IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SOCIETY OF LLOYD'S,	:	
Plaintiff,	:	Miscellaneous Docket No. 1:04-MC-00007
v.	:	JUDGE LESLEY WELLS
JOHN STEINER ROBY,	:	
Defendant.	:	

MEMORANDUM OF PLAINTIFF THE SOCIETY OF LLOYD'S IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND/OR TO STRIKE

Introductory Statement

This miscellaneous docket matter (the "Filing") was put on record by plaintiff The Society of Lloyd's ("Lloyd's") in order to attain recognition in this Court of its March 11, 1997 English judgment (the "Judgment") in favor of Lloyd's and against defendant John Steiner Roby ("Roby"), of this district and division, for an amount that (with English judgment interest and at current exchange rates) now is well in excess of $300,000. The substantive predicate for the Filing is the Uniform Foreign Money-Judgments Recognition Act (the "Comity Act"), as codified in Ohio Revised Code §§ 2329.90-2329.94. Roby has filed a Motion to Dismiss and/or to Strike (the "Motion") by which it is asserted (1) primarily that this Court's cognizance has not been duly triggered for the supposed reason that the principle of international comity enshrined by the Comity Act can be invoked in federal court only by the filing of a civil action and (2) secondarily that

Lloyd's is disabled from invoking this Court's power and aid by the foreign corporation licensure conventions of Ohio Revised Code Chapter 1703 (the "License Statute").

This memorandum will explain that the Motion is wide of the mark, and the Filing was wholly effective to produce full and immediate recognition of the Judgment. The primary position espoused by Roby accords unjustifiably short shrift to the principle of international comity—which was coined and refined by the federal courts long before embodied in the Comity Act—and both rests upon a misapprehension of the Comity Act's essential character and disregards instructive provisions of federal law, most notably Rule 69(a) of the Federal Rules of Civil Procedure. In addition, even any perceived irregularity in the actuation of this Court's jurisdiction by the Filing has been cured and consigned to mere academic interest through the recent commencement by Lloyd's of a civil action against Roby. Furthermore, Roby's fall-back reliance upon the License Statute is misplaced, because the License statute has no applicability here.

Untenability of the Motion

A. The Filing was in accord with the Comity Act and consistent with federal decisional law and statutes.

1. The principle of international comity

The Supreme Court ruled in the seminal *Hilton v. Guyot*, 159 U.S. 113, 202 (1895), that a judgment reached by a tribunal in a foreign country was deserving of complete respect in the United States if "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries." The Court hastened to add

that a defendant hopeful of contesting a foreign country judgment would not be heard to do so "upon the mere assertion . . .[that the judgment] was erroneous in law or fact," *id*. at 203, or simply because the foreign tribunal followed "procedure . . . [that] differed from that of our own courts." *Id*. at 205. Instead, declared the Court, a foreign country judgment must be "held conclusive upon the merits tried in the foreign court, *unless some special ground is shown for impeaching the judgment*, as by showing it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full faith and effect." *Id*. (emphasis added).

The principle of international comity thus enunciated in *Hilton* has been upheld and refined throughout the ensuing decades. For instance, that principle was central to the Supreme Court's landmark endorsement of international exclusive forum clauses in *The Bremen v. Zapata Off-Shore Co*., 401 U.S. 1 (1972). Notably, among *The Bremen's* progeny is the Sixth Circuit's enforcement of choice of law and exclusive forum clauses in the very form of General Undertaking used by Lloyd's to admit "names" such as Robinson as members. *See Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995).[1] As respects the pertinence of the principle of international comity for that purpose, the Sixth Circuit concluded that it was a moot question whether state or federal law governed, "because both Ohio and federal law treat these clauses in a similar manner." *Id*. at 1229.

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[1] Other federal courts as well have ruled that names' agreements in the General Undertakings to litigate with Lloyd's in England are valid and binding and preclude merits adjudication in the United States. *See,* e.g., *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.s. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993).

As *Hilton* itself indicated, once a judgment is reached by a court in a foreign country, the principle of international comity demands that the judgment be respected—and thus enforced—in the United States unless and until the judgment debtor succeeds in impugning it. In other words, the judgment itself is the only thing a foreign judgment creditor must demonstrate in order to be entitled to judicial assistance in enforcing its right of recovery. Accordingly, the sole foreign judgment decision cited in the Motion, *Kahrs v. Rio Verde Energy Corp*., 604 F. Supp. 877 (S.D. Ohio 1985), held that "[p]rinciples of comity" required enforcement of an English court order because the judgment debtor "failed to put forth a persuasive reason for not recognizing" it. *Id*. at 880.

2. The Comity Act's exaltation of the principle in Ohio

The Comity Act was enacted by the Ohio General Assembly to take effect in late 1985, several months *after* issuance *of the Kahrs* decision. Ohio's Comity Act makes clear that a foreign country judgment is accorded the same status in Ohio as the judgment entered in another of the United States. Ohio's Comity Act terms such a foreign country judgment "conclusive" between the parties in the absence of a showing by the judgment debtor that the judgment is afflicted by one of a mere handful of serious deficiencies. *See* Ohio Revised Code. §§ 2329.91(B), 2329.92.[2] As part and

[2] Roby seems to understand both that there are only a few cognizable bases for challenging a foreign country judgment under the Comity Act and that the burden is upon the judgment debtor to mount a challenge and then carry the day in court if such a judgment is to lose "conclusive" status. The Motion at 3 suggests that Roby may wish to attack the Judgment, but Roby there offers no rationale for his bare supposition that, before he could have the chance to do that, "a Complaint must first be filed [by Lloyd's] pursuant to the Federal Rules of Civil Procedure." Roby does cite *Kahrs* and Civil Rule 3 generally, but nowhere in *Kahrs*—which, as mentioned above, predated the advent of the Ohio Comity Act in any event—did the court state that a complaint must be filed by a creditor wishing to enforce a foreign country judgment, and Civil Rule 3 does not address the circumstances under which a civil action must (or need not) be commenced. Furthermore, Roby albeit rather obliquely, acknowledges in the Motion at 2-3 that the form and nature of the Filing would have been satisfactory under the Comity Act if Lloyd's had gone to

parcel of its effectuation of the principle of international comity, the Ohio Comity Act specifies in *id*. § 2923.91 that a "foreign country judgment is enforceable in this state in the same manner as a judgment of another state that is entitled to full faith and credit." As the Motion at 2 notes, that "manner" is by filing a certified copy with the court, as Lloyd's did here. *See* Ohio Revised Code § 2329.022.[3]

3. Applicability of the Comity Act in this federal forum

Kahrs held that in a diversity situation such as the instant matter, "the forum state's full faith and credit principles provide the rule of decision." 604 F. Supp at 878. In other words, international comity is substantive, so the *Erie* doctrine mandates effectuation of the Comity Act in this forum. Indeed, Lloyd's has successfully invoked other states' versions of the Comity Act—both by complaint and by notice—in federal fora throughout the country. *See, e.g., The Society of Lloyd's v. Turner*, 303 F.3d 325, 329-30 (5th Cir. 2002); *The Society of Lloyd's v. Ashenden*, 233 F.3d 473, 475-81 (7th Cir. 2000); *The Society of Lloyd's v. Mullin*, 255 F. Supp. 2d 468, 471-76 (E.D. Pa. 2003); *The Society of Lloyd's v. Webb*, 156 F.Supp. 2d 632, 638-44 (N.D. Texas 2001).[4]

4. Propriety of the Comity Act "manner" for enforcement here

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state court and that, in such event, *he would have the opportunity to raise Comity Act defenses in the absence of any complaint*. Roby fails to supply any grounding for his tacit postulate that in the aftermath of the Filing, he could not advance Comity Act defenses in the same fashion before this Court as he could have if Lloyd's had obtained recognition of the Judgment in state court.

[3] Of course, as incorporated in Ohio's Comity Act, § 2923.022 refers to the "clerk of any court of common pleas'" and Lloyd's made the Filing with the clerk of this Court. In Roby's telling, there "clearly" was no "no authority" for the Filing, Motion at 3, but it seems from the glaring lack of analysis in the Motion that Roby has hoped to deploy "clearly" as a cover for his inability to supply a principled explanation of his conjecture.

[4] In such matters, names' efforts to disparage the English judicial system have been readily rebuffed, the Seventh Circuit even advising in *Ashenden* that an attempt in that vein "borders on the risible." 233 F.3d at 476. It is presumed that Roby does not wish to trouble the Court with contentions of that stripe.

Each of several fundamental points dispels Roby's conception that the Comity Act "manner" of the Filing—via a miscellaneous docket posting that included both a certified copy of the Judgment and notice, obviously effective, to Roby—is inadequate purely by reason of the fact that Lloyd's came to this Court rather than a state forum.

First, because it is integral to the Ohio Comity Act's vindication of the principle of international comity, the "manner" of the Filing is itself a matter of substance applicable in this Court through the *Erie* doctrine. International comity hardly would be served fully were a foreign country judgment winner required to plead and prove in this forum anything beyond the mere fact of judgment, as the self-authenticating Judgment in the Filing does for Lloyd's. The character of the Filing thus is not simply a matter of procedure.

Second, Civil Rule 69(a) indicates that even if the "manner" of the Filing pursuant to Ohio's Comity Act were viewed as procedural, it nonetheless would be proper here. The second sentence of Civil Rule 69(a) states, "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, except that any statute of the United States governs to the extent that it is applicable." *Ashenden* held that Civil Rule 69(a) made state (Illinois there) procedure appropriate in federal court for Comity Act purposes and that, accordingly, "the filing of the judgments inaugurated this federal-court proceeding to collect them." 233 F.3d at 475.

Third, the Ohio Comity Act "manner" of the Filing is wholly consistent with the terms of the most analogous federal statutes. For instance, 28 U.S.C. § 1963 specifies

that a money judgment entered by one federal court can be registered in another "by filing a certified copy of the judgment." Similarly, 28 U.S.C. § 1738 provides, *inter alia*, that a state court judgment can be "proved or admitted" in a federal forum, and thereby gain "full faith and credit," through submission of an authenticated copy. Therefore, the Filing is compatible with federal norms for recognition in one forum of the results of proceedings before another court.

These three reasons—both individually and collectively—all indicate that Roby is mistaken when arguing in the Motion that the Filing is inefficacious in this forum. Roby certainly has not demonstrated that he lacks the ability to raise any of the Comity Act defenses until Lloyd's utilizes a complaint to trigger this Court's jurisdiction.[5] There is no good reason that Roby could not have presented to this Court before now, in the same fashion that he would have in the event that the Filing had been made in state court, any Comity Act defense he can honestly raise. Nevertheless, lest the parties and the Court be distracted further by this issue, Lloyd's has initiated a civil action, Case No 1:04CV0400, against Roby, so there can be no question that the Court has jurisdiction to enforce the Judgment under the Comity Act.

B. Neither the Filing nor the standing of Lloyd's, an English corporation created by Act of Parliament and engaged in no intrastate commerce in Ohio, is undermined by the License Statute.

Roby's License Act argument in the Motion is clearly unavailing. Although Lloyd's is a "foreign corporation" within the meaning of Ohio Revised Code § 1703.01(B)

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[5] There was no mention of any complaint having been filed in *Ashenden,* but that obviously did not preclude the judgment debtors there from advancing their Comity Act defenses against Lloyd's. Likewise, *The Society of Lloyd's v. Webb*, *supra*, did not refer to a complaint—and even displayed what appears to be a miscellaneous docket filing number—yet the judgment debtor managed to have his Comity Act defense adjudicated in federal court "by filing a motion for non-recognition" in accordance with state law. *Id* at 638.

and (C), it is excepted from the License Act's licensure requirements by Ohio Revised Code § 1703.02, which states that the License Act provisions, including licensure requirements "do not apply to corporations engaged in this state solely in interstate commerce."

As the court observed in the lone License Act decision cited in the Motion, "Whether a corporation engages solely in interstate commerce so that it is exempt from Ohio's licensing requirements is largely a factual determination dependent upon the totality of the relevant circumstances surrounding the corporation's business operations." *Auto Driveaway Co. v. Auto Logistics of Columbus*, 188 F.R.D. 262, 264 (S.D. Ohio 1999). Roby's attempt to negate the § 1703.02 exception—by asserting conclusorily that "Lloyd's has not engaged solely in interstate commerce but instead has [*sic*] and is carrying on and transacting a substantial part of its business in the State of Ohio," Motion at 3-4—hardly creates a factual framework on the basis of which the Court could choose to dismiss.[6] A decision concerning the applicability of the License Act, the pertinence of the § 1703.02 exception most particularly, must rest upon a factual record developed for that purpose. *See, e.g., Dot Systems, Inc. v. Adams Robinson Enterprises, Inc.*, 67 Ohio App. 3d 475, 480 (1990); *Cocon, Inc. v. Botnick Building Co.*, 59 Ohio App. 3d 42, 43 (1989); *Contel Credit Corp. v. Tiger, Inc.*, 36 Ohio

[6] In *Auto Driveaway*, the court did not dismiss even though it determined—on the basis of evidence, not mere conclusory language of the sort contained in the Motion—that the plaintiff had intrastate operations. Instead, the court stayed the litigation. *See* 188 F.R.D. at 265. An Ohio state court has termed the License Act "a purely technical defense" where applicable and indicated that it ought not unduly hinder a foreign corporation's ability to press its claim. *See E.R. Moore Co. v. Ochiltree*, 16 Ohio Misc. 45, 48 (Ct. C.P. 1968).

App. 3d 71, 72-73 (1987); *Acton Sells Associates v. St. Vincent Medical Center*, 63 Ohio Misc. 2d 404, 406 (Ct. C.P. 1992).

As is obvious, a foreign corporation can engage in only interstate commerce in the contemplation of § 1703.02 notwithstanding that it derives revenue from Ohio. *See, e.g., Golden Dawn Foods, Inc. v. Cekuta*, 1 Ohio App. 2d 464, 466-67 (1964); *Local Landmarks, Inc. v. Derrow Motor Sales, Inc.*, 120 Ohio App. 103, 106-09 (1963). Although Roby has failed to apprise the Court of any facts—rather than bare, self-serving conclusions—regarding the nature and activity of Lloyd's, the Court may wish to consult the writings of American courts which have pondered actual facts of that kind. The Sixth Circuit, for example, described Lloyd's in *Shell v. R.W. Sturge, Ltd.*, *supra* at 1228, as "an insurance marketplace, in which individual Underwriting Members, or Names, join together in syndicates to underwrite a particular type of business." The Sixth Circuit's words are irreconcilable with the conclusory contention in the Motion at 3-4: the notion that an international "insurance marketplace" sited in London and created by English statute conducts intrastate business in Ohio simply cannot be credited.[7]

The Court has been provided no evidence that could fuel a determination that Lloyd's must be licensed in Ohio. To the contrary, the limited information available to

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[7] Furthermore, *Ashenden* emphasized that Lloyd's "is not an insurer, but rather the overseer of the London insurance market," with "actual insurance [being] written by syndicates of 'names.'" 233 F.3d at 478. *See Turner v. The Society of Lloyd's*, *supra* at 327; *Haynsworth v. The Corporation*, *supra* at 958-59. The *Haynsworth* court noted that even the inception of names' memberships in Lloyd's typically involves their personal appearance in England to "acknowledge their awareness of the various risks and requirements of membership, and in particular the fact that underwriting in the Lloyd's market subjects them to unlimited personal liability." *Id*. at 959.

the Court at this juncture suggests precisely the opposite. Accordingly, the second branch of the Motion cannot vitiate or diminish the Filing.

Conclusion

For the reasons set forth above, the judgment debtor's dilatory Motion is unfounded and should be denied by the Court.

Respectfully submitted,

s/ Terry M. Miller

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via regular U.S. Mail, postage prepaid, upon Sean P. Allan, Allan & Gallagher, LLP, 1300 Rockefeller Building, 614 West Superior Avenue, Cleveland, Ohio 44113, on this 11th day of March 2004.

s/ Terry M. Miller

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