United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Judge Zagel	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	09 C 3959	**DATE**	January 21, 2010
CASE TITLE	TRUSTMARK INSURANCE COMPANY v. JOHN HANCOCK LIFE INSURANCE COMPANY		

DOCKET ENTRY TEXT:

Defendant's Motion for Reconsideration and Clarification (69) is granted. Defendant's request to extend the October 8, 2009 deadline for arguments regarding continuing sealing and redactions is granted. The new deadline is October 19, 2009.

STATEMENT

On September 30, 2009, I enjoined the parties' participation in the Second Arbitration with Gurevitz, a party-appointed arbitrator on the panel. Defendant John Hancock now moves for clarification and reconsideration on two grounds.[1] Ultimately, Hancock seeks an opinion that the panel of the Second Arbitration "is authorized to determine which issues should be precluded based on the rulings in the first arbitration, apart from the direct/retro issue which the parties have agreed to relitigate."

First, Hancock requests that I clarify my previous order by making it clear "that all prior preclusion rulings apart from Paragraph 1 of Interim Ruling 11 in the Second Arbitration remain in effect and the Second Arbitration Panel retains the authority to amend and supplement these rulings as it deems appropriate." Paragraph 1 reads "Retrocessional Business: The issue of retrocessional business under the treaties at issue, including excess of loss on excess of loss, is precluded."

In my ruling, I included a footnote explaining that Hancock had agreed to "set aside the preclusion order and relitigate the issue of whether its retrocessional business was properly ceded," and later noted that "[h]ad confidentiality of the First Arbitration award been maintained, there would have been no preclusion order and Trustmark would have had the benefit of relitigating the retrocessional business issue notwithstanding the first panel's finding against Trustmark on the matter." These are not rulings, but rather observations I needed to make to explain the situation as it stood on the eve of the Second Arbitration. Hancock had agreed to set aside the preclusion order *with respect to the issue of whether its retrocessional business was properly ceded*, allowing for the relitigation of that one specific issue. I made no rulings as to the preclusion order itself, or whether the Second Arbitration panel has authorization to decide the issues of preclusion now raised by Hancock.

Hancock next points out that the opinion cites to an arbitration clause in the wrong agreement, and they are correct. The cite should have been to the arbitration clause contained in the Excess of Loss Reinsurance Agreement, and not the clause included in the Underwriting Agreement. However, this does not

STATEMENT

alter the outcome of the opinion. The clause contained in the Excess of Loss Reinsurance Agreement reads:

> Disputes between the parties arising out of this Reinsurance which cannot be resolved by compromise, including but not limited to any controversy as to the validity of this Reinsurance, whether such disputes arise before or after termination of this Reinsurance shall be submitted to arbitration.

Hancock maintains that this clause is broader, and should be interpreted to include the Confidentiality Agreement at issue. In support of this argument, Hancock cites *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Intern., Ltd.*, 1 F.3d 639, 641 (7th Cir. 1993), where the question before the Court was "Does a dispute, which has as its object the nullification of a contract, 'arise out of' that same contract?" The Court held that it does, noting that "any dispute between contracting parties that is in any way connected with their contract could be said to 'arise out of' their agreement and thus be subject to arbitration under a provision employing this language." *Id.* at 642. The Court cites *Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 391 (7th Cir. 1984), where it found that the arbitration clause at issue covered disputes about whether a party to a Reinsurance Agreement induced its counterparty to sign the agreement by verbally agreeing to a condition precedent to pay an advance premium. The counterparty refused arbitration claiming that the contract was void at inception, and therefore there was no obligation to arbitrate. The Court held that "[t]he dispute about the condition precedent involved questions of interpretation and performance[,]" setting it squarely within the parameters of the arbitration clause which governed any differences of opinion with respect to the interpretation of or performance under the agreement at issue.

Hancock also cites *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000), where the party opposing arbitration argued that the contracts at issue were themselves illegal thereby rendering the arbitration clauses therein ineffective. The Court, citing *Sweet Dreams*, held that the parties could not be protected from arbitration by a statute invalidating the agreement, since even this contention "arose out of" and "had its origins in" the agreement. *Id.* at 550-51.

None of these cases addresses the situation before me. Trustmark is not attacking the validity of the Reinsurance Agreement or the arbitration clause therein. Hancock attempts to argue that the Confidentiality Agreement has its origin in the Reinsurance Agreement, and that in fact, the Confidentiality Agreement would not exist but for the Reinsurance Agreement. But this is too tenuous a connection. The dispute here arises out of the Confidentiality Agreement, not the Reinsurance Agreement. The Confidentiality Agreement, which obviously came after the Reinsurance Agreement, contains no arbitration clause, nor does it incorporate or reference the Reinsurance Agreement in any way. Also, the Confidentiality Agreement involves additional parties - the Arbitrators "who evidence[d] by [their] execution hereof of [their] undertaking to maintain Arbitration Information in confidence[.]" The Confidentiality Agreement is a separate contract, binding on more than just the Plaintiff and Defendant, and Hancock points to no authority that supports the idea that such an agreement is encompassed by an arbitration clause in an earlier separate agreement.

Finally, Hancock maintains that regardless of the arbitrability of disputes under the Confidentiality Agreement, the agreement does not restrict the Second Arbitration panel's authority to consider discovery, evidence and rulings from the First Arbitration. I must once again stress that I made no ruling as to the second panel's authority to determine which issues should be precluded based on the rulings in the first arbitration. But to the extent that Hancock suggests that this should somehow affect my ruling on Trustmark's likelihood of success on the merits, I will address their argument. Hancock cites to case law supporting the proposition that discovery and other procedural questions arising out of an arbitration are for the arbitrators to decide, not a judge.[2] But this is not a discovery dispute - it is a contractual one. Hancock points out that the Confidentiality Agreement itself allows for disclosure of arbitration information "as is necessary in order to comply with subpoenas, discovery requests or orders of any court." However, throughout the Confidentiality Agreement, distinctions are drawn between "court proceedings" and

STATEMENT

arbitration, and court and arbitrators. This agreement does not expressly allow for disclosure to comply with orders of an arbitration panel.[3]

Hancock also suggests that Trustmark is unlikely to succeed on the merits in the face of "substantial case law stating that issues of preclusion are left to the subsequent arbitration panel." It is true that "arbitrators can take 'arbitral notice' of a previous decision by another arbitrator[.]" *Consolidation Coal Co. v. United Mine Workers of America*, 213 F.3d 404, 407 (7th Cir. 2000) ("If the parties to the [ ] agreement want the first arbitrator's interpretation of a provision of the agreement or resolution of a dispute arising under the agreement to have preclusive effect, they can so provide; and whether they do so or not, the question of the preclusive force of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator to decide."). However, this case involves the possible breach of a confidentiality agreement, the existence of which can be interpreted to suggested that at the time, the parties did not intend the First Arbitration to have preclusive force. Furthermore, Hancock points to one case, a controversial judgment of the Lords of the Judicial Committee of the Privy Council in Associated Electric and Gas Insurance Services v. European Reinsurance Company of Zurich, [2003] UKPC 11, in a case on appeal from the Bermuda Court of Appeal. The Judicial Committee found that the parties' confidentiality agreement did not prevent disclosure of the award in a first arbitration to the panel in a second arbitration. While I am not bound by such case law, it is worth noting that the language at issue in that agreement differs from what is before me and I am not persuaded by the reasoning in that case.

None of Hancock's arguments affect my analysis with regard to Trustmark's success on the merits, irreparable harm, and balance of harms. For this reason, I adhere to my previous ruling on the motion for preliminary injunction. I make no finding as to whether the Second Arbitration panel has the authority to determine which issues should be precluded based on the rulings in the First Arbitration.

1. Although this motion has not been formally presented or responded to, it is appropriate to rule at this time in light of the substance of the motion and the lack of prejudice to the non-moving party.

2. Notably, Hancock references *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), where although the Court stated that procedural questions are in the province of the arbitrators, it explained that "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court."

3. Even if I were to read the Confidentiality Agreement as allowing for disclosure to comply with orders or subpoenas of an arbitration panel, under Massachusetts law, it is within the courts' power "to vacate any subpoena which it determines is unreasonable, oppressive, irrelevant, or improper." *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 615 (1993).