UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 11 Civ. 1040 (RJS)

CENTURY INDEMNITY COMPANY,

Petitioner,

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,

Respondents.

MEMORANDUM AND ORDER
January 10, 2012

RICHARD J. SULLIVAN, District Judge:

Petitioner Century Indemnity Company ("Century") brings this action pursuant to section 207 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201, *et seq.*, seeking confirmation of a February 5, 2009 arbitration order. Two of the three respondents have not appeared in this action and therefore do not oppose Petitioner's motion. However, one respondent, Harper Insurance Limited ("Harper"), has filed a cross-petition, which *also* seeks confirmation of the February 5, 2009 order as well as a May 5, 2008 arbitration order.

Additionally before the Court is Century's motion to strike portions of Harper's Cross-Petition. For the reasons that follow, the parties' unopposed Petitions to confirm the arbitration awards are granted, and Century's motion to strike is denied.

I. BACKGROUND

A. Facts[1]

Century, a Pennsylvania insurance company, entered into a "Global Slip" reinsurance agreement with certain London Market Reinsurers (the "LMRs") for the year 1968.[2] Pursuant to the Global Slip agreement, the LMRs agreed to indemnify Century for certain asbestos claims. (Doc. No. 6, Ex. 1 (the "Agreement").) In 2001, the LMRs promulgated new documentation requirements for claims made under the Global Slip treaty. In subsequent years, from 2001 through 2005, the LMRs

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[1] The following facts are taken from Century's First Amended Petition (the "Petition"), Harper's Cross-Petition (the "Cross-Petition"), the parties' memoranda of law, and the parties' declarations and exhibits attached thereto.

[2] The LMR Respondents in this action are National Casualty Company, National Casualty of America Limited, and Harper Insurance Limited.

allegedly withheld and delayed payments to Century on the contention that Century had failed to meet these documentation requirements.

The Agreement contains an arbitration clause, which requires the parties to arbitrate "any dispute . . . between [Century] and the REINSURERS with reference to the interpretation of this CONTRACT or their rights with respect to any transaction involved." (Agreement at art. 22.) The arbitration clause further provides that the decision of the arbitration panel shall be "final and binding" upon all parties. (*Id.*) In May 2005, Century initiated arbitration proceedings against the LMRs pursuant to the Agreement, alleging that the new documentation requirements were improper. (Doc. No. 6, Ex. 2.) In the arbitration, Century sought, among other things, payment of outstanding reinsurance billings plus interest, a declaration of the parties' respective rights and obligations under the payment and records-inspection provisions of the treaty, and certain declarations regarding the LMRs' obligations to pay future billings. (*Id.*)

An arbitration panel (the "Panel") was convened, and in April 2006, Century filed a motion with the Panel requesting an order directing the LMRs to post pre-hearing security for the amounts at issue or, alternatively, to post letters of credit to secure Century's outstanding recoverables. (Decl. of John R. Vales, dated April 15, 2011, Doc. No. 13 ("Vales Decl."), Ex. A.) On June 9, 2006, the Panel issued an order denying Century's request for pre-hearing security but directing Harper to post letters of credit pursuant to Article 15 of the Treaty with respect to certain reserves and claims. (*Id.*)

The Panel conducted an evidentiary hearing from January 17, 2007 through January 23, 2007. (Vales Decl., Ex. B at 1.) Following the hearing, on January 24, 2007, the Panel issued a "Final Interim (Phase One) Order," which established the documentation that Century would be required to provide to the LMRs for asbestos claims, as well as guidelines by which the parties were to reconcile their outstanding balances. (*Id.* at 1-4.)

On September 15, 2007, the Panel issued an additional interim order, which modified certain terms of the January 24, 2007 order and called for the Panel to reconvene in fifteen months in order to evaluate the need to exercise continued jurisdiction over the arbitration. (*Id.*, Ex. C.)

In April 2008, a dispute between the parties emerged with respect to Harper's obligation to provide letters of credit for incurred but not reported ("IBNR") accounts. On May 5, 2008, the Panel issued a ruling with respect to that dispute, which reaffirmed the Panel's June 9, 2006 order stating that Harper was not obligated to post letters of credit for any IBNR amounts under Article 15 of the Treaty. (*Id.*, Ex. D.)

In January 2009, pursuant to the September 15, 2007 order, the Panel reconvened to decide whether it should continue to exercise jurisdiction over this matter. On February 5, 2009, the Panel issued a final order terminating its jurisdiction and denying any further relief. (*Id.*, Ex. E.)

On February 15, 2011, Century filed the instant Petition seeking confirmation of "the interim arbitration orders dated January 24, 2007 and September 15, 2007 and the final award dated February 5, 2009 that

necessarily incorporated those interim orders." (Doc. No. 1.)[3] On April 15, 2011, Harper filed an answer to the Petition as well as a Cross-Petition to confirm the arbitration order. Specifically, Harper seeks confirmation of "(i) the Panel's May 5, 2008 Order that necessarily incorporated the Panel's June 9, 2006 Order, and (ii) the Panel's February 5, 2009 Final Order that necessarily incorporated the Panel's January 24, 2007 and September 15, 2007 Orders." (Doc. No. 12.) On April 29, 2011, Century filed a "Motion to Strike Portions of [Harper's] Cross-Petition to Confirm Arbitration Awards," arguing that the Cross-Petition contains inaccuracies that constitute an "attempt to frame the subject matter of the dispute in a manner favorable to it and disadvantageous to Century." (Doc. No. 16.) The motions were fully submitted as of May 24, 2011.[4]

II. STANDARD OF REVIEW

In this Circuit, district courts treat an unopposed petition for confirmation of an arbitration award "as akin to a motion for summary judgment based on the movant's submissions." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 109 (2d Cir. 2006). Indeed, where a non-movant has failed to respond to the petition, the court "may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." *Id.* at 109-10 (citation omitted). "Nonetheless, in the context of a petition to confirm an arbitration award, the burden is not an onerous one: confirmation of an arbitral award is generally 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court, and the court must grant the award unless the award is vacated, modified, or corrected.'" *N.Y.C. Dist. Council of Carpenters Pension Fund v. Angel Constr. Grp., LLC*, No. 08 Civ. 9061 (RJS), 2009 WL 256009, at *1 (S.D.N.Y. Feb. 3, 2009) (quoting *D.H Blair*, 426 F.3d at 110).

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention") applies to arbitral awards, such as this one, which arise out of commercial relationships that are "not considered as domestic awards in the State where their recognition and enforcement are sought."[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art 1 ¶ 1, June 10, 1958, 21 U.S.T. 2517 ("N.Y. Conv."). Under the New York Convention, "[w]ithin three years after an arbitral award . . . is made, any party to the arbitration may apply to any court having jurisdiction under [the Convention] for an order confirming the award as against any other party to the arbitration." 9 U.S.C. § 207. Such a court shall, in turn, "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." N.Y. Conv., art. III. "Typically, a district court's role in reviewing a foreign arbitral award arising

[3] On March 7, 2011, Century filed an "Amended Petition to Confirm Arbitration Awards," which no longer named Equitas Insurance Limited as a Respondent but was otherwise identical to the original Petition.

[4] Century served copies of the Petition and supporting documents on all Respondents on February 15, 2011. (*See* Doc. No. 1 at 16.) However, as noted above, Harper is the only Respondent to file an appearance in this action or to respond to the Petition.

[5] The New York Convention was implemented by and reprinted in the FAA, which grants United States district courts original jurisdiction over "an action or proceeding falling under the Convention." 9 U.S.C. § 203.

under the Convention is 'strictly limited and the showing required to avoid summary confirmance is high.'" *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09 Civ. 8856 (RJS), 2011 WL 1345155, at *2 (S.D.N.Y. Apr. 5, 2011) (quoting *Compagnie Noga D'Importation et D'Exportation, S.A. v. Russ. Fed'n*, 361 F.3d 676, 683 (2d Cir. 2004) (internal quotation marks omitted)).

Nevertheless, Article V of the Convention articulates a number of grounds upon which a reviewing court may refuse or defer recognition of a foreign arbitral award. These grounds are: (i) "the parties to the arbitration agreement lacked capacity or the agreement was not legally valid;" (ii) "proper notice of the appointment of the arbitrator or of the arbitration proceeding was not given;" (iii) the award "deals with a matter not submitted to arbitration or beyond the scope of the submission;" (iv) "the arbitral authority or procedure was not agreed to by the parties;" or (v) "the award was not yet binding or had been set aside or suspended in the enforcement forum." *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 494 (2d Cir. 2002). A reviewing court may also refuse enforcement of the arbitration agreement if "[t]he subject matter of the difference is not capable of settlement by arbitration," or if "recognition or enforcement of the award would be contrary to the public policy of [the forum where enforcement is sought]." N.Y. Conv., art. V.

Finally, "the FAA only permits a federal court to confirm or vacate an arbitration order that is final." *Employers' Surplus Lines Ins. Co. v. Global Reinsurance Corp.-U.S.*, No. 07 Civ. 2521 (HB), 2008 WL 337317, at *3 (S.D.N.Y. Feb. 6, 2008) (quoting *Banco De Seguros Del Estado v. Mut. Marine Office, Inc.*, 230 F. Supp. 2d 362, 368 (S.D.N.Y. 2002) (quotation marks omitted)). "An interim ruling is sufficiently final if it finally and definitely disposes of a separate independent claim even though it does not dispose of all the claims that were submitted to arbitration." *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp. 2d 362, 368 (S.D.N.Y. 2002) (quoting *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986) (internal quotations omitted)).

III. DISCUSSION

As noted above, Century and Harper both seek confirmation of the Panel's February 5, 2009 final award, which they agree "necessarily incorporated" the January 24, 2007 and September 15, 2007 interim orders. (Doc. Nos. 1 and 12.) Additionally, in its Cross-Petition Harper seeks confirmation of the Panel's June 9, 2006 and May 5, 2008 orders regarding Harper's obligation to post letters of credit. (Doc. No. 12.) Finally, Century has moved to strike portions of Harper's cross-petition.

A. Confirmation of the Arbitration Awards

1. The February 5, 2009 Final Award and Interim Orders

The parties agree that the February 5, 2009 final award, which "necessarily incorporated" the terms of the January 24, 2007 and September 15, 2007 interim orders, should be confirmed. Having carefully reviewed the Panel's orders, the Court finds no basis for vacating, modifying, or correcting any portion of the awards. No party has put forward evidence suggesting that any of the Convention's seven grounds for vacatur applies here, nor has any party asserted any other reason to vacate. Thus, the February 5, 2009 final award is confirmed. In so confirming, the Court notes that the majority of the Panel's

substantive findings are articulated in the January 24, 2007 and September 15, 2007 interim orders. The Court agrees with the parties, therefore, that these interim orders are "necessarily incorporated" into the final award.

2. The May 5, 2008 Final Award and Interim Order

In its Cross-Petition, Harper seeks confirmation of the Panel's May 5, 2008 order, which "necessarily incorporated" the terms of the Panel's June 9, 2006 interim order, regarding Harper's obligations to post letters of credit. Century does not oppose Harper's request for confirmation of these orders. (*See* Pet'r's Mem. in Supp. of Mot. to Strike ("Pet'r's Mem.") at 4 n.2, 8.)

While the May 5, 2008 order was not the final award issued by the Panel in this action, courts in this district have found that an interim order mandating prejudgment security in the form of letters of credit is sufficiently separate and final for federal court review and confirmation. *See Banco de Seguros del Estado*, 230 F. Supp. 2d at 368 (collecting cases); *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 204 (S.D.N.Y. 2002) ("[E]quitable orders involving the preservation of assets related to the subject of arbitration are generally considered 'final' arbitral orders subject to judicial review."). Thus, the Court may review the Panel's May 5, 2008 order as a final award.

After careful review of the May 5, 2008 award, the Court finds no basis – nor has one been advanced – for vacating, modifying, or correcting any portion of the award. Accordingly, the May 5, 2008 award, as well as the June 9, 2006 award that specifies Harper's obligations with respect to the posting of letters of credit, are confirmed.

B. Motion to Strike

Century has also moved, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, to strike portions of Harper's cross-petition, arguing that the document contains "irrelevant" and "gratuitous" assertions that are designed to function as a "press release for use in other matters." (Pet'r's Mem. at 6.) Century argues that, in addition to being superfluous, such assertions are violative of the parties' confidentiality order. (*Id.* at 1.) Accordingly, Century asks the Court to strike most of the Cross-Petition's "Factual Background" section. (*Id.* at 2.)

Pursuant to Rule 12(f), a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Because of the presumption of public access to judicial documents in federal courts, however, motions to strike are disfavored. *See RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 394 (S.D.N.Y. 2009). "A motion to strike immaterial or impertinent matter from a pleading will ordinarily not be granted unless the matter sought to be stricken clearly can have 'no possible relation' to the matter in controversy." *TouchTunes Music Corp. v. Rowe Int'l Corp.*, No. 07 Civ. 11450 (RWS), 2010 WL 3910756, at *4 (S.D.N.Y. Oct. 5, 2010). (quoting *Gleason v. Chain Serv. Rest.*, 300 F. Supp. 1241, 1257 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 343 (2d Cir. 1970)).

Here, Century has failed to satisfy the "stringent" standard governing motions to strike. *TouchTunes Music*, 2010 WL 3910756, at *4. While Century argues that the fact section of Harper's Cross-Petition

constitutes an attempt to "disadvantage Century with its other reinsurers" (Pet'r's Mem. at 11), it cannot be said that the factual background included by Harper is so gratuitous that it bears "no possible relation" to the underlying controversy. Even if the Cross-Petition sets forth factual assertions that are within the scope of the confidentiality agreement executed during the arbitration, the mere fact that the parties have designated certain documents as confidential among themselves is insufficient to rebut the "strong presumption of public access to court records" that exists in federal courts. *Video Software Dealers Assoc.* v. *Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (citing *Nixon* v. *Warner Commc'ns*, 435 U.S. 589, 597-98 (1978). Moreover, in light of the fact that the Panel's orders are part of the record in this case, and can therefore be reviewed by the general public, Century's assertion that it will be prejudiced by Harper's characterization of the Panel's decisions is unpersuasive.[6]

Accordingly, Century's motion to strike is denied.

[6] The Court notes that Century made an identical motion against the LMRs in an arbitration confirmation proceeding before Judge Koeltl. *See Century Indemnity Co. v. Certain Underwriters at Lloyd's, London*, No. 11 Civ. 1503 (JGK), Doc. Nos. 19-20. In that action, the factual background section of the LMRs' brief that Century sought to strike was virtually identical to the section at issue here. While noting that some of the LMRs' factual assertions were precluded by the parties' confidentiality agreement, Judge Koeltl denied Century's motion to strike, stressing that "[b]oth sides are well positioned to conduct their own public relations campaign outside the Court." *Century Indemnity Co. v. Certain Underwriters at Lloyd's, London*, No. 11 Civ. 1503 (JGK), 2011 WL 2119703, at *1 (S.D.N.Y. May 23, 2011).

IV. CONCLUSION

For the foregoing reasons, the parties' cross-petitions to confirm the arbitration awards are granted. Additionally, Century's motion to strike is denied. The Clerk of Court is respectfully directed to terminate the motions located at Doc. Nos. 12 and 16 and to close this case.

SO ORDERED.

Dated: January 10, 2012
New York, New York

RICHARD J. SULLIVAN
United States District Judge

* * *

Petitioner Century Indemnity Company is represented by Andrew I. Hamelsky of White and Williams, LLP, One Penn Plaza, 250 W. 34th Street, Suite 4110, New York, NY 10119.

Respondent Harper Insurance Limited is represented by Brian O'Donnell and John Vales of Riker Danzig Scherer Hyland Perretti LLP, One Speedwell Avenue, Morristown, NJ 07962.