

## CLIENT ALERT

### Confirmation of Arbitration Awards: Second Circuit Rules That Arbitration Panels Have the Authority To Clarify an Otherwise Final Award

December 20, 2018

On November 28, 2018, the Second Circuit Court of Appeals held that the *functus officio* doctrine does not preclude an arbitration panel from clarifying a final arbitration award it determines is ambiguous. *General Re Life Corporation v. Lincoln National Life Insurance Company*, 909 F.3d 544 (2d Cir. 2018).

Lincoln National Life Insurance Company (the cedent) and General Re Life Corporation (the reinsurer) arbitrated whether General Re was permitted to increase the premiums under a YRT Reinsurance Agreement. If so, Lincoln had the right to recapture the business rather than pay the increased premiums. In July 2015, the arbitration panel issued a final award finding that General Re was entitled to increase the premiums under the contract (the “Final Award”). The Final Award also stated that, if Lincoln chose to exercise its right to recapture following the arbitration, the recapture would be effective April 1, 2014 (*i.e.*, 15 months earlier) and, in such an event, all post-April 1, 2014 premium and claim transactions would be unwound. The Final Award did not address how the recapture would impact premium or claim transactions occurring prior to April 1, 2014.

In October 2015, a dispute arose regarding whether General Re was entitled to keep premiums that were paid, but not earned, prior to April 1, 2014. General Re argued that the panel was *functus officio* and, thus, did not have the authority to resolve the dispute. The panel rejected that argument, finding that the Final Award contained “ambiguities requiring clarification,” and stated that, when read in the context of the parties’ reinsurance agreement, the award permitted General Re “to retain the unearned premium[s],” but also required it “to be liable for claims for which it retains premium.”

General Re moved to confirm the original award (without the clarification), and Lincoln cross-moved to confirm the Final Award as clarified by the arbitration panel. The district court confirmed the Final Award as clarified.

On appeal, the Second Circuit held that the *functus officio* doctrine did not preclude the panel from clarifying its award. Joining the Third, Fifth, Sixth, Seventh and Ninth Circuits, the Second Circuit recognized an exception to *functus officio* “where an arbitral award ‘fails to address a contingency that later arises or when the award is susceptible to more than one interpretation.’” (Citation omitted.) Specifically, the Second Circuit ruled that arbitration panels are permitted to clarify final awards where each of the following three conditions are satisfied: “(1) the final award is ambiguous; (2) the clarification merely clarifies the award rather than substantively modifying it; and (3) the clarification comports with the parties’ intent as set forth in the agreement that gave rise to arbitration.” The Second Circuit found that that the panel had merely “clarified” and did “not rewrite” an ambiguous award and, accordingly, the clarification was proper and not barred by the *functus officio* doctrine.

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