

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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**ACE PROPERTY & CASUALTY  
INSURANCE COMPANY and ACE FIRE  
UNDERWRITERS INSURANCE  
COMPANY,**

**Petitioners,**

**v.**

**ENSTAR (US) INC. and ENSTAR (EU)  
LIMITED,**

**Respondents.**

**CIVIL ACTION NO.**

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**ACE PROPERTY & CASUALTY INSURANCE COMPANY and ACE FIRE  
UNDERWRITERS INSURANCE COMPANY'S PETITION TO COMPEL  
ARBITRATION AND FOR AN ORDER DIRECTING SELECTION OF THE UMPIRE**

Petitioners, Ace Property & Casualty Insurance Company and ACE Fire Underwriters Insurance Company (collectively "ACE"), seek an order compelling Enstar (US) Inc. and Enstar (EU) Limited ("Enstar") to arbitrate a dispute between the parties in accordance with the terms of a reinsurance contract known as the Blanket Excess of Loss Cover, effective July 1, 1982 (the "Global Slip Treaty"), as amended by the parties for this dispute by their April 8, 2014 Umpire Selection Agreement, and directing Enstar to complete the process for selecting the neutral umpire for this arbitration.

There is no disagreement between the parties that the underlying dispute is subject to arbitration under the arbitration provision in the Global Slip Treaty. Likewise, there is no disagreement that the umpire for the arbitration panel is to be selected under the Umpire Selection Agreement, the terms of which were negotiated specifically for this dispute and have already begun to be implemented by the parties. The next step in the Umpire Selection

Agreement is the obligation to rank the four remaining candidates to select the neutral umpire, a step which Enstar refuses to complete.

Thus, the parties are at a temporary impasse and ACE seeks this Court's intervention to order Enstar to proceed with the next step in the agreed umpire selection process. In support of its petition, ACE relies upon the Memorandum of Law filed with this petition and further states as follows:

### **THE PARTIES**

1. ACE Property and Casualty Insurance Company is a Pennsylvania insurance company with its principal place of business in Philadelphia, Pennsylvania.

2. ACE Fire Underwriters Insurance Company is a Pennsylvania insurance company with its principal place of business in Philadelphia, Pennsylvania.

3. ENSTAR (U.S.) Inc. is a Delaware company with its principal place of business in St. Petersburg, Florida. It is responsible for the run-off and management of certain United States-domiciled insurance companies, including Seaton Insurance Company and Constellation Reinsurance Company, which are citizens of Rhode Island and New York, respectively.

4. ENSTAR (E.U.) Limited is non-U.S. company with its principal place of business in Hamilton, Bermuda. It is responsible for the run-off and management of certain non-US insurance companies.

### **JURISDICTION AND VENUE**

5. This Petition is submitted under Chapters 1 and 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 and §§ 201-208.<sup>1</sup>

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<sup>1</sup> Chapter 2 of the FAA provides for enforcement of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention").

6. Both the FAA, § 4, and The New York Convention, as implemented by Chapter 2 of the FAA, provide this Court with the power to compel arbitration.

7. Section 4 states: “A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.”

8. This Court has jurisdiction over Enstar (US) Inc. and its United States domiciled insurance companies, Seaton Insurance Company and Constellation Reinsurance Company, under 28 U.S.C. 1332, because each are citizens of Delaware, Rhode Island and New York, respectively, and ACE is a citizen of Pennsylvania, and the amount in controversy exceeds \$75,000. Diversity of citizenship also applies to Enstar’s non-US owned and managed companies as well, but original jurisdiction is also available under 9 U.S.C. § 203.

9. Section 203 of the FAA states: “An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.”

10. Section 206 of the New York Convention specifically provides that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.” 9 U.S.C. § 206.

11. Venue is proper in this district because Section 4 of the FAA provides that a party aggrieved by another's failure to arbitrate under a written agreement "may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action ... of the subject matter of a suit arising out of the controversy between the parties" 9 U.S.C. § 4. In the absence of an agreement to arbitrate between the parties, ACE could have sued Enstar in this District.

### **BACKGROUND**

12. In a reinsurance contract, a reinsurer typically agrees to indemnify the reinsured with respect to a portion of the reinsured's obligations under an insurance policy issued by the reinsured, in exchange for a portion of the premium paid to the reinsured for the underlying policy.

13. Under a type of reinsurance contract known as a "treaty," the reinsurer assumes all or part of an entire category or "book" of insurance policies issues by the reinsured company.

14. Effective July 1, 1982, various insurance and reinsurance companies that are now owned or managed by Enstar participated as reinsurers of ACE's predecessors under the Global Slip Treaty. (*See* Exhibit 1 to the Declaration of Larry P. Schiffer, dated July 7, 2014 ("Schiffer Dec.").)

15. Under the Global Slip Treaty, ACE was permitted to cede and Enstar was obligated to accept a percentage of ACE's excess liabilities. (*Id.* at Art. 1) The Global Slip Treaty requires that disputes between ACE and Enstar be submitted to arbitration as follows:

[a]s a precedent to any right of action hereunder, if any dispute shall arise between the Company and the Reinsurers with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Agreement, such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within thirty days after the receipt of

written notice from the other party requesting it to do so, the requesting party may appoint two arbitrators. If the two arbitrators fail to agree in the selection of a third arbitrator within thirty days of their appointment, each of them shall name two, of whom the other shall decline one and the decision shall be made by drawing lots.

(*Id.* at Art. 21).

16. ACE has settled and paid asbestos claims arising from two insurance policies issued by ACE to the Plant Insulation Company.

17. These insurance policies come within the coverage of the Global Slip Treaty and ACE submitted reinsurance billings to Enstar for its share of the Plant Insulation losses.

18. Enstar has refused to pay the amounts billed.

19. On November 11, 2013, ACE demanded arbitration against Enstar under the arbitration clause in Global Slip Treaty because of Enstar's non-payment of the Plant Insulation loss as billed. (*See Ex. 2 to Schiffer Dec.*)<sup>2</sup>

20. On November 18, 2013, in-house counsel for Enstar responded to ACE's Arbitration Demand on behalf of all Enstar managed companies, thereby acknowledging that the present dispute is ripe for arbitration. (*See Ex. 4 to Schiffer Dec.*)

21. Enstar's outside counsel also responded to ACE's Arbitration Demand on November 25, 2013, further confirming that the present dispute is ripe for arbitration. (*See Ex. 5 to Schiffer Dec.*)

22. On December 16, 2013, in keeping with the terms of the Global Slip Treaty and as agreed between the parties, and further acknowledging that the dispute between the parties

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<sup>2</sup> On November 25, 2013, ACE amended its arbitration demand to rectify the inadvertent clerical error in not originally demanding arbitration on behalf of both ACE Property & Casualty Insurance Company and its wholly-owned subsidiary, ACE Fire Underwriters Insurance Company. (*See Ex. 3 to Schiffer Dec.*) The billings from ACE to Enstar expressly included the amounts due for both ACE companies.

should be resolved in the arbitration commenced by ACE's Arbitration Demand, Enstar appointed Michael L. Cohen as its arbitrator. (*See* Ex. 6 to Schiffer Dec.)

23. Also on December 16, 2013, ACE appointed its arbitrator, but on December 20, 2013, replaced its original arbitrator with Paul Dassenko as its arbitrator. (*See* Ex. 7 to Schiffer Dec.)

24. Enstar also entered into a highly customized written Umpire Selection Agreement with ACE on April 8, 2014, following negotiations that began on November 26, 2013. (*See* Ex. 8 to Schiffer Dec.)

25. The Umpire Selection Agreement provides that it replaces the portion in the arbitration clause "contained in the Blanket Excess of Loss Contract (Layers 1, 2 and 3) that directs the two party-appointed arbitrators to select a 'third arbitrator,' and sets forth a procedure to follow when the two arbitrators fail to agree on the selection of the third arbitrator."

26. A key feature of the customized Umpire Selection Agreement is a provision that eliminates many of the experienced candidates that each party might have otherwise nominated to act as neutral umpire. For example, under the Umpire Selection Agreement the parties agreed not to:

. . . nominate any Umpire Candidate who has previously served as an expert witness, arbitrator or umpire in any prior reinsurance arbitration between the Parties and their affiliates within the past 7 years. . . . This provision, however, shall not preclude the Umpire in this dispute from serving as an Umpire in disputes between any one of the Parties, their affiliates or counsel and another party not related to the Parties in this arbitration. . . .

(Ex. 8 to Schiffer Dec.)

27. As provided for in the Umpire Selection Agreement, each party was to name, and did name, four qualified neutral umpire candidates and were to jointly send a mutually agreeable form of umpire questionnaire to each of the eight umpire candidates via e-mail.

28. Upon receipt of all completed umpire questionnaires, “each Party will strike two (2) names from the other Part’s [sic] list of four (4) Umpire Candidates.” (*Id.*)

29. The parties were to then rank the remaining candidates and the umpire candidate with the lowest combined ranking will serve as the umpire. (*Id.*)

30. The parties simultaneously exchanged lists of umpire candidates on April 14, 2014.<sup>3</sup>

31. The parties then negotiated an umpire questionnaire, which was sent to the umpire candidates on April 28, 2014. (*See* Ex. 9 to Schiffer Dec.)

32. Prior to sending the questionnaire, Enstar replaced one of its nominees. Subsequent to sending the questionnaire, ACE replaced one of its nominees. A dispute arose concerning the qualifications of one of Enstar’s nominees, and Enstar eventually agreed to replace that nominee as well.

33. As required by the Umpire Selection Agreement and as agreed by the parties after all the replacement candidates had completed their umpire questionnaires, on June 3, 2014, the parties each struck two candidates from the other party’s list of nominees.

34. The next step in the umpire selection process is for each party to rank the four remaining neutral umpire candidates.

35. On the same day that the parties exchanged the strikes under the Umpire Selection Agreement, both counsel asked each other when the other party would be ready to exchange the rankings of the remaining four candidates so the neutral umpire could be chosen.

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<sup>3</sup> The umpire candidate nomination letters, the names of the candidates, including the candidate at issue here, and e-mails containing the parties’ strikes have not been included as exhibits or have been redacted because disclosure would alert the potential candidates to the identity of the nominating party and jeopardize the neutrality of the umpire.

36. That evening one of the remaining four umpire candidates advised the parties that he had been selected as a neutral umpire in a different reinsurance arbitration between ACE and an unrelated reinsurer, but where the underlying claim was the same claim at issue in the arbitration between ACE and Enstar. (*See* Ex. 10 to Schiffer Dec. (redacted).)

37. The Umpire Selection Agreement provides guidance for such a circumstance and allows candidates to remain eligible to act as a neutral umpire in other disputes that involve one of the parties: “[t]his provision, however, shall not preclude the Umpire in this dispute from serving as an Umpire in disputes between any one of the Parties, their affiliates or counsel and another party not related to the Parties in this arbitration.” (Ex. 8 to Schiffer Dec.)

38. On June 5, 2014, counsel for ACE e-mailed counsel for Enstar indicating that ACE was ready to exchange the rankings of the remaining four candidates that day. (*See* Ex. 11 to Schiffer Dec.)

39. Instead of agreeing to exchange rankings, counsel for Enstar asked if ACE would agree to a replacement of that nominee with another umpire candidate. On June 13, 2014, counsel for ACE advised counsel for Enstar that ACE would not agree to a replacement of that umpire candidate, primarily because the umpire selection process had already winnowed down the candidates and this candidate was not disqualified under the carefully drafted limitations of the Umpire Selection Agreement. (*See* Ex. 12 to Schiffer Dec. (redacted).)

40. Counsel for ACE reiterated the request for a date to exchange the rankings of the remaining four remaining neutral umpire candidates. (*Id.*)

41. Counsel for Enstar has continued to delay in acting on that obligation. (*See* Ex. 13 to Schiffer Dec. (redacted).)



42. Section 5 of the FAA provides that if an arbitration agreement contains a provision “for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.” 9 U.S.C. § 5

43. Under Section 208 of the New York Convention, “Chapter 1 [of the FAA] applies to actions and proceedings brought under [the New York Convention] to the extent that chapter is not in conflict with [the New York Convention].” 9 U.S.C. § 208.

44. The Global Slip Treaty (Ex. 1 to the Schiffer Dec.), as amended solely for this dispute by the parties’ Umpire Selection Agreement (Ex.8 to the Schiffer Dec.), provides the method for selection of the neutral umpire.

45. Enstar willingly participated in the agreed-upon method for the selection of the umpire up until the present delay.

46. The parties each nominated four umpire candidates and struck two candidates from the other’s list.

47. All that has to happen to select the neutral umpire is for the parties to rank the remaining candidates and the candidate with the lowest combined ranking will serve as the neutral umpire.

48. The Umpire Selection Agreement also has a tie-breaking mechanism. (Ex. 8 to the Schiffer Dec.)

49. Although Enstar exchanged lists of umpire candidates with ACE and exchanged lists of strikes, Enstar has delayed its ranking the remaining four candidates unless a replacement is made for one candidate, a candidate it no longer likes, because of his separate and coincidental appointment for the neutral umpire role in another arbitration.

50. Nothing in the Umpire Selection Agreement bars the candidate from serving as a neutral umpire in this case just because he has been selected as a neutral umpire in another, similar case. (*Id.*)

51. Consistent with Section 5 of the FAA and Section 206 of the New York Convention, this Court should direct Enstar to complete the umpire selection process as required under the Umpire Selection Agreement.

52. Enstar should be required to rank the remaining four umpire candidates, including the candidate Enstar wants to see replaced, so that the neutral umpire in this case may be chosen as agreed to by the parties.

#### **REQUEST FOR RELIEF**


WHEREFORE, ACE has properly demanded arbitration under the Global Slip Treaty, Enstar does not contest that the dispute concerning the Plant Insulation loss is arbitrable, and the contract provides a method for umpire selection, as supplemented by the parties Umpire Selection Procedure, the Court should enforce the clear terms of the Global Slip Treaty and the Umpire Selection Agreement. For the reasons stated above and in the accompanying memorandum of law, ACE requests that this Court enter an Order:

1. Directing that the arbitration commenced by ACE's proceed forthwith before a single arbitration panel consisting of Paul Dassenko, Michael L. Cohen, and an neutral umpire selected under the Umpire Selection Agreement agreed to by the parties;
2. Directing that Enstar immediately rank the four remaining umpire candidates, including the candidate that Enstar wants to see replaced, and proceed forthwith to select a neutral umpire as agreed in the Umpire Selection Agreement; and

3. Directing Enstar to pay ACE its reasonable attorney fees and costs incurred because of the filing of this Petition.

Respectfully submitted,

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