Time Limits on Arbitrator Appointment

By

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I. Introduction

On occasion, it can take an inordinatley long period of time to complete the selection of an arbitration panel. Sometimes this results from one party neglecting to appoint its party arbitrator promptly. Sometimes this is a tactic to put off the day or reckoning as long as possible. One way to combating such a tactic is to put a time limit into the arbitration clause for selection of a party arbitrator. Typically, it gives a party 30 days to appoint its party arbitrator and after that, the other party may appoint both party arbitrators.

One would think that experienced counsel and parties would seldom run afoul of such a provision. However, caselaw suggests that it happens with surprising frequency. The purpose of this article is to examine selected caselaw to determine which courts are willing to enforce such provisions.

II. Caselaw Enforcing Time Limits on Arbitrator Appointment

Due to a clerical error in recording the deadline for appointment of a party arbitrator, the reinsurer was four days late in appointing its arbitrator and in the interim, the cedent had appointed a second party arbitrator in *Universal Reins. Corp v. Allstate Ins. Co.,* 16 F.3d 125 (7th Cir. 1993). The lower court ruled for the reinsurer on the basis that the reinsurer's late appointment was a technical, procedural oversight which is overborne by the expressed desire of the parties to arbitrate with each side appointing a party arbitrator. The court of appeal reversed noting that the 30-day provision allowed a party to appoint a second arbitrator if the other party "refuses or neglects" to appoint an arbitrator within 30 days. The court found that

they late appointment constituted "neglect" and that bad faith or gross negligence need not be shown. The court went on to state:

> In this case the agreement is crystal clear, specifying a particular course for the appointment of a second arbitrator when one of the parties fails to make its selection within thirty days. This provision does not command less deference simply because it concerns a procedural rather than substantive aspect of the parties' decision to arbitrate. On the contrary, the [Federal] Arbitration Act states that in no uncertain terms that contractual provisions for the appointment *shall* be followed. 9 U.S.C. Sec. 5.[1]

Certain Underwriters at Lloyd's v. Argonaut Ins. Co., 444 F. Supp. 2d 909 (N.D. IL 2006) involved a 30-day period to appoint an arbitrator with the period ending over the Labor Day weekend. The court followed *Universal Reinsurance* commenting:

> [W]here parties have designated a time limit, that time limit controls. The time limit specified in the Treaties offers no hint that some or all Sundays or Holidays are excepted; sophisticated commercial parties certainly can (and sometimes do) make such provisions when they wish to provide for exceptions from what would otherwise appear to be facially applicable deadlines.[2]

Four days after the expiration of a 30-day provision for "qualification" of party arbitrators, the cedent appointed an arbitrator for the reinsurer in *Evanston Ins. Co. v Gerling Global Reins. Corp.,* 1990 WL 141442 (N.D. IL.). The reinsurer admitted that it failed to notify the cedent of its selection within 30 days but argued that selection took place prior to the deadline and that this met the "qualification" standard of the arbitration clause. The reinsurer also argued that the omission was excusable since there was no "time is of the essence" provision in the contract. The court rejected the reinsurer's first argument finding that "qualification" necessarily includes notice to the opposing party. With respect to the reinsurer's second argument, the court ruled for the cedent:

> Th[e] express language [of the 30-day provision] demonstrates that the parties intended to create contingent rights. [The reinsurer] had the right to appoint an

> arbitrator *only if* it qualified its arbitrator within one month of a request from [the cedent]. Failure to do so would result in [the cedent] having the right to appoint both arbitrators. Thus, the language of the arbitration clause itself makes the timing of the qualification consequential regardless of a "time is of the essence" clause.[3]

National Planning Corp. v. Achatz, 2002 U.S. Dist. LEXIS W.D. N.Y.) was an NASD arbitration in which the respondent failed to submit a list of suggested arbitrators on time due to a clerical error. The NASD selected the arbitration panel from the petitioner's list and the respondent filed this action for a new panel. The court observed that section 5 of the FAA requires that the NASD rules for appointment of arbitrators must be followed:

> [T]he parties have agreed to arbitrate under the NASD Rules. Consequently, judicial disregard of the NASD's interpretation of its own Rules would inject uncertainty into the arbitration process and increase the prospects of time-consuming litigation – which are some of the evils arbitration is designed to avoid.[4]

The treaty at issue contained a 90-day appointment provision in *Cravens, Dargen & Co. v. General Ins. Co. of Trieste and Venice,* 1996 WL 41825 (S.D. N.Y.). When the reinsurer failed to do so, the cedent asked the California Insurance Commissioner to appoint the second arbitrator. The Commissioner declined to do so and the reinsurer attempted to appoint its candidate three months late. The reinsurer justified this attempt based on the lack of a "time is of the essence" clause and several non-insurance cases which forgave a one-to-three-day delay on arbitrator appointment. The court rejected these arguments due to the reinsurer's protracted delay in nominating a candidate.

III. Caselaw Not Enforcing Time Limits on Arbitrator Appointment

Texas Eastern Transmission Corp. v. Barnard, 285 F. 2d 536 (6th Cir. 1960) was a case in which the respondent had 30 days to appoint an arbitrator, otherwise the petitioner's arbitrator would be the sole arbitrator. The respondent was five days late in appointing its arbitrator. The district court found for the petitioner but the appellate court reversed ruling:

> In our view, the controlling consideration in this case is that, in the provisions of the arbitration agreement relating to the time within which appellant was to appoint its arbitrator, time was not of the essence of the contract. At law and in equity, the question is one of construction to be determined by the intent of the parties and time is, ordinarily, not of the essence, unless it is made so by express stipulation, or unless something in its nature, or connected with its purpose, makes it apparent that the parties intended the contract to be performed within the time limit specified.[5]

A mistaken time stamp by an intermediary on an arbitration demand led to a reinsurer appointing is arbitrator five days late in *Ancon Ins. Co. (U.K.) v. GE Reinsurance Corp.,* 480 F. Supp.2d 1278 (D. KS. 2007). In considering this dispute, the court quoted extensively from *Lobo & Company v. Plymouth Navigation Co.,*187 F. Supp. 859 (S.D.N.Y. 1960) to the effect that an immaterial delay in arbitrator appointment should not defeat the mutually chosen method of dispute resolution. The court ruled for the reinsurer:

> [The reinsurer's] *very* short delay in appointing its arbitrator was not due to bad faith. Instead, it was attributable to a simple mistake by [the reinsurer's] agent, Cavell. Although the parties' agreement technically provides that [the cedent] may appoint an arbitrator if [the reinsurer] neglects to do so within thirty days of receipt of the arbitration demand, the court finds a strict, hypertechnical enforcement of this provision under the facts presented here would almost certainly lead to an arbitration judgment in which [the reinsurer] is likely to have zero confidence.[6]

The reinsurer was 8 days late in appointing an arbitrator in *New England Reins. Corp. v. Tennessee Ins. Co.,* 780 F. Supp. 2nd (D. MA 1991). In the interim, the cedent appointed a second party arbitrator. The court found for the reinsurer:

> The [reinsurer's] counsel's lack of diligence in transmitting his letter of appointment does not rise to a level sufficient to deprive the [reinsurer's] right to appoint an arbitrator, especially considering the lack of prejudice to the defendant. . . . Moreover, nothing indicates that the parties intended time to be of the essence.[7]

The respondent did not appoint an arbitrator within 21 days because it believed the dispute was not subject to the arbitration clause in *In Re Utility Oil Corp.,* 10 F. Supp. 678 (S.D.N.Y. 1934). The petitioner sued to compel arbitration and the district court agreed that the dispute was not subject to arbitration. The court of appeals reversed and after the Supreme Court denied certiorari, the respondent appointed an arbitrator. The petitioner argued that the respondent forfeited is right to appoint an arbitrator, but the court disagreed stating:

> The refusal to name an arbitrator within twenty-one days was not due to caprice, perverseness, or desire for delay, but solely to a belief, mistaken but far from unreasonable, that the case was not one for arbitration. The rights of the parties must be determined then with the fact in mind that the respondent in good faith refused to appoint an arbitrator within the time fixed in the agreement and did appoint as soon as it was decided with finality that the matter was covered by the arbitration clause.[8]

IV. What About Replacement Arbitrators?

The acquisition of a book of business provided the backdrop for *Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.,* 547 F. Supp. 2d 889 (N.D. IL. 2008). Both parties appointed arbitrators within the time limit in contract but after two years, the arbitrator for the petitioner parties withdrew and a substitute was appointed. The respondent objected to the replacement as being beyond the time limit for arbitrator appointment. The court found for the petitioner:

> [The respondent] urges an interpretation of the agreement that would prohibit either party from ever choosing an arbitrator after the expiration of the initial 20-day period, but the Court finds this an untenable reading of the parties' agreement. . . .
> The [contract] evidences the parties' intent that the arbitration proceed before a panel comprised of one arbitrator chosen by each party and a neutral umpire. . . . That is what occurred here.[9]

Argonaut Midwest Ins. Co. v. General Reinsurance Corp., 1998 U.S. Dist. LEXIS 12497 (N.D. IL.) involved a contract which required an appointment of active officers within one month. Both sides complied but before the panel was fully formed, the arbitrator for the petitioner retired. The respondent gave the petitioner a date certain to appoint a replacement, but the petitioner appointed a replacement a day thereafter. The respondent objected to the replacement and sought to appoint both arbitrators. The court ruled for the petitioner stating that the

respondent's request "runs contrary to the clear intent of [the arbitration clause] which is to permit each party to nominate one of the three members of the arbitration panels [*sic*], with the third being chosen by the party's [*sic*] nominated arbitrators."[10]

Matter of the Arbitration between Evanston Ins. Co. and Kansa General Int'l Ins. Co. Ltd., 1995 WL 23063 (N.D. IL.) is another case in which the arbitrators where appointed timely but thereafter the reinsurer's party arbitrator resigned and the reinsurer attempted to appoint a replacement. The cedent alleged that the original appointment was a nullity and that it had the right to appoint a second arbitrator. The court ruled for the reinsurer: "[The reinsurer] did not 'fail to designate' an arbitrator and the Court declines to subscribe to the fiction proposed by [the cedent] that the nomination of [the original arbitrator] was the equivalent of no nomination at all."[11] The court went on to observe:

> [T]he Court must endeavor to effectuate the intention of the parties. The Court notes that the overriding intent of the parties was to submit their disputes to binding arbitration before a three-arbitrator panel, with each party nominating one disinterested arbitrator. The Court can effectuate that intent by allowing [the reinsurer's] designation of [the replacement arbitrator] to stand.[12]

V. Comments

There is a substantial split in the courts between those that strictly enforce contractual time limits on arbitrator appointment and those that will overlook a brief delay when: (a) time is no made of the essence; and (b) it serves the interest of the alternative dispute resolution mechanism selected by the parties. One point not evident in these court decisions is that time limits on arbitrator appointment is one means of accelerating the panel-completion process which can take many months when it is in the interest of one party to put off the resolution of the dispute as long as possible *i.e.* the context supports relatively strict adherence to time limits.

ENDNOTES

1 16 F.3d 125 at 129 (emphasis in the original).

2 444 F. Supp. 2d 909 at 916.

3 1990 WL 141442*7 (emphasis in the original).

[4] 2002 WL 31906336*12.
[5] 285 F. 2d 536 at 539.
[6] 480 F.Supp. 1278 at 1285 – 6 (emphasis in the original).
[7] 780 F. Supp. 2d 73 at 77.
[8] 10 F. Supp. 678 at 680.
[9] 547 F. Supp. 899 at 916.
[10] 1998 U.S. Dist. LEXIS 12497*9.
[11] 1995 WL 23063*7.
[12] 1995 WL 23063*9