UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, Petitioner, v. CENTURY INDEMNITY COMPANY, SUCCESSOR TO CCI INSURANCE COMPANY, SUCCESSOR TO INSURANCE COMPANY OF NORTH AMERICA, Respondent.	CIVIL ACTION NO. 14-CV-10062 MEMORANDUM OF LAW IN SUPPORT OF JOINDER IN MOTION TO SEAL

MEMORANDUM OF LAW IN SUPPORT OF CENTURY INDEMNITY COMPANY'S JOINDER IN PETITIONER'S MOTION TO SEAL

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Petitioner, Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America ("Century"), hereby submits this Memorandum of Law in Support of its Joinder in Petitioner's, Certain Underwriters at Lloyd's of London's ("Lloyd's") Motion to Seal: (1) certain portions of Petitioner's Petition for an Order Confirming Arbitration Award and Entering Judgment and Memorandum in Support of Petition to Confirm Arbitration Award ("Petition to Confirm"); (2) the Final Award dated December 23, 2011, Exhibit 2 to Petitioner's Petition for an Order Confirming Arbitration Award and Entering Judgment ("Final Award").

INTRODUCTION

Accompanying Lloyd's Petition to Confirm – which Century will not oppose – was a Motion to Seal that did not elaborate on why it is important to seal certain portions of the Petition to Confirm and the Final Award.[1] Accordingly, Century feels compelled to join in the Motion to Seal to explain why sealing is necessary and appropriate in this context. The fact that Lloyd's waited until the day before the limitations period ran for filing its Petition to Confirm and did not explain the basis of its motion to seal raises a question about whether Lloyd's has an ulterior motive in seeking to confirm the Final Award and hoping that it becomes public.[2] Where, as here, there is no opposition to the confirmation and no public interest in the Final Award, the motion to seal should be granted.

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[1] The Motion to Seal was provisionally granted by the Honorable Vernon S. Broderick on December 22, 2014, pending further action by this Court.

[2] After nearly three years of silence, Lloyd's advised Century on December 19, 2014 – a Friday at 4:00 PM – that it intended to file its Petition to Confirm the following Monday, December 22, the day before the three year limitation period set forth in the Federal Arbitration Act ("FAA") would expire.

BACKGROUND

The underlying arbitration concluded by final award on December 23, 2011. Since that time, the parties have acted in conformance with the Final Award and there is no indication that the parties will act in any other way in the future. In fact, Century does not oppose the Petition to Confirm.

The arbitration was conducted pursuant to a Confidentiality Agreement, executed by the parties on April 14, 2011. Importantly, the three members of the arbitration panel also signed the Confidentiality Agreement. That agreement provides that all information and documents generated or produced in the arbitration be kept confidential. The Confidentiality Agreement continues to be in effect. A copy of the Confidentiality Agreement is attached hereto as Exhibit 1. The Agreement requires that the parties keep confidential, *inter alia*, "Arbitration Information," including the Award and any interim decisions, subject to certain exceptions. *See Id.* at § 2. One such exception is that an award may be disclosed "in connection with court proceedings relating to any aspect of the arbitration, including but not limited to motions to confirm, modify or vacate an arbitration award . . . ." *Id.* at § 3(b). However, the Agreement also states, in connection with such disclosures, "the parties agree, subject to court approval, that all submissions of Arbitration Information to a court shall be sealed." *Id.* at § 3.

LEGAL ARGUMENT

Although there is a common law right of public access to judicial documents, that right is not absolute. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). The Second Circuit has articulated a three-step process for determining whether documents should be placed under seal. First, the court must determine whether the documents are judicial documents such that the presumption of access attaches. *Id.* A "judicial document" is an "item . . . relevant to the performance of the judicial function and useful in the judicial process." *Id.* (quoting

United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995)). Second, once the court determines that the item to be sealed is a judicial document, the court must then determine the weight of the presumption of access. *Id.* "[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts [*i.e.*, the public]." *Id.* (quotation omitted). "Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quotation omitted). "Finally, after determining the weight of the presumption of access, the court must 'balance competing considerations against it.'" *Id.* at 120. (quotation omitted). "Such countervailing factors include . . . 'the privacy interests of those resisting disclosure.'" *Id.* (quotation omitted).

The Arbitration Award does not concern public health or safety, nor does it involve a public entity or official. Any interest that the public would have in the award is accordingly minimal. On the other side of the scale, in contrast, the parties' legitimate interest in keeping the Arbitration Information contained in the award private is significant. By entering into private arbitration, and then into a Confidentiality Agreement, the parties made clear at the outset their desire for confidentiality.

About a year ago, in another case involving Lloyd's and an affiliate of Century's, the Honorable Andrew Carter, Jr. of this Court granted Century's motion to seal filed in conjunction with a motion to confirm. *ACE Property & Casualty Co. v. Certain Underwriters at Lloyd's*, Civil Action No. 13-CV-6569 (Nov. 6, 2013) (handwritten order accepting joint redaction proposal) (attached as Exh. 2). Century's motion followed an arbitration that was conducted pursuant to a Confidentiality Agreement virtually identical to the one at issue in this matter. The

Court ordered the parties to file a redacted version of the Memorandum of Law removing the Arbitration Information protected by the Confidentiality Agreement. The unredacted version was filed under seal. The same outcome is warranted here.

In another factually analogous matter, *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 (2d Cir. 1997), *cert. den.* 118 S. Ct. 695 (1998), the Second Circuit upheld a similar confidentiality agreement. In that case, the parties had agreed in the underlying arbitration that: (1) the documents produced in the arbitration would only be used in the context of that arbitration; and (2) in the event any such produced documents were filed with a court, they would be filed under seal to protect their confidentiality. *Id.* at 826. When one party filed a petition to modify the arbitration award, and included throughout its papers and copies of and references to documents that were the subject of the confidentiality agreement, the district court placed the entire file, except for the court's opinions and orders, under seal. *Id.* at 820-21, 826. The district court noted the general principle that good cause must be shown for denying public access to judicial files, and concluded that the burden was met under such circumstances. *Id.* at 827. On appeal of that ruling, the Second Circuit affirmed, finding that the district court did not abuse its discretion given the facts before it. *Id.* at 827-28.

As in the *ACE v. Lloyd's* and *DiRussa* matters, this case calls for a sealing of the Final Award and documents discussing it. Century and Lloyd's entered into a Confidentiality Agreement in which they expressly agreed that any Arbitration Information would be kept confidential (subject to particular exceptions set forth therein). The ensuing arbitration was conducted privately, with the expectation that the agreed confidentiality would be maintained by both parties (subject again to the exceptions set forth in the Confidentiality Agreement)

regardless of the outcome. Thus, the parties have a legitimate interest in maintaining the confidentiality of those proceedings.[3]

Moreover, private, confidential arbitration proceedings are common in the reinsurance industry, and the confidentiality of such proceedings are in fact encouraged by industry organizations like ARIAS-U.S. and the Reinsurance Association of America. *See* ARIAS-U.S., Practical Guide to Reinsurance Arbitration Procedure § 3.8, Comment C, attached hereto as Exhibit 3 ("It is generally agreed throughout the industry that reinsurance arbitrations are and should be confidential in most circumstances, even absent the parties' complete agreement"); Insurance and Reinsurance Dispute Resolution Task Force, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes, §§ 7.1, 7.2, attached hereto as Exhibit 4 ("All meetings and hearings of the Panel are private and confidential to the Parties. . . . The Panel and the Parties shall use their best efforts to maintain the confidential nature of the arbitration proceedings and any Decision . . . ."). Undoing the parties' agreement to keep Arbitration Information confidential by not sealing it would undermine the arbitration process in the reinsurance industry, where such proceedings are typically confidential.

Lloyd's failure to vigorously advocate for the sealing of the Arbitration Award and certain portions of its Petition to Confirm should not minimize the importance of the need to seal these documents. In satisfaction of the recognized competing interests, and consistent with the

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[3] The circumstances surrounding the Petition to Confirm and Motion to Seal raise a serious question about the bona fides of Lloyd's motions. First, there is no reason to have the Arbitration Award confirmed because the parties have been acting in conformance with it for three years. Second, Lloyd's chose to file its Petition in this District notwithstanding the fact that the arbitration itself took place in Philadelphia — custom would have dictated that this petition be filed in the Eastern District of Pennsylvania, where motions to seal are more freely granted. If, as it appears, Lloyd's is hoping to have the Final Award become public for its own purposes (and not to benefit the public), that is inappropriate and the motion to seal should be granted. Where, as here, the arbitration award is solely based on the facts presented in that arbitration, there is no public interest in it.

Confidentiality Agreement, Century respectfully requests that the Final Award and documents discussing same be sealed.

As an alternative, the parties could simply submit a stipulated order of confirmation to be signed by the Court. In that case, the Final Award and discussion of it in the Petition to Confirm could be withdrawn because there would be no need for the Court to consider those documents before confirming the Final Award and entering judgment on it.

CONCLUSION

For all of the foregoing reasons, Century requests that this Court seal the Final Award and those portions of the Petition to Confirm discussing it.

Respectfully submitted,

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