GAR Global Arbitration Review

The US's distinctive approach to competence-competence

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Michael Nolan

At a keynote to mark the relaunch of the Chartered Institute of Arbitrators' Washington, DC chapter, independent arbitrator ***Michael Nolan*** *of Arbitration Chambers addressed the United States' distinctive approach to competence-competence and its implications for treaty-based arbitration.* ***Anna Isernia Dahlgren****,* ***Erin Howard*** *and* ***Trishala Dessai****report.*

On 22 March, the DC chapter of CIArb marked its relaunch with a virtual keynote and discussion organised by DC chapter co-chairs **Susan Franck** of the American University Washington College of Law and **Chip Rosenberg** of King & Spalding.

Nolan presented the keynote for the event, entitled "The US's Distinctive Competence-Competence Law: Implications for Treaty-Based Arbitrations."

Nolan began with a hypothetical: two parties – L and W – go to arbitration to resolve a dispute. The arbitration agreement does not specify a seat, so the neutral seat of DC is chosen. The tribunal renders a final award incorporating a jurisdictional decision. Thereafter, L moves to vacate the arbitral award in DC federal court, while W moves to have it confirmed. Nolan then presented three different arbitral clauses:

Clause 1 – *Ad Hoc* Arbitration: "Any controversy or claim arising out of or relating to this contract shall be settled by *ad hoc* arbitration."

Clause 2 - Institutional Arbitration: "Any controversy or claim arising out of or relating to this contract shall be settled by the Florin Arbitration Association (FAA) in accordance with the FAA International Arbitration Rules." The FAA rules provide: "The arbitral tribunal shall have the power to rule on its own jurisdiction."

Clause 3 - Investment Treaty Arbitration: "In the event of disputes as to the interpretation or application of this Treaty, the Parties shall engage in amicable resolution of the dispute. If a dispute is unresolved, it shall be submitted to a tribunal of three arbitrators . . . [and] unless the Parties otherwise decide, the Tribunal shall determine its own rules of procedure."

For each clause, Nolan asked the audience to choose whether the US court reviewing arbitrability should apply a deferential or *de novo* standard in deciding whether the tribunal had jurisdiction. Nolan explained that a deferential standard of review gives primary authority to the arbitrators to determine their ability to arbitrate. *De novo* review, on the other hand, makes the courts primary with respect to the determination of arbitrability.

On clauses 1 and 2, which concerned commercial arbitration, the participants had clear opinions – though not necessarily in line with US jurisprudence – about which standard of review a court should apply. Both came out to around 30% for *de novo* review and 70% for deferential review. On clause 3, which concerned investment treaty arbitration, the poll was more balanced at 45% and 55%, respectively.

Competence-competence: conflicting US perspectives

In international law, competence-competence refers to the ability of an arbitral tribunal to decide its own jurisdiction. This concept is often understood through the lens of arbitrability, which asks whether a particular category of dispute may be capable of resolution through arbitration. However, Nolan said, in the US this term broadly encompasses many issues, including party consent, that bear upon whether a dispute can go to arbitration.

Nolan explained that the US circuit courts and the American Law Institute (ALI) Restatement of the US Law of International Commercial and Investor-State Arbitration are currently in conflict as to the US approach to competence-competence. The basic principle, expressed by the US Supreme Court in *First Options v Kaplan*, is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable evidence that they did so.' … One can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." This standard has been described by **George Bermann** of Columbia University as a

"gateway issue": at the outset of a case, do you go through the gateway to arbitration or to the court system?

Reading from the Sixth Circuit's recent opinion in *Blanton v Domino's*, Nolan observed that virtually all of the US circuit courts have determined that the *First Options* standard is satisfied if the parties incorporate arbitration rules that empower an arbitrator to determine jurisdiction or competence into their agreement by reference. Satisfaction of *First Options* allows use of a deferential standard of review. However, when there is not clear evidence of the parties' consent through an unmistakable arbitral clause, a *de novo* standard of review is applicable.

However, Nolan observed that the ALI Restatement disagrees. Bermann, the chief reporter for the Restatement, has written that a clause cannot be deemed "clear and unmistakable," as required by *First Options*, if it is buried within procedural rules because a party cannot realistically be expected to scrutinise rules of arbitration procedure incorporated by reference.

Nolan then revealed that clause 2 was based on article 19 of the 2014 ICDR International Arbitration Rules. The article was amended in 2021, in light of the Restatement's position, to add that the arbitral tribunal had the power to rule on its own jurisdiction "without any need to refer such matters first to a court."

In making that amendment, the American Arbitration Association (AAA) "was trying to make clear what the power of the arbitrator was and that that power was a primary power," explained Nolan.

However, he said the amended rule still wouldn't satisfy Bermann, who wrote in an amicusbrief in *Henry Schein v Archer and White*, "it does not matter what *the AAA* thought it was doing. What matters is what *parties signing an arbitration agreement* think they are doing. That the AAA thinks its amended rule constitutes clear and unmistakable evidence does not mean that it does. It does not."

The investment treaty context: "a gateway problem in the absence of a gateway"

Nolan turned to the Second Circuit's interpretation of the standard. In ***Beijing Shougang Mining Investment Co. v Mongolia***, a case in which he had represented Mongolia in the arbitration and subsequent court proceedings, the Second Circuit held that the China-Mongolia bilateral investment treaty did not contain a clear statement empowering arbitrators to decide issues of arbitrability. However, the court determined that the conduct of the parties throughout the arbitration created a "distinct agreement" of consent from the outset, which made the decisions of the arbitrators primary, thus providing for a deferential standard of review.

Nolan focused on the Second Circuit's interpretation of the treaty and questioned whether it had taken sufficient account of the fact that, under the treaty, any breach of its protections was exclusively for an ad hoc arbitral tribunal to determine, not any

state court foreign to the state parties to the treaty. He said there had been an attempt to resolve a "gateway problem" when, in fact, there was no gateway to any US court, but a "one-way street" leading only to arbitration for the determination of disputes as to whether the BIT had been violated.

Closing thoughts: "anything that makes arbitration easier is a good thing"

From the audience, **Colm MacKernan** of London-based firm Origin said there are other substantive questions that are *a priori* to the issue of standard of review. International arbitrator **David Sharp**, who joined virtually from Spain, asked whether it is improper to use arbitral procedural rules to decide whether arbitration should substantively proceed.

Katherine Smith-Dedrick, CIArb's North American branch chair, asked whether the *First Options* standard indicates that the US Supreme Court is making arbitrations more difficult to proceed. Nolan said the court's animating concern seemed to be to make sure that a party is not "being denied a day in court that they would have had, but for the agreement to arbitrate". Sole practitioner **Merril Hirsh** of HirshADR PLLC and the Law Office of Merril Hirsh PLLC, observed that "in the US, there's a very strong culture that ties in with the self-determination aspect of arbitration. We justify these whole procedures on the basis of 'this is what the parties decided.'"

Franck noted that self-determination is reflective of a US cultural practice, except for states like Florida and Colorado which have passed their own model laws that grant tribunals express authority as a default. "Anything that makes arbitration easier and clearer is a good thing," concluded Smith-Dedrick.

The CIArb DC branch is planning to host in-person events beginning in the Fall of 2022.