MReBA Cover Notes --

A Publication of the Massachusetts Reinsurance Bar Association

Spring 2011

In This Issue:

Welcome!

Dear Members and Readers,

With this issue of *Cover Notes*, MReBA celebrates its second anniversary and the publication of eight issues of its quarterly newsletter. We thank all of the people who have contributed their time and talents to *Cover Notes* and hope that you have found something of interest in each issue; whether one of our reports on recent decisions, one of our Practice Notes, or our Industry Spotlights. As always, we welcome and encourage your feedback and participation.

One of MReBA's principal missions is to provide a forum for discussing topics of interest to reinsurance practitioners and industry members. We aim to do this through this newsletter, as well as our Annual Symposium, and our Spring Reception which takes place this year on April 28 at Boston's Hampshire House and features Joseph G. Murphy, Massachusetts' newly appointed Insurance Commissioner.

Our Education Committee has also done a terrific job scheduling a series of educational presentations at our monthly lunch meetings by both MReBA members and visiting speakers. This issue of *Cover Notes* features articles on three such recent presentations by MReBA members Jason Reeves, Natasha Lisman and Rob Whitney. We hope you will check our events calendar and make a date to join us at our cocktail reception and one of our monthly meetings.

Susan A. Hartnett
Chair, Publications Committee
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Case Note: "Storm Warnings" Intensify: Determining the Statute of Limitations In Reinsurance Fraud Actions

You're Invited!

You are invited to MReBA's Spring 2011 Cocktail Reception!

For more information, please click here.

MReBA
Massachusetts Reinsurance Bar Association

Join Our Mailing List!

MReBA Calendar

MReBA Meetings

April - Annual Meeting
Thursday, April 28
3:30 pm
Location: The Hampshire House

May
Wednesday, May 11
12:30 pm
Location: Mintz Levin
Topic: Business Meeting

June
Wednesday, June 8
12:30 pm
Location: Prince Lobel
Topic: TBD

July

By Melissa M. D'Alelio,
Robins, Kaplan, Miller & Ciresi LLP

New Englanders know to take heed when we see clouds on the horizon and hear a storm warning. It turns out that reinsurers seeking to assert fraud in litigation or arbitration against a cedent need to heed another type of "storm warning." In the Second Circuit decision of *AXA Versicherung AG v. New Hampshire Insurance Company et al* ("AIG"), No. 08-2521-cv, 2010 U.S. App. LEXIS 17645 (2nd Cir. August 23, 2010), the Court declared that the "storm warning doctrine" applies to reinsurance disputes and that the emergence of "storm warnings" of fraud or misrepresentation by a cedent will, therefore, trigger the running of the statute of limitations. Reinsurers who fail to inquire about inconsistencies--storm warnings--when they arise may see their rights lost to the running of the statute of limitations period for fraud.

AXA Versicherung involved a claim of fraudulent inducement with respect to two reinsurance facilities. Reinsurer AXA filed suit against AIG, alleging that AIG misrepresented that it would treat the facilities as facultative obligatory, when, in fact, AIG subsequently administered the facilities as purely facultative. Reinsurer AXA alleged that this sleight of hand enabled AIG to offload unacceptable risk onto its reinsurers. AXA further claimed that it would not--in fact, could not--have entered into purely facultative reinsurance contracts. A jury agreed. At the close of trial, AXA obtained a $34 million judgment for fraud against AIG.

AIG appealed, posing two questions: First, should AXA's fraud claims have been in arbitration rather than in Court? And, if not, were AXA's claims nevertheless time barred by the statute of limitations? As a threshold matter, the Court of Appeals agreed with the District Court that AXA's allegations sounded in fraud and were properly decided in Court rather than in arbitration. Nonetheless, the Court of Appeals vacated the judgment against AIG on the ground that AXA's fraudulent inducement claims were barred by the statute of limitations. The Second Circuit overruled the District Court's previous rejection of both AIG's summary judgment motion and renewed Rule 50(b) motion on this very point.

To read this Case Note in full, please click here.

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Case Note: One Beacon v. Swiss Re - An Arbitration Panel's Limits on "Custom and Practice" Discovery and Testimony Does Not Provide Grounds for Vacating Award Under "Manifest Disregard of the Law" Standard

Wednesday, July 13
12:30 pm
Location: Ropes & Gray
Topic: TBD

General Interest

NAIC Spring Meeting
March 26-29
Austin, TX

Association of Corporate Counsel Risk Management Training for In-House Counsel
April 6-8
Boston, MA

Opening Day, Fenway Park
April 8
Boston, MA

MReBA Spring Cocktail Reception, featuring Insurance Commissioner Joseph Murphy
4:30 pm
April 28
Hampshire House
Boston, MA

ARIAS U.S. Spring Conference
May 4-6
Miami Beach, FL

RE Basics: Demystifying Reinsurance
May 9
Chicago, IL

New Members

MReBA is pleased to welcome the following new members:

Melissa D'Alelio, Robins Kaplan Miller & Ciresi LLP

Elisabeth Ditomassi, Beazley Group

Stephanie Kassis, Lexington Insurance Company

Steve Zera, Lexington Insurance Company

MReBA Officers

By Erin N. Roth,
Zelle Hofmann Voelbel & Mason, LLP

In *OneBeacon America Insurance Co. v. Swiss Reinsurance America Corp*., 2010 U.S. Dist. LEXIS 136039 (D. Mass. Dec. 23, 2010), a Massachusetts District Court judge recently followed the First Circuit's highly deferential standard for reviewing an arbitration award, even in the face of allegations of misconduct in the handling of discovery by the arbitration panel. The case involved a dispute between OneBeacon and its reinsurer (Swiss Re) over the cedent's demand for reimbursement of sums that it had paid to its insureds to settle non-products asbestos claims.

The reinsurance contract at issue was a Multiple Line Reinsurance Treaty Contract ("Treaty") under which Swiss Re's obligations were not triggered until OneBeacon first paid a specified retention amount. The retention was to be applied on a "per occurrence" annual basis, where "occurrence" was defined under the Treaty for non-products purposes as "injuries to one or more than one person resulting from infection, contagion, poisoning or contamination proceeding from or traceable to the same causative agency." Any disputes between the parties arising out of the Treaty were to be resolved pursuant to the Treaty's arbitration clause.

Such a dispute arose when OneBeacon sought to aggregate non-products liability claims from six different policyholders into a single occurrence, thereby reaching the Treaty's threshold retention amount and exposing Swiss Re to approximately $9 million in liability to OneBeacon. Swiss Re rejected OneBeacon's attempt to aggregate multiple policyholders' non-products claims under the Treaty and the resulting dispute was submitted to an arbitration panel.

To read this Case Note in full, please click here.

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Industry Spotlight: Retakaful - Reinsurance in the World of Islam

By Robert A. Whitney,
White and Williams, LLP

"Retakaful" is reinsurance governed by Islamic, or Sharia, law. While a relatively new form of reinsurance, the number of Retakaful companies and contracts will continue to grow throughout the world over the next few years, including within the United States. As such, there is a growing need for attorneys and arbitrators who are familiar with these contracts and experienced in Sharia insurance and reinsurance law.

Introduction

Insurance as a risk transfer mechanism dates back thousands of years before Edward Lloyd opened his coffee house in the City of London. Historically, early methods of transferring or distributing risk were practiced by Chinese and Babylonian traders as long ago as the 3rd and 2nd millennia BCE, respectively. Chinese merchants redistributed their wares across multiple ships in order to limit the loss due to any single vessel's sinking. Babylonian merchants also developed a system practiced by early traders sailing the Mediterranean in which a merchant who received a loan to fund his shipment of goods would also pay the lender an additional sum in exchange for the lender's promise to cancel the loan should the shipment be stolen.

In the early days of the Islamic era, caravans trading throughout Arabia and

adjoining lands were also exposed to potentially catastrophic losses, such as sandstorms and raiders. Also, as Muslim traders expanded to markets in the Indian subcontinent, the Malay Archipelago and Asia, they often experienced large losses when ships were lost at sea or raided by pirates along the way.

Based on the Islamic principle of "mutual help and cooperation in good and virtuous acts," traders often agreed before they started their long journey to contribute to a fund that would be used to compensate any member who suffered losses on the caravan trip or ocean voyage. Muslim scholars generally acknowledge that the basis of "shared responsibility" as practiced between these early Muslim traders laid the foundation for a form of "mutual insurance" under Islamic law known as "Takaful" and "Retakaful."

To read this Industry Spotlight in full, please click here.

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Practice Note: Primer on (Re)insurance Market and Dispute Resolution in England & Wales

By Jason Reeves,
Zelle Hofmann Voelbel & Mason LLP

The London market is a key component of the (re)insurance industry and must be understood in context. It is a distinct marketplace and is facilitated by a highly developed legal framework. English legal precedents that address difficult insurance problems are frequently cited in judgments in foreign jurisdictions. And, with London still the center of the (re)insurance world, English law often has the final say in resolving (re)insurance disputes. This article is not a comprehensive review of the London market or English law, but rather provides an overview of interesting and distinct points for Americans to consider when London may become involved in a reinsurance dispute.

Setting the Stage

The United Kingdom includes four countries: England, Wales, Scotland, and Northern Ireland. Within England, the City of London (which, in turn, is within the larger city popularly known as London) is a global center for insurance and reinsurance. The City has the greatest concentration of insurers in the world at Lloyd's and in the London company market.

England and Wales share a centuries-old common law legal system that is generally referred to as "English" law. Note that "British" or "UK" law does not exist: to an English lawyer, Scotland is as foreign a jurisdiction as France, or Kansas.

The courts of England and Wales routinely hear reinsurance disputes, and London is often the seat of reinsurance arbitrations. Rather than juries (which are used for criminal matters), the outcome of civil trials is decided by the highly competent English judiciary.

Like New York law, English law is often chosen as a "neutral" law to govern cross-border commercial contracts. Accordingly, it is not unusual for reinsurance disputes originating from U.S. claims or involving U.S. cedents to be subject to English law or an English forum.

Jargon

Scratches, syndicates, slips, spirals, subscription markets, leads, followers, agreement parties, and Names: the London market is home to a peculiar jargon beyond the infamous Cockney rhyming slang. Understanding London market jargon

is not the aim of this article, but if you have a Barney with the jargon use the Dog and we can Rabbit about the flavour of the Frankie. (Barney Rubble = Trouble; Dog and Bone = Phone; Rabbit and Pork = Talk; colour = color; flavour = flavor; Frankie DeTory = Story.)

The meaning of words is critical in the insurance business, but it is more than a common language that divides the London market and the English legal system from the rest of the global reinsurance industry. London is fundamentally a very different marketplace.

To read this Practice Note in full, please click here.

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Practice Note: Arbitration Wars in Insurance Insolvency

By Natasha C. Lisman,
Sugarman, Rogers, Barshak & Cohen, P.C.

While the once reigning judicial hostility to arbitration agreements as unenforceable "attempt[s] to wholly oust the courts of jurisdiction" has generally been consigned to ancient legal history, resistance to honoring arbitration agreements has survived in one environment - insurance insolvency. In that context, the enforceability of arbitration agreements, and specifically, whether an insolvent insurer's pre-insolvency arbitration agreement with a third party is binding on the insurer's liquidator as one standing in the insurer's shoes, is a live, highly controversial, and actively litigated issue. This article presents a general overview of the main legal strands in the extensive case law engendered by this litigation.

Background

The wars over the arbitrability of disputes in insurance liquidations are triggered by a clash of preferences for the resolution forum. Insurance liquidators prefer to submit disputes for adjudication by the state courts supervising liquidations and strenuously resist having to abide by arbitration clauses in the insolvent insurers' contracts with third parties, even when seeking to recover under them. The third parties, on the other hand, have the exact opposite preference and respond by seeking court orders compelling arbitration.

The ensuing battles have been waged in a number of state and federal jurisdictions and have produced such sharp divisions among, and even within, the courts that on most key issues, for each line of reasoning and conclusion one can find in the case law an equal and opposite line of reasoning and conclusion.

This intersection of insurance and arbitration law is of particular interest to reinsurance practitioners. Reinsurers are disproportionately represented among the targets of liquidators' claims because reinsurance contracts are typically the largest and most collectible potential assets that a liquidator can marshall for the insolvent estate. Since reinsurance contracts tend to include arbitration clauses, reinsurers figure prominently as liquidators' opponents in the wars over arbitration in insurance liquidation.

To read this Practice Note in full, please click here.

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