NOT FOR PUBLICATION [Docket No. 28]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

CERTAIN INTERESTED UNDERWRITERS AT LLOYDS' SUBSCRIBING TO THE FOLLOWING TREATIES: 1993, TREATY NUMBER 482/93; 1994, TREATY NUMBER 482/94 1995, TREATY NUMBER 482/95; 1996, TREATY NUMBER ES1649696, Petitioner, v. PINEHURST ACCIDENT REINSURANCE GROUP, et al., Respondents.	Civil No. 08-2950 (RMB) **MEMORANDUM AND ORDER**

Appearances:

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BUMB, United States District Judge:

This matter comes before the Court in the context of a petition to confirm an arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., brought by the petitioner, Certain Interested Underwriters at Lloyds' ("Underwriters"), and which was unopposed by the respondent,

Pinehurst Accident Reinsurance Group ("PARG"). At a hearing on December 18, 2008, the Court granted the unopposed motion to confirm an arbitration award, but recognizing that the parties had differing interpretations of the award, the Court requested further briefing on enforcement of the award. For the reasons set forth herein, the Court vacates its Order confirming the arbitration award and remands the award to the arbitrator for clarification.

Background Facts

The Court has been disheartened by the acrimonious tone the present dispute has taken. It is, indeed, "both ironic and unfortunate that arbitration, a process designed to accomplish the peaceful and speedy resolution of labor disputes, should have devolved into the bitter impasse before us." Office & Professional Employees International Union, Local No. 471 v. Brownsville General Hospital, 186 F.3d 326, 333 (3d Cir. 1999)

PARG provides reinsurance coverage to various insurance companies (referred to as the "underlying insured" or "underlying contracts"). PARG, in turn, reinsures some of the accompanying risk in what is called a "retrocession". This case arises from Underwriters' reinsurance of PARG, as managed by AUL Reinsurance Management Services ("AUL/RMS"), under the Group Accident Quota Share Reinsurance Treaties (the "Optimum Retro Treaties") for the 1993 through 1999 underwriting periods.

A dispute arose between PARG and Underwriters in connection with the Optimum Retro Treaties. In December 2006, Underwriters demanded arbitration pursuant to the arbitration clause in the Optimum Retro Treaties, and the parties submitted the dispute to a panel of three arbitrators (the "Panel"). On August 27, 2007, the Panel issued an Interim Order. Following an evidentiary hearing held on March 31 through April 4, 2008, the Panel issued a Final Order on May 14, 2008. In August 2008, Underwriters filed, in this Court, a petition to confirm the arbitration award, as well as a motion to deposit funds into court pursuant to Federal Rule of Civil Procedure 67(a). After oral argument, the Court confirmed the arbitration award by Order dated December 18, 2008, and dismissed the other motions as moot. By a Consent Order dated December 22, 2008, Underwriters agreed to remit the proposed tender to PARG's attorneys under a reservation of rights and without prejudice to be held in escrow in an interest-bearing account pending the Court's decision on enforcement of the award.

Legal Standard

District courts have jurisdiction to confirm and enforce arbitration awards. China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 278 (3d Cir. 2003). In the context of a confirmation or enforcement proceeding, a court may remand an arbitration award to the arbitrator if: (1) a mistake in need of correction is apparent on the face of the

award, (2) the award does not adjudicate an issue which has been submitted, or (3) an ambiguity arises which affects the award's enforceability. Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 332 (3d Cir. 1991). An ambiguity requiring remand may arise either on the face of the award or from extraneous but objectively ascertainable facts. Office & Professional Employees International Union, Local No. 471, 186 F.3d at 333. Courts should not attempt to "divine the intent of the arbitrator, a perilous endeavor." Id. Rather, remanding the award "avoids the court's misinterpretation of the award and is therefore more likely to give the parties the award for which they bargained." Colonial Penn, 943 F.2d at 334; see also New York Bus Tours, Inc. v. Kheel, 864 F.2d 9, 12 (2d Cir. 1988) ("When an arbitration award provides no clear instruction as to how a court asked to enforce the award should proceed, the court should remand to the arbitrator for guidance.").

Discussion

The Court is now called upon to interpret the arbitration award, as specified in the Panel's Final Order. The Court held a hearing on this matter on March 10, 11, and May 11, 2009, which focused primarily on the interpretation of paragraph four of the Final Order. In paragraph four, the Panel reaffirmed the ruling of its Interim Order and rejected the Petitioners' definition of what constitutes a mandatory commutation clause. The Panel then

gave examples of what it considered to be mandatory commutation clauses, found in the State Compensation Insurance Fund of California Effective January 1, 1993 (FP40614) (the "California Treaty"), (Pl.'s Ex. 22), and Texas Workers' Compensation Insurance Fund Effective January 1, 1994 (FP40703) (the "Texas Treaty"), (Def.'s Ex. 5). The Panel held that "[a]s to these [foregoing] examples and any other contracts with this mandatory commutation language within the relevant time period, the Parties are ordered to calculate on an as is basis what the results of these treaties would have been if they had been commuted as required by the language of the treaties." (Joint Ex. 1 (emphasis added).) However, the Final Order left the parties to determine which other treaties contain the applicable "mandatory commutation language," as well as the monetary value of the commutations. Both of these issues are now disputed.

Thus, to enforce the award, the Court must determine whether the various treaties in dispute contain "mandatory commutation language," as contemplated by the Final Order. Twenty-four treaties are now in dispute: Underwriters believes these treaties contain a mandatory commutation clause to which the Final Order applies; PARG maintains that these treaties' commutation provisions are not mandatory under the Final Order. The Court conducted a hearing spanning several days, at which testimony focused on the scope of the treaties, i.e., whether or

not the treaties in dispute fall within paragraph 4 of the Final Order.

The dispute between the parties can be boiled down to one overarching difference: PARG argues that if the treaties' commutation clauses have any permissive or discretionary language, they do not fall within the Order; Underwriters argues, however, that even mandatory commutation clauses may provide some margin of discretion, for example, by allowing the parties, if they agree, to "carve out" (or "pull out") certain claims from the commutation.

According to PARG, the examples provided by the Panel indicate that the only treaties mandating commutation are those leaving the parties no discretion in arriving at a value for all losses. In support of this view, they point to this language from one of the Panel's example-treaties:

> [T]he Fund shall submit a statement to the Reinsurer listing amounts paid and reserves, in respect to all losses. This statement shall form the basis of a final agreed value for all such losses. . . . This statement, duly signed by the Fund, shall then be deemed to be the full and final statement of all such losses, and the Reinsurer shall promptly pay the Fund any amounts that may be shown to be due.

(California Treaty, Pl.'s Ex. 22.) Observing that there is no discretionary act contemplated by this commutation clause, PARG argues that any clause with discretionary or permissive language is not "mandatory" within the Panel's Final Order. In particular, PARG points to five factors shared in common by the

Panel's example-treaties, which, PARG maintains, are necessary for a commutation clause to be deemed "mandatory": (1) the word "shall" (rather than "may"), (2) a population of claims to be commuted, (3) a set date or limited time-frame for the commutation, (4) a method of calculating risk value, and (5) a required, definitive end to the treaty. (Tr., May 11, 2009, at 455-461.)

Underwriters counters, however, that a commutation clause may still be mandatory within the meaning of the Final Order, even while providing the parties with a margin of discretion. Specifically, Underwriters argues that commutation clauses are enforceable, and thus mandatory, even when they include a provision allowing the parties to "carve out" certain claims from the commutation. Underwriters maintains that the rigid five-factor test advocated by PARG lacks a basis in industry practice.

The Court understands the parties' respective positions. Still, a number of vexing questions remain.

As to the problem of "carve-out" provisions: Accepting that the carving-out of losses from commutations is typical in the industry -- as evidenced by the testimony -- it is unclear whether the absence or presence of this language in the disputed treaties was significant to the Panel's decision.

As to the five factors, which PARG avers are necessary for a commutation clause to be deemed "mandatory":

First, although PARG has identified five attributes shared by the commutation clauses of the Panel's two example-treaties, PARG has not established that these five attributes were contemplated by the Panel when it selected these treaties as examples. (Of course, it is in PARG's interest to apply the Panel's decision as narrowly as plausible.) The Court is unsure what combination of these five attributes gives a commutation clause "mandatory" effect under the Final Order.

Second, it is far from clear that even the Panel's two example-treaties conform to the rigid standard advocated by PARG. In particular, paragraph C of the California Treaty's commutation clause appears to grant some discretion to the parties. That provision permits calculation of the commutation value by "[a]ny other method of calculating the agreed value of one or more losses as mutually agreed between the Fund and the Reinsurer." (California Treaty, Pl.'s Ex. 22.) It is not clear whether this is to be construed as a traditional "carve out" provision, leaving the parties with discretion (upon mutual agreement) to commute while continuing reinsurance of particular claims. If so, the implications for the 24 disputed treaties create an array of new questions, namely, if a "mandatory" commutation clause may provide a margin of discretion, how much discretion is permissible before a commutation clause is no longer deemed "mandatory"?

Thus far, the Court has raised only questions that were broached in its hearing on this matter. Other equally vexing questions lurk down the road. For example, the Final Order's text could be read to suggest that the Panel anticipated that the parties would return to seek approval of their final calculations. Evidently, the parties do not agree on the method of calculation under the treaties. Thus, even if the Final Order were clear as to which treaties mandated commutation, it would still lack clarity on how the parties must proceed in commuting the treaties.[1]

In short, the Court finds that paragraph four of the Final Order is ambiguous. The Court will not -- and indeed should not -- engage in a guessing game as to what the Panel had in mind. See Office & Professional Employees Intern. Union, Local No. 471, 186 F.3d at 332 ("[A] remand for clarification . . . gives the arbitrator the opportunity to clarify an award with respect to which an ambiguity has arisen rather than forcing the court to interpolate its own estimate of the arbitrator's intent."). The Court is mindful that "remand is to be used sparingly," Colonial Penn, 943 F.2d at 334, and has tried to make sense of the Final Order without speculating about the Panel's intentions. This

[1] The Panel's failure to resolve the dispute conclusively arguably constitutes a failure to adjudicate an issue which was submitted for arbitration. See Colonial Penn, 943 F.2d at 332 (holding that the failure to adjudicate is a basis for remand). Regardless, it quite clearly renders the award ambiguous.

task, however, proved impossible. The Court therefore vacates its Order confirming the arbitration award and remands the award to the arbitrator for clarification.

Accordingly, for the reasons stated herein, it is on this, the **20th** day of **May 2009**, hereby

ORDERED that the Court's December 18, 2008 Order confirming the arbitration award [Docket No. 24] is **VACATED**; and it is further,

ORDERED that the award is **REMANDED** to the arbitration panel for clarification; and it is finally,

ORDERED that the CLERK OF THE COURT shall **CLOSE** this file.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge