THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MILTENBERG & SAMTON, INC., Plaintiff	:	January Term, 2000
	:	No. 3633
v.	:	
	:	Commerce Case Program
ASSICURAZIONI GENERALI, S.p.A., et al. Defendants	:	Control No. 070692

MEMORANDUM OPINION

Defendants Assicurazioni Generali, S.p.A. ("Generali") and Concorde Assurances Groupe Des Assures ("Concorde")[1] have filed preliminary objections ("Objections") to the complaint ("Complaint") of Plaintiff Miltenberg & Samton, Inc. ("M&S"). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous Order denying the Objections in part and holding the remaining Objections under advisement. The Order further directs the Parties to address the factual matters in dispute through depositions and translations and to file briefs within sixty days of the issuance of this Opinion.

BACKGROUND

In May 1998, Patricia Cella ("Cella") brought a personal injury action ("Cella Action") against M&S and Togum Constructeur Ensemblier ("Togum"), inter alia. The Cella Action was based on injuries allegedly caused by a gumball-making machine manufactured by Togum and sold by M&S.[2]

[1] The Defendants claim that M&S has incorrectly set forth the name of Concorde, whose correct name, they assert, is "Generali France Assurances." To distinguish between the two Defendants more easily, however, the Court will refer to the French entity as "Concorde."

[2] Cella v. Amco Customs Brokerage Co., et al., May Term, 1998, No. 121 (C.P. Phila.).

At the time, Togum was covered under two relevant insurance policies ("Policies"). The first was a master liability policy for product liability claims ("Generali Policy") issued by Generali. The Generali Policy includes a forum selection clause stating that "English Courts alone shall have jurisdiction" over any dispute arising under the Generali Policy. Generali Policy, Conditions at ¶ 10. The second Policy was issued by Concorde and covered product liability bodily injury claims ("Concorde Policy"). Under the Concorde Policy, any relevant litigation is to be exclusively within the jurisdiction of French courts. Concorde Policy at 20.

M&S asserted a cross claim in the Cella Action for indemnification against Togum and allegedly tendered its defense to Togum on numerous occasions. M&S also specifically demanded that Generali and Concorde defend and indemnify it against the Cella Action claims. In response, Generali and Concorde refused either to defend or to indemnify M&S and have denied liability under the Policies.

On January 21, 2000, Generali commenced an action for a declaratory judgment in the United Kingdom[3] against Togum, M&S and three additional defendants[4] ("UK Action").[5] As relief, Generali requested a declaration that it is not responsible to the UK Action defendants, including M&S, for any liability arising from the Cella Action or the underlying accident.[6]

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[3] Q.B., Commercial Court, Claim No. 2000 Folio 88.

[4] The three additional defendants in the UK Action are Ronald E. Kehle, Edward J. Strycharz and Elizabeth Lancaster. They appear to be employees of M&S.

[5] Concorde is not a party to the UK Action.

[6] The Defendants have attached to the Objections an interim injunction issued on June 28, 2000 in connection with the UK Action ("Injunction"). The Injunction restrained M&S until July 7, 2000 from continuing or prosecuting any claim related to the Generali Policy anywhere other than in the Courts of England and Wales. According to the accompanying documentation, the Injunction was

In response to the UK Action, M&S filed the instant action on January 31. The Complaint sets forth three counts: (1) a request for a declaratory judgment ordering Generali, Concorde and Togum to indemnify M&S in connection with the Cella Action; (2) a breach of contract claim against Generali for failure to defend M&S in accordance with the terms of the Generali Policy; and (3) a request for punitive damages from Generali.

Defendants Generali and Concorde filed the Objections based on five grounds:

1. Unavailability of punitive damages;

2. Pendency of the UK Action;

3. Lack of personal jurisdiction over Generali and Concorde;

4. Improper venue due to the forum selection clauses in the Policies; and

5. Improper service of process.

The Objections relating to punitive damages and pendency of a prior action are without merit and are overruled. In addition, the forum selection provision in the Generali Policy is unenforceable in the context of this action, and Generali's Objection to venue in Philadelphia is overruled.

The remaining Objections relate to improper venue under the Concorde Policy and personal jurisdiction over and improper service on both Defendants. These Objections require further factual determination. Accordingly, the Court is ordering the Parties to conduct depositions, to undertake additional translations and to file briefs, as set forth in the Order.

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extended to July 14, 2000, with no indication of an additional extension beyond this date.

DISCUSSION

I. Punitive Damages

The Defendants assert that punitive damages are not recoverable in a breach of contract action and that the Complaint does not allege a tort for which punitive damages may be awarded.[7] Consequently, they argue, Count III - Punitive Damages must be dismissed. While the title of this Count is misleading, it is, in essence, a count for bad faith and the Objections to it are overruled.

Under Pennsylvania law, "[a] request for punitive damages cannot stand as an independent cause of action." Holl & Assocs. v. 1515 Market St. Assocs., May 2000, No. 1964, slip op. at 5-6 (C.P. Phila. August 10, 2000) (Herron, J.) (citing Nix v. Temple Univ. of the Commw. Sys. of Higher Educ., 408 Pa. Super. 369, 596 A.2d 1132 (1991)).[8] Furthermore, "punitive damages are not recoverable in an action solely based upon breach of contract." Johnson v. Hyundai Motor Am., 698 A.2d 631, 639 (Pa. Super. Ct. 1997).

However, Pennsylvania statutory law[9] allows a court to assess punitive damages against an insurer if it has acted toward an insured in bad faith, which is defined as

> [A]ny frivolous or unfounded refusal to pay proceeds of policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

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[7] The Objections do not challenge M&S's right to bring a bad faith action against the Defendants.

[8] Available at http://courts.phila.gov.

[9] 42 Pa. C.S. § 8371.

Adamski v. Allstate Ins. Co., 738 A.2d 1033, 1036 (Pa. Super. Ct. 1999) (citation omitted), app. denied sub nom. Goodman v. Durham, __ Pa. __, __ A.2d __ (2000).[10] A party may show bad faith on the part of an insurer by establishing that "(1) the insurer lacked a reasonable basis for denying coverage; and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis." Id. (citing Terletsky v. Prudential Property and Cas. Ins. Co., 437 Pa. Super. 108, 649 A.2d 680 (1994)).

Count III of the Complaint is titled as a "Punitive Damages" claim. However, the allegations in the Count assert that Generali's conduct "constitutes bad faith, for which [M&S] is entitled to punitive damages." Complaint at ¶ 28.[11] Because the text of Count III alleges bad faith, it must be treated as a bad faith claim and not merely a count for punitive damages.[12] Accordingly, the allegations in Count III may serve as a basis for a punitive damages request, and the Objections to the Count are overruled.

II. Pending Prior Action

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[10] A claim for bad faith is an independent cause of action under Pennsylvania statutory law. See Terletsky v. Prudential Property and Cas. Ins. Co. 437 Pa. Super. 108, 124, 649 A.2d 680, 688 (1994).

[11] In addition, the Complaint alleges that Generali's denial of coverage under the Policy "is without justification, manifestly unreasonable, outrageous and undertaken with malice, wantonness and utter disregard for the rights of" M&S. Complaint at ¶ 27.

[12] When faced with a conflict between the allegations of a count and the count's title, Pennsylvania courts look at the allegations and not the title. See, e.g., Zernhelt v. Lehigh County Office of Children and Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled "negligent infliction of emotional distress" as a claim for intentional infliction of emotional distress); Maute v. Frank, 441 Pa. Super. 401, 403-04, 657 A.2d 985, 986 (1995) ("since the complaint states a viable mandamus claim, we will treat that portion of the action as such, regardless of the fact that the complaint is not titled properly as one involving mandamus"); Commonwealth ex rel. Saltzburg v. Fulcomer, 382 Pa. Super. 422, 555 A.2d 912 (1989) (although action was titled as one involving habeas corpus relief, petitioner's action clearly was one for mandamus and was therefore treated as such).

Pennsylvania Rule of Civil Procedure 1028(a)(6) allows a party to raise preliminary objections based on "pendency of a prior action or agreement for alternative dispute resolution." This protects "a defendant from harassment by having to defend several suits on the same cause of action at the same time." Penox Techs., Inc. v. Foster Med. Group, 376 Pa. Super. 450, 453, 546 A.2d 114, 115 (1988).

Under Pennsylvania law, the question of a pending prior action "is purely a question of law determinable from an inspection of the pleadings." Davis Cookie Co. v. Wasley, 389 Pa. Super. 112, 121, 566 A.2d 870, 874 (1989) (quoting Hessenbruch v. Markle, 194 Pa. 581, 592, 45 A. 669, 671 (1900)). To sustain a preliminary objection based on a pending prior action, "the objecting party must demonstrate to the court that in each case the parties are the same, and the rights asserted and the relief prayed for are the same." Virginia Mansions Condominium Ass'n v. Lampl, 380 Pa. Super. 452, 456, 552 A.2d 275, 277 (1988). This test must be applied strictly. Norristown Auto. Co. v. Hand, 386 Pa. Super. 269, 274, 562 A.2d 902, 904 (1989).

Generally, an action underway outside the Commonwealth is not considered a pending prior action:

> [U]nless an in personam action pending in another state or another country reaches judgment, so as to come within the protection of the Full Faith and Credit Clause of the Federal Constitution, such action will not prevent the institution of an action in this state on the same cause and between the same parties.

Singer v. Dong Sup Cha, 379 Pa. Super. 556, 560, 550 A.2d 791, 792-93 (1988) (citation omitted).[13] Here, no judgment has been entered in the UK Action, and the interim injunction issued in the UK Action expired on July 14, 2000. Consequently, the UK Action cannot serve as a pending prior action to bar M&S from proceeding with its claims here.

Even if a foreign action could be a pending prior action, there are significant differences between the UK Action and the instant matter. While both involve a request for a declaratory judgment, the UK Action does not involve a breach of contract or bad faith claim, as the case at hand does.[14] In addition, Togum and the three individual defendants in the UK Action are not parties to the instant action, while Concorde, a Defendant here, is not a party to the UK Action. Consequently, the UK Action is not a pending prior action, and the Objections based on this ground are overruled.[15]

III. Personal Jurisdiction

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[13] This does not prevent a Pennsylvania court from staying proceedings during the pendency of the foreign suit if a stay is sought. Singer, 379 Pa. Super. at 560, 550 A.2d at 793.

[14] An objection based on a pending prior action must be overruled where the action at hand relates to a breach of contract claim and "the prior proceeding is an action for declaratory judgment to determine whether the later action for breach of contract can be maintained." Penox Techs., 376 Pa. Super. at 453, 546 A.2d at 115 (1988). See also Kramer v. Kramer, 260 Pa. Super. 332, 340, 394 A.2d 577, 582 (1978) ("[g]enerally, a pending equity action is deemed not to be the same as the corresponding legal action when the remedies being pursued are different, even if both actions arose out of the same factual situation").

[15] In their Memorandum, the Defendants assert that "by letter dated March 8, 2000, Miltenberg unequivocally consented to English jurisdiction." However, the letter, as attached to the Objections, is from Holman, Fenwick & Willan, with no indication of how the sender is related to M&S. In addition, the Defendants cite no case law to support the argument that M&S's alleged consent to English jurisdiction makes the UK Action a pending prior action.

The Defendants next claim that the Court does not have personal jurisdiction over them. M&S counters that the Court's exercise of personal jurisdiction over the Defendants complies with the constraints imposed by the United States Constitution and Pennsylvania statute. Because this Objection raises questions of fact, additional information is required before a determination is possible. As a result, the Court is ordering that the parties take depositions and file briefs on this issue, as outlined in the Order.

In evaluating an objection to personal jurisdiction, the objecting party initially bears the burden of proof. Barr v. Barr, 749 A.2d 992, 994 (Pa. Super. Ct. 2000); Grimes v. Wetzler, 749 A.2d 535, 538 (Pa. Super. Ct. 2000); King v. Detroit Tool Co., 452 Pa. Super. 334, 339, 682 A.2d 313, 315 (1996) (the objecting party must "meet its burden of showing jurisdictional infirmities that are 'clear and free from doubt'"). However, "[o]nce the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it." Barr, 749 A.2d at 994. See also Grimes, 749 A.2d at 538.

In order for a Pennsylvania court to exercise jurisdiction over a non-resident defendant, (1) the Commonwealth's long-arm statute ("Long-Arm Statute")[16] must authorize jurisdiction and (2) the exercise of jurisdiction must satisfy Constitutional principles of due process. Graham v. Machinery Distrib., Inc., 410 Pa. Super. 267, 269-70, 599 A.2d 984, 985-86 (1991). Because the Long-Arm Statute allows for personal jurisdiction "to the fullest extent allowed under the Constitution of the United

[16] 42 Pa. C.S. §§ 5321-5329.

States," any discussion of personal jurisdiction must focus on Constitutional due process constraints. Temtex Products, Inc. v. Kramer, 330 Pa. Super. 183, 194, 479 A.2d 500, 505-06 (1984).

Under the United States Constitution, a court "may exercise two types of personal jurisdiction over out-of-state defendants, (1) specific jurisdiction, based upon the specific acts of the defendant which gave rise to the cause of action, and (2) general personal jurisdiction, based upon a defendant's general activity within the state." McCall v. Formu-3 Int'l, Inc., 437 Pa. Super. 575, 578, 650 A.2d 903, 904 (1994).

For a court to exercise specific jurisdiction,

> (1) the non-resident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice. The determination of whether this standard has been met is not susceptible of any talismanic jurisdictional formula: the facts of each case must always be weighed in determining whether jurisdiction is proper.

Kubik v. Letteri, 532 Pa. 10, 17, 614 A.2d 1110, 1114 (1992) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985)) (emphasis added).

The minimum contacts requirement is not satisfied by contacts "that are 'random,' 'fortuitous' or 'attenuated'" or by "unilateral activity in the forum by others who claim some relationship with the defendant." Id., 532 Pa. at 18, 614 A.2d at 1114 (citing Burger King, 471 U.S. at 475). Rather, it must be shown that the "defendant's conduct and [its] connection with the forum State are such that [it] should reasonably anticipate being haled into court there." Id., 532 Pa. at 17-18, 614 A.2d at 1114 (quoting Burger King, 471 U.S. at 474-75). This requires that a court make "the determination that the defendant purposefully directed [its] activities at residents of the forum and purposefully availed [itself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protection

of its laws." Id. In addition, "the cause of action must arise from the defendant's activities within the forum state." Id., 532 Pa. at 19, 614 A.2d at 1115 (citation omitted).

A court's exercise of specific jurisdiction must also conform to notions of fair play and substantial justice. In reviewing whether exercise of jurisdiction meets this requirement, a court should consider:

> (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Id., 532 Pa. at 18, 614 A.2d at 1114 (citing Burger King, 471 U.S. at 477).

Even where specific jurisdiction is not proper, "Pennsylvania courts may still be able to exercise general personal jurisdiction if the defendant has carried on a continuous and systematic part of its general business within the Commonwealth." McCall, 437 Pa. Super. at 578-79, 650 A.2d at 904. Such jurisdiction is valid "regardless of whether the cause of action is related to the defendant's activities in Pennsylvania, as long as the corporate defendant's activities in this Commonwealth are 'continuous and substantial.'" Garzone v. Kelly, 406 Pa. Super. 176, 183, 593 A.2d 1292, 1296 (1991) (citation omitted).

Unfortunately, the documents submitted by both sides are more confusing than helpful on this issue. Neither side distinguishes between Generali and Concorde when discussing personal jurisdiction. It is also unclear what contacts either Defendant has with Pennsylvania. Furthermore, the Defendants fail to address "fair play and substantial justice," further complicating an analysis of the issue.

In spite of this confusion, it is clear that the Complaint, the Objections and the related documents present questions of fact relating to the Court's exercise of personal jurisdiction over the Defendants. The Complaint alleges that "[a]t all times material hereto, [the Defendants] were regularly conducting business in the State of Pennsylvania and the County of Philadelphia."[17] Complaint at ¶ 6. In contrast, the Defendants have attached affidavits setting forth facts[18] that lead to the opposite conclusion.[19]

Factual disputes such as these are to be resolved through interrogatories, depositions or an evidentiary hearing. Luitweiler v. Northchester Corp., 456 Pa. 530, 535, 319 A.2d 899, 902-03 (1974) (interpreting Pa. R. Civ. P. 1028(c)).[20] While affidavits may be used if the facts are clear and

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[17] To support this claim, the M&S alleges in its Answer that Generali has been a litigant in thirteen civil actions in Philadelphia County alone, including three as a plaintiff, and that a United States branch of Generali is licensed to issue insurance policies in the Commonwealth. M&S also asserts that the Defendants undertook a defense in the Cella Action, including hiring Pennsylvania attorneys and expert witnesses and participating in discovery and litigation. Also in connection with the Cella Action, the Defendants communicated their denial of Policy coverage to M&S through their Pennsylvania attorneys.

[18] According to the affidavits attached to the Objections, neither Defendant has any Pennsylvania offices or employees and neither one has been incorporated in Pennsylvania.

[19] The institution of legal proceedings does not amount to conducting business in Pennsylvania. Gale v. Mercy Catholic Med. Ctr. Eastwick, Inc., Fitzgerald Mercy Div., 698 A.2d 647, 652 n.8 (Pa. Super. Ct. 1997). Similarly, the activities of a wholly owned subsidiary are not sufficient to grant a court personal jurisdiction over a parent corporation. Consolidated Textile Corp. v. Gregory, 289 U.S. 85 (1933); Lawlor v. National Screen Serv. Corp., 10 F.R.D. 123, 124 (E.D. Pa. 1950).

[20] When trial courts have failed to follow this rule, appellate courts have been unrestrained in expressing their displeasure. See Delaware Valley Underwriting Agency, Inc. v. Williams & Sapp, Inc., 359 Pa. Super. 368, 518 A.2d 1280 (1986) (remanding the case to the lower court with instructions to follow the "current version" of the law); Luria v. Luria, 220 Pa. Super. 168, 170, 286 A.2d 922, 923 (1971) (reprimanding the lower court for making factual determinations without ordering the taking of depositions or the filing of interrogatories or both).

specific, "[t]his is not a recommended procedure," and it is "preferable to proceed by depositions or written interrogatories." Slota v. Moorings, Ltd., 343 Pa. Super. 96, 100, 494 A.2d 1, 2 (1985). See also Ambrose v. Cross Creek Condominiums, 412 Pa. Super. 1, 13-14, 602 A.2d 864, 869 (1991) (recognizing that resolving objections to personal jurisdiction by the "submission of evidence by affidavit is not a recommended procedure" and requiring a trial court to resolve a factual dispute "through interrogatories, depositions or an evidentiary hearing").[21]

Accordingly, the Court is ordering that the Parties take depositions regarding those acts that would allow the Court to exercise personal jurisdiction over each Defendant. These depositions are to be completed within 45 days of the issuance of this Opinion and in accordance with Pennsylvania Rule of Civil Procedure 4007.1. Once this has been accomplished and within sixty days of the issuance of this Opinion, the Parties are to file briefs addressing the issue of personal jurisdiction and referencing the depositions and any other relevant evidence. In the interim, the Defendants' Objections to personal jurisdiction will be held under advisement.

IV. Improper Venue

The Defendants base their Objections to venue on two grounds. First, they assert that M&S does not have standing to object to the forum selection clauses in the Policies because it is not a party

[21] Here, the Parties have not requested the procedures outlined in Luitweiler. Nonetheless, this does not release a court of its obligation to take evidence to resolve a factual dispute. See Ambrose, 412 Pa. Super. at 12, 602 A.2d at 869 ("[t]he failure of the parties to provide the evidence necessary for a proper determination of the issue does not excuse the court from further inquiry. Thus, it was incumbent on the court below to take evidence to resolve the dispute"); Delaware Valley, 359 Pa. Super. at 374-75, 518 A.2d at 1283 (remanding matter for further proceedings where the lower court relied on uncontested allegations set forth in the preliminary objections).

to the Policies.[22] Second, the Defendants argue that, even if M&S does have standing, the forum selection clauses are valid and confer exclusive jurisdiction on English and French courts.

As an initial matter, when preliminary objections challenge venue, "the defendant is the moving party and bears the burden of supporting [its] claim" of improper venue. Liggitt v. Liggitt, 253 Pa. Super. 126, 131, 384 A.2d 1261, 1263-64 (1978). See also Gale v. Mercy Catholic Med. Center Eastwick, Inc., Fitzgerald Mercy Div., 698 A.2d 647, 652 (Pa. Super. Ct. 1997) (the moving party has the burden of showing that the original choice of venue is improper). Consequently, to prevail, the Defendants must show that Philadelphia constitutes improper venue.

A. Standing

Under the Generali Policy,[23] among the definitions of "Insured" is "[a]ny Additional Insured defined elsewhere herein." Generali Policy, Definitions at ¶ 4(f). "Additional Insured," in turn, is defined as "[a]ny person or organisation who undertakes in the normal course of their business to distribute or sell the Insured's Products,[24] herein after referred to as Vendor, but only with respect to

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[22] It is important to note that the Objections are limited to M&S's standing to challenge the forum selection clauses and do not address M&S's standing to bring an action against the Defendants for either breach of contract or bad faith.

[23] Interpretation of an insurance policy is a matter of law to be decided by the court. Curbee, Ltd. v. Rhubart, 406 Pa. Super. 505, 509, 594 A.2d 733, 735 (1992). If an insurance policy is ambiguous, it must be construed "against the insurer as the drafter of the instrument." Riccio v. American Republic Ins. Co., 550 Pa. 254, 264, 705 A.2d 422, 426 (1997).

[24] "Insured's Products" is defined as "services, goods or products (after they have ceased to be in the possession or under the control of the Insured) manufactured, constructed, installed, repaired, serviced, treated, sold, supplied or distributed by the Insured including any container and instructions for use." Generali Policy, Definitions at ¶ 5(a).

Bodily Injury[25] or Property Damage[26] arising out of the sale or distribution of such Products." Generali Policy, Additional Insureds.

In this case, M&S sold a gumball-making machine manufactured by Togum, one of the named Insureds under the Generali Policy. Furthermore, the injuries in the Cella Action allegedly were caused by this machine. Accordingly, M&S meets the definitional requirements of an Additional Insured under the Generali Policy.

Additional insureds "are entitled to the same coverage as the named insured." Allan D. Windt, Representation of Insurance Companies and Insureds, 3rd ed. § 11.30. Cf. Township of Springfield v. Ersek, 660 A.2d 672, 676-77 (Pa. Commw. Ct. 1995) (requiring the insurer to defend and to indemnify an additional insured for damage resulting from the additional insured's negligence that occurred on the covered premises). This implies that an additional insured has the same rights under a policy as the named insured, including the right to test the limits and validity of the policy's provisions. As a result, M&S has standing to challenge the validity of the forum selection clause in the Generali Policy.

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[25] The Generali Policy does not include a definition of "Bodily Injury." However, "Personal Injury" is defined as "bodily injury, sickness, disease or death at any time and shall include, but not by way of limitation, mental injury, mental anguish, shock, false arrest, invasion of the right of privacy, detention, false imprisonment, false eviction, libel, slander or defamation of character." Generali Policy, Definitions at ¶ 10.

[26] The Generali Policy defines "Property Damage" as "(a) injury to, loss of, or destruction of material property, or (b) nuisance, trespass, obstruction, loss of amenities or interference with any easement, right of air, light, water or way arising out of and consequent upon (a) above." Generali Policy, Definitions at ¶ 12.

Unfortunately, the Parties have not provided translations of the entire Concorde Policy, which is written in French. This renders a determination of M&S's status and its standing to challenge the Concorde Policy's forum selection clause impossible. To resolve this issue, the Order directs the parties to supply for the Court an English translation of the portions of the Concorde Policy the Parties believe are relevant to M&S's status under that Policy.[27] Also, the Parties may address the issue of M&S's standing under the Concorde Policy in the briefs to be filed in accordance with the Order. In the meantime, Concorde's Objection to venue will be held under advisement.

B. Enforcement of Forum Selection Clause

Because M&S has standing to challenge the forum selection clause in the Generali Policy, it is necessary to determine whether that clause renders Philadelphia improper as venue. Upon review, the Generali Policy forum selection clause is unreasonable, and the Court is under no obligation to limit M&S to England as a forum in this matter.

Pennsylvania law[28] holds that if a forum selection clause broadens the jurisdiction of a court, "the only issue is the enforceability and effect of the clause." First Union Commercial Corp. v. Medical Mgmt. Servs., LLC, February 2000, No. 3673, slip op. at 4 (C.P. Phila. July 26, 2000) (Herron, J.) (citation omitted).[29] However, where a forum selection clause purports to make an otherwise proper

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[27] While the Court could try its hand at translating the Concorde Policy, it believes that the interests of justice are better served by the Parties engaging a professional translator to secure a more accurate version.

[28] To the extent that the Defendants rely on Federal cases, they are mistaken, since, "[i]n federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law." BABN Tech. Corp. v. Bruno, 25 F. Supp. 2d. 593, 595 (E.D. Pa. 1998).

[29] Available at http://courts.phila.gov.

venue improper, "it would be contrary to public policy to allow an agreement made in advance of the dispute to oust said tribunal's jurisdiction."[30] Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 132-33, 209 A.2d 810, 815-16 (1965) (citing In Rea's Appeal, 13 W.N.C. 546 (1883)). See also Healy v. Eastern Bldg. & Loan Ass'n, 17 Pa. Super. 385, 392 (1901) (an agreement to sue only in New York does not prevent plaintiff from bringing action in a Pennsylvania court). However, this does not mean that an agreement limiting the forum for future dispute resolution is per se invalid:

> The modern and correct rule is that, while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.

Central Contracting, 418 Pa. at 133, 209 A.2d at 816 (emphasis added). See also Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., __ A.2d __ (Pa. Super. Ct. 2000) (using the test laid out in Central Contracting to determine the validity of a forum selection clause).[31]

An agreement on a particular forum is unreasonable

> [W]here its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue its cause of action. Mere inconvenience or additional expense is not the test of unreasonableness if the plaintiff received under the contract consideration for its agreement to litigate in a specified forum. If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by its agreement.

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[30] In essence, Pennsylvania courts are generous in allowing a forum selection clause to broaden jurisdiction, but apply a stricter test when such a clause limits jurisdiction. See First Union, slip op. at 5 n.2.

[31] This opinion may be found on Westlaw as 2000 WL 1100159.

Churchill Corp. v. Third Century, Inc., 396 Pa. Super. 314, 321-22, 578 A.2d 532, 536 (1990) (citations omitted) (emphasis added). See also Williams v. Gruntal & Co., 447 Pa. Super. 357, 361, 669 A.2d 387, 389 (1995) ("if the agreement to proceed in the alternative forum has the effect of seriously impairing the plaintiff's ability to pursue a cause of action, the court will strike such an agreement as unreasonable").

Here, M&S asserts in its Answer that it "is not and will not be litigating . . . in England, primarily because it lacks sufficient resources to do so. As such, dismissal of the present action will effectively leave [M&S] without a remedy" for the Defendants' alleged misconduct. Answer at ¶ 21. In addition, the Memorandum attached to the Answer states that

> The staggering cost of litigating a coverage dispute in Europe while simultaneously defending a product liability case in this Court has proven insurmountable for M&S . . . . Even if M&S could afford to successfully defend this . . . claim, Generali would be free to cite any number of additional alleged policy exclusions in any number of subsequent cases. In view of the circumstances, M&S has abandoned any defense in the English proceedings as it is simply unable to afford representation there.

M&S's Memorandum at 9-10.[32] The Defendants do not contest these assertions.

M&S's assertions are sufficient for the Court to conclude that forcing M&S to raise its claims in England would seriously impair its ability to pursue its causes of action. This renders the forum selection clause in the Generali Policy unreasonable.

This conclusion is bolstered by the Pennsylvania Superior Court's recent ruling in Morgan Trailer. In that case, a New Jersey corporation brought suit against a British corporation in

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[32] M&S also claims that Generali has a Pennsylvania subsidiary licensed to issue insurance in the Commonwealth. M&S's Memorandum at 4. In addition, the Cella Action, which underlies the case at hand, has been listed for trial in Philadelphia, Pennsylvania.

Pennsylvania based on a series of disputes arising out of a distribution contract. The contract in question included a clause stating that the parties submitted themselves "to the exclusive jurisdiction of the English Courts." __ A.2d at __. Based on facts similar to those here, the Superior Court determined that forcing the plaintiffs to litigate in England would seriously impair their cause of action, making the forum selection clause unreasonable.

As in Morgan Trailer, the Generali Policy forum selection clause is unreasonable and, thus, unenforceable in the context of this matter. As a result, Generali's Objections based on improper venue are overruled.[33]

V. Service of Process

Last, the Defendants argue that service made on them via registered mail did not comport with the requirements of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 361 ("Hague Convention"), and is therefore invalid. Because validity of service under Pennsylvania law is inextricably intertwined with personal jurisdiction, this Objection cannot be resolved without additional information.

Under the Hague Convention, parties are permitted to "send judicial documents, by postal channels, directly to persons abroad," unless the state of destination objects. Hague Convention art. 10(a). Neither France nor the United Kingdom has filed any objections to this provision,[34] and Federal

[33] There is no need to address M&S's argument that it did not freely agree to the terms of the Generali Policy.

[34] The Defendants argue that the United Kingdom has filed objections to Article 10(a) of the Hague Convention. However, the United Kingdom's objections relate to the provisions addressing service through judicial officers set forth in Article 10(b) and (c).

courts have held that service on French and United Kingdom corporations via mail is legitimate. See EOI Corp. v. Medical Mktg. Corp., 172 F.R.D. 133 (D.N.J. 1997) (allowing service of process by mail on a British corporation); Melia v. Les Grands Chais de France, 135 F.R.D. 28 (D.R.I. 1991) (permitting service by mail on French defendant).

Pennsylvania courts interpreting the Hague Convention have held that service of a complaint on a foreign corporation through certified mail is valid so long as the service complies with the Long-Arm Statute. See Jordan v. SEPTA, 708 A.2d 150, 151-52 (Pa. Commw. Ct. 1998); Sandoval v. Honda Motor Co., Ltd., 364 Pa. Super. 136, 139-40, 527 A.2d 564, 566 (1987). Such service is proper even if the document is not translated into the official language of the state of destination. Jordan, 708 A.2d at 152; Sandoval, 364 Pa. Super. at 140-41, 527 A.2d at 567.[35]

According to the Long-Arm Statute, "[w]hen the law of this Commonwealth authorizes service of process outside this Commonwealth, the service, when reasonably calculated to give notice, may be made . . . [b]y any form of mail addressed to the person to be served and requiring a signed receipt." 42 Pa. C.S. § 5323(a). Because the Complaint was mailed to the Defendants via registered mail,[36] service on the Defendants was proper if it was authorized by Pennsylvania law.[37]

Pennsylvania law permits service of process outside of Pennsylvania "[w]hen the exercise of personal jurisdiction is authorized." 42 Pa. C.S. § 5322(d). As discussed supra, a resolution of the

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[35] Concorde's alleged corporate policy that official legal documents served on Concorde must be translated into French cannot trump Pennsylvania case law.

[36] Both Parties acknowledge that the Complaint was mailed to the Defendants via registered mail. Defendants' Memorandum at 3; Answer at ¶ 34.

[37] The Court can infer that the M&S's actions were reasonably calculated to give notice.

personal jurisdiction issues is not possible at present due to outstanding issues of fact. This, in turn, prevents a resolution of the Objections to service. Consequently, the Objections to service will be held under advisement and will be resolved in conjunction with the other outstanding Objections.[38]

CONCLUSION

For the reasons set forth in this Opinion, the Objections based on a pending prior action and failure to set forth a cause of action for punitive damages are overruled, as are Generali's Objections to venue. The Objections of both Defendants to personal jurisdiction and service and the Objections of Concorde to venue require additional information before they can be resolved. As a result, the Court is ordering the translation of the relevant parts of the Concorde Policy, the taking of depositions and the submission of briefs addressing the outstanding matters. Pending the receipt of this additional information, the Court will hold the outstanding Objections under advisement.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: October 11, 2000

[38] If personal jurisdiction is, in fact, valid, service of process was proper and the Objection will be overruled.

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MILTENBERG & SAMTON, INC., Plaintiff	:	January Term, 2000
	:	No. 3633
v.	:	
	:	Commerce Case Program
ASSICURAZIONI GENERALI, S.p.A., et al. Defendants	:	Control No. 070692

ORDER

AND NOW, this 11th day of October, 2000, upon consideration of the Preliminary Objections of Defendants Assicurazioni Generali, S.p.A. ("Generali") and Concorde Assurances Groupe des Assures ("Concorde") to Plaintiff Miltenberg & Samton, Inc.'s Complaint and Plaintiff's responses thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections asserting failure to set forth a cause of action for punitive damages and pendency of a prior action are OVERRULED;

2. The Preliminary Objections of Generali asserting improper venue are OVERRULED;

3. The Preliminary Objections of Concorde asserting improper venue will be held under advisement for sixty days. Within forty-five days, the Parties shall complete a translation into English of those parts of the Concorde Policy relevant to the issue of improper venue as raised in Concorde's Preliminary Objections;

4. The Preliminary Objections asserting lack of personal jurisdiction over both Defendants will be held under advisement for sixty days so that within forty-five days, depositions pursuant to Pa. R. Civ. P. 4007.1 may be taken to resolve the factual questions regarding personal jurisdiction over the Defendants;

5. The Preliminary Objections asserting improper service will be held under advisement for sixty days; and

6. After the forty-fifth day but on or before the sixtieth day, the Parties shall file with this Court:

(a) the translation made in accordance with Paragraph Three of this Order; and

(b) briefs offering any further argument and referencing the depositions or other relevant evidence on the issues being held under advisement in Paragraphs Three, Four and Five of this Order.

BY THE COURT:

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JOHN W. HERRON, J.