

News flash

Jurisdiction in International Reinsurance Disputes: A Return to Freedom of Choice?

The jurisdictional provisions of the Air Transportation and System Stabilisation Act of 2001 (the Act) has been causing headaches for the international insurance market for over two years now. They have been relied upon as superseding even jurisdiction clauses in contracts. Recent news from the US Court of Appeals has finally restricted the impact of the Act on the choice of jurisdiction in international contract disputes heard in the US.

Simon Gildener welcomes this new guidance for reinsurers, particularly where personal accident and health, property or business interruption portfolios burdened with World Trade Centre related losses are concerned.

What is the Act?

The US Congress passed the Act in the immediate aftermath of the September 11 tragedy. The Act was designed to ensure that victims of September 11 received proper compensation, that US airlines remained solvent, and the continued operation of the air transportation system.

The Act created an exclusive federal cause of action for damages arising out of the air crashes on that day. It also provided that the sole venue for these actions was to be the US District Court for the Southern District of New York ("the Federal Court"). Section 408(b)(3) of the Act stated that the Federal Court:

"...shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."

By assigning all September 11 related claims to one court, Congress hoped to ensure consistency and efficiency in resolving the large numbers of personal injury and property damage claims expected.

So what was the problem?

The Act was drafted in an extreme rush. In particular, the drafting of Section 408(b)(3) left much to be desired. As soon as the Act was introduced, commentators began raising concerns about the scope of this Section. Lawyers argued that the words "resulting from or relating to [September 11]" could cover any dispute where there was a September 11 connection, no matter how remote, and the words "shall have...exclusive jurisdiction" could mandate that the proceedings had to be litigated in the Federal Court.

These arguments quickly filtered down into the reinsurance world, which had felt the enormous losses of September 11. There were (and are) many coverage disputes, and it was not uncommon for the disputes to be related to a reinsurer's refusal to pay losses which were much larger (due to September 11) than perhaps had been expected. It was perhaps more common for the legal issues in dispute to have nothing to do with September 11 itself, but the losses which fell to be paid or rejected may have included a September 11 element.

Some coverage litigation was initiated in London. Warring parties pointed out September 11 connections, however tenuous, and argued that the Act's mandatory language overruled the English Court's jurisdiction.

Some coverage litigation was initiated in the Federal Court in New York. The lawyers again pointed out September 11 connections and argued that the Act conferred jurisdiction on the Federal Court where no other grounds might exist.

How does a US federal court determine whether it has jurisdiction?

Ordinarily, jurisdiction may be conferred upon the US federal courts where:

- (1) the parties to a dispute are residents of different US states;
- (2) where at least one party is a US resident but the other is foreign; or
- (3) where federal laws are at issue.

Why did it matter whether the Act conferred jurisdiction or not?

Whether in the UK or the US, these jurisdictional arguments often completely ignored express jurisdiction or arbitration clauses in the reinsurance contracts, or other more traditional factors which might have indicated the proper forum and choice of law. By ignoring their own agreements, those proffering these jurisdictional arguments attempted to avail upon Federal law which might be



- ▶ more generous to them than the laws applied in foreign courts such as England and Wales, or in arbitration.

What is the view of the US Courts?

Many of the cases involving these issues were effectively put on hold while the issue was debated and analysed. A resolution (of sorts) has taken a long time, but a decision of the 2nd Circuit of the US Court of Appeals ("the Appellate Court") in July this year finally sheds a little light on this issue. *Canada Life Assurance Company v Converium Rückversicherung (Deutschland) AG* (210 F Supp.2d 322) effectively provides that the Act will confer jurisdiction on the Federal Court in cases where the factual or legal issues actually requiring a determination by the court are sufficiently connected to September 11.

What were the facts in the case?

Canada Life Assurance Company (CLA) reinsured a number of primary insurers' books of business under two reinsurance facilities. These facilities mainly covered catastrophe, occupational accident, personal accident, and workers compensation classes of business. After September 11, CLA found itself liable for significant losses arising from those books of business. CLA sought to pass these losses on to its own quota share retrocessionaire, Converium Rückversicherung ("Converium") and, according to CLA's Complaint in the Federal Court, Converium failed to pay.

Before the Federal Court would hear CLA's case, CLA had to prove that the jurisdictional rules were satisfied. None of the usual factors were present. Both companies were alien to the US, and no federal laws were in dispute. However, CLA argued that the losses they were seeking to pass on to Converium were September 11 losses and therefore Section 408(b)(3) conferred jurisdiction.

Converium argued that the Act was designed to apply to claims by "direct victims" of the tragedy, not "reinsurers with a contract dispute".

The Decision

The dispute found its way to the Appellate Court, where the judges sided with Converium. They pointed out that CLA's claim was for breach of contract.

However, no defence or claim had been raised which would require the Court to determine any issue of law or fact concerning the actual events of September 11.

In the Appellate Court's view, CLA's case for jurisdiction was no more than "but for" September 11, their losses would have been fewer.

The Appellate Court took a dim view of CLA's argument that Section 408(b)(3) had the effect of mandating that CLA's breach of contract claim had to be brought in the Federal Court, and could not be brought anywhere else (at least in the US). This argument appears to have been raised because there was an arbitration clause in the Converium contract. Stating the matter bluntly, the court found that "Congress cannot have intended the absurd result of requiring every lawsuit involving economic losses traceable to September 11 to be brought in the [Federal Court]." This would create a "potential tsunami of actions" which would overwhelm the Court and frustrate the Act's aim to resolve WTC actions efficiently.

The Appellate Court concluded that section 408(3)(b) did not confer jurisdiction on the Federal Court to hear actions involving economic losses that would not have been suffered "but for" the events of September 11 and otherwise involved no claim or defence raising an issue of law or fact involving those events.

The Appellate Court emphasised that their decision was limited to denying jurisdiction over this carefully defined class of cases, and did not purport to establish affirmatively in what cases section 408(b)(3) would apply.

What has been the subsequent impact of CLA v Converium?

The case is already having a significant impact upon pending international disputes where insurance contracts covering WTC-related losses are concerned.

In *Combined Insurance Company of America v Lloyd's of London (No 01 CIV.10023 (RO))*, Lloyd's of London ("Lloyd's") had issued proceedings against Combined Insurance Company of America ("CICA") in London. The case concerned reinsurance losses incurred under accidental death and dismemberment policies. The issue at stake was whether the wording on these underlying policies covered AON employees killed in the WTC building on September 11. CICA responded to Lloyd's suit in London by initiating parallel litigation in the Federal Court under section 408(b)(3).

CICA argued that S408(b)(3) conferred exclusive jurisdiction on the Federal Court, exclusive even as far as foreign courts were concerned.

At first instance (September 2002), the Federal Court dismissed CICA's arguments, and dismissed the proceedings in the Federal Court. CICA appealed, and, on 22nd August 2003, the Appellate Court relied on its *CLA v Converium* decision. The Appellate Court held that CICA's case turned solely upon the extent of coverage contained in a reinsurance contract and narrow questions of contract interpretation. It had nothing to do with interpreting the events of September 11.

A final thought: Constitutional Concerns and the Silverstein WTC Litigation

In the *CLA v Converium* case, Converium had also argued that Section 408(b)(3) was fundamentally unconstitutional. The Appellate Court was troubled by the Section, but decided that it did not need to address this very thorny question, as it had plenty of other (and easier) grounds upon which to base a decision on jurisdiction.

However, the issue arose again in late September 2003, in the Appellate Court decision in the ongoing Silverstein / Swiss Re WTC litigation (2003 WL 22220124). Silverstein argued that Section 408(b)(3) conferred exclusive jurisdiction on the Federal Court for this dispute. The Appellate Court was again troubled by the constitutionality of the provision. Once again, however, it decided that it need not address this question as there were other grounds upon which it could rely.

This debate therefore lives on. While the *CLA v Converium* decision may not resolve the many outstanding issues, it does at least provide some guidance on how the courts are thinking. It is particularly refreshing that jurisdictional clauses in contracts will not automatically be ignored in the light of the Act.

Should you require any further information about this topic, and / or US legal and insurance issues generally, please contact any of our US Team at Robin Simon LLP:

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