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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of the Arbitration)
Between CERTAIN UNDERWRITERS AT)
LLOYD'S, LONDON and CERTAIN)
LONDON MARKET COMPANIES,)
SUBSCRIBING TO REINSURANCE)
CONTRACT 344 and EXCESS)
INSURANCE CO., LTD.,)
)
Petitioners,)
)
-and-) No. 97 C 3639
) Judge Robert W. Gettleman
CONTINENTAL CASUALTY COMPANY,)
)
Respondent.)
---------- X
In the Matter of the Arbitration)
Between CERTAIN UNDERWRITERS AT)
LLOYD'S, LONDON and CERTAIN)
LONDON MARKET COMPANIES,)
SUBSCRIBING TO REINSURANCE)
CONTRACTS US142 and US257,)
)
Petitioners,)
) No. 97 C 3640
-and-) Judge Robert W. Gettleman
)
CONTINENTAL CASUALTY COMPANY,)
)
Respondent.)
---------- X
In the Matter of the Arbitration)
Between CERTAIN UNDERWRITERS AT)
LLOYD'S, LONDON and CERTAIN)
LONDON MARKET COMPANIES,)
SUBSCRIBING TO REINSURANCE)
CONTRACT US608,)
)
Petitioners,)
) No. 97 C 3643
-and-) Judge Robert W. Gettleman
CONTINENTAL CASUALTY COMPANY,)
)
Respondent.)

MEMORANDUM OPINION AND ORDER

Petitioners, London Market Reinsurers, have filed three separate motions to compel arbitration and disqualify the party arbitrators chosen by respondent, Continental Casualty Company ("CNA"), in arbitration proceedings commenced by respondent pursuant to reinsurance contracts entered into between the parties. The three actions have been assigned to this court as related cases. For the reasons set forth below, petitioners' motions are denied.

FACTS

Petitioners are foreign insurers with their principal places of business located outside the United States. Respondent is an insurance company incorporated under the laws of the State of Illinois with its principal place of business in Chicago, Illinois.

In the 1950's through the 1970's, the parties entered into several reinsurance contracts, whereby respondent, an insurer, transferred all or a portion of the risk it had underwritten for

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its insureds through policies ("reinsurance contracts") issued by petitioners, reinsurers. Pursuant to the reinsurance contracts at issue in the instant case (contracts US364, US142 and/or US257, and US608), the parties agreed to submit their disputes to a tripartite panel of arbitrators composed of "managing officials" and "executive officers" of insurance companies.

On March 19, 1997, respondent commenced three separate arbitration proceedings against petitioners involving reinsurance claims under: (1) contract US364 for indemnification of amounts allegedly paid to respondent's insured, Pennsalt Chemicals Corporation ("Pennsalt"), in connection with underlying environmental pollution claims against Pennsalt ("Pennsalt Arbitration"); (2) contracts US142 and/or US257 for indemnification of amounts allegedly paid to respondent's insured, H.K. Porter Company, Inc. ("H.K. Porter"), in connection with underlying asbestos-related claims against H.K. Porter ("H.K. Porter Arbitration"); and (3) contract US608 for indemnification of amounts allegedly paid to respondent's insured, AT&T Nassau Metals Corporation as assignee of the rights under respondent's policies issued to Diversified Industries, Inc. ("Diversified"), in connection with underlying environmental

pollution claims against Diversified ("Diversified Arbitration").

For both the Pennsalt Arbitration and the H.K. Porter Arbitration, the following arbitration clause in contracts US364 and US142[1] applies:

> Differences and disputes between the two contracting parties with reference to the interpretation or working of this Agreement or any matter originating therefrom or in any way connected with same and whether arising before or after the termination of notice under the Agreement shall be settled in an equitable rather than in a strictly legal way and in such cases the parties agree to submit to the decision of the Arbitrators, one to be chosen by the Company and the other one by the Reinsurers, and in the event of disagreement between these two then an Umpire who shall have been chosen by said two Arbitrators previous to their entering upon Arbitration.
>
> The Arbitrators and Umpire shall be managing officials of Insurance Associations and/or Organizations, and their decision or that of the majority of them shall be final and binding upon the two contracting parties without appeal. Such Arbitration shall be held in Chicago, Illinois.

For the Diversified Arbitration, the following arbitration clause in reinsurance contract US608 applies:

> In the event of difference arising between the contracting parties with reference to any transactions under this AGREEMENT, such differences must be submitted to arbitration upon the request of one of the contracting parties. Each of the contracting parties shall nominate an arbitrator within

[1]The parties have failed to submit the arbitration clause in contract US257 to the court. However, neither party disputes that the arbitration clause in contract US142 applies to the H.K. Porter Arbitration.

thirty days of being requested to do so, and the two named shall select an umpire before entering upon the arbitration. . . . The said arbitrators and umpire shall be executive officers of insurance companies not under the control or management of either party to this AGREEMENT.

On April 30, 1997, the parties exchanged their respective party arbitrator designations. Petitioners designated as their arbitrators, in the Pennsalt and H.K. Porter matters, Joanne Moore, an executive officer of a Japanese reinsurance company, Tokio Re, and, in the Diversified matter, Arthur Barry, an executive officer of a domestic insurance company, Reliance National Insurance Company. Respondent designated as its arbitrators, in the Pennsalt and H.K. Porter matters, W. Mark Wigmore, an executive officer of Travelers Insurance Company ("Travelers"), and in the Diversified matter, Susan Stonehill of Travelers.

Mr. Wigmore is the Vice President of the Special Liability Group at Travelers. Ms. Stonehill is the "General Counsel-Environmental Litigation Group" at Travelers. Currently, Travelers and petitioners are involved in several reinsurance disputes, including pending arbitrations and at least one law suit. According to petitioners, the disputes involve claims made by Travelers against reinsurance contracts subscribed by

petitioners, arising from underlying environmental and asbestos related claims against policies issued by Travelers to its insureds.

Before the parties began the process of umpire selection in the Pennsalt, H.K. Porter, and Diversified matters, petitioners filed the instant motions to compel arbitration and disqualify respondent's arbitrators. Petitioners argue that Mr. Wigmore and Ms. Stonehill should be disqualified on grounds of bias and partiality. Petitioners allege that: (1) the claims in the disputes between Travelers and at least some of the petitioners are similar to those in the instant action; (2) Mr. Wigmore and Ms. Stonehill are personally involved in the matters relating to such disputes; and (3) Travelers has an attorney-client relationship with the law firm that is representing respondent in the arbitration.

DISCUSSION

I. Section 10 of the FAA

Petitioners assert that this court has subject matter jurisdiction in the instant matters under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the

Convention"), 9 U.S.C. § 206. The Convention applies to actions involving arbitration agreements in commercial contracts which are not entirely between citizens of the United States. See 9 U.S.C. §§202-03. Respondent denies that there is jurisdiction because: (1) the Convention provides no jurisdictional basis for a court to entertain a challenge to the designation of an arbitrator; and (2) although the Convention incorporates all non-conflicting provisions of the Federal Arbitration Act (the "FAA", 9 U.S.C. §§ 1-16), see 9 U.S.C. § 208, the only provision in the FAA that authorizes a court to address arbitrator bias is § 10, which allows only for a post-award challenge.[1]

Section 10, 9 U.S.C. § 10(a)(2) states, in pertinent part:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award . . . (w)here there was evident partiality or corruption in the arbitrators, or either of them.

[1] The FAA itself does not provide an independent basis for federal question jurisdiction. There must be diversity of citizenship or some other independent basis for federal jurisdiction. Old Republic Insurance Co. v. Meadows Indemnity Co., Ltd., 870 F.Supp. 210, 211 (N.D. Ill. 1994). In the instant case, it is undisputed that there is diversity jurisdiction pursuant to 28 U.S.C. § 1332.

Although the Seventh Circuit has not squarely decided the issue,[1] other courts addressing it have held that, under the FAA, courts do not have authority to hear pre-award challenges to an arbitrator designation on grounds of bias and partiality. See Aviall, Inc. v. Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997); Folse v. Richard Wolfe Med. Insurance Corp., 56 F.3d 603, 605 (5th Cir. 1995)("By its own terms, § 10 authorizes court action only after a final award is made by the arbitrator."). In Aviall, the Second Circuit distinguished the few cases in which courts have reviewed claims of arbitrator bias and partiality before an award has been issued. "[T]hose cases," the court explained, "simply manifest the FAA's directive that an agreement to arbitrate shall not be enforced when it would be invalid under general contract principals."

Similarly, in Old Republic Insurance Co. v. Meadows Indemnity Co., Ltd., 870 F.Supp. 210, 211 (N.D. Ill. 1994), Judge

[1] Although the respondent cites Yasuda Fire & Marine Ins. Co. v. Continental Casualty Co., 37 F.3d 345 (7th Cir. 1994), to support its position, that case is not dispositive of the issues presented here. Yasuda dealt with whether an interim order by arbitrators is an "award" under § 10 of the FAA. The court explained, "[i]f the interim security does not constitute an award within this statute, the district court had no jurisdiction to hear this case." Id. at 346.

Aspen stated that § 10 of the FAA does not provide a pre-arbitration remedy for arbitrator bias or partiality. He explained: "Old Republic has a remedy in the event it feels it has been judged unfairly [by an arbitrator]. That remedy, however, is simply not available at this time." Id. at 212.

In so stating, Judge Aspen acknowledged that there were at least two cases to the contrary: Third Nat'l Bank v. Wedge Group, Inc., 749 F.Supp. 851 (M.D. Tenn. 1990), and Metropolitan Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co., 780 F.Supp. 885 (D. Conn. 1991). However, he distinguished those cases from the one before him because they involved allegations of actual "misconduct or impropriety" by an arbitrator, not just "potential" or "institutional" bias. Old Republic 870 F.Supp. at 212. In Metropolitan, the court disqualified an arbitrator who had spent a significant amount of time discussing issues and evidence with one of the parties prior to his selection as an arbitrator. In Wedge, Judge Aspen explained, there was "a fiduciary relationship between the arbitrator and the defendant that essentially required the arbitrator to be partial to the defendant." Old Republic, 870 F.Supp. at 212. Finding no such misconduct or fiduciary relationship in the case before him,

Judge Aspen concluded in Old Republic that, "even if the Federal Arbitration Act gave us the authority to review the impartiality of an arbitrator prior to arbitration, this is clearly not a case in which such review is appropriate." 870 F.Supp. at 213.

Notwithstanding the holdings in Availl and Old Republic, petitioners suggest that there is precedent in this district to support their position that § 10 of the FAA permits courts to review pre-arbitration challenges to arbitrator partiality. Specifically, petitioners cite an unpublished opinion by Judge Nordberg, Evanston v. Kansa, 94 CV 4957 (October 17, 1994), issued on the same day that Judge Aspen's opinion in Old Republic was issued. In Evanston, Judge Nordberg stated that, "the ability of a court to consider arbitrator bias after the arbitration process is concluded [under § 10 of the FAA] suggests that a court might make a similar inquiry before the process begins." Slip op. at *5.

However, as is clear from the rest of Judge Nordberg's opinion, the above-quoted passage is dicta. He explains: "The Court holds only that it has the authority to disqualify Kansa's designated arbitrator as part of its ability to enforce arbitration agreements." Id. at *9. Accordingly, to the extent

petitioners' motions assert jurisdiction under § 10 of the FAA, the motions are denied.

II. The Reinsurance Contracts

Like the Second Circuit in Aviall and Judge Nordberg in Evanston, this court agrees that it has jurisdiction to review a challenge to an arbitrator's impartiality prior to the completion of an arbitration proceeding as part of the court's ability to enforce arbitration agreements. See 9 U.S.C. § 4 (providing that a court may "direct[] that . . . arbitration proceed in the manner provided for in [the arbitration agreement].") In Aviall, the Second Circuit explained that the few cases in which courts have made pre-award arbitrator disqualifications are simply examples of a court's enforcement of an arbitration agreement. "The touchstone of those cases," the Second Circuit continued, "was that the arbitrator's relationship to one party was undisclosed, or unanticipated and unintended, thereby invalidating the contract." 110 F.3d at 896.*

* To the extent Third Nat'l Bank v. Wedgs Group, Inc., 749 F.Supp. 851 (M.D. Tenn. 1990), could not be distinguished on the same grounds as the other cases cited by the plaintiffs in Aviall, the Second Circuit held that Wedgs was unpersuasive authority. In (continued...)

In Evanston, Judge Nordberg also stressed that its authority to review an arbitrator's impartiality prior to the issuance of an arbitration award emanated from general contract principles. The court's role was to "interpret the meaning of 'disinterested' as it applies to arbitrators under the contract between [the parties]." Evanston, slip op. at *4. "Evanston," Judge Nordberg explained, "is not merely alleging that [Kansa's chosen arbitrator] is unacceptably partial to Kansa in violation of section 10. Evanston argues that the arbitration agreement goes further than section 10 in insuring neutral arbitrators and Kansa has broken the contract. To the extent the contract so provides, this Court may enforce the agreement." Id. at *5.

In the instant case, the arbitration agreements at issue do not go further than § 10 of the FAA in insuring neutral arbitrators. Instead, they appear to suggest advocacy arbitration and implicitly concede that some bias may exist. For the Pennsalt and W.R. Porter matters, the applicable arbitration clause provides:

*(...continued)
the instant case, petitioners also cite Wedgs to support their position. Like the Second Circuit in Aviall, this court finds that Wedgs is unpersuasive.

> The parties agree to submit to the decision of the Arbitrators, one to be chosen by the Company and the other one by the Reinsurers, and in the event of disagreement between these two then an Umpire who shall have been chosen by said two Arbitrators previous to their intering [sic] upon Arbitration.
>
> The Arbitrators and Umpire shall be managing officials of Insurance Associations and/or Organizations.

For the Diversified matter, the applicable arbitration clause provides:

> Each of the contracting parties shall nominate an arbitrator within thirty days of being requested to do so, and the two named shall select an umpire before entering upon the arbitration. . . . The said arbitrators and umpire shall be executive officers of insurance companies not under the control or management of either party to this AGREEMENT.

By no accident, each agreement provides for three arbitrators: one nominated by each party and a third "umpire" to decide issues disputed by the party-nominated arbitrators. Like other courts addressing the issue, this court recognizes that party-nominated arbitrators may be more partial than umpire arbitrators. See, e.g., Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1472 (11th Cir. 1988), cert. denied, 488 U.S. 1018 (1989) ("An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial."). In drafting their reinsurance contracts, the parties implicitly

recognized this distinction. By the above-quoted language, they appear to have anticipated that the party-nominated arbitrators might be so sympathetic to the nominating party's interests that an "umpire"[1] would be necessary.

Petitioners' allegations of arbitrator partiality, however, stem not only from the sympathy that Ms. Stonehill and Mr. Wigmore allegedly have for respondents (i.e. from the fact that Travelers, the employer of Ms. Stonehill and Mr. Wigmore, has an attorney-client relationship with respondent's attorney), but also from the bias they allegedly have against petitioners. Specifically, petitioners allege that Mr. Wigmore and Ms. Stonehill are, on behalf of Travelers, currently involved in negotiations with petitioners concerning contract disputes similar to those in the instant case.

Perhaps indicative of potential bias, this is not the sort of "actual misconduct" that, in Old Republic, Judge Aspen suggested could result in pre-award disqualification. Also, by

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[1] The Webster's Third New International Dictionary, unabridged, (1993), defines "umpire" as: "one having authority to arbitrate and make a final decision as . . . (1): an attorney at law appointed to judge a legal matter disputed by arbitrators (2): an impartial third party chosen by labor management to arbitrate disputes arising under the terms of a labor agreement."

requiring the arbitrators to be current "executive officers" of other insurance companies (which could be expected to have some kind of business relationship as competitors, allies, or adversaries of some or all of the parties to the arbitration), the parties should have reasonably anticipated that a conflict of interest might arise. The fact that the parties provided for an "umpire" suggests that they did. Moreover, unlike the arbitration agreement in Evanston, the contracts in the instant case do not specify that the party-nominated arbitrators be "disinterested" or neutral. As Judge Posner stated in Merit Insurance Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir.), cert. denied, 464 U.S. 1009 (1983), "[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."

Lastly, petitioners argue that Ms. Stonehill should be disqualified because she is not an "executive officer," notwithstanding her affidavit to the contrary. But, petitioners offer no evidence to support this claim. They simply ask the court to "summarily reject" Ms. Stonehill's "self-serving and unsubstantiated affidavit." Without more, the court declines to do so.

The court finds that respondent's nominations of Mr. Wignore and Ms. Stonehill are not contrary to the arbitration agreements applicable to the Pennsalt, H.K. Porter, and Diversified matters. Petitioners' motions are therefore denied.

CONCLUSION

For the reasons set forth above, petitioners' motions to compel arbitration and disqualify arbitrators are denied, and petitioners' matters before this court are dismissed.

ENTER: August 7, 1997

Robert W. Gettleman
United States District Judge