

U.S. Supreme Court Denies Certiorari in *Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia*, Leaving in Place the Second Circuit’s Expansion of “Clear and Unmistakable” Delegation Standard

August 17, 2022

On June 27, 2022, the Supreme Court denied certiorari in *Beijing Shougang Mining Inv. Co., Ltd. v. Mongolia*, leaving in place a Second Circuit Court of Appeals decision that expands the standard for determining whether parties intended to delegate the issue of arbitrability exclusively to an arbitral forum based on conduct rather than on the terms of the arbitration agreement.

Background. Under the U.S. Federal Arbitration Act (the “FAA”), parties have significant discretion to define the terms and scope of arbitration agreements. However, U.S. courts have found that issues of arbitrability, gateway issues relating to the enforceability of the arbitration agreement, typically remain subject to independent judicial review. Notwithstanding this general presumption, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court held that parties may agree to “delegate” to arbitral tribunals exclusive authority to determine issues of arbitrability that are typically reserved for judicial determination under the FAA, if there is “clear and unmistakable” evidence that they intended to do so.

First Options arose out of a dispute between First Options of Chicago, a financial clearing house, and an investment company wholly owned by two individuals, the Kaplans, over several agreements to pay stock purchase obligations. Those agreements also provided for arbitration of any disputes arising out of them. When the Kaplans did not pay, First Options sought to arbitrate the dispute. The arbitration panel overruled the Kaplans’ jurisdictional objections and awarded damages to First Options. The Kaplans petitioned a federal district court to vacate the award. The district court confirmed the award, concluding that by submitting their jurisdictional objections to the tribunal, the Kaplans waived their right to post-award judicial review of arbitrability. The Third Circuit reversed, finding that submitting jurisdictional objections to an arbitration tribunal did not constitute a waiver. The court concluded that the dispute was not arbitrable and annulled the award.

The Supreme Court unanimously affirmed. In so doing, the Supreme Court established the prevailing standard for determining whether the parties intended to exclusively submit or “delegate” the question of arbitrability to an arbitral forum—*i.e.*, there must

be “clear and unmistakable” evidence, reflected in the arbitration agreement or the conduct of the parties, that they intended to do so. The Court held that “merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue” and observed that “insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did not want the arbitrators to have binding authority over them.” The Court recognized that “allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination” did not necessarily indicate a “willingness” to waive the right to post-award *de novo* judicial review.

First Options provided limited guidance regarding what evidence would satisfy the “clear and unmistakable” delegation standard. The majority of the cases interpreting *First Options* concern arbitration agreements that incorporate by reference institutional arbitration rules containing a “*Kompetenz-Kompetenz*” provision, that is, a provision granting authority to the tribunal to determine its own jurisdiction. Provisions such as these are pervasive in modern arbitration rules. The majority of federal courts of appeals have held that incorporating institutional rules with a *Kompetenz-Kompetenz* provision into the arbitration agreement constitutes “clear and unmistakable” evidence of an intent to delegate most issues of arbitrability exclusively to the arbitral forum. However, the Supreme Court has not ruled on the issue, and the determination in an individual case could depend on the wording of the particular rule. We note that the final draft of the Restatement of U.S. Law of International Commercial Arbitration takes the position that to exclude *de novo* review, arbitration rules must expressly give the tribunal *exclusive* authority to determine arbitrability; this position has not been generally adopted by courts so far.

Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia. The Second Circuit’s decision in *Beijing Shougang Mining Inv. Co., Ltd. v. Mongolia*, 11 F.4th 144 (2d Cir. 2021) is notable in that, unlike the majority of *First Options*’ progeny, it did not involve the interpretation of an arbitration agreement but, rather, what kind of party *conduct* qualifies as “clear and unmistakable” evidence of delegation.

The case arose out of a 2010 investment treaty claim brought by Chinese investors against Mongolia. After the tribunal was constituted, the parties agreed to a procedural schedule for the arbitration, which featured a combined jurisdiction and liability argument phase. During the arbitration, Mongolia objected to the tribunal’s subject matter jurisdiction, arguing that the arbitration agreement only conferred jurisdiction over disputes concerning the quantum of compensation for expropriation, not over the expropriation itself. On June 30, 2017, the New York-seated UNCITRAL tribunal agreed with Mongolia, dismissing the claims for lack of subject matter jurisdiction. Shortly thereafter, Beijing Shougang petitioned the United States District Court for the Southern District of New York (the “District Court”) to: (i) review the tribunal’s

decision on jurisdiction *de novo* because the arbitration agreement did not “clearly and unmistakably” delegate the issue of arbitrability to the tribunal; (ii) set aside the award; and (iii) compel arbitration of the merits of the dispute. Mongolia cross-petitioned for a confirmation of the award.

The District Court confirmed the award. The District Court held that although the arbitration agreement “itself does not contain clear and unmistakable evidence that the parties intended to place the question of arbitrability before the arbitrators,” Beijing Shougang’s “behavior” provided evidence of its intent to exclusively delegate issues of arbitrability to the tribunal. In particular, the District Court concluded that by initiating the arbitration and arguing that the tribunal had jurisdiction “from [its] very first submission,” Beijing Shougang evidenced its “clear and unmistakable” intent to delegate the issue of arbitrability exclusively to the arbitration tribunal. Accordingly, the District Court engaged in deferential review of the UNCITRAL tribunal’s decision on jurisdiction, denied the petition to set aside and compel arbitration, and granted Mongolia’s cross-petition for confirmation of the award. On August 26, 2021, the Court of Appeals for the Second Circuit (the “Second Circuit”) affirmed the District Court’s decision. The Second Circuit concluded that, by consenting to a procedural schedule for jurisdictional issues, in which the parties would “submit arguments as to the appropriate reach of the arbitrators’ jurisdiction,” the parties “indisputably” and exclusively delegated the issue of arbitrability to the tribunal.

On March 11, 2022, Beijing Shougang filed a petition for certiorari before the Supreme Court arguing that: (i) under *First Options*, a party does not agree to forsake the right to *de novo* judicial review of arbitrability by agreeing to a schedule for making jurisdictional arguments in arbitration and then making those arguments; and (ii) the Second Circuit ignored “the critical distinction between an arbitrator’s ‘initial’ ruling on arbitrability, on the one hand, and an arbitrator’s ruling that the parties have agreed would be ‘binding,’ on the other.” On June 27, 2022, the Supreme Court denied certiorari in the case, leaving the Second Circuit holding in place.

Takeaways and Practical Implications. The expansive view of the “clear and unmistakable” delegation standard in the *Beijing Shougang* decision places parties in arbitration that wish to preserve the right to *de novo*, post-award judicial review of issues of arbitrability in a difficult position. The decision has significant practical implications. In particular, parties in arbitration, particularly with seats located in the Second Circuit, should consider carefully whether conduct in arbitration proceedings could result in a waiver of the right to *de novo* post-award judicial review. Parties that jointly wish to reserve that right should expressly do so in any agreements concerning the procedural schedule for jurisdictional issues. If the parties are not in agreement on the issue, the party wishing to reserve that right should expressly do so in communications and submissions concerning the tribunal’s resolution of jurisdictional issues. Moreover, at

the outset of arbitration proceedings, and prior to agreeing to a procedural schedule on jurisdictional issues, respondents that wish to preserve the availability of *de novo* judicial review should consider instituting an action in a court of competent jurisdiction to obtain a judicial decision on the issue of arbitrability and enjoin or stay arbitration pending that decision.

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