UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NATIONAL INDEMNITY COMPANY,

Petitioner,

- against -

IRB BRASIL RESSEGUROS S.A.,

Respondent.
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MEMORANDUM AND ORDER

15 Civ. 3975 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

In the latest episode of this now nearly decade-long dispute, the National Indemnity Company ("NICO") seeks to enforce an arbitral award that this Court confirmed in March 2016 against IRB Brasil Resseguros S.A. ("IRB"). ECF No. 70; see Nat'l Indem. Co. v. IRB Brasil Resseguros S.A. ("NICO v. IRB"), 164 F. Supp. 3d 457 (S.D.N.Y. 2016). Also before the Court is a motion from Companhia Siderurgica Nacional S.A. ("CSN") to intervene in this proceeding on the ground that it is the ultimate beneficiary of the award in question. ECF No. 81. For the following reasons, NICO's motion to enforce the award and CSN's motion to intervene are both granted.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

A. Reinsurance Agreements and Related Disputes

CSN is a Brazilian mining and steelmaking conglomerate that owns and operates the TECAR coal terminal in Rio de Janeiro. NICO v. IRB, 164 F. Supp. 3d at 460-61. CSN bought two direct insurance policies for the TECAR facility: the first policy was in effect from January 21, 2007 to November 21, 2007 (the "Original Period"), and was extended to cover November 21, 2007 to February 21, 2008 (the "Extension Period"). Id. at 461. The second policy was in effect from February 21, 2008 to February 21, 2009 (the "Renewal Period"). Id. IRB reinsured a significant portion of these insurance policies, and NICO provided IRB with retrocessional coverage[2] for the Extension Period and Renewal Period (but not the Original Period).[3] Id.

The terms of NICO's obligations to IRB were formalized in two retrocessional agreements: one covering the Extension Period (the "2007 Contract"), and another covering the Renewal Period (the "2008 Contract"). Id. Pursuant to the 2008 Contract, NICO

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[1] The facts of this case are described in detail in NICO v. IRB, 164 F. Supp. 3d at 460-73. We assume the reader's familiarity with the case and only provide the background relevant for deciding the motions before the Court.

[2] Reinsurance is insurance for insurers, while retrocession (provided by a "retrocessionaire" to a "retrocedent") is insurance for reinsurers.

[3] IRB previously argued that NICO's contract for the Renewal Period was invalid. However, both the arbitration panel and this Court found that NICO provided retrocessional coverage for the Renewal Period. Id. at 461 n.5, 472, 486-87.

received a premium of $9,114,240 (the "2008 Premium") directly from CSN.[4] Id. at 462.

In July 2008, CSN notified its direct insurer and IRB that it had incurred substantial losses related to the conveyor system for iron ore at the TECAR terminal. Id. at 462-63. NICO subsequently learned of the loss and commenced arbitration against IRB. Id. at 463. When CSN filed litigation against IRB in Brazil, NICO and IRB agreed to stay their arbitration pending resolution of the Brazilian litigation, which CSN and IRB eventually settled for $167,391,030.33. Id. at 467-68. IRB then requested that NICO pay $41,364,857.81 of the settlement, which IRB alleged was NICO's required contribution under the 2007 Contract. Id. at 468.

At the same time CSN and IRB settled the Brazilian litigation, they entered into a second agreement. NICO provocatively calls this agreement the "secret side deal," while IRB explains that it was intended to settle CSN's pending appeal of a Brazilian appellate court's ruling that IRB had not reinsured CSN in the Renewal Period. Id. at 468, 469 n.14. Under this "deal," CSN and IRB agreed to take the position, with retroactive effect, that IRB had reinsured CSN for the 2008-09 period, but had never ceded the

[4] NICO states that, after commission to CSN's agent and broker, Catalyst Re Consulting, LLC ("Catalyst Re"), the premium totaled $8,931,955.20. ECF No. 72 at 3. In various filings in these and related proceedings, the parties have described the 2008 Premium as either $8,931,955.20 or $9,114,240. For the purposes of the present motions, we will proceed on the assumption that the 2008 Premium is approximately $9 million.

CSN-related risk to an international reinsurer (a position inconsistent with the 2008 Contract, which describes a retrocessional agreement with NICO). Id. at 468-69. IRB also agreed to cooperate with CSN to recover any premium paid to international insurers; in turn, CSN renounced its claim to coverage for damages over the 2008-09 period. Id. at 469.

CSN then demanded that NICO return the 2008 Premium, citing the "secret side deal" as evidence that NICO had not provided IRB with retrocessional coverage for the Renewal Period. Id. at 470. NICO brought this demand to the attention of the panel in its arbitration with IRB and requested a ruling that IRB hold NICO harmless for any liability related to the 2008 Premium. Id.

B. The Arbitration Awards

The panel in the arbitration between NICO and IRB issued three awards.[5] Id. at 470-73. The panel's second award (the "Second Award"), which is at issue in the instant motions, stated:

> (a) NICO reinsured IRB for the renewal period; (b) NICO is entitled to retain the premium it received for its reinsurance of IRB for the renewal period; (c) IRB is obligated to hold NICO harmless for (and indemnify NICO against) CSN's claim for the return of the premium it paid to NICO for the renewal period, limited to the premium amount paid and the fees and

[5] In the first award, the panel determined that it was not reasonable to allocate the CSN loss to the Extension Period, and NICO was therefore not liable to IRB for any portion of the CSN loss. Id. at 470-71. The third award ordered IRB to pay NICO's fees and costs of $2,524,486.40. Id. at 472-73. These two awards are not presently before the Court.

> costs incurred by NICO in connection with CSN's premium collection efforts.[6]

ECF No. 71-1, p. 4 (emphasis added).

This Court filed a memorandum and order on March 10, 2016 and entered judgment on March 15, 2016 granting NICO's petition to confirm all three awards and denying IRB's cross-petition to vacate. ECF Nos. 35, 36. NICO submitted its first motion to enforce the judgment on April 5, 2016. ECF Nos. 38-41. After IRB appealed this Court's order confirming the awards to the Second Circuit, we denied NICO's first motion to enforce as premature given the ongoing appeal. ECF No. 65.

C. The New Jersey Action, Mediation, and Settlement

While the confirmation process was ongoing in this Court, NICO and CSN were engaged in separate litigation related to liability for the 2008 Premium. On February 2, 2015, NICO filed a complaint in the United States District Court for the District of New Jersey, alleging claims of tortious interference, unjust enrichment, injurious falsehood, prima facie tort, and civil conspiracy against CSN, IRB, and Catalyst Re. NICO v. CSN, No. 15-cv-752 (D.N.J.) (the "New Jersey Action" or "NJA"), ECF No. 1. NICO also sought a declaratory judgment that NICO had no obligation

[6] IRB's party-arbitrator dissented from the Second Award. IRB initially filed a copy of the dissent with this Court as supplemental evidence in support of its motion to vacate, NICO v. IRB, No. 15-cv-1165 (S.D.N.Y.), ECF No. 43, but later withdrew it from the docket when it was revealed that it had been drafted by IRB's former counsel and provided to the dissenting arbitrator ex parte, NICO v. IRB, No. 15-cv-1165 (S.D.N.Y.), ECF No. 47.

to pay CSN for the 2008 Premium. CSN moved to dismiss for lack of personal jurisdiction and lack of proper service, and Catalyst Re, CSN's broker, moved to dismiss for failure to state a claim. NJA ECF Nos. 9, 21. On June 23, 2015, after extensive briefing on each of these motions, and while each motion was still pending, the case was referred to mediation, with the Honorable Faith S. Hochberg, a former Judge of the United States District Court for the District of New Jersey, appointed as mediator. NJA ECF No. 64.

The initial mediation spanned more than 120 days and included two full-day in-person mediation sessions, as well as frequent communications between the parties and Judge Hochberg. See NJA ECF No. 90, p. 3. NICO represented that the mediation was ultimately unsuccessful given the parties' irreconcilable differences as to whether the court had personal jurisdiction over CSN. NJA ECF No. 70, pp. 2-3.

On November 11, 2015, NICO voluntarily dismissed its claims in the New Jersey Action against IRB without prejudice. NJA ECF No. 72. IRB did not object, and the court ordered IRB's dismissal on November 18, 2015. NJA ECF No. 74. IRB did not subsequently seek to intervene in the New Jersey Action. On February 8, 2016, the court denied CSN's motion to dismiss for lack of personal jurisdiction on NICO's claims for declaratory relief related to CSN's rights with regard to the 2008 Premium, and ordered the

parties to return to mediation with Judge Hochberg. NJA ECF Nos. 86-88.

During this second round of mediation, NICO and CSN agreed to settle their dispute for $5 million.[7] Their April 26, 2016 settlement agreement ("NICO-CSN Settlement Agreement") provides, in relevant part:

> 1. NICO and CSN agree to settle CSN's claim for premium under the 2008 Retrocessional Contract for the sum of $5,000,000 US Dollars (the "Settlement Amount").
> 2. NICO shall have no liability whatsoever to pay the Settlement Amount to CSN from its own funds.
> 3. Instead, NICO shall promptly pursue a judgment against IRB for $5,000,000 plus interest and NICO's legal fees pursuant to its hold harmless and indemnity rights against IRB as granted to NICO under the April 15, 2015 award and as confirmed by the NY Judgment.
> . . .
> 22. The Parties recognize that entry of a judgment against IRB for the Settlement Amount may require a determination by the court in the NY Action that the settlement reflected in this Agreement is reasonable in light of the litigation risks, costs, and expenses facing each Party, and it is the express mutual understanding of the Parties that this Agreement is not conditional upon the court in the NY Action making such determination.

ECF No. 83-6, pp. 5, 10. The recitals to the NICO-CSN Settlement Agreement stated that CSN believed it was entitled to the return of the approximately $9 million Premium and over $6 million in interest, while NICO maintained that neither CSN nor IRB was entitled to the 2008 Premium or any other amount under the 2008 Contract. ECF No. 83-6, p. 4. NICO and CSN explained that they

[7] At oral argument, counsel for CSN represented that IRB was involved in the second round of mediation, but was not present when NICO and CSN drafted the settlement agreement. Oral Arg. Tr. (Jan. 9, 2018) 9:5-12.

agreed to the $5 million settlement as a compromise between these positions and in order to avoid the risk and expense of litigation in the United States and Brazil. Id.

D. Recent Procedural History

On January 31, 2017, the Second Circuit affirmed this Court's judgment confirming the three arbitration awards and rejecting IRB's motion to vacate. NICO v. IRB, 675 F. App'x 89 (2d Cir. 2017). NICO then filed a renewed motion to enforce the Second Award, requesting $5 million for the 2008 Premium, legal fees and costs of $497,901.69 from the New Jersey Action, and legal fees associated with the instant motion to enforce.[8] ECF Nos. 70-72, 75. IRB opposed the motion to enforce, ECF Nos. 73-74, 78, 87, and CSN sought to intervene in support of the motion, ECF Nos. 81-83, 88.

III. DISCUSSION

A. Motion to Intervene

CSN argues that it is entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, alternatively, that the Court should grant it permission to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. ECF No. 82. Neither IRB nor any other party opposes

[8] At oral argument, NICO indicated that the dispute over attorneys' fees and costs for the New Jersey Action has been resolved, and that it is no longer seeking attorneys' fees and costs for the present motion. Oral Arg. Tr. at 13:5-6, 19:19-20. NICO's requests for fees and costs are therefore moot.

CSN's motion to intervene, and the Court grants this motion. See ECF No. 87, p. 4 ("IRB does not dispute that CSN has a legitimate reason to intervene in the case for purposes of supporting NICO's Renewed Motion.").

B. Motion to Enforce

The parties dispute the scope of the second award, which requires IRB to indemnify NICO against CSN's claim for the return of the 2008 Premium. NICO asserts that IRB is liable for the $5 million settlement from the New Jersey Action, which NICO contends "falls squarely within the [Second Award's] broad indemnification and hold harmless language." ECF No. 72, p. 11. IRB responds that it has no obligation to pay NICO $5 million for the NICO-CSN Settlement because (1) the Settlement extinguished IRB's obligation to indemnify NICO for CSN's return-of-premium claim since NICO has been unconditionally released from any liability for that claim; (2) CSN and NICO actually settled the claim for $0; and (3) the Settlement was reached in bad faith and is presumptively unreasonable. ECF No. 73, pp. 7-13, ECF No. 78, pp. 4-7, ECF No. 87, pp. 4-7

1. Legal Standard

A federal court has inherent power to enforce its judgments. Peacock v. Thomas, 516 U.S. 349, 356 (1996). Once a court has entered judgment, "it has ancillary jurisdiction over subsequent proceedings necessary to 'vindicate its authority and effectuate

its decrees.' This includes proceedings to enforce the judgment." Dulce v. Dulce, 233 F.3d 143, 146 (2d Cir. 2000) (quoting Peacock, 516 U.S. at 354). A judgment confirming an arbitration award under the Federal Arbitration Act "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13.

The power to enforce an arbitration award does not extend beyond the scope of the confirmed award embodied in a judgment. Nat'l Football League Players Ass'n v. Nat'l Football League Mgmt. Council, 523 F. App'x 756, 760 (2d Cir. 2013). "[T]he judgment to be enforced encompasses the terms of the confirmed arbitration awards and may not enlarge upon those terms. . . . Once confirmed, the awards become enforceable court orders, and, when asked to enforce such orders, a court is entitled to require actions to achieve compliance with them." Zeiler v. Deitsch, 500 F.3d 157, 170 (2d Cir. 2007).

2. Analysis

The issue before the Court is whether NICO's request to hold IRB liable for the $5 million NICO-CSN Settlement falls within the terms of the Second Award. If so, we must enforce the terms of the Award. See Zeiler, 500 F.3d at 170.

The Second Award provides, in relevant part, "IRB is obligated to hold NICO harmless for (and indemnify NICO against) CSN's claim for the return of the premium it paid to NICO for the renewal period, limited to the premium amount paid and the fees and costs incurred by NICO in connection with CSN's premium collection efforts." ECF No. 71-1, p. 4. The Court confirmed the Second Award, NICO v. IRB, 164 F. Supp. 3d at 487-88, and the Second Circuit affirmed, NICO v. IRB, 675 F. App'x at 91, thereby making IRB's obligation to indemnify NICO for CSN's claim for the 2008 Premium an enforceable court order, see 9 U.S.C. § 13.

The parties agree that "CSN's claim for the return of the premium it paid to NICO for the renewal period" refers to CSN's claim in the New Jersey Action.[9] ECF No. 71-1, p. 4. IRB's indemnification obligation is capped at "the premium amount paid," which the parties agree is approximately $9 million. Id. NICO and CSN settled the claim in the New Jersey Action for $5 million, approximately $4 million less than IRB's maximum indemnification obligation, and therefore within the scope of the confirmed Second Award.

IRB does not contest this analysis. Rather, it asserts that the fact that NICO has no liability to pay CSN the $5 million

[9] For example, IRB concedes that NICO's attorney's fees and costs in the New Jersey Action were incurred by NICO "defending against CSN's claim for a return of premium." ECF No. 73, p. 13.

settlement from its own funds ends IRB's indemnification obligation to NICO. IRB argues that, under New York law, "an insurer's obligation to indemnify extends only to the damages the insured is legally obligated to pay." McDonough v. Dryden Mut. Ins. Co., 276 A.D.2d 817, 818, 713 N.Y.S.2d 787, 788 (3d Dep't 2000); see also Westervelt v. Dryden Mut. Ins. Co., 252 A.D.2d 877, 879, 676 N.Y.S.2d 358, 360 (3d Dep't 1998) ("A release discharging an insured from all liability effectively relieves an insurer from indemnifying under a contract of insurance."); Erdman v. Eagle Ins. Co., 239 A.D.2d 847, 849, 658 N.Y.S.2d 463, 466 (3d Dep't 1997) ("An insurer has no obligation to defend an action if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy.") (emphasis in original) (internal quotation marks omitted). IRB therefore asserts that the NICO-CSN Settlement Agreement either extinguished the indemnification obligation entirely or resulted in a settlement for $0.[10]

[10] CSN and NICO point us to contrary authority from the Second Circuit. In Pinto v. Allstate Ins. Co., 221 F.3d 394 (2d Cir. 2000), the court found that the parties did not intend to extinguish an assigned insurance claim by entering a release. Id. at 403-04. Since the parties would have achieved their desired result had they entered a covenant not to sue rather than a release, the Court declined to "exalt form over the spirit of the agreement" and "g[a]ve force and effect to the intention of the parties." Id.; see also Plath v. Justus, 268 N.E.2d 117, 28 N.Y.2d 16 (N.Y. 1971) (interpreting a release as a covenant not to sue so as to effectuate the parties' intentions).

This argument misses the point. IRB's obligation to pay any amount NICO owed CSN preceded the NICO-CSN Settlement Agreement. It was an obligation embodied in a judgment of this Court. It is not a private contract between insurer and insured, and it is not properly characterized as "an insurer's obligation to indemnify."[11] See McDonough v. Dryden Mut. Ins. Co., 276 A.D.2d at 818. The provision in the NICO-CSN Settlement Agreement that "NICO shall have no liability whatsoever to pay the [$5 million] Settlement Amount to CSN from its own funds" simply reflected the reality of the arbitration award. ECF No. 83-6 at 5.

We also reject IRB's argument that the $5 million settlement was unreasonable or was reached in bad faith. CSN claimed damages of more than $15 million in the New Jersey Action, equal to the 2008 Premium and an additional $6 million in interest, while NICO argued that it had no liability whatsoever. Judge Hochberg presided over the court-sponsored mediation where the parties agreed to settle this claim for $5 million, one-third of CSN's total claim.

Viewing the settlement from CSN's perspective, as we should, it was not unreasonable or in bad faith to settle for one-third of the total value of its claim and $4 million less than the maximum

[11] The fact that NICO and IRB happen to be in the insurance business is incidental. If the arbitration award obligated one confectionery company to indemnify another against a third party's claim, the result here would be the same.

amount IRB was required to indemnify. See Koch Indus., Inc. v. Aktiengesellschaft, 727 F. Supp. 2d 199, 225 (S.D.N.Y. 2010) ("In the context of indemnification, courts routinely find settlements to be 'reasonable' when the recovery at trial could have been greater.").

As for IRB, it made strategic decisions in the New Jersey Action not to object to being dismissed and not to seek to intervene, which it clearly could have done. See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (holding that the requirement of personal jurisdiction may be waived). Moreover, NICO (and in turn, IRB) faced potential legal exposure if the New Jersey Action had not settled. Although the panel in the NICO-IRB arbitration concluded that NICO was entitled to keep the 2008 Premium, NICO still faced potential liability in Brazil, as it "was uncertain . . . whether, in a litigation involving CSN, full faith and credit would be applied by a Brazilian Court to a U.S. arbitration award to which CSN was not a party." ECF No. 71, p. 7.

Therefore, assessing the record as a whole, the Court does not find that the NICO-CSN Settlement was unreasonable or that it was reached in bad faith.

IV. CONCLUSION

For the foregoing reasons, CSN's motion to intervene, ECF No. 81, and NICO's motion to enforce the judgment, ECF No. 70, are granted.

Dated: New York, New York
January 23, 2018

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE