MReBA Cover Notes --

A Publication of the Massachusetts Reinsurance Bar Association

Winter 2010

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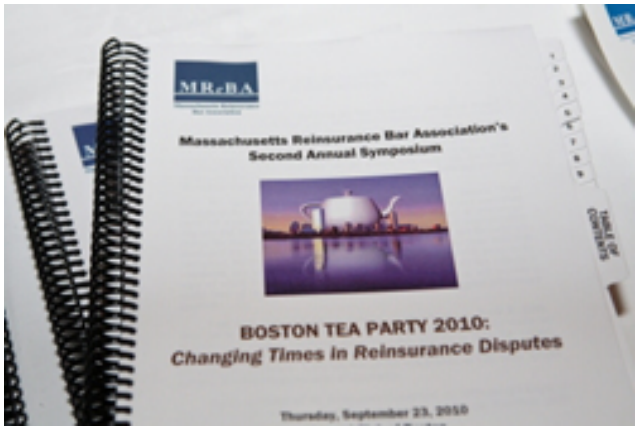
Welcome!



Dear Members and Readers,

More than one hundred reinsurance professionals - lawyers, claims people, arbitrators, umpires and consultants - participated in our second annual symposium, with strong representation from both reinsurers and ceding companies. To all of you who attended, thank you!

Those of us in MReBA enjoyed the day tremendously, thanks to the spirited participation of our panelists and audience. Despite our Massachusetts focus, our presenters joined us from four countries on two continents, and we had panelists and guests from nine states.

For those of you who could not attend, we include below summaries of the major presentations and of the keynote address from David Robb, past president of HartRe, the assumed reinsurance arm of The Hartford. Full materials for the Symposium, including slide presentations and written supplementary materials are now available on MReBA's website.

What we cannot summarize here are the lively participation from the floor (including in a interactive, problem-solving session lead by Bill Erickson, our former president; the tremendous effort and leadership of our symposium chair, John Harding; the excellent lunch and comfortable setting; and, of course, the cocktail hour (cut slightly too short because we packed so much into each panel). Our thanks, too, to the mock arbitration panel-comprising John Dattner (Reinsurance & Arbitration Services), Mark Gurevitz (The Hartford), and Andrew Maneval (Chesham Consulting)-and the additional facilitators for the interactive problem solving: Adam Stein and Paul White.

Consistent with our mission to provide a forum for thoughtful, creative, free and open discussion, the symposium raised challenging issues and encouraged debate. In reading these materials and those on our website, please keep in mind that all

MReBA
Massachusetts Reinsurance Bar Association

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MReBA Calendar

MReBA Meetings

December
Wednesday, December 8
12:30 pm
Location: Prince Lobel

January
Wednesday, January 12
12:30 pm
Location: Ropes & Gray

February
Wednesday, February 9
12:30 pm
Location: Robins Kaplan

General Interest

Equinox: Shortest Day Of The Year
December 21
Partout

III Joint P/C Industry Forum
January 12
New York City

NAMIC Public Policy Summit
January 20-21
Washington, D.C.

Big I Best Practices Symposium
January 19-24
Rancho Mirage, CA

Evacuation Day

opinions and views expressed are offered in that spirit for the purpose of education and discussion. Accordingly, these views and opinions cannot be viewed as anything more than that. They are not the views of our companies, law firms, or clients, or of any of their members, affiliates, shareholders, or managers.

We hope to see you next year!

Catherine M. Colinvaux

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Partner, Zelle Hofmann Voelbel & Mason LLP
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Keynote Speaker David Robb on the Myths & Legends of Reinsurance

By Alexander G. Henlin,
Edwards Angell Palmer & Dodge LLP

Students of literature understand the power that myths hold over the popular imagination. Often containing a grain of truth, myths can be deeply embedded in a particular culture. David Robb, the keynote speaker at MReBA's Second Annual Symposium, observed that the reinsurance industry has its own set of "myths." Drawing upon both his past industry experience as a reinsurance executive with HartRe and his work with RobbRe, LLC as an arbitrator and umpire in reinsurance matters, Robb reminded the audience of the importance of reexamining the popular myths of reinsurance from time to time, if only to ensure that the culture of the industry may endure.

Robb's overview of the six myths and legends of reinsurance opened a symposium that considered the changing times in reinsurance disputes. His remarks gave context and perspective to sometimes murky concepts, and his call was a welcome reminder for all involved in dispute resolution to be both creative and collegial.

The first popular myth that cedents, reinsurers, and their attorneys should regularly reexamine is whether their side is, indeed, always right. Though this myth can be a useful way in which to approach complicated coverage questions, the responsibility of a reinsurance professional should be to see both sides of an issue. Too often, Robb said, what initially appears to be an easy case in fact has nuance, and more texture than may have been imagined. Asking whether the other side's view has merit often seems taboo, but Robb stressed that it is important to consider this question. Considering the merits of the other side's position may facilitate an early resolution to a complicated dispute and, at the very least, may leave the parties better off after an arbitration.

A second popular myth is that the party that loses the arbitration "coin toss" has no recourse. A third, and related, myth is that a cedent and its reinsurer should just settle a case early, because the arbitration panel is likely to split the baby. Robb suggested ways to address these concerns that are both cost-effective and relatively easy: for example, deciding to use neutrals with particular experience or certifications can help to minimize the parties' perception that arbitration decisions can be capricious, and insisting on unanimous or at least reasoned decisions may help to mitigate against seemingly harsh remedies. The parties to an arbitration, Robb stressed, largely control their own destiny.

A fourth popular myth is that arbitration is cheaper and faster than litigation. In the

March 17
Boston, MA

NAIC Spring Meeting
March 26-29
Austin, TX

RIMS Annual Conference
May 1-5
Vancouver, B.C.

ARIAS Spring Conference
May 4-6
Miami Beach, FL

New Members

MReBA is pleased to welcome the following new members:

David Bloser, Liberty Mutual Group

Christian Bouckaert, BOPS Avocats (Paris)

Jack Burds, Guy Carpenter

Philip Chisholm, Controlled Risk Insurance Co. (Harvard Medical Institutions)

Nancy Israel, Israel & Silberman PC

Shanel Lindsay, Sugarman, Rogers, Barshak & Cohen PC

Brian McDonough, Zelle McDonough & Cohen LLP

Julian Miller, Beachcroft LLP (London)

Rhonda Rittenberg, Lexington Insurance Company

Erin Roth, Zelle Hofmann Voelbel & Mason LLP

Nick Scott, Beazley Group

Michael Stevens, Liberty Mutual Group

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absence of a strong umpire or panel, Robb noted that this may not necessarily be true, particularly today. The size of disputes, the emergence of e-discovery, the involvement of skilled counsel, and a general unwillingness by parties to try new and untested procedures that could streamline proceedings can often cause arbitrations to bog down. There is a need, Robb suggested, for more willingness to innovate.

Robb's final two myths are interrelated. One is that a wholly-neutral arbitration panel could cure what ails the process. Robb observed that it may be unrealistic to place much hope in wholly-neutral panels emerging, as an ARIAS protocol for neutral panels has gone unused for over three years. Rather, neutrals with deep industry experience seem to offer the best options improving the arbitration process.

Finally, Robb's sixth myth is that the current reinsurance dispute-resolution system is fundamentally broken and must be replaced. Some in the reinsurance industry have opined that reinsurance disputes should simply go through the ordinary litigation process because arbitration proceedings have been "hijacked" by lawyers, who draw out disputes and increase costs. In response to these critics, Robb cautioned that arbitration still offers advantages that litigation does not, in the form of cost savings, experienced arbitrators who can understand and resolve a dispute within the context of the industry, and expedited procedures. Robb pointed out that, while under strain, that system has worked well for decades and perhaps should not be so lightly cast aside.

If the goal is to resolve reinsurance disputes quickly, inexpensively, and meaningfully in a way that honors the historic purposes and culture of reinsurance, Robb suggested, then industry players must become more assertive in their roles. They must understand the details of the arbitration process, and the needs of the parties and people involved. Most importantly, they should take charge of the decision process.

Overall, Robb's remarks stressed the need for industry players and their counsel to be creative in developing solutions to disputes which honor the basic purposes and understandings of a reinsurance transaction. Allowing the current dynamic to persist, he suggested, is likely not a viable option. Robb threw down a challenge, and the Symposium's panels continued the discussion of where reinsurance dispute resolution is and where we would like it to be.

Alex Henlin may be reached at ahenlin@eapdlaw.com.

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Panel Debates Contractual, Practical and Legal Considerations of Consolidation

By Seth V. Jackson,
Zelle Hofmann Voelbel & Mason LLP

Panelists

Mitchell S. King, Prince, Lobel, Glovsky & Tye, LLP

Steven J. Torres, Mintz Levin Cohn Ferris Glovsky and Popeo PC

Susan E. Grondine, R&Q USA, Randall & Quilter Investment Holdings plc

A panel consisting of Prince Lobel's Mitchell King, Steven Torres of Mintz Levin and Susan Grondine of R&Q USA considered the issues that cedents and reinsurers face in deciding whether to consolidate multiple reinsurance arbitrations.

Contractual Considerations

Steven Torres emphasized that the first thing a party must do is to analyze the reinsurance contracts to determine all key provisions related to consolidation. For example, are the "scope of arbitration" clauses similar or identical in the various contracts or do they conflict? Do the various the arbitration clauses contain the same arbitrator/umpire credential requirements? Do all the contracts or only some of the contracts contain an honorable engagement clause allowing panels to avoid strict adherence of the law? The greater the differences between the contractual provisions, the less likely that consolidation will be a viable option.

Practical Considerations

Susan Grondine next addressed various practical considerations in considering whether to consolidate. As Grondine observed, "These situations are like snowflakes. They may look the same, but no two situations are the same for consolidation purposes." For example, some parties find consolidation appealing where there is a single claim with multiple reinsurers. Consolidation may also be appealing when the dispute involves a single claim with different layers of reinsurance. Whatever the situation, however, there are numerous business considerations that companies must review before deciding whether to consolidate multiple arbitration proceedings and no single philosophy controls.

To read this panel overview in full, please click here.

**The views and opinions attributed to speakers at the Symposium do not necessarily represent the views of their respective companies, law firms or clients, or any of their members, affiliates, shareholders or managers.*

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Reinsurance in the Global Age

By Rachel M. Davison,
Morrison Mahoney LLP

Panelists

Julian Miller, Beachcroft LLP, London, England

Christian Bouckaert, Bouckaert Ormen Passmard Sports Cabinet, Paris, France

Rod Attride-Stirling, Attride-Stirling & Woloniecki, Hamilton, Bermuda

John Harding, Morrison Mahoney LLP

A panel of reinsurance experts from England, France and Bermuda added an international flair to MReBA's Second Annual Symposium and provided a global perspective on arbitration and litigation.

Julian Miller of Beachcroft LLP in London, England discussed several recent cases involving "follow the settlements" provisions. One of the cases, *Wasa International Insurance Co. Ltd. v. Lexington Insurance Co.*, [2009] UKHL (House of Lords), was the subject of much discussion at last year's Symposium because it called into question the enforceability of follow the fortunes/follow the settlements clauses in London-placed reinsurance contracts. Despite a final determination of liability by the Washington Supreme Court and a businesslike settlement made in good faith by Lexington, the House of Lords refused to bind the reinsurers to follow the settlement and pay their share of the reinsurance because English law would not permit the temporal limitation of the reinsurance cover to be overridden by application of the

"all sums" allocation ordered by a U.S. state court. English law would have respected the temporal limitation of the reinsurance contract and not applied an "all sums" allocation.

Wasa was the last decision issued on the last day of the House of Lords, but while it may have seemed like a dramatic shift in the interpretation of London-placed reinsurance contracts to those of us on this side of the Atlantic, Miller observed that many on the other side of the Atlantic view *Wasa* differently. Although the reinsurance contracts at issue did not specify the governing law, they were subject to English law because they were placed in London. Under English law, the governing law must be set at the inception of the contract. In contrast, the Washington Supreme Court ordered an "all sums" allocation based on Pennsylvania law after applying Washington conflict of law rules, well after the reinsurance contracts had incepted. Miller advised that if a ceding company wants to ensure true back-to-back coverage, including application of the same governing law, the reinsurance contract could be written to explicitly provide back-to-back coverage and could specify the same governing law as the underlying insurance contract.

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Panelists Explore Ethical Issues in Reinsurance Arbitration

By Christine T. Phan,
Zelle Hofmann Voelbel & Mason LLP

Panelists

John Dattner, Reinsurance Arbitration and Consultation Services

Mark Gurevitz, The Hartford

Jerry McElroy, Zelle Hofmann Voelbel & Mason LLP

The increasing use of arbitration to resolve reinsurance disputes has brought a number of ethical issues arising from the process to the forefront. Consideration and discussion of ethical issues raised by reinsurance arbitrations can help enhance the fairness, integrity, and efficiency of the process. At the Second Annual MReBA Symposium, John Dattner, of Reinsurance Arbitration and Consultation Services, and Mark Gurevitz, of The Hartford, discussed numerous ethical issues raised in reinsurance arbitrations. Zelle Hofmann's Jerry McElroy moderated the panel.

Evident Partiality

McElroy began the panel dialogue by discussing the concept of "evident partiality." Under Section 10(a)(2) of the Federal Arbitration Act (FAA), a court may vacate an arbitration award "where there was evident partiality or corruption in the arbitrators, or either of them." McElroy pointed to the Supreme Court's decision in Commonwealth *Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968) as the seminal case discussing the standard for determining whether evident partiality was present in an arbitration to warrant vacatur of an arbitration award, albeit one that has led to confusion and controversy.

In *Commonwealth Coatings*, three Supreme Court Justices - Justice Black, Justice

White, and Justice Fortas - disagreed on the proper standard for finding evident partiality. Justice Black believed that arbitration awards should be judged by the same standard under which a judge's judgment would be subject to challenge - that is, an award should be overturned where there is an "impression of possible bias." Justice Black justified his opinion by the fact that arbitrators have the power to decide both law and facts and are not subject to appellate review. Justice White joined Justice Black's opinion but noted that trivial business relationships should not constitute evident partiality sufficient to overturn an arbitration award. Justice Fortas, joined by two other Justices, dissented, reasoning that the arbitration award should not have been overturned because the neutral arbitrator had no actual bias nor was there any suggestion of intentional concealment. McElroy noted that *Commonwealth Coatings* brings to the forefront the tension between preserving the fairness of the arbitration process and efficiently resolving disputes by employing as arbitrators those individuals who are the most familiar with the reinsurance field.

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Contract Wordings: Old Dilemmas, New Solutions

By Shanel Lindsay,
Sugarman, Rogers, Barshak & Cohen, PC

Panelists

Elaine Caprio Brady, Liberty Mutual Group

John Phillips, General Reinsurance Corp.

Michael O'Malley, Liberty Mutual Group

Julie Pollack, Swiss Reinsurance America Corp.

Rhonda Rittenberg, Lexington Insurance Company

After a thought-provoking day exploring the complex problems that arise during reinsurance disputes, the MReBA Symposium concluded by coming full circle with a panel addressing the initial point of reference when a conflict arises between a cedent and reinsurer - the reinsurance contract. Moderated by Elaine Caprio Brady, Vice President and Director of Ceded Reinsurance at Liberty Mutual, the panel of industry insiders surveyed recent developments affecting reinsurance contract wording and provided practical tips for parties to consider during the drafting process.

"Access to Records" Clauses

John Phillips, Senior Vice President of General Reinsurance Corporation kicked off the discussion with a presentation on "access to records" clauses in reinsurance agreements that allow reinsurers to inspect a cedent's records related to its settlements with an insured. Considering that the majority of disputes between cedents and reinsurers revolve around a cedent's handling of an insured's claim, the reinsurer's access to the cedent's records can prove critical during arbitration. Noting the inherent tension between the position of the reinsurer (who wants access to all records) and a cedent (who may want to limit access to certain records), Phillips provided two examples of clauses that have appeared in reinsurance agreements as a result. A more inclusive clause allows access to "all relevant records," while a more

restrictive clause permits a reinsurer to inspect only the cedent's "claims and accounting documents."

Phillips went on to note that an important emerging issue in the "access to records" arena is the effect that sharing documents with a reinsurer may have on claims of privilege in an underlying coverage case. This situation could arise where the cedent and reinsurer are involved in arbitration before or at the same time that the cedent is litigating an underlying coverage dispute. During the arbitration, the cedent may share with the reinsurer information that, in the underlying action, is subject to the work-product or attorney-client privilege. Traditionally, Phillips explained, both the cedent and reinsurer believed that the shared information remained privileged in the underlying action under the "common interest" doctrine, notwithstanding that the reinsurer is not a co-defendant in that litigation. However, the Oregon District Court's recent decision in *Regence Group v. TIG Specialty Ins. Co.*, 2010 WL 476646 (D.Or. 2010), challenges this assumption. In *TIG*, the court, in part, ruled that the cedent's sharing of information with a reinsurer destroyed any privilege in the underlying litigation between the cedent and its policyholder, despite the fact that the arbitration panel had ordered the cedent's production of the documents and, in doing so, had specifically stated that no privilege waiver would result from the production. In disagreeing with the arbitration panel, the court reasoned that a cedent and reinsurer have no common interest during an arbitration and, therefore, any information that is shared between the two cannot be claimed as privileged in a proceeding between the cedent and its insured. Phillips noted the potential limited precedential value of the *TIG* decision, and observed that future cases may well be distinguishable from *TIG* based on the relevant facts and circumstances.

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