IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LINCOLN GENERAL INSURANCE COMPANY	:	No. 4:08-cv-0583
Plaintiff,	:	Judge John E. Jones III
v.	:	
CLARENDON NATIONAL INSURANCE COMPANY, *et al.*, Defendants	:	

MEMORANDUM AND ORDER

August 15, 2008

This matter is before the Court on a bevy of motions from the parties to this action, each of which is discussed in turn below.

Because it calls into question the Court's jurisdiction, the motion for remand (Doc. 14) of the plaintiff Lincoln General Insurance Company ("Lincoln General") will be considered first. This motion will be denied.

Next, the Court will address the motion to stay this litigation and compel arbitration (Doc. 10) filed by defendants Clarendon National Insurance Company, Clarendon America Insurance Company, Harbor Speciality Insurance Company, and Clarendon Select Insurance Company (collectively "Clarendon") and Redland Insurance Company ("RIC"). This motion will be granted. The parties will be

ordered to submit this dispute to arbitration, and this litigation will be stayed pending such arbitration.

Next, the Court will consider the cross-motions of Clarendon (Doc. 28) and Lincoln General (Doc. 32) seeking confirmation of the appointment of arbitrators. The Court will deny Clarendon's motion, grant Lincoln General's motion, and order the parties to proceed to arbitration before arbitrators Richard White, Constance Foster, and a third arbitrator chosen in accordance with the parties' arbitration agreement.

Finally, the Court will hold in abeyance RIC's motion to dismiss (Doc. 18) pending resolution of the arbitration as this motion potentially implicates the merits of the dispute which is properly the subject of arbitration.

I. BACKGROUND

On March 23, 2008, Lincoln General commenced an action against Clarendon and RIC in the Court of Common Pleas of York County, Pennsylvania at C.A. No. 2008-SU-1217-Y01. The complaint alleges that on March 10, 2003, Lincoln General and the defendants entered into a Quota Share Reinsurance Treaty (the "2004 Treaty") wherein Lincoln General agreed to reinsure certain automobile policies written by the defendants. (Compl., Doc. 1-2, ¶¶ 5, 8, Ex. A.) The parties renewed the treaty by executing a Reinsurance Confirmation Quota Share

Reinsurance Treaty (the "2004 Treaty") on October 3, 2003 and again by executing another Reinsurance Confirmation Quota Share Reinsurance Treaty (the "2004 Treaty") on January 7, 2005. (*Id.* at ¶¶ 6-7, Exs. B-C.) The 2004 Treaty provided that it was the "entire agreement" between the parties, superceding and canceling their prior agreements. (*Id.* at ¶ 9.)

The effective date of the 2004 Treaty was July 1, 2004. (*Id.* at ¶ 10, Ex. C.) As to termination, the 2004 Treaty provided:

> This Contract may be terminated by either party at any time, with no less than 120 days prior written notice by certified mail.
>
> Unless [the defendants] elect[] to reassume the ceded unearned premium in force on the effect date of termination, and so notif[y] [Lincoln General] prior to or as promptly as possible after the effective date of termination, reinsurance hereunder on business in force on the effective date of termination shall remain in full force and effect until expiration, cancellation or next premium anniversary of such business whichever first occurs, but in no event beyond 12 months following the effective date of termination.
>
> In the event [the defendants] [are] prohibited or precluded by the appropriate regulator authorities, or by law (in those states where applicable and enforced), from effecting mid-term cancellation or non-renewal of any policies subject to this Contract beyond their natural expiry, [Lincoln General] agrees to extend reinsurance coverage until such policies may be terminated by the [defendants], but in no event beyond 24 months after the effective date of termination.

(*Id.* at ¶ 10, Ex. C.) On December 30, 2004, the defendants notified Lincoln General of their cancellation of the 2004 Treaty, effective July 1, 2005. (*Id.* at ¶ 14, Ex. D.)

The 2004 Treaty also requires any reinsurer who is or becomes rated B++ or lower by A.M. Best to collateralize its share of Clarendon's ceded unearned premium, outstanding losses reported, and allocated loss adjustment relating thereto. (*Id.* at ¶ 11.) On December 18, 2007, Lincoln General's A.M. Best rating was downgraded from an A- to a B++. (*Id.* at ¶ 15.) On February 6, 2008, Clarendon demanded that Lincoln General post collateral in accordance with the 2004 Treaty. (*Id.* at ¶ 16, Ex. E.) On February 11, 2008, Lincoln General responded that it has no obligation to collateralize and asked Clarendon to explain the basis for its demand. (*Id.* at ¶ 17, Ex. F.)

On February 14, 2008, Clarendon demanded arbitration under the arbitration provision of the 2004 Treaty, which provides:

> As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Contract, including the formation or validity thereof, will be submitted for decision to a panel of three arbitrators.

(*Id.* at ¶ 18, Ex. G.)

Lincoln General argues that, by virtue of its "entire agreement" clause, the 2004 Treaty superseded and cancelled the 2002 Treaty and the 2003 Treaty. (*Id.* at

¶ 19.) Lincoln General further argues that, as a result of the defendants notice of cancellation, the 2004 Treaty terminated on July 1, 2005, and therefore, it has no obligation to collateralize or arbitrate. Lincoln General's complaint seeks a declaration that the 2002 and 2003 Treaties were superseded by the 2004 Treaty, that the 2004 Treaty is terminated, that it has no obligation to collateralize or arbitrate under the treaty, and that as a result of the treaty's termination, no justiciable controversies exist between it and the defendants. (*Id.* at 7.)

On March 31, 2008, Clarendon removed Lincoln General's action to this Court. (Doc. 1.) RIC joined in this removal. (Doc. 2.)

II. DISCUSSION

A. Lincoln General's Motion for Remand

A defendant may remove a civil action filed in state court if the federal district court has original jurisdiction to hear the matter. 28 U.S.C. § 1441. Once a case has been removed from state court, however, the federal district court must remand the case if it appears that there is no subject matter jurisdiction. 28 U.S.C. § 1447(c). In determining whether removal is proper, "the removal statute should be strictly construed and all doubts should be resolved in favor of remand." *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) (citations omitted). "The defendant's right to remove is to be determined according to the plaintiffs'

pleading at the time of the petition for removal, and it is the defendant's burden to show the existence of federal jurisdiction." *Id.*

The defendants removed this action on the basis of diversity jurisdiction under 28 U.S.C. § 1332. Original jurisdiction based on diversity is present where the civil action is between citizens of different states and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332; *see also* 28 U.S.C. § 1441(b) (stating that an action not founded on a claim or right arising under the Constitution, treaties or laws of the United States "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"). "Jurisdiction under 28 U.S.C. § 1332(a)(1) requires complete diversity of the parties; that is, no plaintiff can be a citizen of the same state as any of the defendants. *Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart Mgmt., Inc.*, 316 F.3d 408, 410 (3d Cir. 2003) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990)).

Lincoln General, a citizen of Pennsylvania, argues that complete diversity is lacking in this case because defendant RIC is indirectly owned by QBE Reinsurance Corporation ("QBE Re"), a reinsurance company incorporated in Pennsylvania with its principal place of business in New York. Lincoln General reasons that this indirect ownership, and the fact that RIC and QBE Re share six of

the same officers and directors, demonstrates that RIC's decision-making and day-to-day management of RIC is controlled by QBE Re, and therefore, RIC should be considered a citizen of Pennsylvania where QBE Re is incorporated.

Lincoln General's argument fails based on the facts of RIC's admittedly complex corporate history. RIC itself is incorporated in New Jersey and has its principal place of business in New York.[1] At one time, RIC was, along with the other defendants in this action, a subsidiary of the Clarendon Insurance Group, Inc. Effective July 1, 2005, RIC was sold to Hannover Finance, Inc., the ultimate parent of the Clarendon Group. As part of a restructuring of its business, Hannover formed Praetorian Financial Group, Inc. ("PFG") on October 26, 2005 and contributed RIC to this group. On December 13, 2006, it was announced that, after closing conditions were met, Hannover would sell PFG, including RIC, to QBE Re. Contrary to Lincoln General's assertions, however, RIC's story does not end there. As RIC itself explains, on March 2, 2007, QBE Re assigned its rights under the agreement with Hannover to its parent QBE Holdings, Inc., a reinsurance holding company incorporated in Delaware with its principal place of business in New York. (Doc. 25 at 3-4.) *See* Amendment No. 1 to Form A Statement

[1] The Court may consider these facts beyond the complaint in resolving Lincoln General's factual challenge to subject matter jurisdiction. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000).

Regarding the Proposed Acquisition of Control of Or Merger With a Domestic Insurer, filed with the Wisconsin Commissioner of Insurance on March 15, 2007, at 5-6 n.1, *available at* http://oci.wi.gov/qbe/amend1_03_15_2007.pdf . Upon satisfaction of closing conditions, QBE Holdings thus became the direct owner of PFG, and thereby, the indirect owner of PFG's subsidiary RIC.

Whatever its merits otherwise, Lincoln General's argument must fail because, contrary to its assertions, QBE Holdings, a Delaware company with its principal place of business in New York is the indirect owner of RIC. Even assuming that RIC takes on the citizenship of the state in which its indirect parent is incorporated, complete diversity is still present. Lincoln General's motion for remand will therefore be denied.

B. Defendants' Motion to Compel Arbitration

Having established jurisdiction, the Court will turn to the defendants' motion to stay this litigation and compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*.[2] "The FAA establishes a strong federal policy

[2] Without discussion, the parties rely on the FAA and federal law in their briefs on the motion to compel arbitration. However, because diversity actions are generally governed by state substantive law, a district court sitting in diversity must determine whether an arbitration dispute is governed by the FAA or state law. *State Farm Mut. Auto. Ins. Co. v. Coviello*, 233 F.3d 710, 713 n.1 (3d Cir. 2000). The FAA applies only if an arbitration agreement is connected to a transaction involving interstate commerce. *Id.* On its face, the reinsurance treaty at issue here, between parties from various states (although applying only to risks located in a single state, *see* 2004 Treaty, Art. 4), involves interstate commerce, and therefore the FAA would seem

in favor of compelling arbitration over litigation." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001). However, "[t]he liberal policy favoring arbitration agreements is at bottom a policy guaranteeing the enforcement of private contractual arrangements, and under the FAA, a court may only compel a party to arbitrate where that party has entered into a written agreement to arbitrate that covers the dispute." *Id.* "A motion to compel arbitration calls for a two-step inquiry into (1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement." *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005).

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to apply. In addition, the arbitration provision itself states that "[t]he parties intend this Article to be enforceable in accordance with the Federal Arbitration Act ... notwithstanding any other choice of law provision set forth in ths Contract." (2004 Treaty, Article 20(F).) The question is complicated in this case, however, by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which generally prevents federal statutes from preempting insurance- related state law. *See, e.g.*, *Elcom Tech. Corp. v. American Dynasty Surplus Lines Ins. Co.*, 2000 WL 1470217, at *2 & n.3 (E.D. Pa. Oct. 3, 2000); *Toomes v. CNA Ins. Co.*, 1995 WL 60008, at *2 n.3 (E.D. Pa. Feb. 10, 1995); *Nationwide Mut. Ins. Co. of Columbus, Ohio v. Patterson*, 1991 WL 96677, at *2-3 (E.D. Pa. May 28, 1991). The Court need not decide the potentially difficult and generally unresolved issue of the interplay between the FAA and the McCarran-Ferguson Act, however, because, as the Third Circuit has repeatedly recognized, the FAA and Pennsylvania law are functionally equivalent regarding the authority of a court to review an agreement to arbitrate and to stay or compel arbitration. *Coviello*, 233 F.3d at 713 n.1; *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 510 (3d Cir.1990) *overruled by implication on other grounds by Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 109, 110 n.23 (3d Cir. 1984); *see also Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643, 656 (Pa. Super. Ct 2002) *overruled on other grounds by Salley v. Option One Mortgage Corp.*, 925 A.2d 115 (Pa. 2007). The Court will therefore rely on federal decisions interpreting the FAA, with the understanding that this federal law is substantively the same as Pennsylvania law regarding the issues raised by the motion to compel arbitration.

The defendants argue that the 2004 Treaty contains a valid arbitration agreement, and that this dispute regarding the continuing validity of the treaty and Lincoln General's collateralization obligation falls within the scope of that agreement, which covers "any dispute arising out of the interpretation, performance or breach of this Contract, including the formation or validity thereof." Lincoln General contends that no valid arbitration agreement exists between it and the defendants because the 2004 Treaty, and therefore the arbitration clause contained in the treaty, terminated on January 1, 2005. Simply put, the defendants have the better argument. The arbitration clause of the 2004 Treaty is a valid arbitration agreement, and Lincoln General does not deny entering into this agreement. The parties' present dispute regarding the continuing validity of the 2004 Treaty and Lincoln General's obligations thereunder are well within the broad scope of the arbitration provision. Precedent makes clear that Lincoln General's arguments regarding the validity of the 2004 Treaty – the merits of which the Court explicitly does not reach – are properly addressed in the first instance by the arbitrators.

Although courts have long recognized and enforced a liberal federal policy favoring arbitration, "[t]he question of whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for

judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Tech., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). Questions of arbitrability, however, are limited to a narrow set of circumstances "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84.

Relying on its prior opinions in *Prima Paint Corp. v. Flood & Conkling Mfg., Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), clarified which types of challenges to the validity of an arbitration agreement are "questions of arbitrability" for the court and which are questions for the arbitrator. The Court held that where a party specifically challenges the validity of the arbitration agreement itself, the issue should be determined by the court. *Id.* at 444, 446. But where a party challenges the contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid, the

issue is to be considered by the arbitrator in the first instance. *Id.* The *Buckeye* court declined to address a third type of challenge based on "whether any agreement between the alleged obligor and obligee was ever concluded" such as "whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent." 546 U.S. at 444 n.1. However, all of the courts of appeals opinions addressing these questions and cited by the Supreme Court in *Buckeye*, as well as the Third Circuit in *Sandvik AB v. Advent Intern. Corp.*, 220 F.3d 99, 107 (3d Cir. 2000), hold that such challenges must be decided by a court. *See Fox Int'l Relations v. Fiserv Sec., Inc.*, 418 F. Supp. 2d 718, 723-24 & n.7 (E.D. Pa. 2006).

In this case, Lincoln General challenges the contract as a whole, arguing that through the parties' actions and by the terms of the contract, the entire 2004 Treaty has been terminated. Lincoln General does not specifically challenge the validity of the arbitration provision itself, nor does Lincoln General deny that it validly entered into the contract. Therefore, in accordance with the foregoing holdings, this dispute must be submitted to arbitration.

Lincoln General attempts to distinguish *Buckeye* and *Prima Paint* on factual grounds, arguing that they do not control here because the parties resisting

arbitration in those cases raised defenses of fraud in the inducement and unconscionability respectively, whereas it challenges the validity of the contract on the grounds that the contract is expired. The broad legal principles pronounced in those cases, however, are not so limited. *See, e.g.*, *Buckeye*, 546 U.S. at 445-46 (stating the three broad legal propositions established by *Prima Paint* and *Southland*); *Prima Paint*, 388 U.S. at 404 ("We hold, therefore, that in passing upon a [FAA] § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."); *Fox Int'l*, 418 F. Supp. 2d at 722-23 (stating, in rejecting a similar argument, that "although the *Prima Paint* case involved a claim of fraudulent inducement, the rule the court announced was more general" (quoting *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563, 1567 (6th Cir. 1990) and citing *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 529 (1st Cir. 1985)). The Supreme Court's holdings in *Prima Paint*, *Southland*, and *Buckeye* govern here, and, to reiterate, based on this precedent, this dispute shall be submitted to arbitration.

As other courts have noted, *see Fox Int'l*, 418 F. Supp. 2d at 724, this holding may lead to the somewhat paradoxical result that the arbitration panel finds that contract terminated and therefore that Lincoln General had no obligation to

arbitrate. But the arbitrators equally might find that the contract is not terminated and that Lincoln General is therefore subject to arbitration. The FAA and Supreme Court precedent shift the balance between these two alternatives in favor of arbitration. The defendants' motion to compel arbitration will therefore be granted.

Within their motion to compel arbitration, the defendants request dismissal of this action. The Third Circuit has held, however, that it is error for a district court to dismiss a suit on the ground that all issues are subject to arbitration; rather, the proper remedy is to stay the litigation pending arbitration. *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 269 (3d Cir. 2004). Therefore, the Court will enter an order compelling Lincoln General to submit the claims raised in this action to arbitration and staying this action pursuant to 9 U.S.C. § 3 pending such arbitration.

C. Cross-Motions to Confirm Arbitrators

Having found that this dispute is subject to arbitration, the Court will turn next to the parties cross-motions for appointment of arbitrators. The arbitration provision of the 2004 Treaty provides the following procedure for choosing the panel of three arbitrators to which a dispute is submitted:

> One arbitrator will be chosen by each party and the two arbitrators will, before instituting the hearing, choose an impartial umpire who will preside at the hearing. If either party fails to appoint its arbitrator within 30 days after being requested to do so by the other party, the latter, after 10 days notice by certified or registered mail of its intention to do so, may appoint the second arbitrator.

(Compl., Ex. C.)

As noted above, on February 14, 2008, Clarendon demanded arbitration with Lincoln General and informed Lincoln General that it had 30 days to name its arbitrator. On March 13, 2008, Lincoln General filed this action in state court, seeking *inter alia*, a declaration that it has no duty to arbitrate. On March 18, 2008, Clarendon notified Lincoln General that 30 days had elapsed since the arbitration demand, and that if Lincoln General did not name an arbitrator within 10 days, Clarendon would appoint an arbitrator on Lincoln General's behalf. On March 21, 2008, Lincoln General advised Clarendon of its belief that it was inappropriate to name an arbitrator in light of its declaratory judgment action. On

that same date, Clarendon named Richard White as its arbitrator. On March 28, 2008, Lincoln General filed a motion to stay the arbitration in its state court action.

On March 31, 2008, Clarendon removed this action to this Court. Clarendon submitted Lincoln General's complaint with its notice of removal, but did not attach a copy of the motion to stay the arbitration and did not mention the motion in its notice. (*See* Doc. 1.) The removal statute, 28 U.S.C. § 1446(a), requires removing defendants to attach to their notice of removal "all process, pleadings, and orders" served upon them in the state action. While a motion is technically not process, a pleading, or an order, the defendants should have brought this pending motion to the Court's attention upon removal, especially given their correspondence which purported to comprehensively describe the status of this litigation.[3] *See, e.g.*, May 29, 2008 Letter from Attorney Friedman at 2. Upon the defendants' failure to file the motion with their notice of removal, however, one would have expected Lincoln General to, at least, apprise the Court of the pending motion, if not file a brief in support thereof in accordance with Local Rule 7.5, which became controlling upon removal of this action to this Court. *See* Fed. R. Civ. P. 81(c). Although alluded to by the defendants in their brief in support of

[3] Although the defendants were remiss in failing to bring the motion to the Court's attention, we note that their failure to do so is not a jurisdictional defect requiring remand of this action. *See* Wright & Miller, 14C Fed. Prac. & Proc. Juris. 3d § 3733.

their motion to compel arbitration (Doc. 11 at 19) and mentioned in Lincoln General's brief in support of its motion to remand (Doc. 15 at 3) and brief in opposition to the defendants' motion to compel arbitration (Doc. 16 at 3), the motion to stay arbitration itself did not appear in the record before this Court until it was filed as an exhibit to Lincoln General's answer to Clarendon's motion to confirm its arbitrator.[4] (Doc. 30-2 at 2.)

On March 31, 2008, Clarendon also designated Peter Scarpato as Lincoln General's arbitrator on the ground that Lincoln General had failed to name an arbitrator within the time required by the treaty's arbitration provision. On April 1, 2008, Lincoln General appeared in state court for argument on its motion to stay the arbitration, but was only able to advise the state court that the action had been removed to this Court. On April 4, 2008, Lincoln General rejected Clarendon's appointment of Scarpato, reserved its right to appoint an arbitrator should it be judicially compelled to do so, and indicated that, solely for purposes of preserving this right, it would name an arbitrator within 30 days. On April 30, 2008, Lincoln General designated Constance Foster as its arbitrator, while reserving its rights in

[4] Although the motion to stay arbitration was never properly put before the Court and was never briefed, for the sake of completeness, the Court will deny the motion without prejudice as moot in light of the decision to grant the defendants' motion to compel arbitration.

connection with this litigation. On that same date, Clarendon rejected Foster's appointment.

In addition to this background, Lincoln General has pointed to certain facts which it argues demonstrate Scarpato's bias in favor of Clarendon. After being informed by counsel for Clarendon of his appointment, Scarpato understandably sought information from Clarendon and Lincoln General regarding who would pay for his services in the matter. Lincoln General, which had rejected Scarpato's appointment, refused to pay. Without informing Lincoln General, Scarpato then sought payment from Clarendon, the party that had appointed him. Lincoln General claims that Scarpato's contact with Clarendon, made without Lincoln General's consent or knowledge, was a breach of Scarpato's duties to Lincoln General as its party arbitrator, and that this breach renders him unable to serve as its arbitrator in this matter.

Thereafter, upon Lincoln General's appointment of Foster, Scarpato informed both Lincoln General and Clarendon that he would cease all activity in the matter until the status of his appointment was clarified by the parties or this Court. Clarendon, however, responded by requesting that Scarpato resume service as Lincoln General's arbitrator, offered to advance his retainer on Lincoln General's behalf, and further offered to hold Scarpato harmless and defend him

against any effort to prevent him from serving as an arbitrator in the matter. While disagreeing with the claim that he had acted improperly or was disqualified from serving as Lincoln General's arbitrator, Scarpato informed both parties that he would await the Court's decision regarding his status. Lincoln General claims that Clarendon's offer to compensate and defend Scarpato disqualify him from serving as its arbitrator because these offers create, at least, the appearance that Scarpato is under Clarendon's control.

The essential issue raised by the parties' cross-motions to confirm their arbitrators is whether Lincoln General's failure to appoint an arbitrator within the time limits set forth in the parties' arbitration agreement waived its right to appoint an arbitrator at all. The parties have not cited to, and the Court's independent research has not uncovered, any controlling precedent on this question. The parties' submissions, however, have accurately identified the divergent lines of precedent addressing this issue.

The first line of cases strictly enforces the unambiguous terms of an arbitration provision and holds that a party failing to appoint an arbitrator in accordance with those terms has waived the right to do so. *See, e.g.*, *Universal Reins. Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994); *Certain Underwriters at Lloyd's of London v. Argonaut Ins. Co.*, 444 F. Supp. 2d 909 (N.D. Ill. 2006);

Nat'l Planning Corp. v. Achatz, 2002 WL 31906336 (W.D.N.Y. Dec. 17, 2002); *Everest Reins. Co. v. ROM Reins. Mgmt. Co., Inc.*, 756 N.Y.S.2d 739 (N.Y. App. Div. 2003); *Employers Ins. of Wausau v. Jackson*, 527 N.W.2d 681 (Wis. 1995). These cases generally reason that an agreement to arbitrate is a contract like any other, and that the agreement reached by the parties should be enforced like any other. *See, e.g.*, *Universal*, 16 F.3d at 128. The cases draw support from the language of the FAA which states that "[i]f in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed."[5] 9 U.S.C. § 5. *See, e.g., id.* at 128-29. Additionally, they rely on the Supreme Court's admonition that courts "rigorously enforce agreements to arbitrate," so as to effect the goals of the FAA: the enforcement of private agreements to arbitrate and the encouragement of efficient and speedy dispute resolution. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Universal*, 16 F.3d at 128 (citing *Southland*, 465 U.S. at 7).

[5] This same provision of the FAA goes on to state, however, that "if a method be provided and any party thereto shall fail to avail himself of such method ... then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein."

A second line of cases holds that a relatively minor delay in appointing an arbitrator does not waive a party's right to do so. *See, e.g.*, *Texas E. Transmission Corp. v. Barnard*, 285 F.2d 536 (6th Cir. 1960); *Ancon Ins. Co. (U.K.) Ltd. v. GE Reins. Corp.*, 480 F. Supp. 2d 1278 (D. Kan. 2007)*; New England Reins. Corp. v. Tennessee Ins. Co.*, 780 F. Supp. 73 (D. Mass. 1991); *Compania Portorafti Commerciale, S.A. v. Kaiser Int'l Corp.*, 616 F. Supp. 236 (S.D.N.Y. 1985); *Lobo & Co. v. Plymouth Navigation Co. of Monrovia*, 187 F. Supp. 859 (S.D.N.Y. 1960); *In re Utility Oil Corp.*, 10 F. Supp. 678 (S.D.N.Y. 1934). These cases generally rely on the rule of contract law that, unless an agreement explicitly states otherwise, time is not of the essence, and therefore a short, non-prejudicial, and good faith delay will not deprive a party of its bargained-for right to appoint an arbitrator. *See, e.g.*, *Ancon*, 480 F. Supp. 2d at 1283-84. This line of cases also reasons that this holding reflects the intent of the parties and furthers the purposes of the FAA by enforcing the parties' agreement to proceed before a fair and impartial arbitral panel of their mutual choosing. *See, e.g.*, *Texas Eastern*, 285 F.2d at 540; *Ancon*, 480 F. Supp. 2d at 1285; *New England Reins.*, 780 F. Supp. at 77-78; *Compania Portorafti*, 616 F. Supp. at 239.

A third, and less frequently invoked, line of cases holds that the effect of a party's untimeliness in selecting an arbitrator is itself a question to be submitted to

arbitration. *See, e.g.*, *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242 (5th Cir. 1998); *Carter v. Cathedral Ave. Co-op., Inc.*, 658 A.2d 1047 (D.C. 1995). These cases reason that this question may fall within the scope of a broad arbitration agreement, *Gen. Motors*, 146 F.3d at 251-52, and that issues of timeliness and panel composition are procedural matters to be determined by arbitrators rather than courts, *Carter*, 658 A.2d at 1049-50.

As these conflicting authorities illustrate, courts have found the question before us to be somewhat difficult.[6] However, our determination is aided by the factual summary relating to the selection of the arbitrators in this case as set forth above. In the circumstances of this case, the Court finds more persuasive the reasoning of the cases which hold that a relatively short, non-prejudicial, and good faith delay in appointing an arbitrator does not waive a party's right to do so. Notably, Lincoln General promptly sought judicial review of its obligation to arbitrate and a quick hearing on its motion to stay the arbitration. Resolution of the stay motion, which would have clarified the parties' duties regarding the

[6] For example, in *Universal Reinsurance*, the Seventh Circuit initially affirmed, over a dissent, the district court's confirmation of a reinsurer's untimely appointment of an arbitrator on the ground that the late appointment was not a material breach of the arbitration agreement. *See* 995 F.2d 113 (7th Cir. 1993). On rehearing, however, the court vacated its opinion and strictly enforced the terms of the agreement for the reasons noted above. *See* 16 F.3d 125 (7th Cir. 1994). After rehearing, the concurring opinion of two judges of the three-judge panel acknowledged the competing line of reasoning but concluded that "[i]t is time to put this difficult-to-decide case behind us." *Id.* at 130 (Cudahy, J. concurring).

arbitration, was delayed by the removal of the case to this Court and the defendants' (and Lincoln General's) failure to bring the motion to the Court's attention. The defendants broadly allege bad faith on Lincoln General's part, but the record before us does not demonstrate motives any more nefarious than those of any other litigant prosecuting a genuine legal dispute. The defendants will suffer little prejudice by the confirmation of Lincoln General's arbitrator. Both sides will receive precisely what they bargained for: arbitration before an impartial panel of three arbitrators, one chosen by each party and an umpire chosen by the parties' arbitrators. Although it is perhaps too fine a distinction, the delay in the commencement of the arbitration has been occasioned by Lincoln General's resort to the judicial process and the parties' subsequent over-papering of this case, rather than Lincoln General's untimeliness in appointing an arbitrator. Moreover, although moving ahead with the arbitration before arbitrators selected exclusively by Clarendon may appear advantageous to the defendants at this juncture, such a proceeding would undoubtedly entail further delay and litigation in attempting to enforce any award against Lincoln General. While the Court cannot fault Scarpato for attempting to determine who would be responsible for his fee, the circumstances of his appointment have already raised the issue of his impartiality. Especially in light of these circumstances, proceeding with arbitration before a

panel chosen completely by Clarendon would certainly subject any resulting award to attack on the grounds of bias. *See* 9 U.S.C. § 10(a)(2) (stating an arbitral award may be vacated by a district court "where there was evident partiality or corruption in the arbitrators"); *Universal*, 16 F.3d at 130 (Cudahy, J. concurring) (questioning whether having all arbitrators selected by one party renders the proceeding *per se* partial and any award vulnerable on the basis of partiality).

In sum, the lack of cooperation and collegiality in Lincoln General's rush to the courthouse and Clarendon's rush to the arbitral panel have so muddied the waters that the best way to effectuate the parties' intent to arbitrate before an impartial and mutually selected panel, and the FAA's intent of getting them there, is to return to the *status quo ante* and proceed with a properly constituted panel of arbitrators. This is a case where otherwise good lawyering has, at least as to the selection of an arbitrator, lapsed into unseemly gamesmanship. As stated in *Universal Reinsurance*, it is now time to put this aspect of the instant case behind us. Clarendon's motion for confirmation will be denied, Lincoln General's will be granted, and the parties will proceed to arbitration before Richard White, Constance Foster, and an umpire selected in accordance with the arbitration provision of the 2004 Treaty.

D. RIC's Motion to Dismiss

Defendant RIC has moved to dismiss Lincoln General's claims under Rule 12(b)(1) on the ground that there is no justiciable controversy between the parties.[7] RIC contends that, although it was a party to the 2004 Treaty, it is no longer a part of the group of insurance companies that entered into the agreement with Lincoln General, after its sale to QBE Holdings as detailed above. RIC notes that it did not demand arbitration with Lincoln General, that it was sold before the arbitration demand was made by Clarendon, and that it does not intend to participate in any arbitration. RIC also notes that it did not demand that Lincoln General post collateral and claims that it has no interest in such collateral because no policies written by RIC are actually reinsured by Lincoln General under the 2004 Treaty.

In response to RIC's contention that none of the business reinsured by Lincoln General under the 2004 Treaty includes RIC policies, Lincoln General proposed that RIC agree to a consent judgment that RIC has no claims against Lincoln General under the treaty. RIC refused. Lincoln General therefore argues that RIC must remain in this action because it is admittedly a party to the 2004 Treaty and Lincoln General has requested a declaration of its rights and obligations

[7] In response to Lincoln General's motion for remand, RIC also argues that it should be dismissed as a dispensable party to preserve diversity jurisdiction. Because Lincoln General's motion for remand will be denied , the Court will not consider this alternative argument.

under that treaty, including whether any justiciable controversies exist between it and any other party to the treaty.

The Court will refrain from resolving RIC's motion to dismiss at this juncture because a decision on the merits of the motion may intrude on the province of the arbitrators. Lincoln General seeks a declaration that no justiciable controversy exists between it and the other parties to the 2004 Treaty. As the Court has already held, this dispute is properly the subject of arbitration. By determining on RIC's motion whether any justiciable controversy exists between it and Lincoln General, the Court may be forced to make determinations that are properly made in the first instance by the arbitrators. RIC's motion will therefore be held in abeyance pending arbitration.

RIC has stated its intent not to participate in the arbitration.[8] The Court, however, will order Lincoln General to submit the claims raised in this action to arbitration in accordance with the 2004 Treaty. To the extent this requires Lincoln General to demand arbitration against RIC, it should do so in accordance with the arbitration agreement contained in the treaty.

[8] The Court notes, however, that the motion to compel arbitration was filed by all defendants in this action, including RIC. (*See* Doc. 10, Doc. 11 at 2.)

III. CONCLUSION

For the foregoing reasons, the Court will deny Lincoln General's motion for remand and will retain jurisdiction over this action. The defendants' motion to compel arbitration will be granted. Lincoln General shall submit the claims raised in this action to arbitration in accordance with the arbitration provision of the 2004 Treaty. This action will be stayed pending such arbitration. Clarendon's motion to confirm arbitrator will be denied, and Lincoln General's motion to confirm arbitrator will be granted. Clarendon's appointment of Peter Scarpato as arbitrator shall be vacated, and Lincoln General's appointment of Constance Foster as arbitrator shall be confirmed. The parties will proceed to arbitration before a panel of Richard White, Constance Foster, and an umpire chosen in accordance with the arbitration provision of the 2004 Treaty. Finally, RIC's motion to dismiss will be held in abeyance pending arbitration.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Lincoln General's Motion for Remand (Doc. 14) is DENIED;

2. Defendants' Motion to Stay Litigation and Compel Arbitration (Doc. 10) is GRANTED;

3. Lincoln General shall forthwith submit the claims raised in this action to arbitration in accordance with the arbitration provision of the 2004 Treaty;

4. This action is hereby STAYED pursuant to 9 U.S.C. § 3 pending such arbitration;

5. Clarendon's Motion to Confirm Arbitrator (Doc. 28) is DENIED;

6. Clarendon's appointment of Peter Scarpato as Lincoln General's arbitrator is VACATED;

7. Lincoln General's Motion to Confirm Arbitrator (Doc. 32) is GRANTED;

8. Lincoln General's appointment of Constance Foster as its arbitrator is CONFIRMED;

9. RIC's Motion to Dismiss (Doc. 18) will be held in abeyance pending the arbitration ordered above; and

10. All parties shall promptly notify the Court by record filing upon resolution of the arbitration and, in any event, shall file a report as to the status of the arbitration on December 12, 2008.

s/ John E. Jones III
John E. Jones III
United States District Judge