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The court held that (1) Article XIII—the exclusive jurisdiction provision of the Convention on Supplementary Compensation for Nuclear Damage (CSC)—is not applicable in this instance because the Convention came into force two-and-a-half years after the suit was brought; (2) the U.S. has a strong interest in using the exclusive jurisdiction provision of the CSC as a “bargaining chip” to encourage other nations to join the Convention and contribute to the supplemental compensation fund; and (3) dismissal for forum non conveniens was inappropriate because U.S. citizens are involved.

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forum non conveniens is not required after balancing the interests of the U.S. citizen plaintiffs.

The Ninth Circuit’s holding is a red flag for U.S. companies supplying goods and services to non-CSC party countries, as it underscores the potential for U.S. jurisdiction over claims for nuclear damage arising out of nuclear incidents in these countries.

**Background**

The plaintiffs in the case are a group of service members in the U.S. Navy who were deployed to Operation Tomodachi, a relief effort in the immediate aftermath of the massive earthquake and tsunami that struck Japan’s northeastern coast on March 11, 2011. The plaintiffs allege they were exposed to radiation during the deployment—as a result of damage to the Fukushima Daiichi Nuclear Power Plant—and brought suit against Tokyo Electric Power Company (TEPCO) in the Southern District of California for alleged negligence in operation and reporting of the radiation leak. TEPCO moved to dismiss the case on several grounds, including international comity and forum non conveniens. The district court denied the motion, but certified the case to the Ninth Circuit for interlocutory appeal.

On appeal, the government of Japan filed an amicus brief urging the Ninth Circuit to overturn the district court’s ruling, citing its interest that Fukushima-related claims brought outside of Japan threaten the viability of its compensation regime. The court then solicited the views of the U.S. Department of State in response, whose brief opined that allowing the lawsuit to continue would be consistent with U.S. efforts to promote the CSC. The State Department took the position that it preferred to keep exclusive jurisdiction as a bargaining chip to encourage other nations to join the treaty. Currently only ten countries—Argentina, Canada, Ghana, India, Japan, Montenegro, Morocco, Romania, the U.S., and the U.A.E.—are members.

**Exclusive Jurisdiction Under the CSC is Prospective Only**

The CSC is a U.S.-led effort to create a worldwide nuclear liability regime. Article XIII of the CSC provides that “jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs.” Countries like the U.S., Japan and India which are not party to other international nuclear liability regimes, such as the Vienna and Paris conventions, can join the CSC if their nuclear liability laws comply with the CSC Annex.

While the CSC has been open for signature since September 1997, it did not enter into force until April 15, 2015—ninety days after Japan signed the agreement and two-and-a-half years after the U.S. service members filed their lawsuit against TEPCO. The Ninth Circuit held that, because the Fukushima Daiichi accident occurred before the CSC entered into force, the CSC’s Article XIII did not strip U.S. courts of jurisdiction over the issue.

**International Comity and Exclusive Jurisdiction as a “Bargaining Chip”**
International comity is a doctrine of courtesy, in which domestic courts have discretion to limit jurisdiction out of respect for foreign sovereignty. In deciding whether to assert jurisdiction, U.S. courts balance the public and private interests at stake, including the public policy interests of the U.S. and the foreign sovereign. The factors the court considered in this instance were (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the countries, and (5) any public policy interests.

The Ninth Circuit gave great weight to Japan’s interests in centralizing jurisdiction to Japanese courts, however it ultimately deferred to the interest expressed by the State Department’s brief in promoting widespread adherence to the CSC so that it could be the “global liability system it was intended to be.” The court further noted that, “[i]f a country knew it could receive the benefit of the exclusive jurisdiction provision ... by virtue of international comity, there would be less incentive to join the CSC before a nuclear incident occurs.” Thus, the Ninth Circuit’s decision to allow the damages suit to proceed makes the case for why non-party countries should join the CSC.

Despite this, the court notes that international comity is a fluid doctrine that may change as the case progresses, particularly if the United States changes its position, or there are further developments in the district court which favor a Japanese forum, such as choice of Japanese law. (For evidence of the doctrine’s fluidity, see Sarei v. Rio Tinto, PLC, where the State Department initially opposed U.S. jurisdiction over claims touching on foreign relations with Papua New Guinea, but later withdrew its opposition in light of changed country conditions.)

The court also declined to dismiss the case on forum non conveniens grounds, taking into account many of the same policy considerations discussed in the international comity argument. Further, it noted that, while both sides would be burdened from the simple nature of international litigation, the decision of U.S. citizen plaintiffs to sue in the United States must be respected.

**Client Implications**

The Ninth Circuit’s decision creates precedent for future damages claims arising out of incidents at nuclear installations in non-CSC party countries. For example, a nuclear incident at a nuclear power plant in the UK (a Paris Convention party) which affects a U.S. citizen could be open to jurisdiction in U.S. courts.

At this time, it is unlikely that most members of the Paris and Vienna Conventions will join the CSC. Accordingly, U.S. companies supplying parts and services to nuclear power plants in Europe and other non-CSC member states may be subject to U.S. jurisdiction in the case of a nuclear incident at a facility in these countries. Thus, clients are advised to consider appropriate contractual protections to limit their exposure to lawsuits in the United States.