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DEBATE OVER ARBITRAL 'COMPETENCE/COMPETENCE' HEATS UP IN US COURTS

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The issue of arbitrators' competence to determine their own jurisdiction – known as 'competence/competence' – was a hot issue in the US courts this summer with three federal Courts of Appeals issuing decisions within weeks of each other. Each of the decisions considers the role of the courts in reviewing arbitrators' jurisdictional decisions as well as the effect of an agreement by the parties to arbitrate under rules that include a competence/competence provision conferring on the arbitrators the power to decide objections to their jurisdiction.

The US framework for determining the standard of judicial review of an arbitral decision concerning arbitral jurisdiction (sometimes referred to as 'arbitrability') was established by the US Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In *First Options*, the Court held in a domestic case governed by the Federal Arbitration Act that the scope of judicial review is

determined by whether the parties agreed to submit the question of arbitrability to the arbitrator. *Id.* at 943. If so, the reviewing court will apply the same deferential standard of review that it applies to any other matters that the parties agreed to arbitrate. If, on the other hand, the parties did not agree to submit the arbitrability question to arbitration, then the question of whether the dispute is arbitrable is subject to independent review by the courts. *Id.* The Supreme Court instructed that courts should not assume that the parties have agreed to arbitrate arbitrability without 'clear' and 'unmistakable' evidence of their intent to do so, and in this regard, held that merely submitting a jurisdictional objection to the arbitrator does not indicate a clear willingness to have the arbitrator decide the question of arbitrability. *Id.* at 945-46.

In *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*, 334 F.3d 274 (3rd Cir. 2003), a panel of the Third Circuit, which included then Circuit Judge Alito prior to his elevation to the US Supreme Court, held that *First Options* also applies to international arbitral awards where enforcement is sought under the New York Convention. In that case, the Third Circuit held that where a party alleged that the arbitration agreement had been forged, the court should make an independent determination of arbitrability. *Id.* at 289.

This summer, the US Courts of Appeals had the opportunity to apply these principles and consider how they interact with the arbitral rules chosen by the parties. On 26 June 2012, the Sixth Circuit, in *Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC*, No. 11-5232, 2012 WL 2401722, reversed a district court's decision confirming an award issued by a AAA arbitrator against a counterclaim-defendant who claimed that he was not a proper party to the arbitration. The lower court had concluded that the counterclaim-defendant had acquiesced to the arbitration by failing to comply with the AAA's rules for objecting to an arbitrator's jurisdiction. The Sixth Circuit, however, ruled that under *First Options*, the counterclaim-defendant had sufficiently preserved his objection,

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and it rejected the argument regarding the AAA procedures, reasoning that the relevant analysis concerned "contract formation principles rather than procedural compliance with the AAA rules". *Id.* at *4. It further noted that "[o]nly if the parties have agreed to arbitrate do the AAA's rules apply". *Id.* The Sixth Circuit thus remanded the case for a determination by the district court of whether the counterclaim-defendant was bound by the arbitration agreement. *Id.* at *5.

A few weeks later, on 13 July 2012, the Second Circuit, in *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*, No. 11-3536-cv, 2012 WL 2866275, affirmed a district court's order confirming an international award issued under the UNCITRAL rules. The case also involved a dispute concerning who was a proper party to the arbitration, but arose in the opposite context of *Crossville Medical Oncology*. In *Thai-Lao*, the respondent, the government of Laos, challenged the standing of one of the two claimants who was not a signatory to the contract containing the arbitration agreement. The Second Circuit upheld the district court's ruling that Laos' agreement to arbitrate under the UNCITRAL rules, which provide that the arbitral tribunal has the power to rule on jurisdictional objections, constituted a "clear and unmistakable intent" to arbitrate arbitrability, and thus, in accordance with *First Options*, the courts would not independently review the issue. *See* 2011 WL 3516154, at **17-21 (S.D.N.Y. 2011). *See also Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (considering effect of incorporating UNCITRAL rules into treaty). Laos filed a petition for rehearing *en banc* which remained pending at the time of the publication of this article.

Finally, on 17 July 2012, the Fifth Circuit issued a decision in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.,* 687 F.3d 671, in which it affirmed the district court's confirmation of a AAA award. In *Petrofac*, the jurisdictional dispute concerned the scope of the arbitration agreement, rather than whether all of the parties had agreed to arbitrate. The appellant asserted that the arbitration panel had exceeded its powers by issuing an award on a claim that the arbitration agreement did not cover. The Fifth Circuit concluded that by expressly incorporating the AAA Rules into their agreement, the parties had clearly and unmistakably agreed to arbitrate arbitrability, and thus the court would not independently review the arbitrators' determination. *See id.* at 674-75.

The rehearing petition filed by Laos in *Thai-Lao* asserts that Second and Fifth Circuit decisions conflict with the Sixth Circuit's decision, as well as the Third Circuit's decision in *China Minmetals*. It also advances the position of the recently published Restatement of the US Law of International Commercial Arbitration that "[m]any institutional arbitration rules give the arbitral tribunal the authority rule on . . . issues [of scope], but do not expressly provide that the tribunal's decision on scope is to

be considered final and unreviewable. If the parties assent to arbitration under such institutional rules, the court nonetheless reviews de novo the arbitral tribunal's determination". *See* Reh'g Pet. at 7-8. Laos argues that while submission to certain arbitral rules may constitute an agreement to have the arbitrators determine their own jurisdiction in the first instance, courts have a responsibility after issuance of the award to determine whether an award should be enforced; while the grounds on which enforcement may be denied are limited, there is no question that one ground is whether the parties agreed to arbitrate the dispute in question. *Id.* at 8-9.

Although Laos asserts that the recent decisions are in conflict, they might arguably be reconciled based on the nature of the jurisdictional challenge. The cases appear to turn on whether there is any question that the party challenging the award unequivocally agreed to submit to the arbitral rules which contain a competence/competence provision. In both *Petrofac* and *Thai-Lao*, submission to the rules by the party challenging the award was undisputed, while in *Crossville Medical Oncology* and *China Minmetals*, the jurisdictional dispute centered on whether the objecting party had agreed to arbitrate at all, let alone under any particular rules. On the other hand, some might argue that this distinction makes no difference, because in both *Petrofac* and *Thai-Lao*, the parties argued that although they had agreed to arbitrate some disputes between them under certain rules, they did not agree to arbitrate the claims in question under any rules. The federal appellate courts may ultimately need to clarify whether this distinction is a valid one, whether the incorporation of rules containing a competence/competence provision evidences a clear and unmistakable intent to arbitrate arbitrability and limit judicial review, or whether the courts should follow the Restatement approach. CD

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