UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CENTURY INDEMNITY COMPANY,

Petitioner,

- against -

EQUITAS INSURANCE LIMITED, et al.,

Respondents.
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M E M O R A N D U M
A N D
O R D E R

11 Civ. 1034 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Before the Court are a petition by Century Indemnity Company ("Century") and a cross-petition by one respondent, Harper Insurance Limited ("Harper"), each requesting the confirmation of the same arbitration award. Century has also moved to strike Harper's cross-petition, pursuant to Federal Rule of Civil Procedure 12(f), and for sanctions. For the reasons discussed below, Century's petition for confirmation is granted, Harper's cross-petition is stricken, and the motion for sanctions is denied.

BACKGROUND

On July 24, 2009, Century and its reinsurers, including Harper, concluded an arbitration proceeding by agreeing to a Final Order and Protocol ("the Arbitration Award") issued by the arbitration panel. (Hamelsky Aff. ¶ 18.)

On February 15, 2011, Century filed a petition in this Court seeking confirmation of the Arbitration Award, pursuant to section 207 of the Federal Arbitration Act. 9 U.S.C. § 207. Accompanying Century's petition were several exhibits and a memorandum of law which contained the following allegations:

> In 2001, LMR announced to Century that new documentation requirements must henceforth be met before LMR would pay asbestos losses under the Global Slip (or any other Century treaty reinsured by LMR). For years thereafter, between 2001 and 2005, LMR repeatedly withheld and delayed payment based on, *inter alia*, the contention that such requirements were not met, insisting on voluminous documentation and/or repeated and exhaustive auditing before payments would be made, if they were made at all. . . . Believing that LMR's unilaterally-imposed requirements were extra-contractual and improper, and that LMR were merely delaying or avoiding payment thereby, Century initiated arbitration against LMR pursuant to the arbitration clause in the Treaty, to address what had seemingly become a pattern and practice of failure to timely pay claims.

(Century's Mem. Supp. Pet.) Century concurrently filed a motion to seal its memorandum of law and exhibits, and that motion was denied. (Century's Mem. Supp. Mot. to Strike, Ex. 2.)

On March 8, 2011, after its motion to seal had been denied, Century filed an amended petition with changes to the parties listed in the caption, but no substantive alterations. At this time, Century again filed the same exhibits and memorandum of

law it had filed with its original petition as well as an affidavit from Century's counsel. The affidavit contained numbered paragraphs which restate the above-quoted information nearly *verbatim*. (*See* Hamelsky Aff. ¶¶ 11-12; 14.)

On March 24, 2011, Harper filed an answer and a cross-petition. Harper's cross-petition requested exactly the same relief as Century's petition, namely confirmation, and included a lengthy section entitled "Factual Background" recounting in detail how and why, from Harper's perspective, an arbitrable dispute had arisen between the parties. (*See* Harper's Answer & Cross-Pet. ¶¶ 31-52.) Harper also submitted a four-page memorandum of law in which it argued that the Court should confirm the Arbitration Award by granting the cross-petition, without addressing the fact that Century's petition for confirmation was already before the Court. (Harper's Mem. Supp.)

On April 15, 2011, Century filed a motion to strike Harper's cross-petition on the grounds that it was "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). Accompanying Century's motion was a twelve-page memorandum of law in support which argues that Harper should be subject to sanctions for filing a cross-petition with the improper motive of distorting the factual record. (Century's Mem. Supp. Mot. to Strike 9.)

On April 29, 2011, Harper filed an eleven-page memorandum of law opposing the motion to strike, or in the alternative, seeking to strike the above-quoted paragraphs from Century's memorandum of law and affidavit. (Harper's Mem. Opp.)

On May 27, 2011, Century responded by filing a five-page reply memorandum of law in further support of its motion to strike. (Century's Reply Mem. Supp.)

DISCUSSION

I. Motion to Strike

Federal Rule of Civil Procedure 12(f) permits a district court to strike an insufficient defense or "any redundant, immaterial, impertinent, or scandalous matter," either *sua sponte* or on motion by a party. Although it is left to the district court's discretion, *see, e.g., Equal Employment Opportunity Comm'n v. Bay Ridge Toyota, Inc.*, 327 F. Supp. 2d 167, 170 (E.D.N.Y. 2004), the Second Circuit has stated that, "unless there is a strong reason for doing so," courts should not be inclined to grant Rule 12(f) motions to strike material from the pleadings. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976). The stated rationale for this presumption has been that, at an early stage of the proceedings, it is best for courts to avoid addressing what amount to evidentiary questions, such as the relevance, or pertinence, of

material the parties choose to include in their pleadings. *See id.*

Century moves to strike Harper's cross-petition because that cross-petition was filed with no legitimate purpose since Harper did not oppose Century's petition for confirmation. Quite simply, there is no dispute between the parties that the Arbitration Award in the present case falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), and that this Court may therefore issue an order confirming the Award upon the application of any of the parties to the arbitration, pursuant to 9 U.S.C. § 207. Indeed, both Century and Harper have asked the Court to confirm the Award.

However, because Century's initial motion to seal was denied, the innocuous assertions in the above-quoted paragraphs regarding actions Century "*believ[ed]* [to be] extra-contractual and improper" or "*seemingly* a pattern and practice of failure to pay timely claims" were made public. (Hamelsky Aff. ¶¶ 12; 14 (emphasis added).) The refusal to seal was consistent with the principle that when a party seeks to avail itself of the court system, it must do so consistent with the rules, including public access, of the public forum. *See, e.g.*, Judicial Conference of the United States, Preliminary Report Judicial

Conference Actions 3 (Sept. 13, 2011) (approving policy of sealing case files only where "required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives . . . so that sealing an entire case file is a last resort"); *Standard Chartered Bank Int'l (Americas), Ltd. v. Calvo*, 757 F. Supp. 2d 258 (S.D.N.Y. 2010). After learning that the case was not sealed, Harper reacted by filing a twelve-page answer and cross-petition seeking exactly the same relief as Century's amended petition. Harper chose to include in its cross-petition a lengthy and detailed factual background section of its own, asserting that its pre-arbitration conduct was "collaborative" rather than "unilateral," that Century had acted "in breach of LMR's contractual rights," and that Century's conduct was "wrongful." (Harper's Answer and Cross-Pet. ¶¶ 41; 43; 51.)

Harper's reaction was unjustifiable given that it too wished to have the Arbitration Award confirmed and that no additional information was required by the Court. Although we are mindful of the presumption against deciding evidentiary questions at an early stage of proceedings, the unique context of the present motion is one in which there will be no further proceedings or evidence put before the Court. Where, as here, a motion to confirm an arbitration award is unopposed, the Court

plays no role in reviewing the evidentiary record. *See Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004); *Gibbons v. Smith*, 67 Fed. App'x 52, 54 (2d Cir. 2003). In these circumstances, the Arbitration Award effectively resolves the disputes between Century and Harper as neither party has asserted "grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207. Thus, details of the parties' interactions leading up to the issuance of the Award are completely immaterial and impertinent to the issue of whether the Award should be confirmed. Moreover, it is almost by definition redundant to file a cross-petition seeking exactly the same relief as a petition already before the Court, as Harper did.[1]

Given that Harper did not intend to oppose confirmation but merely disputed certain background facts, it had available at least two sensible means of responding to Century's amended petition. The first, and notably the one chosen by each of the other eleven reinsurer respondents in this case, would have been to simply file *nothing* and ignore the three apparently offending paragraphs, which could not conceivably impact the Court's

[1] We note that Harper is correct that the material it submitted does not rise to the level of the scandalous, and that motions to strike are "usually granted only for scandalous matter." *Metrokane, Inc. v. Wine Enthusiast*, 160 F. Supp. 2d 633, 642 (S.D.N.Y. 2001). Nonetheless, we find the present circumstances to be unusual, as we explained above.

decision to confirm. The second would have been for Harper to inform the Court that it did not oppose confirmation, but did dispute certain background facts.[2]

Whereas choosing either of the two sensible options just described would have permitted the Court to issue the order both parties seek without delay, Harper's chosen course of action has instead unnecessarily prolonged the case and wasted the limited time and resources of the Court and the other parties.

For these reasons, we find Harper's stated aim of filing its cross-petition to "provide[] the Court with appropriate background information" to be disingenuous. (Harper's Mem. Opp. Mot. to Strike 6.) Instead, it appears to be an effort to utilize the Court's public docket for the purpose of influencing non-parties to the present case. In our view, such manipulative conduct cannot be justified by any act of Century and in the unique circumstances here does afford "a strong reason" to grant Century's motion. *Lipsky*, 551 F.2d at 893. Harper's cross-petition is therefore stricken as redundant, immaterial and impertinent matter, and Century's unopposed petition to confirm the Arbitration Award is granted.

II. Motion for Sanctions

[2] We note our view that Century's description of the background to the arbitration award was neither provocative nor strident. Rather, it approached "plain vanilla."

Century's motion does not identify the source of authority for the sanctions it seeks against Harper, a fact noted by Harper in its memorandum in opposition to the motion. (Harper's Mem. Opp. Mot. to Strike 10.) Although we cannot say that Harper's counsel could not be found liable for multiplying proceedings unreasonably and vexatiously under 28 U.S.C. § 1927 on a procedurally proper motion, it is clear that Century did not provide the required notice of this authority for sanctions in its motion. *See Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (2d Cir. 1997) ("An attorney must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against specific charges"). Thus the motion for sanctions must be denied.

However, we note Harper's assertion of its view that it was "entitled" to file a cross-petition for exactly the same relief as a pending petition which it did not oppose, replete with factual assertions that have no bearing on the matter before the Court, solely because it found three paragraphs of the original petition to be "one-sided." (*Id.*) We reject this position in the strongest terms, and refer Harper to the two sensible options described above, either of which would have saved all involved a great deal of time and effort, and would not have resulted in any prejudice to the parties.

CONCLUSION

For the reasons set forth above, Century's petition is granted, Harper's cross-petition is stricken, and Century's motion for sanctions is denied.[3]

SO ORDERED.

Dated: New York, New York
September 27, 2011

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

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[3] While we recognize that all parties have a right to move for reargument and that both parties here may not be totally satisfied with the outcome, we offer our observation that enough ink has already been spilled in this case.