UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AIG GLOBAL TRADE AND POLITICAL RISK INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioners,

- against -

ODYSSEY AMERICA REINSURANCE CORPORATION and CLEARWATER INSURANCE COMPANY,

Respondents.

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MEMORANDUM DECISION

05 Civ. 9152 (DC)

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CHIN, D.J.

In this diversity case, petitioners AIG Global Trade and Political Risk Insurance Company ("AIG Global") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") move for an order pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 5, requiring Odyssey America Reinsurance Company ("Odyssey America") and Clearwater Insurance Company ("Clearwater") to appoint umpires from petitioners' slate of

proposed candidates in two separate arbitrations. In the alternative, petitioners ask the Court to act in place of respondents and select umpires from petitioners' slate. Respondents, in turn, request that the Court order the parties to "start from scratch" by proposing new slates of umpire candidates, who are to be screened by the Court for "impartiality, disinterestedness, and neutrality," after which umpires will be selected by "coin toss." For the reasons that follow, respondents' requests are granted in part and denied in part; petitioners' requests are denied.

BACKGROUND

This dispute arises out of two distinct reinsurance arbitrations. The first was commenced by Odyssey America against National Union (the "Aerostaff Arbitration"), and the second was commenced by Clearwater against AIG Global (the "Trade Credit Arbitration").[1] Petitioners originally brought this suit in New York State Supreme Court on October 17, 2005, to compel the appointment of umpires for these arbitrations. On October 27, 2005, Odyssey America filed a notice of removal based on diversity of citizenship and fraudulent joinder. An amended notice of removal was filed on October 31, 2005, to correct an error in Odyssey America's place of incorporation. On January

[1] Initially, there was some confusion as to whether the correct parties were named in this action. Pursuant to the Stipulation and Order entered on January 12, 2006, however, the correct parties are now included. (Stipulation and Order (hereinafter "Stip.") ¶¶ 1-2). In the Stipulation, National Union was substituted for AIG, and Clearwater was added to this action. (Id.).

12, 2006, all four parties entered into a stipulation and order to combine the two actions. The Court has subject matter jurisdiction based on complete diversity.[2] Below is a brief summary of the two arbitrations at issue.

A. The Aerostaff Arbitration

1. The Aerostaff Certificate

Pursuant to a Casualty Facultative Reinsurance Certificate (the "Aerostaff Certificate"), Odyssey America agreed to reinsure $750,000 of National Union's $1 million commercial auto policy insuring Aerostaff Services, Inc. ("Aerostaff"), plus loss adjustment expenses for losses during the period between January 15, 1999, and January 15, 2000. (Lewin Decl. ¶ 2(a); id. Ex. 1).[3] After National Union advised Odyssey America that it

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[2] AIG Global is organized under the laws of New Jersey, and has its principal place of business ("PPB") in New York. (Odyssey America's Amended Notice of Removal ¶ 3). National Union is organized under the laws of Pennsylvania, and has its PPB in New York. (Id. ¶ 5). On the other hand, Odyssey America is organized under the laws of Connecticut, and has its PPB in Connecticut. (Id. ¶ 2). Clearwater has its PPB in Connecticut, and is organized under the laws of either Connecticut or Delaware. (Odyssey America's Notice of Removal ¶ 11). It is not entirely clear whether Clearwater is organized under the laws of Delaware or Connecticut. The original notice of removal states that Clearwater's place of incorporation is the same as Odyssey America -- i.e., Delaware. (Id.). Subsequently, however, Odyssey America filed an amended notice of removal stating that it was actually organized under the laws of Connecticut -- but did not make any reference to whether this meant that Clearwater's place of incorporation was also in Connecticut. (Odyssey America's Amended Notice of Removal ¶ 2). In any event, whether Clearwater's place of incorporation is Delaware or Connecticut, there is still complete diversity between petitioners and respondents. Thus, this Court has subject matter jurisdiction.

[3] The parties to the Aerostaff Certificate are National Union and TIG Reinsurance Company, which is now known as Odyssey

paid $1 million in loss to Aerostaff, and incurred expenses of $1,261,614 based on an October 21, 1999 claim, Odyssey paid $1,538,029.94 to National Union under the Aerostaff Certificate. (Id. Ex. 3). Approximately $790,000 of this payment represented Odyssey America's proportionate share of National Union's adjustment expenses. (Id. Ex. 3; Mem. of Law of Odyssey Am. Reinsurance Corp. & Clearing Ins. Co. Concerning Umpire Selection (hereinafter "Resp. Mem. Law") at 12 n.8). Odyssey America later learned that National Union had paid Aerostaff $12 million, not $1 million as originally thought. (Lewin Decl. Ex. 3; Resp. Mem. Law Ex. 20).

2. The Arbitration Demand

Odyssey America demanded arbitration on December 23, 2004, pursuant to Section O of the Aerostaff Certificate, based on Odyssey America's belief that a portion of the $12 million payment was made in settlement of a bad faith claim by Aerostaff against National Union.[4] (Lewin Decl. Ex. 3; Resp. Mem. Law at 12 n.8). In short, Odyssey America seeks a refund because it maintains that it paid more than its "proportionate share of National Union's adjustment expenses." (Resp. Mem. at Law 12 n.8).

America. (Lewin Decl. Exs. 1, 3).

[4] Odyssey America's Demand for Arbitration initially named AIG as the respondent. (Lewin Decl. Ex. 3). In a letter dated October 27, 2005, however, Odyssey America amended its demand to name National Union as the proper respondent in the Aerostaff Arbitration. (Lewin Decl. Ex. 4).

National Union, for its part, disputes Odyssey America's position and declares that the expenses billed were proper under the Aerostaff Certificate. Further, National Union contends that Odyssey America actually owes National Union $174,000 in additional expenses, which National Union intends to seek in arbitration. (Lewin Decl. ¶ 5).

3. Selection of Arbitrators

a. The Selection Procedure

Section O of the Aerostaff Certificate provides that

> Any unresolved difference of opinion between the Reinsurer and the Company with respect to the interpretation or validity of this certificate or the performance of the obligations under this certificate shall be submitted to arbitration. Each party shall select an arbitrator within one month after written request for arbitration has been received from the party requesting arbitration. These two arbitrators shall select a third arbitrator within ten days after both have been appointed. Should the arbitrators fail to agree on a third arbitrator each arbitrator shall select one name from a list of three names submitted by the other arbitrator and the third arbitrator shall be selected by lot between the two names chosen. The arbitrators shall be impartial and shall be present or former officials of other property or casualty insurance or reinsurance companies. . . .

(Id. Ex. 1 ¶ O; see Resp. Mem. Law at 12 & Ex. 20).

On February 7, 2005, both parties appointed arbitrators: National Union appointed Sylvia Kaminsky, Esq., and Odyssey America appointed Robert Reinarz. (Resp. Mem. Law at 13). To select the umpire, the arbitrators agreed that each side would propose three candidates, strike two candidates from the

other side's list, and randomly select the umpire "by lot" from the remaining two candidates. (Lewin Decl. ¶ 9). The parties agreed that the method to select "by lot" entailed the selection of an odd or even number based on the last whole digit of the Dow Jones Industrial Average at its closing on July 26, 2005. (Id.; Resp. Mem. Law at 14-15). The agreement was silent on the issue of selecting a replacement umpire in the case of a resignation.

b. Odyssey America's Objection to Umpire Selected

In March 2005, each side proposed three candidates for umpire.[5] After umpire questionnaires were completed by all the candidates, Odyssey America objected to all of National Union's candidates because of their connections to National Union or its parent company, AIG. (Lewin Decl. ¶ 12; Resp. Mem. Law at 14).[6] Despite Odyssey America's objections, the parties proceeded to strike candidates, leaving Cole as National Union's candidate for umpire and Hall as Odyssey America's candidate. The parties then selected an umpire by lot as agreed upon. (Lewin Decl. ¶¶ 14-15; Resp. Mem. Law at 15). National Union won the "coin toss," and

[5] Odyssey America proposed Paul Dassenko, Esq., Robert M. Hall, Esq., and Robert Mangino, Esq. as its candidates for umpire; National Union proposed John Cole, Esq., Andrew Walsh, Esq., and Mark Wigmore, Esq. as umpire candidates. (Lewin Decl. ¶ 10; Resp. Mem. Law at 13). Mr. Dassenko withdrew from consideration prior to selection, and the parties agreed to proceed with Odyssey's remaining two candidates. (Lewin Decl. ¶ 11).

[6] Odyssey America objected to Mr. Cole because his law firm represented AIG in several bankruptcy matters. (Resp. Mem. Law Ex. 22). It objected to Mr. Walsh and Mr. Wigmore because each was serving as a party-appointed arbitrator for AIG in other pending arbitrations. (Id. at 14).

Mr. Cole was selected as umpire. (Lewin Decl. ¶ 15; Resp. Mem. Law at 14).

Upon his selection, Mr. Cole informed the parties on August 5, 2005, that subsequent to completing his umpire questionnaire, he was selected to serve as the party-appointed arbitrator for another company represented by Stroock & Stroock & Lavan, National Union's counsel. (Lewin Decl. ¶ 16; Resp. Mem. Law at 15). Odyssey America then protested the selection of Mr. Cole, prompting Mr. Cole to withdraw as umpire on August 21, 2005. (Lewin Decl. ¶ 21; Resp. Mem. Law at 16). Afterwards, Odyssey America reasserted its objections to National Union's remaining candidates, and the parties continued to dispute whether a new "coin toss" was warranted. (Lewin Decl. ¶¶ 22-26; Resp. Mem. Law at 16-17). National Union, failing to agree on the next steps in the arbitration, filed the state court action that was eventually removed to this Court.

B. The Trade Credit Arbitration

1. The Quota Share Agreement

The second arbitration arises out of a dispute between AIG Global and Clearwater over a reinsurance contract, entitled the Trade Credit Variable Quota Share Agreement (the "Quota Share Agreement"). Under the Quota Share Agreement, Clearwater and others agreed to reinsure insurance polices issued by AIG Global that were classified as export credit or trade credit insurance. (Resp. Mem. Law at 6 n.4). Clearwater alleges that AIG Global made material misrepresentations in obtaining Clearwater's

acceptance of a trade credit insurance policy issued by AIG Global. (Id.; Lewin Decl. ¶ 29). As a result, Clearwater challenges AIG Global's claim that Clearwater is required to pay $1,449,600 under the Quota Share Agreement for its share of the loss from the policy. (Resp. Mem. Law at 6 n.4).

2. The Arbitration Demand

In a letter dated April 29, 2005, Clearwater demanded arbitration pursuant to Article 21 of the Quota Share Agreement.[7] Clearwater denies the trade credit insurance policy claim and intends to seek an award declaring that it has no liability with respect to the claim. (Lewin Decl. Ex. 22).

3. Selection of Arbitrators

a. The Selection Procedure

Article 21 of the Quota Share Agreement provides that all disputes arising out of the Agreement are subject to arbitration in New York, New York. (Id. Ex. 2, art. 21). In pertinent part, it provides:

> All disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two arbitrators, one to be chosen by each party, and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators. The arbitrators and umpire shall be disinterested active or retired executive officials of fire or casualty insurance or reinsurance companies or

[7] The parties to the Quota Share Agreement are AIG Global and Odyssey Reinsurance Corporation, which is now known as Clearwater. (Resp. Mem. Law at 5 n.3). Odyssey America and Clearwater (or Odyssey Reinsurance Corporation) are "separate and distinct affiliates within the same group of companies." (Id.).

> Underwriters at Lloyd's, London. If either of the parties fails to appoint an arbitrator within one month after being required by the other party in writing to do so, or if the arbitrators fail to appoint an umpire within one month of a request in writing by either of them to do so, such arbitrator or umpire, as the case may be, shall at the request of either party be appointed by a Justice of the Supreme Court of the State of New York.

(Id.).

On June 30, 2005, both Clearwater and AIG Global designated their party-appointed arbitrators. (Id. ¶ 32, Exs. 24, 25; Resp. Mem. Law at 6). Clearwater selected Aaron B. Stern, and AIG Global selected Mary Ellen Burns, Esq. (Resp. Mem. Law at 6). To select an umpire, the arbitrators agreed that they would follow the same procedure as in the Aerostaff arbitration, rather than turning to the Supreme Court: each party would select three candidates, each party would strike two of the other party's candidates, and the umpire would be selected from the remaining two candidates based on the closing of the Dow Jones Industrial Average on August 26, 2005. (Lewin Decl. Ex. 26).[8] Following this methodology, Mr. Robert M. Hall was selected as umpire. (Id. ¶ 35; Resp. Mem. Law at 8).

[8] Clearwater's candidates were Robert F. Hall, Lawrence Monin, Esq., and Paul Walther; AIG Global's candidates were Ronald Gass, Esq., Robert M. Hall, Esq., and Mark Wigmore, Esq. (Lewin Decl. ¶ 34; Resp. Mem. Law Exs. 5, 7). Andrew Walsh, Esq. was substituted for Mr. Gass in response to Clearwater's objections to Mr. Gass's candidacy. (Lewin Decl. ¶ 34; Resp. Mem. Law Ex. 7).

b. Clearwater's Objection to Umpire Selected

After Mr. Hall was appointed as umpire, Clearwater requested that he complete an umpire questionnaire to disclose his contacts with the parties and firms involved in the arbitration. (Resp. Mem. Law at 8). Before the parties could agree on whether Mr. Hall should complete a questionnaire, he volunteered his contacts in an email to the parties and their arbitrators. (Lewin Decl. Ex. 28; Resp. Mem. Law Ex. 8-9).

Based on Mr. Hall's responses, Clearwater requested that he recuse himself because of his "significant contacts with AIG, AIG's counsel and AIG's arbitrator in past and present matters," and called for an umpire with "incidental ties to either party, including their arbitrators and counsel." (Lewin Decl. Ex. 29; Resp. Mem. Law Ex. 10). Over AIG Global's protest, Mr. Hall withdrew from the arbitration. (Lewin Decl. Ex. 31; Resp. Mem. Law Ex. 13).

Following Mr. Hall's resignation, the parties were unable to agree upon a process to select a replacement umpire. (Resp. Mem. Law at 10-11; Mem. Law Supp. Pet. Mot. to Appoint Umpires (hereinafter "Pet. Mem. Law") at 11-12). The arbitration agreement did not provide a procedure through which the parties would select a replacement umpire. Accordingly, AIG Global filed the instant action in New York State Supreme Court on October 17, 2005, and the case was later removed to this Court. (Resp. Mem. Law at 11; Pet. Mem. Law at 12).

On January 12, 2006, the parties stipulated that the vacant umpire issue relating to both the Aerostaff and Trade Credit arbitrations would be heard by this Court. The parties agreed that Clearwater would be added as a party to this action, and that Clearwater would withdraw its other action from state court. (Stip. ¶¶ 3-4). The stipulation states, in relevant part, that "[t]he claim that Clearwater has asserted against AIG Global in its Petition currently pending in the Supreme Court of the State of New York, New York County, Index No. 05-114878 ("the State Court Action"), shall be heard by this Court." (Stip. ¶ 2). Thus, the parties have asked this Court to resolve the umpire issue in these two arbitrations.

DISCUSSION

Petitioners seek an order compelling respondents to appoint umpires from petitioners' slates of candidates, and failing that, for the Court to appoint umpires in place of respondents. Respondents, on the other hand, argue that the Court should: (1) order each side in the two arbitrations to "start from scratch," and propose new slates of candidates for the position of umpire; and (2) monitor the selection process to ensure that umpire candidates are without preexisting relationships with any of the parties, their affiliates, counsel or party arbitrators. For the following reasons, respondents' requests are granted in part and denied in part; petitioners' requests are denied. Respondents' request is granted only to the extent that both sides are directed to submit a new list of

candidates for each arbitration. From those lists, however, the Court will appoint umpires.

A. Applicable Law

The FAA, 9 U.S.C. § 1 et seq., provides that if an arbitration agreement contains a provision "for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. But,

> if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, 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 . . . .

Id.; see also CAE Indus. Ltd. v. Aerospace Holdings Co., 741 F. Supp. 388, 392-93 (S.D.N.Y. 1989) (where the arbitration agreement does not provide an explicit provision in terms of naming an arbitrator, or for any other reason there shall be a lapse in the naming of an arbitrator, then the court has authority under § 5 to appoint one). The Court therefore has the authority under § 5 to select a replacement umpire to fill a vacancy if there is a "lapse" in the naming of an umpire and the arbitration agreement in question does not provide a mechanism for filling the void. See Home Ins. Co. v. Banco de Seguros del Estado (Uru.), 98 Civ. 6022 (KMW), 1999 U.S. Dist. LEXIS 22479,

at *1-2 (S.D.N.Y. March 29, 1999) (holding that "where the arbitration agreement is silent on the appointment of a replacement arbitrator, it was within the authority conferred by the [Federal Arbitration] Act for the court to appoint to the panel [one party's] new nominee [] to replace [] its original nominee") (internal quotations omitted) (citing Trade & Transp. v. Natural Petro. Charterers, 931 F.2d 191, 195-96 (2d Cir. 1991).

B. Application

Here, both agreements are silent on the issue of selecting a replacement umpire in the case of a resignation. Because no method is provided for replacing an umpire, § 5 of the FAA grants this Court the authority to select a replacement. See Home Ins. Co., 1999 U.S. Dist. LEXIS 22479, at *1-2; 9 U.S.C. § 5. Accordingly, pursuant to § 5 of the FAA, this Court will "designate and appoint an . . . umpire."

Petitioners argue that it has already won the coin tosses, and thus, respondents should simply be ordered to select a replacement based on petitioners' original slates of candidates (or in the alternative, to have the Court select from petitioners' slates). These candidates, however, were already stricken in the original selection process. Thus, it would be unfair to appoint these same candidates to serve as umpires now, when petitioners' umpire candidates were the ones to resign. Moreover -- and more importantly -- nothing in the agreements authorizes such a remedy to cure the resignation of an umpire.

The Court notes, however, that respondents' objections to the umpires selected are not well taken. In both arbitrations, respondents objected to the umpires because they believed that the umpires were tainted by partiality. The law is clear, however, that pre-award challenges to arbitrators based on evident partiality are not allowed. See Aviall, Inc. v. Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997) ("Although the FAA provides that a court can vacate an award [w]here there was evident partiality or corruption in the arbitrators, it does not provide for pre-award removal of an arbitrator.") (internal quotations and citation omitted); see also Florasynth, Inc. v. Pickholz, 750 F.2d 171, 174 (2d Cir. 1984) (noting that "[t]he Arbitration Act does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service"); Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 n.4 (2d Cir. 1980) ("[I]t is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award.").

At the same time, the umpires in both arbitrations resigned on their own volition. Had they not resigned, those umpires would be serving, and respondents' objections concerning the partiality of the umpires would not have been considered until after an award had been rendered, in proceedings to vacate

or confirm. Nonetheless, their resignations mean that there are now vacancies, which neither agreement contemplated. Accordingly, the Court will appoint replacements. Petitioners and respondents shall both submit a list of three candidates for each arbitration within seven business days. Each side will have five business days to submit any objections to the proposed candidates. The Court will choose from among these candidates, taking into account objections from both sides. If the Court determines that none of the proposed candidates is acceptable, then the Court will simply select a replacement umpire on its own, without regard to the lists.

Finally, the Court rejects the standard proposed by respondents that umpire candidates "be without pre-existing relationships with any of the parties, their affiliates, counsel or party arbitrators." On the other hand, the Court expects the parties to propose candidates who can be expected to be fair and impartial.

CONCLUSION

In one of the arbitrations, two years have already lapsed since the arbitration demand, yet no action has been taken because of the deadlock in selecting a replacement umpire. Both arbitrations have been significantly delayed. As other courts have noted, "arbitration is supposed to conserve the time and resources of both the courts and the parties." Michaels, 624 F.2d at 414-15. That has not occurred here. It is time for these matters to proceed expeditiously.

For the foregoing reasons, the Court will select replacement umpires as set forth above.

SO ORDERED.

Dated: New York, New York
September 21, 2006

DENNY CHIN
United States District Judge