



THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

FORUM SHOPPING IN EUROPEAN INSURANCE LITIGATION: WHAT WE HAVE LEARNED FROM *NEW HAMPSHIRE INSURANCE CO. V. STRABAG BAU*

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This article attempts to highlight certain ways that litigants in the European Union could gain unjustified advantages over United States-based insurance companies in insurance litigation by comparing Council Regulation (EC) 44/2001¹ (hereinafter “Council Regulation”) and the U.S. jurisdictional rules. *New Hampshire Insurance Co. and Others v. Strabag Bau A.G. and Others*² is utilized as an illustration herein.

I. THE STRABAG BAU CASE

In *Strabag Bau*, the defendants, Strabag Bau, a German company, along with two other companies (hereinafter the “Construction Companies”) entered into a contract for the construction of Basrah International Airport in Iraq. The Construction Companies took out an insurance policy in London through their British brokers. The leading underwriter, New Hampshire Insurance Co., a U.S. insurer, was represented in London by its representative, and the bulk of the risk was placed with insurers based in the United Kingdom (hereinafter the “Insurers”). There was neither a governing law clause nor a jurisdictional clause in the policy. Subsequently, the Construction Companies filed claims totaling £20 million to £60 million, and the Insurers sought a declaration to avoid the policy. The English Court of Appeal held that it had no jurisdiction.³ The following are other relevant facts to keep in mind:

- the policy was likely to be governed by English law;⁴
- Strabag Bau is the fifth largest construction company in Europe;⁵
- £20m - £60m in 1989 is worth £50m - £150m today.⁶

II. THE COUNCIL REGULATION

The jurisdiction rules on insurance are in Section 3 of the Council Regulation.⁷

¹ Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcements of Judgments, 2001 O.J. (L 12) 1 (EC).

² *New Hampshire Insurance Co. and Others v. Strabag Bau A.G. and Others*, [1992] 1 Lloyd’s Rep. 361 (A.C.).

³ *Id.* at 362.

⁴ See Rule 214(2), LAWRENCE COLLINS ET AL., *THE CONFLICT OF LAWS* 1701 (Lawrence Collins ed., Oxford University Press 2006) (1896).

⁵ Strabag Bau Topic Entry, <http://www.absoluteastronomy.com/topics/Strabag> (last visited Oct. 5, 2009).

⁶ Based on calculation from Measuring Worth, <http://www.measuringworth.com/ukcompare/> (last visited Sept. 29, 2009).

⁷ Council Regulation 44/2001, *supra* note 1, art. 8.

A. Art. 9(1) - Domicile⁸

Art. 9(1)(a) allows the insurer domiciled in a member state to be sued in the courts of the member state where it is domiciled.⁹ However, in order to protect the policyholder, the insured, and the beneficiary (hereinafter the “policyholder”), Art. 9(1)(b) further allows such parties to sue in the courts of the member states where they are domiciled.¹⁰ This greatly expands the possible fora in which an insurer could be sued despite the fact that the insurance may have little connection with the policyholder’s jurisdiction. However, the insurer could only sue in the policyholder’s home jurisdiction.¹¹ Applying these rules, the Court of Appeal found that the Insurers could not sue the Construction Companies in England due to the fact that the Construction Companies were domiciled in Germany.¹² If the Insurers were to sue the Construction Companies in the European Union, the only possible forum was the German court.

What if the Construction Companies sue the Insurers for non-payment instead? Here, the Construction Companies will be able to sue the Insurers in England, where the insurers bearing the bulk of the risks were domiciled. In addition, the Construction Companies could also sue in Germany pursuant to Art. 9(1)(b). Thus, within the European Union, the Construction Companies could shop between England and Germany. The above analysis is summarized in Table 1 below:

Plaintiff/Jurisdiction	Insurers Suing Construction Companies	Construction Companies Suing Insurers
England	A X	B √
Germany	C √	D √
New York	E X	F X*

* The New York court will decline jurisdiction due to *forum non conveniens*.

⁸ *Id.* art. 9(1).

⁹ *Id.* art. 9(1)(a).

¹⁰ *Id.* art. 9(1)(b).

¹¹ *Id.* art. 12(1).

¹² *New Hampshire*, 1 Lloyd’s Rep. at 362.

*B. Art. 9(2) - Expansion of the Domicile Rule*¹³

New Hampshire Insurance was bound by the Council Regulation because the basic domicile rule under Art. 9(1) is expanded by Art. 9(2), which provides that an insurance company is deemed to be domiciled in a member state if it has a branch, agency or other establishment in one of the member states, and if the dispute arises out of such a branch, agency or other establishment.¹⁴ Accordingly, as New Hampshire Insurance was represented by its London representative, it would be deemed to be domiciled in England through agency.

The above rules provide a policyholder with plenty of options and motivation to engage in forum shopping and are clearly unsatisfactory. After all, the only connection with Germany was the domicile of the policyholder, whereas the connections with London were overwhelming. While the intention of the Council Regulation is to protect the policyholder who is usually the weaker party, the Construction Companies do not deserve the protection. The Insurers challenged on this basis, but the court rejected that argument, referring to the drafting report of the Brussels Convention which stated that the member states failed to find a “suitable demarcation line” to limit the application of Section 3.¹⁵ In a subsequent case, *Universal General Insurance Co. (UGIC) v. Group Josi Reinsurance Co. SA*,¹⁶ the European Court of Justice (E.C.J.) discussed the applicability of Section 3:

According to settled case-law, it is apparent...that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically.¹⁷

It seems that the Insurers’ argument above might be accepted by the E.C.J. After all, the Construction Companies are all large corporations with substantial bargaining power. The wording of the policy was also proposed by their brokers. However, the paragraph cited above is from *Gerling and Others v. Amministrazione del Tesoro dello Stato*,¹⁸ in which the policyholder was the powerful Italian Ministry of Finance. Accordingly, it appears that the holdings in *UGIC* are limited to professional insurance parties, while sophisticated policyholders will continue to be protected.

*C. Art. 13(5) and Art. 14 - Jurisdiction Clause and Arbitration Agreement*¹⁹

Under the Council Regulation, a jurisdiction clause in a policy is effective against the Construction Companies in our case only if the insurance policy involves “large risks,” which

¹³ Council Regulation 44/2001, *supra* note 1, art. 9(2).

¹⁴ *Id.*

¹⁵ *New Hampshire*, 1 Lloyd’s Rep. at 368.

¹⁶ Case C-412/98, *Universal General Insurance Co. (UGIC) v. Group Josi Reinsurance Co. SA*, 2000 E.C.R. I-05925.

¹⁷ *See id.* ¶ 64.

¹⁸ Case 201/82, *Gerling and Others v. Amministrazione del Tesoro dello Stato*, 1983 E.C.R. 02503.

¹⁹ Council Regulation 44/2001, *supra* note 1, art. 13(5) & 14.

include *inter alia* “miscellaneous financial loss.”²⁰ A jurisdiction agreement involving a “large risk” will be effective against a policyholder that exceeds two of the following criteria: (1) a balance-sheet total of €6.2m, (2) a net turnover of €12,8m, or (3) 250 employees.²¹ However, it is unclear what constitutes a “financial loss.” Even if “financial loss” covers the policy in the case, the exception only applies to large companies.²² The only certain way that the insurers could have prevented an undesirable forum is through the inclusion of an arbitration clause in the policy according to Art. 1(2)(d).²³ However, taking the case out of the jurisdiction of the Council Regulation by an arbitration agreement is not a complete solution. Instead of being able to rely on a uniform enforcement mechanism under the Council Regulation,²⁴ the enforcement of the arbitration agreement will be subject to the various domestic rules of different countries since the New York Convention only provides that “there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards . . . than are imposed on the recognition or enforcement of domestic arbitral awards.”²⁵

III. THE U.S. JURISDICTION RULES

Since *International Shoe Co. v. Washington*,²⁶ “minimum contacts” has been the basic jurisdictional test in the United States. In that case, the Supreme Court held that a state could exercise personal jurisdiction over a defendant if he has such “minimum contacts” with that state to justify requiring him to defend a lawsuit there. Commentators divide personal jurisdiction into two categories, namely specific jurisdiction and general jurisdiction.²⁷ Specific jurisdiction refers to the jurisdiction over claims arising out of acts specific to the dispute. General jurisdiction, on the other hand, refers to jurisdiction founded upon a basis independent of the nature of the dispute between the parties.²⁸ In *McGee v. International Insurance*,²⁹ the Supreme Court held that there were minimum contacts by the insurer even though it only had a single transaction solicited in California. Applying these rules to *Strabag Bau*, the Insurers cannot sue the Construction Companies in the United States due to their lack of any operation there. However, if the Construction Companies were to sue New Hampshire Insurance in New York, New Hampshire Insurance would be subject to the general jurisdiction of New York due to the fact that its headquarters are located there. That being said, the New York courts probably will not exercise the jurisdiction due to *forum non conveniens*. Under the doctrine, U.S. courts could exercise their discretion in declining jurisdiction on the basis that there exists a more appropriate forum.³⁰ In

²⁰ *Id.* art. 14(5).

²¹ Second Council Directive 88/357, On the Coordination of Laws, Regulations, and Administrative Provisions Relating to Direct Insurance, art. 5(d)(iii), 1988 O.J. (L 172) 1 (EEC).

²² The Frankfurt Stock Exchange only requires a minimum market capitalization of €1.25 million. *See* Deutsche Börse Group, http://deutsche-boerse.com/dbag/dispatch/en/kir/gdb_navigation/listing.

²³ Council Regulation 44/2001, *supra* note 1, art. 1(2)(d).

²⁴ One will only need to register a judgment given by another EU court for it to be enforceable. *See* Rule 48(1), COLLINS, *supra* note 4, at 650.

²⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, available at <http://interarb.com/vl/p027755967>.

²⁶ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁷ *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 305 (3d ed. 1992).

²⁸ *Id.* at 306.

²⁹ *McGee v. International Insurance*, 355 U.S. 220 (1954).

³⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

our case, England is obviously the more appropriate forum due to its overwhelming connections with the insurance company.³¹ Comparatively, there is no *forum non conveniens* principle under the Council Regulation. Finally, a jurisdiction agreement will usually be given effect by the U.S. courts unless it is affected by “fraud, undue influence, or overweening bargaining power.”³² Similarly, an arbitration agreement will also be enforceable.

Differences in how the U.S. jurisdictional rules will operate are illustrated in the following hypothetical case. English insurers entered into an insurance policy with California construction companies, through their respective Texas representatives, with insured risk in Iraq:

Plaintiff/Jurisdiction	English Insurers Suing CA Construction Companies	CA Construction Companies Suing English Insurers
Texas (playing the role of England)	A √	B √
England (playing the role of New York)	C X	D √
California (playing the role of Germany)	E X*	F X

* California courts shall deny jurisdiction due to *forum non conveniens*.

The conclusion is simple and reasonable. Texas, the natural forum, will have minimum contacts and hence jurisdiction, whether the plaintiffs are the insurers or construction companies. In addition, construction companies can sue the insurers in England, which is not unreasonable given that it is their home jurisdiction. California will not hear the case in either scenario.

IV. CRITICISMS AND RECOMMENDATIONS

A. *The Council Regulation is Rigid*

The Council Regulation and the U.S. jurisdictional rules could be viewed as a classic “rule versus standard” choice. The Council Regulation is rule-based. The purpose is to reach the same result across the member states as much as possible. Meanwhile, the U.S. jurisdictional rules are based on a standard, the “minimum contacts” test. As we have seen above, the rule-based Council Regulation is more prone to producing absurd results and provides more opportunities for forum

³¹ But if the English courts cannot hear the case, how can the New York courts dismiss in favor of them? Here, since the *forum non conveniens* issue will only arise when Construction Companies sue Insurers (Box F instead of Box E in Table 1), the English courts will have jurisdiction in that case (Box B instead of Box A).

³² *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

shopping. Since whether the parties can litigate in an appropriate forum has significant weight in the final decision, the U.S. rules are preferable.

B. Unfairness against Insurance Companies

The Council Regulation protects the policyholders without looking beyond the labels. This is not fair to the insurers which deal with powerful policyholders on an arms-length basis. If the goal of the jurisdictional rules is to allocate a dispute to the forum where the combined cost to the parties will be the lowest,³³ “subsidizing” the undeserving parties will likely increase the total cost of the litigation by disturbing that equilibrium.

C. Unfairness against Foreign Insurers

The rules are even more unfair to foreign insurers. Art. 9(2), by deeming the U.S. insurance company as domiciled in England, thereby allows policyholders to sue in their home jurisdictions.³⁴ Compared to their European counterparts, it would be more costly for the U.S. insurers to defend in the European Union. This increased cost may be reflected in a higher premium by the U.S. insurers, making them less competitive. Comparatively, there is also no special protection for domestic policyholders per se in the United States.

The European Union should consider taking one of three courses: (1) creating a *forum non conveniens* rule; (2) excluding the large policyholders from the protection; or (3) clarifying the “large risks” exception. The last suggestion is the easiest as it takes only judicial interpretation and avoids formal amendment of the Council Regulation. Even if the European Union takes no action, the U.S. courts should not change its jurisdictional rules to force a change on the E.U. side. The Supreme Court believes that U.S. commerce abroad would be hampered if its courts do not adopt an internationalist approach.³⁵ As the Supreme Court stated in *Bremen v. Zapata*, “[t]he expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our own law and in our courts.”³⁶ The U.S. courts therefore should not take revenge by imposing unreasonable jurisdictional rules on E.U. insurers.

³³ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 707 (Aspen Publishers 2003) (1986).

³⁴ Council Regulation 44/2001, *supra* note 1, art. 9(1)(b).

³⁵ LAWRENCE COLLINS, *ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS* 267 (Oxford Univ. Press 1994) (1979).

³⁶ *See Bremen*, 407 U.S. 1 at 8.