IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY,

Plaintiff,

v.

EL BANCO DE SEGUROS DEL ESTADO,

Defendant.

OPINION
AND ORDER

98-C-521-C

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This is a civil action in which plaintiff Employers Insurance of Wausau, A Mutual Company, has moved for relief in aid of enforcement of judgment and writ of execution of this court's January 5, 1999, judgment confirming an arbitration award against defendant El Banco de Seguros del Estado (the state bank of the Republic of Uruguay). Defendant responded to plaintiff's motion by filing a brief, a cross motion and a motion to stay proceedings on plaintiff's motion. In an order entered August 27, 2001, I advised the parties that defendant's cross motion would be considered nothing more than opposition to plaintiff's motion. Defendant seeks to stay proceedings on plaintiff's motion until the District Court for the Southern District of New York has heard its complaint for declaratory relief concerning its letter-of-credit liabilities under the arbitration award.

Plaintiff's motion for relief in aid of enforcement of judgment and writ of execution

will be granted. Defendant's motion to stay proceedings will be denied. Defendant will have until September 30, 2001, to (1) pay the arbitration award of $181,319 plus interest from the date of the award at a compound annual rate of 7.5%; (2) pay attorney fees and costs of $930,730 plus post-judgment interest at the statutory rate; (3) issue a letter of credit to the plaintiff in the amount of $9 million in a form acceptable to the Wisconsin Insurance Department; and (4) pay all plaintiff's attorney fees and costs incurred in collecting the judgment since June 5, 2000, the date the United States Supreme Court denied defendant's petition for review. Moreover, if defendant defies this order it will be held in contempt of court and will be required to pay sanctions to plaintiff in the amount of $2,000 a day for each day it remains in contempt of this order.

UNDISPUTED FACTS

Plaintiff Employers Insurance of Wausau is a mutual insurance company organized under the laws of the state of Wisconsin with its principal place of business in Wausau, Wisconsin. Defendant Banco de Seguros del Estado is the state bank of the Republic of Uruguay with its principal place of business in Montevideo, Uruguay.

Between 1966 and 1973, plaintiff entered into a series of excess retrocessional insurance "treaties" with underwriters, or retrocessionaires, at Lloyd's of London. In effect, the subject treaties obligated the retrocessionaires to pay plaintiff specified percentages of

losses incurred by plaintiff that were within the coverage of the treaties. Defendant was one of these retrocessionaires.

A dispute arose regarding amounts due under the treaties for asbestos-related losses. The treaty contained a clause requiring arbitration of any dispute. An arbitration panel heard the dispute and issued its decision on September 18, 1995. The panel determined that plaintiff was entitled to a total of $7,783,324 from the retrocessionaires. Of this amount, defendant's share is $181,319. Additionally, the panel's order provides:

> If such amounts are not tendered by [the retrocessionaires], either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:
>
> 1) Interest from the date of this award at a compound annual rate of 7.5%;
> 2) Attorneys fees and costs of $930,730 for which [the retrocessionaires] are jointly and severally liable;
> 3) At the expiration of a period of 45 days following the date of this award, [the recessionaires] shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

On January 5, 1999, this court entered judgment confirming the panel's arbitration award. On December 15, 1999, the United States Court of Appeals for the Seventh Circuit affirmed this court's judgment; it denied defendant's petition for rehearing en banc on January 19, 2000. On June 5, 2000, the United States Supreme Court denied defendant's petition for certiorari.

Defendant owes plaintiff approximately $1.7 million ($181,319, plus interest at 7.5%

compounded annually from September 18, 1995, plus $930,730 in attorney fees and post-judgment interest).

OPINION

A. Arbitration Award: Letter of Credit

According to the arbitration award, defendant is required to issue a $9 million letter of credit because it failed to pay its designated share within the award's 45-day time frame. Under the Federal Arbitration Act, defendant had three months to challenge the arbitration award. 9 U.S.C. § 12. When that time expired without a challenge, it was barred from raising an attack on that award at a later date. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 51, 63 n.5 (1981); Lander Company, Inc., v. MMP Investments, Inc., 107 F.3d 476, 478 (7th Cir. 1997) (noting that under the Act "if you fail to move to vacate an arbitration award you forfeit the right to oppose confirmation (enforcement) of the award if sought later by the other party"). Although its obligation to pay had become final three months after September 18, 1995, it never complied with the arbitration award. Instead, nearly three years later, on July 22, 1998, plaintiff had to file a complaint in this court petitioning for judicial confirmation of the arbitration award in order to collect the money due and obtain the $9 million letter of credit required under the award.

Defendant now argues that the letter-of-credit directive requires it only to post a letter

of credit sufficient to secure its share of liability and not one to secure the full $9 million. Plaintiff asserts that defendant was well aware it would have to post the full $9 million if all other retrocessionaires paid the amount they owed and this is merely another stalling tactic to delay issuing the letter of credit. Plaintiff's reading of the arbitration award is a persuasive one. Clearly, the obligation was intended to force the parties to pay up quickly and thereby avoid the obligation. It would not have the desired effect if it were intended merely to secure each party's share of the liability. Defendant chose to stall; by doing so, it assumed the full burden of the letter-of-credit obligation.

Curiously, defendant's current interpretation of the letter-of-credit provision runs counter to its previous arguments to this court and on appeal. For example, while contesting plaintiff's petition for confirmation of the arbitration award, defendant argued to this court that the letter of credit and other arbitration sanctions would be "grossly unfair and would work a terrible hardship." Dft's. Br. in Reply of Respondent's Mot. to Vacate Arbitration Award, dkt. #18, at 19. This argument was rejected on the ground that "the necessity for the letter of credit was a matter addressed at arbitration. Having failed to participate, [defendant] cannot question the conclusions of the panel." Defendant appealed this court's holding to the Court of Appeals for the Seventh Circuit, which affirmed the ruling. Defendant stated in its petition for rehearing en banc, which was denied, that a judgment had been entered "in excess of $10 Million Dollars." Kareken Aff., dkt. #44, Exh. 6, at 1.

Defendant then petitioned for certiorari to the United States Supreme Court, stating specifically that the arbitration award "will be enforceable as a judgment" and would require "the posting of a $9,000,000 letter of credit in favor of [plaintiff]." Plt.'s Reply Br., dkt #43, at 13. Unquestionably, from its pleadings, defendant was aware that it would have to post a $9 million letter of credit if this court's judgment was not overturned. It is clear that after defendant's petition for certiorari was denied, defendant should have paid plaintiff the money due immediately and issued the $9 million letter of credit pursuant to the terms of the arbitration award and this court's judgment confirming that award. Its belated claim of ambiguity sounds hollow. Defendant is required to issue a $9 million letter of credit under the arbitration award. Therefore, I will grant plaintiff's motion for relief in aid of enforcement of judgment and writ of execution and deny defendant's motion to stay the proceedings.

B. Sanctions

Federal courts possess an inherent power to sanction parties for conduct that abuses the judicial process. Barnhill v. United States, 11 F.3d 1360, 1367 (7th Cir. 1993) (citing Chambers v. Nasco, Inc., 501 U.S. 32 (1991)). A court may impose sanctions either to coerce obedience to its order or to compensate the complainant. United States v. Slaughter, 900 F.2d 1119, 1125 (7th Cir. 1990); Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th

Cir. 1988) (citing United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947)). The court maintains broad discretion to set a contempt award "based on the nature of the harm and the probable effect of alternative sanctions." Connolly, 851 F.2d at 933. The complainant must establish a violation of the order by clear and convincing evidence. Stotler and Company v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989) (citing United States v. Huebner, 752 F.2d 1235, 1241 (7th Cir. 1985)). In addition, Fed. R. Civ. P. 70 allows for contempt sanctions if a party fails to comply with a judgment. Stotler, 870 F.2d at 1164 (noting that "Rule 70 permits a court to find a party in contempt if he fails to honor a court's order").

Plaintiff requests sanctions for defendant's refusal to honor this court's judgment after all defendant's appeals had been exhausted. Contradicting its arguments to the Court of Appeals for the Seventh Circuit and Supreme Court, defendant contends that plaintiff has not made a case for sanctions because issuing the full $9 million letter of credit is not enforceable as a judgment. Defendant argues that its delay in satisfying this court's judgment has been caused by plaintiff's demands in excess of the arbitration award; namely, plaintiff's insistence on a letter of credit for the full $9 million. First, because defendant did not appeal the arbitration award within the three-month period as required under the Federal Arbitration Act, it is time-barred from disputing it now. Second, defendant has already appealed the arbitration award and this court's judgment through the federal judicial

system and has lost. When the Supreme Court denied certiorari, defendant should have realized the time for delay tactics had passed. Instead, it continued to stonewall plaintiff, allegedly giving false answers to interrogatories by stating that it had no assets in the United States, when in fact it had over $1.2 million at Citibank, N.A. in New York.

Because I find that plaintiff has demonstrated by clear and convincing evidence that defendant is abusing the judicial process and has defied this court's judgment, I will order defendant to pay all attorney fees and costs plaintiff has incurred in attempting to collect the judgment since June 5, 2000, the date on which the United States Supreme Court denied defendant's petition for review. Moreover, defendant will have until September 30, 2001, to issue a $9 million dollar letter of credit and pay all money due under the arbitration award and this order. If defendant fails to do so, it will be held in contempt of court and will be required to pay sanctions to the plaintiff in the amount of $2,000 a day until it complies with this order.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for relief in aid of enforcement of judgment and writ of execution is GRANTED.

2. Defendant's motion to stay proceedings on plaintiff's motion for relief in aid of enforcement of judgment and writ of execution is DENIED;

3. Defendant has until September 30, 2001, to:

(a) pay the arbitration award of $181,319 plus interest from the date of the award at a compound annual rate of 7.5%;

(b) pay attorney fees and costs of $930,730 plus post-judgment interest at the statutory rate;

(c) issue a letter of credit in the amount of $9 million in a form acceptable to the Wisconsin Insurance Department; and

(d) pay all attorney fees and costs incurred by plaintiff in collecting the judgment since June 5, 2000.

4. No later than September 21, 2001, plaintiff is to submit an itemized accounting of the fees and costs it has incurred since June 5, 2000, in its efforts to collect on the judgment it obtained against defendant.

5. If defendant defies this order, it will be in contempt of court and required to pay sanctions to plaintiff in the amount of $2,000 a day for each day it remains in contempt of this order.

Entered this 13th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge