

## MReBA Cover Notes --

A Publication of the [Massachusetts Reinsurance Bar Association](#)

Fall 2012

### In This Issue

#### [Welcome Note](#)

[Just A Few Weeks Away... Register Now For The Fourth Annual Symposium: "A Fresh Perspective..."](#)

[Insurance & Reinsurance Exposures Presented by Cyber Risks](#)

[A Highlight of Differences Between Bermuda & US Arbitrations](#)

[Case Note: First Circuit Upholds Grant of Summary Judgment to Reinsurer on Issue of Treaty Duration](#)

[First Circuit Highlights The Importance of Carefully Crafted Arbitration Clauses](#)

[Fourth Circuit: Abitration Ordered - McCarran-Ferguson Act Does Not Combine With South Carolina Law Barring Arbitration To Preempt International Convention Favoring Arbitration](#)

### Fall Is In The Air...

By [Alexander Henlin](#)  
Edwards Wildman Palmer LLP

Greetings from the Massachusetts Reinsurance Bar Association! The newsletter committee has been busy over the hot summer months and is pleased to offer this issue of MReBA's quarterly newsletter.

This issue focuses broadly on topics involving international risks and the insurance and reinsurance that covers them. MReBA member **Julian Miller** and his colleague **Hans Allnutt** offer an engaging feature article on insurance for cyber risk exposures, and MReBA member **Rod Attride-Stirling** offers a separate feature on the subtle but significant differences in the form that arbitrations take in the United States and Bermuda. Case notes by **Michael Aylward**, **Jessica Park**, and **Michael Mullins** and **Ashley Harrison** round out the issue. The committee is deeply grateful to all of the authors for their contributions.

We also want to remind you about the Fourth Annual MReBA Symposium, which **Rhonda Rittenberg** details below. We hope you will be able to join us in October.

*Alexander Henlin is the chair of MReBA's Newsletter Committee. He may be reached at [ahenlin@edwardswildman.com](mailto:ahenlin@edwardswildman.com).*

© 2012 Edwards Wildman Palmer LLP. All rights reserved.



Massachusetts Reinsurance  
Bar Association

[Join Our Mailing List!](#)

### MReBA Calendar

#### MReBA Fourth Annual Reinsurance Claims Symposium

October 11, 2012  
[Back Bay Harvard Club](#)  
374 Commonwealth Ave.  
Boston, MA

The symposium will take the place of the October 2012 meeting

#### MReBA Meetings (lunch is served):

##### September

September 12, 2012 at  
12:30 p.m.

[Morrison Mahoney](#)

Boston, MA

Focus: Business Meeting

##### November

November 14, 2012 at  
12:30 p.m.

[Prince Lobel](#)

Boston, MA

Focus: Business Meeting

##### December

December 12, 2012 at  
12:30 p.m.

[Day Pitney](#)

Boston, MA

Focus: Educational Meeting

#### General Interest

**Federal Insurance Office  
To Release Global  
Markets Report Analysis**

## Just A Few Weeks Away... Register Now For The Fourth Annual Symposium: "A Fresh Perspective..."

On behalf of the Symposium Committee, I invite you to our program: **A FRESH PERSPECTIVE...**, the Fourth Annual Symposium sponsored by the Massachusetts Reinsurance Bar Association, to be held on **Thursday, October 11, 2012 at the Harvard Club, 374 Commonwealth Avenue, Boston.**

Consistent with our goal to offer you a fresh perspective on timely industry topics, we are pleased to announce that **Melissa Salton**, Chief Risk Officer and Senior Vice President of Munich Reinsurance America, Inc., will be our keynote speaker and will share her insights on Enterprise Risk Management, a significant topic being addressed by boardrooms in corporate America and beyond.

We will also have the following substantive sessions with leading industry professionals who will cover the latest and most pressing issues in the audit, arbitration and regulatory arenas:

### **Need To Know Basis - Reinsurance Audit Issues**

This panel's industry insiders will provide a forthright discussion of the issues and disputes they find most significant in connection with reinsurance audits relating to complex claims, such as long-tail environmental, toxic tort, and asbestos claims. The discussion will highlight the differences in the perspectives of the cedent and reinsurer with respect to how reinsurance audits should be conducted in such cases and the conduct they find most challenging.

### **A View from the Panel: Hot Topics in Arbitration**

This session promises to be a master class in what is on the minds of party arbitrators and umpires today. Our panel of reinsurance arbitrators will share their collective knowledge, wisdom and practical advice gleaned from decades of experience on several of the "hot button" issues that are at the forefront of current reinsurance practice, including panel "neutrality" (does it exist and is it a good idea); the role of "custom and practice" in reinsurance arbitration (including who decides what it is); and the role of fee and cost awards. This exchange of views is certain to provide frank insights into what really goes on when counsel and parties are not around.

### **Regulatory Perspectives: The Latest Word from the U.S., U.K., and E.U.**

In this session, the panelists will compare and contrast current regulatory efforts domestically and internationally. Topics will include reinsurance collateral requirements, the "equivalency" standard of Solvency II vs. the "outcomes" approach in the U.S., the roles of the NAIC, FIO, EIOPA, and FSA, and the Non-Admitted and Reinsurance Reform Act. As these regulations affect not only the business of reinsurance, but also claims handling and payment, this panel is designed to better equip each insurance/reinsurance professional and counsel.

This year's interactive workshop will not only encourage audience participation, but will include commentary from our panel of esteemed arbitrators. This year promises to be lively, informative and thought-provoking. Please click [here](#) to access the symposium agenda and registration form.

We look forward to seeing you at **A FRESH PERSPECTIVE...**

**Rhonda L. Rittenberg, ASLI**

September 30, 2012  
Washington, D.C.

### **Society of Actuaries Annual Meeting**

October 14-17, 2012  
Washington, D.C.

### **World Series Begins**

October 24  
Not Boston

### **ARIAS Fall Meeting**

November 1-2, 2012  
New York, NY

### **NAIC Fall Meetings**

November 29, 2012  
Washington, D.C.

## **MReBA Officers**

### **President:**

[Susan A. Hartnett](#)

### **Vice-President:**

[John T. Harding](#)

### **Secretary:**

[Alexander Henlin](#)

### **Treasurer:**

[Mitchell S. King](#)

### **Directors:**

[Catherine M. Colinvaux](#)

[Nicholas C. Cramb](#)

[William N. Erickson](#)

[Benjamin Hincks](#)

[John N. Love](#)

[Jerry McElroy](#)

[Joe Sano](#)

## **Committee Chairs**

### **Newsletter:**

[Alexander G. Henlin](#)

### **Symposium:**

[Rhonda Rittenberg](#)

### **Education:**

[Robert Whitney](#)

[Steven Torres](#)

### **Web/Database:**

[Rachel Davison](#)

### **Membership:**

[Seth V. Jackson](#)

MReBA Symposium Chair  
Senior Vice President & Senior Associate General Counsel  
Lexington Insurance Company  
[Rhonda.Rittenberg@chartisinsurance.com](mailto:Rhonda.Rittenberg@chartisinsurance.com)  
[Back to Top](#)

## Insurance & Reinsurance Exposures Presented by Cyber Risks

By [Julian Miller](#) and [Hans Allnutt](#)  
DAC Beachcroft LLP

Cyber risk presents a growing set of exposures for insureds, insurers, and reinsurers worldwide. As commerce increasingly moves online, and vast amounts of personal information increasingly reside in online databases, professionals who work in and with the insurance industry face increasing challenges, both in complying with regulations designed to mitigate against cyber risks and defending insureds when a data breach occurs. But, cyber risk insurance also presents opportunities for carriers who underwrite policies in that space.

People conduct their business and personal lives electronically more than ever before - subjecting their business and personal information to an unprecedented degree of risk. Data security breaches, and consequent litigation, have proliferated, with legislative and regulatory efforts scrambling to keep pace. All of this is of acute interest to insurers, whose policyholders face growing and uncertain cyber risks in a rapidly evolving technological and legal environment.

### What Is "Cyber Risk"?

"Cyber risk" is an umbrella term embracing any risk faced by an organization through its use of online networks or systems. Those risks can include denial of networks and systems by natural phenomena, electronic phenomena (e.g., viruses), and humans; and data lost through error or theft. Cyber risk may encompass first-party losses such as network damage, website damage, data or intellectual property theft, denial of service attacks, business interruption, or espionage. They may also include third-party losses such as breach of confidentiality, breach of privacy, failure to protect personally identifiable information, defamation, and intellectual property infringement.

To read this article in full, please [click here](#).

© 2012 DAC Beachcroft LLP. All rights reserved.

[Back to Top](#)

## A Highlight of Differences Between Bermuda & US Arbitrations

By [Rod S. Attride-Stirling](#)  
Attride-Stirling & Woloniecki

Arbitration in the U.S. and in Bermuda is dangerously similar. The attributes of each are sufficiently alike so that the practice of one is immediately recognizable as closely related to the other. The challenge, therefore, occurs in discerning where the differences lie. Although the differences may appear small or subtle, their effects can be substantial.

Bermuda has two pieces of arbitration legislation. For purposes here, we

discuss the Bermuda International Conciliation and Arbitration Act 1993 (the "Arbitration Act"), which generally applies to 'international commercial arbitrations.' The Arbitration Act enacts the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). Many states have adopted parts of this U.N.-created model as part of their domestic arbitration regime. Bermuda has adopted it in whole.

Some of the Model Law's fundamental elements include the right to challenge the jurisdiction of the Tribunal and the right to challenge individual arbitrators in limited circumstances, principally where the arbitrator lacks contractually required qualifications, or justifiable doubts exist concerning his or her impartiality. These types of challenges are made first to the Tribunal and then to the Supreme Court of Bermuda (the first-instance trial court). There can be no appeals from this court.

In terms of key differentiators, the leading ones are the make-up and approach of the Tribunal itself. In a Bermuda arbitration, all of the Tribunal members, including the party-appointed members, must be neutral, independent and impartial.

Whilst in the U.S. there is a debate as to whether party-appointed arbitrators should be neutral, outside of the U.S., the norm is that all arbitrators must be neutral. Evidence of partiality is a ground for the removal of an arbitrator under the Model Law.

To read this article in full, please [click here](#).

© 2012 Attride-Stirling & Woloniecki. All rights reserved.

[Back to Top](#)

## Case Note: First Circuit Upholds Grant of Summary Judgment to Reinsurer on Issue of Treaty Duration

By [Jessica Park](#)  
Sugarman, Rogers, Barshak & Cohen, P.C.

In a recent decision, the U.S. Court of Appeals for the First Circuit affirmed a grant of summary judgment in favor of a reinsurer on the question of whether the reinsurance relationship with its cedent extended beyond the end of the express term stated in the reinsurer's facultative certificate, which was the only written agreement between the parties. The decision is [OneBeacon America Ins. Co. v. Commercial Union Ins. Co.](#), 684 F.3d 237; 2012 WL 2821893 (1st Cir. 2012) . The holding illustrates the importance of written contract terms-and in the absence thereof, circumstances consistent with a reinsurance relationship-when a cedent seeks to prove the scope of a reinsurance obligation.

To read this article in full, please [click here](#).

© 2012 Sugarman, Rogers, Barshak & Cohen, P.C. All rights reserved.

[Back to Top](#)

## First Circuit Highlights The Importance of Carefully Crafted Arbitration Clauses

By [Michael Mullins](#) and [Ashley Harrison](#)  
Day Pitney LLP

Reinsurance arbitrations are becoming increasingly contentious not only with respect to substantive issues, but also with respect to procedural concerns. In [Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.](#), 683 F.3d 18 (1st Cir. 2012), the U.S. Court of Appeals for the First Circuit addressed one such procedural issue: whether an arbitration could involve more than two parties.

To read this article in full, please [click here](#).

© 2012 Day Pitney LLP. All rights reserved.

[Back to Top](#)

## Fourth Circuit: Arbitration Ordered

### McCarran-Ferguson Act Does Not Combine With South Carolina Law Barring Arbitration To Preempt International Convention Favoring Arbitration

By [Michael Aylward](#)  
Morrison Mahoney LLP

A recent ruling by the U.S. Court of Appeals for the Fourth Circuit addresses the complex question of how federal preemption principles work where federal statutes, international treaties and principles of public policy collide. At issue in [ESAB Group, Inc. v. Zurich Ins. PLC](#), 685 F.3d 376 (4th Cir. 2012), was whether a South Carolina statute that bars the enforcement of arbitration clauses in insurance agreements, which has been held, under McCarran-Ferguson, to "reverse preempt" the application of Chapter 1 of the Federal Arbitration Act ("FAA"), has similar preemptive effect with respect to foreign arbitral agreements subject to Chapter 2 of the FAA.

To read this article in full, please [click here](#).

© 2012 Morrison Mahoney LLP. All rights reserved.

[Back to Top](#)

## MReBA Cover Notes Editorial Board

[Michael F. Aylward](#), [Catherine M. Colinvaux](#), [Alexander G. Henlin](#), [John N. Love](#), [Jessica Park](#), [Ethan Torrey](#), and [Steven J. Torres](#).

For further information regarding MReBA or MReBA *Cover Notes*, please contact any of us directly. Articles from past issues of *Cover Notes* are available on our [website](#).