Wither Judicial Review For Institutional Arbitrations?

James E. Berger and Charlene C. Sun

King & Spalding LLP

All too often, parties who have agreed to submit their disputes to arbitration find themselves with buyer's remorse. Whether at the beginning of the process (when first served with a notice of arbitration) or at the end of the process (after finding themselves on the short end of an award), parties frequently seek to derail or nullify an arbitration by seeking a judicial ruling that the arbitral tribunal lacked jurisdiction. In several U.S. judicial circuits, however, parties who have entered into agreements calling for arbitration under institutional rules are likely to find that the courts are increasingly – and perhaps completely – unwilling to entertain those claims. Those circuits – including the First, Second, Fifth, Eighth, Eleventh and Federal Circuits – have held definitively that where parties agree to arbitrate under arbitral rules that vest arbitrators with the power to determine their own jurisdiction – known better as "competence-competence" provisions – the parties will be deemed to have agreed to let the arbitrator make that determination, thus putting it beyond the scope of searching judicial review. These rulings effectively eliminate any meaningful avenue of judicial relief from an arbitrator's jurisdictional findings, and appear to signify a growing impatience with parties who, having agreed to arbitrate, later grasp at straws in an attempt to avoid the results of a dispute resolution process that they agreed to use.

Historical Background

U.S. law enshrines a robust public policy in favor of arbitration, and U.S. law has long held that arbitration agreements and awards are to be enforced promptly and with minimal judicial interference.[1] Despite this well-developed policy favoring arbitration, U.S. law has always recognized that courts have a role to play in determining whether or not a particular matter is subject to arbitration; that issue is a critical one, both to the parties and to the courts, since a finding that a party has agreed to submit a dispute to arbitration works as a bar against bringing the same dispute to court. Congress recognized this necessary judicial role in the Federal Arbitration Act, which sets forth specific circumstances under which an arbitration award can be vacated.[2] Perhaps the most frequently invoked ground for vacatur raised by parties opposing enforcement of an arbitration award is that the arbitrator exceeded his powers, i.e., acted without jurisdiction.[3] The New York and Panama Conventions, the two treaties that provide the legal foundation for the recognition and enforcement of international arbitration awards in the United States, likewise provide that a U.S. court may refuse to recognize and enforce an arbitration award where the arbitrator has acted without jurisdiction.[4]

James E. Berger

U.S. law thus recognizes that courts may play an important role in determining whether an arbitrator had jurisdiction over a dispute (i.e., the existence of jurisdiction) and/or whether the arbitrator's actions were consistent and proper under the jurisdiction he has been found to have (i.e., the scope of jurisdiction). This role was further defined by the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*,[5] in which the Court considered whether courts were obligated to independently decide whether an arbitrator had jurisdiction over the merits of a dispute. In its decision, the Supreme Court identified three fundamental points of dispute that typically appear in any litigation concerning a putatively arbitrable dispute: the underlying merits, whether the dispute is arbitrable, and most importantly for the *First Options* court, who gets to decide whether the dispute is arbitrable. The Court stated:

> We believe the answer to the "who" question … is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to determine arbitrability" turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would any other question that the parties did not submit to arbitration, namely independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties[.][6]

While noting that the question of whether the parties agreed to arbitrate arbitrability should be decided using ordinary state contract law principles, the Supreme Court noted that the evidence of an agreement to arbitrate arbitrability was required to be "clear and unmistakable." The Court added this qualification based on its conclusion that although parties are likely to be cognizant of the disputes that they have agreed to arbitrate, the "arcane" nature of the question of who should determine arbitrability rendered it unlikely that parties would understand their silence on the issue to constitute an agreement having the effect of insulating the arbitrator's jurisdictional rulings from independent judicial review.

Interpreting *First Options*

First Options did not appear to be a fundamental shift in the law concerning who determines arbitrability; by requiring "clear and unmistakable evidence" of an agreement by the parties to give the tribunal the power to determine its own jurisdiction, the Supreme Court appeared to leave undisturbed the presumption that courts, not arbitrators, would have the power to conclusively resolve disputes over arbitrability. Ten years after the Supreme Court decided *First Options*, however, the Second Circuit decided *Contec Corp. v. Remote Solution, Co., Ltd*., 398 F.3d 205 (2d Cir. 2005). In *Contec*, Contec Corporation ("Contec") filed suit to compel Remote Solution Co., Ltd. ("Remote Solution") to arbitrate an indemnification dispute. Remote Solution opposed the motion to compel, arguing that it could not. That agreement provided for final and binding arbitration of the parties' disputes under the AAA Rules. The district court dismissed the suit, finding that all of the claims set forth in the complaint and counterclaim were subject to arbitration.

The Second Circuit affirmed. Acknowledging *First Options*' presumption that the issue of arbitrability should be resolved by the courts unless there is clear and unmistakable evidence of the parties' intent to submit that dispute to arbitration, the Court of Appeals explained that such intent may be derived "from the arbitration agreement, as construed by the relevant state law," where "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability."[7] The Second Circuit's holding in *Contec* was reaffirmed in *T. Co. Metals v. Dempsey Pipe & Supply, Inc*., 592 F.3d 329 (2d Cir. 2010), a case involving the arbitrator's authority to correct or amend an award. In *T Co*., the party opposing judicial confirmation of an award claimed that the arbitrator exceeded his jurisdiction in making substantive amendments to a final arbitration award. Specifically, that party claimed that the arbitrator violated the doctrine of functus officio – which provides that the arbitrator loses jurisdiction over a dispute once a final award has been issued – by making substantive amendments to the final award while claiming to act under a rule that permitted him to make ministerial or computational corrections to an award. The district court vacated the amended award on this basis, finding, not unreasonably, that the functus officio doctrine barred the arbitrator from amending the award. The Court of Appeals, however, reversed. Making note of the presumption that courts are responsible for determining the question of arbitral jurisdiction unless there is "clear and unmistakable evidence" of the parties' agreement to authorize the arbitrators to determine their own jurisdiction, the Court of Appeals held that the parties' agreement to arbitrate under the ICDR Rules, which authorize the arbitral tribunal to rule on its own jurisdiction, constituted "a clear and unmistakable expression [by the parties] of their intent to allocate to the arbitrator the task of interpreting the scope of his powers and duties under Article 30(1)."[8] Having found that the parties had agreed to arbitrate under a set of rules that permitted the arbitrators to determine their own jurisdiction, the Court of Appeals concluded that it "must afford significant deference to the arbitrator's interpretation of [Rule 30(1)]."

Finally, in a confirmation case arising under the New York Convention, the Second Circuit clarified that its holding in *Contec* applied not only to compel arbitration at the pre-arbitration stage, but also to preclude the court's *de novo* review of an arbitrator's arbitrability determination at the post-award stage. In *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012), the Court of Appeals held expressly that parties' agreement to arbitrate under the UNCITRAL Rules foreclosed independent judicial review of the tribunal's jurisdictional rulings – specifically whether the investment in dispute was covered by the relevant investment treaty – at the enforcement stage, rejecting Thailand's argument that the parties' agreement to arbitrate under rules providing the arbitrator with authority to rule upon his own jurisdiction merely permitted the arbitrator to make a jurisdictional determination at the outset of the arbitration without delay, but could not preclude independent judicial review at the confirmation stage.

While the rule requiring deferential review of an arbitrator's arbitrability determination when rendered under authority conferred by institutional arbitration rules agreed upon by the parties is perhaps most fully developed in the Second Circuit, the principle is certainly not foreign to other circuits.[9] The impact of these rulings is even more significant given that almost all of the most commonly-used arbitral rules include a competence-competence provision that expressly authorizes the tribunal to rule on its own jurisdiction.[10]

At first blush, these rulings may seem to work at cross-purposes with the Supreme Court's concern in *First Options* that parties negotiating arbitration agreements may not pay sufficiently close attention to the arcane question of who is authorized to determine arbitral jurisdiction, since the "clear and unmistakable" evidence of an agreement to authorize the arbitrators to determine jurisdictional disputes appears not in the arbitration clause itself, but rather in the rules the clause incorporates. The Supreme Court, however, has declined the opportunity to consider the lower courts' interpretation of *First Options*, most recently in late 2012.[11] As a result, in several federal judicial circuits, agreement to institutional – whether domestic or international – will likely be sufficient to preclude meaningful judicial review of arbitral rulings on jurisdiction.

James E. Berger *is a Partner in the Global Disputes practice at King & Spalding LLP, resident in the firm's New York office. Mr. Berger focuses his practice on cross-border disputes, with a focus on matters involving arbitration and disputes involving sovereigns and state-owned enterprises.* ***Charlene C. Sun*** *is an Associate in King & Spalding's Global Disputes group, also resident in the firm's New York office. For the footnotes to this article, please visit http://www.metrocorpcounsel.com/articles/24498/wither-judicial-review-institutional-arbitrations.*

Please email the authors at jberger@kslaw.com or csun@kslaw.com with questions about this article.