SEVENTH CIRCUIT EMPHASIZES THE NECESSITY FOR THE TIMELY SELECTION OF EACH PARTY ARBITRATOR

Experienced reinsurance litigators know that selecting the *right* arbitrator can be the key to a favorable outcome in a reinsurance arbitration. A knowledgeable and sympathetic arbitrator can be the voice of reason and persuasion that ultimately sways the panel's decision. Hence, a party's right to designate an arbitrator of its own choosing should be guarded jealously, a point driven home in a recent decision by the Court of Appeals for the Seventh Circuit: *Certain Underwriters at Lloyd's London v. Argonaut Insurance Co.*, No. 06-3395, 2007 WL 2433139 (7th Cir. Aug. 29, 2007) ("*Argonaut*"). There, the court held that an arbitration clause containing a 30-day limit on the right to appoint one's party arbitrator must be construed strictly in accordance with federal law, and a party that fails to appoint its party arbitrator within the time prescribed by the contract will forfeit the right to do so.[1]

Background

Reinsurance contracts have traditionally contained clauses calling for the arbitration of disputes before a panel consisting of current or former insurance or reinsurance executives. Reinsurance arbitration clauses typically provide for a "tripartite" panel in which each party appoints its own arbitrator (a "party arbitrator") and the two party arbitrators select a third arbitrator (an "umpire") to complete the panel.[2]

> [This] concept of arbitration before a panel of experts has appealed to insurers and reinsurers alike for many years. The shared belief is that the ultimate decision more often will be equitable if that decision is made by a panel of individuals who are familiar with the business practices of insurers and reinsurers.[3]

These arbitration clauses usually impose a duty on the party to act expeditiously in nominating its party arbitrator, and penalize a party for not timely doing so. A typical arbitration clause thus provides that, "[i]f either party refuses or neglects to appoint an arbitrator within thirty days after the receipt of written notice from the other party requesting it to do so, the requesting party may appoint *two* arbitrators."[4] Given the importance of selecting the right arbitrator, reinsurers and

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[1] *Certain Underwriters at Lloyd's London v. Argonaut Insurance Co.*, No. 06-3395, 2007 WL 2433139, *9 (7th Cir. Aug. 29, 2007).

[2] Jay E. Grenig, 2 Alternative Dispute Resolution, Appendix K (3d ed. 2007).

[3] ROBERT C. REINARZ, ET AL., REINSURANCE PRACTICES, VOL. I 59 (1990).

[4] Marilyn J. Laughlin, *General Clauses for All Treaties*, *in* REINSURANCE CONTRACT WORDING, 91 (Robert W. Strain ed. 1992); *see also* REINARZ, *supra* note 3, at 61, 65 (highlighting the 30-day time limit for appointment of arbitrators on the basis of a timely and early resolution of the dispute, and offering sample language depriving the defaulting party of the right to appoint); Practical Guide to Reinsurance Arbitration Procedure, Chapter II: Panel Selection, *at* http://www.arias-us.org/index.cfm?a=39 ("[i]f either party fails to appoint an arbitrator within thirty [] days after it receives a written request by the other party to do so, the other party may appoint an arbitrator for it.").

cedants must remember that "[t]his clause is one of the more important general clauses for a contract drafter and should be prepared [and] reviewed carefully."[5]

The Seventh Circuit's *Argonaut* Decision

The consequences of a party's failure to adhere to this caveat are clearly on display in the *Argonaut* decision. There, the Underwriters at Lloyd's reinsured Argonaut through numerous treaties from 1959 to 1973. The treaties contained arbitration clauses providing in pertinent part:

> If either party refuses or neglects to appoint an arbitrator within thirty days after receipt of written notice from the other party requesting it to do so, the requesting party may nominate two arbitrators, who shall choose the third.[6]

A dispute arose between the parties, and Argonaut submitted a demand for arbitration on August 4, 2004. Its demand invoked the 30-day time limit for Underwriters to name their party arbitrator, but Argonaut did not itself name an arbitrator. Two days later, on August 6, Underwriters demanded that Argonaut nominate its party arbitrator within 30-days. In compliance with the 30-day proviso, Underwriters named their party arbitrator on September 3, 2004. However, the September 5, 2004 deadline for Argonaut's response lapsed without its arbitrator being named, and on September 6 -- which was a holiday in the U.S. but not in the U.K. -- Underwriters invoked the default provision in the arbitration clause and named a second arbitrator. On September 7, 2004, 32 days after Underwriters' demand, Argonaut attempted to name its party arbitrator.

Argonaut challenged in federal court Underwriters' default appointment of the second party arbitrator. Argonaut argued that California law did not require strict compliance with the 30-day limit -- because the September 5th deadline fell on a Sunday, and the following day, September 6th, was a U.S. legal holiday (Labor Day), it had until the following day to make its appointment known. The district court disagreed, however, and granted summary judgment in favor of Underwriters, holding that the arbitration provision was governed by the New York Convention (the "Convention"), a federal law implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[7] The court held that the Convention required that it "enforce strictly the terms of the agreement as written, with no extension[s]"[8] for weekends or holidays.

On appeal, the Seventh Circuit affirmed. The appeals court agreed that federal law should apply to this international dispute because the federal government has a very specific interest in "ensuring that its treaty obligation to enforce arbitration agreements covered by the Convention finds reliable, consistent interpretation in our nation's courts."[9] The Convention, according to

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[5] *Id*. at 93.

[6] *Argonaut,* 2007 WL 2433139, at *1.

[7] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (implemented by 9 U.S.C. § 201, *et seq.*).

[8] *Argonaut,* 2007 WL 2433139, at *3.

[9] *Id*. at *8.

the court, bound the parties to the explicit language of the clause, while application of various state laws' myriad exceptions could generate unintended or absurd results.[10] The court highlighted the exacting consequences of its holding:

> The content of the federal rule we today adopt must provide that, when the parties do not otherwise determine by contract, deadlines included in arbitration agreements under the Convention will admit of no exceptions. *Thirty days must mean thirty days*. When the end of the thirty days falls on a Saturday, a Sunday, a national holiday or a state or parochial holiday, the parties will be bound nonetheless to comply with the deadline for which they bargained.[11]

The result was that Argonaut, by erroneously excepting weekend days and a federal holiday from its calculation of the 30-day deadline, had forfeited its right to nominate its own party arbitrator. Underwriters' selection of the second arbitrator stood.[12]

Practical Effect

The *Argonaut* decision is a reminder that parties to arbitrable disputes should assiduously follow the timelines in arbitration clauses. Failure to do so can have severe consequences -- among them, the loss of the ability to select a party arbitrator who may be sympathetic to one's position. To avoid the costly pitfalls associated with arbitrator appointment mishaps, parties to reinsurance contracts should consider taking the following practical steps.

First, be attentive to any deadlines in your contracts, both old and new. Reinsurers and cedants must be conscious of when a demand to appoint a party arbitrator is made, and what the applicable deadlines are in their contracts, and must respond promptly with the identity of their chosen party arbitrator. Aside from taking the time to research and select one's party arbitrator very little is gained by dragging out the process, while much can be lost. *Argonaut* underscores the hazards that await parties who fail to promptly appoint their own arbitrator.

Second, plan ahead -- have a short list of possible arbitrator candidates with whom you are familiar and keep it current. Knowing which arbitrators have experience in particular lines of business or have relevant business experience (such as underwriting, actuarial, claims) will reduce the time necessary to obtain the services of the most qualified and available arbitrator. In

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[10] *See id*. at *5, n.6 ("We note that Argonaut's suggestion, that California law should apply and that it would extend the contract deadline, would permit such an extension of the deadline not only for Sundays and for national holidays, such as Labor Day, but also for Cesar Chavez Day (March 31) and Admission Day (September 9). *See* Cal. Gov. Code § 6700(f), (j). Under this interpretation, in Illinois, Casimir Pulaski Day (March 1) would be exempted. *See* 205 ILCS 630/17(a) (defining holidays); 5 ILCS 70/1.11 (providing that when the time within which an act required by law to be performed ends on a day designated as a holiday by the state, it may be performed on the next business day). In Hawaii, Argonaut may have had the benefit of Prince Jonah Kuhio Kalanianaole Day (March 26) and King Kamehameha I Day (June 11). *See* Hi. Rev. Stat. § 8-1 (listing holidays), *id*. § 1-32 (providing that acts required by contract to be performed on a particular day, which fall on a holiday, may be performed on the next business day). The application of local rules such as these necessarily would defeat the uniformity goals of the Convention.").

[11] *Id*. at *9 (emphasis added).

[12] *Id*. at *3, *9.

turn, you will be free to file the demand as soon as you make the decision to arbitrate, thus shifting the burden to a potentially under-prepared opposition.

Third, draft your contracts carefully. Courts will strictly enforce contractual time provisions, so make sure your arbitration clauses are clear.[13] Do not assume that you can defer communicating your arbitrator appointment just because the law in your jurisdiction will give you an extra day to act if the contractual deadline falls on a weekend day or holiday. Argonaut's belief that California law would govern on this point proved unavailing. Argonaut could have guaranteed a business-day deadline by making it clear that if the 30-day deadline ended on a weekend or recognized holiday, the deadline would be extended to the next business day. Alternatively, if it were sure that state law was favorable on this point, it could have included a choice-of-law clause in the contract.[14]

Fourth, include in your arbitration demand the identity of your party arbitrator and likewise request the other party to identify its arbitrator within the time period provided for in the contract.

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If you have any questions about this memorandum, please contact Richard Mancino (212-728-8243, rmancino@willkie.com) or the attorney with whom you regularly work.

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October 2, 2007

[13] As *Argonaut* involved international parties and no choice of law clause in the contract, the court concluded that a strict federal interpretation of the 30-day time limit would apply. A different result might obtain under state law. In a case involving domestic parties to a reinsurance agreement where one party failed to appoint its party arbitrator within the 30-day deadline, the court applied state law and held that the defaulting party could name its arbitrator after the deadline in the absence of bad faith or a clear indication that time was of the essence. *See New Eng. Reinsurance Corp. v. Tennessee Ins. Co.,* 780 F. Supp. 73 (D. Mass. 1991). There are, however, cases to the contrary.

[14] *See Argonaut,* 2007 WL 2433139 at *9 ("In the absence of a choice-of-law provision, we conclude that the parties are to be bound to the explicit language of arbitration clauses, with no state-specific exceptions that would extend otherwise clear contractual deadlines.").