

## RES JUDICATA AND COLLATERAL ESTOPPEL

### EFFECT OF PRIOR ARBITRATION ORDERS:

### WHAT IMPACT ON SUBSEQUENT ARBITRAIONS?

By

**Robert M. Hall**

*[Mr. Hall is a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator and mediator of insurance and reinsurance disputes. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright 2006 by the author. Questions or comments may be addressed to the author at bob@robertmhall.com]*

#### **I. Introduction**

In general, it is easy to posit the answer as “no impact” for a variety of practical and policy reasons. Reinsurance arbitrations are confidential and panel orders are sometimes very cryptic making it very difficult to know what was considered and decided in a prior arbitration. Moreover, arbitrations are not designed to create precedent for future actions but merely to provide a private resolution to a dispute.

But what if one could construct, in law professor fashion, an extreme fact situation in which both the earlier and the current disputes were between the same parties on the same provision of the same contract? What if the same issue and even the same claim were in question? Should the current panel be able to do a de novo review of the decisions of the prior panel? Should the current panel be required to defer to the earlier panel? Just such a fact situation has been explored in two decisions of the Connecticut Supreme Court.

#### **II. Stratford v. Int’l Assoc. of Firefighters, 728 A.2d 1063 (Conn. 1999).**

This case involved three separate arbitrations arising out of disputes under a collective bargaining agreement. The initial decision was that a collective bargaining agreement did not apply to promotions of senior members a fire department. The subsequent decisions were that there was a lack of compliance with the collective bargaining agreement in promotions of senior members of a fire department. The two subsequent decisions necessarily contradicted the decision of the first panel. The town sought to have the two subsequent decisions vacated on the basis of collateral estoppel, also known as issue preclusion.

The court acknowledged the use of collateral estoppel by the courts but stated the issue as follows:

It should be noted, however, that although collateral estoppel precludes subsequent litigation in our courts of issues meeting the above requirements, we have never addressed whether the doctrine properly applies in the context of arbitration. Therefore, at the core of this issue is a conflict between two competing policy considerations: (1) the desire to promote stability and finality of judgments, and the closely related interest of judicial economy; and (2) the desire to maintain the flexibility of the arbitral process.<sup>1</sup>

Initially, the court noted that the overwhelming majority of federal jurisdictions have held that arbitrators are not bound by the decisions of other arbitrators but that this issue is very unsettled in state courts.<sup>2</sup> Second, the court observed that by opting for arbitration, the contracting parties had chosen a dispute resolution mechanism conscribed by the contract and not by the formalistic rules of the courtroom. The parties are free to include in the contract whatever deference arbitrators should give to prior arbitration rulings (*e.g.* that they be “final and binding”) but that arbitrators would always be free to determine the import of such language.<sup>3</sup> This being the case, the court held:

[I]n the absence of a specific contract provision to the contrary, an arbitrator is not bound to follow prior arbitration decisions, even in cases in which the grievances at issue involve the same parties and interpretation of the same contract provisions. Although an arbitrator may find well reasoned prior awards to be a compelling influence on his or her decision-making process, the arbitrator need not give such awards preclusive effect. Rather, the arbitrator should bring his or her own independent judgment to bear on the issue to be decided, using prior awards as the arbitrator sees fit, as it is the arbitrator’s judgment for which the parties had bargained.<sup>4</sup>

In addition, the court found support for its position in the very limited ability of disgruntled parties to vacate adverse arbitration awards. It stated that the allowing arbitrators to accept or disregard prior ruling as they saw fit operated as an informal check and balance on the arbitral process.<sup>5</sup>

### **III. Lasalla v. Doctor’s Assoc., Inc., 278 Conn. 578 (2006).**

In this case, the plaintiff was an agent which assisted in the development of Subway stores and the defendant was a franchiser of Subway stores. The defendant agreed to pay the plaintiff a certain development fee that involved a modifier used to reflect the Subway stores already in the area. In the first arbitration, the plaintiff sought clarification of the operation of the modifier but

did not seek money damages. The first arbitration panel agreed with the plaintiff's interpretation and issued an order accordingly.

Several years later, the plaintiff brought a second arbitration seeking enforcement and money damages based on the prior panel's ruling on the modifier. The second panel granted damages but changed the calculation of the modifier. The defendant moved to vacate the second order as violating the public policy of res judicata, also known as claim preclusion, because: (a) it permitted the plaintiff to raise and prevail upon claims it could have made in the earlier arbitration; and (b) changed the calculation of the modifier.

In essence, the court followed Strafford but added some elaboration:

In the absence of a specific contractual provision governing the issue, for which the parties are certainly free to bargain, arbitrators are not required to apply claim preclusion; rather, they are free to apply or to reject the doctrine to the extent that they deem it appropriate because the parties have bargained for their judgment.<sup>6</sup>

The court also found that injecting res judicata into arbitrations undermined the business relationship of the parties in that it would force them plead all related claims or forms of relief, rather than resolve them amicably, to avoid such claims being precluded in a subsequent action.<sup>7</sup> Also, the court characterized res judicata as a public policy designed to conserve judicial resources and thus inappropriate to arbitration.<sup>8</sup>

#### **IV. Discussion**

For reasons stated in the Introduction, there is seldom a proper context in which to apply res judicata and collateral estoppel in a reinsurance arbitration.<sup>9</sup> In addition, res judicata and collateral estoppel can be slippery doctrines to apply for the uninitiated. Nonetheless, reinsurance arbitrators can and do consider these doctrines in appropriate circumstances.

Case law from Connecticut and a good many other jurisdictions indicate that the application of collateral estoppel and res judicata are optional to a panel. The Connecticut Supreme Court, at least, views the need for flexibility in the arbitration process as trumping finality in resolution of the dispute. Collateral estoppel and res judicata are viewed primarily as a means to achieve economy in the use of judicial resources.

Conversely, it can be argued from a user standpoint that the arbitration process does not benefit from those who would resort to it multiple times on essentially the same issues between the same parties hoping, eventually, for a favorable ruling. The parties have an interest in a final resolution of the issue without the cost of arbitrating it multiple times.

While res judicata and collateral estoppel may never be a major force in reinsurance arbitrations, perhaps ARIAS – US should develop some suggested protocols for their application in this context. This will assist arbitrators and help meet the needs and expectations of the parties who, clearly, are the most important players in the arbitration process.

## ENDNOTES

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<sup>1</sup> 728 A.2d at 1069.

<sup>2</sup> *Id.* at 1071-2.

<sup>3</sup> *Id.* at 1072.

<sup>4</sup> *Id.* at 1073.

<sup>5</sup> *Id.* at 1072.

<sup>6</sup> 278 Conn. 578 at 591.

<sup>7</sup> *Id.* at 591-2.

<sup>8</sup> *Id.* at 595-6.

<sup>9</sup> On occasion, however, a “reasoned” decision of a prior panel becomes available through the effort to confirm the order in court. This can support the application of res judicata or collateral estoppel.