

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDS SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 1/11/2010
--

_____ x
AXA BELGIUM, S.A., f/k/a ROYALE BELGE
INCENDIE REASSURANCE,

Petitioner,

09 Civ. 9703 (CM)

-against-

CENTURY INDEMNITY COMPANY,
SUCCESSOR TO INSURANCE COMPANY OF
NORTH AMERICA,

Respondent.

_____ x

MEMORANDUM DECISION AND ORDER TRANSFERRING CASE AND THE
PENDING MOTION TO COMPEL ARBITRATION TO THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

McMahon, J.:

The following are the only facts necessary to dispose of Petitioner's motion to compel arbitration and Respondent's cross-motion to transfer this action to the Eastern District of Pennsylvania:

AXA Belgium, S.A. ("AXA or AXA Belgium") participated as Century Indemnity Company's ("Century's") re-insurer under Century's Excess General Liability Excess of Loss Reinsurance Agreement, colloquially known as Treaty 1001 (or the "Treaty"), for treaty years 1978 through 1986. Treaty 1001 contains a broad arbitration clause.

In 2005, Century initiated arbitration pursuant to the arbitration clause in the Treaty. Although Century indicates that it did so "to address what had seemingly become a pattern and practice of failure to timely pay claims," (Century Mem. in Opp. to Pet. to Compel Arbitration ("Century Br."), Dec. 14, 2009, at 2), the reason why is not important, and the Court makes no finding. In its demand for arbitration, Century sought payment of various reinsurance billings, a declaration of the parties' responsive rights and obligations under the payment and records inspection provisions of the treaty, declarations regarding reinsurers' obligations to pay future billings, and other relief as deemed appropriate by the arbitration panel.

On February 16, 2007, an arbitration panel issued a final award (the “Award”). The Award indicates, inter alia, that certain of Century’s settlements with its policyholders, including Dresser Industries, are “unconditionally binding on [AXA Belgium], such that Petitioner immediately became liable for its share of those settlement amounts. (Aff. of H. Dykowsky (“Dykowsky Aff.”), Nov. 20, 2009, Ex. 2 ¶ 6.) The Award also requires AXA Belgium to pay other reinsurance billings under Treaty 1001 within sixty days of receipt unless, within that period, Petitioner sets forth a substantive reason for denying payment. (*Id.* at ¶ 2.) Century indicates that it has sent “numerous reinsurance billings” to AXA, to which no objection was interposed within the requisite sixty days. According to Century, none of the billings that are the subject of the Award has been paid.

Century filed a motion to confirm the Award in the United States District Court for the Eastern District of Pennsylvania. The motion was not opposed, and the Award was confirmed by a judgment of that court (Diamond, J.) on July 21, 2009. Therefore, whatever the provisions of the Award may be, they have been reduced to a judgment of a United States District Court in a district other than this one.

After confirmation of the Award, Century alleges that it tried to get AXA Belgium to comply with the judgment voluntarily, to no avail. On September 15, 2009, Century served AXA Belgium with demands for discovery in aid of execution. AXA Belgium objected to Century’s interrogatories and document requests. It asserted, inter alia, that it has a contractual right of set-off that must be decided by another arbitration panel before it can be forced to comply with the judgment of the Eastern District of Pennsylvania (the “Judgment”).

On November 12, 2009, Century filed a motion for a finding of civil contempt against AXA Belgium, due to its failure to comply with the Judgment. Century also sought the imposition of coercive sanctions in order to compel answers to the discovery requests. (Dykowsky Aff. Ex. 7.) AXA Belgium was ordered to respond to the motion for contempt by November 20, 2009. It sought and received an extension until November 30, 2009. Although AXA justified its request for an extension by claiming to need “the opportunity to review the many exhibits which are crucial . . . in preparing the opposition papers” (Aff. of J. Caprice, Dec. 14, 2009 (“Caprice Aff.”) ¶ 20 & Ex. D), it did not use the time solely to prepare and file opposition papers. Instead, it served arbitration demands on Century on November 18, 2009.

One of those arbitration demands seeks arbitration of AXA Belgium’s obligation to make payments pursuant to the Judgment; another relates to balances allegedly due under a treaty between a Century affiliate, ACE INA Insurance and AXA Belgium. It is these balances that AXA Belgium now contends it is entitled to set off against amounts it is obligated to pay by virtue of the now-confirmed arbitration award that has been reduced to Judgment in Pennsylvania. In papers filed in the Eastern District of Pennsylvania on November 30, 2009, AXA Belgium insisted that it did not have to pay the Judgment at this time, and could not be held in contempt, because it had a right of set off that needed to be determined by arbitration. But significantly, AXA Belgium did not

ask Judge Diamond to compel arbitration of those issues. Instead, on November 20, 2009, AXA Belgium filed a petition asking this Court to compel arbitration of the purported set off amounts. Century responded to the motion by asking the court to transfer the entire matter to the Eastern District of Pennsylvania.

Century's cross-motion is granted and the Clerk of the Court is directed to transfer this action immediately to the Eastern District of Pennsylvania, and to indicate that it is related to the action by and between the same parties currently pending before Judge Diamond.

There are numerous reasons why this action should go to Philadelphia, but the principal one is this: Petitioner contends that it is not liable to pay a judgment *of that court* because of offsets under various insurance treaties with Respondent. Indeed, that is the defense it either has interposed or plans to interpose to a motion seeking to hold it in contempt for failing to comply with the judgment. The Eastern District of Pennsylvania has a vested interest in determining AXA Belgium's motion to compel arbitration of the offset claims, because a decision on that motion could affect that court's ability to enforce its own judgment and to determine matters collateral to that judgment (including Respondent's motion to hold Petitioner in contempt).

There is also merit in Century's invocation of the "first filed rule," which strongly favors the transfer of a subsequently-filed action to the court where a prior action covering the same subject matter is pending. The first-filed rule does not require that the second action be completely congruent with the first; it merely requires that there be some overlap in the claims asserted. First City National Bank and Trust Co. v. Simmons, 878 F. 2d 76 (2d Cir. 1989); 800-Flowers, Inc. v. Intercontinental Florist, Inc., 860 F. Supp 128, 131 (S.D.N.Y. 1994). It cannot be disputed that there is *some* relationship between the subject matter of this action and the matters pending before Judge Diamond. Petitioner asserts that some of the claims for which he seek to compel arbitration in this Court are defenses to its liability to pay the judgment, and thus give it defenses to the pending motion for contempt for its failure to comply with the terms of the Judgment. Indeed, in its motion to hold AXA Belgium in contempt, filed on November 12, 2009, Century asked the Eastern District of Pennsylvania, inter alia, to declare that AXA Belgium has no right to arbitration of the matters that purportedly constitute set offs. There is more than sufficient duplication of issues to support application of the first-filed rule, thereby sending this action to Philadelphia.

If there has been any forum shopping here, it appears to me that Petitioner, not Respondent, is the guilty party. AXA Belgium first raised the issue of set off in its objections to interrogatories served and filed in the Eastern District of Pennsylvania; it inserted the issues of set off and other arbitrable disputes into that action and it will litigate those issues in that action.

There is absolutely no inconvenience to sophisticated commercial parties like Petitioner and Respondent to litigating in either New York City or Philadelphia (which is but ninety miles from here). So the only issue pertinent to a balance of convenience

analysis is the fact that the parties and subject matter of this petition to compel arbitration is already familiar to the Eastern District of Pennsylvania.

But it is first and foremost the intimate relationship between issues that can only be decided in the Eastern District of Pennsylvania and the instant action that cause this Court to defer to that one. This is a simple matter of comity. This Court is simply not prepared to enter any order that might impact a sister court's ability to enforce its own judgment. Ordering arbitration of these claims would do precisely that. Petitioner can obtain the relief it seeks equally expeditiously in the Eastern District of Pennsylvania. AXA Belgium has not identified a single reason why this busy Court ought to involve itself in this particular matter.

Accordingly, the motion to transfer is granted. When the case arrives in Philadelphia, Petitioner's motion to compel arbitration will be decided. The Clerk of the Court will remove the motion to transfer (docket no. 10) from this court's docket and effect the transfer immediately, so that Judge Diamond can assume jurisdiction over everything that touches on the enforceability of his judgment.

Further, the motion to seal (docket no. 11) is granted, and the Clerk of the Court is instructed to seal all motion papers (and any accompanying affidavits) in this matter because they contain a substantial amount of information that is sensitive (and otherwise irrelevant to the motion to transfer). However, this Court will not seal its decision and order in this case because the decision makes no use of any of this sensitive information.

Dated: January 11, 2010



U.S.D.J.

BY ECF TO ALL PARTIES