KING & SPALDING

Client Alert

Business Litigation Practice Group

September 5, 2012

Second Circuit Clarifies Scope of Post-Award Judicial Review of Arbitrability

On August 8, 2012, the U.S. Court of Appeals for the Second Circuit issued its decision in *Schneider v. Kingdom of Thailand*,[i] a case in which the Court of Appeals was asked to clarify the scope of the competence-competence doctrine—the doctrine holding that, where parties authorize an arbitration tribunal to rule on its own jurisdiction, that agreement will foreclose *de novo* judicial review of the tribunal's decisions—in post-arbitration enforcement proceedings.

In *Schneider*, the Court of Appeals affirmed a district court's confirmation of an arbitration award entered in favor of a German investor who had brought a claim under the bilateral investment treaty between Germany and Thailand. That treaty—and its arbitration agreement—applied with respect to "approved investments" as that term was defined in article 8 of the treaty. When a dispute between the investor and Thailand arose, the investor commenced arbitration, and the parties agreed to terms of reference in which they agreed that the UNCITRAL Arbitration Rules would govern the arbitration.

Thailand objected to the arbitral tribunal's jurisdiction on the ground that the investment at issue was not an "approved investment," specifically because the investor never obtained a "Certificate of Admission" from Thailand's Ministry of Foreign Affairs. The tribunal, following a two-day evidentiary hearing, issued a 43-page decision unanimously concluding that the investment at issue was an "approved investment," and that it accordingly had jurisdiction. The tribunal ultimately found for the investor on the merits, and awarded the investor over €30 million in damages, costs, and expenses.

The investor sought confirmation of the award in the U.S. District Court for the Southern District of New York. Thailand cross-moved to dismiss the petition; its arguments included a claim that the tribunal lacked jurisdiction to render the award because the investment at issue was not an "approved investment."[ii] The District Court found that it was not required to review this finding *de novo*, because it found that the question of whether the project was an "approved investment" was a question concerning the scope of the arbitration agreement rather than a question concerning whether the parties had agreed to arbitrate. It conducted a deferential review of the tribunal's jurisdictional determination—utilizing the "light burden" standard recognized

For more information, contact:

James E. Berger
+1 212 556 2202
jberger@kslaw.com

Charlene C. Sun
+1 212 556 2107
csun@kslaw.com

King & Spalding
New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100
Fax: +1 212 556 2222

www.kslaw.com

under Section 10(a) of the Federal Arbitration Act and the manifest disregard doctrine—and found that the tribunal's jurisdictional determination satisfied that standard. It confirmed the award; Thailand appealed.

The Court of Appeals opened its analysis by noting the well-developed rule that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'"[iii] The Court observed further that "a party resisting confirmation of an arbitral award is entitled to an independent court review of a question of arbitrability unless there is clear and unmistakable evidence that the parties agreed to arbitrate that question."[iv] The Court then noted that the term "arbitrability" is a "term of art" covering both, whether parties are bound by an alleged agreement to arbitrate (a question of formation) and whether an arbitration clause covers a particular dispute (a question of scope).[v]

The investor claimed that because the question of whether the project was an "approved investment" was one of scope, the District Court was correct to refuse to conduct *de novo* review. The Court agreed that the question was one of scope—it found that Thailand's signature of the treaty pursuant to which the arbitration was commenced "created a separate agreement to arbitrate" —but disagreed with the District Court insofar as it found that independent review was unavailable to Thailand for that reason. The Court of Appeals held that the question of whether the District Court declined to conduct an independent review "does not turn on whether that question was one of scope or formation," but rather "whether there was clear and unmistakable evidence of the parties' intent to commit that question to arbitration."[vi] The Court found that the District Court had erred by failing to make this determination, and by refusing to determine arbitrability "without first finding clear and unmistakable evidence of the parties' intent to submit that question to arbitration."[vii]

The Court of Appeals found the District Court's error harmless, however, because it concluded that the parties had, in fact, agreed to arbitrate arbitrability. Noting its well-established rule—first announced in *Contec v. Corp. v. Remote Solution, Inc.*[viii] —that where "parties explicitly incorporate rules [into their arbitration agreement] that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator"—the Court found that Thailand's agreement to arbitrate under the UNCITRAL Rules foreclosed its ability to seek independent judicial review of the arbitrators' determination that the project was an approved investment, since those rules expressly confer upon the arbitral tribunal "the power to rule on objections that it has no jurisdiction, including objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."[ix]

Thailand argued that because the Second Circuit had, in its earlier decision in *Rep. of Ecuador v. Chevron Corp.*,[x] held that parties' agreement to arbitrate under the UNCITRAL Rules entitled the arbitral tribunal to rule on its jurisdiction "in the first instance," the *Contec* rule applied only to litigation occurring prior to the arbitration, such as where a party seeks to compel arbitration or stay parallel litigation in aid of arbitration. The Court of Appeals disagreed, holding:

> Thailand argues that *Republic of Ecuador* does not resolve its appeal because our use of the phrase "in the first instance" limits the holding to cases presenting the same procedural stance of determining whether the district court properly refused to stay arbitration. According to Thailand, *Republic of Ecuador* merely confirmed the arbitrators' power to decide their jurisdiction at the outset of the arbitration without delay, and did not hold that the agreement to UNCITRAL rules precluded

> independent judicial review at the later confirmation stage. We do not read *Republic of Ecuador* to be so lifeless….
>
> Thus, under *Republic of Ecuador*, when parties incorporate UNCITRAL rules, they clearly and unmistakably intend to refer questions of arbitrability to the arbitrators "in the first instance." 638 F.3d at 394. This necessarily means that a district court considering whether to confirm the award must review the arbitrators' resolution of such questions with deference.[xi]

The Court concluded by noting that "[b]ecause Walter Bau and Thailand clearly and unmistakably agreed to arbitrate issues of arbitrability—including whether the tollway project involved 'approved investments'—Thailand is not entitled to an independent judicial re-determination of that question."[xii]

Schneider establishes conclusively that the *Contec* rule applies in post-arbitral enforcement proceedings, and holds that where a party agrees to arbitrate under rules that authorize an arbitration tribunal to rule upon its own jurisdiction, a party who subsequently opposes confirmation of an award will be foreclosed from obtaining independent judicial review of the tribunal's arbitrability determinations. To the contrary, the reviewing court will be required to defer to the tribunal's jurisdictional rulings.[xiii]

Schneider obviously is a very pro-arbitration decision, and one that is consistent with the robust U.S. policy favoring prompt confirmation and enforcement of arbitration agreements and awards, particularly those concerning international disputes.[xiv] One of the more common objections to enforcement under the New York Convention is that the tribunal "exceeded its authority," though this ruling makes clear that such objections are unlikely to gain traction in cases where the parties agreed to arbitrate under the ICC, ICDR, AAA, or UNCITRAL Rules, all of which the Second Circuit has now held contain sufficiently explicit delegations of authority to arbitrators to determine their own jurisdiction as to foreclose independent judicial review of the arbitrators' rulings.

---

[i] --- F.3d ---, No. 11-1458-CV (2d Cir. Aug. 8, 2012).

[ii] Thailand claimed further that the petition should be dismissed on grounds of *forum non conveniens*. The District Court rejected that claim, and Thailand did not appeal the District Court's denial of it.

[iii] *Schneider*, slip. op. at *5 (italics original) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs. v. Commc'ns Wkrs.*, 475 U.S. 643, 649 (1986)).

[iv] *Id.* at *5-6 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 947 (1995)).

[v] *Id.* (citing *Rep. of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011) (citation omitted)).

[vi] *Id.* at *7.

[vii] *Id.* at *8.

[viii] 398 F.3d 205, 208 (2d Cir. 2005).

[ix] *Schneider*, slip. op. at *9 (citing UNCITRAL Arbitration Rules, art. 21 par. 1).

[x] 638 F.3d 384 (2d Cir. 2011).
[xi] *Id.* at *11-12 (citations omitted).

[xii] *Id.* at *11 (citing *First Options*, 514 U.S. at 943-44).

[xiii] The Second Circuit had applied this rule at least once before in a post-arbitration litigation context. Specifically, *in T.Co. Metals LLC v. Dempsey Pipe & Supp.*, 592 F.3d 329 (2d Cir. 2010), the Court of Appeals reversed a District Court's vacatur of an arbitration award on the ground that the parties' agreement to arbitrate under the ICDR Rules foreclosed independent judicial review into whether the arbitrator had authority to substantively amend an award after the award had been issued. In that case, the arbitrator had relied upon a rule permitting him to make ministerial corrections to an award as a basis for substantively amending the award, and the party seeking vacatur of the award claimed that the arbitrator had exceeded his jurisdiction—as well as the doctrine of *functus officio*, which holds that an arbitrator's authority ends with the issuance of the award—by doing so. The Court of Appeals held that because the parties had agreed to arbitrate under the ICDR Rules, and because those rules authorize the arbitrator to rule both on the scope of his authority under the rules and upon arbitrability, his interpretation of, and reliance on, the rule permitting ministerial corrections to make substantive amendments was not subject to independent judicial review or second-guessing. *T.Co. Metals*, 592 F.3d at 344-45 (citing *Contec*, 398 F.3d at 208).

[xiv] *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Thomas James Assoc. Inc. v. Jameson*, 102 F.3d 60, 65 (2d Cir. 1996) ("It is important to note that the FAA embodies 'a strong federal policy favoring arbitration.'"); *JLM Indus., Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163, 171 (2d Cir. 2004) (noting that strong federal policy favoring arbitration applies with "particular force" in international disputes); *Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Federation*, 361 F.3d 676, 683 (2d Cir. 2004) (same); *see also Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) ("Given the strong public policy in favor of international arbitration . . . review of arbitral awards under the New York Convention is 'very limited ... in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'") (citations omitted).