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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IRB-BRASIL RESSEGUROS S.A.,

Petitioner,

- against -

NATIONAL INDEMNITY COMPANY,

Respondent.
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MEMORANDUM AND ORDER

11 Civ. 1965 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Before this Court are cross-petitions by petitioners IRB-Brasil Resseguros S.A. ("IRB") and National Indemnity Company ("NICO") concerning two arbitration proceedings between IRB and NICO in New York. IRB's petition asks the Court to stay both arbitrations, to disqualify an arbitrator appointed by NICO and permit IRB to appoint NICO's arbitrator, and to consolidate the two arbitrations or, alternatively, to direct that a separate arbitration panel be formed to determine whether consolidation should occur. NICO's petition asks the Court to designate a neutral third arbitrator in one of the arbitrations, pursuant to section 5 of the Federal Arbitration Act. 9 U.S.C. § 5. For the reasons discussed below, both petitions are denied.

BACKGROUND

On December 31, 2008, NICO commenced an arbitration in London, England ("Arbitration 1") and an arbitration in New York

City ("Arbitration 2") by serving IRB with two Notices of Arbitration and Requests for Appointment of Arbitrator. (IRB Pet. Ex. A; B.) The disputes in the Arbitration 1 arose in connection with a reinsurance policy issued by NICO to IRB bearing the policy number 90SRD102340 and covering the period of November 21, 2007 to February 21, 2008. (IRB Pet. Ex. A 1.) The disputes in the Arbitration 2 arose in connection with a reinsurance policy issued by NICO to IRB bearing the policy number 90SRD102385 and covering the period of February 21, 2008 to February 21, 2009. (IRB Pet. Ex. B 1.) The arbitration clause in both reinsurance policies provided for the following procedure to select arbitrators:

> If any dispute shall arise among the Reinsured and the Reinsurer with reference to the interpretation of this Insurance or rights with respect to any transaction involved, whether such dispute arises before or after termination of this Insurance, such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chosen by either party, and the third by the two so chosen. If either party refuses, or neglects to appoint an arbitrator within 30 days after receipt of written notice from the other party requesting it to do so, the requesting party may appoint two arbitrators. If the two arbitrators fail to agree in the selection of a third arbitrator within 30 days of their appointment, each of them shall name two, of whom the other shall decline one and the decision shall be made by drawing lots. All arbitrators shall be

> active or retired officers of insurance or reinsurance companies not under the control of either party to this Certificate.

(IRB Pet. Ex. A 2; Ex. B 2.) The parties selected arbitrators in Arbitration 1 according to the above procedure. (IRB Pet. ¶ 21.) On November 16, 2010, the panel in Arbitration 1 determined that it lacked jurisdiction and dismissed the arbitration. (IRB Pet. ¶ 28.) On the same day, November 16, 2010, NICO commenced a third arbitration against IRB in New York City ("Arbitration 3"), under the same reinsurance policy as Arbitration 1. (IRB Pet. ¶ 34.)

Meanwhile, on January 30, 2009, IRB had appointed James White as its party-appointed arbitrator in Arbitration 2. (IRB Pet. ¶ 30; Ex. C.) On June 22, 2009, NICO had appointed James Dowd as its party-appointed arbitrator in Arbitration 2. (IRB Pet. ¶ 31; Ex. D.) According to IRB's petition, "IRB nominated William Trutt and Jonathan Rosen as potential Umpires in [Arbitration 2], and notified NICO of its nominations for Umpire on September 15, 2009." (IRB Pet. ¶ 32.) On September 18, 2009, both parties had agreed to postpone selection of the third arbitrator in Arbitration 2 so that they could conduct confidential, without-prejudice settlement discussions. (IRB Mem. Opp. 4.) These discussions concluded in December 2009

without an agreed settlement, and no third arbitrator was ever selected in Arbitration 2.

On December 16, 2010, IRB appointed James White as its arbitrator in Arbitration 3. (IRB Pet. ¶ 35.) On March 1, 2011, NICO appointed Jonathan Rosen as its arbitrator in Arbitration 3. (IRB Pet. ¶ 36.) In a letter dated March 15, 2011, IRB objected to NICO's appointment of Rosen because IRB had previously nominated Rosen as a potential neutral third arbitrator in Arbitration 2 and because IRB believed that NICO or its counsel had *ex parte* contact with Rosen. (IRB Pet. Ex. H.)

On March 21, 2011, IRB filed a petition in this Court to disqualify Rosen from serving in Arbitration 3 and to compel consolidation of Arbitrations 2 and 3. On April 8, 2011, NICO filed an answer and cross-petition seeking appointment of the third arbitrator in Arbitration 3 because IRB's arbitrator, Mr. White, had refused to discuss the selection of a third arbitrator with NICO's arbitrator, Mr. Rosen, allegedly causing the selection procedure to lapse. (NICO's Cross-Pet. ¶ 5-7.)

DISCUSSION

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "establishes a federal policy favoring arbitration . . . requiring that we rigorously enforce agreements to arbitrate."

Shearson/American Express v. McMahon, 482 U.S. 220, 226 (1987) (internal quotations and citation omitted). Section 5 of the FAA requires that "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. Section 5 also provides that if a party fails to follow the method specified in the agreement, or in the event of a lapse in the selection of arbitrators, either party may make an application to the court, and "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." 9 U.S.C. § 5.

I. Disqualification

Neither section 5 nor any other provision of the FAA authorizes the court to disqualify an arbitrator chosen in accordance with the parties' agreement to arbitrate. In the present case, the parties' agreement requires only that the arbitrators be "active or retired officers of insurance or reinsurance companies not under the control of either party." (IRB Pet. Ex. A 2; Ex. B 2.) Although IRB asks the Court to disqualify Rosen from serving as NICO's arbitrator in Arbitration 3, it has failed to identify any source of authority

for the Court to grant the relief sought. The New York state court case cited by IRB, *Excelsior 57th Corp. v. Kern*, 218 A.D.2d 528, 630 N.Y.S.2d 492 (1st Dep't 1995), involved the disqualification of an arbitrator from serving in a subsequent arbitration after the Appellate Division previously had held that his conduct gave rise to an appearance of impropriety, circumstances which are not present here.

Furthermore, even if the Court were empowered to disqualify Rosen, it is highly doubtful that his alleged conduct, namely having previously agreed to serve as a candidate to be the neutral third arbitrator in Arbitration 2, affords any cause for concern about his ability or qualifications to serve as NICO's party-appointed arbitrator in Arbitration 3. As we expressed to the parties at a conference with the Court, the converse is perhaps the better view: that by agreeing to serve as NICO's arbitrator in Arbitration 3, Rosen has effectively removed himself from consideration as a neutral third arbitrator in Arbitration 2, and that by selecting Rosen in Arbitration 2, NICO has effectively exercised its option to decline Rosen as a candidate to be the neutral third arbitrator Arbitration 3, under the terms of the agreement.[1]

[1] While we do not retract this observation, which the parties' subsequent letters to the Court suggest they have accepted as an accurate description of the current state of affairs, we note that it is not necessary to our

Thus, IRB's request for the Court to disqualify Rosen as NICO's arbitrator in Arbitration 3 must be denied.

II. Consolidation

IRB also argues that Arbitrations 2 and 3 involve the same underlying loss and must be consolidated under the plain language of the arbitration clauses in the reinsurance policies, each of which provides that "[i]f any dispute shall arise among the Reinsured and the Reinsurer with reference to the interpretation of this Insurance or rights with respect to any transaction involved . . . such dispute, upon written request of either party, shall be submitted to three arbitrators, one to be chosen by either party, and the third by the two so chosen." (IRB Pet. Ex. B.) NICO contends that the two arbitrations were commenced separately, nearly two years apart, and that any question of consolidating them should be put to the arbitrators, once an arbitration panel has been chosen.

The Supreme Court, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), held that the specific question of contract interpretation concerning "what kind of arbitration proceeding the parties agreed to" is "for the arbitrator, not the courts, to decide." In the present case, it is apparent that

decision on the merits of IRB's petition seeking disqualification. Thus, the question of who the neutral third arbitrator will be in Arbitration 2, while it may be of great importance to the parties, is not before the Court.

the issue of whether the two arbitrations should proceed separately or in consolidated form is a question of "what kind of arbitration proceeding the parties agreed to." *Id.* Therefore, we decline to offer our view on the matter. Moreover, the numerous issues that may arise in connection with the consolidation of two arbitrations are best left to the arbitrators.

We see no further barrier to the parties concluding the relatively straightforward process of selecting the arbitrators in Arbitration 2 according to the terms of their agreement. Once that panel is chosen, it can address these issues if the parties choose to have it do so.

Thus, IRB's request for the Court to consolidate Arbitrations 2 and 3 is denied, and we decline the invitation to be involved any further in the selection of the third arbitrator in Arbitration 2, such as by performing a coin-toss pursuant to the "drawing lots" provision, something we are confident the parties can manage agreeably on their own.

III. Lapse in Selection

Finally, NICO argues that IRB has caused a lapse in the selection of an umpire in Arbitration 3 by refusing to accept NICO's appointment of Rosen, and that the Court should select

the third arbitrator from a list of retired federal judges.[2] The procedure set forth in the agreement to arbitrate allows thirty days for the two arbitrators appointed by the parties to attempt to agree on the selection of a third arbitrator and then to follow the lot-drawing procedure if they are unable to agree. (IRB Pet. Ex. B.) Because NICO notified IRB of its appointment of Rosen on March 1, 2011 and IRB filed its petition with the Court only twenty days later, on March 21, 2011, it is apparent that no lapse has occurred. Having denied IRB's petition to disqualify Rosen, it is the Court's expectation that the parties can now proceed with the selection of arbitrators in Arbitration 3 according to the terms of their agreement, or they can reach some alternative agreement in anticipation of the resolution of the consolidation issue by the arbitrators in Arbitration 2. Thus, NICO's request that the Court exercise its authority pursuant to section 5 of the FAA to designate and appoint a third arbitrator in Arbitration 3 is denied.

IV. Stay of Proceedings

Finally, IRB seeks a stay of both arbitrations so that a separate panel can be appointed to decide whether the two proceedings should be consolidated. As we explained above, the

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[2] We note that it is highly unlikely that any retired federal judge meets the sole requirement specified in the agreement to arbitrate that the arbitrators be "active or retired officers of insurance or reinsurance companies."

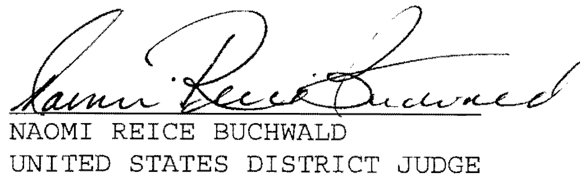
arbitration panel chosen by the parties in the first arbitration, Arbitration 2, is the appropriate entity to decide the consolidation issue. Thus, the request for a stay is denied.

CONCLUSION

For the foregoing reasons, IRB's petition to stay the arbitrations, disqualify an arbitrator, and consolidate the proceedings is denied, and NICO's petition to appoint an arbitrator is denied.

SO ORDERED.

Dated: New York, New York
October 5, 2011



NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

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