MReBA Cover Notes --
A Publication of the Massachusetts Reinsurance Bar Association

Spring 2012

In This Issue

Welcome!

By Alexander Henlin,
Edwards Wildman Palmer LLP

The Newsletter Committee is proud to bring you this latest newsletter of the Massachusetts Reinsurance Bar Association.

This month, our authors have based their articles on the educational offerings of the Association, including presentations given by individual members and panel discussions moderated by our guests. As usual, we also provide commentary on significant court decisions in the reinsurance sector, and offer some practice tips. We are exceedingly grateful to the authors of our several articles for helping us put this newsletter together.
We hope you enjoy reading this issue and that we will see you at our Spring Cocktail Reception on April 24.

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When Does an Abitration Panel Exceed its Authority in Issuing Awards? Some Cases Take a Look

By Robert A. Whitney

Several recent federal cases explore the question of when a court may vacate an arbitration award on the grounds that an arbitration panel has exceeded its authority.

1. Framework for Review of Arbitration Panel Decisions

You're Invited!

You're invited to MReBA's Spring 2012 Cocktail Reception!

For more information, please click here.

MReBA
Massachusetts Reinsurance Bar Association

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MReBA Calendar

MReBA Meetings:

April 24, 2012 at 3:30 pm
Hampshire House
84 Beacon Street
Boston, MA
Focus: Annual Meeting & Cocktail Reception

May 16, 2012 at 12:30 pm
Edwards Wildman
111 Huntington Ave.
Boston, MA
Focus: Educational Meeting

June 2012
Location TBD
Focus: Educational Meeting

July 2012

In order to place these rulings in context, it is important to first understand the role that courts play in reviewing arbitration panel rulings.

Reinsurance contracts have traditionally contained clauses stating that the arbitrators shall interpret the reinsurance contract as an "honorable engagement," and not merely as a legal obligation. Such "honorable engagement" clauses relieve reinsurance arbitrators from following the strict rules of law, and allows them to use their expertise and experience in reaching a result that is consistent with the reinsurance contract and with the custom and practice of the reinsurance industry.

This flexibility and broad discretion may manifest itself in many ways. Although freed from following strict rules of law and contract interpretation, reinsurance arbitrators are still bound to resolve the dispute based on the reinsurance contract before them. The honorable engagement clause is not an invitation to the arbitrators to ignore express provisions of the parties' contract. Similarly, arbitrators may not base their decisions on thoughts, feelings, policy, or law that come from outside of the contract, unless the arbitration agreement itself allows the arbitrators to do so.

The United States Supreme Court has noted that "Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). "In consenting to arbitration, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001). "An application [to vacate an arbitration award] will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court." *Hall Street Assocs.*, 552 U.S. at 582.

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Abitrator Disclosures and Evident Partiality: The Second Circuit's Recent Decision in *Scandinavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*

By Susan Hartnett,
Sugarman, Rogers, Barshak & Cohen, P.C.

The Second Circuit's recent decision in Scandinavian Reinsurance Company Ltd. v. St. Paul Fire & Marine Insurance Company, ___ F.3d ___ (2d Cir. Feb. 3, 2012) is the latest judicial opinion to address the extent to which arbitrators must disclose potential conflicts of interest, and the availability of a remedy for such non-disclosures. There, the court reversed vacatur of an arbitration award, holding that two arbitrators' failure to disclose their concurrent service in a similar dispute involving a common witness, common issues, and (allegedly) a related party did not establish "evident partiality" under 9 U.S.C. § 10(a)(2).

The District Court Ruling

We reported the district court's decision in the Summer 2010 issue of our newsletter. The district court granted Scandinavian Re's petition to vacate the award against it. The district court agreed with Scandinavian Re that two

Location TBD
Focus: Business Meeting

General Interest:

Red Sox Home Opener
Fenway Park
April 13, 2012

RIMS Annual Conference
Philadelphia
April 15-18, 2012

Patriot's Day
Boston
April 16, 2012

ARIAS Spring Claims Conference
Palm Beach
May 9-10, 2012

RAA Current Issues Forum
Philadelphia
May 22-24, 2012

NAIC Financial Summit Conference
Washington, D.C.
May 30, 2012

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arbitrators' undisclosed involvement in a concurrent arbitration was a "material conflict of interest" that required disclosure, and that their failure to disclose established evident partiality under §10(a)(2).

In vacating the award, the district court rejected St. Paul's contention that the arbitrators' undisclosed conduct was "trivial" because it did not concern a personal or financial relationship between the arbitrators and a party. The district court noted that, although evidence of an undisclosed relationship between an arbitrator and a party is a relevant factor, it is not a dispositive factor in determining whether the undisclosed matter was material so as to require disclosure and support a finding of evident partiality under § 10(a)(2).

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Massachusetts Courts Limit Ability of Cedents to Gain Jurisdiction Over Foreign Insurers

By Michael F. Aylward,
Morrison Mahoney LLP

Even as an increasing number of reinsurance actions are being filed in Boston, our state and federal courts are reminding cedents of the difficulties that they may face in gaining jurisdiction over foreign reinsurers. Herewith a cautionary tale.

In *OneBeacon America Insurance Company v. Argonaut Insurance Company*, No. 09-5085 (Mass. Super. Nov. 9, 2011), OneBeacon filed suit against various foreign reinsurers on behalf of the Employers Liability Assurance Corporation ("ELAC"), a British-based insurer operating out of London with a U.S. branch headquartered in Boston. In late 1967, the London office of Willis Faber telexed ELAC's Boston office asking if ELAC would agree to front the renewal of B.F. Goodrich's umbrella program. Because the London Market insurers were not admitted in Ohio, where B.F. Goodrich is headquartered, Willis sought this fronting arrangement under which ELAC provided excess coverage to Goodrich, retained 5% of the risk and ceded most of the risk (and most of the premiums) to various London reinsurers. Although it appears that these reinsurance undertakings were entered into, the documentation with respect to them was (and remains) sparse. Further, although certain of the slips make reference to a "service of suit clause," the actual wording of the clause is unknown.

Decades later, B.F. Goodrich became involved in numerous environmental controversies, including a claim involving a facility in Kentucky. OneBeacon, acting for ELAC, disputed coverage for the claim, but was held liable by an Ohio jury in 2007. After exhausting its appeals, OneBeacon paid the judgment in 2009 and sought reimbursement for $72 million from ELAC's reinsurers. After those reinsurers disputed the cession, OneBeacon filed suit against them in the Business Litigation Session of the Suffolk County Superior Court in Boston. The reinsurers moved to dismiss this action claiming that the court lacked personal jurisdiction over them or, in the alternative, that Boston was an inconvenient forum in which to litigate the dispute.

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Follow the Fortunes" Still Means That Reinsurers Must Follow the Fortunes -- At Least in New York

By Andrew Ian Douglass,
Morrison Mahoney LLP

Longstanding readers of reinsurance case reports are no doubt aware of the famous final decision handed down by the House of Lords, *Lexington Insurance v. Wasa*, 2009 UKHL 40, in which the Law Lords decided that the reinsurer did not have to follow the fortunes of a cedent who was stuck with a large environmental clean-up tab involving an Alcoa plant in Washington State, where the underlying case was brought. A fair reading of the case poses the possibility that the Law Lords may have been less than in awe of the depth of knowledge of Pennsylvania law displayed by the Supreme Court of Washington (the policy had a Pennsylvania governing law clause).

There does not yet appear to be any true consensus about the full implications of that decision, but it may become the "Hostile Judge" exception to the UK common-law doctrine. If so, as a choice of governing law for reinsurance contracts, New York would in the future appear to be a better jurisdiction for cedents, unless a *Lexington/Wasa* clone appears on the New York judicial scene. Whether that is likely then becomes the question.

In the two opinions discussed below, the New York State Supreme Court, Appellate Division, First Department has answered that question in the negative, at least for now. It remains to be seen whether the parties will appeal either decision to the New York Court of Appeals.

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Pointers for Reinsurance Practitioners

By Alexander Henlin,
Edwards Wildman Palmer LLP

Reinsurance disputes are not regularly decided by courts. Often, the parties to a reinsurance agreement - cedents and reinsurers alike - prefer to have any disputes between them resolved through arbitration. This can pose a challenge for practitioners, particularly those with less reinsurance experience, because their instincts and modes of presentation are typically honed by years of experience in litigation. And while arbitrators generally possess an intellectual appreciation for rules of procedure and rules of evidence, they recognize that they have been hired to resolve a dispute, not to undertake the full duties of a judge overseeing a case from start to finish. Accordingly, are there any strategies that a reinsurance practitioner might employ to be a more effective advocate for his client before an arbitration panel?

Charles Foss and David Thirkill presided over a lively discussion at the January 2012 meeting of the Massachusetts Reinsurance Bar Association, held at Morrison Mahoney LLP. Lawyers, reinsurance professionals, and in-house counsel in attendance exchanged thoughts on how reinsurance practitioners can more effectively advocate for their clients within the context of a reinsurance arbitration. Several points emerged from the discussion:

- **Attempt to summarize the points in dispute.** A focused presentation makes for a smoother arbitration. To the extent that timelines, coverage charts, and rosters of key players can be prepared and given to the panel, practitioners are well advised to make them. Similarly, practitioners may consider exploring whether the panel would find advance copies of slide presentations helpful. These steps, while they seem basic, can help keep the arbitration on track, and make any formal sessions more productive.

- **Be judicious in the evidence presented to the panel.** An arbitration panel typically does not have the time to sift through reams of deposition transcripts and expert reports to develop the same deep understanding of a case that practitioners have. Accordingly, if there are relevant deposition extracts, practitioners might choose to highlight them at or before the hearing. Similarly, expert witnesses should be used judiciously. In a related vein, practitioners should carefully consider how much arbitration discovery is enough, and how what discovery is taken will ultimately aid the panel in resolving the matter. It is absolutely crucial, too, that practitioners clearly explain the relevance of any evidence they choose to present to the panel.

- **Keep your writing clear.** A linear presentation of the case can be an immense help to the panel. Accordingly, a brief that focuses on the dispute at hand, and that does not dwell on irrelevant cases or arguments, is more likely to persuade than one that does not. Even something as simple as reducing the number of footnotes can make the presentation more readable, and contribute to the overall clarity of the argument.

- **Know your audience.** Arbitrators are hired to resolve disputes, not to make law. Accordingly, while the panel may very well want to know what a cedent did, it is less likely to be deeply interested in extensive disputations about the burden of proof, or abstract discussions of legal doctrines like follow-the-fortunes. Presumably, the parties have agreed to arbitrate their dispute in order to benefit from the experience that people who are knowledgeable about - and, more importantly, have experience in - the reinsurance industry can bring to the arbitration panel. Accordingly, practitioners who focus on abstract legal arguments may cause their presentations to fall short of the mark.

Every arbitration panel is different, and each individual who serves on one tends to bring a unique set of experiences to a particular dispute. Practitioners who adopt a flexible style of presentation, therefore, and who are mindful of the foregoing points, are likely in the best possible position to advocate effectively for their clients.

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