STROOCK

IS MY ARBITRATION FINAL OR IS IT GROUNDHOG DAY?

November 18, 2016

Panel: Honorable Brian Cogan, Robert Lewin, Brad Rosen and Anthony Vidovich

Goal of Arbitration

- One of the most important goals of arbitration is finality.
- Binding arbitration decisions are made final by virtue of the FAA, which provides for limited review of arbitral awards to maintain arbitration's "essential virtue of resolving disputes straightaway." *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)

FAA's Narrow Grounds For Modifying Or Vacating An Arbitration Award

- Sections 9-11 of the FAA set forth narrow grounds for modifying or vacating an Arbitration Award.
- Section 12 of the FAA requires that a motion to vacate be made within 3 months of the date of the Award.
- Courts are required to confirm Arbitration Awards in the absence of a basis under the FAA to vacate.
- Motions to Vacate Arbitration Awards are rarely successful due to the limited review by the courts and the deference accorded to arbitrators.

What if The Dissatisfied Party Commences a Second Arbitration?

- Two different factual circumstances may apply to a second Arbitration, which may result to very different outcomes.
- One factual circumstance involves a claim against a party which arguably is precluded by the first Arbitration. This may be referred to as “issue preclusion,” “collateral estoppel” or “res judicata.”
- The other factual circumstance involves a claim which directly challenges the very award rendered in the first Arbitration. This is referred to as a “collateral attack.”

Issue Preclusion

- Arbitration Awards should 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).
- Many courts have held that under the FAA claim preclusion 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).
- Thus, it would be for the arbitrators in Arbitration II to determine the preclusive effect, if any, of Arbitration I.

Citigroup, Inc. v. Abu Dhabi Investment Authority, 776 F.3d 126 (2d Cir. 2015)

- Abu Dhabi asserted various claims against Citigroup, including fraud, breach of fiduciary duty, breach of contract and breach of the implied covenant of good faith and fair dealing arising out an Investment Agreement in which Abu Dhabi invested billions of dollars in Citigroup.
- After an extensive evidentiary hearing, the arbitration panel ruled in favor of Citigroup.
- After Abu Dhabi's motion to vacate the Award was denied, Abu Dhabi commenced a second arbitration.

Citigroup, Inc. v. Abu Dhabi Investment Authority, 776 F.3d 126 (2d Cir. 2015)

- Citigroup commenced an action seeking to enjoin the second arbitration which Citigroup feared would allow Abu Dhabi an opportunity to re-litigate the same claims that were, or could have been, raised in the first arbitration. Citigroup sought an injunction based upon the All Writs Act, 28 U.S.C. Section 1651(a), which empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
- The District Court dismissed the action, which was affirmed by the Second Circuit.
- The Second Circuit's decision rests on the scope of the All Writs Act and on earlier Second Circuit precedent involving the arbitrability of claim preclusion. The Court does not address the issue of whether Abu Dhabi in fact seeks to re-arbitrate what was decided in the first arbitration.

Citigroup, Inc. v. Abu Dhabi Investment Authority, 776 F.3d 126 (2d Cir. 2015)

- The *Citigroup* case demonstrates the difficulty in seeking to have a court enjoin a later arbitration on the grounds of claim preclusion even when the court has confirmed an award and there is a federal court judgment.

Collateral Attack Doctrine

- A collateral attack on an arbitration award is a later proceeding which seeks to challenge "the very wrongs affecting the award for which review is provided under Section 10 of the Arbitration Act." *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1213 (6th Cir. 1982).
- Courts have applied the Collateral Attack Doctrine whether the second proceeding is a litigation or an arbitration. *See, e.g., Decker v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 205 F.3d 906 (6th Cir. 2000)
- Courts have enjoined a subsequent arbitration where it is found to constitute a Collateral Attack. *See, e.g., Decker; Prudential v. Hornsby*, 865 F. Supp. 447 (N.D. Ill. 1994), *Federated Rural Elec. Ins. Exchange v. Nationwide Mut. Ins. Co.*, 134 F. Supp. 2d 923 (S.D. Ohio 2001) and *Prime Charter Ltd. v. Kapchan*, 287 A.D.2d 419 (1st Dep't 2001).

Arrowood Indemnity v. Equitas Ins. Ltd., 2015 WL 4597543 (S.D.N.Y. July 30, 2015)

- After failing to vacate a confirmed award under FRCP 60(b) for Arrowood's alleged misconduct in the arbitration, Equitas brought a second arbitration which sought to recover monies paid under the arbitration award.
- Arrowood sought to enjoin the second arbitration as Collateral Attack on the arbitration award and Equitas sought to compel arbitration.
- The District Court granted the injunction and denied the motion to compel holding that the "FAA does not permit a second arbitration demand to be used to nullify an arbitral award in whole or in part…." The Court went on to say that "[s]uch arbitral mulligans are forbidden by the FAA, which is the 'exclusive remedy for challenging acts that taint an arbitration award…'" (quoting *Decker*, 205 F.3d at 911).

Hypothetical 1

- Party prevailed in a reinsurance arbitration and confirmed the award. Losing party paid the award amount. Four years later, the prevailing party receives an arbitration demand from the loser seeking the return of the arbitration award payment on the grounds that the arbitrator's view of the law was incorrect, as demonstrated by a recent appellate court decision in the jurisdiction. The losing party moves to compel arbitration under a broad arbitration clause, and the winning party seeks a declaration and injunction in court that it need not move forward with the arbitration. What should the result be?

Hypothetical 1 Cont'd

- What if instead of demanding the award amount back, the demand sought a declaration as to how the agreement would apply in the exact factual setting as had been previously arbitrated? Does that matter? What if the award contained express language stating that the panel found that the contract should be interpreted in a particular way going forward (i.e., a declaration)?

Hypothetical 2

- Losing party in an arbitration brings a RICO and fraud action more than 1 year after a foreign arbitral award was confirmed based upon a $25 million bribe paid to the arbitrators by the prevailing party. Should this action be viewed as a Collateral Attack on the arbitration award or one that should be subject to the affirmative defense of res judicata?
- Can it be a Collateral Attack where the losing party is not seeking to re-litigate the facts and defenses involved in the underlying arbitration?
- Do res judicata and issue preclusion apply where corruption of the arbitrators was not decided in the arbitration proceedings?

Hypothetical 3

- The parties arbitrate the question of whether a type of business is excluded under the terms of the reinsurance agreement, which contains a broad arbitration clause. The panel determines that the business is, in fact, excluded, and denies the claimant's request for damages. The panel unanimously finds in its award that "automobile liability is excluded under the terms of the XOL treaty." The award is confirmed. A year later, the cedent cedes another automobile liability claim to the reinsurer under the same reinsurance agreement. The reinsurer denies the claim on the basis of the award. Cedent commences arbitration. Is this a Collateral Attack?

Hypothetical 4

- Cedent and reinsurer litigate the question as to whether WC claims are covered under a reinsurance agreement. The court issues a judgment finding that WC claims are covered, and that, as a result the reinsurer must pay $1M. Two years later, cedent bills reinsurer for another WC claim, which reinsurer refuses to pay. Cedent commences a second litigation and obtains summary judgment based upon res judicata.

Hypothetical 4 cont'd

- Cedent and another reinsurer arbitrate the same question. The arbitrators -- like the court in the other proceeding -- rule in favor of the cedent, finding that WC claims are covered. That award is confirmed. Two years later, cedent bills reinsurer for another WC claim, which the reinsurer refuses to pay. Cedent commences a new arbitration and once again reinsurer argues that WC claims are not covered. Reinsurer prevails this time as the panel refuses to invoke issue preclusion because they are not bound by the strict rules of law. How does this scenario comport with the theory of arbitration being final, less costly and streamlined?

Hypothetical 5

- Arbitration over the scope of coverage provided by a reinsurance agreement results in a declaration that multiple asbestos losses may be aggregated provided as being derived from the same causative agency. The award is confirmed. Reinsurer commences a second arbitration involving different claims than those at issue in the first arbitration contesting aggregation of asbestos losses under the same reinsurance agreement.
- Can the cedent invoke the Collateral Attack doctrine or is this properly analyzed under the claim preclusion line of authorities?

Hypothetical 6

- Cedent commences arbitration for losses that are allegedly covered under a reinsurance agreement. Arbitrators unanimously rule for the reinsurer finding that the loss was an ex gratia payment not covered under the reinsurance agreement. Cedent then brings a second arbitration under a number of reinsurance agreements, including the agreement involved in the first arbitration proceeding, seeking damages based upon the reinsurer's pattern and practice of delaying its coverage determinations and denying claims.
- Can the collateral attack doctrine be used to enjoin the second arbitration to the extent that the cedent seeks damages that were the subject of the first arbitration?
- If the answer to the preceding question is yes, can the facts relating to the first arbitration be introduced by the cedent as evidence of the wrongful pattern and practice of the reinsurer?

Hypothetical 6 cont'd

- Since res judicata applies to what was litigated, or could have been litigated, can the reinsurer invoke res judicata to enjoin the second arbitration entirely?