DISADVANTAGES TO AMERICAN LITIGANTS IN INTERNATIONAL REINSURANCE DISPUTES

By

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Abstract: American litigants can be disadvantaged in international reinsurance disputes, because of two legal hurdles that have encouraged American courts to eschew jurisdiction in favor of English courts. First, our federal system, with its focus on state jurisdiction, has created a jurisdictional "gap" through which foreign defendants may avoid American jurisdiction. Second, under the doctrine of forum non conveniens, American courts have been quick to defer to the perceived reinsurance expertise of London courts.

London is the center of the world reinsurance market and, as a result, courts in the United Kingdom are experienced in hearing reinsurance disputes. Courts in the United Kingdom exercise expansive jurisdiction over international disputes based on minimal contacts with the U.K. *See e.g., Airbus Industrie v. Patel*, [1999] 1 AC 199. As such, it is not surprising that English courts have asserted jurisdiction when either party is an English insurer or reinsurer or when an English broker or intermediary is involved, and have guarded such jurisdiction jealously. For example, in *General Star Int'l Indemnity Ltd v. Stirling Cooke Brown Reinsurance Brokers*, [2003] All ER (D) 95, a reinsurance dispute, the court in the United Kingdom enjoined the litigants from proceeding with a parallel in New York State court.

The assertiveness of U.K. courts is not reciprocated on the American side of the Atlantic. To the contrary, two significant factors in U.S. jurisprudence help perpetuate a jurisdictional imbalance that disadvantages American litigants.

The first of these factors is the so-called "jurisdictional gap" in U.S. courts. As discussed below in Part I, courts generally only have personal jurisdiction in reinsurance disputes based on the contacts of the foreign defendant with the state where the court sits. The foreign defendant's contacts with other states generally do not impact the jurisdictional analysis. As a result, foreign defendants with significant contacts in the Unites States often are able to avoid jurisdiction in a U.S. court and retreat across the Atlantic to friendlier soil.

Second, even where federal courts can exercise personal jurisdiction over foreign defendants, there appears to be a disturbing trend to dismiss reinsurance cases based on the doctrine of *forum non conveniens.* Under this doctrine, courts in the United States defer to a foreign tribunal under the theory that, based upon the location of witnesses and/or the applicability of foreign law, the foreign tribunal is better suited to hear a dispute. As discussed below in Part II, American courts may be too quick to surrender jurisdiction in the reinsurance context. However, courts in the United States are often in a better position to hear international reinsurance disputes.

I. The Jurisdictional "Gap"

Most claims involving reinsurance do not arise under federal law. That is, the law of a particular state, or of a foreign nation, will govern the dispute. As such, federal courts typically may hear a case only if the requirements of diversity jurisdiction are met. *See* 28 U.S.C. § 1332. Essentially, diversity jurisdiction may attach if (a) none of the plaintiffs is a "citizen" of the same state as any defendant and (b) the amount of the dispute exceeds $75,000. *Id.* A corporation is deemed a citizen of both its state of incorporation and the state of its principal place of business. *Id.*

Federal jurisdiction could be available if the claim arises under federal substantive law. However, there is no federal law of reinsurance. As a result, litigants have been creative in asserting purported federal claims. *See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282 (S.D.N.Y. 2000) (dismissing reinsurer's federal RICO claims against domestic and foreign reinsurance intermediaries); *Messenger v. Grinnell Mutual Reinsurance Co.*, No. 96 C 50371, 1997 WL 269477 (N.D. Ill., May 19, 1997) (dismissing RICO claims against reinsurer).

When an action is brought under state substantive law, whether a court has personal jurisdiction over the defendant is determined solely by the defendant's contacts with that particular state. *See Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). For personal jurisdiction to attach, the defendant must have "purposefully availed itself of the privilege of conducting activities within the forum state." *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 109 (1987). Those activities must "create a substantial connection with the forum state." *Id.*

If the claim is based upon state substantive law, this "minimal contacts" analysis applies, regardless of whether the claim is brought in state court or federal court. *Id*. The "jurisdictional gap" arises where a foreign defendant may have engaged in a series of insubstantial contacts with several states. If aggregated, the contacts would be sufficiently substantial for jurisdiction to attach, but because the contact is spread over several states, no one state has the requisite level of contacts for personal jurisdiction to attach. *Id*. This is known as the "jurisdictional gap."

Prior to 1993, the jurisdictional gap could arise, regardless of whether the claim arose under state law or federal law. *See Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97, 111 (1987). In *Omni*, the Supreme Court dismissed a claim under the federal Commodity Exchange Act against British defendants. Assuming that the aggregation of the defendants' contacts with the United States as a whole satisfied the Due Process Clause of the Fifth

Amendment, the Court, nevertheless, affirmed the dismissal of the British defendants. *Id.* at 111. The Court held that, because of the language of the federal rule governing service, federal courts could not assert jurisdiction over foreign defendants, unless the federal substantive statute specifically authorized the court to do so. Interestingly, the Court recognized the gap it had created and invited the Rules Committee and Congress to change the applicable rule:

> We are not blind to the consequences of the inability to serve process on [the British defendants]. A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of . . . federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.

Responding to the Supreme Court's invitation, Rule 4 of the Federal Rules of Civil Procedure was amended in 1993 to allow federal courts to assert personal jurisdiction over federal claims where the defendant has significant aggregate contacts with several states, but not sufficient contacts with any particular state, for the courts of that state to exercise personal jurisdiction. *See* Fed. R. Civ. P. 4(k)(2). The committee revising the federal rules commented on this additional section as follows:

> This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in *Omni Capital Int'l. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987).

The availability of expanded jurisdiction for federal causes of action has resulted in creative uses of federal law in the reinsurance context. For example, in *Odyssey*, the plaintiff reinsurer sued several foreign reinsurance managing general underwriters under RICO for allegedly fraudulently placing risks with the reinsurer. 85 F. Supp. 2d at 300. Because of the expected jurisdictional fight, the plaintiffs brought their claims as federal RICO claims to obtain the benefit of the federal "anti-gap" provision. *See also Foster v. Berwind Corp.*, Civ. A. No. 90-0857, 1991 WL 21666 (E.D. Pa. 1991) (alleging mismanagement, fraud and RICO violations relating to reinsurance agreement).

Where a creative federal claim is not available, litigants are relegated to their state law claims. The result is that the domestic cedant or reinsurer bringing claims against a foreign cedant, reinsurer, agent or intermediary for breach of contract, breach of duty of good faith, negligence or fraud under state law may face a jurisdictional hurdle that the foreign defendant would not face if the action was brought in the foreign state. Because each state of the United States is considered a sovereign state, the jurisdictional power of each state is analyzed separately with no aggregation based upon contacts with other states. *Asahi*, 480 U.S. at 113.

The Revision Committee's commentary recognizes that this "narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country . . . ." Fed. Rule Civ. Pro. 4, Official Comment, 1993 amendments. The question is whether this gap may be remedied without amending the Constitution. In *Asahi*, 480 U.S. at 113, the Supreme Court expressly declined to adjudicate the constitutionality of aggregating national contacts to allow federal jurisdiction over state law claims. Numerous commentators have addressed the issue, and most agree that Congress could grant federal courts to power to exercise personal jurisdiction in diversity cases based on nationwide contacts. *See* Jack B. Weinstein, *Mass Tort Jurisdiction*, 37 Williamette L. Rev. 145 (2001) (advocating for nationwide contacts personal jurisdiction should apply in mass tort cases); Leslie M. Kelleher, *Amenability To Jurisdiction As A "Substantive Right"*, 75 Ind. L.J. 1191 (2000) (it does not follow from E*rie* that Congress cannot by legislation provide a nationwide amenability standard for diversity cases. *But see* Gerald Abraham, *Constitutional Limitations Upon The Territorial Reach Of Federal Process*, 8 Vill. L. Rev. 520 (1963) (suggesting that principles of federalism may limit Congress's power to give federal courts nationwide jurisdiction in diversity cases).

Regardless of which view ultimately is held correct, the current situation is the same. American plaintiffs potentially are disadvantaged in asserting most reinsurance claims against foreign cedants, reinsurers, brokers or intermediaries. This disadvantage will continue until remedied by Congress, the Rules Committee or, if necessary, Constitutional amendment.

II. Forum Non Conveniens

The other significant factor creating a disadvantage to American litigants is the willingness of American courts to defer to English courts plenary control over cases relating to the London reinsurance market, even with respect to disputes involving American reinsureds, reinsurers or risks. While recognizing their *power* to exercise jurisdiction, these courts cite the doctrine of *forum non conveniens* as supporting a relinquishment of jurisdiction in favor of English courts. For example, in *Odyssey Re (London) Ltd. v. Stirling, Cooke, Brown Holdings, Ltd*, 85 F. Supp. 2d 282 (S.D.N.Y. 2000), a federal court in New York declined to hear a Unicover-related dispute involving American workers' compensation risks. The cedant was an American insurer, although the dispute was between the reinsurer and American and English brokers. Citing *forum non conveniens*, the court dismissed the case, holding that the parties should litigate in London.

In *CNA Reins. Co. v. Trustmark*, 2001 W.L. 648948 (N.D.Ill. 2001), the court declined to hear a dispute between a London cedant and an American reinsurer. Both American and English brokers were involved. Invoking *forum non conveniens*, the court declined to hear the case,

deferring to an English court. The court observed that an "English court would have far more experience with London market customs and practice, an understanding of which will be essential to definitively resolving this case. As the reinsurance industry 'appears to be a world unto itself,' there is considerable advantage in having this case resolved by the courts most familiar with this strange world."

Most recently, a federal court has declined to hear a dispute between a New York cedant, on the one hand, and several English reinsurers and one American reinsurer, on the other. *New Hampshire Ins. Co. v. Sphere Drake Ins. Ltd.*, 2002 WL 1586962 (S.D.N.Y., July 17, 2002), *aff'd in relevant part*, 2002 WL 31501581 (2d Cir., Nov. 5, 2002). This case involved an underlying American risk. Recognizing its own jurisdiction, the court still dismissed the case under *forum non conveniens*. Given that the cedant was based in New York, the forum state, the decision is remarkable. The court found that litigation in London would be convenient for the parties.

These cases present a recent trend of American courts declining to hear reinsurance disputes relating to the London market in favor of the expertise of English courts. Taken to its logical conclusion, any American company damaged in the London market would be relegated to litigation there. English courts would become a "world court" for London-related reinsurance disputes.

This trend is of debatable wisdom. While London courts have market expertise, this expertise can be provided to an American court through expert testimony and experienced advocacy. Indeed, courts regularly rely on experts for education in matters more complex than London reinsurance, and the sudden need for adjudicative expertise is a remarkable revelation for a system where lay juries regularly decide patent, antitrust and death penalty matters. Perhaps all complex issues should be referred to foreign courts. On the other hand, perhaps our system of general jurists and juries (where the right to a jury exists), coupled with experts and cross-examination works just fine, thank you. If not, then we have bigger problems than the adjudication of reinsurance disputes.

The *CNA* court noted that "an English forum would have far more interest in policing London market reinsurance slips … than would a Chicago forum." That may be true, but is scant reason to avoid adjudicating the case. Perhaps the forum should be *disinterested*, rather than *interested*. The interests of the London market, of the players in the London market, and of English courts in policing or protecting the London market may be antithetical to the reasonable expectations of an American domiciliary damaged by dealings in the London market.

Many London reinsurance contracts require arbitration or litigation in London. American courts should and do respect such contractual provisions. However, where a forum is not designated contractually, an American court should adjudicate most reinsurance cases over which it otherwise has jurisdiction. *Forum non conveniens* should not be a convenience for ceding jurisdiction to other nations.

III. Conclusions

As demonstrated above, there is a disturbing trend towards forcing American litigants to litigate international reinsurance disputes in London. Congress could help to reverse this trend by revising the Federal Rules of Civil Procedure to close the "jurisdictional gap" discussed above. In addition, federal courts in the United States should be less willing to dismiss cases based on *forum non conveniens*. This will promote equity by allowing American litigants to litigate international reinsurance disputes on their home soil.