IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Petitioners, vs. CENTURY INDEMNITY COMPANY, Respondent.	:	Civil Action No.: 18-12041

MEMORANDUM IN SUPPORT
OF PETITION TO CONFIRM ARBITRATION AWARD

The Petitioners, Certain Underwriters at Lloyd's, London ("Underwriters") submit this memorandum in support of their Petition for an Order Confirming Arbitration Award and Entering Judgment (the "Petition"). Underwriters' Petition requests the entry of: (1) an order pursuant to pursuant to Section 9 of the Federal Arbitration Act, 9 U.S.C. §§1 et seq. ("FAA") and, more specifically, Chapter 2 of the FAA, 9 U.S.C. §§ 201-208, which provides for enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") confirming the Final Award dated May 4, 2018 and the Clarification Award dated August 28, 2018 (together, the "Arbitration Award") issued in a reinsurance arbitration between Underwriters and respondent, Century Indemnity Company ("Century"), and (2) judgment on the Arbitration Award pursuant to 9 U.S.C. §§ 13, 207.

I. FACTUAL BACKGROUND

A. The Reinsurance Treaties

Century and Underwriters entered into a number of annual reinsurance contracts known as the General Casualty Reinsurance Agreements, which were in effect from 1963 through 1967

(collectively, "Treaty 101") and the Blanket Excess of Loss Covers, which were in effect from 1968 through 1970 (collectively, "the "Global Slip"). True and correct copies of the Treaty 101 reinsurance contracts and Global Slip reinsurance contracts are attached to Underwriters' Petition as Exhibits 1 and 2, respectively. The Treaty 101 reinsurance contracts and the Global Slip reinsurance contracts are collectively referred to herein as the "Reinsurance Treaties."

B. The BSA Claims

The Reinsurance Treaties (subject to all their terms, retentions, conditions, and exclusions) reinsure losses under eight annual policies of insurance that Century issued to BSA between 1963 and 1971 (the "BSA Policies").

Beginning in or around 1996 and through the present, BSA submitted dozens of claims to Century arising out of BSA's alleged liability for the sexual molestation of minors committed by individuals affiliated with local boy scout troops across the United States (the "BSA Claims"). Century settled the BSA Claims and allocated the attendant losses to its BSA Policies in accordance with a private agreement between BSA and Century (the "First Encounter Agreement").

The First Encounter Agreement deemed (for insurance purposes) that all of the losses incurred as a result of the molestation of a given claimant occurred during the policy period when the first (but not the only) act of molestation took place. The First Encounter Agreement applied to all BSA Claims, irrespective of the number of molestation incidents or the number of years over which those incidents took place.

Century treated each of the BSA Claims as a separate occurrence under its BSA Policies.

C. The Reinsurance Billings

From February 2016 through April 2018, Century issued numerous reinsurance notices and billings via reinsurance intermediaries to Underwriters concerning the payments it had made in connection with the BSA Claims (the "BSA Reinsurance Billings").

The BSA Reinsurance Billings purported to allocate the losses attributable to each BSA Claim to a single BSA Policy period, in accordance with the First Encounter Agreement. Thus, for example, when settling with a claimant who alleged that he was abused between the years 1964 and 1970, Century allocated that settlement payment entirely to the 1964 BSA Policy. In this manner, Century "telescoped" the injuries arising out of all acts of sexual abuse against an individual into the first year that such abuse began.

In its BSA Reinsurance Billings, Century sought to combine all of these "telescoped" BSA Claims into a single reinsurance loss for each "telescoped" year. Thus, for example, all BSA Claims that had been "telescoped" into the year 1964 were then accumulated as a single loss for reinsurance purposes and presented to Underwriters under the 1964 year of account.

Underwriters raised numerous questions about, and requested more information from Century concerning, the BSA Reinsurance Billings.

Underwriters ultimately declined to pay the BSA Reinsurance Billings because, among other stated reasons: (i) Century's allocation of losses was counterfactual and the First Encounter Agreement was not the product of a reasonable and business-like investigation; and (ii) Century's accumulation of the "telescoped" BSA Claims as a single reinsurance "event' for each year of the Reinsurance Treaties was improper.

D. The Arbitration Award

On November 28, 2018, Century demanded arbitration against Underwriters, seeking payment of both the existing BSA Reinsurance Billings and an order requiring Underwriters to

pay future reinsurance billings for BSA Claims. In response, a three-member arbitration panel (the "Panel") was convened to resolve the disputes concerning each of the Reinsurance Treaties in a single hearing.

Following a discovery period, the parties submitted pre-hearing briefs and exhibits to the Panel. The parties and the Panel then convened for a four-day evidentiary hearing, which began on April 30, 2018 and concluded on May 3, 2018. On May 4, 2018, the Panel issued its unanimous Final Award. A true and correct copy of the Final Award is attached to Underwriters' Petition as Exhibit 4.

After the Final Award was issued, Century submitted revised reinsurance billings to Underwriters on August 16, 2018 ("Century's Revised Billings"). Given the Panel's Final Award, Underwriters contested the propriety of Century's Revised Billings and moved the Panel for clarification. On August 28, 2018, the Panel issued its unanimous Clarification Award. A true and correct copy of the Final Award is attached to Underwriters' Petition as Exhibit 5.

The Final Award and the Clarification Award constitute, collectively, the "Arbitration Award" that is the subject of Underwriters' Petition.

II. THE COURT SHOULD REDUCE THE ARBITRATION AWARD TO A JUDGMENT

A. The Court Should Confirm the Arbitration Award Because None Of the Bases For Refusing To Recognize The Award Apply

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." New York Convention, Art. 1 ¶ 1; *see Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 448-49, 449 n.13 (3d Cir. Pa. 2003) (citing the New York Convention, Art. II, § 2) (explaining that an arbitration agreement

falls within the New York Convention when the agreement (1) is an agreement in writing to arbitrate the subject of a dispute, (2) provides for arbitration in the territory of a signatory to the Convention, (3) arises out of a legal relationship, contractual or not, that is considered commercial, and (4) is a legal relationship between parties at least one of which is not an American citizen, or at least is a legal relationship bearing some reasonable relation with one or more foreign states).

Section 207 of Chapter 2 of the FAA provides that federal district courts have jurisdiction to confirm the awards of arbitration panels:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207.

Pursuant to that Section, federal courts have only limited authority to review the arbitrators' decision under the FAA and the NY Convention, and it is presumed that a reviewing court will confirm an arbitration award. *See Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09 Civ. 8856 (RJS), 2011 U.S. Dist. LEXIS 38565, 2011 WL 1345155, at *2 (S.D.N.Y. Apr. 5, 2011) ("Typically, a district court's role in reviewing a foreign arbitral award arising under the Convention is 'strictly limited and the showing required to avoid summary confirmance is high.'") (quoting *Compagnie Noga D 'Importation et D 'Exportation, S.A. v. Russ. Fed'n*, 361 F.3d 676, 683 (2d Cir. 2004)). *See also Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 20 (1st Cir. 2001) ("judicial review of an arbitration decision is extremely narrow and extraordinarily deferential") (internal citations omitted). Indeed, the "confirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration

award a judgment of the court.'" *F. Hoffmann-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318, 332 (S.D.N.Y. 2010) (quoting *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). Accordingly, this Court may only refuse recognition and enforcement of the Arbitration Award if "one of the grounds for refusal or deferral of recognition or enforcement of the award specified" in the Convention applies.

Here, Underwriters brings this petition well within three years after the Arbitration Award issued and none of the grounds for refusal or deferral of recognition or enforcement of the award set forth above apply to the Arbitration Award. 9 U.S.C. § 207. Accordingly, under Chapter 2 of the FAA and the Convention, this court must "recognize [the Arbitration Award] as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." New York Convention, Art. III. Under Chapter 1 of the FAA, a court must confirm an arbitration award unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of the FAA. *See Ottley v. Schwartzberg*, 819 F.2d 373, 375 (2d Cir. 1987). Century has not filed a petition to vacate, modify or correct the Arbitration Award.

B. The Arbitration Award Is A Final Award That Warrants Confirmation Under The FAA

The Court has jurisdiction to confirm the Arbitration Award because it fully resolves all of the issues presented to the arbitration Panel. Under the FAA, courts are only authorized to confirm final awards. *See Employers' Surplus Lines Ins. Co. v. Global Reinsurance Corp.-U.S.*, 2008 U.S. Dist. LEXIS 8253, 2008 WL 337317, at *3 (S.D.N.Y. Feb. 6, 2008) (noting that the FAA "only permits a federal court to confirm or vacate an arbitration order that is final")(citation and quotations omitted); *Hart Surgical, Inc. v. UltraCision, Inc.*, 244 F.3d 231, 233 (1st Cir. 2001) ("In applying [the FAA], we have followed the principle that 'it is essential for the district court's jurisdiction that the arbitrator's decision was final, not interlocutory.'" (quoting *El*

Mundo Broad. Corp. v. United Steel Workers of Am., 116 F.3d 7, 9 (1st Cir. 1997)); New York Convention, Art. V (confirmation may be refused if "The award has not yet become binding on the parties").

Confirmation of the Arbitration Award is necessary to ensure that the Arbitration Award will have full legal effect and to provide Underwriters with the ability to enforce it against Century. *See Weinstein v. Lev-In-Frick-Recon*, No. 97-11165, 1999 U.S. Dist. LEXIS 8950, *7-9 (D. Mass. April 29, 1999) (confirmation appropriate where it would allow the arbitration award to have res judicata and potentially issue preclusion effect in a related proceeding); *The Variable Annuity Life Insurance Co. v. Bencor, Inc.*, No. H-05-1843, 2006 U.S. Dist. LEXIS 34360, *10 (S.D. Tex. May 30, 2006) (confirming an arbitration award "intended to have a prospective effect, establishing both BENCOR's ability to compete with VALIC and to receive certain compensation from VALIC during the remainder of the contract term.").

III. A JUDGMENT SHOULD BE ENTERED IN ACCORDANCE WITH THE CONFIRMED ARBITRATION AWARD

Section 13 of the FAA provides, in part, that: "[t]he judgment shall be docketed as if it was rendered in an action."

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>
> The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 13. Accordingly, this Court has the jurisdiction to, and should, enter a judgment in accordance with the confirmed Arbitration Award in the form annexed hereto as Exhibit 1.

CONCLUSION

For the foregoing reasons, Underwriters respectfully request that the Court grant their Petition to confirm the Arbitration Award in all respects, enter judgment on the Award, and grant such other and further relief as this Court deems just and proper.

Dated: Boston, Massachusetts
October 1, 2018

Respectfully submitted,

By: _____

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