IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Continental Casualty Company, an Illinois corporation, individually and as successor-in-interest to The Niagara Fire Insurance Company (Canadian Branch),	)	Case No. 07 C 4228
Plaintiff,	)	Judge Ruben Castillo
vs.	)	
LaSalle Re Limited, a Bermuda corporation	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF CONTINENTAL CASUALTY COMPANY'S MOTION TO STAY ARBITRATION

Plaintiff, Continental Casualty Company ("CCC"), by and through its attorneys, Lord Bissell & Brook LLP, submits the following Memorandum in Support of its Motion to Stay Arbitration. In support of its Motion, CCC states as follows:

BACKGROUND

On May 31, 2007, Defendant LaSalle Re Limited ("LaSalle Re") issued a Notice of Request to Arbitrate (the "Arbitration Request') to CCC wherein LaSalle Re demanded arbitration pursuant to an arbitration provision contained in a contract of reinsurance known as the All Classes Excess of Loss Retrocession Agreement No. 8550-98 effective from July 15, 1998 to December 31, 2000 (the "Retrocession Agreement"). Copies of the Arbitration Request and the Retrocession Agreement are Exhibits "B" and "C" to CCC's Amended Complaint filed contemporaneously with this Motion (Exhibit "1" to the instant Motion to Stay). The Retrocession Agreement contained provisions requiring the parties to resolve disputes arising

under the agreement through private arbitration. By the issuance of its Arbitration Request, LaSalle Re commenced arbitration proceedings against CCC in Toronto, Canada.

The Arbitration Request, however, was issued contrary to the express provisions of a separate agreement, known as the Commutation and Release Agreement, executed by the parties on April 27, 2004. A copy of the Commutation and Release Agreement is Exhibit "A" to CCC's Amended Complaint (Exhibit "1" to the instant Motion to Stay).

According to its terms, the purpose of the Commutation and Release Agreement was to terminate all of the parties' rights and obligations under the prior reinsurance agreements within its scope, including the Retrocession Agreement. The terms of the release incorporated in Article 2(b) of the Commutation and Release Agreement are, therefore, extremely broad, providing as follows:

> Simultaneously with the effectiveness of the release referred to in Article 2(a), the REINSURER [LaSalle Re] hereby irrevocably and unconditionally releases and forever discharges the COMPANY [CCC], its parents, subsidiaries and affiliates, and their respective predecessors, successors, assigns, officers, directors, agents, employees, shareholders, representatives and attorneys from any and all past, present and future actions, causes of action, suits, arbitrations, mediations, debts, liens, contracts, rights, agreements, obligations, promises, liabilities, claims, demands, damages, controversies, losses, costs and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, which the REINSURER [LaSalle Re] now has, owns, holds or claims to have, own, or hold, or at any time heretofore had, owned, or held or claimed to have had, owned, or held, or may hereafter have, own, or hold or claim to have, own, or hold, arising out of conduct or matters occurring prior to, on or subsequent to the EFFECTIVE DATE, against the COMPANY [CCC], arising from, based upon, or in any way related to the Reinsurance Agreements and any other agreements relating to or arising out of the Reinsurance Agreements; provided, however, that the provisions of this Article 2(b) shall not discharge obligations of the COMPANY [CCC], which have been undertaken or imposed by the terms of this Agreement.

This release effectively extinguished the parties' prior agreement to arbitrate contained in the Retrocession Agreement, and therefore no agreement to arbitrate presently exists with respect to the claims raised by LaSalle Re in the Arbitration Request.

The Commutation and Release Agreement further contains its own dispute resolution and choice of law provisions in Article 11 as follows:

* * *

(g) This Agreement shall be governed by and construed in accordance with the laws of Illinois without regard to principles of conflicts of law.

(h) The Parties hereby consent to the jurisdiction of the courts of the State of Illinois, in connection with any legal action arising out of this Agreement.

* * *

Accordingly, to the extent the Arbitration Request seeks to avoid or circumvent the dispute resolution provisions of the Commutation and Release Agreement, it is null and void and without any legal effect whatsoever. Any remaining dispute between the parties must be resolved through litigation under Illinois law.

On July 25, 2007, prior to the deadline established under the Retrocession Agreement for the appointment of an umpire in the arbitration proceeding commenced by LaSalle Re, CCC filed a Complaint for Declaratory Judgment, to Stay Arbitration and for Other Relief in the Circuit Court of Cook County, Illinois. CCC also filed an Emergency Motion to Stay Arbitration which was to be heard by the Circuit Court on July 27, 2007. In order to avoid a hearing on CCC's emergency motion, LaSalle Re filed a Notice of Removal to this Court on July 26, 2007. A Motion to Remand filed by CCC and a Motion to Stay this litigation filed by LaSalle Re subsequently were denied by this Court.

The Court suggested that CCC re-file its Motion to Stay Arbitration, and this Memorandum is submitted in support of that motion. CCC also has filed an Amended Complaint against LaSalle Re pursuant to F.R.C.P. 15(a). A copy of CCC's Amended Complaint is attached to the instant Motion to Stay Arbitration.

ARGUMENT

I. CCC Is Entitled to a Stay of Arbitration Because No Arbitration Agreement Presently Exists Between the Parties

A. The Courts Are Empowered to Stay Arbitration Under the Federal Arbitration Act and Applicable State Law

Both the Retrocession Agreement and the Commutation and Release Agreement involve interstate commerce and therefore the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* applies. The FAA authorizes federal and state courts to compel arbitration if there exists "an agreement in writing to submit to arbitration." 9 U.S.C. § 2. Absent such an agreement, however, the courts are empowered under the FAA to stay any attempt to force a party to arbitrate against its will. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F. 3d 1126, 1130 (7th Cir. 1997).

Moreover, pursuant to the Illinois Uniform Arbitration Act, 710 ILCS 5/2, courts have the express authority to enter a stay of an arbitration commenced by any party on a showing that no agreement to arbitrate the dispute exists. Section 2(b) of the Act provides, in part:

> On application, the court may stay an arbitration proceeding commenced or threatened *on a showing that there is no agreement to arbitrate*. That issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. (Emphasis added.)

Although both the FAA and the Illinois Uniform Arbitration Act embody strong public policy favoring arbitration of commercial disputes, "agreements must not be construed so broadly as to force arbitration of claims that the parties never agreed to submit to arbitration." *Bayer Cropscience, Inc. v. Limagrain Genetics Corp.*, 2004 WL 2931284 *3 (N.D. Ill. 2004).[1]

[1] CCC acknowledges that courts are required to recognize and enforce written agreements to arbitrate pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.* The Convention concerns arbitration agreements contained in commercial contracts which are between U.S. citizens and citizens of foreign states which are signatories to the Convention. 9 U.S.C. § 202. As with the general provisions of the FAA, however, the Convention is inapplicable in the instant matter as no arbitration agreement presently exists between CCC and LaSalle Re.

In determining whether an arbitration agreement exists between the parties "a federal court should look to the state law that ordinarily governs the formation of contracts." *Gibson*, 121 F. 3d at 1130; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally... should apply state-law principles that govern the formation of contracts"); see also *Hawkins v. Aid Association for Lutherans*, 338 F. 3d 801, 806 (7th Cir. 2003) ("whether the parties agreed to arbitrate is a matter of state contract law"); *Aste v. Metropolitan Life Ins. Co.*, 312 Ill. App. 3d 972, 976, 728 N.E. 2d 629, 632 (1st Dist. 2000) (in determining whether a valid arbitration agreement exists "a federal court should look to the state law that ordinarily governs the formation of contracts").

Accordingly, this Court has the authority to stay the arbitration proceedings commenced by LaSalle Re against CCC in Toronto, Canada upon a showing that there is no valid and enforceable agreement to arbitrate. Moreover, pursuant to the choice of law provisions provided in the parties' Commutation and Release Agreement, this Court is required to determine the issue of whether or not an arbitration agreement currently exists between CCC and LaSalle Re pursuant to Illinois law.

B. The Issue of Whether an Arbitration Agreement Exists is Not for an Arbitration Panel to Decide

"The sole issue at preliminary hearings to compel or stay arbitration is whether there is an agreement to arbitrate: if so, the court should order arbitration; if not, arbitration should be refused." *TDE Ltd. v. Israel*, 185 Ill. App. 3d 1059, 1064, 541 N.E. 2d 1281, 1284-85 (1st Dist. 1989); see also *Northern Illinois Gas Co. v. Airco Industrial Gases*, 676 F. 2d 270, 275 (7th Cir. 1982); *Glenn H. Johnson Construction Co. v. Board of Education*, 245 Ill. App. 3d 18, 22, 614

N.E. 2d 208, 211 (1st Dist. 1993). Accordingly, whether or not an agreement to arbitrate exists is a question for the court to decide.

In *First Options of Chicago,* (Supra), the Supreme Court considered the question of who should determine whether a given dispute is arbitrable – a court or an arbitrator. In the absence of "clear and unmistakable" evidence to the contrary, the Supreme Court held that the issue of arbitrability should be resolved by the courts. 514 U.S. at 944; see also *Bayer Cropscience*, 2004 WL 2931284 *3 ("in Illinois, state law requires the court to determine whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration"). In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) the Supreme Court distinguished between gateway issues and procedural issues holding that the "question of arbitrability" is a gateway issue and therefore "an issue for judicial determination." *Id* (internal citations omitted). Accordingly, the courts decide "certain gateway matters, such as whether the parties have a valid arbitration agreement at all...". *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam*, 537 U.S. at 83-84.

The existence of an arbitration agreement is a gateway question subject to judicial determination. *Aste*, 312 Ill. App. 3d at 982, 728 N.E. 2d at 637 ("the rule is clear that the issue of whether a contract to arbitrate exists must be determined by a court, not an arbitrator"); *Barker v. Trans Union*, 2004 WL 783357 *4 (N.D. Ill. 2004) ("questions regarding the existence of an arbitration agreement are generally for the court to decide"); see also *Acme-Wiley Holdings, Inc. v. Buck*, 343 Ill. App. 3d 1098, 1103, 799 N.E. 2d 337, 341 (1st Dist. 2003); *Menard County Housing Authority v. Johnco Construction, Inc.*, 341 Ill. App. 3d 460, 463, 793 N.E. 2d 221, 224 (4th Dist. 2003). Moreover, "where there are multiple contracts at issue, the earlier having arbitration clauses and the later not having such clauses, the district court, rather

than the arbitrator, should decide whether the earlier arbitration clauses have been superseded...". *WFC Commodities Corp. v. Linnco Futures Group, Inc.*, 1998 WL 834374 *2 (N.D. Ill. 1998).

Courts determine whether or not a valid arbitration agreement exists through basic contract principles regarding the parties' objective expressions of their intentions as demonstrated by their written agreements. Accordingly, this Court must determine the intent of CCC and LaSalle Re by examining the "clear language [and] intentions expressed in the language" of the parties' contracts, particularly the Commutation and Release Agreement. *Glenn H. Johnson Construction*, 245 Ill. App. 3d at 22, 614 N.E. 2d at 211 (*quoting Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 387, 574 N.E. 2nd 636, 641 (1991)); *Acme-Wiley Holdings*, 343 Ill. App. 3d at 1103, 799 N.E. 2d at 341-42; *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13, 761 N.E. 2d 724, 731 (2001). The "clear language" in the Commutation and Release Agreement reveals the parties' intent to extinguish any and all liabilities between them with respect to the prior Retrocession Agreement and their intent to resolve any and all remaining disputes exclusively through litigation under Illinois law. The parties expressly foreclosed private arbitration going forward through the general release contained in the Commutation and Release Agreement.

C. No Arbitration Agreement Exists As the Retrocession Agreement Has Been Superseded By the Commutation and Release Agreement

Arbitration is a matter of contract and therefore as with any contractual provision parties may agree to extinguish their contractual right to arbitrate. Parties who once agreed to arbitrate their disputes can later agree not to do so. *See Matterhorn, Inc. v. NCR Corp.*, 763 F. 2d 866 (7th Cir. 1985) (court affirmed the denial of a motion to compel arbitration where the parties' subsequent agreement, which lacked an arbitration clause, superseded an earlier agreement containing an arbitration clause); *WFC Commodities,* 1998 WL 834374 *3 (court denied motion to compel arbitration finding that "the 1994 contracts [with no arbitration clauses] superseded the

1991 contracts" and thus there was no "existing agreement between Plaintiff and Defendant to arbitrate their disputes"). Moreover, subsequent agreements between parties that contain general releases and no arbitration provisions supersede and replace earlier agreements, rendering the arbitration provisions of the earlier agreements unenforceable. *Acme-Wiley Holdings,* 343 Ill. App. 3d at 1106, 799 N.E. 2d at 344 (court found that a settlement agreement containing a release of all claims and no arbitration clause "operates as a general release, is clear and unambiguous, and we are at a loss as to how we might interpret it to mean anything other than the original employment agreement was to be regarded as history... [and] that the parties never intended to submit this particular dispute to arbitration"); *Liebl v. Mercury Interactive Corp.*, 2006 WL 3626764 *4 (N.D. Ill. 2006) (court determined that "the language of the release, and the Separation Agreement as a whole, make clear that the parties intended for it to be the final agreement between them... [and] even though it is a unilateral rather than mutual release, the final agreement indicates the parties' intent to release [all] obligations under prior agreements...").

Under the broad terms of the general release contained in the Commutation and Release Agreement at issue in this case, LaSalle Re expressly released CCC from any and all liability for any and all claims, including known and unknown, reported and unreported, fixed and contingent obligations and liabilities, which it had or might have in the future. The plain language of this subsequent agreement demonstrates that the parties intended to extinguish all obligations owed to each other under all previous agreements, including the Retrocession Agreement. This comprehensive general release relieved the parties from their prior arbitration agreements. Instead, and to leave not doubt, the Commutation and Release Agreement set forth language by

which the parties consented to the jurisdiction of the courts of Illinois and the application of Illinois law in connection with any possible further dispute.

A party cannot be compelled to arbitrate where no arbitration agreement exists. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); see also *Gibson*, 121 F. 3d at 1130 ("if there is no contract there is to be no forced arbitration"); *Northern Illinois Gas*, 676 F. 2d at 275 ("a party cannot be required to arbitrate a dispute which he has not agreed to arbitrate"). Consequently, "if it is apparent that no arbitration agreement exists... the court should decide the arbitration issue in favor of the party opposing arbitration." *Glenn H. Johnson Construction*, 245 Ill. App. 3d at 22, 614 N.E. 2d at 211-12. Insofar as the Commutation and Release Agreement supersedes the Retrocession Agreement, no agreement to arbitrate exists between these parties with respect to the subject matter raised in the arbitration proceedings commenced by LaSalle Re against CCC's predecessor, Niagara Fire.

II. LaSalle Re's Claims Arise Under and Relate Solely to The Commutation and Release Agreement

In its May 31, 2007 Arbitration Request, LaSalle Re demanded arbitration from CCC pursuant to an arbitration clause contained in the Retrocession Agreement. This Arbitration Request, however, was issued contrary to the express provisions of the Commutation and Release Agreement, executed by the parties on April 27, 2004. Far from disavowing the Commutation and Release Agreement in its Arbitration Request, LaSalle Re in fact acknowledged that "LaSalle Re and Niagara Fire entered into a Commutation Agreement which, according to Niagara Fire, makes Niagara Fire no longer liable to pay Hartford claims...". Amended Complaint, Exhibit C at 3. The only argument offered by LaSalle Re in its Arbitration Request for its breach of the forum selection and choice of law provisions of the Commutation and Release Agreement concerns its allegation that "at the time that the Commutation

Agreement was being negotiated, Niagara Fire did not disclose to LaSalle that any of the claims listed on Schedule "A" were pending and had not been paid by Niagara Fire." *Id.*

This argument amounts to a concession by LaSalle Re that the Commutation and Release Agreement is applicable in the instant matter. Its claim rests solely on the allegation that certain claims were not disclosed to LaSalle Re during the negotiations leading to the execution of the Commutation and Release Agreement. That agreement, however, specifically relieves CCC from any obligations concerning "liabilities, claims, demands, damages, controversies, losses, costs and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected...". Accordingly, the Commutation and Release Agreement extinguished any liability CCC might have had for claims which were allegedly undisclosed to LaSalle Re.

The crux of LaSalle Re's claim is that there were certain misrepresentations or non-disclosures in connection with the negotiation of the Commutation and Release Agreement. This allegation, even if it were true, has nothing whatsoever to do with the Retrocession Agreement. Rather, LaSalle Re's sole avenue of relief arises under the Commutation and Release Agreement, or perhaps for rescission of that agreement on the ground of material misrepresentation. Such relief must be sought through a legal action brought under Illinois law, not in a private arbitration proceeding.

LaSalle Re initiated its arbitration proceeding based on a reinsurance contract that is no longer in effect. Without a stay of arbitration, however, that proceeding will continue in Toronto. If the arbitration were permitted to proceed, CCC would be deprived of the benefit of its bargain under the Commutation and Release Agreement to have any and all remaining disputes between itself and LaSalle Re decided through litigation under Illinois law. However, if

the arbitration is stayed pending the Court's determination of the issues raised by LaSalle Re, neither party will suffer any harm whatsoever and the *status quo* will be preserved. Because, by virtue of the Commutation and Release Agreement, there is no longer a continuing agreement between CCC and La Salle Re to arbitrate disputes arising from Retrocession Agreement No. 8550-98, CCC is entitled to a stay of arbitration.

CONCLUSION

WHEREFORE, for the foregoing reasons, CCC respectfully requests that this Court enter an order indefinitely staying the arbitration in Canada.

Dated: August 16, 2007

Respectfully submitted,

LORD, BISSELL & BROOK LLP

By: s/Kimberly M. Hamm
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CONTINENTAL CASUALTY COMPANY

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CERTIFICATE OF SERVICE

I, Kimberly M. Hamm, an attorney, hereby certify that copies of the following documents were served via e-mail by 5:00 p.m. on August 16, 2007 to Robert J. Bates, Jr., and Maryann C. Hayes, Bates & Carey LLP, 191 N. Wacker Drive, Suite 2400, Chicago, Illinois 60606:

Memorandum Of Law In Support of Continental Casualty Company's Motion to Stay Arbitration

s/Kimberly M. Hamm
Kimberly M. Hamm

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