What is an Impermissible Collateral Attack on an Arbitration Ruling?

By

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I. Introduction

Those aggrieved by an arbitration award have a number of options to challenge the award under the Federal Arbitration Act. Such a party, within 90 days, may seek an order from the federal district court vacating the award on the basis that:

- The award was procured by corruption, fraud or undue means;
- There was evident partiality or corruption by one or more arbitrators;
- There was a failure to postpone the hearing for sufficient cause, refusing to hear pertinent evidence or other misbehavior prejudicing one of the parties; or
- Arbitrators exceeded their powers or imperfectly executed them so that a mutual, final and definite award was not made.[1]

What happens when a party misses the 90 day deadline and seeks to overturn the arbitration award on different bases? The purpose of this article is to examine selected caselaw on the viability of such attacks on arbitration awards.

II. Caselaw Finding Impermissible Collateral Attacks

A recent case on point is *Texas Brine Co. LLC v. American Arbitration Ass'n,* 955 F.3d 482 (5th Cir. 2020). After awards against Texas Brine were vacated by a state court due to conflicts of interest on the part of arbitrators, Texas Brine sued to recover fees paid to the AAA. Texas Brine argued that vacature pursuant to the FAA was an incomplete remedy to compensate it for

damages. However, the court rejected Texas Brine's argument ruling that Sec. 10 of the FAA was the exclusive remedy for violation of the FAA:

> Congress identified some potential problems that may arise in arbitration with Section 10 of the FAA and provided a limited remedy. The relief, purported harm, and alleged wrongdoing here shows that Texas Brine's claims, at heart, are in fact an unauthorized collateral attack on the arbitration.[2]

In the midst of an investment advisor arbitration, the plaintiff became aware that one of the arbitrators had been retained by a subsidiary of the defendant in an unrelated matter in *Decker v. Merrill Lynch, Pierce, Fenner & Smith,* 205 F.2d 906 (6th Cir. 2000). The panel denied the plaintiff's request for sanctions and recusal and went on to find for the plaintiff, but in an amount that the plaintiff thought was inadequate. Thereafter, the plaintiff sued Merrill Lynch for tortious interference and breach of contract. The court dismissed the claim noting: (1) that Sec. 10 of the FAA provided the exclusive remedy for violations of the FAA; and (2) that the wrong alleged by plaintiff was not the hiring of the arbitrator by the defendant's subsidiary but that the impact it had on the size of the damage awarded to plaintiff. Therefore, the plaintiff's remedy was a motion to vacate under the FAA arguing that the award was procured by "undue means".

Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982) was an investment advisor dispute. The plaintiff lost his arbitration and then sued Merrill Lynch and the Stock Exchange on the basis that they deprived him of a fair hearing. The court noted that Sec. 10 of the FAA provides the exclusive remedy under the FAA and that the plaintiff's allegations fell squarely within the bases enumerated therein for vacating an award. The court rejected the plaintiff's claims ruling:

> [Plaintiff's] claims constitute a collateral attack against the award even though [Plaintiff] is presently suing a different party than his original adversary in the arbitration proceeding and is requesting damages for the acts of wrongdoing rather than vacation. . . . [Plaintiff's] complaint has no purpose other than to challenge the very wrongs affecting the award for which review is provided under section 10 of the Arbitration Act.[3]

Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp. , 512 F.3d 742 (5th Cir. 2008) was an extended dispute over an oil-related contact. After losing a Swiss arbitration, the plaintiff filed an action in Texas alleging RICO and various state statutory and common law claims related to the arbitration. The court rejected the plaintiff's claims as a collateral attack on the arbitration order:

> [Plaintiff] contends that it has pled independent violations of federal and state law, but the ultimate significance of the conduct it complains of can only be found in the effect that it had on the Final Award. . . [I]ts true objective in this suit is to rectify the harm it suffered in receiving the unfavorable Final Award. . . . Though cloaked in a variety of federal and state law claims, [Plaintiff's] complaint amounts to no more than a collateral attack on the Final Award itself.[4]

An arbitration over the proper value of stock was the backdrop for *Sander v. Weyerhaeuser Co.,* 966 F.2d 501 (9th Cir. 1992). Plaintiff sought and failed to obtain a vacation of the panel's valuation and two years later sued for federal and state law securities law violation. The court rejected this claim on the basis that the Plaintiff merely was seeking a reevaluation of its stock through different means.

Arrowood Indem. Co. v. Equitas Ins. Ltd., 2015 U.S. Dist. LEXIS 99787 (S.D.N.Y.) involved an arbitration in which the panel ordered the reinsurer to pay the cedent based on a certain interpretation of the treaty. A year later, the reinsurer came across a document which the reinsurer contended should have been produced in the earlier arbitration and completely contradicted the cedent's position in the earlier arbitration. Ultimately, the reinsurer sought a second arbitration designed to vacate and reverse the earlier arbitration award. The court ruled that this was an impermissible collateral attack:

> [T]he Second Arbitration demand to recover the sums already paid amounts to a collateral attach on the merits of the Award. In practical effect [reinsurers] seek to vacate the Award on the ground that it was wrong . . . in the first place. . . . [T]he FAA does not permit a second arbitration demand to be used to nullify an arbitral award, in whole or in part, on the same untimely ground.[5]

III. Caselaw Finding No Impermissible Collateral Attack

Allocation of molestation claims among multiple years was the issue in *Certain Underwriters at Lloyds's v. Century Indem. Co.*, 2020 U.S. Dist. LEXIS 39242 (D. Mass.). The arbitration panel decided that the cedent's method of allocating the losses to the reinsurer was improper without identifying a proper method. The cedent made slight changes to its allocation and sought arbitration when the reinsurer rejected the new allocation. The reinsurer argued to the court that the second arbitration demand was a collateral attack on the first arbitration. The court rejected this claim on the bases: (1) the issue is really one of preclusion; and (2) it is not evident that the prior arbitration award forecloses the new billing methodology.

Turner v. Anderson, 704 So.2d 748 (Ct. App. FL) involved an arbitration dealing with an alleged securities law violation. The plaintiff in this matter lost that arbitration and in this lawsuit brought a malpractice action against the plaintiff's attorneys based on conflict of interest. The court ruled that the malpractice action was not a collateral attack on the arbitration:

> Plaintiff's claim here is not an attempt to challenge the award to the parties recovering in the arbitration proceeding, but rather a totally separate and distinct claim which is not even subject to being arbitrated . . . . We thus conclude that this suit is not a collateral attack on the arbitration award.[6]

IV. Comments

It appears evident from above caselaw that in considering whether later litigation is an impermissible collateral attack on an earlier arbitration, the court will look to the plaintiff's desired remedy. If the remedy changes or reverses the result of the earlier arbitration, it will be rejected by the courts regardless of the causes of action alleged.

ENDNOTES

[1] 9 U.S.C. Sec. 10.
[2] 955 F. 3d 482 at 489.
[3] 691 F.2d 1205 at 1213.
[4] 512 F.2d 742 at 750.
[5] 2015 U.S. Dist. LEXIS 99787 *16.
[6] 704 So.2d 748 at 749.