UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL CASUALTY COMPANY,

Plaintiff,

-v-

08 CV 8062 (PGG)

Judge Gardephe

Magistrate Gornstein

ECF Case

MUTUAL MARINE OFFICE, INC.,
PACIFIC MUTUAL MARINE OFFICE, INC.,
MUTUAL INLAND MARINE OFFICE, INC.,
MUTUAL MARINE OFFICE OF THE MIDWEST, INC.,
UTICA MUTUAL INSURANCE COMPANY,
EMPLOYERS MUTUAL CASUALTY COMPANY,
MERCHANTS MUTUAL INSURANCE COMPANY,
THE LUMBER MUTUAL FIRE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
THE MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY,
ARKWRIGHT BOSTON INSURANCE COMPANY n/k/a COFACE NORTH AMERICA INSURANCE COMPANY,
ARKWRIGHT BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY n/k/a COFACE NORTH AMERICA INSURANCE COMPANY,
NEW YORK MARINE INSURANCE COMPANY
NEW YORK MARINE AND GENERAL INSURANCE COMPANY,
THE PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,

Defendants.

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NATIONAL CASUALTY COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STAY OR DISMISS, COMPEL ARBITRATION AND APPOINT AN ARBITRATOR

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PRELIMINARY STATEMENT

National Casualty Company ("National Casualty") filed this lawsuit to accomplish the two things it has been unable to achieve through direct dealings with Mutual Marine Office, Inc. and the other named defendants (collectively "MMO"). First and foremost, National Casualty seeks to obtain information about the claim or claims that make up the $240,450.00 balance that MMO arbitration demand alleges is owed. Second, National Casualty seeks to establish that arbitration under the reinsurance contracts can only be commenced by transmittal of a demand through the contractual intermediary – Guy Carpenter & Company, Inc.

Information identifying the claim or claims that the arbitration demand alleges are owed is paramount for two reasons. First, arbitration under the reinsurance contracts is restricted to disputes involving contract interpretation and any transaction thereunder. MMO's unwillingness to provide claim specifics, e.g. date of loss, original insured, claim number and amount of loss, it is not possible for National Casualty or the Court to determine whether the claim or claims are transactions under the reinsurance contracts.

Second, arbitration under the reinsurance contracts is only required if a "dispute" exists. Since MMO refuses to identify the claim or claims allegedly in dispute and National Casualty's records reveal no outstanding or disputed claims, National Casualty rightly questions whether a dispute exists. MMO could not possibly seek recovery of $240,450.00 unless it possessed the claim particulars and its refusal to share that information with National Casualty and the Court is confounding.

The reinsurance contracts in issue specifically state that all communications relating thereto shall be transmitted to MMO and National Casualty through Guy

Carpenter & Company, Inc. Instead of following this agreed to approach, MMO sent its arbitration demand to an outside law firm and an in-house attorney of a company affiliated with National Casualty. Rather than simply resending its demand through the appropriate channel once the error was brought to its attention, MMO has remained intransigent and resolutely mute. Compliance with something required by the reinsurance contracts and so simple to accomplish is not more than National Casualty is entitled to expect, but apparently is not achievable for MMO unless judicially commanded.

Under prevailing law and with due consideration to efficiency and practicality, National Casualty urges the Court to resolve this matter through the following approach.

1. Tentatively find that MMO did not demand arbitration in accordance with the terms of the parties' agreement and strongly encourage MMO to send the demand through Guy Carpenter and thereby make the service issue moot.
2. Conclude that MMO's motion to dismiss is not ripe on the grounds that the Court must have the claim particulars before it can determine whether the claim or claims fall within the scope of the parties' agreement to arbitrate.
3. Order MMO to produce the claim particulars to National Casualty within 5 business days and give National Casualty 10 business days to determine whether it agrees or disagrees that the identified claim or claims are arbitrable.
4. If no dispute regarding arbitrability remains following disclosure of the claim particulars, then as soon thereafter as practical the Court will entertain the umpire selection issue. If a dispute regarding arbitrability does remain, then as soon

thereafter as practical the Court will rejoin the motion to dismiss or stay/compel and, assuming there are items to be arbitrated, the umpire selection issue.

STATEMENT OF CASE

The facts relevant to MMO's motion are not in dispute.

MMO as the reinsured and National Casualty as the reinsurer entered into six separate and distinct reinsurance contracts.[1] Each one of the Treaties contains the identical article entitled "Arbitration".

Relevant to addressing MMO's motion, the arbitration clause in each Treaty states as follows.

> If any dispute shall arise between [MMO] and [National Casualty] with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen.[2]

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[1] The six reinsurance contracts, commonly referred to by the parties as the "Treaties," are attached as exhibits 1-6 to National Casualty's complaint.

[2] The entire arbitration clause in each Treaty reads as follows.

> If any dispute shall arise between the [MMO] and the [National Casualty] with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within thirty days after the receipt of written notice from the other party requesting it to do so, the requesting party may nominate two arbitrators who shall choose the third. Each party shall submit its case to the arbitrators within thirty days of the appointment of the arbitrators. The arbitrators shall consider this Agreement an honourable [sic] engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. The decision of a majority of the arbitrators shall be final and binding on both [MMO] and [National Casualty]. The expense of the arbitrators and the arbitration shall be equally divided between the [MMO] and the [National Casualty]. Any such arbitration shall take place in New York, unless some other location is mutually agreed upon by [MMO] and [National Casualty].

See, e.g, Complaint Exhibit 1 at Article XVI p. 7.

Each Treaty also contains an article entitled "Intermediary Clause". Relevant here, each Treaty's intermediary clause reads, in pertinent part, as follows.

> Guy Carpenter & Company, Inc., are hereby recognised [sic] as the Intermediaries negotiating this Agreement for all business hereunder, except Canadian business, on which Guy Carpenter & Company (Canada) Limited are hereby recognised [sic] as the Intermediaries. All communications relating thereto shall be transmitted to [MMO] and [National Casualty] through Guy Carpenter & Company, Inc., 110 Williams Street, New York, New York 10038, (acting on behalf of themselves and Guy Carpenter & Company (Canada) Limited).[3]

On August 12, 2008, MMO's counsel sent a letter via registered mail and federal express to Attorney Mark C. Kareken.[4] The letter states that it is enclosing "by way of service" a demand for arbitration and that the demand has also been "served" on Mendes & Mount "in accordance with the provisions of the Treaties." The letter also states that MMO seeks payment "of balances" from National Casualty under the Treaties.

The enclosed demand for arbitration, among other things not relevant here, contains the following statement.

> MMO demands arbitration and seeks a hearing to resolve disputes with National Casualty that arise from the interpretation of the reinsurance contracts and the parties' rights with respect to transactions involved, including National Casualty's wrongful failure to pay balances due MMO pursuant to the Treaties and to seek security for reserves in the form of a Letter of Credit.[5]

The demand goes on to make the following prayer for relief.

> MMO seeks an award: (i) ordering National Casualty to pay balances due under the Treaties currently in the amount of $240,450.00, together with interest thereon; (ii) declaring that National Casualty is liable for all

[3] *See* Complaint Exhibit 1 at Article XV p. 7; Ex. 2 at Article XV p. 7; Ex. 3 at Article XV p. 7; Ex. 4 at Article XVI p. 7; Ex. 5 at Article XVII p. 7 and Ex. 6 at Article XVII p. 10.
[4] *See* Complaint Exhibit 7.
[5] *See* Complaint Exhibit 8.

> claims submitted by MMO to National Casualty under the Treaties; (iii) declaring that National Casualty will continue to be liable for losses under the Treaties; (iv) ordering National Casualty to procure and maintain a Letter of Credit in an amount sufficient to secure all outstanding loss reserves and incurred but not reported loss reserves; (v) attorneys fees; and (vi) such additional damages and relief deemed appropriate, including costs and expenses as may be awarded by the arbitrators.

National Casualty, through Attorney Kareken, responded to the arbitration demand by letter of August 22, 2008.[6] Therein, National Casualty pointed out that Attorney Kareken was not authorized to accept "service" of the demand and that the proper procedure would be to send the demand through Guy Carpenter.[7] National Casualty advised that the demand was also deficient because MMO had failed to identify the claim or claims in dispute and that National Casualty was paying the only three claims (totaling $98,661.29) it could locate as outstanding on its books. With payment of the three claims and without further identification from MMO, National Casualty questioned the existence of an arbitrable dispute and advised that MMO's failure to provide the requested information would force National Casualty to seek judicial intervention.

MMO did not respond so on August 28, 2008, National Casualty sent another letter to MMO.[8] National Casualty reminded MMO that if it would just rectify the deficiencies of its demand (service and claim particulars) then the matter could move

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[6] *See* Complaint Exhibit 9.

[7] National Casualty also explained that "service" on Mendes & Mount was not effective either. Specifically, Mendes & Mount is designated in the Treaties as agent for service of process only with respect to non-domestic reinsurers. *See* Service of Suit Clause in Complaint Exhibit 1 at Article XVII p. 8; Ex. 2 at Article XVII p. 8; Ex. 3 at Article XVII p. 8; Ex. 4 at Article XVIII p. 8; Ex. 5 at Article XVIII p. 8 and Ex. 6 at Article XIX pp. 10-11. National Casualty is a domestic reinsurer – organized and existing under the laws of the State of Wisconsin.

[8] *See* Complaint Exhibit 10.

forward. National Casualty again advised MMO that its failure to act in a commercially reasonable manner was leaving National Casualty with little choice but to seek judicial redress and provided MMO with a draft of the complaint National Casualty advised that it would file if the deficiencies were not corrected. Again, MMO did not respond.

By letter of September 11, 2008, National Casualty advised MMO that it had commenced this lawsuit and offered to provide courtesy copies to MMO's counsel.[9] In order to prevent the loss of its right to name its arbitrator, but without waiving its contentions regarding the deficiencies, National Casualty appointed Spiro K. Bantis as its arbitrator.

This time MMO did respond, but not with the requested information or an indication that it would resend the arbitration demand through Guy Carpenter.[10] Instead, MMO's counsel requested the proffered courtesy copies and advised of its intention to move forward with umpire selection. National Casualty responded by, *inter alia*, providing the courtesy copies.[11] National Casualty objected to moving forward with the umpire selection process with the following.

> We note your stated expectation that the party appointed arbitrators proceed with the umpire selection process. We respectfully disagree. National Casualty does not believe that arbitration has been commenced and it filed the lawsuit to have that issue resolved. National Casualty named Mr. Bantis solely for the purpose of preventing an adverse selection of its arbitrator pending the outcome of the litigation.

[9] *See* Declaration of Mark C. Kareken submitted herewith at ¶ 7 and Exhibit 1 attached thereto.
[10] *See* Kareken Declaration at ¶ 8 and Exhibit 2 attached thereto.
[11] *See* Kareken Declaration at ¶ 9 and Exhibit 3 attached thereto.

In a letter of September 25, 2008, National Casualty objected again to MMO's push for selection of an umpire.[12] National Casualty implored MMO to end the need for the litigation with the following.

> We take this opportunity to remind MMO that this unfortunate circumstance could have been avoided. We promptly notified MMO of National Casualty's concerns, which MMO chose to ignore, forcing us to commence the declaratory judgment action. We do not understand why MMO would prefer to litigate about arbitration when it could simply identified for National Casualty what claims are allegedly in dispute. With the hope of ending or at least truncating the pending court action, we again invite MMO to identify the allegedly disputed claims.

MMO filed its motion to dismiss/stay/compel/appoint on October 17, 2008.

ARGUMENT

I. MMO's Arbitration Demand Is Deficient Because It Fails To Identify What Is In Dispute And Since The Court, Not The Arbitrators, Decides Whether The Dispute Is Arbitrable, But Cannot Make That Determination In The Absence Of Knowing What Is In Dispute, MMO Should Be Ordered To Produce The Needed Claim Information.

A. Prevailing law demonstrates that MMO's arbitration demand is deficient for failing to identify what is in dispute.

National Casualty maintains that MMO's demand is defective because it does not identify the alleged dispute with sufficient particularity, making it impossible to determine whether the dispute falls within the scope of the agreement to arbitrate. National Casualty's position is well supported by prior judicial decisions.

Pana-Oro and the predecessor to Johnson Matthey entered into a distribution agreement containing a clause requiring arbitration of "any dispute arising under this

[12] *See* Declaration of Mark C. Kareken submitted herewith at ¶ 10 and Exhibit 4 attached thereto.

Agreement". *Pana-Oro, S.A. v. Johnson Matthey Florida, Inc.*, Case No. 85 Civ. 9059, 1986 U.S. Dist. Lexis 29048 *1-2 (S.D.N.Y., Feb. 21, 1986).[13] Thereafter, Pana-Oro attempted to commence an arbitration with Johnson Matthey via a demand that identified the dispute as "[w]hether parties demanding Arbitration are indebted to parties against whom Arbitration is sought or whether the parties against whom arbitration is sought are indebted to Pana-Oro, S.A. and in any event, the amount of any indebtedness." *Id*. at *3. Pana-Oro then filed a petition to compel arbitration before the federal court in New York. *Id*. Johnson Matthey opposed arbitration on the grounds that the demand was not specific.

In resolving the matter, Judge Motley began by recognizing the long line of authority which holds that an arbitration demand must include more than a mere conclusory statement that a dispute exists and that it must specify the nature of the controversy. *Id*. at *4. Based on this precedent, Judge Motley concluded that the demand could not be enforced because it referred only to some general dispute concerning indebtedness under the contract. *Id*. at *6.

One of the cases relied upon by Judge Motley was *Unipak Aviation Corp. v. Mantell*, 20 Misc. 2d 1078, 196 N.Y.S.2d 126 (N.Y. Sup. Ct. 1959). There, Unipak and Mantell were parties to a contract containing an arbitration clause requiring that "[a]ny dispute which may arise hereunder … shall be resolved by Arbitration". 20 Misc. 2d at 1078, 196 N.Y.S.2d at 126. Thereafter, Unipak made the following demand for arbitration.

[13] A true and correct copy of the unreported *Pana-Oro* decision is attached as Exhibit 5 to the Declaration of Mark C. Kareken submitted herewith.

> Specific performance of the contract dated November 18, 1956 entered into by all parties mentioned in said contract, or in lieu thereof: payment of all damages sustained by the persons or firm aggrieved by such breach, and for such other and further relief as may be determined, together will all costs and disbursements in this proceeding.

20 Misc. 2d at 1078-1079, 196 N.Y.S.2d at 127. Mantell brought a motion to vacate the arbitration demand, which the court granted for the following reasons.

> The purported demand for arbitration is inadequate as petitioners cannot possibly be expected to proceed to arbitration without being apprised of the specific issues to be arbitrated. The demand does not sufficiently inform petitioners of the subject matter in dispute, as it asks for specific performance of the contract without indicating what provisions they are asking to be performed and without specifying either the nature of the alleged breach or the amount sought by reason thereof or whether the dispute is one which is arbitrable under the contract.

20 Misc. 2d at 1079, 196 N.Y.S.2d at 127.

Another decision relied on by Judge Motley was *Lease Plan Fleet Corp. v. Johnson Transportation, Inc.*, 67 Misc. 2d 822, 324 N.Y.S.2d 928 (N.Y. Sup. Ct. 1971). There Lease and Johnson had entered into a contract containing an arbitration clause requiring arbitration of "any dispute, claim, or controversy arising out of or pertaining to [the lease]". 67 Misc. 2d at 822, 324 N.Y.S.2d at 929. Johnson made an arbitration demand to resolve "a controversy arising out of an equipment contract". *Id*. Lease challenged the arbitration demand as defective. *Id*. Judge Boomer agreed with Lease ruling as follows.

> The demand [for arbitration] must state the specific nature of the *existing* controversy to be arbitrated. … [Johnson] shall be stayed from proceeding with arbitration pursuant to its notice, with leave, however, to the respondent to serve a new notice not inconsistent with this memorandum, particularly specifying the controversy to be arbitrated.

67 Misc. 2d at 823, 324 N.Y.S.2d at 930.

Judge Motley relied on two other cases in reaching his conclusion. *Nager Electric Co. v. Weisman Construction Corp.*, 29 A.D.2d 939, 289 N.Y.S.2d 473 (N.Y. Sup. Ct. App. Div. 1968)("[t]he demand must state the specific nature of the *existing* controversy to be arbitrated"); *Electronic & Missile Facilities, Inc. v. Campbell*, 20 A.D.2d 891, 248 N.Y.S.2d 944 (N.Y. Sup. Ct. App. Div. 1964)("the petition does not state the nature of any arbitrable dispute, as distinguished from asserting merely that there is a dispute"). Both of these cases involved all encompassing arbitration clauses and arbitration demands that failed to identify the specifics of the dispute to be arbitrated.

The situation here is virtually indistinguishable from the circumstances present in the foregoing cases. Like the parties in those cases, MMO and National Casualty entered into contracts with broad arbitration clauses. Like the parties in the foregoing cases, MMO makes a demand alleging the existence of a dispute by merely parroting the language of the parties' arbitration clause and vaguely asserting that "balances" are owed. Although the law clearly supports the invalidation of MMO's demand, the Court and parties would be better served by following Judge Boomer's approach, namely, permit MMO to rectify the deficiency by identifying the claim specifics.

B. The Court cannot determine whether the alleged dispute comes within the scope of the parties' agreement to arbitrate unless it knows what is in dispute.

The reason supporting specifics in an arbitration demand is well grounded in the law governing arbitration. First, and contrary to what MMO implies, courts, not arbitrators, decide what is arbitrable. *AT&T Technologies, Inc. v. Communication Workers of America, et al.*, 475 U.S. 643, 649 (1986)("the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator"); *Alliance Bernstein*

Investment Research and Management, Inc. v. Schaffran, 445 F.3d 121, 125 (2d Cir. 2006)(same).[14]

To determine whether a dispute is arbitrable comprises two questions: (1) whether a valid agreement to arbitrate exists and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of that arbitration agreement. *Hartford Accident & Indemnity Co. v. Swiss Reinsurance America Corp.*, 246 F.3d 219, 226 (2d Cir. 2001); *National Union Fire Insurance Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2nd Cir. 1996); *Progressive Casualty Insurance Company v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1986).

The parties here do not dispute the existence or validity of their agreement to arbitrate. Consequently, only the second issue is in play. What then does the Court require to make its determination?[15]

Is MMO's alleged entitlement to recover $240,450.00 from National Casualty sufficient for the Court to determine that the alleged dispute falls within the scope of the

[14] The only exception being where the arbitration parties have clearly and unmistakably provided otherwise, i.e. that the arbitrators are to determine their own jurisdiction. *AT&T*, 475 U.S. at 649; *Schaffran*, 445 F.3d at 125. The arbitration agreement between MMO and National Casualty contains no language vesting the arbitrators with authority to determine what is and is not arbitrable. Therefore, the rule announced by the Supreme Court in *AT&T* is controlling here and thus the Court, not the arbitrators, should determine what is arbitrable.

[15] MMO avoids this question preferring to argue that all matters should be referred to the arbitrators. This position is erroneous. None of the authorities on which MMO relies support its "cart-before-the-horse" proposition. In each and every case relied on by MMO the court determined arbitrability and had sufficient information to do it. The fact that each court found the arbitration agreement broad enough to encompass the particular dispute is of no moment to the question here which is what or how much information is needed to make the arbitrability determination. In the words of *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), arbitrability – whether the dispute is something the party agreed to arbitrate – is a "gateway" matter.

parties' agreement to arbitrate? National Casualty submits that the insufficiency is most evident when one has a cursory understanding of the way the Treaties work.

MMO wrote marine insurance. Every policy of marine insurance MMO wrote, however, impaired its surplus – the margin between its assets and liabilities – impacting its ability to write other policies, i.e. collect more premium. So, MMO reduced this impact by spreading the risks it is wrote through the purchase of reinsurance, in this case the Treaties. In simplified terms the Treaties apply only to loss above a specified amount arising out of certain categories of marine insurance written during the effective period of the Treaties. Thus, to know whether a particular claim is a "transaction involved" under the Treaties one needs to know the identity of the original insured, the type of marine policy involved, the effective dates of the marine policy, the claim number and the total amount of the loss.

On a par with the deficient demands found in *Para-Oro* and its predecessors, $240,450.00 standing by itself does not tell the Court, or National Casualty, whether the alleged dispute is a "transaction involved" under the Treaties. The demand is clearly deficient, but the defect is easily rectified, and could have been long before now, by MMO disclosing the information it must possess in order to have arrived at the assertion that it is owed $240,450.00 in the first place.

There is truly no valid justification or excuse for MMO's "hide-the-ball" approach and there should be a consequence – beginning with claim identification. If the claim or claims identified are "transaction involved" under the Treaties over which the parties have a dispute, then National Casualty will honor its obligation to arbitrate, but it needs the Court's assistance to reach that point.

II. By Sending Its August 12, 2008 Arbitration Demand To Guy Carpenter Now, MMO Can Rectify Its Failure To Serve The Demand In Accordance With The Terms Of The Agreement.

The general rule is that service on an attorney not authorized to accept service for her client is ineffective. *Santos v. State Farm Fire & Casualty Co.*, 902 F.2d 1092, 1094 (2d Cir. 1990); *J & L Parking Corp., Inc. v. United States*, 834 F. Supp. 99, 102 (S.D.N.Y. 1993)("[a]n attorney does not become a client's agent for service of process simply because she represented the client in an earlier action"); *Broman v. Stern*, 172 A.D.2d 475, 567 N.Y.S.2d 829 (N.Y. Sup. Ct. App. Div. 1991); *Certain Underwriters at Lloyd's of London v. Bellettieri*, 19 Misc. 3d 1136A, 862 N.Y.S.2d 813 (N.Y. Sup. Ct. 2008); *State v. Cortelle Corp.*, 73 Misc. 2d 352, 341 N.Y.S.2d 640 (N.Y. Sup. Ct. 1972).

The letter transmitting MMO's demand says that it is being "served" "in accordance with the provisions of the Treaties." To MMO this meant sending the demand to an attorney employed by Nationwide Indemnity Company and an outside law firm, Mendes & Mount. Neither of the recipients was authorized to accept service of the demand.

Mr. Kareken is an in-house attorney employed by Nationwide Indemnity Company, not National Casualty.[16] Mr. Kareken is occasionally assigned to represent Nationwide Indemnity Company affiliate companies on an as needed basis.[17] Although it is true that Attorney Kareken has represented National Casualty with respect to various past matters, he is not now and never has been designated as an agent to accept service by

[16] *See* Declaration of Mark C. Kareken submitted herewith at ¶ 1.
[17] *Id*. at ¶'s 2-3.

Nationwide Indemnity Company or any of its affiliated companies.[18] Moreover, Attorney Kareken was not assigned to represent National Casualty Company with respect to the MMO arbitration demand until after it was made.[19]

Mendes & Mount is a law firm with offices in New York City. Although it is true that Mendes & Mount has and does represent National Casualty with respect to completely unrelated matters, it has never been designated by National Casualty to be its agent to accept service with respect to disputes under the Treaties.[20] Since neither Attorney Kareken nor Mendes & Mount were authorized to accept service of MMO's demand, effective service of the demand on National Casualty was never made.[21]

Proof of the importance proper service of the arbitration demand plays is easily demonstrated by MMO's conduct. Apparently to ensure that Attorney Kareken could not deny receipt, MMO transmitted its demand to him via registered mail and Federal Express. MMO also personally served Mendes & Mount. What this latter action shows is that MMO understood that its demand would not be effective unless it complied with the terms of the parties' agreement.

What MMO obviously missed or chose to ignore, is that the Treaties contain a provision requiring that all communications between MMO and National Casualty be

[18] *Id*. at ¶ 4.
[19] *Id*. at ¶ 5.
[20] *Id*. at ¶ 6.
[21] MMO asserts that Attorney Kareken "was responsible for handling the dispute between MMO and [National Casualty]". This assertion is incongruous because Attorney Kareken could not represent National Casualty with respect to a demand until it was made. Attorney Kareken clearly made this point when he responded to the demand in his letter of August 22, 2008. *See* Complaint Exhibit 9.

transmitted through Guy Carpenter.[22] Just as National Casualty cannot be required to submit to arbitration any dispute which it has not agreed to submit, *AT&T*, 475 U.S. at 648, so too it is entitled to arbitration, as MMO itself admits, "in accordance with the provisions of the Treaties," 9 U.S.C. §§ 3, 4, including commencement of the arbitration demand through Guy Carpenter.[23]

Most perplexing is MMO's steadfast refusal to accept its mistake and the easy single step needed to rectify it – send the arbitration demand to Guy Carpenter. If National Casualty does not insist now on MMO's compliance with the Treaties' service provision, then National Casualty will have no hope of MMO's compliance therewith in the future.

III. The Court Should Defer Consideration Of The Umpire Selection Issue Until After It Determines That There Is Something For The Parties To Arbitrate.

MMO urges the Court to appoint an umpire to preside over the purported arbitration. Although it disputes the existence of any wrongdoing, National Casualty submits that it makes no sense for the Court to undertake the selection of an umpire until it has determine that there is something to arbitrate and that is not possible until MMO has disclosed the claim particulars.

National Casualty respectfully suggests that the Court defer taking up the umpire selection issue until after MMO has identified the claims allegedly in dispute and it is

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[22] *See* Complaint Exhibit 1 at Article XV p. 7; Ex. 2 at Article XV p. 7; Ex. 3 at Article XV p. 7; Ex. 4 at Article XVI p. 7; Ex. 5 at Article XVII p. 7 and Ex. 6 at Article XVII p. 10.

[23] MMO's reliance on the contention that Guy Carpenter has not been involved with the Treaties for several years should be of little or no consequence. MMO and National Casualty did not execute an addendum modifying the Treaties' intermediary clause nor is MMO entitle to unilaterally abandon its application.

determined that one or more of those claims are arbitrable. Should there be something to arbitrate National Casualty requests the opportunity to promptly make an umpire selection submission. Such a submission would be made with the understanding that the Court may opt to allow the party-appointed arbitrators an opportunity to agree (9 U.S.C. § 5 – "such method shall be followed") and recognizing that the Court is not bound to make its selection from among the candidates offered by the parties.[24]

CONCLUSION

MMO's arbitration demand is deficient as a matter of law because it fails to identify what is in dispute. Consequently, MMO's motion to stay, dismiss, compel and appoint is premature. MMO should be ordered to supply the needed information so that the arbitrability of its alleged dispute can be determined.

MMO's demand is also deficient because it was not "served" in accordance with the terms of the parties' agreement. Without further jeopardizing the purported arbitrability of its alleged dispute, MMO can easily correct this deficiency by simply sending the arbitration demand to Guy Carpenter.

Because the Court has not yet determined that there is any dispute to arbitration, judicial appointment of a third arbitrator is premature. National Casualty suggests that the umpire selection issue be taken up by the Court only if it determines that there is something to be arbitrated.

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[24] The umpire selection process is usually slightly more involved than MMO has suggested. Typically, the party-appointed arbitrators submit questionnaires to their nominees to check availability and screen for potential conflicts of interest. Once a slate of candidates on each side is confirmed, each party-appointed arbitrator declines enough of the other side's nominees to leave one candidate and the other side does the same. The selection is then made between the two remaining nominees via an odd/even designation method involving the Dow Jones Industrial Average.

Based on the foregoing, National Casualty respectfully suggests that the Court defer ruling on MMO's motion and: (1) strongly encourage MMO to make the service issue moot by immediately sending the arbitration demand to Guy Carpenter and (2) ordering MMO to produce the claim particulars to National Casualty within 5 business days and then permit National Casualty 10 business days to determine whether it agrees or disputes that the identified claim or claims are arbitrable.

Dated: October 28, 2008
Wausau, Wisconsin

Respectfully submitted,

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