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In Second Circuit an Arbitrator Decides Claim Preclusion in the First Instance

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The *All Writs Act (Act)* empowers federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions,” including “to effectuate or prevent the frustration of orders it has previously issued.” *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, No. 13-4825-cv, — F.3d —, 2015 WL 161745, at *3, *4 (2nd Cir. Jan. 14, 2015) (citations omitted); see also 28 U.S.C. 1651(a). In *Citigroup*, the Second Circuit held that the Act cannot be used to enjoin an arbitration on the theory that the arbitration is barred by the *res judicata* effect of a prior judgment that confirmed an earlier arbitration award between the parties. *Citigroup*, 2015 WL 161745, at *1.

Citigroup brought an action pursuant to the All Writs Act to enjoin an arbitration on the ground that it was barred by *res judicata* because the claims asserted therein could have been raised by Abu Dhabi Investment Authority (ADIA) in a prior arbitration between them. Citigroup characterized the second arbitration as an “assault” on the district court’s judgment confirming the first arbitration. *Id.* The district court granted ADIA’s motion to dismiss the action, holding that the All Writs Act did not apply to enjoin the arbitration, and that the *res judicata* issue should be decided in the second arbitration. Citigroup appealed. *Id.* at *1–*2.

The Second Circuit affirmed, indicating that the case presented “a high order challenge” involving balancing two competing considerations. *Id.* at *3 (citation and quotation marks omitted). On the one hand, the *FAA* expresses a national policy favoring arbitration. *Id.* On the other, there is a “weighty” concern for the integrity of federal judgments that would be offended if parties felt free to relitigate in arbitration claims previously resolved in federal court. *Id.*

The court held that All Writs Act did not, under the circumstances presented, authorize district courts to enjoin arbitration to prevent relitigation of prior federal judgments. Rather, Citigroup’s assertion of *res judicata* would be evaluated by the arbitrators in the first instance. According to the Second Circuit, this is because *res judicata* is an affirmative defense asserted in arbitration and thus part of the arbitration’s merits, not a question of arbitrability, which is an issue for the court. *Id.* at *5. The court noted that it had previously decided that arbitrators decide the *res judicata* effect of an arbitration award confirmed by a state court and the collateral estoppel effect of an arbitration award confirmed by a federal court. *Id.*

The Second Circuit distinguished cases in which other circuit courts sanctioned the use of the All Writs Act to enjoin arbitrations threatening to undermine federal judgments. *Id.* at *5. In those cases, the district courts addressed the merits of the underlying claims, so the main justification given for the applicability of the All Writs Act was that the district court was in the best position to protect its judgment. *Id.* at *5.

By contrast, a district court—like the one in *Citigroup*—that engages in the summary proceeding of confirming an arbitration award does not deal with the merits of the case and is not the best interpreter of what was decided in the arbitration. *Id.* at *5–*6. The court left open the possibility that there might be circumstances in which the All Writs Act could be used to enjoin an arbitration, but not where the district court merely confirmed an arbitration award. *Id.* at *6.

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