ALERT
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LAW FIRM DISQUALIFIED AFTER ITS CLIENT'S PARTY-APPOINTED ARBITRATOR PROVIDED IT WITH PANEL DELIBERATIONS

Richard C. Mason • 215.665.2717 • *rmason@cozen.com*
Robert W. Tomilson • 215.665.5587 • *rtomilson@cozen.com*

On October 3, 2011, the U.S. District Court for Southern District of New York disqualified a law firm from acting as counsel in a reinsurance arbitration. *Northwestern National Ins. Co. v. Insco, Ltd.*, No. 11 Civ. 1124 (S.D.N.Y. Oct. 3, 2011).

Case Synopsis

As a preliminary matter, the court first observed that it, rather than the arbitration panel, had jurisdiction to determine whether counsel should be disqualified because (1) disqualification "requires an application of substantive state law regarding the legal profession," and (2) the panel had declined to decide the issue.

On the substance, the court found that defendant Insco's party-appointed arbitrator disclosed to Insco's counsel numerous emails reflecting panel deliberations, and communicated with it while motions were pending (during which time *ex parte* communication was barred). In deciding to disqualify Insco's counsel, Freeborn & Peters, LLP, the court held: "Freeborn's actions in obtaining and hiding panel deliberations in an ongoing arbitration constituted a serious violation of arbitral guidelines, as well as ethical rules." (Insco's party-appointed arbitrator had already resigned from the arbitration.)

In reaching this conclusion, the court relied on the following:

1. Though "not binding law," the ARIAS Code of Conduct forbids arbitrators from informing anyone of the content of panel deliberations.

2. The ARIAS Ethical Guidelines forbid arbitrators from repeating statements made by panel members in deliberations.

3. The ABA's Code of Ethics for Arbitrators also states it is improper for an arbitrator to inform anyone regarding the substance of deliberations of the arbitrators.

Significantly, the court rejected Insco's contention that the arbitration was not governed by ARIAS rules, pointing out that Insco itself had frequently invoked ARIAS rules in the arbitration, and further observing that the New York Rules of Professional Conduct state that a lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation [or] engage in conduct that is prejudicial to the administration of justice." Although it recognized that proper *ex parte* feedback from a party-appointed arbitrator may assist arbitration proceedings, it stated that "leaking private communications among the arbitrators that may contain sensitive deliberations on disputed matters goes beyond the salutary purpose of expediting the arbitration and has a strong tendency to taint arbitral proceedings."

The court opined that the following communications between counsel and arbitrator "raise a serious risk of tainting the underlying proceedings:"

1. Disclosure of a draft that became an interim order of the panel;

2. Communications from the law firm providing the arbitrator with "a one-sided view of certain discovery issues which [the arbitrator] then forwarded to the full panel;"

3. Disclosure of panel discussions regarding pending discovery issues;

4. Disclosure of an email from the umpire containing his views regarding timing of depositions and motions; and

5. Disclosure of panel emails regarding choice of law issues.

The decision may be appealed to the 2nd Circuit Court of Appeals.

Practice Points

Arbitration counsel and participants should:

1. Understand that a court may look to arbitral guidelines, such as ARIAS-US guidelines, as authoritative, particularly if the parties have (i) invoked the guidelines themselves in the proceedings, and (ii) have not otherwise stipulated to alternative applicable rules.

2. Be aware that a court may find that *ex parte* communications, *even if not necessarily made during a period when such communications are prohibited*, can potentially taint the proceedings if the firm's arguments are relayed verbatim to the panel.

3. Carefully control the content of *ex parte* communications, in the context of clearly articulated understandings between the parties, to avoid such communications being deemed to have potentially tainted such proceedings.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Richard Mason at 215.665.2717 or rmason@cozen.com or Robert Tomilson at 215.665.5587 or rtomilson@cozen.com.