

CLIENT ALERT

Confidentiality v. Public Access: Third Circuit Unseals Arbitration Award Based On Common Law Right of Access

December 30, 2020

On December 24, 2020, the Third Circuit Court of Appeals held that an arbitration award filed in connection with a petition to confirm constituted a “judicial record” to which the common law right of public access applies. The Court also held that the ceding company failed to demonstrate a “clearly defined” injury that would warrant keeping the award under seal. The award was thus unsealed and made available to the public, including the ceding company’s other reinsurers who were not parties to the arbitration. *Pennsylvania Nat’l Mut. Cas. Ins. Co. v. New England Reinsurance Corp.*, No. 20-1872, 2020 WL 7663878 (3d Cir. Dec. 24, 2020).

In April 2018, Pennsylvania National Mutual Casualty Company (“Penn National”) petitioned the District Court to confirm an arbitration award in order to reduce the award to judgment. The arbitration award was filed as part of the petition, and the District Court granted Penn National’s request to file the award under seal. The parties then settled, and the District Court took no action on the petition to confirm.

Everest Reinsurance Company (“Everest”), one of Penn National’s other reinsurers that was not a party to the arbitration, later moved to intervene and unseal the award. The District Court denied Everest’s motion to unseal, but the Third Circuit reversed, holding that the District Court had applied an incorrect standard. As explained by the Third Circuit, under the correct standard, any document filed with a court is a “judicial record” (subject to certain exceptions not applicable in the case), and that “gives rise to a presumptive right of public access.” Unless the party opposing access can demonstrate a “clearly defined and serious injury” that would result from disclosure, the common law right of access prevails.

On remand, the District Court granted Everest’s motion to unseal the arbitration award, but stayed its order pending appeal. On appeal, the Third Circuit affirmed.

The Third Circuit rejected Penn National’s argument that, under an alternative “use” test, the award was not a “judicial record” because the District Court had never actually taken any action on the original petition to confirm. According to the Third Circuit, the “use” test had been rejected in the circuit. Under the rule in the Third Circuit, as long as a document (other than a settlement agreement) “does make its way into the clerk’s file, then the common-law right of access ordinarily attaches.” *Penn Nat’l*, 2020 WL 7663878, at *2 (emphasis in original; citation and internal quotations omitted).

In addition, the Court found that the District Court had not erred in finding that Penn National “did not demonstrate a specific harm sufficient to overcome the presumption of public access.” *Id.*, 2020 WL 7663878, at *2. Penn National had asserted that “other reinsurers might choose to forego paying Penn National and contest their contractual obligation to pay if they learned of the contents in the arbitration award.” However, the Third Circuit agreed with the District Court’s holding that “no ‘clearly defined’ injury existed” because the court “could not determine how many possible relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful.” *Id.* at *2 (citation and internal quotation marks omitted).

As a result of the Third Circuit’s ruling, the arbitration award was unsealed and is now publicly available.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Harry P. Cohen

Partner – New York

Phone: +1.212.803.4044

Email: hcohen@crowell.com

Michael K. Robles

Partner – New York

Phone: +1.212.803.4035

Email: mrobles@crowell.com

Brian J. O’Sullivan

Senior Counsel – New York

Phone: +1.212.803.4056

Email: bosullivan@crowell.com

Kelly H. Tsai

Senior Counsel – New York

Phone: +1.212.803.4069

Email: ktsai@crowell.com