UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AXA VERSICHERUNG AG, on its own behalf and as successor in interest to ALBINGIA VERISCHERUNGS AG,	:	05 Civ. 10180 (JSR)
Plaintiff,	:	MEMORANDUM ORDER
-v-	:	
NEW HAMPSHIRE INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,	:	
Defendants.	:	

JED S. RAKOFF, U.S.D.J.

By Order dated December 26, 2007, the Court directed defendants New Hampshire Insurance Company, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pennsylvania (collectively, "AIG") to provide to counsel for plaintiff AXA Versicherung AG ("AXA") the arbitral Decision and Award recently rendered in a dispute between AIG and Lloyd's Syndicate 435/D.P. Mann ("D.P. Mann"), In re an Arbitration Between New Hampshire Insurance Company et al. and Lloyd's Syndicate 435/D.P. Mann (the "Decision and Award"), and the Confidentiality Agreement governing that arbitration, on the ground that the Decision and Award might create a basis for collateral estoppel in the present litigation. Upon reviewing the Decision and Award, AXA moved, by letter brief to the Court dated January 3, 2008 (the "AXA Letter"), to collaterally estop AIG from relitigating ten enumerated issues AXA claims the Decision and Award resolved. In their responding letter brief dated January 8, 2008 (the "AIG Letter"), AIG argues that

collateral estoppel does not apply for various reasons, including that the D.P. Mann arbitration panel rendered its decision according to equitable rather than legal principles and that, in any event, each of the ten enumerated issues either was not actually and necessarily decided by the arbitration panel or is not identical to an issue in the present litigation. See *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999) (holding that collateral estoppel applies "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action," and the party against whom collateral estoppel is asserted "had a full and fair opportunity to litigate the issue in the earlier action").

Having reviewed the Decision and Award and the parties' letter briefs,[1] the Court concludes that the matter is moot as to one issue and that none of the other nine issues that AXA identifies qualifies for collateral estoppel.

The first of the ten issues to which AXA originally claimed that collateral estoppel applies is the arbitration panel's legal determination that Nausch Hogan & Murray, Inc. ("NHM"), a New York reinsurance broker, acted as AIG's agent. However, in view of AIG's statement in its January 8 letter that it will not here dispute this

[1] Although the Court initially believed it might benefit from oral argument, it now finds that such argument is unnecessary and that the parties would benefit from having this decision prior to the start of trial on January 14, 2008.

determination, AXA's collateral estoppel argument is moot with respect to this issue. See AIG Letter at 3.

The second issue AXA raises is whether New, Martin & Buchan ("NMB"), a London reinsurance broker, also acted on AIG's behalf as NHM's sub-agent. The arbitration panel actually and necessarily decided that NMB acted in this capacity with respect to D.P. Mann, but, according to AIG, evidence in the instant case will show that AXA's relationship with NMB is different from D.P. Mann's relationship with NMB, such that AIG may colorably claim that NMB was AXA's agent, rather than AIG's. Given this representation, the issues are not identical, so the doctrine of collateral estoppel does not apply. See Envtl. Def. v. United States EPA, 369 F.3d 193, 202 (2d Cir. 2004) ("When the facts essential to a judgment are distinct in the two cases, the issues in the second case cannot properly be said to be identical to those in the first, and collateral estoppel is inapplicable.").

Third, AXA claims that AIG should be estopped from disputing that the 1997 and 1998 contracts were brokered to "reinsurers" as facultative obligatory facilities. AXA Letter at 5. As an initial matter, D.P. Mann did not subscribe to the 1997 Facility, so any factual matter related to that Facility could not have been "necessarily decided" by the panel. Furthermore, although the arbitration panel found that AIG's misconduct with respect to the facultative/facultative obligatory issue "must be considered by the panel in its evaluation with [AIG's] (and their agents') overall

conduct," it rested its finding that rescission was warranted primarily on "the far more serious fundamental flaw in the reinsurance presentation material" – the loss statistics. Decision and Award at 26. Thus, the Court cannot conclude that the panel "necessarily decided" the facultative/facultative obligatory issue. Further still, AXA's claims turn on what representations (or misrepresentations) and disclosures AIG, NHM, and NMB made to AXA, just as D.P. Mann's claims turned on the representations made to D.P. Mann. Even if the arbitration panel had considered the entire universe of communications to AXA, which is unlikely, any conclusions it drew from those communications would not have been necessary to its ultimate decision regarding AIG's communications to D.P. Mann. And, in any event, AXA would have received any disclosures regarding the 1998 Facility in a different context than would D.P. Mann, as AXA had already subscribed to the 1997 Facility.

Similar problems plague the remaining issues AXA identifies as precluded by collateral estoppel. For example, in issue four, AXA states that the change in the contract from facultative to facultative obligatory that the arbitration panel found AIG to have "slip[ped] past" D.P. Mann, Decision and Award at 26, was also made to the wording of AXA's 1998 contract, and so, AXA argues, AIG should be estopped from arguing that it had a different duty of disclosure to AXA than the duty the panel found it had to D.P. Mann. AXA Letter at 5-6. But as AIG notes, it is at least possible that AXA was differently situated than D.P. Mann in a number of relevant respects,

including the past information AXA may have received and the timing of AXA's participation in the 1998 Facility.

Issue five concerns the 1997 Facility, and so could not have been necessarily decided by the panel.

Issues six, seven, and eight relate to the loss data supplied to both AXA and D.P. Mann. Even if the information received by both AXA and D.P. Mann was identical, however, the panel's decision turned on what D.P. Mann did or should have understood; it did not (and could not) have turned on what AXA did or should have understood.

Issue nine involves NMB's understanding regarding and disclosures to "reinsurers" and so the panel could only have "necessarily decided" those issues with respect to D.P. Mann; the issues are therefore non-identical.

In the final issue AXA identifies, AXA argues that AIG should be collaterally estopped from disputing the "the requirements of the duty of utmost good faith" as set forth by the arbitration panel in some detail. AXA Letter at 10; see Decision and Award at 16-21. AIG argues that collateral estoppel cannot apply to the panel's determination of these requirements because they are not "issues of fact," AIG Letter at 6; but collateral estoppel does, except in certain circumstances, apply to questions of law. See United States v. Stauffer Chemical Co., 464 U.S. 165, 170-171 (1984) ("[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action."). Here, the arbitration panel did not couch its exposition of the duty of utmost good faith

as a "legal" determination, but rather as a "summary of certain principles of reinsurance" derived from an "authoritative reinsurance text" authored by executives, brokers, and lawyers. Decision and Award at 16-17.[2] While it may well be that New York law regards the "utmost duty of good faith" as comprising the same elements set forth by the arbitration panel, the Court cannot so find purely as a matter of collateral estoppel.

For the foregoing reasons, the Court denies AXA's collateral estoppel motion in its entirety.

SO ORDERED.

Dated: New York, NY
January 12, 2008

JED S. RAKOFF, U.S.D.J.

[2] In contrast, the panel stated that certain other principles were matters of New York law. Decision and Award at 21-23.