judge in North Carolina determined the amount Guilford owed. 128 B.R. at 628. Because the district court must now determine the sum due as attorneys' fees, it is prudent for the court simultaneously to fix the amount of penalty interest and enter a single judgment, on which the guarantors will be jointly and severally liable. We remand the case for that purpose.

Only the amount of fees and penalty interest remains in contention. The district court held, 768 F.Supp. at 247 n. 4, that penalty interest is due from January 1, 1990, when the defendants dishonored their guarantees. The guarantors did not present this as an issue on appeal separate from their main argument that they owe nothing. Any additional arguments they may have, they have waived. And it should go without saying that the computation of legal fees and costs is not an occasion to reopen any of the substantive issues that we have resolved, or passed in silence as requiring no separate discussion.

AFFIRMED AND REMANDED

In the Matter of AMOCO PETROLEUM ADDITIVES COMPANY and Buck Isbell, Petitioners.

In the Matter of Robin A.G. JACKSON, an Underwriter at Lloyd's, London, et al., Petitioners.

Nos. 92-1649, 92-1676.

United States Court of Appeals, Seventh Circuit.

Submitted April 2, 1992.

Decided May 21, 1992.

In separate civil actions, the defendants filed petitions to remove the cases from state court to federal court. The United States District Court for the Southern District of Illinois, William L. Beatty, J., and the United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, remanded the cases. Petitions for mandamus were filed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) mandamus review was available where a remand order had been premised on acts that occurred after the case had been removed and that allegedly deprived the district court of jurisdiction that existed at the time of removal; (2) employees' invasion of privacy and intentional infliction of emotional distress claims were preempted by federal labor law, and therefore, removal was appropriate; and (3) the failure of all defendants to join a removal petition was a procedural defect that deprived the Court of Appeals of jurisdiction to review the remand order, even if the defendants invoked the statute ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as the basis for removing.

Petitions for writ of mandamus granted in part and denied in part.

1. Mandamus ⇐44

Order remanding action to state court for lack of subject matter jurisdiction or for any defect in removal procedure is not ordinarily reviewable by mandamus. 28 U.S.C.A. § 1447(c, d).

2. Mandamus ⇐44

Order remanding employees' action to state court was reviewable by mandamus if subject matter jurisdiction existed at time of removal and if remand had been based on events that occurred after removal. 28 U.S.C.A. § 1447(d).

3. Removal of Cases ⇐25(1)

Employees' claims against employer for intentional infliction of emotional distress and invasion of privacy had been preempted by federal labor law and, therefore, district court had jurisdiction over removed action where employer claimed that management rights clause of collective bargaining agreement [illegible] to videotape employees' lo[illegible] in workplace was ordinary subject of

gaining and employer's defense required interpretation of collective bargaining agreement. 28 U.S.C.A. § 1447(c, d).

4. Removal of Cases ⇐103

Failure of all defendants to join removal petition justified remand for defect in removal procedures, which deprived Court of Appeals of jurisdiction to review remand order by way of appeal or mandamus, even though defendants attempted to invoke statute implementing Convention on Recognition and Enforcement of Foreign Arbitral Awards in order to claim that it was not necessary to have all defendants join removal petition; even if Convention would have justified removal by fewer than all defendants, that did not give defendants second opportunity to remove case after initial removal had been found to be procedurally defective. 28 U.S.C.A. § 1447(d).

Robert A. Knuti, Jane H. Veldman, R.R. McMahan, Lord, Bissell & Brook, Chicago, Ill., Thomas C. Walsh, Rebecca Jackson, Sabrina M. Wrenn, Bryan Cave, St. Louis, Mo., and Neil L. Brilliant, Amoco Corp., Chicago, Ill., for petitioners.

Douglas J. Klingberg, Ruder, Ware & Michler, Wausau, Wis., Lawrence T. Hofmann, Timothy W. Regan, Dale I. Larson, Robert M. Wattson, Zelle & Larson, Minneapolis, Minn., and John T. Papa, Pratt & Callis, Granite City, Ill., for respondents.

Before FLAUM, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Two petitions for mandamus present questions concerning review of orders remanding cases to state court.

I

Employees working in a laboratory in Wood River, Illinois, complained to management that Kathryn Gullick and Dennis Cheatham, a supervisor, were visiting the women's locker room together during working hours. Amoco Petroleum Additives Company, the employer, installed a video camera in the ceiling of the entrance hallway, which enabled the firm to record who entered and left the locker room, and when, but not what they were doing inside. The videotape recorded one instance of a joint Gullick–Cheatham visit. Local No. 7-776 of the Oil, Chemical and Atomic Workers International Union, AFL–CIO, filed suit in state court seeking an order restraining the operation of the camera; "Jane Doe" sought damages for invasion of privacy and intentional infliction of emotional distress. Defendants (Amoco and one of its managers) removed the case to federal court, contending that despite the state-law veneer the suit required the court to interpret the collective bargaining agreement, creating federal jurisdiction and a right to remove under 28 U.S.C. § 1441(b).

Plaintiffs asked the district judge to remand the case, contending that it is based on state law and so may not be removed. (Amoco does not contend that the parties are of diverse citizenship.) On January 17, 1992, the district court entered this handwritten order: "Before the Court is plaintiff's motion to remand. Having considered the premises contained in the plaintiff's motion, briefs, and heard oral argument, plaintiffs motion is Denied." The court gave no explanation. After taking some discovery, Amoco filed a motion for summary judgment. Plaintiffs opposed the motion and also altered the lineup of parties. The union dropped out, and eight female employees (including Gullick) replaced "Jane Doe." The new plaintiffs filed a motion to remand. More briefs and another oral argument ensued, and on March 6 the court entered this handwritten order:

> Case called on Δ's Motion for Summary Judgment and π's Second Motion for Remand. Ct considers the Motion for Remand initially. Arguments heard and the Court being fully advised the Motion to Remand is granted. The Court does not consider Δ's Motion for Summary Judgment as it does not have jurisdiction.

Again the judge furnished no explanation. Amoco lodged its petition for mandamus, which has been briefed.

A

[1] An order remanding a case to state court is not appealable—not only because the case continues, see *Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 270, 21 L.Ed. 493 (1873); *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507, 23 L.Ed. 103 (1875); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352–53, 96 S.Ct. 584, 593–94, 46 L.Ed.2d 542 (1976), but also because of 28 U.S.C. § 1447(d), which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Amoco did not remove under § 1443, so a straightforward reading of § 1447(d) leads to the conclusion that we lack power to act, for mandamus is the "or otherwise" of which § 1447(d) speaks.

"Straightforward" is about the last word judges attach to § 1447(d) these days, however. *Thermtron* holds that § 1447(d) does not mean what it says, that it forbids mandamus only when the judge relies on § 1447(c), which provides the exclusive reasons for remand. Remand on an unauthorized ground produces an automatic writ of mandamus, while even an obviously erroneous invocation of § 1447(c) is untouchable. *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977). Then *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), held that *Thermtron* does not mean what *it* says—that district courts sometimes *may* remand cases on grounds unmentioned in § 1447(c). When they do so, review by mandamus remains a possibility. *Carnegie-Mellon* approved a remand of state claims after the plaintiff dropped all federal claims. That leaves us with three categories: (1) remands on grounds listed in § 1447(c) and beyond the power of appellate review; (2) remands on grounds not listed in § 1447(c) but nonetheless sometimes proper, and reviewable to decide whether this is one of those times; (3) remands not authorized by § 1447(c) or anything else, and subject to automatic mandamus. Figuring out which remands fall into which categories is a difficult task, as a series of our cases illustrates. See *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir.1991); *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267, 269–71 (7th Cir.1990); *Rothner v. Chicago*, 879 F.2d 1402 (7th Cir.1989). Complex proceedings just to determine whether a remand is reviewable by the court of appeals defeat the speed and simplicity that one would have thought to be the principal justification for § 1447(d).

Section 1447(c) calls on a court to remand a case "on the basis of any defect in removal procedure" or whenever "it appears that the district court lacks subject matter jurisdiction". Why did Judge Beatty remand this case? He did not say. Even his second order, which mentions jurisdiction, may mean only that *after* the remand the court lacks jurisdiction and so cannot adjudicate the motion for summary judgment. But the only reason we can imagine, and the only one the parties discuss, is lack of subject-matter jurisdiction.

[2] The dispositive question is "When?" Was there subject-matter jurisdiction at the time of removal, vanishing because of the change in the identity of the plaintiffs? If so, we have a replay of *Carnegie-Mellon* and may review the remand order. Well, not quite a replay, for that case involved the remand of pendent state claims after the resolution of the federal claim. Here there are no pendent claims; the parties dispute whether the claims rest on state or federal law. But we understand *Carnegie-Mellon* to permit review when the district judge believes that removal was proper and that later developments authorize remand. If the judge believed that subject-matter jurisdiction was missing at the outset, however, § 1447(d) puts the remand beyond our ken.

Unfortunately, the district judge did not reveal whether he believes that jurisdiction has been missing all along or whether instead the case was properly removed but jurisdiction is no longer present. Appellate

judges are no better than average mind readers, which creates difficulties in reviewing unexplained acts. Still, it is hard to understand the court's order of January 17, refusing to remand the case, if it believed the removal improper. The only way to make the two orders consistent is to assume that the judge believed that so long as the union was a plaintiff, there was federal-question jurisdiction, which vanished when the union dropped out. If that was indeed the court's approach, then we may review the order by mandamus, properly asserted here in aid of our (eventual) appellate jurisdiction if indeed the case comes within federal subject-matter jurisdiction.

B

[3] Whether this case comes within the subject-matter jurisdiction of the federal courts depends on a doctrine misleadingly known as "complete preemption." When federal law occupies a field, state rules are preempted. But preemption is just a defense, and federal defenses to claims based on state law are adjudicated in state court. There is no general right of federal-defense removal. When national law is so pervasive that it is impossible even to state a claim based under state law, though, a court treats the attempt to do the impossible as equivalent to a spelling error, which does not affect the body of law invoked by the complaint. See *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22, 103 S.Ct. 2841, 2852, 77 L.Ed.2d 420 (1983); *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073 (7th Cir.1992).

Federal law so dominates relations between employers and unions that the Supreme Court treats any attempt to interpret, enforce, or question a collective bargaining agreement as necessarily based on national law—in this case, § 301 of the Labor–Management Relations Act, 29 U.S.C. § 185. "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405–06, 108 S.Ct. 1877, 1881–82, 100 L.Ed.2d 410 (1988). Substantive federal principles permit removal under the federal-question jurisdiction. *Id.* at 406 n. 5, 108 S.Ct. at 1881 n. 5; *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct. 1904, 1910, 85 L.Ed.2d 206 (1985). The nature of the claim, not the identity of the plaintiff, determines federal jurisdiction.

Plaintiffs maintain that their claims for invasion of privacy and infliction of emotional distress do not depend on the meaning of the agreement between the union and Amoco. Defendants reply that surveillance in the workplace is one of the standard conditions of employment, either regulated by agreement or reserved to management's discretion by a management-rights clause. Plaintiffs concede that a collective bargaining agreement could authorize surveillance but observe that there is not one word in the compact about cameras, locker rooms, or surveillance in general. Amoco does not find this surprising, because on its view the subject is covered by the management-rights language. As Amoco sees things, everything that is neither regulated nor forbidden by the collective bargaining agreement is committed to its discretion by this residual clause. Thus "resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement", which transmutes state to federal law.

Amoco has the better of this argument. A state court could not award damages without first construing the collective bargaining agreement and rejecting Amoco's interpretation of the management-rights clause. *Lingle* held that to adjudicate a claim that the employer retaliated against a worker who had asserted rights under state workers' compensation legislation is not to interpret the collective bargaining agreement. Workers' compensation laws exist outside collective bargaining; no

agreement may vary them. Privacy in the workplace, by contrast, is an ordinary subject of bargaining. The extent of privacy is a "condition" of employment. Even agreements that do not mention surveillance expressly may deal with the subject by implication. If Amoco were to discipline Gullick or Cheatham, the union could file a grievance and take the complaint to arbitration. An arbitrator, we doubt not, could overturn any discipline if he believed the surveillance unjustified. Damages remedies under state law would disrupt this process of accommodation and interpretation.

Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir.1987), holds that a claim of invasion of privacy in the workplace necessarily rests on federal labor law. Although decided before *Lingle*, this opinion uses the same approach, expressly concluding that adjudication of the claim would require interpretation of the collective bargaining agreement. 811 F.2d at 256. *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir.1990), takes the same view of a claim that the employer violated a worker's privacy by demanding that the worker consent to a search of his car. As *Stikes* noted, state-law invasion-of-privacy claims depend on proof that the defendant invaded an objectively reasonable expectation of privacy. 914 F.2d at 1269. What expectations of privacy in the workplace are objectively reasonable depends on powers and duties specified in the collective bargaining agreement.

A series of drug testing cases reinforces this conclusion. Several courts have held that federal rather than state law governs employees' privacy-based objections to drug tests—and this whether or not the collective bargaining agreement expressly mentions drug tests. E.g., *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988); *Laws v. Calmat*, 852 F.2d 430 (9th Cir.1988); *Utility Workers v. Southern California Edison Co.*, 852 F.2d 1083, 1085–87 (9th Cir.1988). Cf. *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807, 826–29 (3d Cir.1991) (in banc) (unions may compromise employees' privacy claims, including objections to drug tests). Although based on the Railway Labor Act, *Conrail v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989), offers support for the conclusion. *Conrail* holds that objections to drug testing are "minor disputes" in the RLA's parlance—that is, disputes about the interpretation or application of an existing agreement. Although the labor agreement between Conrail and its unions did not mention drug tests, the Court held the dispute "minor" because "collective-bargaining agreements may include implied, as well as express, terms." *Id.* at 311, 109 S.Ct. at 2485. Implied terms include the norms of the shop. Because the railroad asserted a customary right to alter physical testing rules, the Court held that the dispute required interpretation of the agreement. Just so here: Amoco claims both a customary right to monitor employees' movements in the workplace and a contractual preservation (through the management-rights clause) of that entitlement. No more is necessary to make this a federal case.

Once the invasion-of-privacy claim is brought under § 301, the case is removable. A single federal claim suffices to support removal. 28 U.S.C. § 1441(c). As it happens, though, the claim for infliction of emotional distress can be brought under § 301 in the same fashion. *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 572 (7th Cir.1989). Cf. *Sluder v. United Mine Workers*, 892 F.2d 549, 552–53 (7th Cir.1989).

Whether defendants are entitled to summary judgment is a question for the district court in the first instance. The petition for a writ of mandamus is granted. The district court shall vacate the order remanding the suit to state court and shall decide the case on the merits.

II

[4] Employers Insurance of Wausau entered into reinsurance treaties with underwriting syndicates at Lloyd's of London and other domestic and foreign rein-

surers. These treaties provide that the parties will arbitrate their disagreements. Since 1988 the reinsurers have declined to reimburse Wausau for payments on asbestos claims. Wausau invoked the arbitration clauses of the treaties, and when the reinsurers did not reply fast enough Wausau petitioned a state court to direct arbitration before two arbitrators Wausau had selected (these two would appoint a third). The complaint, filed on August 19, 1991, named as defendants many syndicates at Lloyd's plus corporations from Brazil, France, Germany, Italy, Japan, Portugal, Switzerland, Turkey, and the United Kingdom, as well as the United States. On September 9 all of the syndicates, joined by all but three of the corporations, filed a petition asserting that the parties are of diverse citizenship and removing the case under § 1441(b) [sic: should be § 1441(a)]. We call the defendants who sought to remove the case "the Reinsurers." Wausau filed a motion to remand, contending, first, that by the insurance treaties the Reinsurers had waived any right to remove and, second, that the unexplained omission of three defendants spoiled the removal and called for remand under § 1447(c) on account of a "defect in removal procedure".

As a rule, removal requires a petition joined by all defendants. *Northern Illinois Gas Co. v. Airco Industrial Gases*, 676 F.2d 270, 272 (7th Cir.1982). Nominal parties need not join the petition, *ibid.*, and the Reinsurers initially insisted that the three defendants that had not joined the petition are nominal. This contention has dropped out of the case, for nothing suggests that the three (El Banco, St. Helens Insurance Co., and La Preservatrice Foncire Assurances) are anything other than full participants in the reinsurance treaties. They are not "nominal" defendants, mere bystanders or formal parties. They have refused to respond to Wausau's demand for arbitration, to answer the complaint, or to join the petition for removal, but an obdurate litigant is not on that account a nominal one.

On November 29, 1991, the Reinsurers asked leave to amend their petition for removal to allege 9 U.S.C. § 205 as the proper basis. This statute, part of legislation ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, provides:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title [the Federal Arbitration Act] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Because defendants may remove "at any time before the trial", the Reinsurers contended that they may amend a defective petition for removal at any time. The district judge disagreed, holding that a "defect in removal procedure" requires remand unless the petition is promptly amended to cure the defect—and this amendment, Chief Judge Crabb concluded, was belated. Her opinion laid out the arguments pro and con and limited the remand to the defect in the petition; she withheld judgment on Wausau's claim of waiver by contract.

After the court denied a petition for clarification on January 13, 1992, the case returned to state court. Before the state judge could act, however, the Reinsurers filed another petition for removal. This document, lodged on January 30, invokes § 205 rather than § 1441 and asserts that the omission of the three intractable firms is irrelevant. On March 23 the court remanded for a second time. 787 F.Supp. 165 (W.D.Wis.1992). Once again supplying a clear and thoughtful explanation, the

judge held that § 205 does not authorize removal by fewer than all defendants. The reference to "the defendant or the defendants" implies that all must join a petition to remove, as does the adoption of the "procedure for removal of causes otherwise provided by law". Because three of the defendants have disdained the opportunity to remove, a "defect in removal procedure" requires remand. Moreover, the judge added, the case must be remanded because defendants have only one opportunity to remove. That a petition under § 205 may be filed any time before trial does not imply that defendants may keep filing petitions until they finally get it right. More than one petition unduly disrupts the progress of the case, the court held.

Section 205 incorporates the "procedure for removal of causes otherwise provided by law". This means title 28, chapter 89, of the United States Code, 28 U.S.C. §§ 1441–52. In particular it means § 1447(c), authorizing remand for defects in the removal procedure, and § 1447(d), blocking appellate review of remands under § 1447(c). This much the Reinsurers concede. Nonetheless they ask us to issue a writ of mandamus, contending that the district court misinterpreted § 205.

Although Congress enacted § 205 in 1970, there has been almost no litigation about its meaning. *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir.1991), the only significant decision interpreting § 205, holds that parties may waive their right to remove under that section but only by express language. A general forum-selection clause, of the sort in the reinsurance treaties there (and here), does not bar removal. Chief Judge Crabb did not use the language of the treaties as the foundation for remand, but *McDermott* is still of some interest—for it holds that review of remand orders is by appeal under 28 U.S.C. § 1291 rather than by mandamus. 944 F.2d at 1201–04. As the Reinsurers seek mandamus and have not filed a notice of appeal, *McDermott* is a potential obstacle. *McDermott* believed that a remand on the authority of a contractual forum-selection clause is reviewable as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The fifth circuit relied on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), which accepted an appeal from an order staying proceedings in the litigation, when that order had the practical effect of dismissal. A remand is even more effective in ending the federal court's role, *McDermott* observed. True enough, but the point of *Moses H. Cone* was that the litigation was (effectively) over, while a remand, like a transfer under 28 U.S.C. § 1404, continues the litigation in another forum.

Twice the Supreme Court has held that remands are not appealable as final decisions. See *Comstock* and *Wiswall*. *Cohen* does not inter these cases; no subsequent decision questions them; *Thermtron* cites both with approval and observes that mandamus is a proper way to obtain any review not precluded by § 1447(d). 423 U.S. at 352–53, 96 S.Ct. at 593–94. *Carnegie-Mellon* also involved a writ of mandamus rather than an appeal, and it was the principle of *Carnegie-Mellon* that avoided § 1447(d) in *McDermott*. Two cases the fifth circuit did not mention hold that orders identifying the appropriate forum for the case are not appealable under *Cohen*. See *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

Lauro is particularly close to *McDermott*, for the Court held that an order interpreting a forum-selection clause and selecting the place for litigation is *not* appealable before trial. The fifth circuit treated the policy allowing liberal removal under § 205 as an argument in favor of appellate review; the Supreme Court in *Lauro* deemed the equally strong federal policy favoring the enforcement of forum-selection clauses as an argument on the merits rather than a justification of appel-

late review. 490 U.S. at 501, 109 S.Ct. at 1980. Our own opinion in *Rothner*, 879 F.2d at 1418–19, concludes that mandamus is the appropriate way to obtain review of remand orders. *McDermott* does not persuade us that *Rothner* is wrong or that *Wiswall* and *Comstock* are no longer binding.

It is mandamus or nothing—a distinction that makes a difference in light of the discretionary character of mandamus. Expeditious action on the motions papers allows the case to continue, while briefing and argument of an appeal consume many months. This suit, seeking nothing but an order to arbitrate, has been paralyzed since August 1991, and more delay lies in store if we set the case for argument next fall as an ordinary appeal. Arbitration is supposed to be quick. Litigation about arbitration frustrates that objective. Litigation about *where to litigate* about arbitration mocks that objective.

Having cleared away the underbrush, we can be brief. First, § 1447(d) applies and precludes appellate review. Second, we would not issue a writ of mandamus even if we possessed the power to do so. The two points are related. The district court expressly found that the removal was procedurally defective because the petition was not joined by all parties. A defect in removal procedure authorizes remand, and § 1447(d) then bars review. *Rothner* holds that a defect in removal procedure means failure to comply with one of the requirements in § 1446. Our opinion in *Airco*, on which Chief Judge Crabb relied, holds that the participation of all defendants is a condition of an effective notice of removal under § 1446(a). All of the Reinsurers' arguments that the district court erred in holding that § 205 does not change this rule are beside the point. A search for error is precisely what § 1447(d) forbids. "[I]f the district court gives a reason authorized by statute, courts of appeals may not inquire whether the court erred." *Hernandez*, 942 F.2d at 1226.

Whatever doubt remains we resolve by exercising any discretion against issuing a prerogative writ. The district judge issued two careful opinions explaining why the attempted removals are defective. If these orders are incorrect, the error is not so apparent that the petitioners' right to relief is clear. Mandamus is not the appropriate means to resolve doubtful issues of procedure or statutory construction. *Mallard v. United States District Court*, 490 U.S. 296, 308–09, 109 S.Ct. 1814, 1821–22, 104 L.Ed.2d 318 (1989); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 402–03, 96 S.Ct. 2119, 2123–24, 48 L.Ed.2d 725 (1976). An applicant for mandamus must establish a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953), or conduct amounting to "usurpation of power," *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566 (1945). Thoughtful resolution of novel questions under an untested statute is some distance from these pejorative phrases.

Instead of seeking immediate review of the first order remanding the case, the Reinsurers tried again in the district court and then came here. They seem fixed on prolonging rather than resolving this contest. It is time to get down to the merits. Wisconsin will decide the meaning of the treaties; interpretation of contracts is a staple of business in state courts. The Reinsurers do not contend that Wisconsin disfavors arbitration or that any other doctrine or practice used there would inhibit prompt and accurate resolution of the parties' dispute. Eight months of litigation about where to litigate is plenty. The petition for a writ of mandamus is denied.

In the Matter of the Arbitration Between EMPLOYERS INSURANCE OF WAUSAU, a Mutual Company, Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and Certain London Market Insurance Companies, Respondents.

No. 92-C-0076-C.

United States District Court, W.D. Wisconsin.

March 23, 1992.

Domestic insurer brought action against foreign underwriters and others in connection with reinsurance agreements. After removal and remand, underwriters filed second notice of removal, attempting to remove case under removal provision of Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On motion to remand, the District Court, Crabb, Chief Judge, held that: (1) all defendants had to join in removal petition, and (2) underwriters should not be permitted second attempt to remove case based on ground that could have been presented in first notice of removal.

Motion granted.

1. Removal of Cases ⇐2

Statutory provisions for removing cases to federal court are subject to strict construction.

2. Removal of Cases ⇐107(7)

Removing party bears burden of establishing propriety of removal.

3. Removal of Cases ⇐107(7)

If propriety of removal is doubtful, federal courts should reject case.

4. Removal of Cases ⇐82

Generally, all defendants must join in removal petition in order to effect removal; if they do not, defendants bear burden of explaining affirmatively why any codefendants are not included in removal petition.

5. Removal of Cases ⇐89

Removal provision of legislation enacted to enforce Convention on the Recognition and Enforcement of Foreign Arbitral Awards was subject to general removal law and, therefore, all defendants had to join in removal petition. 9 U.S.C.A. § 205.

6. Removal of Cases ⇐110

General removal law permits defendants to file second petition for removal if subsequent events make case removable.

7. Removal of Cases ⇐110

Defendants who failed to raise removal provision of Convention on the Recognition and Enforcement of Foreign Arbitral Awards as basis for removal in initial removal petition could not, after remand for defect in notice of removal, remove case again on that basis. 9 U.S.C.A. § 205.

Douglas J. Klingberg, Ruder, Ware & Michler, Wausau, Wis., for Employers Ins. of Wausau.

William D. Mollway, Madison, Wis., for Certain Underwriters at Lloyd's, London and Certain London Market Ins. Companies.

OPINION AND ORDER

CRABB, Chief Judge.

This petition to compel arbitration is before the court on respondents' second notice of removal. Petitioner opposes the removal, contending that respondents should not be permitted to remove on a ground that could have been presented in the first removal petition they filed pursuant to 28 U.S.C. § 1441(b) and because all of the respondents have not joined in the removal petition. Respondents assert that 9 U.S.C. § 205 entitles them to remove the action at "any time" and does not require all respondents to join in the petition for removal.

I conclude that 9 U.S.C. § 205's provision that "[t]he procedure for removal of causes otherwise provided by law shall apply" mandates that general removal law will govern those issues not covered specifically

by § 205, which means that all respondents were required to join in the removal petition. I am persuaded also that respondents should not be permitted a second attempt to remove this case based on a ground that could have been presented in the first notice of removal. For these two reasons, the case will be remanded to state court.

For the sole purpose of deciding this motion, I find from the complaint and from the procedural history that the following material facts are undisputed.

UNDISPUTED FACTS

Employers Insurance of Wausau is a Wisconsin corporation with its principal place of business in Wausau, Wisconsin. Respondent Underwriters at Lloyd's are individuals engaged in the business of underwriting insurance and reinsurance risks at Lloyd's of London, England. Respondents "Certain London Market Insurance Companies" are corporations doing business in London, England. At all times relevant to this complaint, respondents did business with petitioner and entered into contracts with it.

Petitioner and respondents are parties to certain contracts of reinsurance, referred to as "blanket excess retrocessional reinsurance treaties." Pursuant to the reinsurance treaties, respondents agreed to be bound by petitioner's loss settlements. In 1984, petitioner began making and paying asbestos loss settlements, and submitted proofs of loss to respondents for payment of respondents' share of the settlements under the reinsurance treaties. Respondents began to deny payment for such loss settlements on August 22, 1988.

Petitioner commenced this action in the Circuit Court of Marathon County, Wisconsin, on August 19, 1991, naming as respondents "certain Underwriters at Lloyd's London," "certain London companies," London, El Banco, St. Helens Insurance Company, Ltd., and La Preservatrice Fondore Assurances. Service of a petition to compel arbitration on all respondents was accomplished on that date. The petition cited the contractual "service of suit" clause that stated:

> It is agreed that in the event of the failure of Reinsurers hereon to pay any amount claimed to be due hereunder, Reinsurers hereon, at the request of the reinsured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

The petition advised respondents that any attempt to remove the cause from the jurisdiction of the Marathon County Circuit Court would be regarded as a further breach of contract by respondents.

Respondents removed the action to this court on September 9, 1991. The notice of removal did not include as respondents El Banco, St. Helens Insurance Company, Ltd., or La Preservatrice. Respondents did not explain their absence. On November 29, 1991, respondents moved to amend the notice of removal to cite 9 U.S.C. § 205 as a ground for removal.

On January 6, 1992, the case was remanded to the Circuit Court for Marathon County, Wisconsin on the ground that the original notice was procedurally defective in failing to name all of the respondents. I concluded that an untimely amendment of the defective notice could not be permitted.

On January 30, 1992, respondents filed a second notice of removal pursuant to 9 U.S.C. § 205. Again, the notice did not include as respondents El Banco, St. Helens Insurance Company, Ltd., or La Preservatrice, and it did not include an explanation for their absence.

OPINION

[1-4] General removal law is clear. Proceeding under the premise that "federal court[ ] jurisdiction under the removal statutes constitutes an infringement upon state sovereignty," statutory removal provisions are subject to strict construction. *See, e.g., Fellhauer v. City of Geneva*, 673 F.Supp. 1445, 1447 (N.D.Ill.1987) (citing *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108–09,

61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941)). The removing party bears the burden of establishing the propriety of the removal. If the propriety of the removal is doubtful, federal courts should reject the case *Id.* Generally, all defendants must join in a removal petition in order to effect removal. *Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272 (7th Cir.1982). If they do not, defendants bear the burden of explaining affirmatively why any co-defendants are not included in the removal petition. *Crete Oil Co. v. Dunham*, No. 91 C 3253, 1991 WL 152898 (N.D.Ill. July 31, 1991).

Failure to Name All Respondents

[1] The first issue is whether the § 205 removal petition is defective because all respondents failed to join in it. 9 U.S.C. § 205 is part of the enabling legislation passed by Congress to enforce the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It provides in part:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

Respondents attempt to distinguish § 205 from general removal law by arguing that the joinder rule applies only to the strict removal provisions of 28 U.S.C. § 1441(a)-(c). They contend that a more liberal construction is favored where removal statutes are designed specifically to bring cases into federal court, as shown, for example, in § 1441(d), relating to removal under the Foreign Sovereign Immunity Act.

Section 1441(d) provides that "Any civil action brought in a state court against a foreign state ... *may be removed by the foreign state....*" (emphasis added). Consistently with the statute's plain language, the Fifth Circuit Court of Appeals has held that when a foreign state petitions for removal, the action is transferred to federal court, even if other defendants do not wish to remove the action. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375 (5th Cir.1980). The Fifth Circuit has analogized the Foreign Sovereign Immunity Act to the Convention Act, finding that 9 U.S.C. § 205 and 28 U.S.C. § 1441(d) are similar in two respects: (1) they both permit removals based on the foreign domicile of the defendant and (2) § 1441(d) allows removal "at any time for cause shown," while § 205 allows removal "at any time before trial." *McDermott Int'l v. Lloyds Underwriters*, 944 F.2d 1199 (5th Cir.1991). The court concluded that Congress's intent in enacting the Foreign Sovereign Immunity Act was to establish a uniform body of law by channelling cases against foreign sovereigns away from the state courts and into federal courts; similarities between the two statutes indicated that Congress sought a unitary jurisprudence for Convention Act cases as well. *Id.* at 1212.

Respondents seek to extend the analogy between these two statutes, arguing that because the Foreign Sovereign Immunity Act does not require removal by all defendants, the Convention Act should be read in the same way. Although, as the Fifth Circuit pointed out, the two statutes have similarities, they are different in one important respect: the language in § 1441(d) provides for removal by "the foreign state," § 205 tracks the language of § 1441(a) in this respect, and provides that "the defendant or the defendants" may remove. Moreover, although both statutes provide a federal forum, the policy favoring a federal forum appears to be stronger with respect to the Foreign Sovereign Immunity Act: "In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in State court." H.R.Rep. No. 94-1487, 94th

Cong., 2d Sess. 32 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6631–6632. By contrast, in *McDermott* the court commented: "the language and history of the Convention Act indicate nothing other than Congress' intent to grant federal courts concurrent jurisdiction over the Convention cases and defendants a right to remove state-filed cases to federal court." *McDermott*, 944 F.2d at 1208 n. 12. Although the Fifth Circuit emphasized the importance of a federal forum to provide a unified interpretation of the Convention Act, it did so in the context of a forum selection clause in the parties' insurance policy. As important as concerns of uniformity are in Convention Act cases, they do not compel the conclusion that § 205 is to be read in exactly the same manner as § 1441(d). Section 205 does not give a preference to a foreign company to remove and its legislative history does not indicate a preference for federal courts to decide Convention Act cases over state courts. I conclude that § 205 and § 1441(d) are not similar enough to require reading § 205 as permitting removal by fewer than all of the respondents.

[6] Respondents cite 28 U.S.C. § 1442(a)(1) in further support of their assertion that removal statutes are to be construed liberally when designed specifically to bring certain cases into federal court. 28 U.S.C. § 1442 provides:

> (a) A civil action ... commenced in a State court against any of the following persons may be removed by them to the district court....
>
> (1) Any officer of the United States or any agency thereof, or person acting under him....
>
> (2) A property holder whose title is derived from any such officer....
>
> (3) Any officer of the courts of the United States ...;
>
> (4) Any officer of either House of Congress....

[7] This statutory language does not need liberal construction; it is clear that specific governmental employees can remove a case to federal court without regard to whether all defendants join in the removal. The Supreme Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1). *Arizona v. Manypenny*, 451 U.S. 232, 242, 101 S.Ct. 1657, 1664, 68 L.Ed.2d 58 (1981) (citing *Willingham v. Morgan*, 395 U.S. 402, 407, 89 S.Ct. 1813, 1816, 23 L.Ed.2d 396 (1969)). Respondents are not persuasive in their assertion that § 205 should be given the deference that § 1442(a)(1) is accorded. Nothing in the case law interpreting § 205 indicates that the policy governing arbitration agreements between foreign and domestic companies is as strong as the absolute policy regarding conduct performed under color of federal office. It would be a stretch to assume that it is.

[8] A statute that does not clearly state a preference as to which particular defendant can remove is a better one against which to compare § 205. An example is the banking removal statute, 12 U.S.C. § 632, which provides that "any defendant ... may, at any time before the trial thereof, remove...." Although the reference to "any defendant" seems to allow removal even if all defendants do not join in the petition for removal, not all courts have read it this way. *See, e.g., Ponce Federal Bank, FSB v. Instituto Medico Del Norte*, 643 F.Supp. 424 (D.P.R.1986), in which the court interpreted the language to require all defendants to join in the petition. The court found "[t]here being no legislative history on this matter, we must presume that absent a clearer intention of Congress to the contrary, Section 632 was intended to parallel Section 1441, the general removal statute. Furthermore, removal statutes should be strictly construed and all doubts should be resolved against removal." *Id.* at 426. The court rejected the holding of *Wenzoski v. Citicorp*, 480 F.Supp. 1056 (N.D.Cal.1979), in which the court had concluded that the "any defendant" language of § 632 rendered unanimity in the removal petition unnecessary. *Id.* at 1058.

In § 632, the "any defendant" language left room for courts to differ about the need for all defendants to join in a removal petition. The same argument cannot be

made with respect to § 205. The language in § 205 as to who can remove does not deviate from the § 1441(a) model that civil actions "may be removed by *the defendant or the defendants.*" Moreover, the language in § 205 provides that "the procedure for removal of causes *otherwise provided by law shall apply.* (emphasis added)." Congress specified two exceptions: it gave additional time for removal and eliminated the requirement that the ground for removal should appear on the face of the complaint. Except for these two provisions, general removal law applies. The law "otherwise provided" requires that all defendants join in the removal petition. 9 U.S.C. § 205.

I conclude that respondents have not borne their burden of proving that 9 U.S.C. § 205 does not require that all defendants must join in a notice of removal. I conclude again that respondents' notice of removal again was procedurally defective for failing to name all of the respondents in the state court action. Although this finding alone is a sufficient basis for ordering a remand to state court, I will decide the remaining issue.

Propriety of Removal under a Different Statute

[6, 7] A remand order is deemed conclusive as to matters that were "adjudged or could have been presented at that time as a basis for removal." 1A James W. Moore et al, Moore's Federal Practice, ¶ 0.169[3] (2d ed. 1991). General removal law permits defendants to file a second petition for removal if subsequent events make the case removable. *See, e.g., Central of Georgia Ry. v. Riegel Textile Corp.*, 426 F.2d 935 (5th Cir.1970) (after remand, state court severed claim against third party defendant; third party defendant could not have removed third party action but could remove direct action).

No such circumstance exists in this case. Respondents could have asserted 9 U.S.C. § 205 as a ground for removal in their first notice of removal. Indeed, they moved to amend that notice to add § 205 as an alternative ground for removal but their motion was denied as untimely. Under general removal law, respondents would not be permitted to remove this case a second time.

Respondents' strategy for rejecting application of general removal law in this instance is similar to that discussed in the preceding section: the policy objectives of § 205 are different from those of § 1441. Respondents assert, for example, that § 1441 is subject to strict time limitations whereas § 205 ignores considerations of judicial economy and efficiency by allowing a party to remove a case at any time before trial.

Petitioner asserts that respondents are entitled to only one chance at removal, as shown by the plain language of the Convention Act that states "[t]he procedure for removal of causes otherwise provided by law shall apply...."

Although respondents seek to portray the policy objectives of § 205 as favoring a liberal construction with respect to the "one-shot at removal" rule, they cite no legislative history or cases. With respect to their assertions that Congress thought it important to make a federal forum freely available for Convention Act cases, I agree that the language of § 205 evidences such an intent. The statute even provides a liberal procedure: defendants can remove an action at any time before trial and the ground for removal need not appear on the face of the complaint. However, nowhere have I found any indication that Congress intended that respondents should be permitted repeated efforts to remove several times before trial, based upon different statutes. Such actions could delay trial dates continuously and wreak havoc with the efforts of state and federal courts to manage litigation effectively. Such a result is manifestly at odds with the underlying purpose of the Convention, which is to expedite the resolution of commercial disputes between companies of different nations. As petitioner notes, respondents' actions have caused a six-month delay in the September 12, 1991 date for final adjudication of petitioner's petition to compel arbitration.

I cannot ignore the mandate that "[t]he procedure for removal of causes otherwise

provided by law shall apply . . .' I conclude that respondents could have used 9 U.S.C. § 205 as a basis for removal in their first notice of removal. Their oversight should not be rewarded by giving them a second try at removal and a second chance to delay the arbitration of this dispute. This case will be remanded to state court. »

ORDER

IT IS ORDERED that petitioner's motion to remand this case to the Circuit Court for Marathon County, Wisconsin is GRANTED. The Clerk of Court for Marathon County, Wisconsin is GRANTED. The Clerk of Court is directed to transmit the record of the case to the Circuit Court for Marathon County, Wisconsin.

UNITED STATES of America

v.

Robert Norman LATTIMORE.

Crim. No. 4-91-17.

United States District Court, D. Minnesota, Fourth Division.

Oct. 17, 1991.

Following conviction, the District Court, Rosenbaum, J., held that departure from defendant's presumptive sentence was appropriate because Sentencing Commission failed to adequately consider impact of mandatory minimum sentences on sentencing guideline calculations.

So ordered.

Criminal Law ⇐1302

Departure from defendant's presumptive sentence was appropriate because Sentencing Commission failed to adequately consider impact of mandatory minimum sentences on guideline calculations; court would depart by incorporating statutory minimum, which was less than guideline range and which was Congress' own clear expression of minimum penalty for particular offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(B), 21 U.S.C.A. § 841(b)(1)(B); 18 U.S.C.A. § 3553(b).

Margaret Burns, Asst. U.S. Atty., Minneapolis, Minn., for U.S.

Arthur Martinez, Minneapolis, Minn., for Robert Norman Lattimore.

SENTENCING MEMORANDUM AND STATEMENT OF REASONS

ROSENBAUM, District Judge.

I. *Findings of Fact*

There being no objection to the factual statements contained in the PSI, the Court adopts these statements as its findings of fact.

II. *Application of Guidelines to Facts*

The Court determines the applicable guidelines to be:

A) Total Offense Level: 28
B) Criminal History Category: I
C) Guideline Sentence: 78–97 months
D) Supervised Release: 4–5 years
E) Fine: $12,500 to $2,000,000, plus costs of imprisonment or supervised release
F) Restitution: Not Applicable
G) Special Assessment: $50

III. *Imposition of Sentence*

For the reasons set forth below, the Court finds it proper to depart from the presumptive guidelines table, and imposes the following sentence.

Robert Norman Lattimore has been charged in Count I with possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1).

Based upon the plea of guilty, it is considered and adjudged that the defendant is guilty of that offense.

"[W]hen parties commit themselves to an arbitration before an arbitrator who is not a professional lawyer but chosen primarily because of his expertise in another field, and also commit themselves to conducting the arbitration without being represented by professional lawyers, they are deliberately aiming at reaching finality by an approach intended to be dominated by practicalities and to keep legalities to the minimum properly possible.

"The purpose of such an approach can only be fulfilled if the courts to whom application must be made for leave to appeal from the resulting awards are particularly careful to confine any appeals to matters of law that were in real and substantial dispute between the parties. The object of such arbitrations as that in the present case would be quite defeated if an unsuccessful party could subsequently raise in an appeal a point that had never been substantially dealt with in the arbitration, through no fault of the arbitrator or the successful party."

Justice Handley agreed that the legal issue urged by the Department in appealing the award "was a new point which had not been properly raised before the Arbitrator." Had it been properly raised, it "might possibly have been met by further evidence and by amendments to the Contractor's points of claim."

The contractor's "lack of legal representation ... during the arbitration made it more difficult for its legal advisors to later recognise that the point on which leave to appeal was sought ... was a new point," Justice Handley added. He concurred with Justice Priestley that this was a sufficient reason to reinstate the arbitrator's award in favor of the contractor.

Effect of Arbitration Clause

All three justices also addressed the issue of contract interpretation, agreeing (although for different reasons) that the Department's exclusion of the contractor from the site lacked contractual justification.

Justice Handley said in this connection that the contract's arbitration clause—which covered "all disputes or differences ... concerning the performance or the non-performance by either party of its obligations under the Contract whether raised before or after the execution of the work"—indicated that the parties intended the arbitrator to decide whether the Department had acted reasonably.

In Justice Handley's view, the "arbitration was an 'appeal' from the refusal of the Principal [the Department] to be satisfied by the cause shown by the Contractor, and from his decision to exercise the powers [of exclusion or cancellation]... On that 'appeal' the Arbitrator was entitled, as he did, to review those decisions on their merits and to decide whether they were unreasonable and therefore invalid."

The contractor's appeal was allowed and the arbitration award in its favor reinstated.

B.W. Walker and M. Christie represented Renard Constructions; G.T.W. Miller QC and J.R. Wilson represented Minister for Public Works. Solicitors: Allen Allen & Hemsley; State Crown Solicitor.

New York Convention

POLICY FAVORING FEDERAL FORUM CAN'T SAVE DEFECTIVE REMOVAL PETITION

Litigants seeking to remove a New York Convention case from state to federal court must make sure they have complied with the procedural requirements for removal, despite Congress's intent to promote federal adjudication of Convention cases, according to the U.S. Court of Appeals for the Seventh Circuit. The court held May 21 that a district court order remanding a Convention case from federal to state court because of procedural defects was not so clearly wrong as to warrant the issuance of a writ of mandamus. (*In the Matter of Amoco Petroleum Additives Co.*, No. 92-1649; *In the Matter of Robin A.G. Jackson, an Underwriter at Lloyd's, London, et al.*, No. 92-1676; CA 7, May 21, 1992) *[Note: The opinion decides two factually unrelated cases; No. 92-1676 is the one discussed here.]*

Employers Insurance of Wausau, a Wisconsin corporation, had reinsurance contracts with underwriting syndicates at Lloyd's of London and other domestic and foreign reinsurers that contained arbitration clauses. In August 1991, Wausau filed suit in state court to compel arbitration of disputes over payments on asbestos claims. The complaint named as defendants many syndicates at Lloyd's, as well as various foreign corporations (hereafter "the reinsurers").

The reinsurers filed a removal petition based on 9 USC 205, a section of the implementing legislation of the New York Convention ("Convention Act"). Section 205 allows defendants to transfer to federal court any case relating "to an arbitration agreement or award falling under the Convention"; it also states that the "procedure for removal of causes otherwise provided by law shall apply..."

Three of the defendant companies failed to join in the reinsurers' removal petition, and Wausau argued that this unexplained omission was a procedural defect requiring remand. Under 28 USC 1447(c), a remand is necessary if there is any "defect in removal procedure," and Section 205's reference to the procedure for removal "otherwise provided by law" incorporates this standard, Wausau contended.

The U.S. District Court for the Western District of Wisconsin agreed. In a March 23 opinion, Judge Barbara Crabb rejected the reinsurers' argument that the removal requirements under Section 205 should be construed more loosely because Congress intended to channel Convention Act cases into the federal courts to promote decisional uniformity. Although the Fifth Circuit emphasized this congressional purpose in *McDermott International v. Lloyds Underwriters*, 944 F2d 1199, 2 WAMR 299 (1991), Judge Crabb wrote that "[a]s important as concerns of uniformity are in Convention Act cases," they do not allow removal to federal court by fewer than all of the defendants. (*Employers Ins. of Wausau v. Certain Underwriters at Lloyd's*, USDC WDWisc, No. 92-C-0076, March 23, 1992)

Contending that the district court misinterpreted the Convention Act, the reinsurers sought a writ of mandamus from the court of appeals.

Mandamus vs. Appeal

Writing for a three-judge panel of the Seventh Circuit, Judge Frank Easterbrook observed that there has been "almost no litigation" about the meaning of Section 205 of the Convention Act apart from the Fifth Circuit's *McDermott* decision. *McDermott* held (among other things) that review of remand orders based on the parties' contract is by appeal rather than by mandamus, but Judge Easterbrook noted that the Seventh Circuit's own precedents go the other way, concluding that mandamus is the right method to obtain review of remand orders (*Rothner v. Chicago*, 879 F2d 1402 (1989)).

The distinction between appeal and mandamus "makes a difference in light of the discretionary character of mandamus," Judge Easterbrook continued. "This suit, seeking nothing but an order to arbitrate, has been paralyzed since August 1991," and setting it for argument as an ordinary appeal would cause further delay. "Arbitration is supposed to be quick. Litigation about arbitration frustrates that objective. Litigation about *where to litigate* about arbitration mocks that objective," he wrote.

Writ Is Unwarranted

Two related reasons support denial of mandamus relief here, Judge Easterbrook explained. First, the district court, relying on Seventh Circuit precedent (*Northern Illinois Gas Co. v. Airco*, 676 F2d 270 (1982)), "expressly found that the removal was procedurally defective because the petition was not joined by all parties." Under 28 USC 1447(c), a defect in removal procedure authorizes remand, and 28 USC 1447(d) bars any review—whether by appeal, mandamus, or otherwise—of a remand based on §1447(c).

The reinsurers' arguments—that the district court erred in holding that §205 of the Convention Act does not change this rule—"are beside the point," the court declared. "A search for error is precisely what §1447(d) forbids."

Second, any error that a search might disclose "is not so apparent that the petitioners' right to relief is clear." Judge Easterbrook continued, because mandamus "is not the appropriate means to resolve doubtful issues of procedure or statutory construction." An applicant for mandamus must show that the district court clearly abused its discretion or usurped its power. "Thoughtful resolution of novel questions under an untested statute is some distance from these pejorative phrases," he observed.

Moreover, the reinsurers do not argue that the Wisconsin state courts disfavor arbitration "or that any other doctrine or practice used there would inhibit prompt and accurate resolution of the parties' dispute," the court concluded. "Eight months of litigation about where to litigate is plenty," and so the petition for a writ of mandamus must be denied.

Dale Larson, Lawrence Hofmann, Timothy Regan, and Brooks Poley (Zelle & Larson), Minneapolis, and Douglas J. Klingberg (Ruder, Ware & Michler), Wasau, Wis., represented respondent Employers Insurance of Wasau; Robert A. Knuti, Jane H. Veldman, and R.R. McMahan (Lord, Bissell & Brook), Chicago, and William D. Mollway (DeWitt, Porter, Huggett, Schumacher & Morgan), Madison, Wis., represented the reinsurers.

CONFERENCES AND MEETINGS

International Arbitration

INTER-PACIFIC BAR ASSN. EXAMINES DISPUTE RESOLUTION IN PACIFIC RIM

SYDNEY, Australia—International arbitration experts from around the world discussed the resolution of disputes in the Asia-Pacific region, at the annual meeting of the Inter-Pacific Bar Association in Sydney, May 3-6.

Stephen R. Bond, former Secretary General of the International Court of Arbitration of the International Chamber of Commerce and now with the Paris office of White & Case, explained the framework of the ICC and its growing relationship with the Asia-Pacific region. The ICC, he noted, represents business interests in over 100 countries, with a pending number of cases averaging from 700 to 764, and claims and counterclaims totaling over US$15 billion.

"In terms of arbitration rules and practice and national legislation related to arbitration, there is in fact no strongly unifying thread among the numerous jurisdictions of this Asia-Pacific region." Bond said. In countries such as China, Japan, and Korea, there tends to be a preference for dispute settlement by negotiation, mediation, and conciliation rather than by arbitration.

"The rule of justice in China is based on reason rather than law. The philosophy of peace, harmony, and conciliation prevail over the strict application of the words enshrined in law," Bond said. Japan has a preference for "non-confrontational" methods of dispute settlement, he added, and litigation or arbitration between large corporations is very rare.

In Korea, the preference is for resolving disputes privately. "Extralegal forms for mediation of commercial disputes have been the historical norm in Korea and commercial arbitration as known in Western countries is a very recent phenomenon," he declared.

But Bond said there is "concrete evidence of an increasing willingness to accept and engage in international commercial arbitration" despite past practices. The number of ICC cases from this region has risen from 21 in 1981 to 70 in 1990, he stated.