

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONWIDE MUTUAL)	
INSURANCE COMPANY,)	
)	
Petitioner,)	
)	Case No.
v.)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY,)	
)	
Respondent.)	

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION TO COMPEL ARBITRATION**

I. Introduction

Petitioner Nationwide Mutual Insurance Company (“Nationwide”) and Respondent, Liberty Mutual Insurance Company (“Liberty”) are parties to a set of reinsurance treaties.¹ Those treaties, like many others, contain arbitration clauses that require the parties to arbitrate disputes arising from them. A dispute has arisen between the parties with regard to their respective rights and obligations under the Access to Records Clause contained in the treaties. The dispute is subject to arbitration in accordance with the bargained-for agreement between the parties. Under the Federal

¹ Reinsurance is a type of insurance under which an insurance company that has insured an underlying risk obtains insurance for itself on the risk in the form of a contract of indemnity provided by another insurance company, which is known as the reinsurer. An insurer that has obtained reinsurance in this manner often is referred to as a “cedent” because it “cedes” a portion of its underlying risk to the reinsurer. In this action, Liberty is the cedent and Nationwide is the reinsurer. This case involves a specific type of reinsurance contract, called treaty reinsurance, which is a standing agreement between the cedent and the reinsurer for the cession and assumption of certain risks defined in the “treaty.” “Excess of loss” reinsurance is a generic term describing reinsurance contracts that, subject to a specific limit, indemnify the cedent against all or a portion of a covered loss in excess of a specific amount.

Arbitration Act (“FAA”) this Court has the power to Order such an arbitration and Nationwide respectfully urges that it do so.

II. Factual Background

Nationwide and Liberty entered into a series of Excess of Loss Reinsurance Contracts for various periods between 1972 to 1983 (the “Treaties”). (Verified Petition, at ¶ 10.) These Treaties require that disputes between the parties be arbitrated. (Verified Petition, at ¶ 11.) Specifically, the arbitration clauses in the Treaties provide, in pertinent part, either that:

As a condition precedent to any right of action hereunder, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire, meeting in Boston, Massachusetts unless otherwise agreed.

or that:

In the event of any dispute or difference of opinion, arising with respect to this Contract, it is hereby agreed that such dispute or difference of opinion shall be submitted to arbitration

(Id.)

The Treaties also contain an Access to Records Clause. This Clause grants Nationwide the right to “at reasonable times, have free access to all books and records of the Company and of its agents or attorneys for the purpose of obtaining any information concerning this reinsurance or the subject matter thereof.” (Verified Petition, at ¶ 13.)

On April 3, 2013, pursuant to the rights granted under the Access to Records Clause, Nationwide requested to audit the following ten claims:

AIRCO/BOC Group, Inc.
Dexter Midland Company

Greene Tweed & Company
Hoyt Manufacturing Company
International Multifoods
John H. Hampshire Inc.
Park Motor Sales
Plastics Engineering Company
The Riley Company
Rogers Corporation

(Verified Petition, at ¶¶ 12 and 14.)

For months, Liberty failed to provide Nationwide with its contractually guaranteed access and intentionally frustrated Nationwide's efforts to obtain a timely response to its requests for additional information and documents concerning these specific claims.

(Verified Petition, at ¶ 15.)

In the interim, Nationwide and Liberty arbitrated a claim that is not the subject of this Petition but which addressed the parties differing views over their rights and responsibilities under, among other things, the right to access "Confidential Material" under the Access to Records Clause, and the interplay between the Access to Records Clause and the "Claims Against Reinsurers" provision. (Verified Petition, at ¶ 16.)

On June 26, 2013, the panel issued an order ("Houdaille Award") addressing these issues and concluding, among other things, that:

Billings of future claims under the Treaties shall be paid, paid subject to a reservation of rights or denied within 60 days of [Nationwide's] receipt of billing and status packages generally in the form and content as Hearing Exhibit 20 and Hearing Exhibits 4-17. During the 60 day period [following Nationwide's receipt of the billing, Liberty] shall make a good faith effort to respond to reasonable requests by [Nationwide] for additional information or documents.

(Verified Petition, at ¶ 17.) Liberty's Motion to Confirm this award, in part over Nationwide's objection, was granted by the Superior Court of Massachusetts in Suffolk County on October 29, 2013. (*Id.*) Notably, however, the time for appeal has not expired. (*Id.*)

After issuance of the Houdaille Award, Liberty continued to impede Nationwide's contractual rights as it related to auditing the ten claims in question. (Verified Petition, at ¶ 18.) On September 11, 2013, Nationwide demanded arbitration against Liberty. The demand seeks, among other things, an award confirming that Liberty has improperly restricted Nationwide's right to have free access to all books and records of the Company and of its agents or attorneys, as required by the Access to Records Clause, in regard to the claims that are the subject of this present motion, and, as a result, is in breach of its contractual obligations. (Verified Petition, at ¶ 19.) In particular, Nationwide contends that Liberty failed to make a good faith effort to provide Nationwide with timely access as required by the Treaties.

On October 1, 2013, after six-months of failing to provide Nationwide access to audit documents, and only after the demand for arbitration was made, did Liberty begrudgingly offer to provide Nationwide with specific dates when it might have limited access to some of the documents requested on improper terms unilaterally imposed by Liberty. (Verified Petition, at ¶ 20.)

Based upon this belated offer – which comes too late and falls far short of providing the full and free access to which Nationwide is contractually entitled – Liberty now refuses to recognize the validity of Nationwide's demand for arbitration. (Verified

Petition, at ¶ 21.) While the parties each appointed arbitrators, as they are required to do under the arbitration clauses in the Treaties, Liberty made its appointment provisionally because it openly disputes the arbitrability of Nationwide’s demand. (*Id.*) Further, Liberty has continually expressed its belief that Nationwide’s demand for arbitration is “precluded,” “moot,” or otherwise not valid because there is “no dispute,” and has made clear that it does not intend to proceed with the appointment of a third arbitrator – or “umpire” – as required by the Treaties.² (*Id.*)

Of course, Nationwide vigorously disagrees with all of Liberty’s stated views, and contends that Liberty has failed – and continues to fail – to act in accordance with its obligations under the Access to Records Clause. Accordingly, this dispute is ripe for arbitration.

III. Discussion

Under Section 4 of the FAA, a “party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4 (2010).³ This is consistent with the recognition of courts that the policy favoring arbitration at the heart of the FAA “is at

² Liberty’s strategy is apparently to forestall the arbitration while seeking a judicial determination in Massachusetts Superior Court regarding application of the 60-day payment decision deadline established by the Houdaille Award. While Liberty’s motion in the Superior Court action acknowledges that Nationwide has demanded arbitration concerning the present access to records dispute, it urges the court to ignore the demand because it is “bogus.”

³ The FAA is found in 9 U.S.C. § 1 *et. seq.* and is implicated whenever interstate commerce is at issue. As a general rule, contracts of reinsurance typically involve interstate commerce and therefore trigger application of the FAA. *See, e.g., Security Life Ins. Co. of Am. v. Hannover Life Reassurance Co. of Am.*, 167 F. Supp. 2d 1086, 1088 (D. Minn. 2001) (“Reinsurance contracts fall under the protection of the FAA.”); *Utica Mutual Ins. Co. v. Gulf Ins. Co.*, 762 N.Y.S.2d 730, 732 (N.Y. App. Div. 2003).

bottom a policy guaranteeing the enforcement of private contractual arrangements.” *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Clarendon Nat’l Ins. Co. v. John Hancock Life Ins. Co.*, 2001 WL 10333581 (S.D.N.Y. Sept. 6, 2001) (relying on a “number of Supreme Court decisions which concluded that the purpose of the FAA is not to expedite resolution of claims, but rather, to enforce private agreements.”)

Here, Nationwide demanded arbitration in September of 2013 against Liberty under the Treaties. (Verified Petition, at ¶ 19.) Nationwide was thus proceeding in a manner consistent with the language of the parties’ arbitration agreements. (Verified Petition, at ¶ 11.) Liberty, on the other hand, has failed and refused to proceed with the arbitration in accordance with the terms of the parties’ agreements to arbitrate. (Verified Petition, at ¶ 25.) Nationwide has thus been aggrieved by Liberty’s failure and refusal to proceed as required by the Treaties. (*Id.*)

The Court's role in this dispute is limited and clear. The FAA directs the Court to issue “an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. Arbitration is the proper forum for resolution of this dispute in light of the Treaty terms mandating any dispute be submitted to arbitration. Accordingly, under the authority provided by the FAA, this Court should order the parties to promptly arbitrate this dispute.

IV. Conclusion

Liberty has failed and refused to proceed with the arbitration as required under the parties’ written agreements to arbitrate. Such failure under the terms of the Treaties is

improper. Accordingly, Nationwide respectfully requests the Court to issue an Order directing the parties to arbitration.

Respectfully submitted,

Nationwide Mutual Insurance Company
By Its Attorneys,

/s/ Patrick J. Hannon

Patrick J. Hannon – BBO No. 664958
SUGARMAN, ROGERS, BARSHAK & COHEN, P.C.
101 Merrimac Street, 9th Floor
Boston, MA 02114-4737
(617) 227-3030

Date: November 13, 2013

Of Counsel:

Keith A. Dotseth
Hilary J. Loynes
LARSON • KING, LLP
2800 Wells Fargo Place
30 East Seventh Street
Saint Paul, Minnesota 55101
(651) 312-6500