledge the *SGS* court's reliance on Massachusetts state law, nor did it refer to New York's CPLR as a basis for the right to enjoin.<sup>41</sup>

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award'. *Id.* In *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003), the Second Circuit noted in a Chapter 1 case that 'the FAA does not provide for petitions (such as Bensadoun's) brought by the party seeking to stay arbitration.' It nonetheless went on to hold that the district court should apply a summary judgment standard to determine arbitrability, 'regardless of whether the relief sought is an order to compel arbitration or to prevent arbitration.'

<sup>36</sup> 49 F. Supp. 2d 331 (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1324 (2d Cir. 1999).

<sup>37</sup> *Id.* at 342.

<sup>38</sup> *Id.* Although *SGS* was a Chapter 2 case, the *SGS* court cited to Chapter 1 of the FAA in finding a concomitant right.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The court further noted that the Second Circuit had affirmed, without articulating its basis for doing so, a number of district court decisions staying or enjoining arbitration proceedings.

<sup>41</sup> C.P.L.R. §7503 was likely not available in these circumstances, because it does not permit a stay of arbitration on the basis of waiver.

The *Satcom* reasoning has been adopted by a number of SDNY courts. In *Republic of Iraq v. ABB*,<sup>42</sup> for example, Iraq sought to invoke an arbitration clause in a New York law-governed contract that had been executed between BNP Paribas and the United Nations. Iraq claimed that it was a third-party beneficiary to the contract and submitted a notice of arbitration and filed a motion to compel arbitration. BNP cross-moved to enjoin the arbitration, arguing that Iraq had no authority to invoke arbitration under the contract. Relying exclusively on *SGS* and *Satcom*, the court denied Iraq's motion to compel and granted BNP's cross-motion to enjoin, based on the fact that Iraq was not a party to the arbitration agreement nor an intended third-party beneficiary of the contract.<sup>43</sup>

Similarly, in *Farrell v. Subway International, B.V.*,<sup>44</sup> the court relied on the reasoning of *Satcom* to stay a Chapter 2 arbitration with a New York seat. In *Farrell*, the court raised *sua sponte* the issue of whether it had subject matter jurisdiction over the stay action, and concluded that it did because the case had been removed to the federal court by the defendant, who opposed the stay and sought to compel arbitration.<sup>45</sup> The court went on to consider whether it had the power to stay arbitration under the FAA. Noting some disagreement within the SDNY on the subject, it nonetheless followed the reasoning of *Satcom* that 'the court should have a concomitant power to enjoin arbitration where arbitration is inappropriate'.<sup>46</sup>

(c) *Pushback: URS and The 'Fear' of Subject Matter Jurisdiction*

Despite the trend of reliance on *Satcom*, some SDNY courts have remained sceptical as to whether the FAA provides the authority to enjoin arbitration, in particular where the arbitration is international. In *Ghassabian v. Hematian*,<sup>47</sup> the district court dismissed a petition to enjoin a Chapter 2 arbitration on the basis of unlawful *ex parte* communications between a party and an arbitrator. The court in *Ghassabian* might have avoided the question of whether there was authority to enjoin under the FAA by simply deciding that, because there was no dispute about whether there was an enforceable agreement to arbitrate, the parties were required to arbitrate and could challenge the *ex parte* communications only after the conclusion of the arbitration, in a motion to set aside the arbitral award. But the *Ghassabian* court instead decided to go further, holding that the petitioner had failed to state a claim upon which relief could be granted because neither the text of the Convention nor the FAA created a cause of action to stay arbitration.<sup>48</sup> The

<sup>42</sup> No. 08 Civ. 5951 (SHS), 2011 WL 781192 (S.D.N.Y. Mar. 3, 2011), *aff'd* 2012 WL 1021032 (2d Cir. Mar. 28, 2012).

<sup>43</sup> *Id.* at \*2.

<sup>44</sup> *Farrell*, *supra* note 7.

<sup>45</sup> *Id.* at \*2.

<sup>46</sup> *Id.* (internal quotations and citations omitted). The petitioner had moved to stay arbitration under CPLR §7503, but the *Farrell* court analysed the power to stay solely under the FAA. See also *Copape Produtos de Petroleo Ltda. v. Glencore Ltd.*, 11 CIV. 5744 LAK, 2012 WL 398596 (S.D.N.Y. Feb. 8, 2012) (relying on *SGS* to find that injunction of arbitration is concomitant of power to compel).

<sup>47</sup> *Ghassabian*, *supra* note 6.

<sup>48</sup> *Id.* One year later, *Ghassabian* was referred to as an 'outlier' in *Oppenheimer & Co. v. Deutsche Bank AG*, No. 09 Civ. 8154 (LAP), 2009 WL 4884158 (S.D.N.Y. Dec. 16, 2009). Borrowing the language of *Westmoreland*, the

court grounded its decision in the ‘limited purpose’ of the New York Convention and the policy underlying the US adoption of it, which is ‘to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries’.<sup>49</sup> The court relied on the canon of statutory interpretation *expressio unius est exclusio alterius* to find that, given the expressly enumerated list of remedies in the FAA and the New York Convention, it would be unreasonable to infer the existence of further remedies.

In a 2005 case, *Republic of Ecuador v. Chevron Texaco Corp. et al.*,<sup>50</sup> an SDNY court stayed arbitration proceedings brought by Chevron before the AAA in New York, based on the stay power found in New York’s CPLR §7503. However, the court also considered whether the action to stay would properly ‘fall under’ the New York Convention, thus giving rise to subject matter jurisdiction. The court concluded that ‘[i]t is not at all clear that an action seeking such [stay] relief ‘fall[s] under the [New York] Convention’ within the meaning of 9 U.S.C. §203, so as to provide this Court with original jurisdiction,’ and that ‘[t]here appears to be little or no basis in Second Circuit case law for invocation of the New York Convention . . . by a party seeking to *avoid* arbitration, rather than compel or aid it.’<sup>51</sup> Nonetheless, the defendants, who were trying to compel arbitration, had removed the case from state court to federal court. Thus, the court held that it had removal jurisdiction over all those claims for relief that were part of the removed action, including the plaintiff’s motion for a stay under CPLR §7503.<sup>52</sup>

In what is perhaps US case law’s most robust discussion of whether an action to enjoin gives rise to jurisdiction under Chapter 2 of the FAA, a Delaware federal district court refused to enjoin an arbitration seated in France.<sup>53</sup> There was no basis for diversity jurisdiction over the parties, and the court refused to exercise subject matter jurisdiction based on Chapter 2 alone. The court distinguished *Satcom* and several other cases based on the notion that in those cases, the arbitrations were seated in the United States, which vested the district courts with primary jurisdiction, whereas the arbitration in *URS* was seated in Paris.<sup>54</sup> The Delaware court further indicated that it was not willing to interfere in the

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*Oppenheimer* court assumed without deciding that Chapter 1 of the FAA gave the court the power to stay arbitration in ‘appropriate circumstances.’ *Id.* at \*\*2-3.

<sup>49</sup> *Ghassabian*, *supra* note 6, at \*1.

<sup>50</sup> 376 F. Supp. 2d 334 (S.D.N.Y. 2005).

<sup>51</sup> *Id.* at 348-349 (emphasis in original).

<sup>52</sup> *Id.* at 350. Similarly, in *JSC Surgutneftegaz v. President and Fellows of Harvard Coll.*, 04 Civ. 6069 (RCC), 2005 WL 1863676 (S.D.N.Y. Aug. 3, 2005), the court permitted a petition to stay arbitration but expressed doubts over its subject matter jurisdiction to entertain an action brought on that basis alone. The court held that the court’s subject matter jurisdiction was apparent from the respondent’s notice of removal, which sought to compel arbitration, and therefore the court could decide a petition to stay arbitration ‘despite the apparent unavailability of such a motion under the FAA.’ *Id.* at \*2 n.3.

<sup>53</sup> *URS Corp. v. Lebanese Co. for the Development & Reconstruction of Beirut Central District Sal*, 512 F. Supp. 2d 199 (D. Del. 2007).

<sup>54</sup> *Id.* at 209. The court also found that it could not assert personal jurisdiction because the defendant did not have sufficient contacts with the state of Delaware or the United States as a whole. *Id.* at 216-17.

arbitration taking place in Paris, holding that such an injunction would be ‘inconsistent with the purposes of the New York Convention’.<sup>55</sup>

In *Dedon GmbH v. Janus et Cie*,<sup>56</sup> an SDNY court agreed that the primary jurisdiction distinction was an important one. There the court clarified an earlier opinion that had suggested that it might have the authority to stay an ICC arbitration in London under the New York Convention based on its personal jurisdiction over the parties. The court said, ‘[a]s I noted in my original opinion, only a court in England can stay the arbitration that is pending in England’.<sup>57</sup>

(d) *The Second Circuit Rules On Anti-Arbitration Injunctions*

In 2011, the Second Circuit had two opportunities to address the issue of anti-arbitration injunctions. In *Republic of Ecuador v. Chevron Corp.*,<sup>58</sup> a Chapter 2 case, the Second Circuit considered but declined to decide whether the FAA provides the authority to enjoin arbitration. There, Ecuador sought to enjoin an UNCITRAL arbitration seated in the Hague on the theory that Chevron had waived its right to arbitrate when it agreed to litigate in Ecuadorian courts. The Second Circuit noted the strong US policy favouring arbitration, in particular arbitration falling under the New York Convention. It went on to find that whether courts have the power to stay arbitration under the FAA or the New York Convention ‘is an open question in our Circuit’.<sup>59</sup> Because it ultimately concluded that a stay was unnecessary, it declined to ‘resolve the question of whether federal courts have the power to stay arbitration under the FAA (or any other authority) in an appropriate case’.<sup>60</sup>

Later in 2011, the Second Circuit finally addressed the longstanding question of the authority to grant an anti-arbitration injunction in *American Express*, a Chapter 1 case.<sup>61</sup> It involved claims brought by individual plaintiffs, the Belands, in an arbitration under Financial Industry Regulatory Authority (‘FINRA’) rules, which require FINRA members to arbitrate claims with their customers. Respondent Ameriprise alleged that the arbitration could not proceed because the Belands’ claims were barred by a class action settlement agreement entered into several years earlier. The arbitral tribunal denied Ameriprise’s application to stay the arbitration, so Ameriprise moved an SDNY court for an order to enforce the settlement agreement and enjoin the Belands from pursuing the pending arbitration. In response, the Belands argued that the definition of ‘Released Claims’ in the settlement agreement did not cover their claims against Ameriprise and that, in any event, the arbitrators should decide that issue. The district court

<sup>55</sup> *Id.* at 210.

<sup>56</sup> 10 Civ. 04541 (CM), 2011 WL 666174 (S.D.N.Y. Feb. 8, 2011).

<sup>57</sup> *Id.* at \*4.

<sup>58</sup> *Republic of Ecuador*, *supra* note 8.

<sup>59</sup> *Id.* at 391.

<sup>60</sup> *Id.*

<sup>61</sup> *American Express*, *supra* note 9.

agreed with Ameriprise and ordered the Belands to have the arbitration dismissed with prejudice.<sup>62</sup>

On appeal, the Second Circuit found that certain of the Belands' claims did not fall under the definition of 'Released Claims,' and had to be arbitrated.<sup>63</sup> As to those claims that were subject to the settlement agreement, however, the Second Circuit court held that the district court could properly exercise its 'remedial powers' to enforce the settlement agreement, which remained subject to the district court's jurisdiction, by enjoining the arbitration of those claims.<sup>64</sup>

In reaching this conclusion, the court analysed several prior decisions that had affirmed anti-arbitration injunctions. It found that those decisions suggested that where 'the parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings'.<sup>65</sup> Relying heavily on *SGS*, the court said it would adopt the principles set forth in that case that 'to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present,' and that allowing a court to enjoin an arbitration not called for by contract 'interferes with neither the letter nor the spirit of' the FAA.<sup>66</sup>

Despite this broad language, the Second Circuit then seemed to reign in its holding. It cautioned that its decision that an injunction was proper was based on the 'particular circumstances presented in this appeal,' which included 'the exclusive nature of the [...] district court's retention of jurisdiction over the Settlement Agreement'.<sup>67</sup> It declined to decide whether a court would have the power to issue an anti-arbitration injunction 'in another case without the type of jurisdiction retention present here'.<sup>68</sup> Thus, the Second Circuit did not find the authority to enjoin in the FAA itself, nor did it hold more broadly that anti-arbitration injunctions necessarily fall within the remedial powers of the court.<sup>69</sup>

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<sup>62</sup> *Id.* at 125.

<sup>63</sup> *Id.* at 138-39.

<sup>64</sup> *Id.* at 140.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 141.

<sup>67</sup> *Id.* n. 20.

<sup>68</sup> *Id.*

<sup>69</sup> While it is impossible to canvass, within a single article, all of the U.S. federal court case law on anti-arbitration injunctions, the major decisions issued by U.S. circuit courts of appeals outside of the Second Circuit tend to be similarly vague about the source of the court's injunctive authority. For example, the Fifth Circuit Court of Appeals has held, without any detailed analysis, that the right to stay of arbitration is 'clearly established in the case law.' *Tai Ping Ins. Co., Ltd. v. M/V Warschau*, 731 F.2d 1141, 1144 (5th Cir. 1984). The Eleventh Circuit has suggested that the All Writs Act, 28 U.S.C. §1651, may authorize federal courts to enjoin arbitration in certain circumstances. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004). A domestic arbitration case from the Third Circuit appears to have rested its injunctive power on a finding of irreparable harm and the general principle that courts are to decide arbitrability. See *PaineWebber Inc. v. Hartmann*, 921 F.2d 507 (1990) (overruled on other grounds) ('If a court determines that a valid arbitration agreement does not exist or that the matter at issue clearly falls outside of the substantive scope of the agreement, it is obliged to enjoin arbitration').

#### IV. ENJOINING INTERNATIONAL ARBITRATION: KEY QUESTIONS FOR FEDERAL COURTS

A careful analysis of whether injunctions of international arbitration are authorized under the FAA, and when (if ever) they should be granted, would be important clarification of US arbitration law. This Section discusses some of the questions that a federal court asked to enjoin an international arbitration must answer, and suggests how those questions might be resolved in a manner that complies with the United States' international obligations, provides clarity to litigants and tribunals, and discourages forum-shopping.

(a) *What Is the Source of the Court's Authority to Enjoin Arbitration?*

Much of the confusion in the US jurisprudence is due to the assumption by some courts that if the power to enjoin exists at all, it must lie within the FAA itself. Struggling to find authority in the FAA in the absence of any textual basis, courts have latched onto the idea that the FAA's explicit authority to compel arbitration must include a 'concomitant' authority to enjoin arbitration.<sup>70</sup> Motivating these courts is the idea that the authority to compel and the authority to enjoin are essentially flip sides of the same coin: the clear textual authority in the FAA to compel arbitration in certain circumstances would be meaningless if courts could not also enjoin arbitration in certain circumstances. Applying such logic, these courts appear to find their power to enjoin within the FAA itself.

The concomitant right theory is attractive on several levels: it is rooted in the FAA's statutory language, and it is simple and straightforward. Injunctions are as much a part of the fabric of US equity jurisprudence as are declaratory actions to compel; surely, the argument goes, the legislature cannot have intended to impede them.<sup>71</sup>

Yet there is danger in simply reading a right to enjoin into the FAA, as there is reading any right – concomitant or otherwise – into a statute that is not explicitly stated there. While the authority to enjoin seems a logical extension of the principle affirmed in *First Options* that the US court acts as a 'gatekeeper' of arbitral jurisdiction, an assumption that a corresponding injunctive power should be implied into the FAA as a statutory matter may go one step too far. There is even less reason to think that Chapters 2 or 3 of the FAA, which codify international conventions that do not provide for injunctions of arbitration, presume such relief.

Those courts that have done better, including the Second Circuit in the *American Express* decision and the First Circuit in *SGS*, have recognized that the source of the court's injunctive power need not necessarily lie within the FAA. Anti-arbitration injunctions must not conflict with the FAA, but that does not mean that the source

<sup>70</sup> See, e.g., *Satcom*, *supra* note 36; *Copape*, *supra* note 46; *Farrell*, *supra* note 44; *Republic of Iraq*, *supra* note 42.

<sup>71</sup> Consider too that FAA §16 prohibits appeals from interlocutory orders 'refusing to enjoin an arbitration,' reflecting at the very least a Congressional acknowledgment that state arbitration laws permitting such injunctions might be invoked in federal court. See *In re Lehman Bros. Securities and ERISA Litigation*, 706 F. Supp. 2d 552, 558 n. 49 (S.D.N.Y. 2010) (noting that §16 'presupposes that the district court could enjoin an arbitration in appropriate circumstances.').

of the authority to enjoin must be found within the FAA. There are at least two alternative sources of authority for anti-arbitration injunctions: (1) the inherent equitable powers of the court and (2) state arbitration laws.

(i) *Inherent Equitable Powers: Permissive and Restrictive Interpretations*

Most US federal courts appear to believe that they possess the inherent authority to enjoin arbitration, at least where they have personal and subject matter jurisdiction. Two basic principles suggest that this is correct. First, although the jurisprudence speaks in terms of ‘enjoining arbitration,’ the court issuing the anti-arbitration injunction is really enjoining a *party* from acting – that is, it is directing the party that has brought arbitration to cease arbitrating. If the court has personal jurisdiction over the party, it should also have the power to enjoin that party from acting in a way that would interfere with the court’s ruling (and to hold that party in contempt of court for its failure to abide by the ruling).<sup>72</sup> Second, the most common complaint of a party who seeks to enjoin arbitration is that it has not agreed to submit disputes to arbitration. Courts generally have the power to issue an injunction to give effect to their interpretation of a contract, and thus should be able to issue injunctive relief to give effect to a decision that the parties’ contract does not provide for arbitration. If we view the statutory power to compel in the FAA as a corollary to the courts’ general equitable power to issue a mandatory injunction commanding specific performance of an agreement to arbitrate, then the complementary equitable power to command a party *not* to arbitrate should also readily exist.

In the case of arbitrations falling under Chapter 1 of the FAA, federal courts have relied on their general equitable powers to issue anti-arbitration injunctions.<sup>73</sup> US federal courts have also relied on their inherent equitable powers to create remedies not otherwise provided for in the FAA in other contexts in connection with international arbitration. For example, it is well established in the Second Circuit that, where there is an enforceable agreement to arbitrate, a court may issue an ‘anti-suit injunction’ to prevent a party from proceeding with a lawsuit in another jurisdiction in violation of the arbitration agreement.<sup>74</sup> This authority is based not on any specific language found in the FAA, but in the inherent remedial powers of the court.<sup>75</sup>

To be sure, the anti-suit injunction has a protective function: it permits the court to foster a pro-arbitration policy and to direct the parties to seek an arbitral award

<sup>72</sup> See generally Dan Tan, *Enforcing International Arbitration Agreements*, 47 Va. J. Int’l L. 545, 554-55 (2007) (hereinafter ‘Tan’) (discussing courts’ use of their inherent powers to order specific performance of an arbitration agreement or to stay proceedings in support of arbitration agreements).

<sup>73</sup> See, e.g., *Lehman Bros. Inc. v. Adkins*, No. 94 Civ. 6827 (DC), 1994 WL 637794, at \*2 (S.D.N.Y. Nov. 14, 1994) (in a Chapter 1 arbitration, relying on the court’s ‘general equitable powers’ to grant injunctive relief to implement court’s judgment that the plaintiff was not bound by an arbitration agreement). See also *Citiigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 33 (2d Cir. 2010).

<sup>74</sup> See John Fellas, *Enforcing International Arbitration Agreements*, in *International Commercial Arbitration In New York* 238 (Carter & Fellas, eds., 2010).

<sup>75</sup> See Tan, *supra* note 72, at 558.

that can later be confirmed by the court. An anti-arbitration injunction does not, by itself, serve any such protective function. Some courts have held that a motion for injunctive relief falling under the court's general equitable powers (rather than a specific statute) 'must be predicated upon a cause of action . . . regarding which a plaintiff must show a likelihood or actuality of success on the merits.'<sup>76</sup> In other words, the injunction is not available 'in the abstract', but must be tied to another, legally cognizable right.<sup>77</sup> It is not obvious that such a right exists where the party seeking to enjoin the arbitration seeks *only* an injunction, without a separate, underlying cause of action against the party it seeks to enjoin.

This perhaps goes a long way toward explaining why the Second Circuit in *American Express* was careful to avoid deciding that courts possess the inherent equitable authority to enjoin arbitrations. The court noted in a footnote that other courts had relied on their general equitable powers, or the statutory authority to grant injunctive relief granted by the All Writs Act,<sup>78</sup> to issue anti-arbitration injunctions. The Second Circuit was clear, however, that its decision to enjoin was based *not* on these principles, but on 'the exclusive nature of the [ ] district court's retention of jurisdiction over the Settlement Agreement.'<sup>79</sup> It declined to decide whether a court would have the power to issue an anti-arbitration injunction 'in another case without the type of jurisdiction retention present here.'<sup>80</sup>

The Second Circuit's caution may have been motivated by the desire to avoid the notion that the court was encouraging interference with arbitration more generally, by emphasizing that, in these circumstances, jurisdiction over the non-arbitrable claims already lay firmly in the court. Courts applying *American Express* must be careful to note the distinction; it would be wrong to read *American Express* as approving injunctive relief in broader circumstances or as rooting the right to such relief in the FAA itself. Marc Goldstein praises the Second Circuit's measured approach which, in his view, advances a pro-arbitration policy that avoids implying the general existence of a statutory cause of action under the FAA, yet correctly permits an injunction in those circumstances where it is *necessary* to protect the court's otherwise properly-invoked jurisdiction.<sup>81</sup>

In Goldstein's view, courts need not even confront the question of whether there is an implied cause of action to enjoin under the FAA, if the motion to enjoin is not otherwise related to proceedings or judgments of the court (and no state statute

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<sup>76</sup> *Klay*, *supra* note 69, at 1098.

<sup>77</sup> *Id.* ('Wrongful arbitration', however, is not a cause of action for which a party may sue').

<sup>78</sup> All Writs Act, 28 U.S.C. §1651 (2012). The Act authorizes federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions.' The All Writs Act is typically understood to allow courts to protect their jurisdiction by enjoining a pending or threatened proceeding which would interfere with the court's jurisdiction or ability to bring a litigation to conclusion. See *Klay*, *supra* note 69, at 1102.

<sup>79</sup> *American Express*, *supra* note 9, at 1 n.20.

<sup>80</sup> *Id.*

<sup>81</sup> Marc J. Goldstein, *Judicial Power to Enjoin Arbitration: Clear Analysis from the Second Circuit*, Arbitration Commentaries, Nov. 14, 2010, available at <http://arblog.lexmarc.us/?s=american+express+financial>.

authorizing the injunction is available).<sup>82</sup> If the dispute is not properly before the court on its merits, but the petitioner has come before the court for the sole purpose of enjoining the arbitration, the motion can be dismissed as not stating a proper cause of action. If, on the other hand, the petitioner has brought the dispute before the court on its merits (or it is otherwise properly before the court), and seeks the injunction to protect the court's jurisdiction, it becomes unnecessary to imply a statutory cause of action in the FAA – rather, the injunction is merely a protective exercise of the court's jurisdiction, authorized under its inherent equitable powers, as in *American Express*.<sup>83</sup> This view fosters a pro-arbitration policy: it would discourage opportunistic litigants from avoiding disputes on their merits by seeking an anti-arbitration injunction from the court most likely to grant it, and would channel more disputes about arbitrability before the arbitrators themselves.

This approach might be viewed as a modified or 'restrictive' application of the inherent powers principle. It would permit a US court's exercise of its inherent powers to grant an anti-arbitration injunction only in those limited circumstances where the injunction is a necessary incident to the courts' otherwise properly invoked jurisdiction.<sup>84</sup>

(ii) *State Law Statutes*

A second potential source of authority to enjoin arbitration is that which was relied on by the court in *SGS*: an applicable state arbitration statute expressly authorizing anti-arbitration injunctions. Most of the individual US states have their own arbitration statutes and their own state jurisprudence that may be applied in cases

<sup>82</sup> Marc J. Goldstein, *An FAA Cause of Action to Enjoin Arbitration: Is It Necessary?*, Arbitration Commentaries, Mar. 29, 2011, available at <http://arblog.lexmarc.us/2011/03/an-faa-cause-of-action-to-enjoin-arbitration-is-it-necessary/>; see also *Rodarte v. FLNRA*, No. 3:11-MC-0084-CMC, 2011 WL 2144886, \*2 (D. So. Carolina Jun. 1, 2011) ('It follows that this court is not empowered by the FAA to issue injunctive relief without first acquiring jurisdiction over the subject matter and parties by virtue of a properly filed civil action.');

<sup>83</sup> Marc J. Goldstein, *An Exceptional, and Proper, Anti-Arbitration Injunction*, Arbitration Commentaries, Jan. 25, 2012, available at <http://arblog.lexmarc.us/?s=oracle>. As discussed by Goldstein, a recent federal district court decision from the Northern District of California adopts this approach. In *Oracle America, Inc. v. Myriad Group AG*, No. C 10-05604 (SBA), 2012 WL 146364 (Jan. 17, 2012), the court enjoined a London-seated ICDR arbitration because the parties' arbitration agreement provided for the exclusive jurisdiction of a court of competent jurisdiction over all disputes related to intellectual property rights. The court refused to enjoin arbitration of the parties' other claims. See also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984) ('Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.');

<sup>84</sup> For an example of a court seemingly relying on the court's already invoked jurisdiction to justify injunctive relief, see *Jock v. Sterling Jewelers, Inc.*, No. 08 Civ. 2875 (JSR), 2010 WL 5158617, \*3 (S.D.N.Y. Dec. 10, 2010) (finding power to enjoin a domestic arbitration where it was duplicative of an already ongoing arbitration that had been compelled by the court, holding that '[a]ny other conclusion would impede rational application of section 4 of the FAA, as well as fundamentally limit the power of a court to enforce its own judgments.');

involving international arbitration,<sup>85</sup> and some US states, including New York, provide for motions to stay arbitration in their state arbitration statutes.<sup>86</sup> Generally, the applicability of state arbitration law in the international arbitration context depends on whether the parties to the arbitration agreement clearly intended to apply the state's arbitration law in addition its substantive law.<sup>87</sup> State arbitration law that is inconsistent with the FAA will apply to the parties' arbitration agreement only where the parties have made clear their intention to apply such inconsistent state law.<sup>88</sup>

*SGS* and *American Express* suggest that state arbitration laws providing for injunctions of arbitration do not conflict with the FAA. The correctness of that view in the context of international arbitrations is discussed in Section B below.<sup>89</sup>

(iii) *The Source Debate And Subject-Matter Jurisdiction*

One question remains in the 'source' debate: if the authority to enjoin does not 'fall under' the FAA or the New York Convention, but is found only in other sources, can a lawsuit filed for the sole purpose of seeking a motion to enjoin provide an independent basis for federal subject matter jurisdiction under FAA §203? As discussed above, there has been a marked resistance in the case law to rely on a motion for an anti-arbitration injunction as the sole basis for federal court jurisdiction.<sup>90</sup> Where diversity jurisdiction provides a basis for subject matter

<sup>85</sup> See David M. Lindsey and Yasmine Lahlou, *The Law Applicable To International Arbitration In New York*, in *International Commercial Arbitration In New York* 3 (Carter & Fellas, eds., 2010).

<sup>86</sup> N.Y.C.P.L.R. §7503. Thirty-five U.S. states have adopted the Revised Uniform Arbitration Act, which does not expressly authorize a stay or injunction of arbitration. See 7 U.L.A. 1-98 (2009) [hereinafter 'RUAA'], §7, available at <http://www.law.upenn.edu/bl/archives/ulc/uarba/arbitrat1213.htm>. However, the RUAA does provide that 'If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.' *Id.* §6(d) (emphasis added).

<sup>87</sup> See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989); *Mastrobuono v. Sherman Lehman Hutton, Inc.*, 514 U.S. 52 (1995)

<sup>88</sup> See *Bechtel do Brasil Construcoes Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150 (2d Cir. 2011). In *Bechtel*, the parties' arbitration clause expressly provided that the law of the state of New York would govern the 'procedure and administration of any arbitration.' Nonetheless, the Second Circuit refused to apply New York state arbitration law providing that the court rather than the arbitrators would determine whether the arbitration was time barred, holding that the parties' contract was ambiguous as to whether the parties intended the New York state rule to govern the issue of timeliness. The decisions discussed in this Article in which the SDNY court relied on CPLR §7503 to stay arbitration did not analyse whether the parties' arbitration clause specifically incorporated New York state arbitration law on stays. See, e.g., *Republic of Ecuador*, *supra* n. 50.

<sup>89</sup> In addition, litigants should be aware that the stay provisions of New York's CPLR are strictly limited. CPLR §7503 permits a stay of arbitration only where the party alleges that there is no valid agreement to arbitrate or the arbitration is time barred. Under U.S. federal law, the question of whether a dispute is time-barred is expressly reserved for the arbitrators. Thus parties wishing to take advantage of the CPLR time-bar provision should expressly state their intention in the arbitration agreement. CPLR §7503 also requires a litigant to move to stay arbitration within twenty days of receiving an arbitration demand (except in circumstances where the party alleges that no arbitration agreement exists), and specifies that a party may move for a stay only if it has not participated in the arbitration and has not made or been served with an application to compel arbitration.

<sup>90</sup> See, e.g., *Republic of Ecuador*, *supra* note 50, at 348 ('[i]t is not at all clear that an action seeking such relief falls under the [New York] Convention within in the meaning of 9 U.S.C. §203, so as to provide this Court with original jurisdiction.')

jurisdiction, on the other hand, courts seem more comfortable finding authority to enjoin, and some decisions implicitly or explicitly limit their applicability to these circumstances.<sup>91</sup>

The answer may be much simpler than the jurisprudence suggests. First, if we accept that the power to enjoin is simply a corollary to the equitable power to compel, and acknowledge that in most circumstances a party resisting a motion to enjoin will affirmatively assert a cross-motion to compel (providing the court with a clear statutory basis for jurisdiction), then it seems overly rigid to suggest that the motion to enjoin itself cannot provide the basis for federal subject matter jurisdiction.<sup>92</sup> As Professor Alan Rau puts it:

A party . . . defending against a motion to enjoin – a party who is asking that an arbitration be allowed to continue unimpeded – is not exactly asking that arbitration be ‘compelled’: But really, the difficulty is only apparent to someone who is anxious to find it, and it is hardly a distinction that the legislator is likely to have been troubled with.<sup>93</sup>

Second, in the view of Professor Rau and others, the FAA can be read to permit any proceeding meeting the definitional requirements of FAA §202 to ‘fall under’ the New York Convention, regardless of whether the specific ‘cause of action’ – here, the motion to enjoin – is found within the New York Convention. The removal provision found in FAA §205 permits a defendant to remove an action to federal court ‘where the subject matter of an action or proceeding pending in a State court *relates to an arbitration agreement or award* falling under the Convention’. Applying this language to §203, Professor Rau suggests that courts should find the relevant ‘falling under’ hook wherever the action relates to an arbitration agreement or award meeting the definitional requirements set forth in FAA §202.<sup>94</sup> This would permit motions to enjoin international arbitration to be brought in federal court in the first instance, even where there is no other basis for jurisdiction over the parties.

*(b) Is An Anti-Arbitration Injunction Permissible Under the New York and Panama Conventions?*

Section IV.(a) discusses three potential answers to the question of whether US courts have the power to issue anti-arbitration injunctions: (1) they may *always* do so pursuant to their inherent equitable authority (at least where they have personal jurisdiction over the parties); (2) they may *only* do so where necessary to protect their otherwise properly-invoked jurisdiction; or (3) they may do so where a state statute invoked by the parties permits an anti-arbitration injunction.

<sup>91</sup> See, e.g., *Satcom*, *supra* note 36, at 342 (‘here, the district court has a basis for subject matter jurisdiction *other* than the Convention and has personal jurisdiction over the parties’).

<sup>92</sup> Alan Scott Rau, *Understanding (and Misunderstanding) ‘Primary Jurisdiction,’* 21 Am. Rev. Int’l Arb. 47, 150-51 (2010) (hereinafter, ‘Rau on Primary Jurisdiction’).

<sup>93</sup> See *id.* at 146.

<sup>94</sup> *Id.* at 151.

In the case of an international arbitration, however, the court's inquiry cannot end there; courts must move on to address whether the injunction is permissible under the New York Convention or Panama Convention, or is in fundamental conflict with them. The Second Circuit has never opined on the question, nor does the First Circuit's decision in *SGS*, a Chapter 2 case, consider the potential Convention conflict. The question deserves serious consideration.<sup>95</sup>

(i) *The International Perspective On Anti-Arbitration Injunctions*

There is no textual basis in the New York or Panama Conventions for anti-arbitration injunctions, and many scholars strongly disagree with an interpretation of those Conventions that permits interference with an arbitration *before* the arbitration has occurred.<sup>96</sup> The New York Convention's text provides only one mechanism for review of the arbitrators' decision on jurisdiction: one that takes place *post-award*, in the enforcement regime. Gary Born suggests that 'the better view is that issuance of an anti-arbitration injunction against an arbitration subject to the New York Convention is generally contrary to the basic legal framework for international arbitration established by the Convention'.<sup>97</sup> The Convention's structural regime contemplates that each and every Contracting State has the right to review the arbitrators' decision on jurisdiction under the Convention's enforcement mechanism; an injunction issued by one domestic court preventing an arbitration from going forward would directly interfere with this right.<sup>98</sup>

Those Contracting States to the New York Convention that adhere strictly to the principle of competence-competence consider anti-arbitration injunctions to be absolutely inimical to the Convention's structure.<sup>99</sup> In those States, arbitrators

<sup>95</sup> See Stephen M. Schwebel, *Anti-Suit Injunctions In International Arbitration: An Overview*, in *Anti-Suit Injunctions in International Arbitration* 5 (Gaillard ed. 2005) (arguing that anti-arbitration injunctions violate the New York Convention, bilateral investment treaty obligations, customary international law, and fundamental principles of international arbitration).

<sup>96</sup> See generally *Anti-Suit Injunctions in International Arbitration* (Gaillard ed. 2005).

<sup>97</sup> Gary B. Born, *International Commercial Arbitration* 1053 (2009) (hereinafter 'Born'). Born states that 'Even where one party denies the existence of a valid arbitration agreement, an anti-arbitration injunction should virtually never be issued,' leaving the determination to the arbitral tribunal 'in virtually all instances.' *Id.* at 1054.

<sup>98</sup> *Id.*; see also Dominique T. Hascher, *Injunctions In Favor Of and Against Arbitration*, 21 *Am. Rev. Int'l Arb.* 189, 190 (2010) (hereinafter, 'Hascher') ('The object and purpose of the New York convention are defeated by anti-arbitration injunctions which aim at suspending the arbitration process initiated on the basis of an arbitration agreement.'). *Id.* at 192 ('An anti-arbitration injunction is contrary to the autonomy of international arbitration.')

<sup>99</sup> See Emanuel Gaillard and Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention In Practice* 261 (Gaillard and DiPietro, eds. 2008) (hereinafter, 'Gaillard and Banifatemi') (noting a trend in recent years towards greater recognition of the priority of the arbitrators in the determination of their own jurisdiction among courts outside the United States). For example, the French Code of Civil Procedure requires that a state court declare itself incompetent when a dispute is already pending before an arbitral tribunal. See Hascher, *supra* note 98, at 190. The French *Cour de Cassation* has made clear that this rule applies regardless of the seat of the arbitral tribunal. *Id.* at 192. Two recent decisions by French courts confirm the principle that the courts may not interfere with an arbitration in any circumstances. See Alexis Mourre, *French Courts firmly reject anti-arbitration injunctions*, *Kluwer Arbitration Blog* (May 6, 2010) (discussing two decisions from Paris courts refusing to intervene in arbitral proceedings). Swiss courts have also declined

are always empowered to rule on their jurisdiction in the first instance, with domestic courts reviewing jurisdictional disputes only after the arbitration has taken place. Such States interpret the New York Convention's instruction to refer the parties to arbitration where there is an enforceable arbitration agreement to justify only the most cursory, 'prima facie' glance at whether an arbitration agreement exists.<sup>100</sup>

Similarly, as mentioned above, the rules of nearly every arbitral institution provide that the arbitral tribunal may decide its own jurisdiction, and the UNCITRAL Model Law expressly contemplates that the arbitral tribunal may continue with proceedings and address issues of jurisdiction even after an action has been brought in a national court to resolve a jurisdictional dispute.<sup>101</sup> Accordingly, an arbitral tribunal may well refuse to comply with an injunction issued by a domestic court,<sup>102</sup> and a party that has been enjoined from arbitrating but believes in good faith that it may do so faces the impossible dilemma of giving up the arbitration or facing charges of civil contempt.

Consider, too, the statement made by an ICSID tribunal in the *Saipem v. Bangladesh* case, which analysed, among other things, whether a Bangladeshi court's revocation of the authority of the arbitrators in an ICC arbitration based on alleged misconduct amounted to a violation of the New York Convention. While the decision was clearly limited to the extreme circumstances in that case, the ICSID tribunal's conclusion was stated in broad terms:

[I]t is for instance generally acknowledged that the issuance of an anti-arbitration injunction can amount to a violation of the principle embedded in Article II of the New York Convention [to 'recognize' an arbitration agreement]. . . . it is the Tribunal's opinion that a decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it *de facto* 'prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement' thus completely frustrating if not the wording at least the spirit of the Convention.<sup>103</sup>

Finally, there is the added complication that when an international arbitration is seated outside of the United States, an anti-arbitration injunction risks interfering

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to enjoin arbitration, on the basis that 'a Swiss court shall only decide on the jurisdiction of an arbitral tribunal after the latter has done so itself.' See Marco Stacher, *You Don't Want To Go There – Antisuit Injunctions in International Commercial Arbitration*, ASA Bulletin (Kluwer Law Int'l 2005, Volume 23, Issue 4, pp. 640-654 (hereinafter 'Stacher').

<sup>100</sup> See Gaillard and Banifatemi, *supra* note 99, at 261.

<sup>101</sup> UNCITRAL Model Law, art. 23(3).

<sup>102</sup> Consider, for example, the *Himpurna California Energy v. Indonesia* case, in which the tribunal refused to comply with an injunction issued by an Indonesian court, despite the fact that the arbitration agreement provided that the seat of the arbitration was Jakarta. See also Julian Lew, *Anti-Suit Injunctions Issued By National Courts To Prevent Arbitration Proceedings*, in *Anti-Suit Injunctions in International Arbitration* 34 (Gaillard ed. 2005) (hereinafter, 'Lew') (discussing *Himpurna* and other examples).

<sup>103</sup> *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award ¶167 (June 30, 2009). Professor Lew cautions against the particular dangers associated with anti-arbitration injunctions in investor-state arbitration, where anti-arbitration injunctions may be motivated solely by the desire of the state to protect its own state entities. See Julian Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 Am. U. Int'l L. Rev. 489, 511 (2009).

with a proceeding that has been brought in another jurisdiction, and is subject to another forum's arbitration law. In the context of anti-suit injunctions, where US courts have enjoined domestic court litigation taking place in another jurisdiction that threatens to impede arbitration, the Second Circuit has developed a robust test to ensure that anti-suit injunctions consider international comity and are issued only in appropriate circumstances.<sup>104</sup> Can a similar test be developed for anti-arbitration injunctions?

(ii) *Striking A Balance: Anti-Arbitration Injunctions By Courts Of The Seat*

The ostensible conflict between anti-arbitration injunctions and the New York Convention is not irreconcilable, but it is critical that courts strike the proper balance. If the circumstances in which anti-arbitration injunctions of international arbitration may be issued are not carefully defined, opportunistic litigants surely will seek assistance from the US courts to avoid arbitration where the courts of other jurisdictions would readily permit it.

The rule that finds most support in the New York Convention and in scholarly commentary would permit anti-arbitration injunctions only in those circumstances where the United States is the primary jurisdiction, i.e., the seat, of the arbitration, but a US court finds that there is no enforceable agreement to arbitrate.<sup>105</sup> The rationale for such a rule is as follows: the selection of the place of the arbitration is a presumptive choice by the parties of that state's body of arbitration law.<sup>106</sup> Under *First Options*, it is well settled that US courts may rule in the first instance as to whether there is an enforceable agreement to arbitrate. If the party seeking arbitration has alleged that the arbitration is seated in the United States, and the party seeking to enjoin arbitration asks the US court to rule on whether there is an enforceable agreement to arbitrate, then the US court is entitled to determine whether the arbitration should go forward under its law, and to bind the disputing parties by either compelling or enjoining the arbitration.<sup>107</sup>

<sup>104</sup> See *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004) (applying four factors enumerated in *China Trade* case to a request for anti-suit injunction: two threshold requirements that (1) the parties are the same in both matters and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined, and two other factors: (3) public policy considerations and (4) protection of the jurisdiction of the rendering court).

<sup>105</sup> For example, Professor Lew suggests that there are 'obvious examples' under the New York Convention where a court order enjoining an arbitration would be justified, such as where there is no agreement to arbitrate. Lew, at 32. The European Commission's Green Paper of 21 April 2009, drafted after the EC's decision in *Allianz SpA and Another v West Tankers Inc*, Case 185/07 (10 February 2009) in response to concerns about the risk of parallel proceedings to determine arbitral jurisdiction, proposed that the courts of the seat be given priority in determining the existence and validity of the arbitration agreement. See Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' on 21 April 2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>.

<sup>106</sup> See, e.g., Rau on Primary Jurisdiction, *supra* note 92, at 66.

<sup>107</sup> The application of this rule will of course be limited by the *First Options* direction that courts must relinquish the arbitrability decision to the arbitrators where there is clear and unmistakable evidence that the parties so intended.

This approach is arguably consistent with at least the framework, if not the language, of the New York Convention. Article II(3) of the New York Convention instructs courts to refer the parties to arbitration where there is a written arbitration agreement, but it also allows a court to refuse to refer the parties to arbitration where the agreement is 'null, void, inoperative or incapable of being performed'.<sup>108</sup> This language protects valid and enforceable arbitration agreements, but offers no protection to non-existent or unenforceable arbitration agreements.<sup>109</sup> If a court finds that there is no agreement to arbitrate, it need not compel arbitration, but to say that it should nonetheless decline to enjoin the arbitration seems to favour rigid textual interpretation over practicality and reasonableness.

Further, the New York Convention favours the *lex arbitri* in vacating or setting aside an arbitral award, and permits courts in other competent jurisdictions to refuse to enforce an arbitral award that has been set aside by a court of the seat.<sup>110</sup> If a US court of primary jurisdiction rules that, according to its law, there is no agreement to arbitrate, the resisting party can simply decline to participate in the arbitration and later move the courts of that same jurisdiction to set aside the award. Other contracting parties to the New York Convention should, generally speaking, give effect to that decision.<sup>111</sup> A claimant pursuing arbitration knowing that a court of the seat has already decided against it may wisely choose to avail itself of its day in court, rather than try to obtain an arbitral award that is likely to be set aside.

These practical advantages fall away when the US court is one of secondary jurisdiction: because the arbitration clause is subject to the law of a foreign seat, the US court may be tasked with applying unfamiliar foreign law to determine whether an agreement to arbitrate exists.<sup>112</sup> The party seeking arbitration can also move to compel arbitration at the seat, threatening a wave of competing and conflicting decisions, and the courts of the seat will have the final say in a set-aside proceeding. All of this suggests that the US court of secondary jurisdiction should,

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<sup>108</sup> New York Convention, art. II(3).

<sup>109</sup> Lew, *supra* note 102, at 32

<sup>110</sup> See New York Convention, art. V(1)(e).

<sup>111</sup> The language of Article V, however, is permissive instead of binding, and a minority of courts have seized on this distinction to refuse to follow a decision by a primary jurisdiction setting aside an arbitral award. See Albert Jan van den Berg, *The New York Convention Of 1958: An Overview*, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention In Practice* 62 (Galliard and DiPietro, eds. 2008) (hereinafter, 'van den Berg') (noting the French view that setting aside in the country of origin should be ignored). See also *In re Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996) (in a case now considered somewhat of an outlier, enforcing arbitral award that was set aside by Egyptian courts).

<sup>112</sup> US jurisprudence regarding the law that will be applied to determine the existence of an arbitration agreement is not entirely settled. Compare *Smith/Enron Cogen. Ltd. P'ship, Inc. v. Smith Cogen. Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (applying federal common law) with *Motorola Credit Corp. v. Kemal Uzan*, 388 F.3d 39, 50-51 (2d Cir. 2004) (applying Swiss law of underlying contract). For a more detailed analysis, see David M. Lindsey and Yasmine Lahlou, *The Law Applicable To International Arbitration In New York*, in *International Commercial Arbitration In New York* 18-24 (Carter & Fellas, eds., 2010).

in most cases, relinquish the arbitrability question to the arbitrators or to the courts of the primary jurisdiction, declining to enjoin.<sup>113</sup>

Permitting only the primary jurisdiction court to enjoin the arbitration fosters two objectives: (1) the courts of the seat are given priority in interpreting their own arbitration laws, which they best understand; and (2) courts of secondary jurisdictions are discouraged from enjoining arbitrations that are seated elsewhere in order to protect their own litigants or seize jurisdiction for themselves, a result that would conflict with a pro-arbitration policy. Moreover, the primary jurisdiction injunction will bind the party seeking arbitration, which is advocating for the application of a particular body of arbitration law, and thus should have to abide by a decision made under that arbitration law. Finally, the primary jurisdiction injunction should have the greatest influence over the arbitral tribunal. Arbitral tribunals are more likely to respect or enforce injunctions issued by the seat or, at least, to take the court's view into account in making their own jurisdictional determination applying the same law. The *Saipem* tribunal cited favourably to the view that:

[T]he *lex arbitri* constitutes the primary legal basis for the effectiveness of the arbitration agreement and the arbitrators do not have discretionary power to disregard injunctions issued by the courts at the seat of the arbitration. To the contrary, they should obey such decisions, unless they are manifestly abusive.<sup>114</sup>

(iii) *An Alternative Approach: Courts 'Seized' Of The Merits?*

Critics of the 'primary jurisdiction' approach will argue that the New York Convention permits *any* domestic court to refer, or decline to refer, parties to arbitration. The bases for finding an arbitration agreement 'null, void, inoperative or incapable of being performed' will vary widely from state to state, and the text of the New York Convention does not expressly require that the *lex arbitri* be applied to determine whether a dispute must be referred to arbitration. Instead, the Convention contemplates a system of concurrent jurisdiction, in which multiple states might determine whether an agreement to arbitrate exists and refer

<sup>113</sup> Professor Rau suggests that, in such circumstances, the court might frame its decision not as a ruling that it has no 'authority' to enjoin, but instead as a presumption in favour of the exhaustion of local remedies or even a prudential *forum non conveniens* decision. Rau on Primary Jurisdiction, *supra* note 92, at 173; see also Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent'*, 24 *Arbitration International* 199, 210 (Kluwer 2008).

<sup>114</sup> *Saipem v. Bangladesh*, *supra* note 103, ¶160. But see *Salini Costruttori S.p.A. v. Federal Democratic Republic of Ethiopia*, ICC Case No. 10623, Award regarding the Suspension of the Proceedings and Jurisdiction (December 7, 2001), ¶128 ('An international arbitral tribunal is not an organ of the state in which it has its seat in the same way that a court of the seat would be. The primary source of the Tribunal's powers is the parties' agreement to arbitrate. . . . In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfillment of the Tribunal's larger duty to the parties.').

the parties to arbitration.<sup>115</sup> Most courts apply by analogy the conflict of laws rules contained in Convention Article V(1)(a), applying the law of the primary jurisdiction to determine whether to refer the parties to arbitration.<sup>116</sup> Others, however, insist on applying an international law standard to analyse the validity of the arbitration agreement.<sup>117</sup> The Convention was deliberately silent on this issue,<sup>118</sup> and perhaps for good reason: there are serious questions as to whether a party seeking to avoid arbitration should be forced to adjudicate the non-existence of the arbitration agreement under the laws of a jurisdiction set forth in an arbitration clause by which it does not believe it is bound.

Moreover, the forum chosen in the arbitration agreement for the arbitration is not necessarily – or even usually – the forum whose courts would have jurisdiction over the underlying dispute.<sup>119</sup> In many situations, the courts of the seat do not have any particular connection to the arbitration, other than their jurisdiction being chosen by the parties in their arbitration clause.

A potential alternative, then, would permit anti-arbitration injunctions only where a court is otherwise seized of the merits of the dispute.<sup>120</sup> This view finds some support in the New York Convention: Article II(3) states that a court ‘seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article’ shall refer the parties to arbitration. Some would argue that it is only a court seized of jurisdiction over the merits of the dispute – rather than the court of the seat of the allegedly improper arbitration – that should decide whether the arbitration may go forward and, if necessary to protect its jurisdiction, may issue an injunction of the proceedings.<sup>121</sup>

This argument works reasonably well in the context of US jurisprudence, which gives the courts priority to decide arbitrability questions. It may conflict however, with a strict view of competence-competence, and would surely increase the risk of parallel proceedings and potentially inconsistent decisions by tribunals that find

<sup>115</sup> See Stacher, *supra* note 99, at 646 ([‘T]he system provided for by the Convention entails concurrent pre-arbitration proceedings in case [the issue of whether the dispute must be arbitrated] arises in more than one signatory and confers on each signatory the responsibility to handle these proceedings in accord with the Convention.’).

<sup>116</sup> See Van den Berg, *supra* note 111, at 53; see also R. Doak Bishop, Wade M. Coriell and Marcelo Medina Campos, *The ‘Null and Void’ Provision of the New York Convention*, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention In Practice* 286 (Galliard and DiPietro, eds. 2008) (hereinafter, ‘Bishop.’).

<sup>117</sup> Bishop, *supra* note 116, at 286.

<sup>118</sup> *Id.* and accompanying note 60.

<sup>119</sup> It is a fundamental advantage of international arbitration that parties may choose to arbitrate in a neutral forum, even if that forum has nothing whatsoever to do with the dispute or the parties.

<sup>120</sup> See discussion *supra* at Section IV.a.i and accompanying notes 82-84. A recent decision of the High Court in London appears to have adopted this approach: in *Excalibur Ventures LLC v. Texas Keystone et. al.*, Justice Gloster held that the court had jurisdiction to enjoin Excalibur from bringing ICC arbitration in New York in part because the English court was already seized of the merits of the dispute. *Excalibur Ventures LLC v. Texas Keystone et al.* [2011] EWHC 1624 (Comm), Judgment, ¶¶59-60, et seq. (June 28, 2011).

<sup>121</sup> See Frédéric Bachand, *The UNCITRAL Model Law’s Take on Anti-Suit Injunctions*, in *Anti-Suit Injunctions in International Arbitration* 106 (Galliard ed. 2005) (citing Sandrine Clavel, *Anti-suit injunctions et arbitrage*, 2011 Rev. Arb. 669, 676) (discussing Sandrine Clavel’s view that Article II(3) gives the task of enforcing the arbitration agreement ‘in its negative effect’ exclusively to the court seized of the merits, rather than to the courts of the seat).

that they have jurisdiction under the law of the arbitration agreement and refuse to submit to the injunction of a court which, in the tribunal's view, has little, if any, authority over the arbitration. In addition, it risks encouraging the issuance of injunctions by secondary jurisdictions protective of their own litigants or state interests. Finally, a view that prioritizes the courts of the merits renders the courts of the seat virtually irrelevant in the pre-award context, and threatens to raise questions about the proper role of the primary jurisdiction in the enforcement context as well.

(c) *Must the Party Seeking the Injunction Demonstrate Irreparable Harm?*

When examining a request for an anti-arbitration injunction US courts must not overlook the fundamental principle that, under US law, injunctions are an extraordinary remedy. A court typically will grant an injunction only if a party can demonstrate that it will suffer 'irreparable harm' absent the injunction.<sup>122</sup> Surprisingly, the question of whether a party seeking an anti-arbitration injunction can demonstrate irreparable harm has been given little attention by courts in the anti-arbitration jurisprudence.

Generally speaking, US courts do not regard monetary harm (e.g., the costs that a party will incur in having to defend against the arbitration) to be 'irreparable' in nature, as such harm theoretically can be remedied by a court.<sup>123</sup> The Eleventh Circuit has suggested that when a court with 'competent jurisdiction' determines a claim to be non-arbitrable, a default award against the arbitration respondent would not be enforceable because the arbitrators would have 'exceeded their jurisdiction' by arbitrating the non-arbitrable dispute, making it 'unclear how [the respondents] would suffer any injury at all, much less irreparable injury'.<sup>124</sup> Yet at least in the realm of international arbitration, this leaves the respondent in a difficult position: even if it chooses not to participate in the arbitration, it must still assert the jurisdictional position in connection with a set-aside or enforcement proceeding, and there is a real risk that that the assertion of jurisdiction by the arbitral tribunal will be favoured in other jurisdictions above the decision of the US court which found jurisdiction lacking. It would also leave anti-arbitration injunctions unavailable, because of a lack of irreparable injury, in the very

<sup>122</sup> See *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Courts will also analyse (1) whether the balance of hardships tips in favour of the party requesting the injunction and (2) where a preliminary injunction is sought, whether the party requesting injunctive relief is likely to succeed on the merits or there are 'sufficiently serious questions' going to the merits. *Id.*

<sup>123</sup> The Second Circuit has held, however, that irreparable harm will result from arbitrating a dispute involving a party who is not covered by the arbitration agreement. *Maryland Casualty Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 985 (2d Cir. 1997) ('[T]he time and resources [plaintiff] would expend in arbitration is not compensable by any monetary award of attorneys' fees or damages pursuant to the provisions of the [arbitration agreement] or the Arbitration Act.'). The SDNY applied similar reasoning to restrain a defendant from pursuing arbitration against a non-signatory in *Masefield AG v. Colonial Oil Industries, Inc.*, No. 05 Civ. 2231(PKL), 2005 WL 911770 (S.D.N.Y. Apr. 18, 2005)

<sup>124</sup> *Klay*, *supra* note 69, at 1112, n.20. The court went on to state: 'It is precisely because arbitrating nonarbitrable claims is such a pointless endeavor that it does not threaten or undermine either the district court's existing order or its jurisdiction over the pending cases.' *Id.* at 1113.

circumstances in which they are probably most justified: where the courts of the seat find that there is no arbitration agreement under their own law. This is an illogical result, one that, in Professor Rau's words, 'inflict[s] an exquisite form of torture on respondents'.<sup>125</sup>

A court might look to the timing of the request for injunctive relief as a factor in determining irreparable harm. Where the arbitrators have already asserted jurisdiction over a dispute, the respondent will be forced to arbitrate or face default, with the resulting risk of enforcement that goes with it. But anti-arbitration injunctions are more commonly sought just after an arbitration demand is filed, before the tribunal has had the opportunity to say anything at all about jurisdiction. Is it enough to justify an injunction that the movant faces the *risk* that the arbitrators will choose to assert jurisdiction, even where a court has said that they have none (a decision that may arguably have *res judicata* effect in the arbitration proceeding)? It is one thing to say that *First Options* gives parties the right to have a court decide jurisdiction; it is quite another to say that the doctrine permits an injunction simply because a party may incur certain costs in convincing the arbitrators to abide by the court's decision.<sup>126</sup> Yet a rule that permits anti-arbitration injunctions only after the arbitral tribunal has wrongfully asserted jurisdiction would encourage forum shopping of the worst kind. One compromise position may be for the court to consider how far the arbitral proceedings have advanced. If a party has delayed too long in seeking the injunction, a court might find that the balance of the equities lies with the claimant.

Finally, courts should consider whether irreparable harm is the appropriate test in the anti-arbitration injunction context. In *Oracle*, a California federal district court held that because the injunction sought was of a 'foreign proceeding' (a London-seated arbitration), the traditional preliminary injunction test was 'inapt,' and instead proceeded to consider the factors established by the Ninth Circuit in the context of anti-suit injunctions of a foreign proceeding.<sup>127</sup> The typical test applied by federal courts to requests for anti-suit injunctions in connection with international arbitration examines whether the proceeding sought to be enjoined will involve the same issues as the proceeding pending before the court, and whether the issuance of the injunction will offend notions of comity.<sup>128</sup> If the party

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<sup>125</sup> Rau on Primary Jurisdiction, *supra* note 92, at 118, n.183 ('But imposing such a choice amounts in most cases to inflicting an exquisite form of torture on respondents – indeed, everything the Supreme Court said in *First Options* can be understood as an attempt to mitigate it.'). The Third Circuit has held that compelling a party to arbitrate that has not agreed to do so constitutes 'per se' irreparable harm. *PaineWebber Inc.*, *supra* note 69, at 515 ('[W]e think it obvious that the harm to a party would be *per se* irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority.').

<sup>126</sup> See *Telenor Mobile Communications AS v. Storm LLC*, 524 F. Supp. 2d 332, 340 (S.D.N.Y. 2007) (discussing court's prior order denying injunction of arbitration because, where arbitrators rendered a 'partial final award' rejecting respondent's jurisdictional argument, 'to the extent [respondent] relied on the general equitable power of the Court, it was insufficiently likely to prevail on the merits, given the likely correctness of the arbitrators' ruling').

<sup>127</sup> *Oracle*, *supra* note 83, at \*3.

<sup>128</sup> See *supra* note 104 (discussing Second Circuit test).

seeking the anti-arbitration injunction seeks the injunction from a court otherwise seized of the merits, then the risk of parallel proceedings on identical issues becomes an important consideration. The comity argument, on the other hand, might favour of the courts of the seat of the arbitration.<sup>129</sup>

(d) *A Way Forward*

The above considerations counsel in favour of a measured, careful approach to injunctions of international arbitration. While every case depends heavily on its facts, US courts must be clear in why they have reached the decision to enjoin or not to enjoin; a muddled subject matter jurisdiction or cause of action analysis detracts from the clarity of US arbitration law and could lead to unintended consequences.

To consider just a few basic examples, an application of some of principles discussed above might look as follows:

- *US As Primary Jurisdiction:* US-Party A and non-US-Party B have entered into a contractual arrangement which, Party A claims, requires arbitration of all disputes in New York. Party A commences arbitration in New York in accordance with the provisions of the alleged arbitration clause. Party B believes there is no agreement to arbitrate, and moves to enjoin the arbitration from going forward by petitioning a New York federal court. *May the court enjoin the arbitration?*

In this scenario, a New York federal court will have subject matter jurisdiction over the parties under the doctrine of diversity jurisdiction, because Party A is from the United States and Party B is a foreign party. The New York court should also have personal jurisdiction over Party A, because Party A claims to have entered into an agreement providing for arbitration within the state.<sup>130</sup> The arbitration is seated in New York and the proceedings are taking place there. If Party B has not sought the court's jurisdiction over the dispute on its merits, the court might decline to issue the injunction, directing Party B to challenge the jurisdiction of the tribunal in the arbitration. If Party B has brought the dispute before it, on the other hand, and can demonstrate irreparable harm or other compelling circumstances favouring an injunction, the court might choose to exercise its inherent powers to issue such relief.

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<sup>129</sup> In *General Electric Co. v. Deutz AG*, 270 F.3d 144 (3d Cir. 2001), for example, the Third Circuit Court of Appeals overturned the district court's decision to enjoin a party from pursuing proceedings to compel arbitration in English court and from 'taking any other action' to further arbitration proceedings in England, based on principles of international comity.

<sup>130</sup> See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lescopulos*, 553 F.2d 842, 844 (2d Cir. 1977) ('Merrill Lynch argues that the agreement to resolve disputes by arbitration in New York constituted consent to personal jurisdiction in New York. Merrill Lynch is correct.').

- *US As Secondary Jurisdiction:* US-Party A, whose place of business is New York, and non-US-Party B, have entered into a contractual arrangement which, Party A claims, requires arbitration of all disputes in Paris. Party A commences arbitration in Paris. Party B believes it is not required to arbitrate. Party B believes that a New York court is the proper forum for the parties' dispute, and seeks to enjoin the arbitration in New York federal court. *May the New York federal court enjoin the arbitration in these circumstances?*

In the above hypothetical, the New York court will have personal jurisdiction over Party A because Party A has its place of business in New York. The court will have subject matter jurisdiction based on diversity. The alleged arbitration agreement is governed by French law, however, and the arbitral proceedings are taking place outside of New York. In these circumstances, the US court might decline to issue the injunction as impermissible under the New York Convention or for reasons of international comity, permitting the arbitral tribunal or courts of the seat to make the jurisdictional decision in the first instance. Of course, if the court does not stay its own litigation pending that decision, it runs the risk of subjecting parties to parallel proceedings and conflicting rulings; the court will have to exercise its discretion to decide whether an injunction would be appropriate in a particular case.

- *US Seat, Non-US Parties:* Party A and Party B are both non-US parties, but Party A alleges that they have agreed to a New York-seated arbitration, and commences proceedings there. Party B moves to enjoin the arbitration in a New York federal court, but does not bring an action on the merits. *May the New York federal court enjoin the arbitration in these circumstances?*

Here, personal jurisdiction over Party A should be established based on the alleged New York arbitration clause. However, there is no basis for diversity jurisdiction under US law over two non-US parties. Thus, the New York federal court has federal subject matter jurisdiction over the action only if it is one 'falling under' the New York Convention. Applying the language of §202 to inform §203, the US court will have subject matter jurisdiction if the matter deals with an arbitration agreement that falls under the Convention.

If Party B alleges that there is no such arbitration agreement, US courts could take the position that Party B has not properly pleaded a basis for jurisdiction under the FAA. The court could then dismiss the case for lack of subject matter jurisdiction, without having to confront the question of whether the injunction is otherwise proper. Courts should, however, be clear in the reasons for the dismissal, rather than conflating the subject matter jurisdiction and cause of action inquiry. Application of such a rule would discourage litigants from seeking injunctions where they refute that they have entered into an arbitration agreement but have

no other basis to be in court: those disputes would be channelled before arbitrators.<sup>131</sup>

If Party A moves to compel arbitration in response, then the court does have subject matter jurisdiction. Given that the arbitration is seated in New York, the court may choose to issue the injunction in appropriate circumstances – perhaps where its own jurisdiction has been properly invoked and the risk to the respondent of having to defend parallel proceedings is particularly pronounced.

If consistently applied, these principles would go a long way toward promoting a measured approach to anti-arbitration injunctions that comports with the US's pro-arbitration policy, international practice, and the *First Options* jurisprudence.<sup>132</sup>

## V. CONCLUSION: A NEED FOR GUIDANCE

The propriety of anti-arbitration injunctions is an important question of federal arbitration law, and there is a pressing need for consistency from the US federal courts. The Second Circuit's guidance on this issue in the international arbitration context has been limited, and opportunistic litigants should not be permitted to take advantage of this lacunae to impede the arbitral process by seeking injunctive relief in inappropriate cases. Courts must, at the very least, be clear in defining the source of their authority for the injunction and their basis for finding irreparable harm or otherwise justifying the extraordinary relief an injunction represents. As a more substantive matter, courts must be sure that the circumstances in which anti-arbitration injunctions are issued are carefully limited to comply with the United States' obligations under the New York and Panama Conventions.

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<sup>131</sup> The author credits Marc Goldstein with offering this view.

<sup>132</sup> In addition to clarifying the source of their power and reasons for issuing the injunction, US courts should be careful not to expand anti-arbitration injunctions outside of those precedents which reserve for US courts only the decision of whether there is a valid and enforceable arbitration agreement; even where a US court is the primary jurisdiction; injunctions are not appropriate vehicles for challenges to 'procedural' matters, such as waiver, time-bar, or procedural irregularities. See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide."); *Tai Ping*, *supra* note 69, at 1146 (holding that district court had abused its discretion in staying arbitration because it was 'undisputed that there is a valid arbitration clause' between the parties, and therefore the scope of the specific issues that would be subject to that arbitration was a matter for the arbitrators to decide); *Ghassabian*, *supra* note 6 (refusing to enjoin arbitration based on *ex parte* communications between arbitrators and opposing counsel). *But see* *Satcom*, *supra* note 36 (enjoining arbitration based on finding that Satcom had waived right to arbitrate by pursuing litigation).