Can a Party Obtain Post-Judgment Relief from a Confirmed Arbitration Award Procured by Fraud?

Introduction

Relief from an Arbitration Award Procured by Fraud

Section 10(a)(1) of the Federal Arbitration Act authorizes Courts to vacate arbitration awards that were "procured by fraud, corruption or undue means." 9 U.S.C. § 10(a)(1). (For a discussion of Section 10(a)(1), see L. Reins. & Arb. Law Forum post here.) But a motion to vacate an arbitration award procured by fraud (or otherwise) is subject to a strict three-month deadline, and Section 10, unlike certain of its state-law counterparts, does not provide for tolling of the three-month deadline on the ground the challenging party did not know or have reason to know it had grounds to allege the arbitration award was procured by fraud. Compare 9 U.S.C. § 10(a)(1) with 2000 Revised Uniform Arbitration Act § 23(b) (Uniform Law Comm'n 2000) (If "the [movant] alleges that the award was procured by corruption, fraud, or other undue means, [then, in that]. . . case the [motion] must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the [movant]."); 1955 Uniform Arbitration Act § 12(b) (Uniform Law Comm'n 1955) ("[I]f predicated upon corruption, fraud or other undue means, [the motion to vacate] shall be made within ninety days after such grounds are known or should have been known.").

Once an award has been confirmed, it has the same force and effect as any other judgment of the court. See 9 U.S.C. § 13. Federal Rule Civ. P. 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or
proceeding for the following reasons:. . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party. . . ." Fed. R. Civ. P. 60(c) provides that "[a] motion under Rule 60(b) must be made within a reasonable time?and for reasons (1), (2), and (3) [i.e., fraud, misrepresentation or misconduct] no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

So can a challenging party obtain relief from a confirmation judgment if: (a) an award-challenging party contends the Court entered judgment oin an arbitration award procured by fraud; (b) by extension, the judgment confirming the award was itself procured by fraud; (c) the award-challenging party did not know or have reason to know it was at the wrong end of an arbitration award procured by fraud until after the three-month statute of limitations for vacating an award had elapsed; and (d) the award-challenging party makes a timely motion for post-judgment relief under Fed. R. Civ. P. 60(b)? According to a district court judge of the U.S. District Court for the Southern District of New York, the answer is "no."

Arrowood Indem. Co. v. Equitas Insurance Ltd., No. 13-cv-7680 (DLC), slip op. (S.D.N.Y. May 14, 2015)

No Post-Judgment Relief from Arbitration Award Procured by Fraud (Alleged or Otherwise)

Background

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Arrowood arose out of an excess-of-loss treaty Arrowood's predecessor(s) in interest had entered into with Underwriters at Lloyd's in the 1960s. The terms of the treaty were apparently part of, or incorporated into, a "Global Slip," which the Court, without much elaboration, described as "a complex contractual reinsurance program." The Global Slip was first negotiated in 1966 and effective January 1, 1967 through December 31, 1968. It was apparently renewed a number of times thereafter, though the court does not say for what period or periods. The renewal agreements were "substantially similar" although they "contain[ed] new contractual language." Slip op. at 2.

The Global Slip covered (apparently among other things) losses in excess of $1 million incurred under Arrowood's casualty insurance policies under three different types of coverage. At issue was "Common Cause Coverage," which covered losses arising out of an "occurrences" during the contract term, provided the occurrence or occurrences were the "probable common cause or causes" of more than one claim under the policies. The Global Slip also contained a "First Advised" clause, which said that "this Contract does not cover any claim or claims arising from a common cause, which are not first advised during the period of this Contract."

Like so many other liability insurers, Arrowood began receiving, adjusting and settling asbestos bodily injury claims beginning in the 1980s. Underwriters at Lloyd's London insisted that Arrowood present its asbestos reinsurance claims on a per claimant per exposure-year basis, absorbing one $1 million retention each year against the total asbestos claim liabilities allocated to that year under the Underwriters' per claimant per exposure-year allocation methodology.

In 2008 Arrowood, after reviewing the contract language, stopped using exclusively the Underwriters-prescribed asbestos personal-injury claim reinsurance allocation methodology, which it had followed for almost 25 years, and began presenting a number of claims under the Common Cause Coverage provision of the Global Slip . Because those claims were not, "first advised" in the years 1967 or 1968, the Underwriters denied them.

The Arbitration and Confirmation Proceedings

One of the parties demanded arbitration in October 2010, and a tripartite panel was appointed. The Underwriters argued, among other things, that: (a) the parties's 25-year course of dealing evidenced a binding agreement on how asbestos claims would be presented to the Underwriters; (b) some claims fell exclusively under employer's liability coverage; and (c) Common Cause Coverage did not apply because the requirements of the First Advised Clause were not satisfied.

Arrowood contended that the First Advised Clause was intended to prohibit recovery only of known losses, the "common cause" of which occurred prior to 1967. Arrowood produced hundreds of thousands of pages of documents, including documents concerning the parties' pre-contract understanding of the First Advised Clause's meaning. But Arrowood objected to, and did not produce, documents concerning "other reinsurers" and "other claims." Slip op. at 4 (quotations in original). Such objections are not unusual in reinsurance arbitration.

Arrowood argued to the Panel that "'there [was not a single fact to support' Underwriters' interpretation of the First Advised Clause." Slip op. at 4.

In March and April 2013 the Panel convened an eight-day arbitration hearing in New York City at which "numerous witnesses testified to the meaning of the First Advised Clause[,]" and "numerous exhibits were presented[.]" Slip op. at 4-5. The Panel made and delivered its Award on April 4, 2013.

The Panel ruled that Arrowood's interpretation of the First Advised Clause was "more reasonable[,]" and "set[] forth its reasoning in some detail and observing that Underwriters 'presented no evidence' by which the Panel might conclude otherwise." Slip op. at 5. Rejecting all of the Underwriters' arguments, the Panel awarded Arrowood $44,808,973.

On October 20, 2013 Arrowood commenced a confirmation proceeding in the U.S. District Court for the Southern District of New York. The Underwriters stipulated to confirmation, and on January 21, 2014 the Court confirmed the award and closed the case.
Smoking Gun?

Nearly a year later, on December 19, 2014, the Underwriters "obtained a document, produced by Arrowood in a different action, that allegedly puts the lie to "Arrowood's argument in theirs." Slip op. at 5. The document was a 1987 letter written by a reinsurance broker to a reinsurer other than the Underwriters (probably a Company Market reinsurer; the opinion does not say), which the Underwriters contended "'sets out in unequivocal terms the very same interpretation of the First Advised Clause that Underwriters propounded to the arbitration panel." The letter "was written to assist in a contemporaneous 1987 claim, not one of those at issue in the instant arbitration[,]" and "described in some detail the broker's understanding of the reasons for and history of the First Advised Clause." Slip op. at 5-6.

Ten days later, on December 29, 2014, the Underwriters "sent a letter to Arrowood expressing concern that the [l]etter had not been produced during arbitration and requesting immediate access, under the Global Slip's audit clause, to all documents related to Common Cause Coverage and the First Advised Clause." Slip op. at 6. Arrowood responded by "explain[ing] that it considered the [l]etter?written to a third party pursuant to a claim not at issue in the arbitration?one of the documents Arrowood had objected to producing, and furthermore that it opposed Underwriters' request [for]. . . an audit as overbroad." Slip op. at 6 (quoting the district court's description of the letter, not the letter itself, which is not quoted in the opinion).

On January 20, 2015, the Underwriters moved the Court for relief from the confirmation judgment under Fed. R. Civ. P. 60(b).
The District Court's Decision

The Underwriters sought relief under Fed. R. Civ. P. 60(b)(3), which, as we mentioned at the outset, authorizes courts to grant relief from a "judgment or order or proceeding" based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Id. Noting that Rule 60(b)(3) relief "cannot be granted absent clear and convincing evidence of material misrepresentation[,]" "cannot serve as an attempt to relitigate the merits[,]'" is "generally not favored and. . . properly granted only upon a showing of exceptional circumstances[,]" the Court explained that Section 10(a)(1) permits vacatur "where the award was procured by corruption, fraud, or undue means. . . . [,]" and that relief under Section 10 is subject to a "strict [three-month] time limit. . . ." Slip op. at 8-10 (quoting 9 U.S.C. § 10(a)(1); other citations and quotations omitted).

The Underwriters claimed that "Arrowood intentionally withheld [the 1987 letter] during the arbitration. . . and deliberately made false statements to the Panel[,]" but "[i]n so doing, they rightly acknowledge[d] that Rule 60(b)(3) cannot be used to challenge directly the arbitration proceedings or the resultant award." Slip op. at 8. They therefore "argue[d] that Arrowood's alleged misconduct was not confined to the arbitration proceeding, but rather 'continued into the judicial proceeding to confirm the award."

Of course, that wasn't much of a judicial proceeding; Arrowood moved to confirm, the Underwriters stipulated to confirmation and the Court entered judgment. There was nothing to suggest that Arrowood obtained the confirmation judgment by any fraud other than that Arrowood allegedly perpetrated during the arbitration. Accordingly, it seems that the Underwriters' argument proved too much: they apparently argued that once the prevailing party moved to confirm the award, the fraud on the arbitrators was effectively transformed into fraud on the court, even though the allegedly defrauding party made no false representation to the Court. But the same could be said of practically any other situation where a party sought confirmation of an award that the other party claims was procured from the arbitrators by fraud.

Thus, and perhaps not surprisingly, the Court said that the Underwriters' "effort to escape the three month limitation imposed by the FAA on motions to vacate. . . arbitration award[s] fails." Slip op. at 8-9. "The judicial proceeding in this case[,]" said the Court, "was a summary affair, the judgment undisputed and stipulated to. However they choose to characterize it, the essence of Underwriters' complaint is that there was misconduct in the arbitration proceedings, not in the summary proceedings before this Court to obtain a confirmatory judgment." Slip op. at 9.

The Court found support for its conclusion not just in commonsense and logic, but also in appellate case law. It explained that [t]he Second Circuit has previously confronted the interaction between 9 U.S.C. § 10 and the Federal Rules, and has found Rule 60(b) a procedurally improper means of redressing alleged wrongs or oversights in arbitration proceedings. Slip op. at 9 (citing Bridgeport Rolling Mills Co. v. Brown, 314 F.2d 885 (2d Cir.
1963) (per curiam)). According to the Court, the Bridgeport Rolling Mills court said "the fact that the party seeking to vacate the award 'may have had, or may now have, sufficient evidence to justify [a different result] is irrelevant to the issues the arbitrator heard and has no bearing upon the arbitrator's determination.'" Slip op. at 9 (quoting 314 F.2d at 885-86.)

With all due respect to the district court, we do not believe the holding in Bridgeport is as broad as the district court's opinion suggests. The Second Circuit held that the Rule 60(b)(3) relief was not warranted because the alleged "fraud" was irrelevant to the outcome of the arbitration, not because it could have been raised in a timely motion to vacate. In any event, in Bridgeport the award-challenging party sought relief under both Section 10 and Rule 60(b)(3) and the Court said nothing about there being any issue of timeliness. Here, by contrast, the award challenging part invoked only Rule 60(b) because by the time the other party sought confirmation, the three-month statute of limitations had elapsed.

The district court's opinions omitted an ellipses (". . . .") after "arbitrator's determination" when it quoted the Second Circuit. The text that followed the ellipses, construed in conjunction with the next sentence of the opinion, demonstrates that Bridgeport turned on materiality, not timeliness: "the fact that the party seeking to vacate the award may have had, or may now have, sufficient evidence to justify [a different result] is irrelevant to the issues the arbitrator heard and has no bearing upon the arbitrator's determination that the employer did not have just cause to discharge him in 1961." 314 F.2d at 885-86 (emphasis added to the text not included in the district court's opinion). The next sentence reads: "Brown's guilt, if now proved, does not require the conclusion that the arbitrator's award, when made was procured by fraud, for the decision of the arbitrator was based upon the failure of the employer's proof to convince rather than on the strength of Brown's alleged perjurious testimony." 314 F.2d at 886 (emphasis added).

The district court also pointed to support for its holding in a district court opinion affirmed without opinion by the Second Circuit, an unreported Fourth Circuit decision referred to in a Second Circuit concurring opinion, an apparent split of authority in the D.C. Circuit and a Ninth Circuit opinion. The footnotes in the opinion also refer to at least one relatively recent Second Circuit decision that the district court distinguishes. A thorough review and analyses of all of these authorities is beyond the scope of this post, although perhaps we shall revisit this issue in a future post.

A Few Observations About Arrowood. . . .

We haven't checked PACER yet, but given the amount in dispute, and the importance of the issue, we would not be surprised if the Underwriters were to appeal this case to the U.S. Court of Appeals for the Second Circuit. If they do then it will be interesting to see how that appeal is decided.

We are not entirely convinced that the district court's decision is a correct interpretation of the interplay between Section 10 and Rule 60(b) and there are various reasons for that. Nevertheless, we see the logic of the Court's opinion, particularly on the facts of this case, where the confirmation proceeding was uncontested, and the essence of the Underwriters' argument was that the party procured the award by fraud or undue means.

Even assuming the Underwriters are successful on a putative appeal, however, they may yet have an uphill battle on remand. From what we can glean from the district court's description of the letter, it does not seem particularly probative of fraud, and fraud

requires clear and convincing evidence. That Arrowood objected to producing documents relating to other reinsurers and claims does little to support the Underwriters' contentions, for such objections are commonly made in reinsurance arbitrations, and have been for some time.

Proving fraud is always difficult and usually requires extensive discovery. Situations like that in the Armstrong arbitration, where fraud was established based on a party's admissions on national television, are the rare exception. (You can read about the Armstrong arbitration here, here, here, here, here & here.)

While our information about the Underwriter's fraud claims is limited to what is set forth in the district court opinion, it seems likely the Underwriters will need a good deal of discovery and/or an evidentiary hearing if they are to establish their claims, and even then they may be unable to do so, either because there was no fraud, or at least no fraud that can be established by clear and convincing evidence. Whether, in the event of a reversal on appeal, the district court will conclude that they are entitled to such discovery and other proceedings remains to be seen.

Photo Acknowledgements: