UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED INSURANCE COMPANY LIMITED,

Plaintiff,

-against-

WORLD WIDE WEB RE f/k/a WORLD WIDE MANAGEMENT OF CONSULTANTS, LTD,

Defendant.
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Report & Recommendation
11-CV-1177 (CBA) (JMA)

AZRACK, United States Magistrate Judge:

On March 11, 2011, petitioner United Insurance Company Limited ("petitioner" or "UIC") moved for a preliminary injunction in aid of arbitration enjoining respondent Word Wide re f/k/a World Wide Management Consultants, Ltd. ("World Wide"), from binding new reinsurances on its behalf. On March 28, 2011, Chief Judge Amon referred the motion to me for a report and recommendation. ECF No. 8. For the reasons that follow, I find that UIC has demonstrated irreparable harm and a likelihood of success on the merits, and therefore recommend granting UIC's motion for preliminary injunction.

I. BACKGROUND

UIC is a Barbados insurance company that provides reinsurance in the property insurance class outside the Caribbean region.[1] Mem. of Law in Supp. of UIC's Pet. for Temporary and Preliminary Injunctive Relief in Aid of Arbitration ("UIC's Mem. of Law") 1, ECF No. 4. On or about July 14, 2009, UIC and World Wide entered into a Binding Authority Agreement ("BAA"), which authorizes World Wide, as UIC's agent, to underwrite and bind reinsurance

[1] "Reinsurance refers to situations in which other companies agree to indemnify the insurance companies for losses they experience pursuant to insurance policies they have issued. This spreads and diversifies the risk. Reinsurers receive a portion of the underlying premium in return for absorbing a portion of the risk." Am. Home Assur. Co. v. Starr Technical Risks Agency, Inc., 11 Misc. 3d 105(A), 2006 WL 304747, at *1 n.2 (N.Y. Sup. Ct. 2006).

risks on UIC's behalf subject to the underwriting guidelines. Id.; World Wide's Mem. of Law in Opp. to Pet. for Temporary and Preliminary Injunctive Relief in Aid of Arbitration ("World Wide's Mem. of Law") 4, ECF No. 11. UIC is World Wide's sole source of revenue and the only reinsurer for which World Wide binds risk. World Wide's Mem. of Law 21.

The BAA allows both parties "to terminate this Agreement immediately upon notice for cause in the event that [a party] breaches any material obligation of this Agreement." Declaration of Stanley Friedman ("Friedman Decl."), Ex. 3 Binding Authority Agreement ("BAA") ¶¶ 11.2–11.4, ECF No. 12-3. It also provides that any disputes, "relating to the formation, interpretation, performance, or breach of [the BAA], whether such dispute arises before or after termination of this Agreement, shall be settled by arbitration." BAA ¶ 17.1.

On October 4, 2010, World Wide received proposed reinsurance terms for the Arcelor Mittal placement, one of the world's largest steel companies. UIC Mem. of Law 2. In early December 2010, World Wide bound this risk on behalf of UIC without UIC's authorization.[2] World Wide's Mem. of Law 4; Alleyne Decl. ¶ 12. UIC alleges that World Wide's disregard of UIC's specific instructions not to bind the risk materially breached World Wide's contractual obligation.[3] UIC's Mem. of Law 5.

Pursuant to its belief that World Wide breached the BAA, on February 28, 2011, UIC sent a Notice of Termination to World Wide revoking the principal-agency relationship and effectively terminating the BAA. UIC's Mem. of Law 2; Alleyne Decl. ¶ 42. By letter dated

[2] The parties dispute whether World Wide needs UIC's authorization prior to binding a risk. World Wide's Mem. of Law 4; Declaration of David Alleyne ("Alleyne Decl.") ¶ 12, ECF No. 5

[3] As the circumstances surrounding the alleged breach are subject to arbitration, I shall not delve into the details of this contract claim. Generally speaking, however, UIC alleges that World Wide's decision to bind UIC to the risk was unauthorized and did not comply with the underwriting guidelines. Alleyne Decl. ¶¶ 11–28; UIC's Mem. of Law 2. Conversely, World Wide argues that it fully complied with the guidelines and that UIC wrongfully cut out World Wide from the deal to bind the risk itself, thereby denying World Wide's commission on the placement. Declaration of Charles Walters ("Walters Decl.") ¶¶ 10–17, ECF No. 13; World Wide's Mem. of Law 18.

March 3, 2011, World Wide responded, stating that it "shall continue to write business until such time as a decision [in arbitration] is rendered granting the relief sought." Alleyne Decl. ¶ 45. Since the exchange of letters, World Wide has continued to bind risks on behalf of UIC subject to the parties' underwriting guidelines. See Order to Show Cause Hearing Tr. ("Tr.") 6 ¶¶ 5–12, ECF. No. 21.

Now, in aid of arbitration, UIC moves this Court for a preliminary injunction "enjoining World Wide from binding new reinsurances or renewing existing contracts and without the prior written consent of UIC canceling, extending, amending, or altering in any way reinsurances already bound under the BAA." UIC's Mem. of Law 1. World Wide objects to the injunction, and, in its opposition, files a competing motion for preliminary injunction, seeking to enjoin UIC from terminating the parties' relationship. As I recommend granting UIC's preliminary injunction, and thereby inversely find that World Wide will not succeed on the merits concerning the principal-agent revocation, I will only discuss UIC's motion.

II. DISCUSSION

To obtain a preliminary injunction, the moving party must establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party. Lynch v. City of New York, 589 F.3d 94, 98 (2d Cir. 2009), cert. denied, --- S. Ct.----, 131 (2010). A district court may issue interim injunctive relief on arbitrable claims to preserve the status quo pending arbitration. Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1053 (2d Cir. 1990). The decision to grant injunctive relief rests in a district court's sound discretion. S.C. Johnson & Son, Inc. v. Clorox

Co., 241 F.3d 232, 237 (2d Cir. 2001); P & G v. Ultreo, Inc., 574 F. Supp. 2d 339, 344 (S.D.N.Y. 2008) (internal quotation marks omitted).

The parties do not dispute that the merits of this case shall be resolved in arbitration. Nor do they dispute that a preliminary injunction can be granted in aid of arbitration. Rather, the seminal issue is whether World Wide's agency rights may be revoked pending arbitration, and, if so, whether World Wide's unauthorized exercise of its agency rights will cause UIC irreparable harm.

1. Principal-Agent Relationship

Before determining whether UIC will suffer irreparable harm, the Court must first distinguish between a revocation of a principal-agent relationship and a termination of a principal-agent contract. While, at first glance, they appear practically to be the same, they are governed by entirely different legal principles.

Courts differentiate between "the parties' power, rights and duties arising under the contract itself, and those arising under the agency relationship." Shelly v. The Maccabees, 183 F. Supp. 681, 683 (E.D.N.Y. 1960) (quoting Wilson Sullivan Co. v. Int'l Paper Makers Realty Corp., 307 N.Y. 20, 24–26 (1954)). New York law clearly provides that a principal has an inviolate right to revoke its agency at any time. American Home, 11 Misc.3d 1051(A), 2006 WL 304746, at *3 (N.Y. Sup. Ct. Feb. 8, 2006) ("It is well settled that . . . a principal has the power to revoke at any time his agent's authority to represent him."); Sea Lar Trading Co., Inc. v. Michael, 433 N.Y.2d 403, 406 (N.Y. Sup. Ct. 1980) ("A principal has the right at any time to revoke the authority of an agent to represent the principal."); Smith v. Conway, 101 N.Y.S. 2d 529, 531 (N.Y. Sup. Ct.. 1950) ("[A] principal, at least generally, is permitted to revoke an agency when he pleases, even though he has contracted with agent for definite period of time, for

the reason that it is deemed contrary to public policy for principal to have agent forced upon him against his will."). This is not to say, however, that in revoking the agency, the principal is immune from liability for breach of contract. Shelly, 183 F. Supp. at 683 (citation omitted). While a principal has the power to revoke its agent, if, in doing so, the principal violates its obligations to the agent under their contract, the agent retains the legal recourse of bringing a breach of contract claim.

In New York, the American Home case upheld this principle. There, the insurer, AIG, sought a preliminary injunction in aid of arbitration to prevent its managing general agent, Starr Tech, from entering into reinsurance agreements on its behalf. 2006 WL 304746, at *2. The court granted AIG's preliminary injunction, finding that AIG, as a matter of law, had the unilateral right to revoke the agency and that AIG would be irreparably harmed if Starr Tech continued to bind reinsurance risks on its behalf.[4] Id. at *3. The court specifically acknowledged that Starr Tech's remedy was limited to a breach of contract claim. Id.

The facts are similar here. UIC exercised its unilateral right to revoke the agency relationship, and now seeks a preliminary injunction to enjoin World Wide from binding it to risk. Although World Wide argues that UIC qualified its inviolate right to revoke agency vis-à-vis the BAA provision that only allows termination "for cause," see BAA ¶ 11.4, this argument proves unpersuasive. UIC argues, and the Court agrees, that the BAA's "for cause" provision does not waive or qualify UIC's revocation rights; rather, it provides legal recourse for World Wide should the contract be terminated without cause. Tr. 28 ¶¶ 10–25, 29 ¶¶ 1–17. The BAA, therefore, only governs the termination of the contract, not the principal's inviolate right to revoke the agency. In this particular case, the revocation of World Wide's agency on February

[4] While the court's basis for finding irreparable harm in American Home differs from this case, the general premise of the case is the same.

28, 2011, also effectively terminated the BAA. However, pursuant to case law discussed above and the terms of the BAA, UIC's revocation of the agency is not governed by the arbitration clause; rather, only the termination of the agency, and whether it was "for cause," are within the scope of arbitration.

2. Irreparable harm

With the revocation and termination distinction drawn, the next issue is whether World Wide's exercise of the agency rights validly revoked by UIC will cause UIC irreparable harm. "Irreparable harm is found where, but for the grant of equitable relief, there is a substantial chance that upon the final resolution of the action the parties cannot be returned to the positions they previously occupied." O.D.F. Optronics Ltd v. Remington Arms Co., No. 8-CV-4746, 2008 WL 4410130, at *6 (S.D.N.Y. Sept. 26, 2008) (internal quotation marks omitted). For a harm to be "irreparable," it must be an injury that money damages cannot compensate, see Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1996), and must neither be remote nor speculative, but rather actual and imminent, Consolidated Brands, Inc. v. Mondi, 638 F. Supp. 152, 155 (E.D.N.Y. 1986).

Absent an injunction, UIC argues that it will suffer irreparable harm for two reasons. First, World Wide will continue to bind UIC to risks without UIC's authorizations, thus exposing UIC to insurance risks that World Wide cannot indemnify. Second, it will suffer reputational harm. The Court agrees with both of these arguments.

UIC will be irreparably damaged because at the close of arbitration, should UIC win, World Wide will not be able to compensate UIC for any losses incurred due to the unauthorized risks it bound. "[W]here a plaintiff's injury is theoretically compensable in money damages but, as a practical matter, the defendant would not or could not respond fully for those damages,

preliminary injunctive relief has been deemed necessary to protect the plaintiff from irreparable injury." Brenntag Intern. Chemicals, Inc. v. Norddeutsche Landesbank GZ, 9 F. Supp. 2d 331, 345 (S.D.N.Y. 1998) (citing Drobbin v. Nicolet Instrument Corp., 631 F. Supp. 860, 912 (S.D.N.Y. 1986)). Thus, while financial injury alone is usually not enough to justify injunctive relief, a defendant's imminent insolvency can constitute irreparable harm when it is likely that the defendant will not be able to pay damages at the conclusion of arbitration. See CRP/Extell Pracel v. Cuomo, 394 Fed. App'x 779, 781 (2d Cir. 2010); see also Brenntag Intern. Chemicals, Inc. v. Bank of India, 175 F.3d 245, 247 (2d Cir. 1999); Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC, 582 F. Supp. 2d 616, 626 (S.D.N.Y. 2008) (citing Castle Creek Technology Partners, LLC v. CellPoint Inc., No. 02-CV-6662, 2002 WL 31958696, at *3 (S.D.N.Y. Dec. 9, 2002)); Netwolves Corp. v. Sullivan, No. 00-CV-8943, 2001 WL 492463, at *11 (S.D.N.Y. May 9, 2001).

Such is the case here. Per World Wide's own admission, bankruptcy is a virtual certainty, since by UIC's revocation of its agency, World Wide has lost its only customer. Indeed, World Wide conceded its financial peril, admitting, "if the Court were to [prohibit World Wide from binding risk], World Wide would be driven out of business, meaning that it would have no funds to satisfy any future judgment on the merits issued in favor of UIC, thereby rendering the parties' arbitration a meaningless exercise." World Wide Mem. of Law 21, Declaration of Stanley Friedman ("Friedman Decl.") ¶ 40.

Although World Wide concedes that it will not be able to satisfy an arbitral judgment should it be enjoined from binding risks, it fails to acknowledge that, regardless of the outcome of this preliminary injunction motion, as a matter of law, World Wide can no longer bind risks on UIC's behalf. World Wide's actual agency has already been revoked, and UIC is taking

measures to ensure that third parties are aware of this fact.[5] Therefore, World Wide, with or without a preliminary injunction against it, will no longer be a profitable reinsurer.

World Wide's imminent insolvency destroys the very nature of the parties' insurer-reinsurer relationship as the reinsurance market depends on the solvency of the reinsurer. In American Home, for example, the court held that "insurers and reinsurers who enter into such arrangements create a relationship in which there is 1) no individual risk scrutiny by the reinsurer, 2) obligatory acceptance by the reinsurer of covered business, and 3) a long-term relationship with which the reinsurer's profitability is expected." American Home, 2006 WL 304746, at *5 (internal quotation marks omitted). Without the expectation of World's Wide's profitability, UIC faces great harm. If World Wide continues to bind UIC to risks without authorization and a disaster occurs, World Wide would not have the means to indemnify UIC for that risk.

World Wide counters that UIC will not be irreparably harmed because it will only bind UIC pursuant to the underwriting guidelines contained in the BAA. However, considering World Wide no longer has any authority to bind UIC, there are no valid underwriting guidelines on which to rely. Further, there is nothing prohibiting World Wide from binding risks outside the scope of the underwriting guidelines and then escaping pecuniary liability due to its inability to compensate UIC for any incurred losses.

Second, UIC will likely suffer reputational harm absent an injunction. A company's loss of reputation, good will, and business opportunities can constitute "irreparable harm" for

[5] Prior to the Order to Show Cause hearing, World Wide notified the Court that UIC was telling its customers that World Wide no longer had the authority to bind risks on its behalf. See World Wide's Letter dated Apr. 11, 2011, ECF No. 18. The Court, at that point in time, was not yet persuaded that UIC had the unilateral right to revoke its agency, and therefore ordered UIC to cease sending out these notifications. However, now that it is clear that UIC validly revoked World Wide's actual agency, UIC may notify third-parties that World Wide no longer has authority to bind risks on its behalf.

purposes of a preliminary injunction. See CRP/Extell Pracel, 394 Fed. App'x at 781 (citing Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004)). Here, as UIC notes, if World Wide continues to bind risk on behalf of UIC, and UIC, in turn, continues to cancel these risks, UIC's reputation as a reliable insurance company will suffer. Brokers and insureds would be reluctant to transact business with UIC if there remained uncertainty as to whether the purported agent had authority to bind UIC to the risk. UIC's Mem. of Law 7. Because UIC would be unable to calculate this type of damage, I find that reputational injury would also result in irreparable harm.

3. Likelihood of Success on the Merits

UIC's prayer for relief does not pertain to whether there was a material breach of the contract, but rather to whether UIC can unilaterally revoke World Wide's agency prior to arbitration and prohibit World Wide from binding risks on its behalf. See Compl. 1. UIC revoked World Wide's agency in its entirety in February 2011. By that notice, World Wide no longer had the authority to bind UIC to reinsurance risks. Because New York law provides that a principal can always revoke agency, and the revocability of the agency is not subject to arbitration, UIC will undoubtedly succeed on the merits of its claim that World Wide is without authority to continue as its agent. See American Home, 2006 WL 304746, at *4. Lastly, regardless of how the arbitrator resolves the merits of the contractual dispute, case law clearly dictates that an arbitrator will not reinstate the principal-agency contract between World Wide and UIC. Tyson v. Cayton, No. 88-CV-8398, 1990 WL 144206, at *2 (S.D.N.Y. Sept. 26, 1990) (noting that, "courts are chary of granting equitable relief where the result would be to compel two antagonistic parties to work together, particularly where the success of the relationship requires continuing cooperation and interwoven performance over a period of time.") (citation

omitted); see also Smith, 101 N.Y.S.2d at 531 (finding that it is "contrary to public policy for a principal to have an agent forced upon him against his will."). Therefore, UIC has proven it will likely succeed on the merits.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that UIC's preliminary injunction be granted in of arbitration, and that the Court enjoin World Wide from writing reinsurance risks on behalf of UIC or modifying or canceling existing risks. Any objections to this report and recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within fourteen (14) days of receipt of this report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6.

SO ORDERED.

Dated: April 27, 2011
Brooklyn, New York

/s/
JOAN M. AZRACK
UNITED STATES MAGISTRATE JUDGE