

Outer Bounds of Arbitration

BY DAVID S. COALE, REBECCA VISOSKY, AND KURT M. WOLBER

Federal courts generally give preclusive effect to issues decided by arbitration panels.¹ The arbitration should have appropriate procedural safeguards. The Ninth Circuit has listed several relevant factors: (1) whether the arbitration was conducted in a judicial-like adversary proceeding; (2) whether the proceedings required witnesses to testify under oath; (3) whether the arbitral determination involved the adjudicatory application of rules to a single set of facts; (4) whether the proceedings were conducted before an impartial hearing officer; (5) whether the parties had the right to subpoena

witnesses and present documentary evidence; and (6) whether the arbitrator maintained a verbatim record of the proceedings.²

Only a few courts have examined the preclusive effects of international arbitration awards. In *Overseas Motors, Inc. v. Import News*, an American

automobile distributor sued a foreign manufacturer for “pinching off” its supply, and the foreign manufacturer demanded arbitration in Zurich pursuant to their agreement. The distributor then sued the manufacturer in federal court in Michigan, who raised the defense of res judicata based on the judgment of the international arbitration panel. The court held that the fact that “it was an arbitration rather than a judicial proceeding does not affect its authority as res judicata, nor does the fact it was before a foreign rather than a domestic tribunal.”³

On the other hand, in *Novak v. Overture Services, Inc.*, the plaintiff sued multiple defendants for trademark infringement. In support of its argument that the trademark was generic, and thus not a violation of trademark law, one of the defendants offered the decision of an international arbitration panel that deemed the mark too generic for trademark protection. The court held that the international arbitration decision had no precedential weight because it had not been rendered by a federal or state court.⁴

Privity

Both claim and issue preclusion require that the current suit involve the same parties as the former proceeding, or parties in privity with those in the former proceeding.⁵ Thus, nonparties are not precluded by an arbitration decision if no facts justify a finding of “privity” with a party to

the proceeding.⁶ In other words, a nonparty may assert res judicata or collateral estoppel only if it is in “privity” with the party from the prior adjudication.⁷ Many relationships may create privity for the purposes of claim preclusion and issue preclusion: employer-employee, principal-agent, and corporation-successor.⁸

A corporation and its subsidiary have been held to be in privity for purposes of res judicata and collateral estoppel. In *Siegel v. Daiwa Securities Co. Ltd.*, the plaintiff initiated an arbitration against Daiwa America, but the plaintiff lost on all issues and then subsequently tried to bring an action against Daiwa Japan, the parent corporation of Daiwa America. Daiwa Japan moved to dismiss the suit on the grounds that it was barred by the arbitration. The court held that “Daiwa Japan [was] clearly in privity with Daiwa America” and that res judicata and collateral estoppel barred all claims and issues that were decided or could have been decided in the prior arbitration.⁹

Dicta

Generally speaking, dicta refers to “statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.”¹⁰ A dictum is not ordinarily considered to be binding as authority or precedent.¹¹ Consistent with that principle, courts hold that arbitration decisions have res judicata effect only as to matters actually decided by the arbitrator, or necessary to the arbitrator’s decision.¹² As the First Circuit summarizes, “While an arbitrator has broad power to fashion remedies on issues the parties have empowered him to resolve, he lacks authority to decide questions the parties have not agreed to submit to him.”¹³

Only a few courts have specifically addressed the preclusive effects of dicta from an arbitration decision. In one case, the prevailing party in an arbitration sought to vacate an unfavorable portion of the award that constituted dicta, out of fear that he might be bound by it in a future arbitration. In holding against the plaintiff, the court reasoned that the arbitrator’s remarks were mere dicta and not necessary to his award, and thus “it is exceedingly improbable that [the arbitrator’s] remarks would be given preclusive effect and we decline to recognize [that] remote possibility.”¹⁴

The Third Circuit has also held that dictum in an arbitration decision is not binding authority. In *Apex Fountain Sales, Inc. v. Kleinfeld*, a trademark owner attempted to resolve an infringement dispute through arbitration and then brought an action challenging the decision of the arbitration panel as having exceeded authority. The arbitration panel was formed

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to review design changes in certain champagne fountains manufactured by the defendant to ensure that they could not be misidentified as the plaintiff's was. In its decision, however, the arbitration panel not only ruled on the sufficiency of the specific designs currently at issue, but also went further and suggested a hypothetical design that would be satisfactory for the future. The plaintiff argued that the arbitration panel's suggestion was dicta and thus outside the scope of its authority, and should be vacated. The court disagreed, stating that "so long as recommendations constitute mere dicta, the panel does not exceed its authority."¹⁵ Although the court allowed the suggestions, it nonetheless recognized that dicta is not binding authority, and that the arbitration panel's recommendations in dicta "could not exempt [the defendants] from [their] obligation to submit new designs to the panel before exhibiting them."¹⁶

Conversely, where parties voluntarily submit an issue to arbitration, they are precluded from objecting to the authority of the arbitrator in a subsequent proceeding.¹⁷ In other words, a party cannot voluntarily submit a claim to arbitration, await the outcome, and then challenge an unfavorable decision on the ground that the arbitrator lacked authority to decide the issue.¹⁸

Conclusion

The doctrines of res judicata and collateral estoppel generally apply to arbitration decisions. Although not many cases appear to have considered the issue, a corporation and its subsidiaries can be bound by prior arbitration decisions involving each other. Courts have also consistently held that dicta does not constitute a holding entitled to binding or precedential effect; rather, only those issues necessary to the arbitrator's decision can be used for preclusion purposes. Courts have upheld an arbitrator's authority to decide an issue if the evidence shows that both parties voluntarily submitted an issue to arbitration. ■

David S. Coale is a partner with K&L Gates LLP in Dallas, Texas. Rebecca Visosky is a partner with Carrington, Coleman, Sloman & Blumenthal, LLP in Dallas, Texas. Kurt M. Wolber is an associate with Locke Lord Bissell & Liddell, LLP in Dallas, Texas.

1. See, e.g., *U.S. West Fin. Servs., Inc. v. Buhler, Inc.*, 150 F.3d 929 (8th Cir. 1998); *Benjamin v. Traffic Executive Ass'n Eastern Railroads*, 869 F.2d 107, 110 (2d Cir. 1989); *Coffey v. Dean Witter Reynolds, Inc.*, 961 F.2d 922, 924–28 (10th Cir. 1992); *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991).

2. See *Jacobus v. CBS Broad., Inc.*, 291 F.3d 1173, 1179 (9th Cir. 2002).

3. 375 F. Supp. 499, 506–07, 511, *order aff'd*, 519 F.2d 119 (6th Cir. 1978).

4. 309 F. Supp. 2d 446, 458 (E.D.N.Y. 2004).

5. See *Allen v. McCurry*, 449 U.S. 90, 94–96 (1980); see also *Katz v. Fin. Clearing & Servs. Corp.*, 794 F. Supp. 88, 94 (S.D.N.Y. 1992).

6. See *Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp.*, 684 F.2d 1383, 1386 (11th Cir. 1982).

7. See *Nevada v. United States*, 463 U.S. 110, 129 (1983).

8. See *Russell v. SunAmerica, Inc.*, 962 F.2d 1169, 1175–76 (5th Cir. 1992).

9. 842 F. Supp. 1537, 1538, 1542 (S.D.N.Y. 1994).

10. See *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995); see also *United States v. Eggersdorf*, 126 F.3d 1318, 1322 n.4 (11th Cir. 1997) ("[L]anguage in [an opinion] . . . not necessary to deciding the case then before us" is dicta).

11. See, e.g., *Kastigar v. U.S.*, 406 U.S. 441, 454–55 (1972) (broad language of opinion that was unnecessary to the court's decision could not be considered binding authority); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 352 (2005) ("Dictum settles nothing, even in the court that utters it."); see also *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 ("It is to the holdings of . . . cases, rather than their dicta, that we must attend. . .").

12. See *Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 739 F. Supp. 692, 697 (D. Mass. 1990).

13. *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 281 (1st Cir. 1983).

14. See *Montgomery Ward & Co., Inc. v. Warehouse, Mail Order, Office, Technical and Professional Employees Union*, 911 F. Supp. 1094, 1099–1103 (N.D. Ill. 1995).

15. 818 F.2d 1089, 1091–95 (3rd Cir. 1987).

16. *Id.* at 1098.

17. See *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980).

18. See *Ficek v. Southern Pac. Co.*, 338 F.2d 655 (9th Cir. 1964).