

**Enstar EU Ltd. v National Union Fire Ins. Co. Of
Pittsburgh, P.A.**

2019 NY Slip Op 31057(U)

February 19, 2019

Supreme Court, New York County

Docket Number: 654089/2018

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. HON. ANDREA MASLEY PART 48
Justice

ENSTAR EU LTD. on behalf of UNIONAMERICA
INSURANCE COMPANY LTD., HARPER
INSURANCE LTD./ TUREGUM INSURANCE
COMPANY, MERCURY INSURANCE GROUP, ST.
PAUL REINSURANCE COMPANY LTD., AND RIVER
THAMES INSURANCE LTD., Petitioners

INDEX NO. 654089/2018

- v -

MOTION DATE

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA., Respondent.

MOTION SEQ. NO. 01 & 02

The following papers, numbered 1 to _____, were read on this motion for APPOINTMENT OF AN UMPIRE

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law----- No(s). _____

Answering Affirmation(s) — Affidavit(s) — Exhibits ----- No(s). _____

Replying Affirmation — Affidavit(s) — Exhibits ----- No(s). _____

Upon the foregoing papers, it is ordered that this motion is

National Union Fire Insurance Company of Pittsburgh Pennsylvania (NUFI) incurred significant losses under an insurance policy issued to California Portland Cement Company, paying out millions of dollars for asbestos-related claims. This policy is covered by three Casualty Excess Reinsurance contracts (the Reinsured Contracts). Petitioners (collectively Enstar) are the reinsurers have refused to satisfy NUFI's demand for \$1.47 million.

On October 26, 2017, NUFI demanded arbitration. The parties selected arbitrators Diane Nergaard for Enstar and David Thirkill for NUFI. Nergaard and Thirkill exchanged the names of eight candidates for appointment as umpire, but were not able to agree on the selection of one. The parties have a fundamental disagreement over experiences that disqualify an umpire. Consistent with the procedures in the agreements, the parties have applied to the court for appointment of an umpire. Enstar proposes John Chaplin or Aaron Stern.1 NUFI proposes Peter Bickford, Mark Gurevitz,

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

1Initially, Enstar proposed Bina Dagar and Jerry Wallis, but failed to argue for them on this motion. At argument Enstar suggested that its support for Dagar and Wallis continued, but the court cannot consider these candidates without a record. Likewise, the court cannot consider qualifications that were raised for the first time at argument.

Andrew Maneval, and Richard White.²

An umpire manages the arbitration from the organizational hearing through discovery, final hearing, deliberations and rendering of a decision. (*See In re The Travelers Indem. Co.*, 2004 WL 2297860, *3, 2004 US Dist LEXIS 30074, *10 [D Conn., Oct. 8, 2004]).

The issue here is what is qualifying and disqualifying for appointment of an umpire.

The Reinsurance Contracts provide that “arbitrators and umpires shall be disinterested active or retired executive officials of fire and casualty insurance or reinsurance companies.” (NYSCEF Doc. No. 4 at Art.15.(A); NYSCEF Doc. No. 5 at Art. 16.A; NYSCEF Doc. 6 at Art. 16A). The Reinsurance Contracts further provide that the “arbitrators and umpire are relieved from all judicial formality and may abstain from following the strict rules of law” and “they shall settle any dispute under the contract according to an equitable rather than strictly legal interpretation of its terms.” (*Id.*) In evaluating whether a particular candidate is disinterested, the court need simply confirm that the candidate is impartial such that his/her decision “will be based upon the merits of the dispute rather than the personal influence or identity of the disputants.” (*In re The Travelers Indem. Co.*, 2004 WL 2297860, *3, 2004 US Dist LEXIS 30074, *8 [D Conn., Oct. 8, 2004]). Prior service as an arbitrator for a party does not render a candidate impartial because such contacts are considered “undoubtedly commonplace among arbitrators experienced in the insurance and reinsurance realms.” (*Nat’l Union Fire Ins. Co. v Source One Staffing LLC*, 2016 WL 5940920, *2 n 1, 2016 US Dist LEXIS 141795, *5 n 1 [SD NY, Oct. 13, 2016]). Likewise, “pre-existing relationships with any parties, their affiliates, counsel or party arbitrators” do not disqualify umpire candidates. (*AIG Global Trade & Political Risk Ins. Co. v Odyssey Am. Reinsurance Corp.*, 2006 US Dist LEXIS 73258, *20 [SD NY, Sept. 21, 2006]). Indeed, serving as an arbitrator presumably gives the candidate valuable experience working with different umpires with different styles. However, current service as a party appointed arbitrator adverse to one of the parties may be disqualifying. (*See Certain Underwriting Members of Lloyd’s of London v Florida Dept. of Fin. Svcs.*, 892 F3d 501, 508 [2d Cir 2008]).

National Union objects to Stern and Chaplin because of their prior expert work for Enstar affiliated companies in 2009 and 2014. Enstar objects to NUFI’s candidates because they served as a party-appointed arbitrator for NUFI or an affiliate.

The court strikes Chaplin from consideration. One issue with which the arbitration will grapple in this case is whether asbestos losses may be properly accumulated under “one event” language in a reinsurance contract. In *Amerisure v Everest*, Chaplin testified as an expert in a 2014 arbitration on behalf of the reinsurer that the ceding company’s accumulation of asbestos losses under “one event” language is improper. (NYSCEF Doc. No. 29, 35). Chaplin’s opinion was rejected by

²In the future, the court urges the parties to consider diversity as a factor in selecting arbitrators and umpires.

the majority of the panel. (NYSCEF Doc. No. 30). Prior service as an expert witness for one of the parties can be grounds to disqualify a candidate as an umpire. (*In re The Travelers Indem. Co.*, 2004 WL 2297860, *4, 2004 US Dist LEXIS 30074, *12 [D Conn., Oct. 8, 2004]). The court rejects NUFI's proposition that prior service as an expert witness is a disqualifier, always. However in this case, the court cannot see how Chaplin can divorce himself from his prior testimony. The court presumes Chaplin testified truthfully when giving his opinion on a critical issue in that case. There is nothing in the record before the court to suggest that Chaplin has changed his mind or that this arbitration significantly differs from that one. Unlike an arbitrator who evaluates the law and facts in a particular case as an expert witness, Chaplin was testifying to his understanding of a general industry standard. Accordingly, the court is compelled to conclude that Chaplin is not entirely neutral as to this arbitration.

NUFI's Maneval was a party appointed arbitrator in the same action and he voted against Chaplin's interpretation. Maneval was merely deciding on the facts and law before him; he has not committed himself to a particular position. Nonetheless, the court strikes Maneval from the list as his vote in that action may be a predictor creating an appearance of possible bias.

Stern currently serves as a party appointed arbitrator adverse to NUFI's affiliate. Thurkill, NUFI's party arbitrator in this case is AIU's party arbitrator in that case involving Stern, making Thurkill and Stern adverse arbitraors in that case. With so many other qualified candidates, there is no reason to put Thurkill and Stern in this untenable position.

As to the balance of the candidates, they have previously served as party appointed arbitrators and umpires in arbitrations concerning NUFI or its affiliates. Specifically, Bickford served once as an arbitrator, and 11 times as an umpire. White served three times as an arbitrator, and ten times as an umpire. Gurevitz served six time as an arbitrator and 16 times as an umpire. A candidate's service as an arbitrator however does not disqualify the candidate from consideration as an umpire. (*Certain Underwriting Members*, supra.) The court rejects Enstar's general objection to any candidate on that basis. Indeed, the best informed and most capable potential arbitrators tend to be "repeat players with deep industry connections." (*Certain Underwriting Members of Lloyd's of London v Florida Dept. of Fin. Srvs*, 892 F3d 501, 507 [2d Cir 2008]). Accordingly, the court will review the qualifications of each of the remaining candidates.

The court strikes Gurevitz from consideration because of his previous employment with White and Williams LLP, the law firm that is currently counsel to NUFI in this action. "Indeed, the nature of the relationship between [a] member of the arbitration panel and the law firm representing one of the principal defendants manifestly [gives] rise to an impression of possible bias." (*In re The Travelers Indem. Co.*, 2004 WL 2297860, *3, 2004 US Dist LEXIS 30074, *10 [D Conn., Oct. 8, 2004] [internal quotations omitted]). That "mere impression of possible bias is enough for the court to pass on his appointment as umpire." (*Id.*)

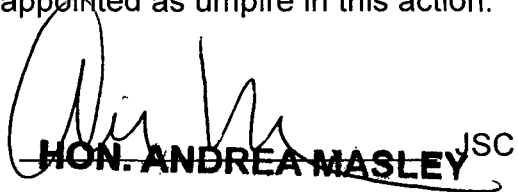
The court strikes White from consideration because as noted earlier, one issue with which the arbitration will grapple is whether asbestos losses may be properly accumulated under "one event" language in a reinsurance contract. Since contract interpretation is an issue here and White is a Certified Public Accountant, his education, training and skills are less applicable here.

Accordingly, the court finds Bickford, an attorney, the best suited impartial candidate for umpire. Bickford previously worked as a Vice President, General Counsel and Secretary of the New York Insurance Exchange. He also was employed as Associate General Counsel and Secretary at the United States Life Insurance Company. From 1998 to 2002, he served as Co-Chair of the Insurance, Corporate and Regulatory Department at the law firm of Cozen O' Connor P.C. He received his L.L.B., from State University of New York at Buffalo, and an L.L.M. in taxation from New York University. He has more than 50 years of experience in the insurance and reinsurance industries. He has authored works such as a chapter in New York Insurance Law & Practice, and is an ARIAS-US³ certified arbitrator and umpire. (NYSCEF Doc. No. 22.) Ultimately, Bickford is in the best position of these candidates to "understand the trade's norms of doing business and the consequences of proposed lines of decision." (*Certain Underwriting Members of Lloyd's of London v Florida Dept. of Fin. Svcs*, 892 F3d 501, 508 [2d Cir 2008]).

Accordingly, its is hereby,

ORDERED that Peter Bickford, Esq. is appointed as umpire in this action.

Dated: 2/19/19
New York, New York


HON. ANDREA MASLEY^{JSC}

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT
- REFERENCE

³ARIAS-US is a nonprofit organization that provides training, continuing education, and certification to qualified arbitrators with respect to the insurance and reinsurance arbitration process.