"Over? Did You Say 'Over'?" Determining the Preclusive Effect of an Earlier Arbitration Award

This article was written by Daniel Lund III for ***The Arbitrator***
and was published in Volume 55, No. 1 in February 2025.

In *Nat'l Cas. Co. v. Cont'l Ins. Co., 2024 U.S. App. LEXIS 29826 (7th Cir. Nov. 22, 2024)*, the United States Seventh Circuit Court of Appeals recently held that under the Federal Arbitration Act, an arbitrator – and not a court – is to determine the preclusive effect of an arbitrator's earlier ruling.

In the case, insurers engaged in three reinsurance agreements had previously arbitrated concerning one of the insurer's billing methodologies. When a similar dispute occurred years later, the victors in the first arbitration – rather than pursuing arbitration – filed in federal court in Chicago seeking to have the court declare that the prior arbitration award precluded re-arbitration of the latest dispute. The insurer on the other side of the dispute moved to compel arbitration, a motion granted by the district court. The plaintiff insurers appealed.

The Court of Appeals affirmed:

> Our case law establishes that the preclusive effect of an arbitral award is an issue for the arbitrator to decide, not a federal court. In no uncertain terms, we have held that '[a]rbitrators are entitled to decide for them-selves those procedural questions that arise on the way to a final disposition, including the preclusive effect (if any) of an earlier award.' ...
>
> Indeed, the Court has repeatedly instructed that, under the FAA, arbitrators presumptively decide procedural issues that 'grow out' of an arbitra-ble dispute and 'bear on its final disposition.' ... Preclusion is one such procedural issue that can grow out of an arbitrable dispute. ... [T]he relevant presumption here [is] that procedural questions growing out of arbitrable disputes are themselves arbitrable. ... To our knowledge, no court has ever interpreted § 13 [of the FAA, declaring that an arbi-tration award "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"] to require federal courts to determine the preclusive effect of arbitral awards.

Interestingly, the Seventh Circuit panel did not offer to circumscribe the list of appropriate arbitrators to the arbitrator or panel of arbitrators which decided the original dispute, citing at least one case which declared that, "[T]he question of the preclusive force of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator to decide."

Arbitrators, as well as the parties which arbitrate before them, understand that the form of an arbitration award may be as simple as "calling balls and strikes" – naming the winner and the loser on particular issues – to as complicated as a fully "reasoned" award, outlining the actual findings and reasons for every aspect of an arbitrator's decision. At the same time, the official "record" of

arbitrations – including whether arbitration hearing testimony is transcribed – varies significantly case to case, depending on the wishes of the parties to the proceeding. Hence, parties in arbitration concerned about the future reopening of similar disputes with the same opponents should carefully consider how the initial arbitration record is put together by the parties and the arbitrator(s)/arbitration agency.

Daniel Lund III
Email