



Reinsurers waiver and a claims co-operation clause

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Guest article

Bill Maher and Marc Abrams of New York law firm Wollmuth Maher & Deutsch LLP consider 'The Battle before the War: the role of the U.S. courts in forming an arbitration panel.'

Catch up

Where to find members of our team in the Market over the next few months.

Trigger litigation

Since June 2008 Mr Justice Burton has been hearing the ‘employers liability trigger litigation’ (**Durham v Builders Accident Insurance; Fleming v Independent Insurance; Edwards v Excess Insurance; Thomas Bates Ltd v Builders Accident Insurance; Akzo/Amec v Excess Insurance; Municipal Mutual Insurance v Zurich Insurance & Others**). Weightmans represent Waverley District Council in the proceedings.

The litigation has arisen out of the Court of Appeal decision in **Bolton v Municipal Mutual Insurance Ltd** where the trigger for a public liability policy, written on an “occurrence” basis (injury occurring during the currency of the policy) was held, in the case of mesothelioma claims, to be triggered when the malignancy started to develop or possibly when symptoms became manifest, but not by inhalation of the asbestos dust.

Following on from the **Bolton** case, several insurers have refused cover in EL cases involving mesothelioma claims. They say that their policies were written on an “injury sustained” basis, which is argued to be the same as “injury occurring.” Other insurers have written their policies on an “injury caused” basis, which clearly refers to the inhalation of asbestos.

Burton J will have to decide, inter alia:

- Does **Bolton** apply to EL policies?
- Is he bound by **Bolton**?
- What is meant by “injury”?
- Is there a practice whereby all EL insurers cover mesothelioma claims on an “injury caused” basis (whatever the wording)?
- Does “injury sustained” mean the same as “injury caused”?

Final speeches are in progress and are due to finish at the end of July, with judgment expected in the autumn.

John Morrell, Partner, Weightmans LLP

Non-receipt of premium and s.53 MIA 1906

In **Allianz Insurance Co Egypt v Aigaion Insurance Co S. A.** (2 June 2008) the Commercial Court decided that the reinsured was entitled to payment from the reinsurer notwithstanding that the reinsurer had not received premium.

Allianz were marine insurers who sought reinsurance from Aigaion in 2005. It was Allianz's case that on 30 March or 2 April 2005, Aigaion agreed to reinsure 30% of the cover provided by Allianz in respect of a fleet of tugs including the **Ocean Dirk**. The reinsurance was brokered through Chedid.

The policy and debit note were sent by Aigaion to Chedid. These were neither acknowledged nor passed on to Allianz. On their part, Allianz paid instalments to Chedid, but Chedid did not pass these instalments on to Aigaion.

On 23 July 2005 the **Ocean Dirk** became a constructive total loss and Allianz sought to recover from Aigaion.

Aigaion claimed that:

- (i) no contract was concluded; and
- (ii) even if one had, then the policy lapsed automatically from non payment of premiums.

The Court concluded that, on the facts, a contract had been concluded on 2 April 2005. The uncertainty of a deferred premium clause did not prevent the contract from taking effect, as the terms of the clause were ascertainable.

A contract for reinsurance was, therefore, in place before the loss of the **Ocean Dirk** on 23 July. In order for this to have been cancelled for non-payment of the premium it would have been necessary to serve a cancellation notice. As this was not done, Aigaion was liable for its share of the loss.

Further the Court was asked to comment on whether s.53(1) of the Marine Insurance Act 1906 provides for Aigaion to be treated as having received the instalments.

Section 53 (1) of the 1906 Act states:

“Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.”

The Court found that s.53(1) means exactly what it says and that it “procures a situation in which, absent agreement to the contrary, the insurer may look to the broker for payment of the premium.” The fiction that the section originally embodied, namely that the broker has paid the premium to the underwriter but has borrowed from him the money with which he pays, is no longer of importance as the statute has made it unnecessary.

Colin Peck, Partner, Weightmans LLP



Construction/Erection All Risks

CAR/EAR Reinsurance

In **Mopani Copper Mines Plc v Millennium Underwriting Ltd** (16 June 2008), the Court had to look at a Construction/Erection All Risks (CAR/EAR) reinsurance policy and determine preliminary issues relating to interpretation and scope.

Mopani had undertaken to construct new copper smelting facilities in Zambia. The policy was insured with a Zambian insurance company and reinsured with Millennium (and others).

The reinsurance was a CAR/EAR policy which covered construction and operations of the plant for testing and commissioning. A condition was inserted which read, "The whole contract period is deemed to include all projects incorporated into the Mopani Smelter Upgrade project and cover extends to include Operational All Risks for completed phases of the project up until the final handover certificate is issued." Following further discussion, the condition was agreed save that the words "and cover extends to include Operational All Risks for completed phases of the project up" were struck out.

The plant was constructed and became operational and a claim was subsequently brought for damage done to part of the plant. Millennium resisted the claim on the basis that the reinsurance did not cover the completed parts of the project once they had become operational. Mopani argued that cover had been extended to cover general operational risks, and that it was incorrect to look at the deleted words on the slip.

The Court recognised that a CAR/EAR policy was significantly different to an operational policy and that any application to extend the former to cover operational risks would require further specifications as to extent of cover and premiums.

In this case, analysis of email communication and the amended slip made it clear that cover had not been extended to general operation risks as there was not due to be any operations before final handover once commissioning was completed.

It was not necessary to refer to the deleted words to reach that decision, although they did support the conclusion. Generally deleted words were not to be used as an aid to construction apart from in two circumstances: (1) where ambiguity of a remaining neighbouring paragraph required it; and (2) as evidence of what the parties had agreed not to agree (as in this case).

Underwriters should, therefore, be cautious when deleting provisions in a slip in circumstances where the words being deleted are still within the body of the slip.

Ling Ong, Partner, Weightmans LLP

Long term costs – who pays?

The Court of Appeal is to be asked once again to decide who should bear responsibility for the costs of future care for Claimants in personal injury proceedings: the Defendant or the local authority. The Courts have determined that the correct test for determining future care is the reasonable needs of the Claimant. The issues to be considered are what impact (if any) the Claimant's damages should have in relation to means testing by the local authority and whether the Defendant should bear any of the costs.

In **Sowden v Lodge** [2005] 1 WLR 2129, the Court of Appeal decided that as the Claimant was entitled to state funding, it would be legitimate for the Defendant to only pay for the difference in cost between local authority care and an additional private provision. Insufficient attention was, however, paid to how this top-up would be treated with relation to means testing and whether it would be considered as income.

In **Crofton v NHS Litigation Authority** [2007] 1 WLR 929, the Claimant was receiving direct payments from the local authority to purchase his own accommodation and employ carers. The Court of Appeal decided that the capital value of any damages awarded to the Claimant could not be taken into consideration at the means testing stage. The payments from the local authority would, however, be taken into account when assessing damages.

In **Peters v East Midlands SHA** [2008] EWHC 778, the Claimant was resident in a privately run specialist home. The decision at first instance was that the local authority would have to disregard both the capital and the income of the Claimant's damages. In considering the future care needs of the Claimant, the Judge was sceptical that the local authority would be able to provide care that would continue to meet the Claimant's reasonable needs. He pointed to the budgetary constraints of the local authority and the need for continual monitoring, revision and assessment of the Claimant's care. In addition, the Judge found that the likelihood of legislative changes to allow local authorities to take into account awards of damages made it unlikely that the Claimant could be accommodated in an equivalent care home for life. The Defendants were therefore liable for full future care costs. Arguments raised by the Defendants were rejected by the Judge. There was no failure to mitigate as it was reasonable to rely on the compensation from the Defendants rather than the local authority, and there would be no double recovery as no further funding would be sought from the local authority.

The Defendants in **Peters** have appealed the decision and it remains to be seen what decision the Court of Appeal will make and specifically how much of a burden will be placed on Defendants (and their insurers).

The government is also considering this issue. In the consultation paper "The Law on Damages" issued last year by the Ministry of Justice, it appears that the government believes that the tortfeasor should pay for the cost of care. The response to this consultation is yet to be published but it may be that the solution to the problem is legislative rather than judicial.

Innes Ebert, Partner, Weightmans LLP

PL insurance and the Riot (Damages) Act 1886

In **Bedfordshire Police Authority v David Constable** (20 June 2008), the Commercial Court had to identify the true construction of a public liability insurance policy and how it related to liability to pay compensation under the Riot (Damages) Act 1886.

Bedfordshire Police Authority was covered by an excess insurance policy issued by the DA Constable syndicate. The policy contained an indemnity in respect of all sums which the assured became legally liable to pay as damages for accidental damage to property which stated: “The company will indemnify the assured in respect of all sums which the assured may become legally liable to pay as damages ... for ... (b) accidental damage to property ... occurring within the geographical limits during the period of insurance arising out of the business.”

A claim arose out of an outbreak of violence at Yarl's Wood Detention Centre in 2002 whereby the Police Authority was required to pay compensation for the damage to the property under the Riot (Damages) Act 1886.

Two issues arose:

- (i) as to the true construction of the phrase “legally liable to pay as damages” in the policy and whether a legal liability under the 1886 Act falls within this; and
- (ii) as to the phrase “arising out of the Business.”

Mr Justice Walker held that in the absence of an indication that the parties had considered the matter, the phrases had to be construed in an ordinary commercial sense and that:

- (i) the phrase “legally liable to pay as damages” referred to both compensation and damages as the terms were interpreted. The phrase “legally liable to pay as damages” referred to both compensation and damages as the terms were interpreted. The 1886 Act imposes a civil liability upon the Police Authority which is ‘akin to tort.’
- (ii) the issue surrounding the words “arising out of the Business” is resolved as part of issue (i), as the Police Authority's liability was passed onto the syndicate.

Christina Pye, Paralegal, Weightmans LLP

Reinsurers waiver and Claims Co-Operation Clause

In **Lexington Insurance Co v Multinacional De Seguros S.A.** (23 May 2008), the Commercial Court had to determine a number of preliminary issues, in particular in what circumstances a reinsurer had waived their right to rely upon a claims co-operation clause.

Multinacional provided property and business interruption insurance to a Venezuelan aluminium producing company, Venalum. Multinacional acted as a front for a number of reinsurers, including Lexington. The reinsurance contract contained a “Claims Settlement Clause” (CSC) which provided for Multinacional to “furnish the reinsurers with all the information in respect of [notified] circumstances and shall co-operate with the reinsurers in the adjustment and settlement of the claim.”

An event at Venalum’s plant gave rise to a claim against Multinacional. Tensions arose between Multinacional and Lexington as to the merits of the claim, in particular whether Venalum had failed to mitigate its losses, and whether the action was time barred. Lexington took the position that Multinacional had breached the CSC by failing to co-operate and that they were therefore discharged from liability. In the alternative and without prejudice, Lexington continued to be involved in the claim.

Multinacional argued that:

- (i) Lexington by relying on the breach of the CSC and repudiating liability had waived by election their right to rely on the clause; and
- (ii) as a matter of construction, the CSC ceased to operate once Lexington had discharged themselves from liability.

The Court held that:

- (i) following the Court of Appeal in **Kosmar Villa Holdings v Syndicate 1243** a waiver by election required a choice between mutually inconsistent rights. In this case, Lexington did not have a choice; if there had been a breach of the CSC they would have been discharged from liability and if there had not been a breach, they would not have been. Raising a defence was not a contractual election;
- (ii) the CSC continued to operate once Lexington had discharged themselves from liability, as a matter of construction and in the interests of justice, to enable reinsurers to deny liability whilst still being involved in the investigation.

Colin Peck, Partner, Weightmans LLP

Disclosure of a third party's insurance position

In **West London Pipeline & Storage Ltd v Total UK Ltd & TAV Engineering Ltd** (9 June 2008) the Commercial Court held that it had no jurisdiction to order disclosure of the third party's insurance position.

The Defendants sought disclosure of the TAV's insurance details. In their claim the Defendants sought a contribution from TAV in respect of any liability arising from the Buncefield oil storage depot explosion. It was the Defendants' case that TAV was the designer, manufacturer or supplier of the switch which failed to operate whereby an overflow of fuel occurred leading to the explosion.

The Defendants argued that the Court had jurisdiction to order the disclosure of the TAV's insurance details under the justification that:

- (i) The material was relevant to the issues and in particular, the question of apportionment; and/or
- (ii) The material was necessary from the perspective of efficient case management.

The Court held that:

- (i) The existence or scope of any insurance cover was not material to the issue of apportionment as considered by the Civil Liability (Contribution) Act 1978;
- (ii) TAV's insurance details were not disclosable under CPR Part 31 whether as part of standard disclosure or otherwise. They did not support or adversely affect any party's case, they were not relevant to the issues nor did they constitute documents which might have led to a train of inquiry enabling a party to advance his own case or damage his opponent's;
- (iii) Contrary to the decision in **Harcourt v FEF Griffin** [2007], CPR Part 18 cannot be used to order disclosure. This follows the Law Commission's Paper on Third Parties Rights Against Insurers 2001 which states that information about cover held by a solvent assured was not available to a claimant unless it was volunteered.

Hannah Solanki, Solicitor, Weightmans LLP

Pure economic loss not recoverable under PL policy

In **Tesco Stores Ltd v Constable** (16 April 2008) Tesco appealed to the Court of Appeal against a decision that it could not recover for pure economic loss under its public liability insurance.

Tesco had embarked on a project to build a supermarket over a railway cutting. The railway was to be enclosed in a tunnel and the supermarket built over the top. The work caused the tunnel to collapse and the line was closed for 51 days. The railway track and surrounding land were owned by Network Rail. Tesco had entered into a deed of covenant with the train operating company (Chiltern) agreeing to compensate for all losses caused by the carrying out of the work. There was no damage to Chiltern's property and Tesco made a payment to compensate for loss of revenue. Tesco then sought to recover from its public liability insurance.

The policy contained the clause "against all sums for which the insured shall be liable at law for damages in respect of ... loss or damage to material property ... obstruction, loss of amenities, trespass, nuisance or any like cause." Tesco argued that the public liability insurance policy covered pure economic loss.

The Court dismissed the appeal on the basis that public liability insurance policies cover liability to the public at large for claims in tort and, as a general rule, a claim in tort cannot be founded on pure economic loss.

The words "all sums for which the insured shall be liable at law" are wide enough to include liability in contract, however, "in respect of" limits the cover to those matters expressly stated which are tortious in nature. The cover is also limited to the person who has a right to claim, liability for loss suffered by someone else as a consequence of the tort is not "in respect of" it.

The deed of covenant between Tesco and Chiltern was a contractual claim for pure economic loss but as Chiltern did not suffer any physical damage, Tesco could not recover from its public liability insurance.

Carys Oatham, Partner, Weightmans LLP

Guest article

We are delighted to have a guest article in this edition from Bill Maher and Marc Abrams at Wollmuth Maher & Deutsch LLP in New York. Our London Market team has good relations with a number of insurance and reinsurance law firms throughout the globe and we are pleased to count Wollmuth Maher & Deutsch LLP amongst those contacts.

Please note, however, that there are no formal ties between Weightmans and any other law firm and the views expressed in this article are those of the authors.

The battle before the war: the role of U.S. courts in forming an arbitration panel

William A. Maher & Marc L. Abrams¹

The formation of an arbitration panel in United States based arbitration may, at first glance, appear to be a puzzling experience. This is because the parties to the arbitration are increasingly devoting enormous resources to panel formation, essentially seeking to “win” the arbitration through the appointment of a favourable umpire rather than through more traditional advocacy methods. As more companies and their counsel follow this approach, it is unsurprising that reinsurance arbitrations are finding their way into federal court where parties seek the protection of the U.S. judiciary against the perception (or reality) that their opponents are “gaming” the panel appointment system. In this article we examine judicial “refereeing” of the arbitral appointment process, and, in particular, discuss the basic rules for invoking the protection of a federal court when a party is concerned that its opponent is manipulating the system. We also provide several points of guidance for parties and practitioners seeking (or seeking to avoid) judicial involvement in the panel appointment process. Finally, we discuss the ARIAS U.S. Umpire Selection Procedure as a means for avoiding the costly and time consuming practice of involving a federal court.

I. The basic rule: When can a party petition a federal court to supervise the appointment process?

The starting point for determining when a federal court can intervene in the arbitral appointment process is the Federal Arbitration Act (the “FAA”). This statute provides that if an arbitration agreement contains a provision setting forth “a method of naming or appointing an arbitrator or arbitrators or an umpire,” then this method must be followed. 9 U.S.C. § 5. If, however, no method is provided in the arbitration agreement, if the parties fail to “avail” themselves of the method specified by the agreement, or “if for any other reason” there is a “lapse” in the naming of an arbitrator or umpire, then a federal court is obligated to designate the arbitrator or umpire “as the case may require.” *Id.*

Federal courts have construed the FAA to allow themselves to designate an arbitrator or umpire when faced with two particular fact patterns: (i) where the arbitration agreement specifies a procedure for selecting an umpire but one of the parties refuses to comply, thereby delaying the arbitration; or (ii) where there is a “lapse” or a “deadlock” in the appointment process – oftentimes, because the arbitration clause does not contemplate the particular impasse that has arisen. See e.g., *In re Saloman Inc.*, 68 F.3d 554, 560 (2d Cir. 1995); *Pacific Reinsurance Management Corp. v Ohio Reinsurance Corp.*, 814 F.2d 1324 (9th Cir. 1987). In either situation, the Court itself will fashion a remedy by monitoring the appointment process, and even by choosing whomever it perceives to be the

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most qualified candidate as the umpire. **AIG Global Trade and Political Risk Insurance Company v Odyssey America Reinsurance Corp.**, 2006 U.S. Dist. Lexis 73258 (S.D.N.Y. Sep. 21, 2006); **Glacier Reinsurance AG v Odyssey America Reinsurance Corporation**, 2007 WL 1875658 (D.Conn. 2007).

On the other hand, there is a typical fact pattern where a federal court will refuse to accept the invitation to referee a dispute: i.e., where one party issues a pre-hearing objection to a candidate proposed by the other party on grounds of bias or partiality. In this particular situation, the federal court will usually dismiss the petition for lack of jurisdiction on the grounds that it “cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and rendition of an award.” **Barlow v Healthextras Inc.**, 2006 U.S. Dist. Lexis 86007 (D. Utah Nov. 13, 2006); **Global Reinsurance Corp v Certain Underwriters at Lloyd’s, London**, 2006 U.S. Dist. Lexis 91446 (S.D.N.Y. Dec. 16, 2006); **Clearwater Insurance Company v Granite State Insurance Company et al.**, 2006 U.S. Dist. Lexis 74771 (N.D. Cal. Oct. 2, 2006).

II. Practice guidelines for seeking or avoiding Federal Court Supervision

Based on the authorities discussed above as well as other relevant case law, we offer the following observations for parties seeking – or seeking to avoid – federal court supervision over the appointment process.

First, there appears to be a possible trend suggesting that parties are seeking the involvement of federal courts as a means of supervising the selection of umpire candidates. But federal courts will not always accept such an invitation. As mentioned above, where a party is merely challenging the partiality or bias of an umpire candidate during the appointment process, federal courts are unlikely to offer their involvement; instead, many of these courts will hope that the uncertainty of going forward with an arbitration proceeding that is subject to a potential post-hearing challenge will coerce the parties into resolving their differences. See, e.g., **Barlow**, 2006 U.S. Dist. Lexis 86007 (suggesting an arbitrator voluntarily withdraw because “[i]t would be unfortunate for [the plaintiff] to go through the time and expense of arbitrating his disputes only to face a potentially valid challenge to [the arbitrator’s] impartiality after issuance of the arbitration award”); **Old Republic Ins. Co. v Meadows Indemnity Co.**, 870 F. Supp. 210 (N.D. Ill. 1994) (“The parties (and the arbitrators) are certainly aware that the arbitration award is subject to judicial review following the arbitration”).²

Moreover, in two recent cases, courts have expressed impatience with parties’ attempts to challenge umpire appointments on a pre-hearing basis, even if the proposed umpires have ties to one the parties or its counsel. Notably, in the **AIG Global** matter, the Court went out of its way to critique the pre-award challenge of umpire candidates on partiality grounds, and, even after agreeing to supervise the umpire appointment process itself, the **AIG Global** Court rejected the reinsurers’ proposal that future umpire candidates “be without pre-existing relationships with any of the parties, their affiliates, counsel or party arbitrators.” **AIG Global**, 2006 U.S. Dist. Lexis 73258, at *20. In a similar manner, The Global Reinsurance Court explicitly rejected the claim that the reinsurers were “gaming the system” by selecting affiliated candidates, stating that “disqualifying an arbitrator because he or she had prior professional dealings with one of the parties would make it difficult at best, to find a qualified arbitrator at all.” 2006 U.S. Dist. Lexis 91446 at *11.

Second, the cases discussed above indicate that certain parties – frustrated by the perception (or reality) that their opponents are “gaming the system” – are resorting to “self help” measures, whereby these parties will attempt to unilaterally create appointment “requirements” that do not explicitly appear in the reinsurance agreement. Regardless of the apparent equities supporting these “self help” measures, federal courts typically will reject them. See **Mutual Marine Office, Inc. v Insurance Corporation of Ireland**, 2005 U.S. Dist. Lexis 11584 (S.D.N.Y. 2005)

² One exception to this rule can occur when a party issues a pre-hearing challenge to an arbitrator on the basis of actual and overt misconduct and impropriety. See **Old Republic Ins. Co.**, 870 F. Supp. at 212 (discussing cases).

(refusing to enforce unilaterally imposed requirement that parties appoint an U.S. based umpire because arbitration provision did not restrict “in any way the type of arbitrator that the parties may nominate”); **AIG Global Trade**, 2006 U.S. Dist. Lexis 73258 (discussed above); **Argonaut Midwest Ins. Co. v General Reinsurance Corp.**, 1998 U.S. Dist. Lexis 12497 (N.D. Ill. Aug. 6, 1998) (refusing to entertain a pre-hearing challenge to a party-appointed arbitrator who was an active reinsurance or insurance officer when appointed, but subsequently retired his position as an officer before an umpire was chosen).

Third, even though a federal court is unlikely to entertain the pre-hearing challenge of an umpire based on bias or partiality, it may – under certain circumstances – consider other pre-hearing challenges to the qualifications of an umpire, especially if they are based on express contractual requirements appearing in the reinsurance agreement. The case of **Jefferson-Pilot Life Insurance Company v LeafRe Reinsurance Company**, 2000 U.S. Dist. Lexis 22645 (N.D. Ill. Oct. 26, 2000), illustrates this point nicely. In that case, the court considered whether a party could challenge the appointment of arbitration candidates on a pre-hearing basis where the AAA had appointed candidates who were not active or retired officers of a health or life insurance company, despite a requirement in the operative reinsurance agreement to the contrary. Ruling to allow a pre-hearing challenge, the Court reasoned that the party challenging the appointment had not petitioned the Court “to undertake the difficult task of determining whether an arbitrator is impermissibly biased” but had instead “merely” asked to be “entitled to a benefit explicitly conferred by a provision of an agreement negotiated in an arm’s length transaction between two sophisticated parties.” See also **First State Ins. Co. v Employers Ins.**, Civ. No. 99-12478-RWZ (D. Mass. Feb. 23, 2000) (making a pre-hearing determination that an attorney was barred from serving as an arbitrator because he had served as one of the party’s counsel and was not “disinterested” as required by the contract); **Certain Underwriters at Lloyd’s v Continental Casualty Co.**, 1997 U.S. Dist. Lexis 11934 (N.D. Ill. 1997) (discussing parties’ limited rights to pre-hearing challenges that emanate from general contract principles); **American Centennial Ins. Co. v Commonwealth Ins. Co.**, 1987 U.S. Dist. Lexis 8542 (S.D.N.Y. 1987) (ordering replacement of non-active, party-appointed arbitrator based on requirements of reinsurance agreement).

Nonetheless, courts in other jurisdictions have rejected any distinction between challenging an arbitrator on bias grounds and doing so based on an arbitrator’s improper qualifications, holding that either challenge must wait until the issuance of an arbitral award. See **Gulf Guaranty Life Ins. Co. v Connecticut General Life Ins. Co.**, 304 F.3d 476 (5th Cir. 2002) (“a court may not entertain disputes over the qualifications of an arbitrator to serve merely because a party claims that enforcement of the contract by its terms is at issue, unless such claim raises concerns rising to the level that the very validity of the agreement is at issue”); **Aviall, Inc. v Ryder System, Inc.**, 110 F.3d 892 (2d Cir. 1997) (refusing to entertain a pre-hearing challenge on bias grounds, and stating, in *dicta*, that “it 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 rendition of an award”) (emphasis added). As always, any party considering a pre-hearing challenge on the basis of an arbitrator’s qualifications should consult the law of the relevant federal jurisdiction.³

Fourth, the **Global Reinsurance** matter provides useful insight for anyone intending to petition a federal court on the ground that its opponent is delaying the formation of an arbitration panel. In particular, this case suggests that a Court will evaluate whether a “lapse” exists (thereby allowing it to exercise jurisdiction) based on whether there is

³ Moreover, the general rule that federal courts will not review the partiality of an arbitrator on a pre-hearing basis may be inapplicable when the reinsurance agreement expressly calls for a federal court to appoint the umpire. For instance, in **Travelers Indemnity Co. v Everest Reinsurance Co.**, 2004 U.S. Dist. Lexis 30074 (D. Conn. 2004), the reinsurance agreement expressly required that if the parties were unable to agree on an umpire candidate, the federal court would select the umpire from a list of six candidates submitted by the parties. The reinsurance agreement also required that the umpire be “disinterested” and have expertise in the custom and practice of the insurance and reinsurance industry. Based on these clauses, the Court examined the qualifications and neutrality of the six umpire candidates, choosing one candidate based on his perceived neutrality and the strength of his qualifications. See also **Glacier Re**, 2007 WL 1875658



a delay in the appointment process – **as measured from when the moving party formally objects to the non-moving party’s dilatory conduct.** See e.g., **Global Reinsurance Corp**, 2006 U.S. Dist. Lexis 91446 (discussed above); **Travelers Indem. Co. v Gerling Global Reinsurance Corp.**, 2001 U.S. Dist. Lexis 6684 (S.D.N.Y. 2001) (no lapse under the FAA where “the parties amicably attempted to resolve the discrepancies between the various reinsurance agreements and had to contend with motion practice regarding the disqualification of counsel”). In sum, any party facing an opponent that is “dragging its heels” during the appointment process would be well advised to formally raise this objection as soon as possible.

III. Avoiding the courts: The ARIAS Umpire Selection Procedure

The most obvious means of resolving a lapsed appointment process is for the parties to propose (and subsequently agree upon) umpire candidates who have well deserved reputations of honesty, integrity and objectivity and who have no prior relations with the parties. But where the parties are unable to reach such an agreement, given the costs and expenses associated with petitioning a federal court, parties would be well advised to take advantage of the ARIAS Umpire Selection Procedure (the “Procedure”). Under the Procedure, the ARIAS US Executive Director’s office randomly selects twelve names from the Umpire List (or if the parties so choose, from the Arbitrator or Newer Arbitrator Lists), the first ten of whom will be contacted by the parties and asked to complete umpire questionnaires. Assuming that all ten of the candidates are available for appointment, the eleventh and twelfth candidates will not be contacted, and each side will select five candidates from the list of ten. After the parties narrow down these “lists of five” by designating three candidates from the other sides’ list and then ranking them, an umpire candidate is chosen – either based on a choice that is common to each party or a points system based on a ranking process.⁴ Although the Procedure appears to foreclose the possibility of a by party stacking the deck with partial candidates it is our understanding that the Procedure is not frequently used, perhaps because the Procedure does require the parties to lose some degree of control over the appointment process.

As parties continue to vigorously attempt to “win” the arbitration during the panel appointment process, the Procedure would appear to offer a best case solution acceptable to both sides. Nonetheless, parties who do agree to select an umpire in accordance with the Procedure would be well-advised to address the issue of whether (or not) certain candidates randomly designated the ARIAS US Executive Director should automatically be stricken from the list – for instance, candidates who formerly held executive positions for one of the parties to the arbitration – or whether any candidate randomly selected by the Executive Director is presumptively able to serve as an umpire candidate. Unless the parties have the foresight to reach agreement on these issues, they may end up re-creating many of the disputes that the Procedure is designed to thwart.

William Maher, Partner, Wollmuth Maher & Deutsch LLP & Marc Abrams, Partner, Wollmuth Maher & Deutsch LLP

⁴ The Procedure as well as the ranking system is described in detail at <http://www.arias-us.org/index.cfm?a=25>

Catch Up

You can catch up with members of our London Market team at the following events:

- The **Monte Carlo Reinsurance Rendezvous** 7–11 September 2008 – Colin Peck and Ling Ong attending
- Our next **London Market Seminar** in October 2008
- **AIRROC** in New Jersey, USA 20–24 October 2008 – Colin Peck and Ling Ong attending
- **Excess/Surplus Lines Claims Association**, Ruschlikon, Switzerland 10–11 November 2008 – Colin Peck and Ling Ong attending
- **Norwich Insurance Institute** on 11 November 2008 – Dan Cutts attending

If you need to contact any members of our London Market team before these events or if any queries arise from the contents of this newsletter, please see below for contact details:



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