The Preclusive Effect of Arbitration Awards

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"That's distinguishable!"

Fess up. The phrase is part of your lawyering DNA, right? It's certainly part of mine.

Reflexively, we litigators look for what law school taught us to spot—meaningful distinctions between cases that otherwise appear to negatively affect or control our own. Our minds impulsively shift into search mode. We're detectives on the trail of some breakthrough clues. In almost a game, often with high stakes, we pursue the missing key that unlocks the secret door. And we feel a special wave of bliss when we succeed. Addicted, we hunt for more, noting the thinnest slices of fact or law to escape an unfavorable decision.

Through it all, we're advocates, so when our position is reversed, we do the opposite. Armed with case law authority that seems to positively affect or control, and confronted with an argument that the case does not perfectly apply, we respond by trying to distinguish away the purported distinctions. We seek to embrace the favorable ruling by suppressing the argued distinctions as meaningless slivers of difference.

This tussle over difference and commonality is especially sharp when issues of res judicata or collateral estoppel arise, forcing us to address the real impacts of a first decision on a second case. It's a heightened fight over the usual distinction process. We confront the painful prospect that the loss is fixed and its effect cannot be avoided. Phrases like "no second bite at the apple" and "no do-over" signal that the distinction game is playing out in a more costly realm.

Still, we do not give up. We search mightily for rationales to keep the quest alive. We argue it's not the same thing, that the parties and issues in the second case are not close enough to those in the first case to suffer the final closeout.

What about when that first decision came from an arbitration, rather than a public lawsuit? That's an extra twist. Does it give us another angle? Arbitration awards are not court judgments, we say. Doesn't that remove us from the wrath of claim or issue preclusion?

Is there a second bite when the first came through arbitration? How do we assess the preclusive effect of arbitration awards? Does it matter if the award was judicially confirmed?

Depending on what side you're on, it might be good news or bad news. As with litigated cases, both confirmed and unconfirmed arbitration awards sometimes can bar later claims and issues under traditional preclusion tests.

Claim and issue preclusion from court judgments are firmly established under the law. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015) (issue preclusion); *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011) (claim preclusion). Even though the labels changed long ago from res judicata

and collateral estoppel, the concepts endure. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 287 n.5 (1984). To promote judicial economy and finality, both claim and issue preclusion prevent repetitive litigation and multiple suits that may lead to inconsistent results, uncertainty, and waste.

Under claim preclusion, a final judgment on the merits is conclusive as to the rights of the parties on the decided claims. Issue preclusion applies in a subsequent proceeding when a question directly involved in one action has been decided and thus is settled as to those parties. *Id.* at 287 n.5. Both preclusion principles deny a "rematch after a defeat fairly suffered." *B&B Hardware*, 135 S. Ct. at 1303.

Those barriers to re-litigation would seemingly apply to a confirmed arbitration award that becomes a judgment. "The 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. . . ." 9 U.S.C. § 13. Yet, one circuit court has said there are "fundamental differences" between confirmed awards and normal court judgments; they are "qualitatively different." *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 883–84 (9th Cir. 2007). How so? The difference lies in the scope of the merits analysis.

Collins noted that, given the narrow statutory grounds for vacatur of an award, confirmation often occurs "without reviewing either the merits of the award or the legal basis upon which it was reached," while by contrast a normal court judgment "confirms the merits of that decision." 505 F.3d at 883. *Collins* dealt with one specific issue (the preclusive effect of a normal court judgment on a later arbitration), but noted both that "arbitrators must give preclusive effect to prior federal judgments" and that arbitrators "are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect." *Id.* at 880, 882. In *Employers Insurance Co. of Wausau v. OneBeacon American Insurance Co.*, No. 13-1913 (1st Cir. Feb. 26, 2014), the First Circuit noted that a federal judgment that confirms an award "rarely considers the merits of the arbitrator's decision" and thus the confirmation order "is distinct from the arbitration award itself."

So are *confirmed* arbitration awards preclusive? And what about *unconfirmed* arbitration awards—do they have any preclusive effect, given that they are not judgments? If so, what is the breadth of that preclusion? And does the preclusive reach differ if the later proceeding is litigation or arbitration?

The Supreme Court in 1985 observed that "the preclusive effect of arbitration proceedings is significantly less well settled than the lower court decisions might suggest" and that "it is far from certain that arbitration proceedings will have any preclusive

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effect on the litigation of nonarbitrable federal claims." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985). Because there was no arbitration award yet, the preclusive effect was not decided in *Dean Witter*. Instead, the discussion dealt mostly with the "misconception" that arbitral preclusion would intrude upon court jurisdiction. *Id.* at 221–22. Nonetheless, the Court concluded that the usual collateral estoppel rules adequately protect the courts' concerns, especially because the courts can decide what, if any, preclusive effect should be given to an arbitration award. *Id.* at 223.

The Recent Consensus on Preclusion

In more recent decades, however, a general consensus has evolved. First, there is no automatic preclusion by a confirmed arbitration award, nor an automatic denial of preclusion by an unconfirmed award. Rather, as section 13 of the Federal Arbitration Act (FAA) directs, the established judicial tests for both claim and issue preclusion apply to both confirmed and unconfirmed awards, as well as to both later litigation or later arbitration.

Second, the judge or arbitrator in the later proceeding has broad discretion to apply those tests and to conclude whether preclusion is proper.

Third, contract principles that are fundamental to arbitration are often integral to the preclusion tests and thus act as another analytical layer, making the distinction game even more complex. Most of the cases addressed here concern the preclusive effect of an arbitration award, confirmed or unconfirmed, in a later lawsuit, which we'll call "arb-to-court" preclusion; but some arbitration-to-arbitration ("arb-to-arb") preclusion lessons arise too.

For a decision to be given preclusive effect, there are well-recognized tests that must be met. For claim preclusion (res judicata), (1) the parties or privies in the prior and present disputes must be identical, (2) the claims or causes of action must be identical and arise out of the same operative facts, and (3) there must have been a final decision on the merits of the asserted claims. *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 79 (1st Cir. 2011). Moreover, the preclusion can cover not just claims that were raised and decided but also claims that could have been asserted in the case. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017).

For issue preclusion (collateral estoppel), there must be (i) identity of issues raised in the prior and later proceeding, (ii) a final ruling on the actually litigated and necessary issue in the first matter, (iii) identity of party or privies in the two cases against whom preclusion is sought, and (iv) a full and fair opportunity for the precluded party to contest the issue in the first matter. *Employers Insurance Co. of Wausau*, No. 13-1913, slip op.; *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653 (10th Cir. 2006). Thus, in issue preclusion, there need not be a direct link between the earlier and later claims. Rather, preclusion applies to issues that were decided, irrespective of the claim in which they arose. *McDonald*, 466 U.S. at 287 n.5.

To determine if any preclusion is warranted, both confirmed and unconfirmed arbitration awards are and should be evaluated under those tests. In that respect, arbitration awards are put on the same footing as regular court judgments. That is the proper approach so that arbitration awards are neither disfavored nor overly endowed with preclusive impact. The rules for the distinction game apply even-handedly.

In arb-to-court preclusion, the court is vested with the discretion to determine if preclusion is appropriate. *FleetBoston Fin. Corp.*, 638 F.3d at 80; *In Re Lehman Bros. Sec. & ERISA Litig.*, 706 F. Supp. 2d 552 (S.D.N.Y. 2010) (ultimately deciding "whether *collateral estoppel* applies and, if so, its scope"); *see also Dean Witter*, 470 U.S. 213 (entrusting the discretionary calls and gatekeeping on preclusion to the courts).

But there may be "particular difficulties" or "complexities" in making the preclusion analysis because arbitrators often do not provide full explanations of their reasons for their decision. The party asserting preclusion has the burden of showing "with clarity and certainty" what was decided by the prior judgment. *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 49 (2d Cir. 2003). An equivocal award may not enable the party to meet that heavy burden. *Id.* at 48–51. Add this point to the distinction battleground.

Thus, *Postlewaite* held that there was no preclusion because the award may have been based on any of three possible reasons, preventing a showing that the arbitrators necessarily decided the issue that the movant wanted precluded. In *FleetBoston*, however, claim preclusion was upheld because the court found that the award was sufficiently reasoned: The claims in both proceedings were virtually identical, the claims were fully contested in the arbitration, and there was sufficient privity between the parties in the two matters. 638 F.3d at 80–81. With that shown, the judgment confirming the award under 9 U.S.C. § 13 was res judicata.

An important lesson to the arbitration winner is to get a clear and complete award. The award need not be lengthy; it just needs to be well reasoned and conclusive. (*See* S. Widman, "The Long Side of Reasoned Awards: Dispelling the Fallacy of Saying Too Much," *Alternatives* (CPR), Nov. 2019.) Picking an arbitrator who has a track record of fulsome discussions of the facts and law is an important step.

In many arb-to-court cases like *Postlewaite*, the movant did not get preclusive effect because one or more of the tests was not met. *Pike v. Freeman*, 266 F.3d 78 (2d Cir. 2001) (no claim preclusion because no identity of claims; later indemnification claim and arbitration award on contract claim covered different transactions in different time periods); *Apparel Art Int'l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576 (1st Cir. 1995) (no claim preclusion from confirmed award because no identity of claims);

Shaffer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2011 U.S. Dist. LEXIS 80478 (N.D. Cal. 2011) (no issue preclusion from confirmed award because lack of identity of issues; thus no full and fair opportunity to contest all issues).

On the other hand, many cases upheld arb-to-court claim or issue preclusion based on a confirmed award when the required tests were met. *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1147–48 (10th Cir. 2007) (finding later retaliatory discharge claim "fits squarely within" claim preclusion from prior arbitration on wrongful discharge claim between same parties that resulted in final and confirmed arbitration award); *B-S Steel*, 439 F.3d at 666 (finding issue preclusion of damages between prior arbitration of price discrimination claims and later lawsuit on antitrust claim, thereby warranting summary judgment in later litigation); *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830–32 (10th Cir. 2005) (finding claim preclusion of patent misuse claim because it arose out of the same contract between the same parties, and movant had an opportunity to contest the claim in court despite the arbitrator's rejection on jurisdictional grounds of the misuse defense); *Manion v. Nagin*, 394 F.3d 1062, 1066–68 (8th Cir. 2005) (finding issue preclusion where confirmed arbitration award decided wrongful termination claim, and thus issue of contract breach was barred in later litigation claiming tortious interference with contract); *IDS Life Ins. Co. v. Royal All. Assocs., Inc.*, 266 F.3d 645, 651–52 (7th Cir. 2001) (dicta that both claim and issue preclusion could arise from confirmed award that district court concluded resolved entire dispute, although there was no later litigation other than appeal of confirmation, so no actual analysis of the tests for preclusion).

Also, preclusion from a confirmed award may not be just a binary yes or no; it may be both. *Fairbank v. Underwood*, 986 F. Supp. 2d 1222 (D. Or. 2013), shows that the comparison of a prior confirmed award and a later complaint can result in different findings of issue preclusion. There, the original arbitration was by Citibank against the plaintiff for credit card nonpayment, and the plaintiff's later litigation was against Citibank's attorneys for violation of the Fair Debt Collection Practices Act. On the preclusion tests, the parties disputed only the identity of issues and whether the issues were actually litigated. *Id.* at 1235. The court undertook a paragraph-by-paragraph analysis, finding that some issues had been fully contested while others had not. *Id.* at 1237–38. Thus, issue preclusion applied only in part.

Accordingly, despite the affirmative language of FAA section 13, in the arb-to-court situation there is no automatic claim or issue preclusion in court from a confirmed arbitration award. Rather, claim or issue preclusion in court arising from a confirmed award *may* apply, depending on whether the standard tests of preclusion can be met. The burden is on the movant to make that clear showing—that is, to eliminate the distinctions between the two cases.

Who Decides Preclusion

Of course, who decides preclusion differs in the arb-to-arb setting, where an arbitrator, not a court, is in the second position. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 132–33 (2d Cir. 2015) (because confirmation is summary proceeding that does not generally entail a merits review, a court is less familiar with the underlying circumstances and thus not the best interpreter of what was decided in the arbitration); *Employers Insurance Co. of Wausau*, No. 13-1913, slip op. at 10 (under general rule, cited precedent, and arbitration clause, "preclusive effect of a prior arbitration is an arbitrable issue"); *Collins*, 505 F.3d at 882.

Applying the more traditional preclusion tests, *Hill v. Wackenhut Services International*, 971 F. Supp. 2d 5, 13–15 (D. Col. 2013), held that an arbitrator in a second case did not exceed his powers by giving issue-preclusive effect to a prior confirmed award that decided that an arbitration clause permitted class arbitration. Citing *Lewis* and *Manion*, the court recognized the preclusive effect that awards can have in later disputes and held that the prior arbitrator "addressed that precise issue" in the prior award. A second arbitration was therefore not required.

A single arbitral decision may have different preclusive effects, depending on what occurred before and what was later being litigated.

In *IDS Life Insurance Co.*, the Seventh Circuit took a different approach. Honoring the fundamental premise that arbitration is a matter of contract, the court opined in dicta that a confirmed award will "not necessarily" lead to preclusion in a later arbitration because "the preclusive effect of the award is as much a creature of the arbitration contract as any other aspect of the legal dispute machinery established by such a contract." 266 F.3d at 651.

In other words, it again depends—but in that view, it depends on the terms of the parties' agreement. Under *IDS*, for the claims or issues in the later arbitration to be subject to preclusion, the terms "final and binding" (or at least something equivalent) must be in the parties' agreement. As we will see later, a variation of

that contract-grounded approach has been applied as a jurisdictional basis to avoid preclusion.

Thus, in both aspects of arbitral preclusion—arb-to-court and arb-to-arb—a prior confirmed award *may* create claim or issue preclusion for the later case. It depends on whether, in the contests of distinctions, the long-standing tests are met. If so, FAA section 13 is applied, and the confirmed award is given "the same force and effect" as a regular court judgment.

There is substantial overlap between the cases addressing confirmed awards and those addressing unconfirmed awards. The same preclusion tests apply, and thus the outcomes vary depending on the scope of the first arbitration compared with the later litigation or later arbitration.

Arb-to-court preclusion arises in many cases in which the prior award was not confirmed. In *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239–46 (10th Cir. 2017), claim preclusion barred Lenox's later assertion of antitrust claims when a prior arbitration award decided claims of intentional interference with economic advantage, breach of license, and patent infringement. Citing *MACTEC*, the Tenth Circuit stated: "A valid and final award by arbitrators generally has the same effect under the rules of *res judicata* as a judgment of a court." *Id.* at 1239. It then concluded that preclusion was warranted because the two disputed tests of identity of parties or privies and full opportunity to litigate were satisfied.

In *Anchor Glass Container Corp. v. Buschmeier*, 426 F.3d 872 (7th Cir. 2005), claim preclusion was upheld based on an international arbitration award in favor of the Buschmeiers. Anchor filed the later lawsuit to recover the exact amount that was awarded to the Buschmeiers. The Seventh Circuit affirmed there was sufficient identity of the parties and of the causes of action. Earlier, in *Slaney v. International Amateur Athletic Federation*, No. 99-4146 (7th Cir. Mar. 27, 2001), the Seventh Circuit had upheld issue preclusion from a prior arbitration award. There, the court examined the relationship of Slaney's later lawsuit to the prior arbitration and held there was identity of the parties and a full opportunity to contest the issues. Thus, they could not be relitigated.

Here, too, there may not be just an all-or-nothing holding of preclusion. In *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137–43 (5th Cir. 1992), the Fifth Circuit concluded that there was issue preclusion as to some aspects of the prior arbitration but not as to another. As in *Dean Witter*, the Fifth Circuit observed that the courts have the gatekeeping discretion to determine if arbitral findings have issue-preclusive effects. *Universal*, 946 F.2d at 1137. Finding that the arbitration afforded the "basic elements of adjudicatory procedure," including sufficient opportunities for discovery, the court held that some issues decided in the arbitration were entitled to issue preclusion, while another issue had not been fully and fairly litigated and was not. Thus, *Universal* also shows that a single arbitral decision may have different preclusive effects, depending on what occurred before and what was later being litigated.

That entire question of distinctions requires acute precision. While *Shaffer v. Merrill Lynch*, 2011 WL 3047478 (N.D. Cal. 2011), addressed arb-to-court preclusion of a *confirmed* award, the case also dealt with the preclusive effect of a second, *unconfirmed* award. In contrast to the court's conclusion of no preclusion of the confirmed award, the court held there *was* issue preclusion arising from the prior unconfirmed award that addressed multiple state law claims. *Shaffer* is therefore also notable for the lesson that different arbitration awards—confirmed and unconfirmed—involving the same parties can have different preclusive effects depending on what was decided in the earlier arbitrations compared with what was asserted in the later litigation.

Hammad v. Lewis, 638 F. Supp. 2d 70 (D.D.C. 2009), upheld the preclusive effect of an unconfirmed Financial Industry Regulatory Authority arbitration award. Issue preclusion barred later litigation by the losing arbitration party where the issues were "substantially similar." *Id.* at 74. The court underscored that arbitration decisions "normally provide the type of finality sought by courts to be protected by collateral estoppel." *Id.*

Yet, many cases hold no claim or issue preclusion from unconfirmed arbitration awards, sometimes based on the important preliminary issue of scope; that is, did the parties agree to arbitrate the specific claim? *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Arbitration clauses can define a narrow scope (arbitrate "only a breach of this agreement") or a broad scope (arbitrate "any contract, tort, or statutory claim arising out or relating to this agreement or the parties' relationship").

Wolf v. Gruntal & Co., Inc., 45 F.3d 524 (1st Cir. 1995), held there was no claim preclusion. Although the court acknowledged that "[f]inal arbitral awards are entitled to the same preclusive effect as state court judgments," the court noted that arbitral jurisdiction can be limited by the parties' contract. *Id.* at 528. The arbitration clause expressly stated that federal securities claims could not be made in arbitration. The court therefore concluded that res judicata did not apply because Wolf could not have asserted his court securities claims in the arbitration, along with his seven arbitrable state law claims. *Id.* at 529. The court concluded: "Because arbitral awards are not 'judgments' *per se*, it cannot be presumed . . . that an arbitral tribunal acquired competent authority over the putative 'precluded' claim for *res judicata* purposes." *Id.* at 528.

Wolf thus adds an important dimension to the preclusion discussion—another test, if you will—that should apply to both confirmed and unconfirmed awards. Claim and issue identity also depend on what the parties' arbitration clause says the arbitrator can decide. If the arbitrator could not entertain a certain claim, preclusion of that claim could not arise from the award.

The important lesson of *Wolf* was adopted in *W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 765 F.3d 625 (6th Cir.

2014). The court reversed a finding of claim preclusion, holding that the arbitrators lacked authority under the parties' arbitration agreement to decide the allegedly precluded claims in the later litigation, stating: "We find good reason not to accord *res judicata* effect to an unappealed arbitration award in a case where the claims sought to be precluded were not subject to the arbitration. An arbitrator's authority derives solely from, and is limited by, the contract between the parties." *Id.* at 631.

The application of the general preclusion tests to arbitration awards means that arbitration awards are put on the same footing as normal court judgments.

Applying res judicata in those circumstances could "subvert[] basic contract principles" underlying arbitration by forcing a party to contest a dispute that it had not agreed to fight. In other words, as a matter of arbitration law, the necessary identity of claims could not exist between the two contests where the parties' contract barred its presentment in the arbitration. That approach picks up the contractual basis for preclusion that the Seventh Circuit applied in *IDS Life Insurance*, 266 F.3d 645.

The focus on the contractually permitted scope of the arbitration clause, and thus what claims could be adjudicated in the arbitration, appears in *Ortega v. San Juan Coal Co.*, No. 12-cv-0501 MV/RHS (D.N.M. Oct. 3, 2013). The court held there was neither claim nor issue preclusion from an arbitration award in an employment arbitration under a collective bargaining agreement (CBA) because the Family Medical Leave Act (FMLA) claims asserted by the employee in the later litigation were beyond the scope of what could be submitted to arbitration under the CBA. The court's holding, which was rooted in Supreme Court and Tenth Circuit authority, discounted the fact that the employee, through his union, argued FMLA liability in the arbitration and that the arbitrator found that the employee was not entitled to FMLA protection. Thus, the opinion ignored the issue of the employee's waiver of the scope limits of the CBA and instead relied on a strict construction of the scope clause.

Issue preclusion will also not apply when the arbitration was not sufficiently adjudicatory, thereby not satisfying the test of full and fair opportunity to be heard. *Jacobs v. CBS Broad. Inc.*, 291 F.3d 1173 (9th Cir. 2002).

Accordingly, the arb-to-court analysis for unconfirmed awards is the same as the analysis for confirmed awards. This is important because it puts unconfirmed awards on the same footing as confirmed awards that have the imprimatur of a court judgment. Indeed, it puts unconfirmed awards on the same footing as normal court judgments—a sign that historical hostility to arbitration awards is disappearing. Moreover, giving preclusive effect to a nonconfirmed arbitration award also delivers the cost savings of arbitration. As between the same two parties, confirmation would not be necessary to get the benefit that a judgment bestows under 9 U.S.C. § 13.

There are fewer cases discussing arb-to-arb preclusion of a prior unconfirmed award. Nonetheless, as with confirmed awards, the decisions vest the successor arbitrators with the discretion to decide whether claim or issue preclusion exists. *Sherrock v. Daimler Chrysler*, 260 F. App'x 497 (3d Cir. 2008); *Detroit Med. Ctr. v. AFSCME Mich. Council 25*, 2006 U.S. Dist. LEXIS 13480, at *7 (E.D. Mich. 2006); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 328 F. Supp. 2d 865 (N.D. Ill. 2004).

Accordingly, as in the arb-to-court preclusion, an unconfirmed arbitration award may also have preclusive effect as to a later arbitration if the judicial tests for preclusion and arbitral tests of jurisdiction are satisfied. The later panel has broad discretion under arbitral rules to make those decisions, and courts are constrained from revisiting the merits of those rulings. Thus, in arb-to-arb preclusion, the battle in front of the later arbitrator will likely be determinative.

Conclusion

In the end analysis, there is no automatic preclusive treatment—positive or negative—of arbitration awards. Rather, pursuant to FAA section 13, judicially created tests for claim or issue preclusion apply to both confirmed and unconfirmed arbitration awards, as they do to court judgments.

Beyond those criteria, arbitration fundamentals such as the scope of the arbitration clause can intertwine with and materially affect preclusion aspects of the claim, issue, or party identity. Arbitration law is vital to preclusion concerns, as it offers a unique variance for the distinction game. Overall, preclusion analysis requires exacting comparisons of the later dispute with the earlier arbitration.

The application of the general preclusion tests to arbitration awards means that arbitration awards are put on the same footing as normal court judgments and that courts respect the holdings of arbitrators. That is a favorable evolution of arbitration law, and it also creates more predictability in litigation. ▪