UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between

AXA VERSICHERUNG, AG, on its own behalf and as successor in interest to ALBINGIA VERSICHERUNGS AG,

Petitioner

and

NEW HAMPSHIRE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

Civil Action No. 12 cv 6009 (JSR)

CORRECTED DECLARATION OF SEAN THOMAS KEELY

Sean Thomas Keely hereby declares the following under penalty of perjury:

1. I am a partner with the law firm Hogan Lovells US LLP, attorneys for the petitioner AXA Versicherung, AG, on its own behalf and as successor in interest to Albingia Versicherungs AG ("AXA"), and am a member in good standing of the Bar of the State of New York and of this Court. I submit this declaration in accordance with the Court's order of September 5, 2012, entered on the docket as Document 13 on September 6, 2012 (the "Confirmation Order").

2. AXA and respondents (collectively, "AIG") were parties to an arbitration proceeding that culminated in a 10-day evidentiary hearing in June 2012 before three arbitrators (the "Panel"). On July 27, 2012, the Panel issued a final award (the "Final Award"). On August 6, 2012, AXA filed with this Court a petition for confirmation of the Final Award (the "Petition"). The Final Award was attached to the Petition as Exhibit A. Pursuant to an order of

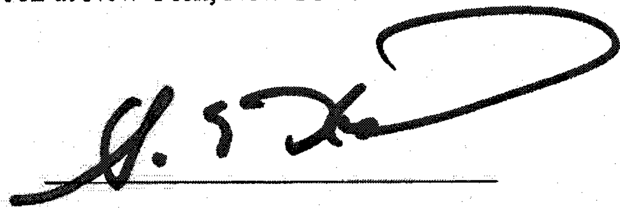
the Part 1 Judge dated August 6, 2012, the Final Award was filed under seal pending further order of the Court.

3. On September 5, 2012, the Court issued the Confirmation Order, confirming the Final Award pursuant to the stipulation of the parties and the Court's authority under 9 U.S.C. §§ 201-208. In addition, the Court ordered that the Final Award be unsealed and that AXA file on the docket a complete copy of the Final Award.

4. Accordingly, attached hereto as Exhibit A is a true and correct copy of the Final Award issued on July 27, 2012 in the arbitration between AXA and AIG.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 10th day of September, 2012 at New York, New York.



Sean Thomas Keely (SK-8593)

EXHIBIT A

In the Matter of the Arbitration Between New Hampshire Insurance Company, American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, PA (collectively AIG) (the "Petitioner")	Mark S. Gurevitz, Arbitrator Jonathan Rosen, Arbitrator Richard L. White, Umpire

and

AXA Versicherung AG and
Albingia Versicherungs AG
(collectively AXA)
(the "Respondent")

FINAL AWARD

After initial briefing, replies and sur-replies, the Panel held a ten-day hearing concluding on June 29, 2012 during which thirteen witnesses testified in person and key trial testimony of three other witnesses was read into the record. The Panel deliberated in July supplemented by email and teleconference fashioning the following award.

By way of background to our award we are cognizant of the litigation history between these parties in this matter culminating in a jury trial in the Southern District of NY, April 22, 2008 and an appeal to the 2nd Circuit, August 23, 2010.

While there are a number of matters for the Panel to consider, a primary issue is whether the contracts governing this dispute for the 1997 period and 1998 year are facultative-obligatory ("FAC-Oblig") or pure facultative ("Fac/Fac"). The former is an arrangement wherein the ceding company, here AIG, may select risks to cede to the reinsurer, here AXA, who must accept such risks provided the ceded risks are within the type of business covered by the contracts (the "Facility"), here construction-all-risks and energy-all-risks ("CAR/EAR"). The latter is an arrangement wherein the ceding company may select risks it proposes to cede to the reinsurer who in turn underwrites the risk much like the ceding company does, before accepting, i.e. reinsuring, the risk.

After reading the contracts and the related documentary evidence and hearing the testimony of the witnesses, almost all of whom in some way supported one of these alternative versions of the contract, it is apparent that both periods of contract were operated as FAC-Oblig arrangements.

There is no dispute that the contract slip(s), a document used in the London market for insurance and reinsurance listing the essential terms of the contract including the topical sections of contract wording typically prepared at a later date, was a FAC-Oblig slip. Indeed, Mr. Martin Stephenson of Newman, Martin & Buchan ("NMB"), AIG's London market reinsurance broker, testified that these contracts were FAC-Oblig contracts.

As if that was not sufficient evidence of the FAC-Oblig nature of the contract, there is the parties' performance under the contracts. Initially only AIG's Southern Pacific Rim sector, some thirteen countries, participated in the contract. The parties ultimately agreed that AIG's Latin American, European Chemical and London sectors were eligible such that offices from sixteen countries were ceding risks to the Facility.

Because these contracts covered the primary layer of insurance, the first $10 million of loss, it would be important to have reinsurance thereon confirmed early. The worldwide dispersion of offices ceding business by numerous underwriters would militate against the iterative process of proposing a risk to a central Facility through a broker, responding to reinsurer underwriting inquiries and then awaiting confirmation of acceptance/refusal common to a Fac/Fac arrangement.

Moreover, the Albingia reinsurance department underwriting these contracts was clearly a FAC-Oblig department. There was little or no evidence of underwriting support from direct underwriters of the organization having expertise in CAR/EAR underwriting. Most tellingly, there were no facultative certificates issued by Albingia evidencing the acceptance of such individual risk that is the lingua franca of Fac/Fac underwriting.

The Panel also considered the internal underwriting policies of the AIG and Albingia organizations. It is clear that AIG does not permit its field offices to contract for any reinsurance other than Fac/Fac. It was equally clear that the Albingia underwriting policy for the department accepting the reinsurance here was limited to FAC-Oblig reinsurance. Notwithstanding these clear but opposite corporate policies of the respective organizations, contracts were formed and this Panel must decide the nature of those contracts.

AIG argues that because the findings of fact by the 2nd Circuit in reaching its decision on the statute of limitations appeal constitute the law of the case, this Panel is bound by such findings notwithstanding the provisions of the arbitration clause in these contracts that the Panel "...is relieved from all judicial formality and may abstain from following the strict rules of law..."

Not surprisingly, AXA argues that because the 2nd Circuit's decision focused on the parties' actions before contract formation, any findings of fact cannot apply to post formation performance under the contracts. It also points out that such fact finding led the Court not to a conclusion of actual notice to AXA that the FAC-Oblig slips, when augmented by actual contract wording for the 1998 year, were confirmed as Fac/Fac contracts, but rather a finding of constructive notice to AXA, an even more remote factor relative to actual performance under the contracts.

As a further complication, the parties have stipulated that for this arbitration, the 1998-year contract would be deemed a Fac/Fac arrangement.

Thus the Panel is presented with a choice of either the Potemkin Village springing from the 2nd Circuit pre-formation fact findings (the AIG view that the second year was facultative and, since nothing changed, the first year must be facultative as well) (the "Appellate Holding") or the Twilight Zone consisting of a disputed arrangement for the 1997 period (FAC-Oblig vs. Fac/Fac) and a stipulated 2nd year Fac/Fac arrangement (the "Hybrid"). Neither of these alternatives, however, comports with the actual operation of the Facility on the ground, as it were. How then to proceed; how to navigate amidst this Scylla and Charybdis? We begin by considering the parties demands for relief.

AIG preferring the Appellate Holding acknowledges an arbitration scope of a couple of contract breaches which understandably they argue are not supported by the factual record. Accordingly, AIG demands payment of some $7.7 million outstanding balance plus interest thereon at the NY statutory rate of 9%. Additionally they request attorney fees and costs.

AXA opting for the Hybrid, bundles its demands under contract breaches and violations of utmost good faith. Demands under the former are essentially twofold. The first category would "back-out" the offensive risks declared to the Facility, the effect of which, serves to approximate a rescissionary award.

The second category, albeit unnecessary if category one was granted entirely, adjusts the extent of risk transfer to reflect what AXA argues was its intended participation in the Facility. Demands under the utmost good faith violations, also provide for "back-out" relief. Understandably AXA seeks interest applicable to whatever relief is afforded. Like AIG, AXA also demands attorney fees and costs. AXA also demands exemplary damages.

AXA demand for relief

Because the AXA demands are more complicated we consider these first. The principal complaint of AXA is that the business ceded to the Facility was a product of adverse selection as evident by the abnormally high loss ratio. In this arbitration the term adverse selection essentially meant that a cross section of AIG CAR/EAR risks were not ceded to the Facility, an ex post condition. True adverse selection requires that the purchaser, here the cedent AIG, knows there is a higher loss potential for a given ceded risk, an ex ante condition, and cedes such risks to the Facility anyway.

The record in this dispute did not establish that the AIG underwriting of these risks, the ex ante condition, was systemically designed or used to produce a relatively greater ceded loss potential. To be sure, the Facility was designed to cover the first $10 million of loss and accordingly the loss to the Facility from the population of risks ceded would be relatively greater to the participating reinsurers

of the Facility than the loss in excess of that limit to reinsurers or insurers of the excess component (amounts > $10 million). That differential was presumably dealt with by the premium charged for use of the Facility.

Now unquestionably, the underwriting loss of the Facility for the 1997-98 period was extreme. A 480% incurred loss ratio on $7 million of premium is not an everyday occurrence. Nevertheless, although there was some suggestive anecdotal evidence, neither of the underwriting experts for the parties could conclude from the records they inspected that a pervasive and perverse pattern of underwriting was apparent in some or all of the worldwide AIG offices ceding this CAR-EAR business to the Facility. Whether this inconclusive aspect of the experts' reports/testimony resulted from insufficient underwriting data or other factors within the samples selected, the record does not reflect a conscious use of asymmetric data by AIG to channel relatively poorer risks to the Facility. Accordingly, we decline to conclude that the AIG worldwide underwriting offices employed pernicious adverse selection of Facility risks.

A related complaint of AXA is that the administration of the cessions to the Facility was so flawed that it constituted a breach of the contracts. The resolution of these complaints would be a function of the Panel's conclusion as to the nature of the Facility, i.e. FAC-Oblig or Fac/Fac. AXA points to (1) the AIG practice of using declarations, typically a single page of data describing the ceded risk, which were deficient in adequately describing the risk or (2) bundling a series of risks and submitting them in bulk in relation to risk periods that had already commenced, or

(3) the fact that no facultative certificates were issued during the Fac/Fac period of the Facility or (4) that to the extent certain FAC-Oblig risks were assumed by the Facility, such risks should have been re-submitted when the Facility was clarified to be Fac/Fac in August 1998.

The documentary evidence and testimonial evidence was extensive on this series of complaints related to administration. With the benefit of hindsight the Panel can see much to be criticized in the AIG administration of this Facility. But we don't need hindsight. AXA had contemporaneous visibility and, though raising some questions, generally acquiesced in the AIG practices. In this sense AXA bears some fault in not more forcefully questioning or objecting to certain of these administrative practices. Therefore we decline to conclude that AIG breached the contracts through its administration, whether those contracts are viewed as FAC-Oblig or Fac/Fac.

Another contract breach related to evidence alleging the improper cession of marine risks as well as improperly ceding certain multi-year policies to this energy Facility. Evaluating the evidence presented, the Panel is not satisfied that the marine nature of the risk(s) was other than incidental to the underlying energy component. Likewise we found that the procedure applied to the multi-year policies did not represent improper judgments on the part of the AIG underwriters.

Finally we come to the category of relief seeking adjustment of AXA's participation in the Facility to reflect their intended participation. During the hearing this was often referred to as the overbilling or a result of the "modus operandi" of the Facility. The task of determining AXA's participatory share under the Facility is one of contract interpretation appropriately before this Panel following the 2nd Circuit's decision.

The record is very clear that AXA intended to participate in a $10 million dollar primary reinsurance facility of CAR/EAR energy type risks. The first period participation was 20% and second year participation was 25%. However, AIG's reinsurance brokers were only able to complete a $2,750,000 and $4,800,000 facility for the respective periods.

The parties went to great lengths during the hearing to demonstrate that this development was communicated (AIG) or miscommunicated (AXA). AIG identified written documents explaining the workings of the Facility participation percentages. Testimony was adduced regarding verbal communication on this point and throughout the operation of the Facility, the AIG declarations ceding a given risk to the Facility included a representation of how much of the risk was being ceded, which if one carefully worked out the arithmetic, one could discern the applicable percentage participation. Finally, and significantly AIG argues, the actual contract wording when agreed in August 1998 specified the precise AXA percentage participation.

AXA acknowledges the documents but asserts, not without merit, the opaque character of the relevant documents. While conceding that certain of the declarations would yield the correct participation percentages, AXA asserts that it was assured by AIG's broker that the purpose of these declarations was for AIG internal purposes and accordingly such documents were not viewed by AXA as meaningful information.

Were the Panel to consider each of the explanatory documents individually as well as the testimonial evidence of contemporaneous communication, it would not be unreasonable to conclude that one could have divined the actual reinsurer percentage participation at the time. But that would miss seeing the forest for the trees. The pattern of written communication on this percentage participation matter is one of repeated obfuscation by AIG's broker. While it is true that AXA has responsibility here as a trading partner, this factor---the extent of a reinsurer's participation in a facility---is so fundamental to the reinsurance transaction that AIG's responsibility to clearly communicate it dwarfs that of AXA to interpret confusing, indeed, perplexing written communications. Early on, AIG could have stated simply that the Facility was undersubscribed and that AXA's 1997 20% in the expected facility represented 72.72% in the actual facility or that AXA's 25% in the expected renewal facility represented 52.08% in the actual renewal facility.[1]

[1] Since the 1997 Facility was only 27.5% subscribed ($2,750,000/$10,000,000), AXA's 20% share would equal 72.72% of the Facility. Likewise the 1998 renewal was 48% subscribed thus giving AXA's intended 25% a 52.08% effect.

With such timely and clear communication AXA could have acquiesced, declined or modified its proposed participation. Absent such clear disclosure, and despite AXA's long history of loss payments at the higher percentage, the Panel is unable to determine that AXA's actions following formation of the contract evidence knowledge and acceptance of the higher participation percentage.

AXA presented an expert report detailing the alternative billing had it been done on the basis equivalent to their intended participation. The Panel accepts the expert report conclusion and directs AIG, within thirty (30) days from the date of this Award, to refund to AXA the difference between (i) $15,357,760 overpaid by AXA for its share of losses ceded to the Facility, plus interest thereon as provided below; and (ii) $5,411,267 in presently due amounts to AIG as provided below, plus interest thereon as also provided below.

The Panel recognizes that actual premiums ceded to the Facility were also overstated when recalculated on the AXA intended participation percentage. Normally that fact would require a netting of the overstated amount against the related losses. In this instance, however, AIG's broker placed retrocessional protection for the Facility's reinsurers and understood that the related retrocessional premium would be a function of the expected premium to be ceded to the Facility, which was estimated at some $10 million. That AIG broker, who charged commissions to the reinsurers for placing the retrocessional coverage, knew or should have known that the undersubscribed Facility would not generate

the expected premium income and that the related retrocessional reinsurance premium would be overstated thereby harming the reinsurers. At minimum this should have been disclosed to AXA. Such failure, whether by acts of omission or commission by AIG's broker NMB was inimical to AXA's interests. The Panel therefore declines to credit AIG with an adjustment for the ceded premium to the Facility.

While the Panel was not persuaded that AIG's administration of the Facility warranted backing out all or part of the ceded population, we were not insensitive to the pattern and direction of administration coordinated between AIG Home Office departments and its reinsurance brokers in New York and London.

Prominent in this pattern was the activity to convert a FAC-Oblig facility to one of Fac/Fac. Instead of forthrightly addressing the corporate policy of restricting the field offices to place Fac/Fac only, by sanctioning an exception for this particular CAR/EAR facility, AIG and its brokers engaged in what can only be described as a series of tergiversations designed to obscure just that. Multiple communications marked this process almost from commencement of the Facility culminating in the issuance of contract wording in August 1998.

The evidence in this arbitration is overwhelming that time after time AIG opted for the obscure and imprecise communication rather than the clear and explicit. Were the subject matters of this deficient communication minor or routine, we need not find fault with AIG. But such matters were anything but minor or routine. They dealt with the most fundamental aspect of this reinsurance relationship, i.e. the nature of the reinsurance transaction and the participation therein. For this reason we award AXA exemplary damages of $1,000,000 as respects AIG's conduct in the operation of the 1997 Facility, recognizing and taking into account the fact that while the contract wording for the 1998 Facility precludes an award of punitive damages that we might otherwise have awarded as respects AIG's conduct in that contract period, no such preclusion exists for the 1997 Facility. Such exemplary damages shall be paid by AIG to AXA within thirty (30) days from the date of this Award.

AIG demand for relief

AIG's demand while less complex is not insignificant. Since we did not find that AIG adversely selected risks for the Facility or so improperly administered the Facility, the unpaid balance of ceded losses are due and owing. Because we have determined that the manner of AIG billing was incorrect, we accept AXA's expert report calculation that the $7,759,406 unpaid amount should be adjusted to $5,411,267 plus interest as provided below. AIG is entitled to take credit against the amount due and payable to AXA as provided above.

Future billings, if any, under these contracts will be prepared by AIG on the AXA basis as reflected in its expert report.

Interest

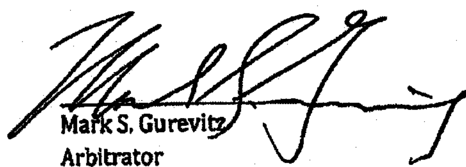
The respective monetary awards, excluding exemplary damages, represent amounts paid at various periods from 1998 forward or billed from 2005 forward. Each party will calculate the interest at 6.5% compounded annually due on the respective paid or unpaid balances from the actual payment date for paid amounts or from the reinsurance contract payment date for billed amounts through the date of payment/credit.

Attorney Fees and Costs

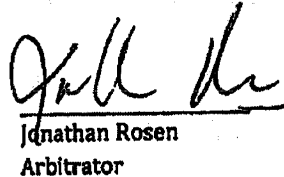
The litigation in the Southern District, later appealed to the 2nd Circuit, was based on allegations of fraud in inducing AXA to participate in these contracts. The court stayed this arbitration pending the outcome of the litigation. Once it was clear that an arbitral panel would have to deal with post contract formation matters, this Panel was formed. While this route to arbitration is atypical, as was certain antecedent litigation and ADR, this arbitration is what the parties intended should a dispute arise which manifestly was the case. Our charge, however, commences with this arbitration and we need be blind as to how the parties arrived here. In the present circumstances, the Panel believes that adherence to the "American Rule" as regards attorney fees and costs is appropriate for purposes of this arbitration proceeding and thus declines to award attorney fees and costs to either party.

The Panel will remain constituted while the Parties prepare their respective interest calculations and related disbursement pursuant to this Award.

So ordered this 27th day of July 2012.



Mark S. Gurevitz
Arbitrator



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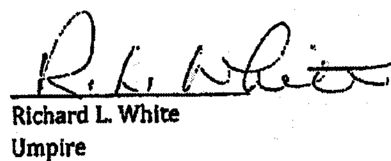
Arbitrator



Richard L. White
Umpire