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UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

In re BCE WEST, L.P., et al.,
Debtors.

GERALD K. SMITH, as Plan Trustee
for and on behalf of the Estates of
Boston Chicken, Inc.; BC REAL
ESTATE INVESTMENTS, INC., and
all Boston Chicken Affiliates and as
assignee of SCOTT A. BECK; and PEER
PEDERSEN,
Plaintiffs,

vs.

ACE INSURANCE COMPANY, LTD.,
aka ACE BERMUDA INSURANCE
LTD.; BAILEY CAVALIERI, LLC.;
DAN BAILEY and CONYERS DILL
& PEARMAN,
Defendants.

In Chapter 11 proceedings
Case Nos. 98-12547
through 98-12570-PHX-CGC
Jointly administered

Adversary No. 2-05-ap-00299

UNDER ADVISEMENT DECISION RE:
MOTIONS TO DISMISS

18 **I. INTRODUCTION**

19 This is a dispute concerning the arbitrability of disputes under an insurance policy purchased
20 by Debtor Boston Chicken, Inc. (“BCI”) to insure its directors and officers (“D&O’s) from loss.

21 Defendant ACE Insurance Company, Ltd. (“ACE”), a Bermuda insurance company, issued
22 a D&O policy with an effective date of 1995; premiums were paid both pre- and post-petition.¹ Two
23 aspects of the policy are critical: first, it provided seventh layer excess coverage in an amount of \$20
24 million under which the primary coverage and the five preceding layers of excess coverage needed
25 to be exhausted prior to its layer being available and, second, the policy excluded claims by one
26 insured against another insured.

27 _____
28 ¹Boston Chicken, Inc. and a number of affiliates commenced these Chapter 11 proceedings on
October 5, 1998.

1 By order dated May 15, 2000, BCI's plan of reorganization was confirmed pursuant to which
2 Gerald K. Smith was appointed Trustee for the estates of the debtors and charged with "monetizing"
3 the Retained Assets, as defined in the Plan, including claims, causes of actions, and insurance
4 policies not transferred to the buyer of the debtor's operational assets, including all insurance
5 policies insuring the debtor's D&O's. The Trustee thereafter commenced litigation against various
6 parties, including the D&O's. The Trustee settled with some but not all of the insured D&O's and
7 recovered policy limits from the primary carrier and the next four layers of excess coverage.² In
8 addition, the Trustee received an assignment of the settling D&O's' claims against ACE.
9 Throughout, ACE denied coverage, asserted it had no obligation to defend and took no action (such
10 as filing a declaratory judgment suit) to determine the existence or extent of its liability.

11 On March 22, 2005, ACE, through its lawyers (and defendants herein) Conyers, Dill &
12 Pearman ("Conyers") filed an action in the Supreme Court of Bermuda against the Trustee and the
13 settling D&O's seeking an order enjoining the defendants from commencing or proceeding with any
14 action or injunction against ACE and awarding them damages and their costs (the "Bermuda
15 Action").³ ACE obtained the injunction that same day, without notice to any of the defendants,
16 notwithstanding the fact that counsel for Trustee and/or the settling D&O's had been in contact with
17 counsel for ACE over a period of years. ACE also sought to commence arbitration of all disputes
18 in Bermuda.

19 Thereafter, on April 18th, 2005, Trustee filed this action against ACE, Conyers and its United
20 States coverage counsel, Bailey Cavalieri, LLC and Dan Bailey (jointly "Bailey"), seeking an
21 injunction against proceeding with the Bermuda action, contempt, contract damages, a declaratory
22 action and bad faith damages.

23 Defendants moved to dismiss this action on July 1, 2005, and, after briefing, oral argument
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25 ²One issue referenced in the pleadings but not relevant to the determination of this motion is that
26 the immediately senior level of coverage was issued by Reliance, which is in insolvency proceedings
27 itself.

28 ³The claims for damages and costs were subsequently stricken by ACE.

1 was held on August 16, 2005. The Court has been advised that proceedings to set aside the Bermuda
2 injunction are scheduled in Bermuda August 22 and 23, 2005.

3 **II. THE ISSUES TO BE DECIDED**

4 Defendants have moved to dismiss this case on the following grounds:

5 A. ACE

- 6 1. ACE asserts that the Court lacks personal jurisdiction over it and the matter
7 in dispute does not involve *in rem* jurisdiction.
- 8 2. ACE asserts that the Arbitration agreement is enforceable.
- 9 3. ACE denies that the *Barton* Doctrine, requiring leave of the appointing Court
10 before suit may be brought against a Court appointed trustee, does not apply
11 to proceedings in Bermuda to enforce an arbitration agreement to which the
12 Trustee is bound. Therefore, it is neither an impediment to the Bermuda
13 action nor a basis for a contempt award against ACE.
- 14 4. The doctrine of comity requires this Court to defer to the Bermuda Court.

15 B. Bailey

- 16 1. Bailey asserts that an injunction may not be issued to prevent it from
17 participating in the Bermuda Action in which it is not representing ACE.
- 18 2. Bailey asserts that the *Barton* Doctrine does not apply and, even if it did,
19 contempt does not lie against Bailey for any purported violation.

20 C. Conyers

- 21 1. Conyers asserts that the Court lacks personal jurisdiction over it.
- 22 2. Conyers adopts Bailey's arguments on the *Barton* Doctrine.

23
24 The Trustee responds:

- 25 1. There is personal jurisdiction over all Defendants.
- 26 2. This Court has exclusive *in rem* jurisdiction over property of the estates,
27 which includes the policies at issue and their proceeds.

3. The defendants violated the *Barton* Doctrine when they brought the Bermuda action without first seeking leave from this Court.
4. Contempt is the appropriate remedy for violation of *Barton*.
5. Comity is either not applicable or should not be applied in this case.
6. By declaring that it will not provide coverage under any circumstances, ACE has repudiated the contract and therefore released the Trustee from any obligation to arbitrate.

III. ANALYSIS

A. Standard on a Motion to Dismiss

1. Personal Jurisdiction (Fed. R. Bankr. Proc. 7012(b)(2))

The Trustee has the burden of making a *prima facie* case that the defendants are personally subject to the jurisdiction of this Court. *Data Disc, Inc. v. Systems Technology Assocs., Inc*, 557 F.2d 1280 (9th Cir. 1977). If no such showing is made, the action must be dismissed, except insofar as the Trustee seeks *in rem* relief only.

2. Failure to State a Claim (Fed. R. Bankr. Proc. 7012(b)(6))

For the purposes of 7012(b)(6), the facts of the complaint, and all reasonable inferences, are taken as true. The defendant has the burden of showing that there are no facts that the Plaintiff may prove that would entitle it to relief under the theories alleged.⁴

B. Personal Jurisdiction

1. ACE

The appropriate initial inquiry is the extent of the Court's jurisdiction over the defendants.

For purposes of bankruptcy jurisdiction, it is necessary only to demonstrate that personal jurisdiction would exist in any state, rather than exclusively in the forum state, in this case Arizona.

⁴The Plaintiff has submitted detailed proposed findings of fact and conclusions of law. The Court declines to enter any of those dealing with the merits of the underlying dispute; the Plaintiff is not now in Court seeking affirmative relief. The issue presented is narrowly whether the complaint should be dismissed; therefore, the Court will only make such limited findings as are necessary to address the personal and *in rem* jurisdiction arguments.

1 ACE asserts (supported by affidavit) that it: conducts no business in the United States, is
2 incorporated in Bermuda, has offices only in Bermuda, sells insurance only in Bermuda through
3 brokers based solely outside the United States, receives its premiums in Bermuda, does not advertise
4 in the United States, chooses only forums to resolve cases outside of the United States, pays no
5 United States taxes and is not regulated by any United States regulatory authority.

6 The starting point for any personal jurisdiction inquiry is the Supreme Court’s extensive
7 jurisprudence on the subject. In *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), the
8 Supreme Court established the oft-cited principle that “due process requires only that in order to
9 subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum,
10 he have certain minimum contacts with it such that the maintenance of the suit does not offend
11 ‘traditional notions of fair play and substantial justice.’” *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220
12 (1957), applied this principle to the question of jurisdiction over the issuer of an insurance policy.
13 McGee’s deceased husband, a resident of California, purchased a life insurance policy from Empire,
14 an Arizona insurance company. International, a Texas company, took over the obligations of
15 Empire and mailed a certificate to the insured in California. The insured paid premiums to
16 International in Texas. Neither Empire nor International ever had any offices or agents in California.

17 The Court held that it was sufficient for purposes of personal jurisdiction over International
18 in California that the “contract was delivered in California, the premiums were mailed from there
19 and the insured was a resident of that State when he died.” 355 U.S. at 201.

20 In *Calder v. Jones*, 465 U.S. 783 (1984), a unanimous Supreme Court found personal
21 jurisdiction in California over a Florida resident who generated a nationally published article that
22 was “intentionally directed” at a California resident. There were no other California contacts.

23 A more recent refining of the doctrine came in *Asahi Metal Industry Co. v. Superior Court*
24 *of California*, 480 U.S. 102 (1987). The issue was whether a California Court could exercise
25 jurisdiction over a cross claim by a Taiwanese tire manufacture against a Japanese manufacturer of
26 valve assemblies (incorporated in the finished tire product in Taiwan) for injuries resulting from an
27 accident that occurred in California. The Court (with different majorities) answered “no” on two
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1 bases: first, that the mere fact that a product is introduced into the “stream of commerce” and may
2 end up in a forum where the product’s manufacturer has no other contacts is insufficient to be the
3 “purposeful act” by the defendant required to submit himself to the jurisdiction of the forum⁵; and,
4 second, even if introduction into the stream of commerce were sufficient, in this case it would be
5 “unfair” to invoke jurisdiction. Two lessons come out of *Asahi*—there must be some action by the
6 party against whom jurisdiction is sought and imposition of jurisdiction, even if it meets the
7 minimum standards test, must still pass muster under the notion of “fundamental fairness.”

8 There are three Ninth Circuit cases worthy of note. In *Haisten v. Grass Valley Medical*
9 *Reimbursement*, 784 F.2d 1392 (9th Cir. 1986), a specialized reimbursement fund was established
10 in the Cayman Islands to provide malpractice insurance for a group of doctors in California. As the
11 Court put it, the fund was “carefully and deliberately established to appear to be doing business only
12 in the Cayman Islands.” 784 F.2d at 1395. Because the business was aimed at California doctors,
13 the Court found that the Fund had “purposely availed itself of the privilege of conducting activities
14 in California,” even though “no part of the transaction for insurance took place in the forum state.”

15 Defendants suggest that the holding of *Haisten* is suspect because of the subsequent decision
16 of the Supreme Court in *Asahi*. This is unconvincing. A year after *Asahi*, the Ninth Circuit decided
17 *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1988), in which the Court found that
18 personal jurisdiction did not exist. However, it cited the holding in *Haisten* approvingly noting that
19 the present case completely lacked any activity by the defendant in the forum state and no “effects”
20 of “purposeful” activity existed. Finally, *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987), discusses the
21 “purposeful availment” test at length and restates the Ninth Circuit’s tri-partite test for specific
22 personal jurisdiction: 1) the nonresident defendant must purposefully direct his activities [at] the
23 forum state or residents thereof; 2) the claim must arise from the forum-related activities; and 3)
24 exercise of jurisdiction must be reasonable.

25 In this case, the Trustee has filed an affidavit asserting that BCI paid all premiums by wire

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27 ⁵See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), *World-Wide Volkswagen Corp. v.*
28 *Woodson*, 444 U.S. 286 (1980)

1 transfer to an account at Citibank in New York, that the policy covered only U.S. based operations
2 (as BCI had no international operations), that all negotiations for the insurance were through a
3 broker based in the U.S. (first RHH and thereafter AON), that coverage confirmations were provided
4 and signed by the U.S. based brokers, and the policies were received by BCI in the United States.

5 Distilling the case law to its essence, the key test is whether a non-resident defendant has
6 purposefully taken an action directed at, or with a likely effect on, the forum state and, if so, does
7 invoking personal jurisdiction as to that defendant “comport with fair play and substantial justice.”
8 In this case, the answer to both questions is yes. This is not a “stream of commerce” case; there is
9 nothing random or unintentional about ACE’s having sold an United States company a \$20 million
10 insurance policy and collected over \$1.8 million in premiums over five years to insure losses that
11 could only arise in the United States. Further, it is not unreasonable for ACE to have to respond to
12 claims brought in this forum by its insured. The law has been made in this area with cases on the
13 edge; this is not one of them. Granted, ACE has taken care, like the defendant in *Haisten*, to keep
14 its *operations* off-shore; however, it has not limited its *activities* to off-shore locations and therein
15 lies the rub. Therefore, the motion to dismiss as to ACE for lack of personal jurisdiction will be
16 denied.

17 2. Conyers

18 The analysis for Conyers is quite different. Here, the Trustee relies entirely upon the
19 “effects” of actions taken by Conyers in Bermuda in commencing and prosecuting the Bermuda
20 Action. Even assuming arguendo that there has been effects of Conyers’ activities in the United
21 States, the second prong must also be met—does it comport with “fair play and substantial justice”
22 to “hale” Conyers into the United States Court. *Lake* set out the factors to be considered: (1) the
23 burden on the defendant; (2) the existence of an alternative forum; (3) convenient and effective relief
24 for the Plaintiff; (4) efficient resolution of the controversy; (6) purposeful interjection; and (7)
25 conflicts with sovereignty. A weighing of these factors leads to the conclusion that jurisdiction over
26 Conyers does not lie. Clearly there is a substantial burden for a Bermuda law firm to defend a suit
27 in an American federal Court where its only activity is bringing an action in Bermuda. Most
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1 importantly, both “convenient and effective relief” and “efficient resolution of the controversy” are
2 completely available without the presence of Conyers as a defendant. ACE is the target; Conyers
3 is a distraction. Counsel for the Trustee admitted as much at oral argument. None of the other
4 factors weighs on the other side. Where there is no general, ongoing relationship with the forum (as
5 here), and “minimum contacts” jurisdiction is based on a single set of activities, the bar for a finding
6 of “reasonableness” is raised. It has not been reached.

7 Therefore, Conyers’ motion to dismiss will be granted.

8 C. *In Rem* Jurisdiction

9 Trustee also argues that this Court has exclusive *in rem* jurisdiction over the policy and its
10 proceeds. ACE disagrees, stating that the complaint seeks personal relief against it.

11 The plan was confirmed on May 15, 2000. Pursuant to the plan, all assets not sold to the
12 buyer of the restaurant operations and all assets acquired after confirmation became property of the
13 estate to be administered by the Trustee pursuant to the Plan subject to the exclusive jurisdiction of
14 this Court. Specifically included in such assets are the various D&O policies held by the Debtor,
15 including the ACE policy, and their proceeds.⁶ As such, this Court has *in rem* jurisdiction over the
16 policies and their proceeds. The more interesting question is—what does that mean?

17 ACE argues that this dispute is not about who owns the *res* but rather whether it has personal
18 liability to the Trustee. This is only half true. The concept of *in rem* jurisdiction is a broad one and
19 encompasses more than merely ownership; it also implicates rights to payment, priorities,
20 enforceability and related issues. The recent Supreme Court case of *Tennessee Student Assistance*
21 *Corp. v. Hood*, 541 U.S. 440 (2004) is the most recent illustration of the breadth of the *in rem*
22 concept. In *Hood*, the Court held that a suit by a debtor against a state to determine the

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24 ⁶The legal question of whether, in the absence of an order to contrary, the proceeds of a D&O
25 policy where there is no separate entity coverage for the Company (here, the company appears to
26 be covered only to the extent of its reimbursement obligations to its D&O’s) are property of the
27 estate is unsettled at best. *See, e.g., Allied Digital Technologies Corp*, 306 B.R. 505 (Bankr. D. Del.
28 2004), *Cf. Froomkin* affidavit, p. 10. Nonetheless, in this case, the Trustee also holds by assignment
the interests of the settling defendants which, under the terms of the plan, are unquestionably
property of the estate.

1 dischargeability of a student loan held by the state did not implicate the state’s Eleventh Amendment
2 sovereign immunity because it was *in rem* in nature. The Court reached this conclusion without ever
3 clearly identifying the *res* at issue. Is it the debt owed? Is it the person of the debtor? Is it that the
4 state is simply enjoined from collecting a debt rather than forced to pay one? How exactly is
5 property of the estate implicated in a dischargeability action? To this reader, this issues are not
6 clearly answered or addressed in *Hood*⁷. The point is that Hood reinforces the strong presumption
7 that bankruptcy remains primarily an *in rem* proceeding. That is particularly true where, as here,
8 the focus is upon the fate of the proceeds of an insurance policy specifically identified as property
9 of the estate. To the extent that this case implicates that policy and its proceeds, the Court has *in*
10 *rem* jurisdiction and, under the plan and 28 U.S.C. § 1334(e), that jurisdiction is exclusive.

11 However, *in rem* jurisdiction does not extend to the bad faith claim asserted or to the damage
12 claims for violation of *Barton*. In those causes of action, more is sought than a determination of
13 rights in a *res*; rather, the Trustee seeks a judgment for personal liability beyond the boundaries of
14 the *res*. For those claims, the Trustee must rely on in personam jurisdiction to proceed.

15 D. The Issue of Arbitrability Outside of Bankruptcy

16 The Trustee argues that ACE’s declination of coverage amounts to a “repudiation” of the
17 contract, thereby relieving BCI of the obligation to arbitrate under New York law *and* requiring the
18 question to be decided in an United States Court. This issue will first be addressed outside the
19 context of the bankruptcy specific arguments put forth by the Trustee.

20 The insurance contract states that the policy shall be construed and enforced in accordance
21 with New York law except for the arbitration provision which shall be construed and enforced in
22 accordance with. Bermuda law. Bermuda law⁸ expressly states that in a Bermuda arbitration a
23 choice of law provision agreed to by the parties will be honored. Construing both of these
24 provisions together, it is fair to say that Bermuda law on arbitration controls the process, the choice

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26 ⁷For a thorough discussion of *Hood* and its *in rem* roots, see Haines, *Hood Immunizes Discharges*
27 *from Sovereign Immunity Defense*, 2004 No. 7 Norton Bankr. L. Adviser 1 (2004).

28 ⁸Section 18 of the Bermuda Arbitration Act (“BAA”) attached to the Froomkin affidavit,

1 of the arbitrators and their powers, judicial review of any arbitral award, enforcement of any award,
2 and the like, but that New York law controls the substantive rights of the parties under the policy.

3 This only partially answers the question, however, because the arbitration language is broad
4 enough to grant the arbitrators the authority to decide all substantive questions of New York law.
5 So, it would be consistent with the policy for the question of whether the carrier “repudiated” the
6 policy by refusing to defend, as arguably required by New York law, to be decided by the arbitrators.
7 However, does the BAA so empower the arbitrators? And likewise, is the right claimed by BCI to
8 have that issue decided by a judge a substantive issue controlled by New York law?

9 Although broadly written, the BAA does not specifically address whether the arbitrators have
10 the authority to determine the arbitrability of the dispute. It does provide for limited judicial review
11 in Bermuda, upon consent of the parties or the arbitrator(s), either on an interlocutory basis or appeal
12 after award, unless the parties have excluded that review under the agreement. This insurance
13 contract does have such an “exclusion agreement”, the upshot of which is that any award is final
14 without judicial review of either legal or factual errors.

15 In short, the BAA provides a template for determining disputes where the Courts may or may
16 not be involved, depending upon the choice of the parties. Here, the parties have opted to remove
17 the Courts from the process (other than pre-arbitration matters) and leave all matters to be determined
18 by the arbitrators. The contract clearly contemplates that whether a claim may be excluded from
19 coverage (as with the “insured vs. insured” exclusion at issue here) is governed by New York law
20 and is within the parameters of the arbitrators’ authority to decide. These are clearly matters of
21 substantive New York law. Similarly, the issue whether “repudiation” relieves a party of the
22 obligation to arbitrate is logically likewise within the scope of the arbitrators’ powers.

23 The Trustee’s arguments to the contrary are not convincing. The Trustee’s conclusion that
24 he is entitled to submit the repudiation/arbitrability issue to a Court is based not on New York law
25 but on federal law, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA”). While the Trustee relies
26 on *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), its holding is not helpful to
27 the Trustee’s position. There, the parties to a securities brokerage contract agreed that all disputes
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1 would be arbitrated under NASD rules but governed by New York law. NASD arbitrations were in
2 turn subject to the standards of the FAA, the United States correspondent to the BAA. New York
3 state law prohibited arbitrators from awarding punitive damages; the FAA allowed such awards. The
4 arbitration resulted in an award of punitive damages and the respondent appealed. The Supreme
5 Court held that the FAA trumped New York state law on the procedural issue of whether arbitrators
6 were so authorized, and reversed. Applying the principle of *Mastrobuono* to this case, the BAA, not
7 the FAA, is the statute that governs the arbitration agreement made by the parties. Therefore,
8 *Mastrobuono* suggests that one should look to the BAA, not the FAA, for direction on the division
9 of power between Courts and arbitrators and that law authorizes the parties, as they have done here,
10 to agree that all disputes of whatever kind shall be referred to the arbitrators.

11 Indeed, even the Trustee's argument that the FAA contemplates that a Court, rather than the
12 arbitrators, must address the repudiation question is unsupported by either the FAA or the authorities
13 he cites. Section 4 of the FAA is directed at what a Court may do if presented with a refusal to
14 arbitrate. The statutory inquiry is directed at the whether the agreement exists or whether it was
15 induced by fraud, not at whether an acknowledged obligation to arbitrate may have been waived or
16 abandoned.⁹ A good example of the distinction is *Controlled Sanitation Corp. v. Dist. 128*, 524
17 F.2d 1324 (3d Cir. 1975) where the Court held that the issue of whether one party had repudiated the
18 an agreement to arbitrate was itself an issue for the arbitrator and not for the Court.

19 There is, however, one final issue that needs to be addressed—the impact of the Convention
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21 ⁹One of Trustee's key authorities on this point is contrary to the Trustee's position:
22 "Defendants also argue that Letizia's proposed amendment to his complaint constituted a
23 generalized claim that the Customer Agreement was fraudulently induced. Under *Prima Paint*
24 *Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 1805-06, 18 L.Ed.2d
25 1270 (1967), these claims cannot be considered by a federal Court. Instead, they are treated as
26 any other dispute under the contract and must be referred to arbitration. *See also Schacht v.*
27 *Beacon Ins. Co.*, 742 F.2d 386, 389-90 (7th Cir.1984); *Merrill Lynch, Pierce, Fenner & Smith v.*
28 *Haydu*, 637 F.2d 391, 398 (5th Cir.1981). Only a claim that the arbitration clause itself was
independently induced by fraud can be brought before the Court under 9 U.S.C. § 4." *Letizia v.*
Prudential Bache Sec., Inc., 802 F.2d 1185, 1188 fn. 4 (9th Cir. 1986)"

1 of Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United States in 9
2 U.S.C. § 201 *et seq.* Both sides embrace the Convention as vindicating their positions. The Trustee
3 asserts that Section II requires that its repudiation argument must be decided by a Court—specifically
4 this Court.¹⁰ Although not clearly articulated, the argument appears to be that, this Adversary
5 Proceeding having been filed, this Court is “seized” of an action relating to a covered arbitration
6 agreement and therefore, may, or indeed must, determine whether it is “null and void” or
7 “inoperative.” ACE counters the Convention requires the referral of the case to arbitration in any
8 event.

9 The focus and purpose of Section II of the Convention is analogous to Section 4 of the FAA;
10 that is, it is Court’s role to determine if an agreement to arbitrate exists (or whether it was induced
11 by fraud or void *ab initio*), and, if so, to refer the matter to arbitration. Under both the statutory and
12 the treaty scheme, it is not for the Court to interpret the parties’ rights under the contract, including
13 whether a pre-existing obligation to arbitrate has been abandoned or repudiated. Therefore, the Court
14 concludes that the Trustee’s repudiation argument lies within the arbitration clause.

15 Of course, this issue is complicated by the fact that there are two Courts in two different
16 countries, each of which is “seized” of an action implicating a potentially arbitrable dispute. That
17 implicates ACE’s argument that comity requires deferral to Bermuda, a subject to which the Court
18 will turn, after a discussion of the so-called *Barton* doctrine.

19 E. The *Barton* Doctrine

20 To recap, the Court has concluded that, outside of bankruptcy, the arbitration clause would
21 should be enforced and that all issues, including policy exclusions, exhaustion of senior coverages,
22 repudiation, and bad faith, would be within the scope of the arbitration proceeding. The bankruptcy
23 proceeding does, however, require another layer of analysis and imposes another layer of
24 complication. As previously concluded, this Court does have personal jurisdiction over ACE to

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26 ¹⁰Article II (3):”The Court of a Contracting State, when seized of an action in a matter in respect
27 to which the parties have made an agreement within the meaning of this article, shall, at the request
28 of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and
void, inoperative or incapable of being performed.”

1 consider the Trustee’s claims and exclusive *in rem* jurisdiction of the *res* of the policies and their
2 proceeds.

3 At the vortex of these seemingly contrary holdings is the *Barton* doctrine. It is well-
4 established in American jurisprudence that a Court appointed Trustee may not be sued without leave
5 of the appointing Court. *Barton v. Barbour*, 104 U.S. 126 (1881); *In re DeLorean Motor Co.*, 991
6 F.2d 1236 (6th Cir. 1993); *In re Baptist Medical Center*, 80 B.R. 637 (Bankr. E.D.N.Y 1987); *Leonard*
7 *v. Vrooman*, 383 F.2d 556 (9th Cir. 1967). None of the defendants seriously challenges this point of
8 law; rather, they argue that it has either been superceded by 28 U.S.C. § 959(a) or that it applies only
9 in cases where the complaint seeks money damages or that its application in this case would be
10 impermissibly extraterritorial. Each of these will be addressed in order

11 Section 959(a) states: “Trustees . . . may be sued, without leave of the Court appointing, with
12 respect to any of their acts or transaction in carrying on business in connection with [estate]
13 property.” The cases are in uniform agreement that this statute is limited to circumstances where a
14 Trustee is “carrying on business” and does not create a *Barton* exception where the Trustee is
15 administering, maintaining, and liquidating assets of the estate, including the commencement and
16 prosecution of litigation concerning estate claims and assets. See, e.g., *Muratore v. Darr*, 375 F.3d
17 140 (1st Cir. 2004); *In re DeLorean, supra*; *In re American Associated Systems, Inc.*, 373 F.Supp. 997
18 (E.D. Ky 1974). The primary purpose of the statute is to facilitate the ordinary give and take of
19 commerce that occurs during reorganization proceedings and those liquidation proceedings where
20 the Trustee is authorized to operate, and does operate, a business. It has no applicability here where
21 the Trustee is engaged solely in collecting, monetizing and distributing assets of the estate.

22 Further, there is nothing limiting the application of *Barton* only to cases where only damages
23 are sought. One of the primary purposes of the doctrine is to protect the exclusive *in rem* jurisdiction
24 of the Court over property of the estate.¹¹ This is accomplished by making the bankruptcy Court, in
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26 ¹¹As the DeLorean Court said:

27 “We think, therefore, that it is immaterial whether the suit is brought against him to recover
28 specific property or to obtain judgment for a money demand. In either case leave should be first obtained.”

1 effect, a clearing house for all litigation concerning the estate and the Trustee. The doctrine does not
2 bar suits, arbitrations or other proceedings. It merely requires leave of the appointing Court, sought
3 in advance. In such a proceeding, the appointing Court should consider any conflicting
4 considerations over what is the best place to determine a particular dispute after being fully informed
5 on those issues by all parties.

6 Finally, would application of the *Barton* doctrine be inappropriate in this case where the
7 proceeding in question is in another country? The answer is no. All parties world wide take their
8 litigants as they find them. The Trustee in this case is clothed in protections that derive from his
9 appointment pursuant to the Plan and his role as an officer of the Court. He is not stripped of those
10 protections when he is sued in another country; indeed, as part of the Bermuda Court's inquiry into
11 its jurisdiction, the Trustee's capacity to be sued, absent leave of the appointing Court, must be
12 considered. It is the conclusion of this Court that he lacks that capacity, as he has neither consented
13 to suit nor has ACE received leave from this Court.

14 ACE argues that it is unaware of any case that has held *Barton* applicable to a suit to compel
15 arbitration in a foreign country. While that may be true, it does not change the basic analysis. As
16 noted, *Barton* springs from two sources; first, the quasi-immunity of the Trustee arising from his
17 appointment by the Court and second, the *in rem* nature of bankruptcy proceeding. All parties to this
18 case agree that *in rem* decisions are "good against the world." Because the property at issue is part
19 of the bankruptcy estate, requiring compliance with *Barton* merely enforces this Court's exclusive
20 jurisdiction over that property.

21 F. Bailey's Motion to Dismiss

22 Following this discussion of *Barton*, it is appropriate to address Bailey's motion to dismiss.
23 Bailey's argument that *Barton* is inapplicable is without merit. Its other argument is that contempt
24 is an inappropriate remedy because there is no specific Court order that has been allegedly violated.

25 _____
26 991 F.2d at 1240.

27 In this case, in a very real way, the Bermuda Action is analogous to an action to "recover
28 specific property" of the estate—the policy and its proceeds.

1 Numerous cases hold that contempt is the appropriate remedy for violation of *Barton*, comparing it
2 to a violation of a stay. See, e.g., *DeLorean, Baptist; In re Premier Sports Tours*, 283 B.R. 600
3 (Bankr. M.D. Fla. 2002). Having conceded personal jurisdiction, and in light of this authority,
4 Bailey’s motion to dismiss is denied.¹²

5 G. Comity

6 The final issue is whether comity requires deferral to the Bermuda Court. The Trustee is
7 incorrect that comity is irrelevant because there is no parallel insolvency case pending. Comity issues
8 may arise in all litigation, not solely bankruptcy cases. Here, there are two pending civil cases—this
9 adversary proceeding (admittedly arising in a pending bankruptcy case) and the Bermuda Action,
10 each of which addresses similar issues concerning the resolution of the parties’ disputes concerning
11 the ACE policy. Therefore, a brief analysis of considerations of comity is appropriate.

12 ACE’s primary argument is that BCI consented to Bermuda jurisdiction and therefore this
13 Court should defer. However, at this point in the proceedings, this Court may decline to defer solely
14 based upon *Barton* and this Court’s exclusive *in rem* jurisdiction over the policies and their proceeds.
15 Indeed, unless and until *Barton* is satisfied, it is this Court’s view that the Bermuda proceedings
16 should defer to the proceedings here. As noted above, *Barton* exists not to create jurisdiction but to
17 protect it. That jurisdiction is protected by the “leave” requirement. This Court could well conclude,
18 after fully consideration of the parties’ positions if and when leave is sought by ACE, that arbitration
19 in Bermuda, as previously agreed to by ACE and BCI, is the appropriate method and venue for
20 resolution of the coverage and related disputes. But we are not there yet and until we are, it is
21 incumbent upon this Court to protect its jurisdiction as established under the Bankruptcy Code and
22 the Plan of Reorganization confirmed over five years ago.

23 **IV. CONCLUSION**

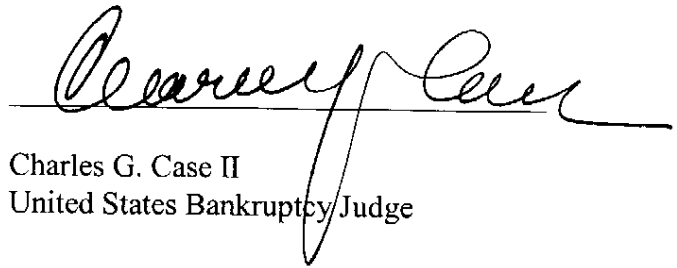
24 For all the foregoing reasons:

25
26 ¹²Bailey’s other ground for dismissal is that it cannot be enjoined prosecuting a case it is not
27 prosecuting. The record is clear that at least two Bailey lawyers have participated in the Bermuda
28 Action without seeking leave under *Barton*. This count is therefore sufficiently pled to survive a
motion to dismiss.

1. ACE's Motion to Dismiss is denied;
2. Bailey's Motion to Dismiss is denied: and
3. Conyers' Motion to Dismiss is granted.

So ordered.

DATED: August 8, 2005



Charles G. Case II
United States Bankruptcy Judge

Copy of foregoing available through CM/ECF on 8, 2005.

Copy of the foregoing will be sent via facsimile on August 22, 2005, to:

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