

<b>Matter of Commerce &amp; Indus. Ins. Co. v ESJC Reinsurance, Ltd.</b>
2008 NY Slip Op 31576(U)
June 9, 2008
Supreme Court, New York County
Docket Number: 0103588/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

Index Number : 103588/2008  
COMMERCE & INDUSTRY  
vs  
ESJC REINSURANCE CO., LTD.  
Sequence Number : 001  
APPOINTMENT OF ARBITRATION

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/9/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

s motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by petitioner, Commerce and Industry Insurance Company for an order appointing a neutral umpire from the list of umpires provided by the AIDA Reinsurance & Insurance Arbitration Society ("ARIAS") is denied, and the petition is dismissed; and it is further

ORDERED that the parties return to the selection process and comply with paragraph B(3), and request that ARIAS provide an additional random list of twelve (12) names, from which the parties can contact, in numerical order and in the manner prescribed in Paragraph B(2) above, the number of candidates required to achieve a slate of ten (10) available candidates, repeating this process until ten (10) available candidates are identified; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: 6/9/08 this constitutes the decision and order of the Court.

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
In the Matter of the Application of  
COMMERCE AND INDUSTRY  
INSURANCE COMPANY,

Index No. 103588-2008

Petitioner,

**DECISION/ORDER**  
Motion Sequence 001

For an Order Appointing an Umpire in an  
Arbitration Proceeding

-against-

ESJC REINSURANCE, LTD., F&R REINSURANCE  
COMPANY, LTD., PRISM REINSURANCE  
COMPANY, LTD., AND RAZOR LIFE REINSURANCE  
COMPANY, LTD.,

Respondents.

**FILED**

JUN 10 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**

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MEMORANDUM DECISION

Petitioner, Commerce and Industry Insurance Company ("petitioner") moves for an order appointing a neutral umpire from the list of umpires provided by the AIDA Reinsurance & Insurance Arbitration Society ("ARIAS").

Factual Background

Petitioner entered into separate Reinsurance Agreements with each of the respondents, ESJC Reinsurance, Ltd., F&R Reinsurance Company, Ltd., Prism Reinsurance Company, Ltd., and Razor Life Reinsurance Company, Ltd. ("respondents"). The terms of the Agreements are substantially the same and the arbitration provisions therein are identical.

The arbitration clause, Article XIV, in the Reinsurance Agreements provide that:

A. All disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two arbitrators, one to be chosen by each party, and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators. The arbitrators and *umpire shall be disinterested active or retired executive officials of fire or casualty insurance or reinsurance companies or Underwriters at Lloyds, London.* If either of the parties fails to appoint an arbitrator within one month after being required by the other party in writing to do so, or *if the arbitrators fail to appoint an umpire within one month of a request in writing by either of them to do so, such arbitrator or umpire, as the case may be, shall at the request of either party be appointed by a Justice of the Supreme Court of the State of New York.* (Emphasis added).

In the early summer of 2003, the petitioner had a dispute regarding the respondents' obligations regarding monies owed under the Reinsurance Agreements. Thus, on July 16, 2003, petitioner sent respondents a demand for arbitration and a request to name party arbitrators. Petitioner and respondents agreed to arbitrate their disputes, and each side appointed party arbitrators, Robert Robinson by petitioner and Richard Bergmann by respondents.

In an attempt to "move forward with the selection of an umpire pursuant to the reinsurance agreements between" the parties, on May 5, 2004, petitioner sent respondents a letter advising respondents that unless the parties agreed on a process for selecting an umpire within two weeks, petitioner would ask the court to select an umpire.

On June 15, 2004, pursuant to the "ARIAS U.S. Umpire Appointment Procedure," the parties requested that ARIAS provide 12 names selected at random from ARIAS' Certified Arbitrators' List. By July 11, 2007, the parties finally agreed to use the umpire selection procedures set forth by ARIAS.

ARIAS provided the parties and arbitrators with two separate lists of potential umpires. Certain candidates declined to serve and others were stricken from the lists by agreement. As a

result, a list of 10 potential umpires and three alternates from ARIAS' Appointment Database remains.

#### Petition to Appoint an Umpire

Petitioner contends that the two party arbitrators have failed to appoint an umpire from the list provided by ARIAS or to use the ARIAS procedures for selecting a single umpire from among the list of 13 candidates. Thus, petitioner requests that the Court select an umpire from among this list, or select another person who is a disinterested active or retired executive official of a fire or casualty insurance or reinsurance company or Underwriter at Lloyd's of London.

#### Opposition

In opposition, respondents contend that under the Reinsurance Agreements, the neutral umpire breaks the tie if the arbitrators chosen and hired by the parties fail to agree. The arbitration clause requires that the umpire shall be "disinterested." Also, New York law requires that candidates for the neutral umpire position should avoid even the appearance of bias or possible interest. However, the list provided by ARIAS includes seven individuals who have current financial or past relationships with the AIG family of insurers, which includes petitioner. Thus, respondents objected to the seven candidates (as well as an eighth candidate who passed away in January 2008 and has not been replaced). While respondents agreed to use the ARIAS umpire list for the selection process, they never agreed to waive the protection of New York law that requires the neutral member of the arbitration panel to be truly disinterested in both fact and appearance. Respondents should not be subjected to a tainted list that includes seven candidates

that are not disinterested because of their current or past relationship with AIG.<sup>1</sup>

In reply, petitioner contends that since respondents only dispute seven of the names on the list due to the alleged partiality, there is no dispute that at least five of the candidates on the ARIAS list are acceptable to act as the umpire in the arbitration. By agreeing to the ARIAS selection process, the parties accepted that the result would be fair and uncontestable and waived all other objections other than post-arbitration claims of “actual bias.” By raising state law impartiality objections now, after going through the selection process under ARIAS, respondents are in effect seeking eight unilateral “peremptory” challenges that are not provided for under ARIAS.

Further, New York law does not mandate that all thirteen umpire candidates be free of the potential for bias. Rather, the most that can be said is that the selection process allow for at least one candidate free from any such bias. Here, at least five candidates meet this standard.

#### Analysis

Under the arbitration clause of the reinsurance agreements, the arbitrators are to appoint an umpire to resolve the parties’ dispute in the event they were unable to agree on a decision. The parties agreed that their arbitrators would select the umpire by using the procedures set forth by ARIAS. To date, the arbitrators and the parties are unable to select an umpire from a list provided by ARIAS, due to respondents’ claim that the list contains candidates who are biased in favor of petitioner.

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<sup>1</sup> In their Answer to the petition, respondents request that the Court deny the petition, and strike those individuals from the proposed umpire selection list who have or appear to have financial or other ties to AIG and select a disinterested umpire from the remaining names. In the alternative, respondents request that the Court order the parties to return to the previously agreed upon ARIAS selection process and obtain additional names of disinterested individuals who are neutral, from which the parties can select a neutral and disinterested umpire.

The Court first examines the procedures set forth by ARIAS regarding the selection of umpires. ARIAS' "Umpire Selection Procedure" provides as follows:

### **A. General**

Under the Procedure, umpires will be selected from the ARIAS·U.S. Umpire List, unless the parties to the arbitration specifically request selection from the ARIAS·U.S. Certified Arbitrator List. . . . The Procedure has been designed by ARIAS·U.S. to be administered by the parties.

### **B. Random Selection from the ARIAS Appointment Database**

1. To initiate the Procedure the parties to the arbitration must jointly notify ARIAS·U.S. in writing. . . . Upon receipt of this notification, the ARIAS·U.S. Executive Director's office will make a *random selection of twelve (12) names* from the designated list and will forward the list of twelve (12) names to the parties.

2. The parties will jointly contact . . . the First through the Tenth candidates on the list of twelve names to determine their availability, identifying the parties, their counsel and their appointed arbitrators. *The parties must also notify the umpire candidates of any specific terms set forth in their arbitration agreement that might affect a candidate's eligibility to serve in the matter* (e.g. active officer, years of experience, area of specialty, etc.). The parties will also furnish each of the ten (10) candidates with a Questionnaire . . . to be promptly completed and returned if the candidate wishes to be considered for appointment. Any candidate who does not return a completed Questionnaire to both parties within ten (10) days of receipt of the form will be considered unavailable for appointment. . . . (Emphasis added).

3. In the event less than ten (10) candidates are available for appointment, the parties shall, unless they agree to the contrary, contact the Eleventh and, if necessary, Twelfth candidates on the original list of twelve (12) names in the same manner as prescribed in Paragraph B(2) above. For example, if only eight (8) of the original ten (10) candidates are available, the parties will contact the Eleventh and Twelfth candidates on the original list of twelve (12) names. If only seven (7) or fewer of the original ten (10) candidates are available, the parties will contact the Eleventh and Twelfth candidates on the original list of twelve (12) names *and will request the ARIAS·U.S. Executive Director's office to provide an additional random list of twelve (12) names. From the additional random list, the parties will contact, in numerical order and in the manner prescribed in Paragraph B(2) above, the number of candidates required to achieve a slate of ten (10) available candidates. This process shall be repeated until ten (10)*

*available candidates are identified.*

**C. Candidate Ranking and Umpire Selection**

1. Within seven (7) days after timely receipt of completed Questionnaires from ten (10) available candidates, each party shall select five (5) names from the list of available candidates and simultaneously notify the other party of its selections. The parties should agree on the date, time and method for this simultaneous exchange.

2. Within seven (7) days of the receipt of these initial selections, each party shall select three (3) names from the other party's list and simultaneously exchange these three (3) names with the other party. The parties should agree on the date, time and method for this simultaneous exchange. If the name of a single individual is present on the list of three (3) names of both parties, that individual will be appointed as umpire. If the names of more than one individual are present on both lists, the parties shall select their umpire from among those individuals by drawing lots or by another method acceptable to both parties.

3. If there is no name present on both lists of three (3) names, the parties shall, within three (3) days after receipt of the lists, rank each of the six (6) candidates in order of preference from "1" through "6", with "1" being the most preferred. The candidate with the lowest combined numerical ranking shall be appointed as umpire. In the event two or more candidates are tied, the parties shall select their umpire from among those candidates by drawing lots or by another method acceptable to both parties.

4. When an umpire has been selected, the parties should notify all responding candidates who were not selected that the selection process is complete.

A reading of the procedures above indicates that the umpire selection process can be divided into two stages: the parties are to first secure a list of 10 names from a list of 12 randomly selected by ARIAS, which is then followed by a candidate ranking stage based on the candidates appearing on the list of 10.

During the first stage, the parties jointly contact the first 10 ten candidates from the list of 12, to determine their eligibility and availability (§§ B(2) and B(3)). It bears noting that

paragraph B(2) requires that the parties notify the candidates of any “specific terms set forth in their arbitration agreement that might affect a candidate's eligibility to serve in the matter (e.g. active officer, years of experience, area of specialty, etc.),” thereby indicating that the terms of the parties’ arbitration agreement determine a candidate’s eligibility. Paragraph B(3) indicates that those eligible also be available.

In the event only 9 or 8 candidates are eligible and available, the parties are to contact the eleventh, or eleventh and twelfth names, respectively, from the original list. This is apparently done in order for the parties to secure a list of 10 names. In the event there are 7 or less candidates eligible and available, the parties are to contact the eleventh and twelfth names on the original list *and* request that ARIAS provide an additional random list of twelve (12) names, from which the parties can select to secure a list of 10 names. Thus, the apparent purpose of the procedures is to allow the parties to secure a list of 10 names of candidates who are both eligible according to the parties’ arbitration agreement and available.

As to an umpire’s eligibility to serve, it is well established that “[p]recisely because arbitration awards are subject to . . . judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded” (*Goldfinger v Lisker*, 68 NY2d 225, 230, 508 NYS2d 159 [1986]). The “basic, fundamental principles of justice require complete impartiality on the part of the arbitrator and mandate that the proceedings be conducted without any appearance of impropriety” (*see concurring opinion, Kern v 303 East 57th Street Corp.*, 204 AD2d 152, 611 NYS2d 547 [1<sup>st</sup> Dept 1994]). Arbitrators must “possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion” (*J. P. Stevens & Co., Inc. v Rytex Corp.*,

41 AD2d 15, 340 NYS2d 933 [1<sup>st</sup> Dept 1973]). This principle applies with equal force to umpires (*see Kern v 303 East 57th Street Corp.*, 204 AD2d 152, *supra*).

The arbitration clause agreed to by the parties provides that the umpire be either “disinterested active” or “retired” executive officials, indicating an intent by the parties that the umpire selected possess the ability to render a disinterested opinion. Therefore, based on the interpretation of the parties’ arbitration agreement, ARIAS procedures, and caselaw, the parties are entitled to secure a list of 10 impartial candidates from which to proceed to the second stage to secure an umpire.

Here, of the thirteen candidates, five are not objected to by the respondents. Thus, it is uncontested that there are five candidates who possess the employment experience required by the arbitration clause, and are neutral and impartial. However, based on respondents’ opposition papers, of the thirteen candidates provided by ARIAS, seven candidates are subject to disqualification due to their current relationships with AIG (which is related to plaintiff), past relationships with AIG, and indirect current relationship with AIG. The eighth candidate, to which respondents objected passed away on January 22, 2008.

Of the seven candidates challenged by respondents, two candidates, W. Mark Wigmore and Ronald S. Gass, are currently engaged by AIG as non-neutral party arbiters in arbitrations still pending. It appears that such candidates, who are selected as arbiters by and on behalf of AIG should be disqualified to avoid even the appearance of partiality and bias. Another candidate, Raymond Prosser, is the vice-president of Transamerica Reinsurance, whose president has an ongoing relationship with AIG. Mr. Prosser is also counsel of Transamerica. While it is unclear as to whether or how the president’s relationship with AIG impacts on the business of

AIG and whether such business relationship impacts Prosser's relationship with Transamerica, both the president and Prosser hold high-level positions in Transamerica, and presumably, share the same interests in Transamerica. To avoid the appearance of bias in favor petitioner, resulting from Transamerica's president's relationship with AIG, Prosser should also be disqualified from the list of candidates. Further, two candidates, Hugh W. Greene, Jr. and Robert B. Green, represented AIG as a non-neutral arbiter in a previous arbitration. Again, it appears that such candidates, who were selected as arbiters by and behalf of AIG, should be disqualified to avoid even the appearance of partiality and bias.

It is also uncontested that two of the candidates, Sylvia Kaminsky and Robert M. Hall, are neither an active nor retired executive of an insurance entity, and thus, lack the qualifying experience to serve as an umpire.

As there are only five candidates on the list provided by ARIAS who are both eligible and available to serve, the Court directs the parties to return to the selection process to obtain additional candidate names to form a list of ten disinterested individuals from which the parties may choose a neutral umpire. While there is nothing in the ARIAS rules or procedures that precludes the parties from selecting an umpire from a list of five candidates, if the parties so consent, the parties are entitled to a list of 10 impartial candidates from which the parties can then proceed to the procedures set forth under the "Candidate Ranking and Umpire Selection" clause.

Based on the foregoing, it is hereby

ORDERED that the motion by petitioner, Commerce and Industry Insurance Company for an order appointing a neutral umpire from the list of umpires provided by the AIDA

Reinsurance & Insurance Arbitration Society ("ARIAS") is denied, and the petition is dismissed;  
and it is further

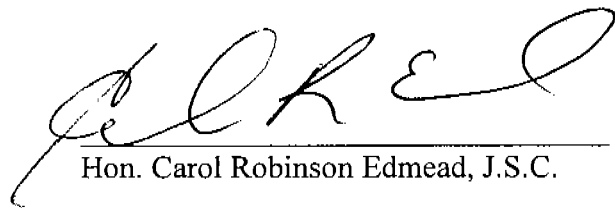
ORDERED that the parties return to the selection process and comply with paragraph B(3), and request that ARIAS provide an additional random list of twelve (12) names, from which the parties can contact, in numerical order and in the manner prescribed in Paragraph B(2) above, the number of candidates required to achieve a slate of ten (10) available candidates, repeating this process until ten (10) available candidates are identified; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 9, 2008

  
\_\_\_\_\_  
Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

**FILED**

JUN 10 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**