Corruption, Fraud or Undue Means | Vacating, Modifying, and Correcting Awards | Businessperson?s Federal Arbitration Act FAQ Guide

Section 10(a)(1) of the Federal Arbitration Act authorizes courts to vacate awards where ?the award was procured by corruption, fraud, or undue means. . . .? 9 U.S.C. § 10(a)(1). Cases vacating awards on Section 10(a)(1) grounds are rare, presumably because the circumstances that would trigger relief are relatively rare.

Section 10(a)(1) is an excellent example of how Section 10 is designed to provide relief in situations where putting a court's imprimatur on an award would deprive one of the parties of the benefit of its freely-bargained-for arbitration agreement. It says that corruption, fraud, or undue means in the procurement of an award, whether perpetrated by the arbitrators or a party, spoils the award (assuming the aggrieved party timely moves to vacate). See 9 U.S.C. § 10(a)(1).

There is nothing particularly controversial about that. Persons who agree to arbitrate do not implicitly consent to awards procured through chicanery. And who would want to agree to arbitrate if they would have no recourse against such an award? (See here].) ?Fraud? and ?corruption? describe dishonest, illegal, and deceptive conduct, whereas ?undue means? arguably broader in scope. But ?[t]he term ?undue means' must be read in conjunction with the words ?fraud' and ?corruption' that precede in the statute.? PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 991 (8th Cir. 1999) (citing Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978)). To establish "undue means" courts therefore require ?proof of intentional misconduct? or ?bad faith,? interpreting "undue means" as "connoti[ing] behavior that is immoral if not illegal.? PaineWebber, 187 F.3d at 991 (quotations and citations omitted).

The burden for obtaining relief under Section 10(a)(1) is heavy. It must be ?abundantly clear that [the award] was obtained through ?corruption, fraud, or undue means.'? Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32, 34 (2d Cir. 1951); accord **Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust**, 729 F.3d 99, 106-07 (2d Cir. 2013). That ?abundantly clear? requirement is often described as one of "clear and convincing evidence of fraud or undue means. . . .? International Bhd. of Teamsters, Local 519 v. United Parcel Serv., Inc., 335 F.3d 497, 503 (6th Cir. 2003); accord Renard v. Ameriprise Fin. Servs., Inc., 778 F.3d 563, 569 (7th Cir. 2015); MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 858 (4th Cir. 2010); A.G. Edwards Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988).

In addition to establishing ?corruption, fraud or undue means? by clear and convincing evidence, a Section 10(a)(1) claimant must demonstrate: (a) ?that that the fraud [, corruption or undue means] materially relates to an issue involved in the arbitration[;] and [b] that due diligence would not have prompted the discovery of the fraud [corruption or undue means] during or prior to the arbitration.? United Parcel Serv., 335 F.3d at 503; Renard, 778 F.3d at 569; MCI Constructors, 610 F.3d at 858; A.G. Edwards, 967 F.2d at 1404; Bonar, 835 F.2d at 1383; see Karppinen, 187 F.2d at 35.

A party will ordinarily be deemed to waive the right to vacate the award under Section 10(a)(1) if it failed to exercise due diligence in discovering the corruption, fraud or undue means during the arbitration; if it discovered the improper conduct during the arbitration but did not seek relief from the arbitrators; if it unsuccessfully sought relief and failed to object to the arbitrator's pre-final-award denial of relief; or if the denial of relief was first made in the final award, to preserve its objection by informing the arbitrators that a failure to grant relief would constitute grounds for vacating the award.

As respects the materiality requirement, Section 10(a)(1) says that the ?award? must be ?procured? by ?corruption, fraud or undue means,? which arguably suggests a causal nexus between the proscribed conduct and the award. While the conduct must ?materially relate to an issue in the arbitration,? must it also be outcome determinative? In other words, must the party seeking relief show that the award would have been different but for alleged fraud, corruption or undue means, or is it enough to show that it tainted the

proceedings simply because it related materially to an issue at stake?
The circuits are split on this point. Some courts require the challenger to show that the corruption, fraud or undue means ?caused the award to be given.? See PaineWebber, 187 F.3d at 994 (?there must be some causal relation between the undue means and the arbitration award?); A.G. Edwards & Sons, Inc., 967 F.2d at 1403 (?the statute requires a showing that the undue means caused the award to be given?). Others say that the challenger is required to show a ?nexus? between the conduct and the award?that is, materiality?but need not ?establish that the result of the proceedings would have been different had the fraud[, corruption, or undue means] not occurred.? See, e.g., Odeon Capital Grp. LLC v. Ackerman, 864 F.3d 191, 196 (2d Cir. 2017) (citing cases); Bonar, 835 F.2d at 1383.
Section 10(a)(1) is probably the least commonly invoked ground for vacating an arbitration award. That said, it provides an important safety valve to address rare, but extremely important cases where an award is the product of corruption, perjured testimony or other egregious, dishonest misconduct, and where the challenger was unable to address the problem adequately before the arbitrators.
The next instalment of this series shall address a more commonly invoked ground for vacatur: evident partiality.
Please note. . .]

This guide, including prior instalments, and instalments that will follow in later posts, does not purport to be a comprehensive recitation of the rules and principles of arbitration law pertinent or potentially pertinent to the issues discussed. It is designed to give clients, prospective clients, and other readers general information that will help educate them about the legal challenges they may face in arbitration-related litigation and how engaging a skilled and experienced arbitration attorney can help them confront those challenges more effectively.

This guide is not intended to be legal advice and it should not be relied upon as such. Nor is it a ?do-it-yourself? guide for persons who represent themselves pro se, whether they are forced to do so by financial circumstances or whether they elect voluntarily to do so.

If you want or require arbitration-related legal advice, or representation by an attorney in an arbitration or in litigation about arbitration, then you should request legal advice from an experienced and skilled attorney or law firm with a solid background in arbitration law.

Contacting the Author

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Philip J. Loree Jr. has 30 years of experience handling matters arising under the Federal Arbitration Act and in representing a wide variety of clients in arbitration, litigation, and arbitration-related litigation.

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