AFTER *FIRST OPTIONS*: DELEGATION RUN AMOK

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I. INTRODUCTION

The proper allocation of authority between courts and arbitral tribunals over the enforceability of agreements to arbitrate has long occupied a central place in U.S. arbitration law, domestic and international alike. From U.S. Supreme Court case law over the years, there has emerged a reasonably well-understood distinction between those issues of enforceability that a court will address if asked by a party to do so and those that it will not. Fundamental to the Court's jurisprudence is a recognition that some enforceability issues—"gateway issues"—so seriously implicate the consent of parties to arbitrate their disputes that a party contesting the enforceability of an arbitration agreement on those grounds is entitled to a judicial determination of the matter, while others—"non-gateway issues"—do not.[1] The Supreme Court has adopted the convention of also referring to gateway issues as issues of "arbitrability," even though that is not how the term arbitrability is understood throughout most of the world.[2]

Classic gateway issues include whether an agreement to arbitrate was ever validly formed,[3] whether a non-signatory is bound by it,[4] and whether it encompasses the dispute at hand.[5] What these issues all have in common is the perception that they directly implicate the consent of the parties to submit a dispute to an arbitral rather than a judicial forum.[6] By contrast, classic non-gateway issues include the timeliness of requests to compel arbitration of a dispute[7] and the satisfaction, or not, of conditions precedent to arbitration.[8] These issues do not question the consent of the parties to arbitrate, but whether an obligation to arbitrate a particular claim should be enforced. Parties are free to

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[1] *See* Lamps Plus, Inc. v. Varela, 587 U.S. ____ (2019), 139 S. Ct. 1407, 1415, 1419 (2019); Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287, 299 (2010); Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U. S., 662, 684 (2010); Mastrobuono *v.* Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

[2] The general understanding of arbitrability internationally is the legal capacity of a category of claims to be arbitrated. *See* George A. Bermann, *Arbitrability Trouble*, 23 AM. REV. INT'L ARB. 367, 369 (2012).

[3] *See, e.g.*, Painewebber v. Elahi, 87 F.3d 589 (1st Cir. 1996).

[4] *See, e.g.*, GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637 (2020).

[5] *See, e.g.*, Tracer Rsch. Corp. v. Nat'l Env't Servs. Co., 42 F.3d 1292 (9th Cir. 1994).

[6] *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012).

[7] *See, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 77 (2002).

[8] *See, e.g.*, BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 34 (2014).

raise their arbitrability objections for the first time before an arbitral tribunal itself for decision, but U.S. law also allows parties to raise them for the first time before a court if they so prefer.

II. *FIRST OPTIONS* AND DELEGATION

Complicating the gateway/non-gateway distinction is the Supreme Court's recognition that parties are free, in an exercise of party autonomy, to reserve the determination of gateway issues exclusively for arbitral determination, thereby foregoing access to a court on those matters. In the Court's terminology, parties thereby "delegate" to a tribunal exclusive authority to determine issues over which they would ordinarily be entitled to a judicial determination. In the leading decision, *First Options of Chicago, Inc. v. Kaplan*, the Court unanimously affirmed a ruling by the appeals court annulling an award rendered against a married couple, the Kaplans, on the basis of that court's independent finding that only the couple's wholly-owned company, not the couple themselves, were parties to and bound by the agreement to arbitrate and were liable to payment of an award rendered against them pursuant to that agreement.[9] The Court there squarely stated:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. . . [T]he "who (primarily) should decide arbitrability" question . . . is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, 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.[10]

The Supreme Court has thereafter reaffirmed on several occasions 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 [u]nless the parties clearly and unmistakably provide otherwise.'"[11]

In sum, the Court in *First Options* took as its point of departure the conviction that, due to the fundamental importance of consent to arbitrate, issues of

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

[10] *Id.* at 944-945 (citations omitted). The Court cited in support of this proposition its prior rulings in AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U. S. 574, 583 n. 7 (1960).

[11] *See e.g., Howsam*, 537 U.S. at 83. *See also BG Grp.*, 572 U.S. at 34.

arbitrability warrant independent judicial determination if sought. At the same time, it left open the possibility that the parties, if they do so "clearly and unmistakably," could agree to forego access to a court on issues of arbitrability, including whether the parties agreed to arbitrate, whether their agreement was valid, whether a nonsignatory could invoke the agreement or be bound by it, and whether the dispute at hand fell within the agreement's scope of application.

In *First Options*, the Kaplans chose to challenge enforcement of the arbitration agreement before the arbitral tribunal, rather than a court, as was their privilege.[12] Having failed to persuade the tribunal that they were not bound to arbitrate, the Kaplans participated in the arbitration under protest, and lost.[13] The question whether they were bound to arbitrate came before a court only on a post-award basis, viz. in an action by the Kaplans to annul the resulting award.[14] However, in most of the decided cases, the question whether a party ever agreed to arbitrate is raised in the context of a motion to compel arbitration, i.e., prior to arbitration getting underway.

III. *KOMPETENZ-KOMPETENZ* IN INSTITUTIONAL RULES

Central to *First Options* is the notion of "clear and unmistakable" evidence of a delegation. In the great majority of delegation cases, respondents have argued that, when parties adopt in their arbitration agreement a set of institutional rules containing a *Kompetenz-Kompetenz* provision, they "clearly and unmistakably" manifest an intention to "delegate" the determination of gateway issues to an arbitral tribunal.[15] According to the doctrine of *Kompetenz-Kompetenz*, an arbitral tribunal has authority to determine its own jurisdiction.[16]

Every U.S. court of appeals to address the matter has taken the view that the parties' incorporation by reference in their arbitration agreement of procedural rules containing a *Kompetenz-Kompetenz* provision clearly and unmistakably signifies an intention on their part to vest exclusive authority over the arbitrability of a dispute in an arbitral tribunal.[17] However, no court of appeals has offered the

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[12] *First Options*, 514 U.S. at 941.

[13] *Id.*

[14] *Id.*

[15] *See* Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION: LIBER AMICORUM ERIC BERGSTEN 157, 162 n.35 (Stefan Kröll et al. eds., 2011) (citing Joseph L. Franco, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 LEWIS & CLARK L. REV. 442, 469-70 (2006)).

[16] *See generally*, C. Ryan Reetz, *The Limits of the Competence-Competence Doctrine in United States Courts*, 5 DISP. RESOL. INT'L 5 (2011).

[17] *See* Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 846 (6th Cir. 2020) ("Finally, consider that every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.' [. . .] And the one remaining circuit has precedent suggesting that

slightest reasoning in support of that position, as typified by the early Eighth Circuit ruling in *FSC Sec. Corp. v. Freel*, in which the court had only this to say:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure. . . . [W]e hold that the parties' adoption of this provision *is* a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators.[18]

Other courts of appeals have decided the matter in a similarly perfunctory fashion.[19] They all make the same unexplained assumption that, if arbitrators *have* authority to determine arbitral jurisdiction, then the courts necessarily *do not*. Worse yet, the majority of court of appeals decisions that followed do not even purport to address the issue, but instead simply "join" the views that other courts of appeal had previously taken. For example, the Fifth Circuit in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.* confined itself to the following: "We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[20] Notwithstanding the high stakes associated with delegations of authority to determine arbitrability, the courts of appeals have failed to give them any serious consideration.

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it would join this consensus.") (citing Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11–12 (1st Cir. 2009); Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208–09 (2d Cir. 2005); Richardson v. Coverall N. Am., Inc., — F. App'x —, 2020 WL 2028523, at *2–3 (3d Cir. 2020); Simply Wireless, Inc v. TMobile US, Inc, 877 F.3d 522, 527–28 (4th Cir. 2017) (same for the "substantively identical" JAMS Rules), abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc. 139 S. Ct. 524; Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech, 559 F.3d 874, 878 (8th Cir. 2009); Brennan v. Opus Bank, 796 F.3d 1125, 1130–31 (9th Cir. 2015); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1246 (10th Cir. 2018); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1372–73 (Fed. Cir. 2006), abrogated on other grounds by Henry Schein, 139 S. Ct. 524; Chevron Corp. v. Ecuador, 795 F.3d 200, 207–08 (D.C. Cir. 2015) (same for the United Nations Commission on International Trade Law Rules); Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272–73 (7th Cir. 1976) (relying on the incorporation of the AAA Rules to find that the parties had agreed to binding arbitration).)

[18] FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1312-13 (8th Cir. 1994).

[19] *See, e.g.*, Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074–75 (9th Cir. 2013) ("We see no reason to deviate from the prevailing view that incorporation of the UNCITRAL arbitration rules is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006) ("We agree with the Second Circuit's analysis …and likewise conclude that the 2001 Agreement, which incorporates the AAA Rules . . . clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator.").

[20] Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012.)

For reasons set out below, the position taken by the courts of appeals in these cases is fundamentally misguided. First, the way to make a delegation clear and unmistakable is *not* to bury it in appended rules of arbitral procedure, but rather to state it plainly in the arbitration agreement itself. Second, even if incorporation by reference were a sufficient delegation vehicle, the language of the *Kompetenz-Kompetenz* provisions in these cases fails to support an inference that if tribunals may determine their arbitral jurisdiction, courts by definition may not. Third, it is well established that *Kompetenz-Kompetenz* in U.S. law signifies only that tribunals may determine their authority; it does not make that authority exclusive. Fourth, treating a standard *Kompetenz-Kompetenz* clause as sufficient to establish clear and unmistakable evidence of a delegation effectively reverses *First Options*' strong presumption that parties are entitled to an independent judicial determination of arbitrability if that is what they seek.

IV. *SCHEIN, INC. V. ARCHER & WHITE SALES, INC.*

The question whether the incorporation by reference of institutional rules containing a *Kompetenz-Kompetenz* provision constitutes clear and unmistakable evidence, within the meaning of *First Options*, first drew the Court's attention in the case of *Henry Schein, Inc. v. Archer and White Sales, Inc*. The issue before the Court there was not whether a *Kompetenz-Kompetenz* provision in a set of incorporated rules constitutes clear and unmistakable evidence of a delegation, but rather whether, assuming a valid delegation has been made, a court could avoid referring the case to arbitration on the ground that the particular challenge to arbitrability being advanced was "wholly groundless."[21] The Court in *Schein* ruled unanimously that no such "wholly groundless" exception exists.[22]

However, during oral argument in *Schein*, several members of the Court expressed doubt whether the incorporation of institutional rules containing a *Kompetenz-Kompetenz* clause did in itself amount to a delegation within the meaning of *First Options* in the first place. The arbitration clause in *Schein* had stated: "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to . . . intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association."[23] This clause contained no language whatsoever suggestive of a delegation.

At the very outset of oral argument, Justice Ginsburg queried counsel as to why the above-quoted arbitration agreement divested courts of authority to determine arbitrability:

> But clear—clear and unmistakable delegation, why can't it be both; that is, that the arbitrator has this authority to decide questions

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[21] Henry Schein, Inc. v. Archer and White Sales, Inc., 576 U.S. ___, 139 S. Ct. 524, 527-28 (2019).

[22] *Id.*

[23] *Id.* at 528.

> of arbitrability, but it is not exclusive of the court? We have one brief saying that that is indeed the position that the Restatement has taken.
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> . . . .
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> When . . . the model case is this Court's [*Rent-A-Center*] decision, and there the—the clause said the arbitrator, not the court, has exclusive authority. And here we—we're missing both the arbitrator, to the exclusion of the court, and the arbitrator has exclusive authority.[24]

Similarly, Justice Kagan inquired:

> *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.[25]

Justice Breyer observed:

> [S]o you say step 1. Is there clear and unmistakable evidence that an arbitrator is to decide whether a particular matter X is arbitrable? Is that right?
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> . . . .
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> Step 1 is we have to decide . . . whether there is a clear and unmistakable commitment to have this kind of matter decided in arbitration.[26]

Justice Gorsuch in turn asked: "[T]here's just maybe a really good argument that clear and unmistakable proof doesn't exist in this case of—of a desire to go to arbitration and have the arbitrator decide arbitrability?"[27]

Significantly, in its directions on remand in *Schein*, the Court specifically invited the Fifth Circuit to address the question whether *First Options*' clear and unmistakable evidence requirement had been met:

> We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that

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[24] Transcript of Oral Argument at 7, 18, *Schein*, 139 S. Ct. 524 (2019) (No. 17-1272) [hereinafter *O.A. Tr.*].

[25] *Id.* at 17.

[26] *Id.* at 20, 24.

[27] *Id.* at 42.

> they did so.' On remand, the Court of Appeals may address that issue in the first instance. . . . [28]

It is a sign of the importance of this predicate question that members of the Court raised the issue, despite not having granted certiorari on it and the parties not having focused on it in their briefs.

However, the Fifth Circuit failed on remand to make the determination that the Court requested. Instead, it simply followed its prior decision in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.* to the effect that "an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"[29] The court then declined to refer the parties to arbitration on the ground that the claim being brought fell within a "carve-out" to the arbitration agreement.[30] The Supreme Court granted certiorari on the "carve-out" question while denying a cross-motion or grant of certiorari on the question whether the parties had made a sufficiently clear and unmistakable delegation. It then heard oral argument, but subsequently dismissed the case on the ground that certiorari had been improvidently granted.[31] The Court therefore ultimately addressed neither the "carve-out" nor the delegation question.[32]

V. INCORPORATION BY REFERENCE

It is questionable at the very outset that evidence of a delegation should be considered clear and unmistakable when it is relegated to a separate instrument that is only incorporated by reference in an agreement to arbitrate, rather than set out in an arbitration agreement itself. By definition, a provision as consequential as a delegation of authority to determine gateway issues cannot be deemed clear and unmistakable when it is buried in a referenced set of procedural rules. Parties can reasonably be expected to read a contractual arbitration clause carefully before agreeing to it. An arbitration clause is where a party entertaining any doubts over whether it was jeopardizing its right of access to a court on the question whether it consented to arbitrate would likely look. But, a party cannot realistically be expected to scrutinize lengthy and detailed rules of arbitral procedure incorporated by reference in an arbitration clause in search of

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[28] *Schein*, 139 S. Ct. at 531 (citations omitted).

[29] Archer and White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279 (5th Cir. 2019) (citing Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012)).

[30] *Archer and White Sales*, 935 F.3d at 281-82.

[31] Writ of Certiorari, *Schein*, 141 S.Ct. 107 (2021) (No. 19-963) (per curiam). *See also* Brief for Petitioner, *Schein*, No. 19-963, 2020 WL 5074342, at *14-15 (5th Cir. Aug., 2020).

[32] The Supreme Court also denied certiorari in another case, raising directly the question whether a *Kompetenz-Kompetenz* clause in incorporated rules of procedure constitutes a clear and unmistakable indication of an intention to make a delegation. Denial of Writ of Certiorari, Piersing v. Domino's Pizza, No. 20-695 (U.S. Jan. 25, 2021).

enlightenment on that matter. Practically speaking, for most parties, rules of arbitral procedure assume importance only once arbitration is initiated. Why, more particularly, would a party look to an instrument outside the arbitration agreement and denominated *rules of arbitral procedure* to find principles that address the relationship between *arbitral* and *judicial jurisdiction*, which is not a procedural matter?

In the only case in which the Supreme Court had squarely faced a delegation clause—*Rent-A-Center, West, Inc. v. Jackson*—the parties did what anyone intent on making evidence of a delegation clear and unmistakable would do.[33] They made the delegation directly in their arbitration agreement itself.[34] No party seeking to make a delegation genuinely conspicuous would choose to place it anywhere else, including in a set of referenced procedural rules.

But, even if incorporation by reference were good enough, which it is not, the presence of a *Kompetenz-Kompetenz* clause in a set of incorporated rules in itself, as shown in the sections that follow, falls far short of clearly and unmistakably manifesting an intention to delegate, and for several reasons.

VI. THE MEANING OF *KOMPETENZ-KOMPETENZ*

A *Kompetenz-Kompetenz* clause unquestionably vests authority in an arbitral tribunal to determine its own jurisdiction.[35] The relevant procedural rule in the *Schein* case—Rule 7 of the AAA Commercial Arbitration Rules—states directly as follows: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s) or to the arbitrability of any claim or counterclaim."[37] By its plain meaning, Rule 7 gives tribunals authority that they arguably would not otherwise have. This is significant. Absent such a provision, a tribunal whose jurisdiction is challenged on arbitrability grounds could be stopped in its tracks if and when a party challenging arbitrability has recourse to a court for a determination of the matter. The tribunal would likely suspend proceedings pending a judicial determination, resulting in delay and expense, thereby compromising two of arbitration's strongest selling points: speed and economy. Conferring authority on a tribunal to determine its own competence is thus neither negligible nor to be taken for granted. It contributes importantly to arbitration's efficacy as a dispute resolution mechanism.

But it does not follow from the fact that arbitrators *have* authority to determine arbitrability that courts *do not*. In order for *Kompetenz-Kompetenz* to achieve its important purpose, it need not be understood as divesting courts of authority to make that jurisdictional determination if asked to do so. In order to reach the result it did in the *Schein* case, the Fifth Circuit, like the courts of

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[33] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010).

[34] *Id.* at 66.

[35] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1141 (3d ed. 2021).

[37] Am. Arb. Ass'n (AAA), Commercial Arbitration Rules R-7 (Oct. 1, 2013).

appeals in the other cases, was required to read into the *Kompetenz-Kompetenz* clause in the AAA Rules the word "exclusive" which is not there.[38] That is a big and very serious leap, and by no means a necessary one, as the above-cited remarks by members of the Supreme Court at the oral argument in *Schein* reveal.

The way in which parties properly dispel doubt over whether they have delegated to a tribunal sole authority to determine matters of arbitrability is through the simple device of making arbitral authority over gateway issues expressly exclusive. That is precisely what the parties did in the *Rent-A-Center* case. Their arbitration agreement stated:

> [t]he 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 including, but not limited to any claim that all or any part of this [Arbitration] Agreement is void or voidable.[39]

In other words, the parties in *Rent-A-Center* took two simple steps to make their intent to delegate authority to determine arbitrability clear and unmistakable. As already noted,[40] they placed the delegation clause in the arbitration agreement itself, not in rules incorporated by reference—and they expressly declared that authority to be "exclusive." That is why the question whether there was a valid delegation in *Rent-A-Center* was never even raised.

Certain lower federal courts, both before and after the trend among the courts of appeal had emerged, have properly understood the difference between granting authority to tribunals and depriving courts of that authority, and could not bring themselves to describe reference to *Kompetenz-Kompetenz* in incorporated procedural rules as clear and unmistakable evidence of a delegation. One federal district court, in a circuit that has not yet ruled on the issue, bucked the trend among the courts of appeals:

> It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to "clear and unmistakable" evidence that the contracting parties agreed to . . . preclude a court from answering them. To the contrary, that seems anything but 'clear.' And the AAA rule itself does not make the purported delegation of authority any more "clear" or "unmistakable." The AAA rule simply says that the arbitrator has the authority to decide these questions. It does not say that the arbitrator has the sole authority, the exclusive authority, or anything like that. The language of the

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[38] Archer and White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 280 (5th Cir. 2019).

[39] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 66 (2010) (emphasis added).

[40] *See* Denial of Writ of Certiorari, Piersing v. Domino's Pizza, No. 20-695 (U.S. Jan. 25, 2021) and text accompanying note 24.

> rule does not suggest a *delegation* of authority; at most it indicates that the arbitrator possesses authority, which is not the same as an agreement by the parties to give him sole authority to decide those issues.[41]

Another federal district court felt obliged to follow the prevailing view, but not without strongly condemning it as "incongruous," "ridiculous" and "bordering on the absurd."[42] It added: "[h]ow this could be considered clear and unmistakable can only be explained if the true meaning of 'clear' and 'unmistakable' are [*sic*] ignored."[43] The court nevertheless felt obliged to follow the trend.[44]

The meaning of *First Options* also arises regularly in state courts since the FAA does not create federal subject-matter jurisdiction, much less exclusive jurisdiction. Some of these courts, like certain federal district courts, have rightly rejected the facile assumption that a grant to arbitrators of authority to determine arbitrability necessarily divests courts of that authority. A Florida appellate court recently stated:

> [W]e find something missing. This [institutional] rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction.
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> . . . .
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> We respectfully disagree with [holdings finding otherwise] because we do not believe they comport with what *First Options* requires . . . . [N]one of these cases have ever examined how or why the mere "incorporation" of an arbitration rule such as the one before us . . . satisfies the heightened standard the Supreme Court set in *First Options*, nor how it overcomes the "strong pro-court presumption" that is supposed to attend this inquiry. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same.[45]

Because the Florida state courts are divided, the Florida Supreme Court is hearing the case and, as of this writing, oral argument awaits.[46] The Florida courts are not

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[41] Taylor v. Samsung Elecs. Am., Inc., No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020).

[42] Ashworth v. Five Guys Operations, LLC, No. 3:16-06646, 2016 WL 7422679, at *3 (S.D. W.Va. Dec. 22, 2016).

[43] *Id.*

[44] *Id.*

[45] Doe v. Natt, No. 2D19-1383, 2020 WL 1486926, at *7-9 (Fla. Dist. Ct. App. Mar. 25, 2020) (citations omitted).

[46] Airbnb, Inc. v. John Doe, et al., Case No. SC2020-1167 (Fla. Filed Mar. 2, 2021).

alone.[47] The matter is also pending before the Texas Supreme Court, since lower state courts in Texas as well are divided over the issue.[48]

The only reason any U.S. court of appeals has advanced in support of its position that a *Kompetenz-Kompetenz* provision in incorporated procedural rules constitutes clear and unmistakable evidence of a delegation is that the AAA, the institution whose rules were invoked in that case, had amended the language of the rules precisely in order to meet the *First Options* clear and unmistakable evidence test.[49] That may well be the case, but is of little import. 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 clause constitutes clear and unmistakable evidence does not mean that it does. It does not.

VII. *KOMPETENZ-KOMPETENZ* IN U.S. LAW

In fact, *Kompetenz-Kompetenz* has been consistently understood in the U.S. to authorize an arbitral tribunal to determine its jurisdiction if challenged, and nothing more.[50] In point of fact, there has never been any inconsistency in U.S. law between *Kompetenz-Kompetenz,* on the one hand, and access to a court on issues of arbitrability, on the other. Decades before arbitral institutions were

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[47] *See* Ajamian v. CantorCO2e, L.P., 137 Cal. Rptr. 3d 773, 782-83 (Cal. Ct. App. 2012) (citations omitted):

> The "clear and unmistakable" test reflects a "heightened standard" of proof. That is because the question of who would decide the unconscionability of an arbitration provision is not one that the parties would likely focus upon in contracting, and the default expectancy is that the court would decide the matter. Thus . . . a contract's silence or ambiguity about the arbitrator's power in this regard cannot satisfy the clear and unmistakable evidence standard.
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> Appellants . . . point[] primarily to . . . the arbitration provision['s] . . . proviso that arbitration may be conducted according to the rules of the AAA (under which an arbitrator has the power to determine the validity of an arbitration agreement). [Appellee] disagrees with appellants' arguments . . . [Appellee]—and the trial court—have it right.

[48] Totalenergies E&P USA, Inc. v. MP Gulf of Mexico, LLC, No. 21-0028 (Tex. filed Apr. 2, 2021).

[49] Blanton v. Domino's Pizza Franchising LLC*,* 962 F.3d 842, 8495050 (6th Cir. 2020).

[50] Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 PEPP. L. REV. 17, 25 (2014) (explaining that U.S. law does not "even contemplate[e] negative kompetenz-kompetenz"); William Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules* 16, (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Paper No. 15-40, 2015) ("[C]ourts will provide early decisions on the validity of a dispute resolution clause alleged to be void *ab initio* because, for instance, the person signing the contract lacked authority to commit the company sought to be bound.").

putting *Kompetenz-Kompetenz* provisions in their procedural rules, courts and tribunals were already practicing *Kompetenz-Kompetenz*, without any supposition that it barred courts from making an independent judicial determination of arbitrability prior to arbitration if so requested.[51]

The fact that *Kompetenz-Kompetenz* does not preclude access to a court on arbitrability issues is actually built into the key instruments of domestic and international arbitration law in the U.S. The Federal Arbitration Act specifically calls upon courts to compel arbitration only if they are "s*atisfied that the making of the agreement for arbitration . . . [was] not in issue.*"[52] Similarly, under Article II of the New York Convention, courts do not refer parties to arbitration if they find the arbitration agreement to be "*null and void*, *inoperative or incapable of being performed.*"[53] Courts could not possibly perform their obligations under the FAA or the New York Convention if *Kompetenz-Kompetenz* operated to negate judicial authority to make arbitrability determinations. In sum, the *Kompetenz-Kompetenz* principle in U.S. law has never entailed the corollary that, if arbitrators *may* decide arbitrability, courts *may not.*

The understanding of *Kompetenz-Kompetenz* in U.S. law contrasts sharply with the understanding that prevails in certain other countries, which view the doctrine as *both* vesting tribunals with authority to determine arbitrability *and* divesting courts of that authority. The jurisdiction that most resolutely adheres to this approach (but not the only one to adopt it) is France. Under settled French law, *Kompetenz-Kompetenz* has *both* a "positive" *and* a "negative" dimension.[54] The former affirmatively confers on tribunals authority to determine their jurisdiction, while the latter deprives courts, prior to arbitration, of that authority.[55] Significantly, however, even under French law, negative *Kompetenz-Kompetenz* is not entirely unreviewable. The Civil Procedure Code expressly authorizes courts to decline to enforce an arbitration agreement if they find it "manifestly void or manifestly not applicable."[56] The sharp difference between the U.S. version of *Kompetenz-Kompetenz* ("positive" only) and the French version (both "positive" and "negative") pervades the international arbitration literature. The

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[51] *See generally* James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT'L DISP. SETTLEMENT 3, 15-20 (2010).

[52] Federal Arbitration Act, 9 U.S.C. § 4 (emphasis added).

[53] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1968, 21 U.S.T. 2517, 330 U.N.T.S. 38 (emphasis added). *See also* Federal Arbitration Act § 201.

[54] *See generally* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

[55] BORN, *supra* note 35, at 1161.

[56] Code De Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1448 (Fr.).

fact that *Kompetenz-Kompetenz* in U.S. law has only a positive dimension is simply uncontested.[57]

In short, whether incorporated in institutional rules or not, *Kompetenz-Kompetenz,* as indisputably understood in U.S. law, does not deprive courts of the authority, when asked, to determine the arbitrability of a dispute prior to arbitration —much less deprive them of that authority "clearly and unmistakably." There is no justification for altering the established meaning of *Kompetenz-Kompetenz* merely because it has made its way into a set of incorporated procedural rules.

VIII. A REVERSAL OF PRESUMPTIONS

The Supreme Court in *First Options* deliberately made judicial authority to determine arbitrability the rule, and deprivation of that authority the exception, doing so out of a commitment to the principle of party consent lying at the heart of U.S. arbitration law. By its own account, the Court in that decision prescribed a "heightened standard" for finding a delegation.[58] In a word, parties must decidedly "go out of their way" to withdraw from courts the authority to decide issues of arbitrability that they ordinarily enjoy. The "clear and unmistakable" standard cannot be understood any other way.

The Supreme Court's purpose in *First Options* would be frustrated if the mere inclusion of a *Kompetenz-Kompetenz* clause in procedural rules referenced in an arbitration agreement were treated, *per se*, as clear and unmistakable evidence of a delegation. There is nothing in the language of a standard garden-variety *Kompetenz-Kompetenz* clause, wherever it may be found, that puts a party on sufficient notice of a delegation. A party reading that language would have no idea that, by signing the agreement, it was relinquishing its fundamental right of access to a court to demonstrate that it never consented to arbitration, *i.e*., that the agreement was never formed, is not binding on it, is invalid or has no application to the dispute. As the Court stated in *First Options* itself, treating as a valid delegation a clause that is less than clear and unmistakable "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[59] The Court considered *Kompetenz-Kompetenz* far too "arcane" to be given that effect.[60]

The inescapable conclusion from all that precedes is that a *Kompetenz-Kompetenz* provision, wherever placed, is altogether too oblique a means of informing parties of a matter as momentous as loss of the right of access to a court on matters of arbitrability—a right of access that they have every reason to believe they enjoy. It is worth recalling here the concern voiced by Justice Kagan in *Schein*:

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[57] *See, e.g*., Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION: LIBER AMICORUM ERIC BERGSTEN 157 (Stefan Kröll et al. eds., 2011).

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

[59] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

[60] *Id.*

> [I]f you look at *First Options*, *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.[61]

Moreover, today *Kompetenz-Kompetenz* provisions are ubiquitous. They are found in virtually every modern set of institutional rules; the AAA Rules are by no means exceptional.[62] They are also found in virtually every modern arbitration law that States enact to regulate international arbitral activity conducted on their territory. Under the leading model law of international arbitration, widely adopted around the world and even by a good number of U.S. states: "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[63] It is consequently the rare international arbitration indeed that is conducted in the absence of a *Kompetenz-Kompetenz* provision. In other words, such provisions have become, for all practical purposes, "boiler-plate." Parties do not need to "go out of their way" to subject their arbitrations to *Kompetenz-Kompetenz.* All modern arbitration laws and rules do that for them.

In short, treating a standard *Kompetenz-Kompetenz* provision as *per se* clear and unmistakable evidence within the meaning of *First Options* effectively reverses the presumption that the Supreme Court so emphatically established in that case when it decided in favor of a party's right of access to a court on the basic issue of consent to arbitrate. It comports neither with the letter nor the spirit of *First Options* to treat a *Kompetenz-Kompetenz* provision in a set of incorporated institutional rules as clear and unmistakable evidence of an intention to deprive parties of access to an independent judicial determination of arbitrability. This simply cannot be the result that the Supreme Court had in mind in rendering the *First Options* decision.

IX. THE EFFECT OF A DELEGATION ON A POST-AWARD ACTION

The cases just discussed all concern the delegation issue as it arises *prior to* arbitration, i.e., when a court is asked to compel arbitration. But the delegation issue also arises in a *post-award* action (as it did in the *First Options* case itself), and there too it has enormously important consequences. More particularly, it would be a great mistake to assume that, if U.S. courts lose their authority to ensure the arbitrability of a dispute prior to arbitration, they will recover it at the end of the process. Under U.S. law, once a proper delegation is made, courts are

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[61] O.A. Tr., *supra* note 24, at 17.

[62] Thus, Article 23(1) of the UNCITRAL Arbitration Rules (2013) similarly provides that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

[63] UN Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 16(1) (2006).

sidelined, not only pre-arbitration but also in post-award review.[64] The case law holds that, under a proper delegation, courts also cannot, in a vacatur or confirmation action, meaningfully ensure that the award debtor consented to arbitration; they owe extreme deference to a tribunal's determination whether an arbitration agreement exists, is valid, is applicable to a non-signatory and encompasses the dispute at hand.[65] According to the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, under a delegation, in order to be overturned, a tribunal's finding of arbitrability must be "baseless,"[66] resting this conclusion on the Supreme Court's ruling in the case of *Oxford Health Plans LLC v. Sutter*.[67]

Thus, under a delegation, *at no point* in the arbitration life cycle will parties have the benefit of an independent judicial determination whether they indeed consented to arbitrate. This is too drastic a result to follow from the mere presence of a standard *Kompetenz-Kompetenz* provision only found in the rules of procedure incorporated by reference in an agreement to arbitrate and again, cannot possibly be what the Supreme Court intended in *First Options* when it demanded clear and unmistakable evidence of a delegation.

A comparison with French law in this regard is here too highly illuminating. As noted, under French law, courts have virtually no role in ensuring that a dispute is arbitrable before compelling parties to arbitrate.[68] For all practical purposes, a dispute will proceed to arbitration on the merits if a tribunal, in its exercise of *Kompetenz-Kompetenz*, finds a dispute to be arbitrable. The involvement of a court at this stage is negligible.

However, French law justifies this result precisely on the ground that *after* an arbitration comes to a close and an award is rendered, a party that failed to convince the tribunal to dismiss a case on arbitrability grounds has access to a court to have the resulting award annulled or denied enforcement on those same grounds. Moreover, the inquiry into arbitrability that a French court performs on that occasion is not deferential, but completely de novo.[69] In other words, French courts fully regain at the end of the process the role they were denied at the outset. Under a delegation clause, U.S. courts do not.

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[64] *See* Schneider v. Kingdom of Thailand, 688 F.3d 68, 74 (2d Cir. 2012) ("Because Walter Bau and Thailand clearly and unmistakably agreed to arbitrate issues of arbitrability . . . Thailand is not entitled to an independent judicial re-determination of that same question.")

[65] *See* Schneider v. Kingdom of Thailand, 688 F.3d 68, 71 (2d Cir. 2012); Chevron Corp. v. Republic of Ecuador, 949 F. Supp. 2d 57, 65-67 (D.D.C. 2013).

[66] RESTATEMENT OF THE L., THE U.S. L. OF INT'L COM. AND INV.-STATE ARB. § 4.12, reporters' note e (AM. L. INST., Proposed Final Draft No. 623, 2019) [hereinafter *Restatement*].

[67] Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013).

[68] *Supra* Section VII.

[69] Ina C. Popova et al., *France*, 2020 EUR. ARB. REV. 28, 34.

X. THE RESTATEMENT AND ACADEMIC COMMENTARY

The delegation question received sustained attention at the time the recently adopted ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration was prepared. The Reporters, the ALI Council and the ALI membership at large directly faced the question whether the incorporation of *Kompetenz-Kompetenz* language from a set of arbitral rules constituted clear and unmistakable evidence of an intention to withdraw from courts their authority to determine arbitrability.

In its lengthy deliberations, the ALI closely examined the proposition that the presence of *Kompetenz-Kompetenz* provisions in incorporated institutional rules satisfies the *First Options* test. It looked at the proposition from every angle, carefully weighing both the strengths and weaknesses of the proposition. The Reporters concluded with confidence that it was unsustainable,[70] and their position was unanimously adopted by both the ALI Council and the ALI membership when the entire Restatement was approved in May 2019.[71]

In an unprecedented step in a Restatement, the reporters requested the ALI, even after the Restatement had received full approval, to be allowed to revisit five issues that either had been controversial in the discussions, or on which court decisions contrary to the approved Restatement position had subsequently come down. Among the five was the delegation issue that is the topic of this article. The ALI agreed, and reconvened the advisory committee to revisit those matters. Following discussion, the committee specifically recommended that the Restatement position on the delegation issue be maintained, and it was. (Notably, on two of the other four issues that were revisited, the reporters, following committee deliberation, actually proposed changing the Restatement positions, and the proposed changes were subsequently approved unanimously by the ALI

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[70] Restatement, *supra* note 66, § 2.8, art. b, reporter's note b(iii).

[71] Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent at 25 fn. 15 and accompanying text, Henry Schein, Inc. v. Archer and White Sales, Inc., 576 U.S. ___ (2019) (No. 19-963). ("Petitioner may, as it did previously in its submission during the certiorari process . . . attempt to undermine the relevance of the ALI Restatement by suggesting that the final version of the Restatement retreated from a stronger position on the point taken in an earlier draft. Petitioner observed that the final draft of the Restatement did not state that it 'reject[s] the majority line of cases . . . as based on a misinterpretation of the institutional rules being applied.' This observation is disingenuous. First, it is the Comments, not the Reporters' notes, that state the official position of the ALI, and Comment *b* to the relevant section in the draft of the Restatement as approved states unequivocally that 'the rules . . . do not expressly give the tribunal exclusive authority over these issues.' Restatement, *supra* note 66, § 2.8, art. B, reporter's note b(iii). As for the Reporters' notes, note b(iii)) examines at length the relevant language of a large number of institutional rules similar to the AAA's and observes that not a single one constitutes 'clear and unmistakable' evidence within the meaning of *First Options*. There was no need to state a global summary of that finding. As Chief Reporter of the Restatement, I can affirm that this amicus brief accurately reports the ALI's position.")

Council and the ALI membership.) It is thus noteworthy that the delegation issue in effect received two "readings" in the ALI and the Restatement position remained the same.

Commentators similarly recognize the anomaly, in light of what the Court meant to achieve in *First Options*, of treating a *Kompetenz-Kompetenz* provision in incorporated rules as clear and unmistakable evidence of a delegation:

> A [] conclusion from *First Options* is that absent rebuttal of the anti-arbitration presumption—and any such rebuttal will surely be very rare—existence and validity questions will not be subject to a negative competence-competence doctrine in the United States. This conclusion is not affected by whether one party has initiated arbitral proceedings or whether arbitrators have been seized of the matter. Court jurisdiction to decide arbitrability [prior to arbitration] will also be full and not limited by a prima facie standard.[72]

That author elsewhere described the courts' position as "startling" and "misguided."[73] He notes that parties include in their arbitration agreement institutional rules containing a *Kompetenz-Kompetenz* clause "almost as a matter of course."[74] Treating such a clause as barring independent judicial review, he writes, "seems unwise and unlikely to have been intended by parties when they opt for institutional arbitration."[75] Significantly, he concludes: "It will fall to the [Supreme] Court itself to correct this error in a future decision."[76]

XI. CONCLUSION

The U.S. courts of appeal have seriously erred in treating the incorporation by reference in an arbitration agreement of procedural rules containing a *Kompetenz-Kompetenz* clause as "clear and unmistakable" evidence of an intention to withdraw from parties the right to a judicial determination of the question whether they ever validly agreed to arbitrate a given dispute. In order to be clear and unmistakable, a delegation should be placed directly in the parties' agreement to arbitrate, not relegated to a set of procedural rules that few parties will read with care upon signing the underlying contract.

The courts are also deeply mistaken in assuming that, if arbitrators have authority to determine the arbitrability of a claim, courts necessarily do not. U.S.

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[72] John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective,* 36 VAND. J. TRANSNAT'L L. 1115, 1133 (2003). *See generally* Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, 2009 AUSTRIAN ARB. Y.B. ON INT'L ARB. 237.

[73] John James Barcelo, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View* 23 (Cornell L. Sch., Legal Studies Rsch. Paper No. 17-40, 2017).

[74] *Id.*

[75] *Id.*

[76] *Id.*

arbitration law distinguishes itself from French arbitration law by, among other things, embracing "positive," while rejecting "negative," *Kompetenz-Kompetenz*. That tribunals may determine arbitral jurisdiction does not mean that courts may not. The meaning of *Kompetenz-Kompetenz* in U.S. law does not change merely because rules of arbitral procedure use the term.

Nor is there any indication to the contrary in *First Options*. U.S. courts, including the Supreme Court, are well aware of the fact that, *Kompetenz-Kompetenz* notwithstanding, they have not only the right, but also the obligation, to determine the arbitrability of a claim if they are asked to do so. Both the FAA and the New York Convention plainly so state. In demanding clear and unmistakable evidence of a delegation, the Supreme Court in *First Options* must have intended federal courts to take a much closer look at purported delegations than they have been doing. The Supreme Court's insistence on clear and unmistakable evidence was emphatic—so much so that it can fairly be described as, in and of itself, "clear and unmistakable."

Kompetenz-Kompetenz provisions are found everywhere on the arbitration landscape, domestic and international alike. Even if parties do not include the term directly in their arbitration agreement, virtually all modern arbitration laws and rules expressly embrace it. If the mere presence of what has become standard boiler-plate language suffices to establish clear and unmistakable evidence of a delegation, the presumption that the Supreme Court carefully and determinedly established in *First Options* will, for all practical purposes, be reversed.

This makes it all the more important that the very high bar set by the Court for a valid delegation in *First Options* be maintained, something the U.S. courts of appeal have utterly failed to do. Without any serious reasoning whatsoever, they have taken a position that is inimical to the fundamental principles that (a) parties are not required to submit their claims to arbitration without their consent and that (b) they are presumptively entitled, upon request, to an independent judicial determination of that matter. At stake is something even more basic than the principle of consent, namely the legitimacy of arbitration itself. It is not news that arbitration is increasingly under attack.[77] U.S. courts should do nothing, in the supposed interest of being "pro-arbitration," to place that legitimacy at risk.[78] In insisting that the mere presence of a *Kompetenz-Kompetenz* provision in incorporated institutional rules of arbitral procedure by definition meets *First Options*' requirement of clear and unmistakable evidence of a delegation, they have done just that.

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[77] *See generally*, James H. Carter, *The Culture of Arbitration and the Defence of Arbitral Legitimacy*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 97, 97 (David D. Caron et al. eds., 2016).

[78] *See* George A. Bermann, *What Does It Mean to Be Pro-Arbitration?*, 34 ARB. INT'L 341 (2018).

POSTSCRIPT

Just when it seemed that the federal courts' misunderstanding and misapplication of the Supreme Court's decision in *First Options, Inc. of Chicago v. Kaplan* could not get worse, they have. As the article above demonstrates, the courts have already done violence to that decision by treating incorporation by reference in an arbitration agreement of a set of procedural rules authorizing tribunals to determine their own jurisdiction as "clearly and unmistakably" evidencing the parties' intention to deprive courts of primary authority to determine the arbitrability of a dispute. *Kompetenz-Kompetenz* in U.S. law does nothing more than empower tribunals to determine their own jurisdiction. It does not disempower courts to make that determination, and its meaning does not change merely because it makes its way into a set of procedural rules. Worse yet, in order to be clear and unmistakable, a delegation should appear on the face of an arbitration agreement, not be relegated to a set of procedural rules merely referenced in that agreement and almost certainly not read when the agreement is made.

In a word, the federal courts have found to be "clear and unmistakable" what is in fact *neither* "clear" *nor* "unmistakable." A mere reference to *Kompetenz-Kompetenz*, unaccompanied by any suggestion that the tribunal's authority thereby conferred is exclusive, is hardly "clear," and burying it in a set of procedural rules that are unlikely to be closely read when an arbitration agreement is signed hardly makes it "unmistakable." Moreover, given the presence of *Kompetenz-Kompetenz* provisions in all modern rules of arbitral procedure, a delegation will be found in nearly every case—exactly the result the Supreme Court sought to prevent in *First Options*. The federal court rulings have thus deprived the phrase "clear and unmistakable" of any meaning.

XII. THE SECOND CIRCUIT'S DECISION IN *BEIJING SHOUGANG MINING INVESTMENT CO., LTD. V. MONGOLIA*

The court of appeals for the Second Circuit has now delivered a second, and no less serious, blow to *First Options.* In its recent decision in *Beijing Shougang Mining Investment Co., Ltd. v. Mongolia*,[75] Chinese claimants initiated arbitration against Mongolia under a bilateral investment treaty (BIT) between China and Mongolia, arguing that Mongolia had expropriated their iron-ore mine in violation of the BIT. Mongolia challenged arbitral jurisdiction on the ground that, by its terms, the BIT conferred jurisdiction only over disputes about the quantum of compensation for expropriation, not over the alleged expropriation itself, an interpretation of the BIT with which claimants disagreed.[76] An arbitral tribunal seated in New York, agreeing with Mongolia, determined that it lacked jurisdiction

[75] Beijing Shougang Mining Inv. Co., Ltd. v. Mongolia*,* No. 19-4191, 2021 U.S. App. LEXIS 25812 (2d Cir. Aug. 26, 2021).

[76] *Id.* at *12-13.

and accordingly dismissed the claims.[77] The claimants thereupon petitioned the district court to set aside the award and compel a return to arbitration, while Mongolia cross-petitioned for confirmation of the award.

Claimants argued that the district court, in keeping with *First Options*, should review the tribunal's finding of no jurisdiction de novo, while Mongolia maintained that the parties had clearly and unmistakably conferred exclusive authority to determine arbitrability on the tribunal and that a court's review of the tribunal's determination of arbitrability was accordingly subject to deferential review only.[78] The district court conceded that the BIT did not by its terms confer exclusive authority on the tribunal to determine its own jurisdiction, but found that the claimants had, by virtue of "[their] behavior during the arbitration," provided clear and unmistakable evidence of a delegation, i.e., essentially waived their right to de novo judicial review.[79] It accordingly declined to make an independent determination of the arbitrability of the dispute and instead, reviewing the award deferentially, denied claimants' petition to set aside the award and granted Mongolia's cross-petition for confirmation.[80]

On appeal to the Second Circuit, the claimants disputed the district court's finding that the parties had clearly and unmistakably withdrawn from the court its authority to review independently the tribunal's determination of arbitrability. Like the district court, the Second Circuit conceded that the BIT did not itself clearly and unmistakably confer exclusive authority on the tribunal to determine the dispute's arbitrability.[81] However, again like the district court, it found clear and unmistakable evidence of a delegation elsewhere. More specifically, it concluded that, when the claimants allowed the issue of the arbitrability of their claims to be determined by the arbitral tribunal, they "clearly and unmistakably" surrendered what would otherwise have been their right to a de novo determination of arbitral jurisdiction.[82] Specifically, the court observed that the claimants had agreed with Mongolia to conduct the arbitration in two phases—a combined jurisdictional and liability phase, followed, if necessary, by a quantum phase—and that that step constituted a delegation.[83] However, there is no reason

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[77] China Heilongjiang Int'l Econ. & Tech. Coop. Corp. v. Mongolia, Case No. 2010-20, Award (PCA Case Repository 2017), https://www.italaw.com/sites/default/files/case-documents/italaw11026_0.pdf.

[78] *See* Beijing Shougang Mining Inv. Co., Ltd. v. Mongolia, 415 F. Supp. 3d 363, 365 (S.D.N.Y. 2019).

[79] *Id.* at 368.

[80] *Id.*

[81] Beijing Shougang Mining Inv. Co., Ltd. v. Mongolia, No. 19-4191, 2021 U.S. App. LEXIS 25812, at *5 (2d Cir. Aug. 26, 2021).

[82] *Id.* at *23.

[83] *Id.* ("[T]he Parties agreed that the first phase of the arbitration would cover jurisdictional and liability disputes. We now hold that this agreement was sufficient in the context of the present arbitration to evidence the Parties' intent to submit arbitrability issues to arbitration.").

to believe that its decision would have been any different if the jurisdictional and liability phases had been bifurcated.

XIII. THE SECOND CIRCUIT'S FUNDAMENTAL ERROR

The Second Circuit was wholly unjustified in treating the parties' submission of the arbitrability question to the tribunal as clear and unmistakable evidence of a delegation. It is not in the least remarkable that a party contesting the jurisdiction of a tribunal would raise its jurisdictional objection to the tribunal itself. That is the standard course of action.

What, one may ask, did the Second Circuit think the claimants should have done to avoid conferring exclusive authority on the tribunal over the arbitrability of the dispute?

Did the Second Circuit think that the claimants should have first instituted an action in court to compel arbitration, thereby putting the jurisdictional question to a court before the tribunal had an opportunity to address it? Going immediately to court is something parties resisting arbitration—typically respondents such as Mongolia—might do; they have every reason to want the question decided by a court rather than the tribunal whose jurisdiction they are challenging. But the claimants in this case were not *resisting* arbitration; they were *seeking* arbitration, and what parties seeking arbitration do is simply initiate arbitration, leaving it to the respondent, if it wishes to do so, to contest the arbitrability of the dispute before the tribunal. Indeed, the FAA does not contemplate actions to compel arbitration against a party, such as Mongolia, that is already appearing in the arbitration, even if it is doing so only to challenge arbitral jurisdiction.[84] In sum, a claimant's only recourse, when faced with a challenge to arbitral jurisdiction, is to refute that challenge before the tribunal. This is precisely what the claimants in this case did. The simple fact is that the arbitrability question arose before the tribunal, not because the claimants raised it, but because the respondent did.

Did the court seriously think that the claimants should have left the jurisdictional challenge by the respondent unanswered? For the claimants to have done so would all but certainly lead to dismissal of their claim. The court cannot seriously expect the claimants to have done that either.

In sum, it is absurd to suppose that, by responding to Mongolia's challenge to arbitral jurisdiction before the tribunal, claimants clearly and unmistakably relinquished their *First Options* right to an independent judicial determination of arbitrability. Under the logic of the Second Circuit, clear and unmistakable evidence of a delegation will *always* be found because claimants, when faced with a challenge to arbitral jurisdiction addressed to the tribunal, will *always* follow the natural and obvious course of action, viz. commence arbitration, and then respond to any jurisdictional challenge the respondent may choose to bring to the tribunal. In taking the position it did, the court of appeals both abandoned all logic and displayed a regrettable lack of understanding of how international arbitration works.

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[84] *See* LAIF X SPRL v. Axtel S.A. de C.V., 390 F.3d 194, 196 (2d Cir. 2004).

XIV. THE LEARNING FROM *FIRST OPTIONS*

By contrast, the Supreme Court in *First Options* demonstrated that it understood the premises of arbitration and reasoned logically from them. It should be noted at the outset that *First Options* represents a much more common scenario than does *Beijing Shougang*. In *First Options*, as in most cases, the parties seeking independent post-award review were the respondents, the Kaplans.[85] They raised their jurisdictional objection directly before the tribunal. Upon losing on that issue, they preserved their objection and proceeded to the merits. Then, having lost on the merits, they sought vacatur of the resulting award. In doing so, they asked the reviewing court to make an independent rather than a deferential determination of the jurisdictional question and to find that they had never agreed to arbitrate.

The Kaplans were unsuccessful in the district court,[86] but the court of appeals reversed, finding that the Kaplans had in fact never agreed to arbitrate the dispute and were entitled to have the award vacated as against them (though not as against MK Investments, which was a signatory to the contract).[87] On further appeal, the Supreme Court affirmed the court of appeals' decision.[88] In doing so, the Court, unlike the Second Circuit in the present case, considered what the Kaplans' alternatives were and properly assessed them. In his opinion for the Court, Justice Stephen Breyer rejected the notion, advanced by First Options, that the Kaplans should have first gone to court for an anti-arbitration injunction targeting the proceedings in order to preserve their jurisdictional objection to an eventual award.[89]

No court has ever held that a party loses its right to contest arbitral jurisdiction before a tribunal, or to contest a tribunal's assertion of jurisdiction in post-award review, by not first seeking an anti-arbitration injunction from a court. Presenting one's jurisdictional objections to the tribunal in the first instance is exactly what the doctrine of *Kompetenz-Kompetenz* contemplates. It would be wholly inimical to the efficiency that arbitration is meant to offer to require a party, in order to mount a challenge to arbitral jurisdiction, to expend the time and resources that obtaining an anti-arbitration injunction from a court would entail. The court of appeals is, but should not be, fomenting unnecessary litigation. The Supreme Court had little difficulty in *First Options* in concluding that, by bringing their jurisdictional challenge directly to the tribunal, the respondents had *not* clearly and unmistakably evidenced an intention to forego independent judicial review of the tribunal's jurisdictional determination.[90]

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[85] Kaplan v. First Options of Chi., Inc., No. 92-MC-210, 1992 U.S. Dist. LEXIS 14961, at *2 (E.D. Pa. Sept. 25, 1992).

[86] *Id.* at *16.

[87] Kaplan v. First Options of Chi., Inc., 19 F.3d 1503, 1505 (3d Cir. 1994).

[88] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[89] *Id.* at 946-47.

[90] *Id.*

Nor could the Court think that the Kaplans should have refrained from challenging arbitral jurisdiction before the tribunal, proceeding directly to the merits instead.[91] The Court surely recognized that, had they done so, they would unquestionably have waived their jurisdictional objection altogether, something the Court could not possibly ask or expect them to do.[92] Nor could the Court expect the Kaplans to fail to appear in the proceeding at all, for that would have subjected them to a default award, something they again could not be asked or expected to do.

The contrast between the Second Circuit's approach in the present case and the Supreme Court's careful one in *First Options* could hardly be more striking. The Supreme Court understood what parties in arbitration can and cannot be expected to do. The Second Circuit did not.

XV. *BEIJING SHOUGANG*: A CONTRADICTION OF *FIRST OPTIONS*

But the errors of the Second Circuit in *Beijing Shougang* are even more serious than that, for the court ended up taking a position that is squarely contrary to the decision in *First Options* itself. As noted above, the Supreme Court flatly rejected First Options' contention that, when the Kaplans raised their jurisdictional objection before the arbitrators, they conferred on the tribunal exclusive authority to address the objection, and were therefore entitled, at best, to highly deferential post-award review of the tribunal's determination.[93] Recognizing that consent to arbitrate is absolutely fundamental to the legitimacy of arbitration, it held that a party does not lose its right of access to a court for an independent determination of arbitrability unless it "clearly and unmistakably" so agreed.[94] The Court then unanimously ruled that raising a challenge to the arbitrability of a dispute before the arbitrators falls well short of clear and unmistakable evidence of an intention to confer on the arbitrators exclusive authority to make that determination.[95] Ironically, it is actually *worse* to treat the claimants in *Beijing Shougang* as having relinquished their right to de novo review than it would have been to treat the Kaplans in *First Options* as having done so. The claimants in *Beijing Shougang,* unlike the Kaplans, did not *question* the tribunal's jurisdiction; they *asserted* it. It was Mongolia that raised the question; all the claimants did was reply.

Notably, the district court in *First Options* had taken exactly the same position adopted by the Second Circuit in *Beijing Shougang*. It had held that "any objection petitioners may have had to the authority of the arbitrators was waived. . . . [A] party who voluntarily and unreservedly submits an issue to arbitration cannot later maintain that the arbitrators acted without authority to resolve that

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[91] *Id.* at 946.
[92] *See id.*
[93] *Id*. at 944.
[94] *Id.* at 944-45.
[95] *Id.* at 946.

issue."[96] Of course, the district court misapprehended the Kaplans' position. They did *not* assert that the arbitrators "acted without authority to resolve that issue." They acknowledged that the arbitrators had that authority, but maintained that their decision on the matter was subject to full judicial review in a post-award action.

But the important point is that in *First Options,* first the court of appeals for the Third Circuit, and then the Supreme Court, squarely rejected the district court's view. The Third Circuit was emphatic: "A party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction."[97] As noted, the Supreme Court affirmed, flatly rejecting the notion that a party's submission of a jurisdictional objection to a tribunal could possibly amount to clear and unmistakable evidence of a delegation and justify denial of that party's right, reaffirmed in *First Options* itself, to independent judicial review of the tribunal's jurisdictional determination:

> First Options relies on the Kaplans' filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction. But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, 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.
>
> . . . .
>
> We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the court of appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.[98]

The Supreme Court was of course correct. It simply defies understanding how submission to a tribunal of a question of arbitrability could be viewed as clearly and unmistakably amounting to an abandonment of a party's presumptive right to independent post-award review of the question. There is obviously nothing in the least contradictory between a party, on the one hand, addressing the question of arbitral jurisdiction before a tribunal and, on the other hand, asserting its right to de novo review of the tribunal's ruling on that matter in an action to vacate the resulting award. The Supreme Court plainly appreciated that parties have every

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[96] Kaplan v. First Options of Chi., Inc., No. 92-MC-210, 1992 U.S. Dist. LEXIS 14961, at *16 (E.D. Pa. Sept. 25, 1992).

[97] Kaplan v. First Options of Chi., Inc., 19 F.3d 1503, 1510 (3d Cir. 1994).

[98] *Kaplan,* 514 U.S. at 946-47.

right to address the question of a dispute's arbitrability before the tribunal and thereafter, having lost on that issue, to enjoy independent post-award review of the matter in an action to vacate the award. In positing that a claimant arguing its position on arbitrability to the arbitrators amounts to an abandonment of that party's right of access to a court for an independent determination of arbitrability, the Second Circuit obviously missed the entire point that the Supreme Court was making in *First Options*.

XVI. THE SECOND CIRCUIT'S MISSTEPS

The Second Circuit judgment in *Beijing Shougang* is thus deeply disturbing in multiple respects.

As demonstrated above, the notion that the mere incorporation by reference in an arbitration agreement of procedural rules containing a *Kompetenz-Kompetenz* provision constitutes clear and unmistakable evidence of a delegation is not tenable. To begin with, the Second Circuit perpetuated the fallacy that, if arbitral tribunals are empowered to determine their own jurisdiction, then courts are necessarily disempowered to make that judgment. So holding requires distorting altogether the meaning of *Kompetenz-Kompetenz* in U.S. law, which accepts that this doctrine has a positive, but not a negative, dimension. The court also makes the baseless assumption that parties, upon signing an arbitration agreement, will examine an instrument captioned "Rules of Procedure" that is merely incorporated by reference in an arbitration agreement in order to learn whether and to what extent they have or have not abandoned their right of access to a court on the question whether they consented to arbitration of their dispute. And, because *Kompetenz-Kompetenz* provisions are ubiquitous in contemporary arbitration, the net effect of this jurisprudence is to undo the presumptive right of parties to the independent judicial determination of arbitrability that the Supreme Court took pains to reaffirm in *First Options*.

Second, the court treats a party's taking the most prudent course of action possible, whether in asserting arbitral jurisdiction (as in *Beijing Shougang*) or in challenging it (as in *First Options*), viz., arguing one's position on arbitrability to the arbitrators themselves, as if it were an abandonment of that party's right of access to a court for an independent determination of arbitrability. This flies in the face of logic and experience.

Third, and perhaps most alarming, the court predicated its finding of clear and unmistakable evidence of a delegation on *precisely* the same conduct that the Supreme Court in *First Options* had expressly rejected as a basis for finding clear and unmistakable evidence of a delegation. Thus, in purporting to implement the Supreme Court's position in *First Options*, the Second Circuit actually defied it.

XVII. CONCLUSION: THE EVISCERATION OF *FIRST OPTIONS*

Due to the position that the federal courts, including most recently the Second Circuit in *Beijing Shougang*, are taking in their application of *First Options*, the

Supreme Court's promise of a presumptive right to an independent judicial determination of arbitrability has now, for all practical purposes, been eviscerated. First, we have been told by the federal appellate courts that the ever-present appearance of a *Kompetenz-Kompetenz* clause in incorporated rules of arbitral procedure is sufficient to signify clear and unmistakable evidence of a delegation. Now, we are being told by the Second Circuit that replying to a respondent's challenge to arbitral jurisdiction before the arbitrators—a step that any party pursuing a claim in arbitration has no choice but to make—is also clear and unmistakable evidence of a delegation. The result is that, on either or both of these fallacious bases, virtually *every* court going forward will find that a party has relinquished its presumptive *First Options* right to a court's independent assessment of arbitral jurisdiction, whether at the pre-arbitration or the post-award stage. If this jurisprudence is maintained, that right will, for all practical purposes, have ceased to exist.