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CASE ALERT, NO. 22 JULY 2, 2007

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Consolidation of Reinsurance Arbitration Proceedings an Issue for Arbitrators, Not Courts

On June 12, 2007, in Certain Underwriters at Lloyd's London v. Westchester Fire Insurance Co., the Third Circuit held that the consolidation of reinsurance arbitration proceedings was an issue to be decided by an arbitrator, not the court. This opinion is significant because it clearly defines the parameters of the role of the court and arbitrators in the interpretation and implementation of arbitration clauses in reinsurance contracts.

The underlying dispute in this matter concerns the payment of asbestos claims under reinsurance coverage that Westchester Insurance Company ("Westchester Fire") purchased from certain Lloyd's of London reinsurers ("the Underwriters"). Westchester Fire argued that two reinsurance programs existed: one, a Comprehensive Catastrophe Treaty, made up of six essentially identical contracts covering different time periods from 1972 – 1985 and the other, a Special Contingency Treaty, made up of two essentially identical contracts in effect from 1974 – 1982. Based on these treaties, Westchester Fire sent two arbitration demand letters to the Underwriters, each based upon one of the two treaties. Each letter stated that Westchester Fire "hereby demands and initiates arbitration under the above captioned Treaty… [U]nderwriters are requested and required in accordance with pertinent treaty provisions to name their arbitrator."

In response to the letters from Westchester Fire, the Underwriters filed a Verified Petition to Compel Arbitration in the District of New Jersey requesting that the court order eight arbitrations in conjunction with the eight contracts the Underwriters had identified - six separate arbitrations in response to the demand under the Comprehensive Catastrophe Program and two separate arbitrations under the Special Contingency Program. As the basis for this request, the Underwriters argued that each of the programs consisted of separate contracts and that none of the agreements provided for the consolidation of arbitration proceedings. Therefore, the Underwriters asserted that the issue of consolidated arbitration was to be reviewed separately by individual arbitration panels convened in accordance with each separate contract.

Westchester Fire responded by arguing that, although the contract wording may have varied in certain respects over the years, the contract wording for the Reinsurance Program provided that the contract between the parties was continuous.

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Against this factual backdrop, the District Court first clarified the issue before them. The issue was *not* whether a valid arbitration agreement existed, but whether the parties had contractually agreed to separate arbitrations under the various contractual layers to the reinsurance program, or to a single consolidated arbitration with respect to each petition. As discussed in more detail below, the District Court concluded that this was an issue for consideration by the arbitrators, not the court.

The Supreme Court has previously addressed the issue of the respective roles of the court and arbitrators in the context of the interpretation of arbitration clauses. In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), the Supreme Court reversed the decision of the Court of Appeals for the Tenth Circuit and held that the question of "whether the parties have submitted a particular dispute to arbitration, i.e. the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Id. at 83. The Howsam Court clarified that questions of arbitrability are raised only in narrow circumstances where courts must determine "gateway matters" such as a dispute about whether the parties are bound by a given arbitration clause, or whether "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." Id. at 83 - 84. In contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide." Id. at 84. "Thus, only when there is a question regarding whether the parties should be arbitrating at all is a question of arbitrability raised for the court to resolve." Certain Underwriters at Lloyd's London v. Westchester Fire Insurance Co., No. 06-1457, p. 8 (3d Cir. 2007).

The Court of Appeals also relied on the Supreme Court's 2003 decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003) which held that, "[m]atters that concern neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties will not fall within the narrow exception" to the arbitrators authority.

As previously noted, in the present matter the question was not a "gateway issue", i.e., whether the parties had agreed to arbitration, but was rather, the manner in which the arbitration was to proceed. Indeed, the parties did not dispute that they had agreed to arbitrate the matter. The parties disagreed regarding the nature of the proceedings, specifically, whether the proceedings were intended to be individualized or consolidated. Accordingly, the Third Circuit determined that "[s]uch disputes on arbitral procedure are included within the scope of the default rule in favor of arbitral resolution, along with the merits of the underlying dispute." Certain Underwriters at Lloyd's, No. 06-1457, p. 13 (3d Cir. 2007), citing, Dockser v. Schwartzberg, 433 F.3d 421, 425 – 427 (4th Cir. 2006). The Third Circuit further determined that the number-of-arbitrators question is not a question of arbitrability and that the question of consolidated arbitration concerns the nature of the arbitration proceeding agreed to, not whether the parties agreed to arbitrate. Certain Underwriters at Lloyd's, No. 06-1457, p. 16 (3d Cir. 2007), citing, Blimpie Int'l Inc .v. Blimpie of the Keys, 371 F. Supp. 2d 469, 473 – 74 (S.D.N.Y. 2005). Based on this distinction, the Third Circuit granted Westchester Fire's motion to compel and ordered that this issue was to be resolved in arbitration.

The Third Circuit's ruling clarifies the distinction between the role of the court and the role of the arbitrator in the interpretation of arbitration clauses. In short, where it is clear that the parties have agreed to arbitrate – and the question of arbitrability is not in issue, all other aspects, including the procedure by which the parties may have agreed to the arbitration are not issues for a court to decide, but must be left to the discretion of the arbitrator.

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