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May a Court Enjoin Arbitration as Precluded by a Prior Confirmed Arbitration Award?

By Everett J. Cygal and Catherine M. Masters

Everett J. Cygal

Catherine M. Masters

Reinsurance treaties typically contain broad agreements to arbitrate all disputes, reinforced by a pro-arbitration rule of construction.[1] Once an arbitration award is issued, it may be presented to a court for confirmation and entry as a judgment. The Federal Arbitration Act ("FAA") specifies that such a "judgment shall be docketed as if it was rendered in an action," and

> [t]he judgment so entered 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.[2]

The status of a confirmed arbitration award as a judgment, with "the same force and effect" as any court-rendered judgment, presents interesting and important questions concerning judicial power in subsequent disputes between the parties to the arbitration agreement. If the parties have a subsequent dispute, must it be arbitrated? Does the prior judgment (the confirmed award) have preclusive force, under collateral estoppel or res judicata doctrines? Who decides — the court or arbitrators — whether or to what extent the prior judgment has preclusive force? May the court enforce its judgment by enjoining further arbitration as precluded?

The tension between the two operative rules — the rule requiring arbitration of all disputes when the parties have entered a broad arbitration agreement, and the rule that prior judgments have preclusive force — has been extensively addressed by the courts, yet continues to present controversies.

The Allocation of "Gateway" Issues Between Courts and Arbitrators

First, some background principles. Under a broad arbitration agreement, any dispute between the parties is arbitrable. When a dispute arises, a party may demand arbitration under the terms of the arbitration agreement, and if the counterparty does not agree to arbitrate, the first party may petition a court to compel arbitration under Section 4 of the FAA. Conversely, if one of the parties files a lawsuit to resolve a dispute, the other may timely ask the court to compel arbitration (under FAA § 4) and to halt the judicial proceedings (under FAA § 3[3]). In either case, as the Supreme Court made clear in *Howsam v. Dean Witter,*[4] the two "substantive" "gateway" arbitrability issues — (1) whether a valid arbitration agreement exists and (2) whether it encompasses the dispute — are for the court to decide (unless the parties expressly allocated these issues to the arbitrator).

Howsam makes clear that, under the strong pro-arbitration principles embodied in the FAA, all further gateway (or threshold) issues that must be addressed before arbitration begins — "procedural" questions, such as "waiver, delay, or a like defense to arbitrability"[5] and "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate"[6] — are for the arbitrator, rather than the court, to decide.[7]

The Preclusive Effect of a Prior Arbitration Award

The parties to a contract with an arbitration clause may have multiple disputes over time. The nature of reinsurance treaties — requiring a series of performance obligations — especially presents the possibility of such a series of disputes. In this scenario, the preclusive force of an earlier arbitration award may, and often does, become an issue. For example, a later dispute may present questions already considered in a prior arbitration, such as interpretation of a key contract term. A party that prevailed in the prior arbitration may resist further arbitration on the ground that the issue was already settled, and contend that it is entitled to prevail in all further disputes. On

the other hand, a party may contend that its current dispute presents issues that are not identical to those in the prior dispute. A party may even claim that the other party improperly withheld information in the prior arbitration, and that a new arbitration panel would reach a different result based on a fuller factual record. Some tribunal must decide the preclusive force, if any, of the prior arbitration.

Whether a prior arbitration award has preclusive force is a "gateway" issue, in the sense that it is a threshold question that should be answered before any subsequent arbitration commences. *Howsam* established that (unless the parties expressly agree otherwise) substantive gateway issues are for the court, and procedural gateway issues are for the arbitrators. Preclusion is not one of the two substantive gateway issues reserved to the court (whether a valid arbitration agreement exists and whether the substantive dispute is within the agreement's scope), but is more like the procedural gateway issues allocated to the arbitrator (such as estoppel).

The Preclusive Effect of a Prior Judicial Proceeding

The question "who decides preclusion" also arises when there are serial proceedings but not serial arbitrations — i.e., when there is first a court proceeding and judgment and then an arbitration — and courts have analyzed this situation differently. When there is a prior court judgment and a subsequent arbitration, courts have held that the preclusive effect of the judgment is for the court itself to decide. For example, in the *Y & A Group Securities Litigation,* an investor class action against an issuer of securities resulted in a consent judgment and release; subsequently the lead plaintiff asserted an arbitration claim against his broker.[8] When the arbitrator denied the broker's motion to dismiss the arbitration claim as released, the broker successfully asked the court that had entered the judgment to enjoin the arbitration. The Eighth Circuit affirmed, because "even when arbitration is involved, federal '[c]ourts should not have to stand by while parties re-assert claims that have already been resolved.' . . . No matter what, courts have the power to defend their judgments as res judicata, including the power to enjoin or stay subsequent arbitrations."[9] The Second Circuit reached a similar conclusion in *In re American Express Financial Advisors Securities Litigation*, holding that, after a class action settlement and judgment in court, "determining the scope of the [plaintiffs'] entitlement to arbitrate . . . is a question for judicial resolution."[10]

These cases' conclusion flows from the principle that the preclusive effect of a judgment is determined by the tribunal that rendered it.

The Preclusive Effect of a Prior Judgment Confirming an Arbitration Award

Assuming that it is for a rendering tribunal to determine the preclusive effect of its judgment, how does that principle apply to judgments entered under FAA § 13, when a court confirms an arbitration award? FAA § 13 says that such a judgment "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." And yet the court engages in little or no analysis when it confirms an arbitration award, and has no particular expertise, investment, or insight regarding its content. In the *Abu Dhabi Investment Authority* case, the Second Circuit analyzed this issue in depth, concluding that — despite FAA § 13's terms — a judgment confirming an arbitration award does not give the court authority to determine its preclusive effect:

> The district court's . . . judgment . . . simply confirmed the arbitration award . . . [in] a summary proceeding that merely ma[de] . . . a final arbitration award a judgment of the court. . . . [I]n confirming the award, the district court did not review the merits of any of [the] substantive claims or the context in which those claims arose. . . . Under these circumstances, 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 it merely confirmed.[11]

Other courts have used the same analysis of judgments that merely confirm arbitration awards.[12]

The tension between the two operative rules — the rule requiring arbitration of all disputes when the parties have entered a broad arbitration agreement, and the rule that prior judgments have preclusive force — has been extensively addressed by the courts, yet continues to present controversies.

Courts' Limited Power to Enjoin Arbitration Proceedings

As *Howsam* makes clear, a court has the authority, in considering the substantive gateway arbitrability issues, to determine that the parties did not enter a valid arbitration agreement, or that the agreement does not encompass the dispute at hand.[13] The FAA expressly provides that a court may compel arbitration if it determines that a dispute is arbitrable,[14] but it does not expressly provide that a court may enjoin arbitration if it determines that a dispute is not arbitrable. Nevertheless, courts have decided that they have power to effectuate the FAA by

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enjoining arbitration when they determine that a dispute is not arbitrable. As the Second Circuit has held, "[i]f the parties . . . have not consented to arbitrate a claim, the district court was not powerless to prevent one party from foisting upon the other an arbitration process to which the first party had no contractual right."[15] Other courts agree.[16] But this power to enjoin arbitration is limited to enforcement of a court's gateway decision regarding arbitrability.

Injunctions Under the All Writs Act

Courts have also enjoined arbitration in order to enforce their own prior judgments (such as in the Eighth Circuit's *Y & A Group* case, the Second Circuit's *In re American Express* case, and the Eleventh Circuit's *Kelly v. Merrill Lynch* case). They have done so under the All Writs Act, 28 U.S.C. § 1651, which allows courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions."[17] But this rationale (that a court may enjoin arbitration based on the preclusive force of its own prior judgment) may not apply as a basis to enjoin arbitration as precluded by a prior arbitration.

The Second Circuit's recent *Abu Dhabi* decision discussed the All Writs Act at length, and concluded that, when the only judgment at issue is a judgment confirming an arbitration award under FAA § 13, rather than a judgment resulting from a court's own adjudication, the All Writs Act does not allow the court to enjoin arbitration on preclusion grounds.[18]

The Second Circuit concluded that "[t]he FAA's policy favoring arbitration and our precedents interpreting that policy indicate that it is the arbitrators, not the federal courts, who ordinarily should determine the claim-preclusive effect of a federal judgment that confirms an arbitration award."[19] Thus, the court may not nip an arbitration in the bud, and must defer until judicial review any arguments about whether the arbitrators should have found preclusion — even though such review is severely limited.[20]

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End Notes

1. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").
2. 9 U.S.C. § 13.
3. The circuits are split on whether, if *all* issues are referred to arbitration, the court must stay the litigation or may dismiss the case.
4. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).
5. *Id.* at 84.
6. *Id.* at 85.
7. *See also Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452-53 (2003) (plurality opinion) (any "procedural gateway matter" is for the arbitrator to decide).
8. *In re Y & A Group Sec. Litig.*, 38 F.3d 380, 381-82 (8th Cir. 1994).
9. *Id.* at 382.
10. *In re Am. Express. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 131 (2d Cir. 2011). *See also Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir. 1993) (same).
11. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d at 132-33 (citations, internal quotation marks, and footnotes omitted).
12. *See Emp'rs Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.,* 744 F.3d 25, 28-29 (1st Cir. 2014) (since a federal judgment confirming an arbitration award "does not address the steps leading to the decision on the merits," the judgment does not "give the federal court the exclusive power to determine the preclusive effect of the arbitration"); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1133-34 (9th Cir. 2000) (since "the district court merely confirmed the decision issued by another entity, the arbitrator," it "was not uniquely qualified to ascertain [the decision's] scope and preclusive effect").
13. *Howsam,* 537 U.S. at 84.
14. 9 U.S.C. § 3.
15. *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 141 (2d Cir. 2011) (citing .
16. *See, e.g., Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.,* 643 F.2d 863, 868 (1st Cir. 1981) ; *Paine-Webber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)
17. *See, e.g., In re Y & A Group Sec. Litig.*, 38 F.3d at 382-83 ("The All Writs Act makes plain that each federal court is the sole arbiter of how to protect its own judgments: federal courts 'may issue all writs necessary . . . in aid of their respective jurisdictions. . . .' 28 U.S.C. § 1651(a).").
18. Citigroup, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d at 131-32.
19. *Id.* at 131.
20. *Id.* at 132 & n.4. *Cf. Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 720, 722 (6th Cir. 2014) (error to entertain interlocutory challenge to arbitration; arguments about partiality must await review after arbitration is complete).

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Everett J. Cygal

Everett Cygal is a partner in the Chicago law firm of Schiff Hardin LLP and the leader of the firm's Insurance and Reinsurance Practice Group. He is a graduate of the University of Chicago and Northwestern University School of Law (cum laude, Order of the Coif) and a member of the bars of Illinois, New York and numerous federal courts. Domestic and global insurance and reinsurance companies (cedents and reinsurers) have hired Everett to try exceptionally complex, high-exposure cases before trial courts and arbitration panels. Everett's trials for these clients have included a vast array of property and casualty and life and health issues.

Catherine M. Masters

Catherine Masters is a litigation partner in the Chicago office of the law firm Schiff Hardin LLP. She is a graduate of the College of the University of Chicago (Phi Beta Kappa, honors), Yale University Graduate School of Arts and Sciences, and the University of Chicago Law School (honors, Law Review Editorial Board). After clerking for a judge on the United States Court of Appeals for the Seventh Circuit, she entered private practice, concentrating in counseling clients and briefing and arguing complex issues at the trial and appellate levels in state and federal courts nationwide. Catherine works on matters in multiple substantive areas, including insurance/reinsurance, product liability, employment, constitutional law, professional liability, and general commercial matters.