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The New (semi) Confidential Arbitration Award

A significant number of reinsurance contracts, particularly treaties implicated in claims involving runoff operations, contain arbitration clauses but do not require that the arbitration be confidential. Nevertheless, many ceding companies and reinsurers alike continue to prefer the "traditional" approach: to conduct their arbitrations in private and treat the process and result as confidential. If that is the preference of the parties to a dispute, they ordinarily execute a confidentiality agreement to that effect and anticipate the entire arbitration, including the award itself, will remain confidential, even if the dispute ends up in court. Until fairly recently, the parties could have been confident that their expectations would be fulfilled.

In recent years, however, some courts have refused to seal post-arbitration proceedings (*i.e.* motions to confirm and/or vacate an arbitration award) despite a joint request by both parties, thereby exposing arbitration materials that the parties agreed to keep confidential to public review and potential use in later proceedings. The divergence among courts creates the potential that parties may be able to influence, after the arbitration, whether agreed-upon confidentiality is maintained, or not, by choosing or avoiding a "pro-disclosure" venue for post-arbitration motions. It is therefore important for all parties to enter the process with "eyes wide open" with respect to confidentiality.

Certain Courts View Confidentiality Agreements with Skepticism

The recent decision by the United States District Court for the Southern District of New York in *Century Indemnity Company, et al. v. AXA Belgium* (*f/k/a Royale Belge Incendie Reassurance*), 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012) is indicative of this trend in the Southern District of New York (and other courts across the country). The Court held that a written confidentiality agreement in a reinsurance arbitration was insufficient to overcome the presumption of public access to court documents when the parties brought to court their dispute about whether the arbitration award should be confirmed or vacated.

The SDNY's approach to the parties' motion to seal in *AXA* is typical of that court's recent attitude towards such motions. The court was presented with cross-petitions to confirm and vacate three related reinsurance arbitration awards, and multiple motions to seal various documents from those arbitrations, *id.* at *1, as required by the confidentiality agreement the parties previously executed.[1] *Id.* at *12. After granting the petition to confirm the awards and denying the petition to vacate, the court turned to the parties' complimentary motions to seal certain arbitration documents. *Id.* at *13-14. After concluding that the arbitration documents and related pleadings were "judicial documents" to which a presumption of access attaches, the court performed a balancing test, *id.* at *13, balancing "competing considerations that include, but are not limited to, the danger of impairing law enforcement or judicial efficiency and the privacy interest of those resisting disclosure." *Id.* at *13.

Though admitting that the public interest in the relationship between an insurer and its reinsurers is relatively low, the court reasoned there was great public interest in the workings of the court, including the arbitration awards and other arbitration information. *Id.* at *14.[2] Finally, the court concluded that neither the parties' reliance on their confidentiality agreement nor their expectation as a result of their agreement to arbitrate rather than litigate was sufficient to overcome the presumption in favor of access. *Id.* The court held the mere existence of a confidentiality agreement did not, without more, demonstrate that sealing was necessary, *Id.* The SDNY has employed similar reasoning to justify public access to reinsurance arbitration information that the parties sought and agreed to keep confidential in a string of recent decisions.[3]

The Proper Forum for Post-Arbitration Motions and Its Potential Effect on Confidentiality

With some courts refusing to seal arbitration records, a critical issue with respect to a court's willingness to seal the record is whether the parties have a choice of where to file post-arbitration motions. Conventional wisdom is that motions to confirm and/or vacate under the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, et seq., should be brought in the jurisdiction in which the arbitration was held. With so much arbitration activity in New York City, that means the (adverse to sealing) SDNY. However,

there may be other options. According to the United States Supreme Court's March 2000 decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.,* 529 U.S. 193 (2000), even though the FAA's provisions regarding venue for motions to confirm or vacate (§§ 9-11) only mention the federal district court where the parties agree venue is proper or where an award was made, those provisions are permissive, not mandatory – that is, a motion to confirm or vacate an arbitration award can also be brought in any other district where venue for a civil action would be proper under federal law.

Cortez involved competing actions to vacate and confirm an arbitration award arising out of a construction dispute, brought respectively in federal court in Mississippi (where the contract was performed) and, seven days later, in federal court in Alabama (where the arbitration was held and the award issued). *Cortez,* 529 U.S. at 195-196. When the petitioner in the Mississippi action moved to dismiss, transfer or stay the Alabama action, the Alabama District Court denied the motion on grounds that Alabama, where the arbitration was held and the award returned, was the *only* court in which venue was proper under the FAA. *Id.* at 196. The Alabama District Court confirmed the award, and the Court of Appeals for the Eleventh Circuit affirmed. *Id.* at 196. A unanimous Supreme Court reversed, holding that the venue provisions of sections §§ 9-11 of the FAA were permissive, not mandatory. *Id.* at 204. According to the Court, a permissive view of the venue provision is the only one consistent with the obvious congressional intent to expand venue choices through enactment of the FAA. The Court therefore held that the proper venue for a motion pursuant to §§ 9-11 of the FAA includes any venue on which the parties agreed, or the award was returned (as provided by the FAA itself) or in which venue would otherwise be appropriate under the general federal venue statute (*i.e.* where the defendant resides or where a substantial part of the events or omissions giving rise to the claim, like performance of a contract, occurred). *Id.* at 200; *see also* 28 U.S.C. § 1391.

…it may be time to rethink and revise the "standard" confidentiality agreements used in arbitrations.

Having a choice of venue may have the unintended consequence of further complicating a system that many in the industry believe is already in need of repair. The question arises in the reinsurance (or the direct insurance) context whether these forum options for post-arbitration proceedings present an opportunity for parties to gain an unfair, and maybe unanticipated, advantage. For example, when parties to arbitration begin the dispute resolution process, they may be on equal footing when deciding whether to agree to confidentiality---both sides could win or lose the arbitration. If both parties agree to conduct the arbitration on a confidential basis, or the Panel orders confidentiality in the face of a dispute on the issue, the parties will make the necessary efforts to have a court seal the record in any post-arbitration proceedings. Given *Cortez*, however, the successful party to the arbitration could file a motion to confirm in a district court it knows is loathe to seal the record. In fact, while some parties may have found a motion to confirm a particular award unnecessary in the past, when courts sealed the record almost as a matter of course, they might now file a motion to confirm in a favorable jurisdiction just to get the award publicized. In addition, the choice of forum issue may create a race to the courthouse, with each party filing its motion to confirm or vacate in a jurisdiction most favorable to their position with regard to confidentiality. While such actions may be contrary to the spirit of the confidentiality agreement or order, there appears to be no restriction in the typical confidentiality agreement to prevent such a scenario.

Conclusion

In light of the refusal by some courts to maintain the confidentiality of certain arbitration information, parties need to be careful about the disclosures they make during the course of the arbitration in case they become public at some point in the future. As a result, it may be time to rethink and revise the "standard" confidentiality agreements used in arbitrations. Perhaps there is some information both parties would agree should not be made public under any circumstances. The parties could agree from the start that such documents will not be attached to, or discussed in, any court record that is not sealed. Similarly, if parties limit their request that a court seal just those truly confidential parts of the record, they may be able to convince the court that their interests in confidentiality outweigh public access. Not only would this maintain the parties position on confidentiality, but it could reduce risk and expense in the arbitration process. In the meantime, the parties to the dispute should be fully aware of these developments and proceed with appropriate caution. ●

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Endnotes

1 Based on language from the confidentiality agreement quoted in the opinion, it appears the parties were employing a standard-form confidentiality agreement available through the AIDA Reinsurance and Insurance Arbitration Society (better known as ARIAS U.S.). *See id.* at *12. The ARIAS U.S. standard-form confidentiality agreement provides that all "Arbitration Information," which includes "all briefs, depositions and hearing transcripts generated in the course of [the] arbitration, documents created for the arbitration or produced in the proceedings by the opposing party or third-parties, final award and any interim decisions, correspondence, oral discussions and information exchanged in connection with the proceedings," "will be kept confidential." Further, "the parties agree, subject to court approval, that all submissions of Arbitration Information to a court shall be sealed."

Continued on page 40

Tempest in a Teapot (continued)

promptly, and a recognition that its failure to do so would cause additional damages of the very sort that the policy was to protect against.

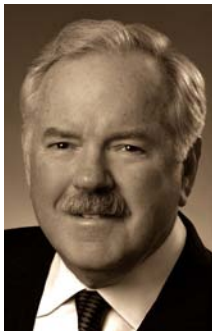
Second, consequential damages claims are narrowly defined under the *Bi-Economy* ruling and may be difficult for policyholders to prove. To recover consequential damages under *Bi-Economy*, a plaintiff must demonstrate (a) the damages were reasonably foreseeable when the contract was formed, *and* (b) that the insurer breached its covenant, implicit in contracts of insurance, of good faith and fair dealing.

Third, the *Bi-Economy* decision did not overrule the long-standing principle of New York law expressed in the Court of Appeals decisions in *NYU* and *Rocanova*, which is that a policyholder still may not pursue a stand-alone punitive damages claim for the breach of an insurance contract unless the plaintiff shows both egregious tortious conduct directed at the insured claimant and a pattern of similar conduct directed at the public generally. Those narrow and high standards remain in place and prevent the types of bad faith claims that are commonplace in other jurisdictions.

What Will Become of the Bi-Economy Ruling and Its Potential Impact on Reinsurers?

The impact of the *Bi-Economy* decision on reinsurers has not yet been reflected in subsequent New York case law. Given the reasoning of the Court of Appeals, consequential damages are a breach of the covered promise, albeit an implicit one, of good-faith and fair dealing, and may therefore be considered a loss covered by reinsurance. To the extent that consequential damage claims do start accumulating under New York law and are then ceded to reinsurers under an extra-contractual theory of liability, coverage will likely turn on the language of any extra contractual obligation ("ECO") clauses in the reinsurance treaties, which typically define coverage for liability that arises from the ceding company's alleged bad faith or negligence in handling of a claim.

Was the storm of criticism and concern directed at *Bi-Economy* a tempest in a teapot? A careful dissection of the majority opinion and the treatment of that opinion by federal and other state courts suggest that it was. ●



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New (semi) Confidential Arbitration Award (cont. from page 29)

2 The leading decision cited for the common law right of public access to judicial documents in *Axa* (and in the cases cited below) is *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), which is not a reinsurance case. Even though the decision is repeatedly relied on by courts denying motions to seal in reinsurance matters, the public interests reviewed by the court in Lugosch – the media's right to review sealed motion papers potentially evidencing graft and corruption by a politically connected real estate developer – are very different than the public interest in reinsurance arbitration awards.

3 *See, e.g., Aioi Nissay Dowa Ins. Co. Ltd. v. Prosight Specialty Management Company, Inc. (f/k/a Mutual Marine Office, Inc.), et al.*, 2012 WL 3583176 (S.D.N.Y. Aug. 21, 2012) (concluding the award, regarding reinsurance dispute arising out of September 11, 2001 attacks, was a judicial document to which the presumption of public access attached and held that the mere existence of a confidentiality agreement was insufficient to overcome, and inconsistent with, the presumption of access.); *Pacific Employers Insurance Company v. Global Reinsurance Corp. of America, U.S. Branch,* No. M-88 (S.D.N.Y. Sept. 2, 2011) (Sullivan, J.) (Part I Judge rejecting request to file documents related to petition to confirm arbitration award under seal); *Pacific Employers Insurance Company v. Global Reinsurance Corp. of America, U.S. Branch,* No. M-88 (S.D.N.Y. Aug. 31, 2011) (Gardephe, J.) (same); *Century Indemnity Co. v. Equitas Ins. Ltd. et al.,* No. 1:11-cv-1034 (S.D.N.Y. Feb. 15, 2011) (Part I Judge rejecting attempt to file petition to confirm arbitration award under seal); *Church Ins. Co. v. ACE Prop. & Cas. Ins. Co.* 2010 WL 3958791, *2-3 (S.D.N.Y. 2010) (denying, without prejudice, reinsurer's request that award arguably filed in violation of confidentiality agreement be sealed); *Mutual Marine Office, Inc. v. Transfercom Ltd.* 2009 WL 1025965, *4-5 (S.D.N.Y. 2009) (denying, without prejudice, reinsurer's motion to seal); and *Global Reinsurance Corporation - U.S. Branch v. Argonaut Ins. Co.* 2008 WL 1805459, *1-2 (S.D.N.Y. 2008) (unsealing reinsurance arbitration awards on cedent's motion for reconsideration of court order sealing same); *see also Harper Ins. Ltd. v. Century Indemnity Co.*, 819 F. Supp. 2d 270, 281 n.15 (S.D.N.Y. 2011) (permitting limited redactions to publicly filed submissions, but rejecting "attempt to use the court system in a private manner"); *OneBeacon Ins. Co. v. Swiss Reinsurance America Corp.*. No. 09-cv-11495 (D. Mass. Nov. 17, 2009) (denying motion to seal petition to vacate arbitration award because "there is a presumption of openness in court proceedings").

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