REINSURANCE ARBITRATION IN RECEIVERSHIP: TO BE - OR NOT TO BE

Prologue

It is often observed that the largest portion of the assets of an insolvent property/casualty insurer is reinsurance recoverables. A substantial body of case law has emerged in recent years, arising out of the property/casualty insolvencies of the 1980s, addressing issues relating to those recoverables. The disputed issues are often similar to those faced by arbitration panels, e.g. setoff, follow the fortunes and allocation. Others are unique to receivership, e.g. voidable preference, direct actions and claim estimation. But one of the hardest fought battles, still being pursued today, addresses arbitration directly - whether a receiver can be compelled to arbitrate pursuant to a pre-insolvency arbitration agreement.

Although the majority of reported decisions on this topic involve disputes between receivers and reinsurers, a number of cases involve other parties seeking to enforce arbitration agreements against the estate, including claimants,[1] cedents,[2] agents,[3] sellers of stock,[4] securities brokers,[5] and other receivers.[6]

It is beyond the scope of this article to discuss the reasons why reinsurers vigorously pursue their arbitration rights and why receivers just as vigorously oppose the recognition of those rights in the context of receivership. However, a brief overview of the landscape should be reviewed in order to set the proper stage for our discussion of the law.

Act I. The Evolution of U.S. Arbitration

Scene 1. Arbitration and the Judiciary

Prior to the mid-1800s, the nation's courts were hostile to arbitration, believing that it infringed upon their jurisdiction.[7] From 1854, the year of an important U.S. Supreme Court decision

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1 Fragoso v. Lopez, 991 F.2d 878 (1st Cir. 1993); Murff v. Professional Medical Ins. Co., 97 F.3d 289 (8th Cir. 1996).

2 Albany Ins. Co. v. Wright (In re Delta American Re), No. 85-CI-0591, Slip op. (Franklin Cir. Ct. Ky. Feb. 4, 1994); Stephens v. American Int. Ins. Co., 66 F.3d 41 (2d Cir. 1995).

3 Knickerbocker Agency, Inc. v. Holz, 149 N.E.2d 885 (1958).

4 Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277 (10th Cir. 1998).

5 Garamedni v. Caldwell, 1992 WL 203827 (C.D. Cal.).

6 Washburn v. Corcoran, 643 F.Supp. 554 (S.D.N.Y. 1986).

7 ELIZABETH ROLPH, ERIK MOLLER AND LAURA PETERSEN, ESCAPING THE COURTHOUSE PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES 9 (1994).

supporting arbitration,[8] through the early 1900s, the courts' resolve was tested by those supporting arbitration and other alternative dispute resolution methods.[9] Finally, in 1920, New York passed the New York Arbitration Act,[10] validating arbitration agreements and paving the way for the development of alternative dispute resolution methods nationwide.[11]

Two major developments followed closely behind New York's action, the passage of the Federal Arbitration Act (FAA)[12], and the establishment of the American Arbitration Association. With the passage of the FAA in 1925, virtually every state and the federal government followed New York's lead, adopting some form of arbitration act.[13]

However, it was not until the 1960s that the evolution really took hold, with the publication of a series of decisions by the U.S. Supreme Court, interpreting the FAA and establishing a strong public policy favoring arbitration.[14] In the years since these opinions were issued, the Court has continued to broaden its support for arbitration,[15] allowing arbitrators broad powers in deciding virtually any type of case.[16]

Scene 2: Arbitration and the Reinsurance Industry

Arbitration is not new to the reinsurance industry which has used the arbitration process since at least as far back as the early 1800s when arbitration clauses were commonly used in English marine reinsurance contracts.[17] Such clauses were gradually introduced in other classes of

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8 Burchell v. March, 58 U.S. 344, 349-350 (1854).

9 ROLPH, *supra* note 7.

10 New York Arbitration Act, N.Y. Civ. Prac. L.&R. 7501-7514 (1980 & Supp. 1986).

11 ROLPH, *supra* note 7.

12 9 U.S.C. §1 et. seq.

13 ROLPH, *supra* note 7, at 9. Most states have enacted some version of the Uniform Arbitration Act which legislatively validates contractual arbitration clauses and clearly defines the relationship between the arbitration process and the judiciary. REINSURANCE ASSOCIATION OF AMERICA, MANUAL FOR THE RESOLUTION OF REINSURANCE DISPUTES 6 (2000).

14 United Steelworkers v. American Mfg., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 583 (1960).

15 Sherck v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Co. v Soler Chrysler-Plymounth, Inc., 473 U.S. 614 (1984); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991).

16 ROLPH, *supra* note 7, at 10.

17 REINSURANCE ASSOCIATION OF AMERICA, *supra* note13, at 8.

reinsurance and eventually became customary in the United States.[18]

Although there are no studies available measuring the relative utilization of arbitration as opposed to litigation in reinsurance disputes, at least one commentator has suggested that roughly 75-90 percent of U.S. reinsurance disputes are submitted to arbitration.[19]

Arbitration in reinsurance disputes has traditionally been preferred over litigation. The relative advantages of arbitration over litigation include the low cost and speed of the process, the privacy of the proceedings, the procedural informality, the expertise of the decision-maker, and the finality of the decision. Arbitration is the industry standard for the resolution of reinsurance disputes because it is a process which seeks a business resolution and relies heavily on the arbitrators' knowledge of and experience with the custom and practice of the reinsurance industry.[20]

Act II: Preservation of State Regulation and Jurisdiction

Scene I: Insurance Regulation Under the McCarran-Ferguson Act

In a decision issued 131 years ago,[21] the U.S. Supreme Court held that the business of insurance did not constitute interstate commerce. Reversing this position 76 years later,[22] the Court decided that the business of insurance is, indeed, interstate commerce. One year later, Congress enacted the McCarran-Ferguson Act (McCarran-Ferguson)[23] recommitting the regulation of the business of insurance to the states and providing that no federal law would be "construed to invalidate, impair or supersede any state law enacted to regulate the business of insurance unless the federal law specifically relates to the business of insurance."[24] McCarran-Ferguson is the mantra recited by state regulators and receivers when faced with any challenge to their authority or jurisdiction, and it is often an effective one.

Scene 2: Federal Abstention under Burford

Although federal courts have recognized an "unflagging duty" to exercise jurisdiction in those

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18 *Id.*

19 VINCENT J. VITKOWSKY, THE REINSURANCE WARS: A REPORT FROM THE FRONT, *reprinted in* REINSURANCE LAW, LITIGATION AND ARBITRATION IN THE UNITED STATES: ARTICLES, PAPERS & SPEECHES 1983-1991 69, at 69 (Buchalter, Nemer, Fields & Younger, 1992)(originally published in REINS. DIG., November/December 1989).

20 REINSURANCE ASSOCIATION OF AMERICA, *supra* note13, at 9.

21 Paul v. Virginia, 8 Wall 168, 19 L. Ed. 357 (1868).

22 U.S. v. South-Eastern Underwriters, 322 U.S. 533 (1944).

23 15 U.S.C. §1012.

24 *Id*.

cases where it is afforded to litigants,[25] federal abstention is the doctrine by which a federal court with jurisdiction may, under very limited circumstances, decide not to hear a case. Although there are a number of abstention doctrines, the Burford abstention doctrine is the one most used by insurance receivers seeking to consolidate jurisdiction of as many issues and matters as possible before the receivership court.[26] Under Burford, a federal court has discretion to abstain from hearing a case if it presents difficult questions of state law relating to important state policy issues, the importance of which goes beyond the result in the case in question.

Act III: Clarification of State Arbitration and Receivership Law

Scene 1: State "Anti-Arbitration" Laws

In 1992, the Court of Appeals for the Tenth Circuit, issued an opinion interpreting Kansas arbitration law.[27] Kansas had adopted statutes of general applicability (not contained in the insurance law) that recognized the validity of arbitration agreements generally, but included certain exceptions intended to apply to contracts of adhesion (where one party has far more bargaining power than the other).[28] These exceptions included contracts between an employer and an employee and contracts of insurance.[29] Although it is highly unlikely that the Kansas Legislature intended the statutory reference to "contracts of insurance" to apply to reinsurance contracts, involving sophisticated parties of equal bargaining power, the Tenth Circuit nonetheless found that reinsurance contracts were included in the statutory reference, thereby excluding reinsurance arbitration clauses from enforceability. The Mutual Bureau decision involved two solvent entities and thus, invalidated an arbitration clause between two ongoing entities. Six other states' laws closely resembled the Kansas law, including Georgia,[30] Kentucky,[31] Missouri,[32] Nebraska,[33] South Dakota,[34] and Vermont.[35] In each of these states,

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25 Grode v. Mutual Fire v. Brittany Ins. Co., 8F. 3d 953 (7th Cir. 1993); Quackenbush v. Allstate, 517 U.S. 706 (1996).

26 The Burford abstention doctrine is named after the U.S. Supreme Court's decision in Burford v. Sun Oil, 319 U.S. 315 (1943).

27 Mutual Reinsurance Bureau v. Great Plains, 969 F.2d 931 (10th Cir. 1992).

28 K.S.A. §5-401.

29 The statute also nullified arbitration agreements providing for "arbitration of a claim in tort."

30 O.C.G.A. §9-9-2.

31 K.R.S. §417.050.

32 R.S. Mo. §435.350.

33 R.R.S. Neb. §25-2 602.

34 S.D.C.L. §21-25A-3.

35 12 V.S.A. §5652,5653.

decisions similar to Mutual Bureau would have nullified arbitration clauses not only in receivership scenarios but in disputes between solvent insurers and reinsurers. Additionally, two other states, Wisconsin[36] and Kentucky,[37] had adopted laws that invalidated reinsurance arbitration clauses in the context of receivership only.

In 1995, the Reinsurance Association of America (RAA) undertook an effort to amend "anti-arbitration" laws across the nation. Today, the landscape looks much different. The "anti-arbitration" laws were successfully amended in Kansas, Georgia, Kentucky, Missouri, Nebraska, South Dakota, Oklahoma and Rhode Island. Based on a review of case law, the RAA determined that reinsurance arbitration would be found valid in Vermont, thus no statutory change was necessary. As a result, Wisconsin remains the only state "anti-arbitration" law in effect today, applying only in the context of receivership.

Scene 2: Distinguishing Claims Against the Estate from Collection Actions Against Debtors

Most of the cases addressing the issue of reinsurance arbitrations against insolvent insurers involve collection actions by the receiver initiated against the reinsurer. Typically, the receiver initiates an action in state court to recover amounts allegedly due the estate. The reinsurer usually responds by removing the case to federal court and then requesting that the federal court stay the litigation and compel the receiver to arbitrate. The receiver routinely responds by requesting that the federal court abstain (under Burford) from hearing the case and remand the matter to state court. The receiver argues that important issues of state law and policy must be determined and that such issues are more appropriately addressed by state courts. Additionally, the receiver will argue that McCarran-Ferguson applies, thus rendering the receivership code as part of the regulation of the "business of insurance." The receiver asserts that this results in a reverse pre-emption with McCarran-Ferguson pre-empting the FAA.

This scenario must be distinguished from the one where a claimant initiates an action against the receiver. State laws provide for a process by which claimants submit proofs of claim in the estate, the receiver evaluates those claims and makes a determination which may or may not have to be approved by the court. State law may be clear with respect to the receivership court's authority to hear and determine those claims. By contrast, state laws permit the receiver to pursue collection actions in any jurisdiction recognizing the fact that the receiver will often need to file actions wherever the debtor is located. Therefore, while state laws contemplate the adjudication of claims against the estate taking place before the receivership court, state laws contemplate that actions pursued by the receiver will not necessarily be before the receivership court.

An additional complication that arises when a claimant seeks to pursue a receiver is the state court anti-suit injunction. Upon the entry of an order of receivership, the receivership court customarily enters an order enjoining third parties from initiating or pursuing actions (whether litigation, arbitration or otherwise) against the receiver or the estate. Some state laws, like the U.S. Bankruptcy Code, contain automatic stays against such actions alleviating the need for a

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[36] W.S.A §645.59.

[37] K.R.S. §§304.33-010.

court-entered injunction. A claimant's pursuit of litigation or arbitration against the receiver may cause the claimant to be in violation of the statutory or court-imposed anti-suit injunction and subject the claimant to contempt proceedings. Relief from the anti-suit injunction or an automatic stay can be requested from the receivership court, otherwise a claimant proceeds at their peril.

Act IV: Summary of U.S. Law Regarding a Reinsurer's Right to Arbitration In the Receivership Context

Scene 1: The Act Begins in New York

The first case to address the topic was Knickerbocker Agency v. Holz.[38] The receiver sued the insolvent insurer's agents to recover unearned commissions. Although the lower court compelled arbitration pursuant to the agents' arbitration agreement with the insurer, the appellate court, and ultimately the state's highest court reversed. The Court's decision was based on a finding that New York had enacted a comprehensive receivership scheme and that the statutory law vested exclusive jurisdiction in the receivership court.

Many problems exist with respect to the Knickerbocker decision but at least two ironies are worth pointing out. First, it is ironic that New York was the first state to recognize and enact arbitration laws even before the enactment of the FAA yet New York courts have for decades followed the findings in Knickerbocker, denying arbitration in receivership proceedings.

The second irony is the fact that other jurisdictions have refused to follow the Knickerbocker precedent, distinguishing the cases before them on the basis that New York has (1) a comprehensive receivership scheme and (2) vests exclusive jurisdiction in the receivership court. Courts in those other jurisdictions have found neither condition to exist in the state laws they had before them. In reality, neither condition exists in New York. The so-called comprehensive receivership scheme repeatedly relied on by New York courts is no more comprehensive, and indeed less comprehensive, than other states. By the Knickerbocker Court's own admission, the so-called exclusive jurisdiction of the receivership court is statutorily provided for only with respect to claims against the assets of the insolvent insurer. While the Knickerbocker Court noted that the statute was silent regarding jurisdiction relating to actions against debtors, the Court found that its interpretation was consistent with the overall statutory receivership scheme.

The dissenting opinion in Knickerbocker noted that no state statute, decision or public policy commands the result reached by the majority. The dissent noted that because the receiver was permitted to pursue debtors wherever they were located, compelling the receiver to arbitrate would cause no more disruption than would the litigation pursued by the receiver outside the receivership court. The dissent further noted that both the Insurance Law and the Civil Practice Act (permitting arbitration) are parts of New York's public policy and the Court should have reconciled them and enforced them both.

Unfortunately, the 1958 decision in Knickerbocker has been cited by New York courts in at least

[38] 149 N.E. 2d 885 (1958).

five subsequent New York cases, as recently as 1995.[39] Only two New York courts have departed from Knickerbocker precedent, with one court referring to the Knickerbocker decision as more of a statement of public policy than of law.[40]

Scene 2: Knickerbocker Look - Alikes

The Act continues with three cases that are Knickerbocker look-alikes. One should take care not to be fooled by these imposters.

In connection with the Delta American Re liquidation in Kentucky, a number of cedents moved to set aside the receiver's dismissal of their proofs of claim, arguing that the receivership court lacked jurisdiction over their claims and that the arbitration clause in their reinsurance contracts should be enforced.[41]

The Kentucky court relied on Knickerbocker and subsequent New York cases for the proposition that the receivership court has exclusive jurisdiction. The Court found that by submitting proofs of claim in the receivership court, the cedents had submitted to the full plenary jurisdiction of the Court.

The second imposter is Munich American Re v. Crawford.[42] Again, this case involved a suit by claimants (reinsurers) against what could potentially be assets of the insolvent insurer (salvage). Applying a detailed McCarran-Ferguson analysis, the Court ultimately found that McCarran reverse pre-empted the FAA to the extent that it would have compelled the receiver to arbitrate under the specific facts of the case. The two statutes that the Court found to prevail over the FAA was (1) the statute vesting exclusive jurisdiction in the receivership court for claims against the assets of the insolvent insurer, and (2) the statute authorizing the court to enjoin actions initiated or pursued against the receiver or the insolvent estate.

And finally, the third Knickerbocker look-alike is the Tenth Circuit decision in Davistar v. United Republic Insurance Company.[43] In Davistar the seller of stock to the insolvent insurer (prior to insolvency) brought an action against the estate and the receiver to compel arbitration pursuant to its contract with the insurer.

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39 Washburn v. Corcoran, 643 F. Supp. 554. (S.D.N.Y. 1968); Corcoran v. Ardra Ins. Co., 657 F. Supp. 1223 (S.D.N.Y. 1987; Union Indemnity, et. a1. v. American Centennial Ins. Co., 521 N.Y.S. 2d 617 (Sup. Ct. N.Y. County 1987; Corcoran v. Ardra Ins. Co. Ltd., 156 A.D. 2d 70, 553 N.Y.S.2d 695 (1990); Stephens v. American International Ins. Co., et a1., 66 F.3d 41 (2nd Cir. 1995).

40 Bernstein v. Centaur Ins. Co., 606 F.Supp. 98, 102 (S.D.N.Y. 1984).

41 Albany Ins. Co. v. Wright (In Re Delta American Re), No. 85-CI-0591, Slip op. (Franklin Cir. Ct. Ky. Feb. 4, 1994).

42 No. 97-10302, Slip op. (5th Cir. June 2, 1998).

43 152 F.3d 1277 (1998).

Relying on Munich American Re v. Crawford, the Court found that Utah statutes consolidating all claims against an insolvent insurer were enacted for the purpose of protecting policyholders and thus constituted the business of insurance.

The most significant factor about all three of these cases is that each one involved a claimant's pursuit of its claim against the assets of the insolvent insurer. None of them were collection actions like those typically pursued by a receiver against a reinsurer.

In summary, New York is the only U.S. jurisdiction that denies reinsurers the right to enforce arbitration clauses in the context of receivership proceedings for the pursuit of collection recoveries against the reinsurer, as a debtor.

Scene 3: Reinsurers, as Debtors, Prevail in Every Jurisdiction Except New York

In cases brought by receivers against reinsurers, as debtors, reinsurers have typically been successful in enforcing their contractual arbitration rights.

State and federal courts have compelled arbitration against receivers in New York (two cases), Missouri, Ohio, Colorado, Pennsylvania, Illinois, California, Vermont and Texas. Additionally, U.S. Courts of Appeal have compelled arbitration in the Third, Seventh and Tenth Circuits. The U.S. Supreme Court has found that federal courts should not abstain from hearing actions brought by receivers to simply collect potential assets, like reinsurance. The Court found that such actions do not interfere with comprehensive state regulatory schemes. In making such findings the U.S. Supreme Court has undercut the thrust of receivers' primary objections to arbitration and paved the way for future courts to continue the trend of what has already become the clear majority view.[44]

Courts representing what is now the majority view have repeatedly held that

- The FAA requires rigorous enforcement of arbitration provisions and leaves no place for the exercise of discretion by a federal court;

- Reinsurance agreements are within the scope of the FAA;

- Reinsurance recoverables are not assets of the estate until ownership of those funds is resolved;

- The fact that the receiver can, and does, pursue litigation outside the receivership court but claims that arbitration outside the receivership court disrupts the estate is without logical foundation and is disingenuous;

- State statutes conferring exclusive jurisdiction on the receivership court may apply to claims against the assets of the insolvent insurer but in no way preclude enforcement of valid arbitration provisions in actions pursued by the estate against others;

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[44] Quackenbush v. Allstate, 517 U.S. 706 (1996).

- Receivers stand in the shoes of the insolvent insurer. When trying to enforce contractual rights owed to the insolvent insurer, the receiver must assume the perceived contractual liabilities;

- Application of the FAA does not impair a receiver's substantive remedy under state law. It merely requires the receiver to seek relief through arbitration;

- Where a receiver initiates an action and the reinsurer exercises its right of removal to federal court, there is no violation of the anti-suit injunction. The reinsurer is in a defensive, not offensive posture, exercising its legal right to refer the matter to an alternative forum;

- A state has no power, direct or indirect, to restrict the unfettered exercise of the right to remove an action to federal court. The right of removal given by a Constitutional act of Congress can not be taken away, restricted or abridged by state statute;

- Actions to collect reinsurance recoverables are ordinary contract actions in which the plaintiff happens to be an insolvent insurer. The state regulatory scheme is not disrupted by a federal court or arbitration panel resolving the collection issue;

- Courts have no discretion to consider state public policy arguments in deciding whether to compel arbitration under the FAA. Federal policy requires the resolution of all ambiguities in favor of arbitration;

- Courts are required to determine only whether a valid arbitration agreement exists covering the disputed claims and, if so, enforce the agreement

Act V: The Next Wave - Service of Suit Clauses

For decades, reinsurers have included service of suit clauses in reinsurance contracts. Only recently have receivers begun to use this contract language against reinsurers. A typical service of suit clause might read like this:

> In the event of the failure of the reinsurers hereon to pay any amount claimed to be due hereunder, the reinsurers hereon, at the request of the reinsured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

The clause is designed to ensure that those pursuing a non-paying reinsurer need not do so in a distant forum. The clause typically applies only in the case of non-U.S. reinsurers.

However, most reinsurance contracts with a non-U.S. reinsurer contain both a service of suit clause and an arbitration clause The inclusion of both clauses raises the question of how to harmonize the reference to court jurisdiction in the service of suit clause with the intention that the parties intend to arbitrate their disputes.

For years courts have reconciled these two clauses and found that the service of suit clause was designed to facilitate the acquisition of jurisdiction over non-U.S. reinsurers for enforcement purposes. In each of these cases the courts rejected plaintiffs' reading of the reinsurance agreements and found that the inclusion of a service of suit clause was not inconsistent with the inclusion of a broad arbitration clause and did not result in either a modification of the arbitration clause or a waiver of the reinsurer's right to arbitrate.[45] But recently courts have interpreted contracts containing both clauses in a way that may cause non-U.S. reinsurers to run the risk of forfeiting their removal rights[46] or waiving their rights to arbitration.[47] In two cases involving Lloyd's, the respective courts have held that the service of suit clause in a Lloyd's contract permitted the insured/reinsured to bypass arbitration, despite the contractual arbitration clause.[48]

The issue arose most recently in LaVecchia v. Munich Reinsurance Co[49] in which the New Jersey federal district court granted the Integrity receiver's motion to remand to state court on the grounds that Munich Re had waived its right to removal in the service of suit clause. Munich Re moved to stay the remand order and for an expedited appeal. The RAA filed an amicus brief in support of Munich Re's position, arguing that federal law favors broad removal rights and that Congress intended to channel international business disputes that are subject to arbitration agreements into federal court. The appeal is still pending.

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45 Corcoran v. AIG Multi-Line Syndicate Inc., et. al., 539 N.W. S. 2d 630 (1989) citing Hart.v. Orian Ins. Co., 453 F. 2d 1358 (10th Cir. 1971); Ideal Mutual Ins. Co. v. Phoenix Greek Ins. Co., No. 83 Civ. 4687, 1984 WL 602 (S.D.N.Y. 1984); Neca Ins. Ltd. v. National Union Fire Ins. Co., 595 F. Supp. 955 (S.D.N.Y. 1984).

46 McDermott Int'l, Inc. v. Lloyd's Underwriters, 944 F. 2d 1199 (5th Cir. 1991).

47 Thikol Corp. v. Certain Underwriters at Lloyd's, No. 1:96-CV-028B (D. Utah 1996); Transit Casualty Co. v. Certain Underwriters at Lloyd's, 963 S.W.2d 392 (Mo. App. 1998).

48 *Id.*

49 Civ. No. 99. 757 (JAG) (D.N.J. 1999).

Although these three cases cannot yet be characterized as a trend, the effect of these significant decisions is too significant to ignore. But their impact will in the end, be limited to older reinsurance contracts. More recent reinsurance contracts are not likely to fall prey to this recent interpretation.

In 1984, the NAIC adopted the Credit for Reinsurance Model Law (NAIC Model). Every state has adopted some version of the NAIC Model which requires the inclusion of a service of suit clause in reinsurance contracts where the reinsurer is not licensed in any U.S. jurisdiction. Regulators made certain that the service of suit clause requirement in the NAIC Model would have no effect on arbitration rights by explicitly stating so:

> If assuming insurer is not licensed or accredited to transact insurance or reinsurance in this state, the credit permitted by Subsections C and D of this section shall not be allowed unless the assuming insurer agrees in the reinsurance agreements:
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> (1) (a) That in the event of the failure of the assuming insurer to perform its obligations under the terms of the reinsurance agreement, the assuming insurer, at the request of the ceding insurer, shall submit to the jurisdiction of any court of competent jurisdiction in any state of the United States, will comply with all requirements necessary to give the court jurisdiction, and will abide by the final decision of the court or of any appellate court in the event of an appeal; and ...
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> (2) This subsection is not intended to conflict with or override the obligation of the parties to a reinsurance agreement to arbitrate their disputes, if this obligation is created in the agreement.[50]

While there has been no change for decades with respect to regulators' intent for requiring the clause, it was not until 1984 that the intent was made clear. Unfortunately courts may not accept that representation and litigants may continue to exploit it.

Epilogue

Reinsurance Arbitration in Receivership: To Be - Or Not To Be? That is the Question - And This is the Answer:

- A reinsurer attempting to compel arbitration in a New York receivership under New York law is not likely to prevail (until Knickerbocker is reversed);

- A reinsurer attempting to compel arbitration in most other jurisdictions, as a

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[50] CREDIT FOR REINSURANCE MODEL LAW 2(F) (National Association of Insurance Commissioners 1996).

debtor, will usually prevail;

- A reinsurer, or any other person or entity, pursuing arbitration in the capacity of a claimant against assets of the insolvent insurer, is not likely to prevail in any jurisdiction and runs the risk of contempt proceedings if such individual or entity initiates or pursues action in violation of an anti-suit injunction;

- Non-U.S. reinsurers may be at risk, in some jurisdictions, of forfeiting their removal and/or arbitration rights if their reinsurance contracts are old and contain both a service of suit clause and an arbitration clause. Contracting parties would be well-advised to amend these old contracts to harmonize the service of suit clause with the arbitration clause by adding a sentence stating that nothing contained herein is intended to waive the parties' right to arbitrate.

Insurance receivers who seek an efficient and effective means of collecting reinsurance recoverables would do well to familiarize themselves with the arbitration process and use it to their benefit. One way to increase the benefits of arbitration would be to undertake an effort to familiarize arbitrators with the realities of the receivership process and concerns faced by receivers in administering the estate of an insolvent insurer. It is clear from the case law that the trend in every jurisdiction, except New York, is to permit reinsurance arbitrations where action is initiated by the receiver against the reinsurer, as debtor. Redirecting the substantial funds expended to continue to litigate this issue, toward a focused educational effort would reap greater benefits for the estate and its creditors.