Who Decides the Preclusive Effect of a Prior Arbitration Award?

Friday, March 6, 2015

What happens when one party loses an arbitration and then commences a second arbitration against the same counterparty over similar issues? Can the party that won the arbitration and then had the award confirmed in federal court obtain an injunction precluding the first party from moving forward with the second arbitration? Apparently not.

In a recent *Second Circuit* decision, the court determined that the district court correctly denied an application to enjoin an arbitration based on the argument that the prior federal judgment confirming the first arbitration award precludes the second arbitration. *Citigroup, Inc. v. Abu Dhabi Investment Auth.*, No. 13-4825-cv (2d Cir. Jan. 14, 2015). While this is not an insurance or reinsurance decision, it is a fairly important decision concerning the preclusive effect of a federal judgment confirming an arbitration award.

In the good old days when a party won an arbitration the losing party would act accordingly and comply with the arbitration award. While running to court to obtain a federal judgment confirming an arbitration award was certainly a conservative belt and suspenders (or belt and braces for those of you across the pond) practice, it was not generally done or believed to be necessary.

Today, the knee-jerk reaction of many who win an arbitration is to obtain that federal judgment as soon as possible just in case enforcement of the arbitration award (and now the judgment) becomes necessary. Strategically, confirming an arbitration award was thought to give the winning party some leverage should a future dispute arise. That presumed leverage was using the federal judgment confirming the arbitration award to defeat a second arbitration based on concepts of issue or case preclusion (the old res judicata or collateral estoppel). In other words, enforcing a court judgment sounded better than enforcing an arbitration award.

Multiple cases have held that in most circumstances, and certainly under the *Federal Arbitration Act*, the issue of whether a prior arbitration award will have a preclusive effect in a subsequent arbitration is for the second arbitration panel to decide. But what about the preclusive effect of the federal judgment confirming that prior arbitration award?

The Second Circuit Court of Appeals has now made it clear (at least in the Second Judicial Circuit) that the arbitrators in the second arbitration remain the proper party to determine the preclusive effect of that prior arbitration award, including the preclusive effect of the federal judgment confirming that arbitration award. A federal district court, said the circuit court, cannot enjoin the second arbitration under the guise of enforcing the court’s judgment.

The court’s rationale for this principle is straightforward. When a prior federal judgment merely confirms an arbitration award through a limited procedure that does not involve consideration of the merits of the underlying claim no injunction may be issued to enjoin the subsequent arbitration. The Second Circuit rejected the notion of creating a hierarchy of judgments confirming arbitration awards between state confirmations and federal confirmations. Because the district court did not review the merits of the substantive claims or the context in which the underlying claims arose, the circuit court found that the district court was not the best interpreter of what was decided in the arbitration.

In other words, the mere act of confirming an arbitration award without ruling on and examining the merits of the
underlying dispute and the arbitrators’ award cannot convert the judgment into one that requires injunctive protection in order to preserve and enforce the judgment. The claim that the second arbitration was an assault on the federal judgment was rejected by the court. Tension between the competing concerns of the FAA’s national policy favoring arbitration and the integrity of federal judgments was, in this case, resolved in favor of the FAA.

From this decision we find that it is the arbitrators that are to resolve the claim-preclusive effect on an arbitration award whether confirmed by a state or federal court and including the claim-preclusive effect of a federal judgment confirming an arbitration award. That is not to say that an injunction may never be issued to protect a federal judgment arising from an arbitration, but on the facts here—which are typically the facts when a petition to confirm a reinsurance arbitration is filed—no injunction will lie and the second arbitration panel is left to address the question of preclusion.

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