Notable 2009 U.S. Reinsurance Arbitration Decisions

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While 2009 has not been a momentous year for United States case law involving, or having an impact on, reinsurance arbitrations, there have been interesting developments in the following key areas: (1) a party's ability to challenge arbitration awards arising under the Federal Arbitration Act (the FAA); (2) arbitrator appointment; and (3) enforceability of arbitration agreements. These developments are summarized below.

Challenging Arbitration Awards

Courts continued to struggle in 2009 with whether the doctrine of manifest disregard of the law remains a valid basis for challenging arbitration awards arising under the FAA, in light of the U.S. Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

In *Hall Street*, the Supreme Court held that the statutory grounds for vacating and modifying arbitration awards are "exclusive" under the FAA, and thus cannot be expanded, even if expressly agreed upon by the arbitrating parties. Subsequent to that decision, federal courts have reached varied conclusions as to whether that decision eliminated the judicially-created doctrine of manifest disregard of the law as a basis for challenging arbitration awards. For example, while courts in the Second, Sixth and Ninth Circuits have continued to find that manifest disregard of the law survived *Hall Street*,[1] the Fifth Circuit held that this doctrine has been abrogated by that decision.[2]

The U.S. Supreme Court has yet to clarify whether it intended that *Hall Street* be interpreted to eliminate the doctrine of manifest disregard of the law as grounds for challenging awards. Moreover, it does not appear that the Supreme Court is in a hurry to do so, having recently denied writs of certiorari in three cases which examined whether manifest disregard of the law remains valid, including the decisions from the Sixth and Ninth Circuits referenced above.3 Insurers, reinsurers and practitioners should stay tuned for developments in this area of the law, including whether jurisdictions continue to treat manifest disregard of the law differently going forward.

Arbitrator Appointment

Two notable decisions in 2009 concerned the appointment of replacement arbitrators during the course of a hearing.

First, in *WellPoint, Inc. v. John Hancock Life Ins. Co.*,[4] the Seventh Circuit ruled that a party seeking to challenge the appointment of a replacement arbitrator must do so at the time of the appointment, or else lose its ability to make such a challenge.

During the course of the arbitration, plaintiff obtained new counsel and requested that its party-appointed arbitrator resign. After plaintiff proposed two separate replacement arbitrators, who were rejected by defendant, defendant's party-appointed arbitrator suggested that the remaining panel members propose three replacement arbitrators from which plaintiff could choose. Plaintiff agreed to this procedure and chose one of those replacements. Defendant agreed that the arbitrator chosen by plaintiff satisfied the prerequisites for service on the panel.

Plaintiff ultimately prevailed in an arbitration against defendant and later petitioned the District Court for confirmation of the award. Defendant cross-moved to vacate the arbitration award, on the grounds that the arbitration panel exceeded its authority by accepting the resignation of plaintiff's initial arbitrator and subsequently filling the vacancy in a manner not specified in the arbitration agreement. The District Court confirmed the panel's award, and denied defendant's cross-motion to vacate. Defendant then appealed.

The arguments raised by defendant to the Seventh Circuit in support of its motion to vacate were identical to those addressed by the District Court. The Seventh Circuit rejected this argument, relying upon Section 5 of the FAA, which sets forth a rule that applies to the "mid-stream" loss of an arbitrator. That section provides that, in "filling a vacancy," as well as in other circumstances, the court can appoint an arbitrator upon the application of either party to do so. Thus, having failed to object to the replacement arbitrator at the time of appointment, defendant had effectively waived its right to do so, and the arbitrators acted within their authority by filling the vacancy.

The Seventh Circuit further rejected defendant's argument that a party may also challenge an arbitrator's "mid-stream" appointment under Section 10(a)(4) of the FAA after the conclusion of an arbitration, noting that this would improperly permit an objecting party to wait until after the proceeding to make such a challenge, resulting in delay and inefficiency. Rather, defendant's own participation in the substitution process estopped it from later challenging the replacement arbitrator's appointment, despite the fact that defendant specifically reserved its right to do so.

The second noteworthy decision, *In the Matter of the Petition of Ins. Co. of North America against Public Service Mut. Ins. Co.*,[5] involved an arbitrator who resigned from a panel for health reasons prior to the rendering of an award. Because the arbitration agreement did not specify how to deal with appointing a replacement, the U.S. District Court for the Southern District of New York held that the arbitration had to start over from the beginning, with each party having the opportunity to select its own party-appointed arbitrator.

Thereafter, upon learning from one of the parties that the previously ill arbitrator's health had improved such that he was actively seeking employment, the court granted the plaintiff's motion for relief pursuant to Fed. R. Civ. P. 60(b)(2) and (6), and vacated its prior ruling. The court noted that had it been aware of this fact at the time of its previous order, it could have reappointed the arbitrator under Section 5 of the FAA, because the arbitration clauses in the

reinsurance contracts at issue were silent with respect to the procedure to be followed to fill a vacancy created by the death or resignation of an arbitrator. Accordingly, pursuant to that statute, the court reappointed the "resigned" arbitrator to the panel and ordered the parties to continue the arbitration proceedings as they were before the arbitrator's initial withdrawal.

Enforceability of Arbitration Agreements

Several decisions from 2009 illustrate that courts continue to adhere to the strong presumption in favor of enforcing arbitration agreements, even where one of the parties to the dispute is a nonsignatory to the relevant arbitration agreement.

In the most notable decision, *Arthur Andersen LLP, et al. v. Carlisle, et al.*,[6] the U.S. Supreme Court resolved a split among federal circuit courts and held that a nonsignatory to an arbitration agreement has standing to stay an action in favor of arbitration under Section 3 of the FAA, so long as the governing state law allows a contract to be enforced by or against nonsignatories to a contract based upon principles of assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and/or equitable estoppel. The Supreme Court found that the Sixth Circuit's ruling that nonsignatories to an arbitration agreement are categorically barred from such relief under the FAA was in clear error.

Similarly, in *Cooke & Partners, Ltd. v. Certain Underwriters at Lloyd's, London*,[7] the U.S. District Court for the Southern District of New York compelled the assignee (Cooke) of a Liquidator's claims to arbitrate its disputes with the reinsurers of the liquidated company, finding that there was a clear connection between Cooke's claims and the reinsurance contracts containing the subject arbitration clauses. In so holding, the District Court rejected Cooke's argument that it was exempt from arbitration, finding that the defendant's inability to compel the Liquidator to arbitrate did not preclude the arbitration of Cooke's claims, as the contract providing for the assignment was silent on this issue.

Finally, addressing the reverse scenario, a federal court in New York held, in *Utopia Studios Ltd. v. Earth Tech Inc.*,[8] that a signatory to an agreement containing an arbitration clause can compel a nonsignatory to arbitrate where the nonsignatory enters into a separate contract that incorporates that clause.

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[1] *See, e.g., Comedy Club, Inc., v. Improv West Assoc.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418-19 (6th Cir. 2008); *Idea Nuova Inc. v. GM Licensing Group, Inc.*, No. 08-civ.-8595 (S.D.N.Y., Aug. 19, 2009); *Global Reinsurance Corp. of America v. Argonaut Ins. Co.*, 2009 WL 928014 (S.D.N.Y., Mar. 3, 2009).

[2] *See Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350, 358 (5th Cir. 2009). In 2008, the First Circuit also found that manifest disregard of the law is no longer a valid basis for vacatur or modification of arbitration awards. *See also Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

[3] *See, e.g., Improv West Assoc., v. Comedy Club Inc.*, 2009 WL 1648924 (Oct. 5, 2009); *Coffee Beanery, Ltd. v. WW, LLC*, 2009 WL 1342336 (Oct. 5, 2009); *Grain v. Trinity Health*, 2009 WL 1421117 (Oct. 5, 2009).

[4] 576 F.3d 643 (7th Cir. 2009).

[5] No. 08-cv-7003 (S.D.N.Y.).

[6] 129 S.Ct. 1896 (2009).

[7] No. 08 Civ. 3435 (S.D.N.Y. Mar. 26, 2009).

[8] No. 08-cv-3515 (E.D.N.Y. April 20, 2009).