Is My Arbitration Final or Is it Groundhog Day?

STROOCK & STROOCK & LAVAN LLP[1]

I. INTRODUCTION

It is universally recognized that one of the most important benefits of arbitration is finality. As recognized by the United States Court of Appeals for the Second Circuit, "parties choose to arbitrate because they want quick and final resolution of their disputes." *Florasynth v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984). The statutes governing arbitration practice and procedure, namely the Federal Arbitration Act ("the FAA"), the New York Convention, the Uniform Arbitration Act ("the UAA"), and New York Civil Practice Law and Rules ("CPLR") Article 75, each embody the principle of finality by providing narrow grounds upon which an arbitration award may be vacated or modified, and by establishing truncated time frames in which to do so. Underscoring the importance of the finality of arbitration awards, the Supreme Court has held that Sections 9-11 of the FAA (concerning the confirmation, modification and vacatur of arbitration awards) substantiate " a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, LLC v. Mattel, Inc*., 552 U.S. 576, 588 (2008).

Despite the bedrock principle of finality of arbitration awards, more and more parties are attempting to avoid unfavorable awards, most often through motions to vacate. What happens when efforts to vacate an unfavorable award fail, or there is no attempt made to vacate an award within the applicable timeframe? The answer would appear to be that the award (now a

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[1] It is important to understand that opinions and comments expressed in these materials and during the conference sessions are not necessarily those of ARIAS•U.S., the firms or companies with which the speakers are associated, or even the speakers, themselves. Some arguments are made in the context of fictitious disputes as illustrations of methods of handling issues. Others are individual opinions about the handling of an issue. Every dispute or matter presents its own circumstances that provide the context for decisions.

judgment) is final and binding. This article addresses the finality of arbitration awards post-confirmation, and whether parties can nonetheless obtain a second bite at the apple through the commencement of a second arbitration.

II. THE ARBITRATION MERRY-GO-ROUND

There are two different factual circumstances under which parties have sought to commence a second arbitration against the very same party with whom it has previously arbitrated: (1) where a party commences a second arbitration which is allegedly precluded by the first arbitration on *res judicata*[2] or collateral estoppel grounds, as was the case in *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F.3d 126 (2d Cir. 2015) ("*Citigroup*") and (2) where a party tries to undo unfavorable results of the first arbitration by bringing a second arbitration that directly attacks the first award, as was the case in *Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, No. 13 cv 7680, 2015 WL 4597543 (S.D.N.Y. July 30, 2015) ("*Arrowood*"). Parties faced with a second arbitration demand from the same party against whom they have previously arbitrated must determine whether the facts of their case are more aligned with those in *Citigroup* or *Arrowood*.

A. Claim Preclusive Effect of an Arbitration Award

It is well established that arbitration awards have the same claim preclusive effect as judgments issued by courts. *See e.g.*, *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) ("When an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of

[2] "The doctrine of claim preclusion, or *res judicata*, bars the subsequent litigation of any claims that were or could have been raised in a prior action." *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F.3d 126, fn. 1 (2d Cir. 2015).

issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated," citing to Restatement (Second) of Judgments § 84(3); *see also* Barry R. Ostrager & Mary Kay Vyskocil, *Modern Reinsurance Law & Practice* (3d ed.) § 14.06[a] ("[c]onsistent with the strong federal public policy favoring arbitration as an efficient and effective means of dispute resolution, courts have uniformly held that the doctrines of res judicata and collateral estoppel apply to arbitration awards to bar subsequent consideration of previously considered claims and issues.").

Even though arbitration awards are entitled to the same claim preclusive effect as judgments, a number of courts have found that the degree to which arbitration awards are afforded claim preclusive effect is arbitrable. *See, e.g.*, *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*, 88 F.3d 129, 136 (2nd Cir. 1996) ("*Belco*"); *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968 (7th Cir. 2000).[3] This principle aligns with the long-standing federal policy favoring arbitration. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (holding "that the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not the judge.").[4] The Second Circuit in *Belco* determined that preclusion "is as much related to

[3] Notably, in New York State Courts applying CPLR Article 75, courts are empowered to enjoin a second arbitration on the grounds that it is barred by res judicata following an earlier arbitration between the parties. *See e.g.*, *American Honda Motor Co., Inc. v. Dennis*, 259 A.D.2d 613 (2d Dep't 1999); *Lari v. Slanetz*, 240 A.D.2d 581 (2d Dep't 1997); *Matter of Pete Klein Assoc. v. Goldenberg*, 183 A.D.2d 717 (2d Dep't 1992).

[4] In *Howsam*, the United States Supreme Court termed "any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." *Howsam*, 537 U.S. at 83. "Questions of arbitrability" are those "narrow circumstance[s] where contracting

the merits [of the dispute] as such affirmative defenses as a time limit in the arbitration agreement or laches[.]" *Belco*, 88 F.3d at 136. Notably, although arbitrators have the authority to determine the claim preclusive effect of an arbitration award under the law of some circuits, arbitration panels nonetheless have discretion to apply that principle; arbitrators "need not follow judicial notions of issue and claim preclusion." *Lindland v. United States of Am. Wrestling Ass'n, Inc.*, 230 F.3d 1036, 1039 (7th Cir. 2000).

The preclusive effect of an earlier arbitration award was recently explored by the Second Circuit in *Citigroup*, where *Citigroup* attempted to use the All Writs Act to bypass the arbitrability of the defense of claim preclusion as set forth in *Belco*. In that case, the parties, Citigroup, Inc. and the Abu Dhabi Investment Authority ("ADIA") participated in an arbitration in which ADIA "asserted claims of fraud, securities fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing" against Citigroup. *Citigroup*, 776 F.3d at 127. Following a lengthy hearing, the Panel ruled for Citigroup and dismissed ADIA's claims. *Id.* Citigroup sought to confirm the award, and ADIA moved for vacatur, in the United States District Court for the Southern District of New York. The District Court denied ADIA's motion for vacatur and entered a judgment confirming the award. *Id.* ADIA appealed the District Court's decision, and the Second Circuit affirmed. *See Abu Dhabi Inv. Auth. v. Citigroup, Inc.*, 557 Fed.Appx. 66 (2d Cir. 2014).

While ADIA's appeal was pending in the Second Circuit, ADIA commenced a second arbitration against Citigroup, alleging that Citigroup breached its contract and breached its

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parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84. The Supreme Court also determined that "'questions of arbitrability' [are] *not* applicable in other kinds of general circumstance where parties would likely accept that an arbitrator would decide the gateway matter;" for example, "'procedural' questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator to decide." *Id.* at 79, 84 (citing to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964)).

implied covenant of good faith and fair dealing. *Citigroup,* 776 F.3d at 127. ADIA alleged, within the arbitration demand, that the second arbitration was different from, and not an attack upon, the first arbitration. *Citigroup, Inc. v. Abu Dhabi Invest. Auth.*, No. 1:13-cv-6073-PKC, Dkt. No. 28-1, ECF No. 25 (S.D.N.Y. 2013). Citigroup then commenced an action in the Southern District of New York seeking to "enjoin the second arbitration on the ground that ADIA's new claims were barred by the doctrine of claim preclusion, or *res judicata*, because they were or could have been raised in the first arbitration." *Citigroup*, 776 F.3d at 128. Citigroup argued that the Court had the authority to enjoin the second arbitration "pursuant to the Declaratory Judgment Act, the All Writs Act, the Federal Arbitration Act…and the district court's 'inherent authority to protect its proceedings and judgments.'" *Id*. at 127-128. (internal citations omitted). Consequently, ADIA sought to dismiss Citigroup's complaint and filed a motion to compel the second arbitration. *Id.* at 128. The District Court granted ADIA's motions, noting the "strong federal policy favoring arbitration," and citing to *National Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996), in which the Second Circuit "held that the preclusive effect of a prior arbitration that had been confirmed by a state court was to be decided by the arbitrators." *Citigroup*, 776 F.3d at 128. The District Court also rejected Citigroup's argument that the second arbitration should be enjoined pursuant to the All Writs Act[5], finding that, although the Second Circuit had left the question of whether an arbitration could be enjoined unresolved in *In re American Express Securities Litigation*, 672 F.3d 113 (2d Cir. 2011) ("*American Express*"), the instant case involved "only garden-variety res judicata concerns." *Citigroup, Inc. v. Abu Dhabi Inv. Authority*, No. 13 Civ. 6073, 2013 WL 617315, at *5 (S.D.N.Y. Nov. 25, 2013). The District Court further noted that to apply the All

[5] The All Writs Act authorizes Federal Courts to "issue all writs necessary to appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a).

Writs Act would "swallow the *Belco* rule" because it "would apply to virtually any instance where a second arbitration is purportedly precluded by a federal court judgment confirming the first arbitration award." *Id.*

The Second Circuit affirmed, noting that from prior Second Circuit jurisprudence regarding the claim-preclusive effect of arbitrations, "it is a simple intuitive step to conclude that arbitrators should also decide the claim-preclusive effect of a federal judgment confirming an arbitral award." *Citigroup*, 776 F.3d at 131. In responding to Citigroup's argument that a second arbitration would afford ADIA an opportunity to re-arbitrate issues decided in the first arbitration, in violation of the "limited statutory grounds under which a district court may vacate or modify an arbitration award" provided by the FAA, the Court of Appeals stated that the District Court simply confirmed the award, without "review[ing] the merits of any of ADIA's substantive claims or the context in which those claims arose," and therefore, "a district court unfamiliar with the underlying circumstances, transactions and claims, is not the best interpreter of what was decided in the arbitration proceedings, the result of which is it merely confirmed." *Id.* at 132-133. Citigroup also argued that if the court did not "permit the use of the All Writs Act to protect federal judgments confirming arbitration awards, [the court] effectively would be relegating those judgments to 'second-class status' as compared to federal judgments following from proceedings on the merits," in violation of 9 U.S.C. § 13, which provides that judgments confirming arbitration awards "'shall have the same force and effect, in all aspects, as, and be subject to all the provisions of law relating to, a judgment in an action.'" *Id.* at 134. The Second Circuit rejected this argument, holding that "Citigroup's argument presents a false choice," because the real issue before the court is not about the degree of "preclusive 'force and effect'" that ought to be given to a judgment confirming an arbitration award as compared to other

judgments, but rather "when, if ever, a federal court's interest in protecting the integrity of prior federal judgments authorizes it to use the All Writs Act to reserve for itself the exclusive prerogative to determine the claim-preclusive effect of those judgments." *Id.* at 134.

Citigroup demonstrates the difficulty of obtaining an injunction on the grounds that an earlier arbitration should be given claim preclusive effect. The case has made clear that the claim preclusive effect of an arbitration award, even when said award is confirmed by a federal court, is an issue for the arbitrators, rather than the court.

B. Collateral Attack on Judgments Confirming Awards

The collateral attack doctrine, where applicable, is a strong defense to potentially never-ending attempts to re-arbitrate final awards. This doctrine is rooted in *Corey v. New York Stock Exchange*, 691 F.2d 1205 (6th Cir. 1982), where the Sixth Circuit held that a party's attempt to sue the New York Stock Exchange for actions of its arbitrators and its arbitration director, stemming from an arbitration proceeding between Corey and Merrill Lynch, amounted to "an impermissible collateral attack on the arbitrators' award." *Corey*, 691 F.2d at 1207. The Court held that "[t]o allow a collateral attack against arbitrators and their judgments would also emasculate the appeal provisions of the Federal Arbitration Act. 9 U.S.C. §§ 9, 10." *Id.* at 1211. A "collateral attack" on an arbitration award is a later and distinct proceeding which seeks to "challenge the very wrongs affecting the award for which review is provided under section 10 of the Arbitration Act." *Corey*, 691 F.2d at 1213. Other courts have also recognized that permitting collateral attacks on arbitration awards would render the FAA's provisions for vacatur and modification meaningless. *See, e.g.*, *Ibarzabal v. Morgan Stanley DW, Inc.*, 333 Fed. Appx. 605 (2d Cir. 2009) (Summary Order); *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 749-750 (5th Cir. 2008); *Sander v. Weyerhauser Co.*, 966 F.2d 501 (9th Cir.

1992); *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338-1339 (9th Cir. 1986); *Prudential Securities Inc. v. Hornsby*, 865 F. Supp. 447, 450 (N.D. Ill. 1994) ("[t]he strictures of section 10 and section 12 [of the FAA] are designed to afford an arbitration award finality in a timely fashion, promoting arbitration as an expedient method of resolving disputes without resort to the courts"); *Alexander v. American Arbitration Ass'n*, No. C01-1461, 2001 WL 868823, at *5 (N.D. Cal. July 27, 2001) (finding that a Plaintiff's complaint amounted to an improper collateral attack where "plaintiff in the present case was allegedly harmed by the impact of the acts instituted by the AAA on her award. Her complaint has 'no purpose other than to challenge the very wrongs that affect the award for which review is provided' for.") (citing to *Corey*, 691 F.2d at 1213).

Courts have also held that the collateral attack doctrine applies whether the second proceeding commenced by a disgruntled party is a litigation *or* <u>an arbitration</u>. In *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 911 (6th Cir. 2000), a party, after prevailing in an arbitration, later commenced both an arbitration and a litigation, contending that Merrill Lynch had interfered with the original arbitration. The initial arbitration involved "a dispute over Merrill Lynch's handling of Decker's securities investments," while the later-filed complaint alleged that "Merrill Lynch owed Decker a duty not to interfere with the arbitration process by directly or indirectly hiring that chairperson of the arbitration panel during the course of the arbitration, conduct it should have known would harm her." *Id.* at 908. The second arbitration, filed after the District Court granted Merrill Lynch's motion to dismiss Decker's complaint as a collateral attack on the first arbitration award, and while Decker's appeal of the District Court's ruling was pending before the Sixth Circuit, alleged the same claims as those asserted in the complaint. *Id.* at 908. The Sixth Circuit held that the collateral attack doctrine

applied to subsequently commenced arbitrations, as well as to litigations: "[t]he FAA provides the exclusive remedy for challenging acts that taint an arbitration award whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration. It would be a violation of the FAA to allow [Plaintiff] to arbitrate the very same claims that we have determined constitute an impermissible collateral attack when previously presented for adjudication by a court." *Id. at 911.*

Other courts have also enjoined arbitrations and denied motions to compel on the basis of the principles underlying the collateral attack doctrine. *See e.g., Prudential v. Hornsby,* 865 F. Supp. 447 (N.D. Ill. 1994) (enjoining second arbitration and denying motion to compel arbitration where the claim in the second arbitration was premised on a newly asserted fraudulent concealment of documents from the first arbitration panel); *Federated Rural Elec. Ins. Exchange v. Nationwide Mut. Ins. Co.*, 134 F. Supp. 2d 923 (S.D. Ohio 2001) (denying motion to compel and enjoining arbitration where the party sought to re-arbitrate a prior award based on an appellate court decision rendered nearly four years after the award was issued); *Prime Charter Ltd. v. Kapchan*, 287 A.D.2d 419 (1st Dep't 2001) (permanently enjoining a second arbitration commenced by respondent during the pendency of the first arbitration after an unfavorable ruling because it was "a preemptive collateral attack on any future award issued in" the parties' first arbitration) (citing the FAA).

The collateral attack doctrine was recently invoked by the Southern District of New York in the context of a second arbitration proceeding between two parties that had previously arbitrated. *See Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, No. 13 cv 7680, 2015 WL 4597543 (S.D.N.Y. July 30, 2015) ("Arrowood II").[6] This case was a follow-up to a prior attempt by Respondents Equitas Insurance Limited and Certain Underwriters at Lloyd's of London

[6] Stroock & Stroock & Lavan LLP represented Arrowood Indemnity Company in this action.

("Underwriters") to challenge a judgment which confirmed an arbitration award on Fed. R. Civ. P. 60(b)(3) grounds. In the Rule 60(b) action, the District Court held that the Federal Arbitration Act trumps the Federal Rules of Civil Procedure on vacatur of judgments and that Underwriters were time-barred from challenging the arbitration award under the FAA. *See Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, No. 13 cv 7680, 2015 WL 2258260, at *5 (S.D.N.Y. May 14, 2015) ("Arrowood I"). While the Rule 60(b)(3) motion was pending, Underwriters commenced a second arbitration which incorporated the allegations contained in the Rule 60(b)(3) motion and sought to revisit the award issued by the arbitration panel in the first arbitration between the parties. Notably, Underwriters sought, in the second arbitration, to recover monies they paid pursuant to the confirmed award in the first arbitration.[7] *Arrowood II.,* 2015 WL 4597543, at *4 (S.D.N.Y. July 30, 2015). Arrowood moved to enjoin the second arbitration on the ground that it was a collateral attack on the award in the first arbitration, and Underwriters cross-moved to compel the second arbitration. *Id.*, at *6. The District Court enjoined the second arbitration, and denied the motion to compel, holding that "the Second Arbitration demand to recover sums already paid [pursuant to the First Arbitration award] amounts to a collateral attack on the merits of the Award." The District Court noted that "[i]n the same way that a Rule 60(b)(3) motion cannot be used to bring an untimely challenge to an arbitral award on a ground enumerated in the FAA, the 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." *Id.*, at *6. Further, the District Court stated the "[s]uch arbitral mulligans are forbidden by the FAA, which is the 'exclusive remedy for challenging acts that taint an

[7] Underwriters also sought an audit, which the District Court found to be related to the request for reimbursement. *Arrowood II*, 2015 WL 4597543, at *7.

arbitration award [,] whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration.'" *Id.*, at *5 (quoting *Decker*, 205 F.3d at 911).

Arrowood Indemnity is the first case in the Second Circuit to apply the collateral attack doctrine to enjoin a second arbitration that sought to do an end run around a confirmed arbitration award.

Parties in reinsurance disputes who find themselves presented with a second arbitration demand from a person or entity against whom they have already arbitrated, which seeks to challenge the first arbitration award itself, can invoke the collateral attack doctrine to preserve the finality of the first award. It is critical that a party faced with a second arbitration demand determine whether that demand is an attempt to arbitrate claims that have already been, or could have been, decided in an earlier arbitration (à la *Citigroup*[8]) or whether it is a direct attack on the award issued in the first proceeding itself, which can only be challenged through the mechanisms and per the time limits set forth in the FAA (à la *Decker* and *Arrowood*). The latter category, which involves an attempt to undo the outcome of an earlier arbitration, is also applicable when the attempt to challenge an earlier award involves new parties. *See Corey*, 691 F.2d at 1213 ("Corey's claims constitute a collateral attack against the award even though Corey is presently suing a different defendant than his original adversary in the arbitration proceeding and is requesting damages for the acts of wrongdoing rather than the vacation, modification of correction of the arbitration award."). The distinction between the two may well result in having to go forward with a second arbitration versus obtaining an order to enjoin it. The collateral attack doctrine, where applicable, is a powerful tool in the arsenal of preserving finality of arbitration awards that has received little attention up until now.

[8] Citigroup did not use the collateral attack doctrine when it sought to enjoin ADIA's second arbitration demand.

III. CONCLUSION

Claim preclusion and the collateral attack doctrine are two separate legal principles employed by parties faced with a second arbitration demand seeking to arbitrate the same or similar dispute. The collateral attack doctrine, which goes to attacks against the arbitration award itself, has been embraced in a number of courts, including the United States District Court for the Southern District of New York. In light of parties' efforts to undo final arbitration awards through various devices, the collateral attack doctrine is an important remedy of which parties in reinsurance arbitrations should be mindful. Practitioners faced with an adversary's attempt to sidestep a final arbitration award ought to be attuned to whether their situation aligns more closely with *Citigroup* or with the principles first enunciated in *Corey* and *Decker,* and later reiterated in *Arrowood*.[9]

[9] For further information please contact Robert Lewin at rlewin@stroock.com or Michele Jacobson at mjacobson@stroock.com.