LATE NAMED WITNESSES:

WHAT'S A PANEL TO DO?

by

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I. Introduction

Sooner or later, most reinsurance arbitrators will be faced with the situation of one side to the controversy attempting to name a new witness to their case in chief long after discovery is concluded and shortly before the hearing. This, naturally, generates complaints of prejudice and intense debate over what was required or implied in the schedule for discovery. The result is a difficult decision for the panel which may have significant impact on the outcome of the hearing.

One issue that may concern the panel in such a situation is the possibility of having the panel's ultimate ruling on the merits vacated because of its decision on the late named witness. The purpose of this article is to examine some recent case law on this possibility and to suggest factors to be considered by a panel in considering whether to allow testimony by a late named witness.

II. Recent Case Law

Commercial Risk Reins. Co. Ltd. v. Security Insurance Co. of Hartford, 526 F. Supp.2d 424 (S.D.N.Y. 2007) was a dispute in which a cedent sought reinsurance recoverables under a contract with an arbitration clause which granted the panel "the power to determine all procedural rules for the holding of the arbitration including but not limited to inspection of documents, examination of witnesses and any other matter relating to the conduct of the arbitration."[1] The contract also included "honorable engagement" language relieving the panel of judicial formalities and allowing it to abstain from following strict rules of law.[2]

The reinsurer proffered its chief financial officer as a witness after the close of discovery and provided to the cedent documents about which he was proposed to testify two days before the hearing. The cedent argued that it was prejudiced by the inability to depose the late named witness and the reinsurer argued that witness lists exchanged previously were merely preliminary in nature. After hearing the arguments of counsel on point, the panel ruled that the CFO's testimony would be excluded stating that the CFO "was not on the witness list." As to the issue of whether the witness lists exchanged by counsel were final or preliminary, the panel commented "Me [sic] take it for what it is . . . ."[3]

While the panel's articulation of the reasons for its decision was fairly opaque, I have no doubt, and neither did the court, that the panel carefully considered the competing arguments. Moreover, the court articulated its very limited standard of review of the panel's decision:

> [T]he panel satisfied the minimal standard governing its authority. The arbitrators allowed the parties an opportunity to address the issue, heard their arguments and "explain[ed] their conclusions in terms that offer even a barely colorable justification for the outcome reached."[4]

This being the case, the court found no justification for going behind the decision of the panel to exclude the CFO's testimony and second-guess it:

> In this context, Commercial Risk's protestations about the status of the witness list and the timing of their proffer of [the CFO] as a witness runs counter to the expansive delegation of decisional authority with which the parties, through their explicit agreement, entrusted the arbitrators. Thus, Commercial Risk's argument reflects an instance of phenomenon noted by this Court In which parties agree to arbitrate and confer upon arbitrators maximum decisional authority so as to liberate them from rigid judicial formalities and application of strict rules of law, and then fault them if they do exercise their latitude to stray from those presumably discarded procedural or substantive constraints.[5]

III. Factors to Be Considered With Late Named Witnesses

One important factor in considering whether or not to allow the testimony of late named witnesses is fundamental due process. Stated differently, a panel must allow each side an opportunity to place its case before the panel.[6] However, a panel may legitimately question why a witness so critical to that party's case appears so late in the day. A related issue is whether the evidence sought to be presented is duplicative of other testimony or evidence, even if important to that party's case.

The party opposing the late named witness has legitimate arguments that it is prejudiced by the inability to depose the witness and to develop a hearing strategy that blunts the strengths and exposes the weaknesses of that witness' testimony. However, a panel may: (a) legitimately question whether this is an automatic reaction of highly competitive trial counsel; and (b) do its own analysis of the benefits of the testimony vs. the prejudice to the other side. Several cases demonstrate the courts' reactions to panel rulings in this context.

The panel denied the petitioner's request to have the CFO of the respondent testify at the arbitration hearing in *Areca, Inc. v. Oppenheimer & Co., Inc.*, 960 F.Supp.2d (S.D.N.Y. 1997). When the court was asked to vacate the panel award in favor of the respondent, the court found that the panel provided a fundamentally fair hearing. The petitioner put on ten witnesses over seven hearing days and introduced 148 exhibits. The CFO did not seem to have significant involvement in the dispute. Nonetheless, the panel allowed the petitioner to make its arguments as why the testimony of the CFO was essential. The court found that the panel was well within its rights to decline to hear cumulative evidence. "Although arbitrators must have before them enough evidence to make an informed

decision, they need not compromise the speed and efficiency that are the goals of arbitration by allowing the parties to present *every piece* of relevant evidence."[7] (emphasis in the original).

Another case on point is *Tempo Shain Corp. et al. v. Bertek, Inc.*, 120 F.3d 16 (2nd Cir. 1997). Wayne Pollock, the former president of Tempo Shain, was scheduled to testify in an arbitration but was unable to do so when his wife became seriously ill. He intended to testify concerning his own alleged oral misrepresentations and in support of a counterclaim for fraudulent inducement related to a transaction in which he was the sole negotiator on his side. The panel declined to postpone the hearing and Tempo Shain moved to vacate an adverse order on the basis of §10(a)(3) of the Federal Arbitration Act which allows the court to take such action when the panel improperly refuses to postpone a hearing. While recognizing the very limited role of the courts in such matters, the court reviewed the record and determined that the testimony Pollock intended to give was; (a) not cumulative; and (b) critical to defending the misrepresentation claim by Bertek as well as Tempo Shain's counterclaim. On this basis, the panel's order was vacated.

IV. Commentary

Late named witnesses can create a difficult problem in administering a fair and orderly hearing. However, the panel has a great deal of discretion in fashioning proper remedies including barring the proffered testimony. If, however, the testimony offered is critical to the party offering the testimony, and that party offers a credible explanation for the delay in naming the witness, the panel should consider a fair means of allowing the hearing to go forward (*e.g.* a last minute deposition), delaying the hearing or keeping the record open for later testimony.

ENDNOTES

1 526 F.Supp.2d at 426.
2 *Id.* at 427.
3 *Id. at 429.*
4 *Id.* quoting *Matter of Andros Compania Maritima, S.A. (Marc Rich & Co,. A.G.)*, 579 F.2d 691, 704 (2nd Cir. 1978).
5 *Id.* at 430-1.
6 *See e.g. Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34 (1st Cir. 1985).
7 960 F.Supp.2d at 55, quoting *Brandt v. Brown & Co. Securities Corp.*, 1995 U.S.Dist.Lexis 5699 (S.D.N.Y.).