Who Demands Arbitration Is Key to Whether Arbitration Will Be Compelled

Complex corporate structures and internal reinsurance relationships can complicate legacy reinsurance relationships. This is especially true where the underlying losses are long-tail liabilities and where companies have changed, merged, combined and succeeded each other. A key question for any legacy reinsurance treaty is whether the losses now being ceded come within the scope of the reinsurance treaty. In a recent case, a federal court had to address a situation where ceded asbestos losses arose from policies issued by another member of the insurance group, but where the original policy issuing company was not a signatory to the reinsurance treaty.

In \textit{TIG Insurance Co. v. American Home Assurance Co.}, No. 18-cv-10183 (VSB), 2020 U.S. Dist. LEXIS 22639 (S.D.N.Y. Feb. 7, 2020), certain members of an insurance group demanded arbitration against a reinsurer (successor in interest) for the reinsurer’s alleged failure to pay its share of asbestos losses arising out of underlying insurance policies issued by another member of the insurance group, but one that did not demand arbitration and which was not a signatory to the reinsurance treaties. The arbitration demands resulted in the reinsurer bringing suit in federal court against the demanding cedents and the affiliated policy issuing
company challenging the arbitrability of the losses arising from the policies issued by the non-demanding affiliate. In response, the ceding companies moved to compel arbitration, and the affiliate moved to dismiss the claim against it because it had not demanded arbitration.

The treaties had broad arbitration provisions. They also included in the definition of the “Company” the named ceding companies and all subsidiary corporations of the named companies. It turns out that one of the ceding companies that demanded arbitration had reinsured its non-demanding subsidiary on a 100% basis. Thus, the ceding companies argued that the reinsurer agreed in the treaties to indemnify covered losses of the signatory ceding companies and their subsidiary companies.

The court granted the ceding companies’ motion to compel arbitration, but denied the motion to dismiss the claim against the non-demanding affiliate and stayed the litigation pending the outcome of the arbitration. The decision goes through the standard litany of how courts determine arbitrability and address motions to compel arbitration.

In granting the motion to compel, the court disagreed with the reinsurer that the issue of whether the non-demanding affiliate’s losses fell within the treaties was not arbitrable. The court stated that the “arbitration clauses are broad enough to encompass the disputes at issue, and the arguments raised by [reinsurer] relate to the interpretation of the underlying contract and must await arbitration.” The arbitration provisions were “quite broad,” requiring the parties to submit “[a]ll disputes or differences arising out of” the treaties to arbitration. The court held that with a broad arbitration clause, there is a presumption that the parties have agreed to submit all disputes to arbitration, “including the present disputes.”

As the court put it, the question of whether the cedent’s claims made in the arbitration demands are covered by the treaties, “is one of contract interpretation, not of arbitrability.” The specific question of whether the claims under the policies issued by the non-demanding affiliate came within the treaties was also “one of contract interpretation for the arbitrator to decide.”

The court declined to address whether the affiliate was subject to arbitration. The reinsurer’s “concern over whether [the affiliate] would have any right under the Treaties to seek arbitration is misplaced, as [the affiliate] has not made any demand for payment, nor was [the affiliate] a party to any of the demands for arbitration made by [the cedent].” The dispute about whether the affiliate’s policies fell outside the scope of the treaties was, according to the court, a contractual one that the reinsurer could make to the arbitrators.

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