

GERLING GLOBAL REINSURANCE

9232gerc

1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

3 GERLING GLOBAL REINSURANCE
4 CORPORATION, U.S. BRANCH,

4 Petitioner,

New York, N.Y.

5 v.

98 Civ. 9185 (LAP)

6 THE YASUDA FIRE & MARINE
7 INSURANCE CO., LTD.,

8 Respondent.
9 -----x

10 February 3, 1999
11 4:10 p.m.

12 Before:

13 HON. LORETTA A. PRESKA,

14 District Judge

15 APPEARANCES
16 (via telephone)

17 OPPENHEIMER, WOLFF & DONNELLY
18 Attorneys for Petitioner
19 EDWARD K. LENCI
20 P. JAY WILKER

21 BRAND & NOVAK, LTD.
22 Attorneys for Respondent
23 MICHAEL D. HULTQUIST
24 CATHERINE F. CHASKIN
25

9232gerc

2

1 (In chambers, telephone conference off the
2 record)

3 THE COURT: We are here on Gerling's request for
4 a conference in respect of what it contends is Yasuda's
5 procedurally flawed cross petition and motion in opposition
6 to Gerling's petition.

7 Counsel have brought to my attention Section
8 1211(c) of the New York State insurance law, which states,
9 "Before any unauthorized foreign or alien insurer files any
10 pleading in any proceeding against it, it shall either (A)
11 deposit with the Clerk of the Court in which the proceeding
12 is pending cash or securities or file with the Clerk a bond
13 with good and sufficient sureties to be approved by the
14 Court in an amount to be fixed by the Court sufficient to
15 secure payment of any final judgment which may be rendered
16 in the proceeding . . . or (B) procure a license to do an
17 insurance business in the state." Clearly (B) is not
18 relevant here.

19 As Judge Wood found in *Skandia America* - 115 70 250
20 Reinsurance Corporation v. Caja Nacional de Ahorro y Seguro, 956
21 1997 U.S. Dist. Lexus 7221 (S.D.N.Y. 1997), "Pursuant to 962
22 this provision, if a foreign insurer fails to post security
23 as required, a Court can grant the movant party's motion by
24 default. The purpose of this law is to ensure that foreign
25 insurers can meet their insurance obligations." (Citations

MEALEY'S International Arbitration Report

XXII 1-4 1159
03.02.1999

1 omitted).

2 [3] As Judge Wood also finds in her opinion in Caja,
3 "The United States acceded to the New York Convention on the
4 Recognition and Enforcement of Foreign Arbitral Awards ("The
5 New York Convention") on September 30, 1970." She goes on
6 to find that "The purpose of the New York Convention was to
7 effectuate arbitration proceedings and their enforcement
8 between companies of different nationalities." Id. at *14.

9 [4] Judge Wood goes on to find, "Because part of the
10 purpose of the New York Convention was to encourage the
11 enforcement of arbitral awards, the New York Convention
12 allows for the posting of prejudgment security.
13 Specifically, Article V of the New York Convention provides
14 that 'If an application for the setting aside or suspension
15 of the award has been made to a competent authority referred
16 to in Article V(1)(e), the authority before which the award
17 is sought to be relied upon may, if it considers it proper,
18 adjourn the decision on the enforcement of the award and may
19 also, on application of the party claiming enforcement of
20 the award, order the other party to give suitable
21 security.'"

22 [5] Judge Wood goes on to state that she notes that
23 "Under Article V(1)(e), 'a competent authority of the
24 country in which or under the law of which the award was
25 made,' therefore, this Court would constitute a competent

1 authority and could, on application of the petitioner, order
2 the respondent to post adequate security." Id. at *15-16.

3 [6] I note Yasuda's argument that its filing of its
4 cross petition to confirm the arbitral award is not a
5 pleading. I decline to so find. Indeed, it certainly
6 appears to be a pleading and, in addition, it appears to be,
7 to some extent, an application for the setting aside or
8 suspension of the award in that it seeks delay in paying the
9 award and, in addition, seeks to decrease the amount of the
10 award as claimed by Gerling. Accordingly, then --

11 MS. CHASKIN: Your Honor, are we allowed to make
12 a statement?

13 [7] THE COURT: Sure.

14 MS. CHASKIN: That the cross petition was not
15 done in an action against Yasuda. The petition was an
16 affirmative moving on Yasuda's part to confirm it as
17 written.

18 [8] THE COURT: I understand that that is what it
19 says. However, in reading it and in discussions with
20 counsel over the last few days and the import of the letters
21 submitted by counsel, it is clear that the import of the
22 pleading is to delay the payment of the arbitral award and,
23 in addition, to decrease the amount of the arbitral award as
24 calculated by Gerling. Neither one of those positions can
25 fairly be found in substance to be a whole-hearted embrace

1 of the arbitral award. Accordingly, I decline to be bound
2 by the title put on the cross petition and, rather, look to
3 the substance of the cross petition and the discussions
4 thereof by counsel over the last few days.

5 Accordingly, then, under Section 1213(c) of the
6 New York insurance law, Yasuda may only present its
7 interpretation of the award and its methods of calculating
8 the amounts due if it first posts the security required by
9 Section 1213.

10 MR. HULTQUIST: Your Honor, may we be heard on
11 this briefly?

12 THE COURT: I thought you had been, but sure.
13 Who is speaking, please?

14 MR. HULTQUIST: Michael Hultquist, representing
15 Yasuda.

16 THE COURT: Counsel, would you spell your name
17 for the court reporter, please.

18 MR. HULTQUIST: H-U-L-T-Q-U-I-S-T.

19 THE COURT: Yes, sir.

20 MR. HULTQUIST: With respect to the petition,
21 Yasuda is not seeking to reduce the award entered by the
22 arbitral panel. The express provision of the award rendered
23 by the arbitral panel directs Gerling to recalculate
24 principal and interest consistent with the directions of the
25 panel. Specifically, on certain underwriting years,

[9] paraphrase

1 participations have been reduced 7.5 percent, 5 percent, and
2 there are other considerations for, if you will, rescission of
3 the contracts that were at issue in the arbitration. All
4 Yasuda is seeking is to have those calculations completed.

5 The fact is, while Gerling sought approximately
6 \$4.3 million at the arbitration, the arbitral award on its
7 face recognizes that that \$4.3 million is not the arbitral
8 award number. That number is subject to the express
9 direction of recalculating principal and interest based upon
10 specifically paragraphs 2 and 3 of the arbitral award.
11 Yasuda is not seeking to have the award suspended.

12 All Gerling is seeking in its cross petition
13 is --

14 THE COURT: Yasuda.

15 MR. HULTQUIST: Sorry, Yasuda.

16 All Yasuda is seeking is to have the calculation
17 completed so that both Gerling and Yasuda can figure out
18 what exactly the final number is, because right now neither
19 Gerling nor Yasuda can tell you what the final number is
20 that's undisputed and supported by documentation.

21 [10] THE COURT: The caveat that is so important in
22 your statement is the number that is undisputed. There is
23 never going to be a number that is undisputed and, again, I
24 refuse to be bound by the title placed on the cross
25 petition. It is apparent to me from the conversations of

1 counsel at the conferences we have had over the last few
2 days, since this matter has arisen, that it is Yasuda's
3 intention here both to delay and to minimize the amounts
4 paid. Not surprisingly, but that is its position.

5 On the other hand, the New York insurance law
6 makes it very clear that an insurance company litigant may
7 not put forth its interpretation of an award in such a
8 manner without posting security.

9 Accordingly, I order that unless security in the
10 amount of \$9 million is posted as provided for in Section
11 1213(c) within ten business days of today, Yasuda's cross
12 petition will be stricken.

13 Is there anything else, counsel?

14 MR. NULTQUIST: Yes, for the record, your
15 Honor --

16 THE COURT: Sir,

17 MR. NULTQUIST: -- the basis for the figure of \$9
18 million?

19 THE COURT: Yes, indeed. I have reviewed the
20 award, I have reviewed Mr. Lanci's February 1, 1999 letter,
21 I have listened to counsel discuss the components of the
22 award and specifically the paid losses of some approximately
23 \$3 million, the reserves of approximately \$3 million and the
24 incurred but not reported losses in the amount of
25 approximately \$3 million. It is upon those figures which I

1 base the amount of the security.

2 Is there anything else, counsel?

3 MS. CHASKIN: Yes, your Honor. With regard to
4 Yasuda's motion to dismiss, we would request that your Honor
5 set a briefing schedule for that.

6 THE COURT: Why don't you folks confer and inform
7 me by letter of your proposed briefing schedule.

8 MS. CHASKIN: All right. We also would ask that,
9 as a housekeeping matter, I requested of your Honor on the
10 25th of January for an extension of time to prevent Yasuda
11 from being in technical default. I want to go on the record
12 as renewing that request for an extension of time in light
13 of your Honor's --

14 THE COURT: Would you repeat, please,
15 Ms. Chaskin, the last few words, "in light of."

16 MS. CHASKIN: In light of your rule -- I believe
17 it is Rule 2(d) -- in which you ask this motion not be filed
18 in the court until they are fully briefed.

19 THE COURT: Yes, indeed. Generally what happens
20 is counsel agree to extend the time to move, answer or
21 otherwise respond to the pleading until the date when the
22 fully briefed motion is filed.

23 Is there any objection to that, Mr. Wilker?

24 MR. WILKER: No, your Honor. And I understand
25 that they have ten days. We recognize that rule, and to the

1 extended it is necessary, we would consent to that. So
2 would be our view that nothing should be done until the ten
3 days that they have to file security. If they fail to file
4 security, then we will take whatever course we think is
5 appropriate. If they file security, then we think the only
6 issue at that point will be not the motion to dismiss, but
7 what should the numbers be if they are going to contest our
8 numbers.

9 THE COURT: Ms. Chaskin, does that take care of
10 it for you?

11 MS. CHASKIN: I am not sure I completely
12 understand, your Honor. You are saying that we have ten
13 days to post security and at that point we should start a
14 briefing schedule?

15 THE COURT: Counsel, may I ask you this? Do you
16 need this on the record?

17 MR. WILKER: No.

18 MS. CHASKIN: No.

19 THE COURT: Off the record.

20 (Discussion off the record)

21 - - -

22

23

24

25

WWW.NEWYORKCONVENTION.ORG