Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Rethinking Who Decides Gateway Arbitrability Issues

By **Gilbert A. Samberg**
January 18, 2019, 2:17 PM EST


Gilbert A. Samberg

Gateway issues of arbitrability are presumptively for a court, rather than an arbitrator, to decide in the first instance.[1] But arbitration is a creature of contract, and the parties to an arbitration agreement ultimately have the power to determine who is to decide such issues. Hence, that presumption may be rebutted by the parties' clear and unmistakable manifestation of their mutual intention that an arbitral tribunal should have the exclusive authority to decide arbitrability issues in the first instance.[2][3] While the federal courts have been identifying examples of the practical application of those principles, many questions are still unanswered and some have barely been posed.

1. What evidence, at a minimum, constitutes a clear and unmistakable manifestation of the parties' intention to delegate the resolution of an arbitrability issue to an arbitrator?

2. Is every such delegation a delegation of an exclusive authority?

3. Should the requisite evidence of such delegation vary by the gravity of the arbitrability issue in question? (For example, would the required evidence be less when the arbitrability issue is (a) whether a particular claim is within the scope of an uncontested arbitration agreement, as opposed to (b) whether "class arbitration," involving non-appearing non-parties, is permitted under the bilateral arbitration agreement in question?)

4. Is implied consent a sufficiently clear and unmistakable manifestation of the parties' intention?

5. When (if ever) is an express statement in the arbitration agreement the requisite clear and unmistakable manifestation of an intention to delegate an arbitrability issue?

6. When (if ever) is the incorporation of institutional arbitration procedural rules into an arbitration agreement a sufficient manifestation of the parties' intention to delegate arbitrability issues exclusively to the arbitral tribunal?

Regarding the last of those questions, federal courts have almost uniformly opined that incorporation of institutional arbitral procedural rules that contain a provision authorizing the arbitral tribunal to

determine its own jurisdiction[4] constitutes "clear and unmistakable" evidence, within the meaning of First Options, that the parties intended to have the arbitral tribunal alone determine arbitrability issues in the first instance.

One commentator begs to differ. In his view, it is simply incorrect to conclude that the parties' adoption of procedural arbitration rules that provide for the authority of arbitrators to determine their own jurisdiction constitutes an agreement to delegate questions of arbitrability exclusively to an arbitrator. This is the "Bermann Objection." Professor George Bermann of Columbia Law School, who, among other things, is the chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, recently described his view in an amicus brief, dated Sept. 25, 2018, submitted to the U.S. Supreme Court in connection with its case Henry Schein Inc. v. Archer & White Sales Inc. The Supreme Court decided that case on Jan. 8, 2019, and did not address the issue that prompted Professor Bermann's point. (Instead, it remanded the case to the Fifth Circuit for its determination regarding whether the parties had delegated the arbitrability issue in question there.)

Here is his argument in brief.

*1. Institutional arbitration rules regarding "competence-competence" do not purport to give the arbitrator exclusive authority to decide arbitrability issues.*

The institutional arbitration rule in question — "known in international arbitration circles as a 'competence-competence' [or kompetenz-kompetenz] clause" — does not delegate exclusive authority to the arbitral tribunal to determine gateway issues of arbitrability. A typical such rule is the American Arbitration Association's Commercial Arbitration Rule 6 that the "arbitrator shall have power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." It does not indicate that the arbitrator's authority to determine his/her own jurisdiction shall be exclusive, and thus does not purport to divest the courts of all authority to make such a determination.

The currently approved ALI Restatement "has concluded that the incorporation of arbitral rules like the AAA rules does not in fact constitute clear and unmistakable evidence of an intention to arbitrate arbitrability as required by First Options."[5] The Restatement notes that "[f]irst, and most fundamentally, the rules do not purport to give arbitrators the exclusive authority to rule on the enforceability of the arbitration agreement."[6]

Professor Bermann maintains that the Supreme Court requires that, to constitute the clear and unmistakable evidence sufficient to rebut the presumption that arbitrability issues are for the courts to adjudicate, "the language chosen must unambiguously establish the 'parties' manifestation of intent' to withdraw from courts authority to resolve issues of arbitrability."[7] Citing Rent-A-Center West Inc. v. Jackson, he points out that the Rent-A-Center case identifies express language that is clear in that regard; that is, the parties agreed that the "Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement."[8] Thus, the delegation to the tribunal was not only of primary authority, but of exclusive authority, to resolve such issues.

In contrast, institutional kompetenz-kompetenz language, as interpreted in U.S. law, confers on an arbitral tribunal an authority to determine arbitrability that is nonexclusive. Professor Bermann points, for example, to Federal Arbitration Act section 4, which authorizes federal courts to compel arbitration "upon being satisfied that the making of the agreement for arbitration ... is not in issue."[9]

*2. The majority view in the federal courts would have the exception swallow the rule regarding delegation.*

Professor Bermann furthermore argues that the First Options rule is that the courts have presumptive authority to determine arbitrability, and that circumstances divesting the court of such authority by delegation are anticipated to be the exception. But, he points out, "kompetenz-kompetenz provisions are ubiquitous" among the arbitration administering organizations. Therefore, he argues, if the mere adoption of the rules of one of those organizations constitutes clear and unmistakable evidence of delegation under First Options, then the exception in effect will swallow the rule.

For example, "very few international arbitrations are conducted in the absence of" the adoption of such arbitration rules, and indeed the incorporation of such rules is essentially "boiler-plate" in arbitration agreements. If such an incorporation constitutes clear and unmistakable evidence of an intention to delegate questions of arbitrability to an arbitrator, then the effect is to make delegation the rule and the court's authority to determine questions of arbitrability in the first instance the exception.

Put another way, "[i]f ordinary kompetenz-kompetenz language found in all modern arbitral rules and all modern arbitration laws were sufficient to rebut the First Options presumption, that presumption will cease to exist." Professor Bermann concludes that something more must be required in order to constitute the requisite clear and unmistakable evidence of intent.

*3. The pertinent judicial opinions provide no explanation of how an ordinary kompetenz-kompetenz provision makes the arbitrator's power exclusive.*

Professor Bermann furthermore reported that a review of the pertinent case law for purposes of formulating the Restatement resulted in the conclusion that none of the opinions addressing the issue in question afforded a meaningful analysis "as to how or why a competence-competence provision not only confers power on an arbitrator to determine arbitrability, but withdraws that power from the courts."

*4. Conclusion*

"[A] party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[10] Professor Bermann's objection is that incorporation by reference of a competence-competence provision of administered arbitration rules is not a clear and unmistakable manifestation that the parties agreed to submit arbitrability questions for resolution exclusively by arbitrators in the first instance, to the exclusion of the courts.

This is certainly food for thought. On the one hand, the adoption of Professor Bermann's argument would likely muddy the pertinent jurisprudence and make the courts' job relative to arbitrations more taxing. (And it would naturally add another checklist item in the drafting of arbitration agreements.) On the other hand, the argument is reasonably supported, and the advisability of adopting it arguably increases as the significance of the arbitability issue in question increases.

For example, the Supreme Court has made it plain that the notion of "class arbitration" refers to a rather different procedure than standard bilateral arbitration as envisioned at the time of the enactment of the FAA. Indeed, the differences between class arbitration and ordinary arbitration — in terms of procedural complexity, expenditure of resources, and consequences — are enormous, and so

the determination of whether an arbitration agreement permits class arbitration is profoundly important. What should be considered a "clear and unmistakable" manifestation of the parties' mutual intention to delegate that determination exclusively to an arbitrator in the first instance? An express specific statement in that regard arguably would be best. The incorporation by reference of arbitration rules that happen to contain a kompetenz-kompetenz provision surely should not be sufficient for those purposes.

---

*Gilbert A. Samberg is a member at Mintz Levin Cohn Ferris Glovsky and Popeo PC.*



[1] First Options of Chicago Inc. v. Kaplan, 514 U.S. 938 (1995).

[2] Id.

[3] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 77, 83 (2002).

[4] There is an abundance of such rules, which are more or less standard in administered arbitration procedures. See, e.g., American Arbitration Association, Commercial Arbitration Rules 6; International Center for Dispute Resolution, International Dispute Resolution Procedures, Art. 19(1); ICC, Rules of Arbitration, Art. 6(3); UNCITRAL, Arbitration Rules, Art. 23(1); LCIA, Arbitration Rules, Art. 23.1; CPR, Rules for Non-Administered Arbitration of International Disputes, Art. 8.1.

[5] Restatement § 2-8 Reporter's Note b(iii) (Tentative Draft No. 4, 2015).

[6] Id.

[7] Citing Rent-A-Center, West Inc. v. Jackson, 561 U.S. 63, 69n.1 (2010)

[8] Id. at 66.

[9] 9 U.S.C. § 4.

[10] Howsam, 537 U.S. at 83.