

ARBITRATION FUNDAMENTALS

ARBITRABILITY TROUBLE

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I. INTRODUCTION

The general notion of arbitrability is practically as old as arbitration itself, and yet it remains profoundly misunderstood, at least in U.S. arbitration law. For many – particularly outside the United States – arbitrability has a single and very precise meaning, signifying the legal capacity of a claim or dispute to be the subject of arbitration rather than litigation¹ or, to borrow the language of the UNCITRAL Model Law² and the New York Convention,³ signifying that a claim or dispute is “legally capable of being arbitrated.” By this understanding, a claim or dispute is “non-arbitrable” within a given legal system if the system’s legislature or, less commonly, the system’s courts acting on their own determine that its adjudication is reserved, as a matter of law, to the courts of that system. This represents what may be called arbitrability *stricto sensu*. To determine whether a claim or dispute is arbitrable or not, in this sense of the term, one needs essentially to consult the statute books and judicial gloss that may have been given to any particular statutory claim.

The narrowness of this definition of arbitrability has important consequences. In the first place, under this definition, the arbitrability or non-arbitrability of a claim or dispute should be readily ascertainable. It should not depend on the factual circumstances surrounding the claim. Used in this way, arbitrability entails a purely legal inquiry. Thus, however else one may understand the principle of arbitrator competence-competence,⁴ that principle would not prevent a

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¹ See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT’L ARB. 159 (2009).

² U.N. Comm’n on Int’l Trade Law, Rep. on its 39th Sess., June 19-July 7, 2006, U.N. Doc. A/61/17 (July 14, 2006) [hereinafter UNCITRAL MODEL LAW], Arts. 34(2)(b)(i), 36(b)(1).

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2519, 330 U.N.T.S. 3 [hereinafter New York Convention], Arts. III(1), V(2)(a). These sections are implemented in the United States by 9 U.S.C. §§ 201-08 (2006).

⁴ See, e.g., William H. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT’L ARB. 75 (2002) (competence-competence addresses the arbitral tribunal’s competence to determine its own power and jurisdiction).

U.S. court, if properly asked to do so, from declaring prior to arbitration that a claim or dispute is not arbitrable and should not be referred to arbitration.⁵

II. ARBITRABILITY IN U.S. LAW

The meaning of arbitrability enjoys no such precision in contemporary U.S. law. On the contrary, according to current usage, a claim or dispute is non-arbitrable if for any reason it should not be referred to arbitration.⁶ This would of course encompass the argument that the claim or dispute is not legally capable of being submitted to arbitration, i.e. is non-arbitrable within the narrow sense of the term identified above.⁷

But there are a multitude of reasons why a claim or dispute may not be referred to arbitration that have nothing to do with the nature of the claim or dispute. U.S. courts, including the U.S. Supreme Court, have adopted the practice of using the term arbitrability so broadly as to encompass many of these other grounds.⁸ For example, a claim may be considered non-arbitrable, in the loose sense of the term, if it falls outside the scope of the parties' arbitration agreement, i.e. if the parties did not agree to submit it to arbitration.⁹ It is also loosely non-arbitrable if no arbitration agreement as such was ever formed¹⁰ or, if formed, is nevertheless invalid under the applicable law.¹¹ Arguably, the claim or dispute is equally non-arbitrable in the loose sense if, while an arbitration clause in itself has been formed and is perfectly valid, it is found within a contract ("the main

⁵ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (a case can be prevented from going to arbitration due to, among others, issues relating to the creation of the underlying agreement); See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

⁶ See George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 *YALE J. INT'L L.* 1, 10 (2012) ("Courts commonly signal as fundamental to the 'arbitrability' of a dispute that a valid enforceable agreement to arbitrate exists and that the particular dispute falls within the scope of the agreement"); See also, e.g., *Equitable Res., Inc. v. United Steel Workers Int'l Union, Local 8-512*, 621 F.3d 538, 550 (6th Cir. 2010); *Teamsters Local Union No. 89 v. Kroger Co.*, 617 F.3d 899, 904 (6th Cir. 2010).

⁷ There is a strong federal presumption in favor of arbitration, but disputes deemed too central to bankruptcy proceedings are not arbitrable. See Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 *ALB. L. REV.* 905 (1996) (citing *Ionosphere Clubs, Inc. v. Shugrue*, 22 F.3d 403, 409 (2d Cir. 1994)).

⁸ See Bermann, *supra* note 6.

⁹ See e.g., *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008); *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 365 (2d Cir. 2003).

¹⁰ See, e.g., *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000).

¹¹ See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114 (9th Cir. 2008).

contract”) that itself was not formed or is not valid.¹² A claim or dispute may further be considered non-arbitrable, at least as concerns a person bringing the claim or dispute or a person against whom it is brought, if that person is not a party to the arbitration agreement in fact or in law.¹³

What all these uses of the term arbitrability have in common – and what differentiates them from arbitrability in the narrow sense – is that the objection to arbitration, if established, has little if anything to do with the nature of the underlying claim or dispute, and everything to do with the consent of the parties or the validity of that consent.

But there is still another set of reasons for denying effect to an arbitration agreement that pertain *neither* to the nature of the underlying claim or dispute *nor* to any asserted defect in the parties’ consent. For example, the statute of limitations on the underlying claim may have expired.¹⁴ The claim may already have been finally adjudicated by a court or arbitral tribunal, and that prior adjudication may have *res judicata* effect.¹⁵ Or the party invoking an agreement to arbitrate may have effectively waived its right to arbitrate.¹⁶ The agreement to arbitrate may also have stipulated that certain conditions precedent – such as an attempt at mediation or conciliation – must be satisfied prior to arbitration.¹⁷ Still other barriers to arbitration may be imagined.

What practical difference does it make whether the notion of arbitrability is understood in the narrow sense I defined at the outset or in the much looser sense just described? In fact, it makes a far greater difference than one might imagine.

Reserving the term arbitrability for its core meaning – viz., the legal capacity of a claim or dispute to be arbitrated – allows us to attach to arbitrability (and non-arbitrability) consequences appropriate for that particular meaning. We can conclude, for example, as I have done, that the question of arbitrability is a legal one and one for the courts to decide, if asked to do so, even prior to the arbitration having begun.¹⁸

But more than precision is at stake. Placing so many and such diverse objections to arbitration under a single non-arbitrability umbrella naturally leads to treating those objections in exactly the same fashion, despite their diversity.

¹² See, e.g., *Buckeye*, 546 U.S. 440; *Prima Paint*, 388 U.S. 395.

¹³ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005).

¹⁴ See, e.g., *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

¹⁵ See, e.g., *FleetBoston Financial Corp. v. Alt*, 638 F.3d 70 (1st Cir. 2011); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623 (1988).

¹⁶ See, e.g., *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 82 (2d Cir. 1998); *Doctors’ Assocs., Inc. v. Distajo*, 66 F.3d 438, 443 (2d Cir. 1995).

¹⁷ See, e.g., *Howsam*, 537 U.S. 79; *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481 (S.D.N.Y. 2003).

¹⁸ See *First Options*, 514 U.S. 938 (court found that the question of arbitrability lies with the courts when the agreement does not clearly submit that question to arbitration).

The single most important consequence of doing so is to find ourselves prescribing for courts the same mode of judicial supervision of arbitration agreements, regardless of the ground upon which enforcement of those agreements is challenged.¹⁹ This is not surprising, since the most important function performed by the notion of arbitrability in current U.S. arbitration law appears to be precisely to allocate decision-making authority over jurisdictional and other threshold issues as between courts and arbitrators. Defining arbitrability to encompass each and every condition upon which the enforceability of an arbitration agreement may plausibly depend impairs our ability to differentiate among grounds for denying enforcement of the agreement and thus to delineate properly the respective roles of courts and arbitrators in determining, with respect to any particular ground, whether an agreement to arbitrate warrants enforcement. This concern has only grown in recent years, as drafters of arbitration agreements increasingly purport to delegate to arbitral tribunals primary authority over jurisdictional issues for which courts rather than arbitrators have traditionally borne primary responsibility.²⁰

III. LEGITIMACY AND EFFICACY

Why is it important, in defining the role of courts vis-à-vis arbitrators at the outset of arbitration, to be able to differentiate among grounds for granting or denying enforcement of agreements to arbitrate? The reason is simple. The role of courts at that moment is to strike a proper balance between ensuring, on the one hand, that parties sent to arbitration actually consented to arbitration and, on the other hand, that judicial intervention does not unduly jeopardize the speed, efficiency and informality that are meant to be arbitration's hallmarks.²¹

Legal systems that fail adequately to ensure a party's consent to arbitration before compelling it to arbitrate run a very real risk of compromising arbitration's very legitimacy as a mode of alternative dispute resolution. Persons are required to arbitrate, rather than litigate, a dispute only if – and to the extent – they have consented to do so,²² and courts are properly expected to make some sort of inquiry into the reality of that consent, if contested.²³ On the other hand, legal systems that invite or tolerate excessive intervention by courts at the threshold of arbitration threaten to impede, if not altogether derail, arbitration.²⁴ The impact on

¹⁹ See Bermann, *supra* note 6, at 12 (addressing the various arbitrability questions in the same manner will create “analytic mischief”).

²⁰ See *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003); *Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic*, 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011); *Telenor Mobile Communc'n AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007).

²¹ See *supra* note 19.

²² See *supra* note 9.

²³ See *supra* note 11.

²⁴ See William W. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783, 1789 (1984) (“court intervention adds cost and delays to the process of producing

arbitration's assumed advantages – speed, cost, informality and flexibility – can be serious.

One of the first moments when the tension between legitimacy and efficacy interests emerges is when parties seek to demonstrate in court that, for one reason or another, an agreement to arbitrate should not be enforced. If the challenge is raised for the first time before the arbitrators, rather than a court, the arbitrators have the authority to resolve it as an exercise of their competence-competence,²⁵ regardless of which challenge it is.

However, a party that objects to arbitration of a dispute has every reason to challenge the arbitration agreement's enforceability in court and to do so at the outset, prior to any arbitration having begun. Sometimes a party initiates a suit in court on a claim or dispute that is arguably subject to arbitration, and its opponent seeks dismissal of the suit, and an order compelling arbitration, on the basis of an arbitration agreement between the parties. The party initiating suit will likely ask the court to deny enforcement of the agreement. At other times, the party resisting arbitration will initiate litigation itself, seeking a declaration that a particular claim or dispute is not amenable to arbitration, and possibly even seeking an anti-arbitration injunction.²⁶ Making an early move has the advantage of avoiding any risk of waiver by the moving party of its objections to the arbitration agreement. It also promises resolution of the challenge before too many resources are expended in the arbitration. But, above all, the challenger will likely prefer that the decision on enforceability or non-enforceability of the arbitration agreement be in the hands of a court rather than in the hands of the very arbitrators whose authority is being challenged.

IV. SUBSTANTIVE AND PROCEDURAL ARBITRABILITY

Some of the questions loosely defined as implicating “arbitrability” are undoubtedly for a court to decide, if asked to do so, rather than left for arbitral determination. The most obvious example is the question of arbitrability *stricto sensu*, i.e. the question whether a claim or dispute is legally capable of being arbitrated.²⁷ But courts will also decide certain other questions that go by the name of “arbitrability,” loosely defined, if they are asked to do so. These include the question of whether an agreement to arbitrate was ever concluded,²⁸

an enforceable award”). *See also* Richard H. Kreindler, *Court Intervention in Commercial and Construction Arbitration: Approaches in the U.S. and Europe*, 13 CONSTR. LAW 12 (1993) (judicial intervention can delay or derail an arbitration that otherwise would have run smoothly).

²⁵ *See supra* note 4.

²⁶ *See, e.g.,* McLaughlin Gormley King Co. v. Terminix Int'l Co., 105 F.3d 1192 (8th Cir. 1997) (filer of suit sought declaratory judgment that the contract precluded arbitration).

²⁷ *See supra* notes 1-3.

²⁸ *See supra* note 9.

or whether a non-signatory of the arbitration agreement may nevertheless invoke it or be bound by it.²⁹

The reason why courts may resolve these threshold questions independently at the outset of arbitration is that they directly implicate the consent of the parties to arbitrate, party consent being the very foundation of the obligation to arbitrate. Consent is taken so seriously in U.S. law that courts will entertain at the outset challenges not only to the *existence* or *formation* of the arbitration agreement, but also to its *validity* – although, under the principle of separability,³⁰ they will do so only if the asserted defect is specific to the arbitration agreement and not shared by the contract as a whole.

The Supreme Court has on occasion referred to questions of this sort as issues of “substantive arbitrability.”³¹ The Court apparently regards them as substantive, not because they have anything to do with the merits of the underlying dispute, but because they raise the substantive question of whether an agreement to arbitrate exists and whether it empowers an arbitral tribunal to resolve a given dispute. I have elsewhere called these “gateway” issues, because passage to arbitration depends on passage through a judicial “portal.”³²

The question whether a particular claim or dispute falls within the scope of an agreement to arbitrate is as “substantive” a question, in this sense, as the question whether an agreement to arbitrate was ever concluded or whether a non-signatory of the arbitration agreement may nevertheless invoke it or be bound by it. Parties to an arbitration agreement do not consent to arbitrate any and all imaginable disputes that may arise between them, but only those that bear the necessary relationship to the contract in which the agreement to arbitrate is found. And yet, to determine whether a given claim or dispute falls within the scope of an agreement to arbitrate one cannot help but interpret that agreement and the contract of which it forms a part, and contract interpretation is by all accounts a quintessential arbitral function.

U.S. courts mainly resolve this dilemma by agreeing to decide at the outset, if asked, whether a claim or dispute falls within the scope of the arbitration agreement, but at the same time to prefer, if in doubt, a liberal rather than restrictive interpretation of the agreement.³³ That represents one way in which courts demonstrate their so-called “pro-arbitration bias.”³⁴

²⁹ See *supra* note 13.

³⁰ UNCITRAL MODEL LAW, Art. 16(1) (“an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”).

³¹ See *Howsam*, 537 U.S. 79. See also *John Wiley & Sons, Inc. v. Livingston*, 84 S.Ct. 909 (1964).

³² See, e.g., *Bermann*, *supra* note 6, at 12.

³³ See *id.* at 38 (“even while admitting that whether a given dispute falls within the scope of an arbitration clause represents a gateway issue, courts sometimes invoke a generalized ‘presumption in favor of arbitration,’ so as to effect an expansive reading of the clause”).

³⁴ Since the Federal Arbitration Act (FAA) was passed in 1925, U.S. federal law has enshrined a pro-arbitration bias that expressly requires U.S. courts to enforce both arbitration agreements and arbitral awards. U.S. courts were quick to accept that pro-

But not all questions that go by the name of “arbitrability,” loosely construed, are “substantive” in the sense of raising the question of whether an agreement to arbitrate exists or whether it empowers an arbitral tribunal to resolve a given dispute. Such questions include several ones mentioned earlier, viz. (a) whether the statute of limitations on a claim has passed;³⁵ (b) whether the underlying claim is one that was authoritatively and definitively resolved by a prior judgment or award, so that its further adjudication is precluded;³⁶ (c) whether the party invoking the arbitration agreement, though otherwise entitled to do so, has waived the right to arbitrate the claim;³⁷ and (d) whether any conditions precedent needing to be satisfied prior to arbitration were in fact satisfied.³⁸

To distinguish this series of threshold questions from the “substantive” ones referred to earlier, the Supreme Court has taken to calling them “procedural” in nature.³⁹ Broadly speaking, these are the same issues that, in other legal systems, may be termed “admissibility” as distinct from “jurisdictional” questions.⁴⁰

“Substantive” and “procedural” arbitrability questions differ importantly in their stakes. The former call into question the consent of the parties and thus potentially implicate the legitimacy of the resulting arbitration and award. The latter do not entail important consent or legitimacy stakes, but they most certainly have implications for arbitration’s efficacy. Permitting courts to intervene prior to arbitration to resolve issues pertaining to the statute of limitation, *res judicata*, waiver of the right to arbitrate or satisfaction of conditions precedent does relatively little to vindicate the values of consent or legitimacy, but can significantly delay and complicate the arbitration itself, rendering it less effective.⁴¹

arbitration bias, and the United States Supreme Court has interpreted the FAA as requiring that “district courts *shall* direct . . . parties to proceed to arbitration on issues as to which an arbitration agreement has been signed” and that courts must confirm an award unless the FAA’s narrow grounds for vacatur apply (emphasis added). *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

³⁵ See *supra* note 14.

³⁶ See *supra* note 15.

³⁷ See *supra* note 16.

³⁸ See *supra* note 17. (The question whether an arbitration may proceed on a class rather than individual basis is not, strictly speaking, an arbitrability question because it pertains more to *how* a dispute may be arbitrated than *whether* it may be. But it is basically procedural in nature. In fact, while the Supreme Court in the *Stolt-Nielsen* case has placed limits on the circumstances in which an arbitration clause may be read as authorizing class arbitration, it still considers it the prerogative of arbitrators to perform that interpretive function.)

³⁹ See *Howsam*, 537 U.S. at 85.

⁴⁰ See Bermann, *supra* note 6, at 27. See also William W. Park, *Determining an Arbitrator’s Jurisdiction*, 8 NEV. L.J. 135, 145 (2007) (“[In the United States], [c]ourt decisions speak of the ‘arbitrability question’ in the same way that the rest of the world refers to a jurisdictional issue”).

⁴¹ See Bermann, *supra* note 6, at 8 (“Arbitration becomes a less effective means of dispute resolution to the extent that, prior to arbitration, parties may have recourse to

V. ARBITRABILITY POST-AWARD

The problems associated with arbitrability do not of course end at the threshold of arbitration. Even after an award has been issued, a disappointed party may seek to have the resulting award vacated on virtually any of the grounds on which the agreement could have been challenged at the outset, subject to the possibility that failure to raise an objection earlier may result in its waiver.⁴² At the vacatur stage, a court may once again be faced with loose claims of “non-arbitrability.” Now the court must decide whether to entertain the challenge at all and, if so, with what degree of deference to the arbitrators, if any, on the findings that may be pertinent to the challenge.

It is no less important at this stage than at the threshold of arbitration to gauge the extent to which a particular challenge to the arbitration agreement raises legitimacy or efficacy questions. Transposing the analysis from the earlier to the later stage would result (subject again to waiver of course) in courts entertaining “substantive arbitrability” challenges, with little if any deference to arbitral findings pertinent to those challenges. At the same time, it would result in courts declining to resolve “procedural arbitrability” challenges, and certainly declining to resolve them independently.

The Supreme Court’s *First Options* decision⁴³ supports this conclusion. *First Options* establishes a strong presumption that courts at the vacatur stage should determine independently, if asked to do so, whether an arbitration agreement was formed (the “whether” question) and whether the party invoking it or sought to be bound by it should be treated as a party (the “who” question);⁴⁴ they do so on account of the paramount importance of consent in those determinations.⁴⁵ Significantly, the Court in *First Options* distinguished between the “whether” and “who” questions, on the one hand, and the “what” – or scope – question, on the other, in this regard. The Court rightly thought that if a party concedes having made an agreement to arbitrate, it may impliedly be understood as accepting that some deference be shown to the arbitrators’ determination as to how broadly or narrowly the agreement should be interpreted.⁴⁶

The Supreme Court then went on in *First Options* to state that the general presumption in favor of *de novo* judicial review over the “whether” or the “who” question may be overcome *only* if the parties have signified “clearly and unmistakably” their intention that primary responsibility for making those

courts to advance reasons why arbitration should not go forward, with the attendant costs and delays. The objectives associated with arbitration thereby stand to be thwarted.”)

⁴² *Id.* at 4-5 (“Perhaps the most dramatic moments associated with this tension [between efficacy and legitimacy] arise when a disappointed party seeks annulment of an award in a court of the arbitral situs or resists the award’s recognition or enforcement elsewhere”).

⁴³ See *First Options*, 514 U.S. 938.

⁴⁴ *Id.* at 942-43.

⁴⁵ *Id.*

⁴⁶ *Id.* at 942.

determinations rest with the arbitrators.⁴⁷ The presumption that the Court established can only be regarded as a very strong one.

In fact the possibility of overcoming the *First Options* presumption, even if very strong, is predicated on dubious logic. It seems anomalous to base a jurisdictional determination on the wording of an agreement to arbitrate that allegedly never came into existence or to which the party sought to be bound asserts that it is a total stranger. A party who seriously maintains that an arbitration agreement was never formed, or who maintains that it was never a party to any such agreement, ought not be required to submit those questions for judgment to a body that owes its very legitimacy, and indeed its very existence, to that agreement.

Leaving the illogic of *First Options* aside, there is no reason to suppose that the judicial role should be any different at the award recognition and enforcement stage than at the vacatur stage. Article V(1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in fact provides that:

[r]ecognition and enforcement of [an] award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;⁴⁸

This provision may fairly be read to authorize judicial review of the arbitration agreement both in terms of its validity and its existence, and there is no reason to suppose that such review is anything other than *de novo*. The parallel provision of the UNCITRAL Model Law is to the same effect.⁴⁹

VI. “CLEAR AND UNMISTAKABLE” EVIDENCE UNDER *FIRST OPTIONS*

Again leaving the illogic of *First Options* aside, the question then naturally arises as to what constitutes “clear and unmistakable” evidence of an intention to delegate to the arbitrators primary responsibility for determining the “whether” and “who” questions. In what is becoming a long line of cases, U.S. courts are finding “clear and unmistakable” evidence of that intention in the incorporation in an arbitration clause of institutional rules that in turn contain an express “competence-competence” provision.⁵⁰ However, the notion that incorporation of

⁴⁷ *Id.* at 944-45.

⁴⁸ See New York Convention, *supra* note 3, Art. V(1).

⁴⁹ See UNCITRAL MODEL LAW, *supra* note 2, Art. 36(1)(a)(i).

⁵⁰ See, e.g., *Mercury Telco Grp., Inc. v. Empresa De Telecomunicaciones De Bogota*, 670 F. Supp. 2d 1350 (S.D. Fla. 2009); *Morsey Constructors, LLC v. Burns & Roe Enter., Inc.*, 2008 WL 3833588, at *4 (W.D. Ky. Aug. 13, 2008) (“[D]istrict courts in this circuit and other circuit courts of appeal have held that when parties agree to settle

arbitral rules containing a competence-competence provision reveals a clear and unmistakable intention to delegate primary authority to arbitrators to determine the “whether” and “who” questions is problematic for several reasons.

A first problem stems from the ambiguity surrounding the notion of competence-competence itself. The U.S., like many other jurisdictions, understands competence-competence as conferring authority on arbitrators to make determinations of their own competence.⁵¹ This has the salutary effect of enabling a tribunal to address jurisdictional challenges rather than having to suspend proceedings and refer the matter to a court of the arbitral situs. But giving arbitral tribunals that authority does not necessitate depriving courts of it. Subject to the principle of separability⁵² and other rules governing the allocation of authority between courts and arbitrators,⁵³ U.S. courts do entertain certain challenges to the enforcement of arbitration agreements on a pre-arbitration basis.⁵⁴ In other words, while U.S. law recognizes the “positive” side of competence-competence, it does not, unlike French law,⁵⁵ ascribe to it a “negative” dimension as well.⁵⁶

claims related to a contract according to the rules of the AAA, ‘they provide a “clear and unmistakable” delegation of scope-determining authority to an arbitrator’ because the AAA rules ‘provide[] that the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the . . . scope . . . of the arbitration agreement.’” (quoting *Bowden v. Delta T Corp.*, 2006 U.S. Dist. LEXIS 85724, at *20 (E.D. Ky. Nov.27, 2006) (citations omitted)); see also *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006) (suggesting that a dispute over the scope of an arbitration provision could be resolved by the arbitrators if the parties clearly and unmistakably so intended).

⁵¹ See Bermann, *supra* note 6, at 48 (“U.S. courts have consistently viewed the doctrine as having a positive dimension only, in the sense of permitting arbitral tribunals to determine all aspects of their own competence”).

⁵² According to Article 16(1) of the UNCITRAL Model Law, for the purpose of the tribunal’s ruling on the existence or validity of the arbitration agreement, “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.” UNCITRAL MODEL LAW, *supra* note 2, Art. 16(1). More specifically, “[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.” *Id.*

⁵³ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010); *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

⁵⁴ See Bermann, *supra* note 6.

⁵⁵ Negative competence-competence bars courts from determining the competence of arbitrators at the outset. Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS THE NEW YORK CONVENTION IN PRACTICE 260 (Emmanuel Gaillard & Domenico di Pietro eds., 2008).

⁵⁶ See Bermann, *supra* note 6, at 48 (“U.S. courts have consistently viewed the doctrine as having a positive dimension only, in the sense of permitting arbitral tribunals

Second, it is difficult to discern clear and unmistakable evidence of the parties' intention to rebut the *First Options* presumption in a single provision of a comprehensive set of rules of arbitral procedure that the parties thought to include in their arbitration agreement. It is true that some arbitral institutions, in the wake of *First Options*, amended their arbitration rules to include a "competence-competence" provision, and even to explicitly extend competence-competence to questions of the jurisdiction and validity of the arbitration agreement. The AAA, for example, revised its rules following *First Options* to provide that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with regard to the existence, scope or validity of the arbitration agreement."⁵⁷ A move of that sort on the AAA's part surely provides clear and unmistakable evidence of the institution's intention to strengthen the hands of arbitral tribunals in determining their own competence. But it falls far short of demonstrating that the parties clearly and unmistakably share that intention.

Indeed, if the incorporation in an arbitral agreement of procedural rules containing "competence-competence" language amounts to clear and unmistakable evidence of that intention, then, by the same reasoning, so too would the parties' selection in their agreement of a place of arbitration whose *lex arbitri* contains such language.⁵⁸ If the *First Options* presumption can be overcome so easily, it is far from the strong presumption that the Supreme Court portrayed it as being and almost certainly intended it to be.

Third, it is important in this context as well to distinguish among the various challenges that may be leveled against the enforcement of arbitration agreements. As earlier noted,⁵⁹ loose use of the term arbitrability has encouraged the idea that all such challenges to the enforcement of arbitration agreements may be treated in the same way. Now, as suggested earlier,⁶⁰ it is not unreasonable to read a competence-competence provision as signifying an intention to give arbitrators the benefit of the doubt when it comes to determining whether a particular claim or dispute falls within the scope of an arbitration agreement. Nor is it unreasonable to read such a provision as underscoring the primacy of arbitral tribunals in deciding issues of "procedural arbitrability," as earlier defined.⁶¹ But courts should be especially cautious in inferring from an indirect and generalized reference to competence-competence in arbitration rules or laws a specific

to determine all aspects of their own competence, thereby promoting the efficacy of arbitration. They have not followed the French in giving Kompetenz-Kompetenz a negative dimension, in the sense of barring courts from treating any threshold questions as gateway issues, except in the exceedingly rare instance of manifest nullity or manifest inapplicability.").

⁵⁷ AAA's COMMERCIAL ARBITRATION RULES, R-7(a).

⁵⁸ See UNCITRAL MODEL LAW, *supra* note 2. Article 16(1) reads: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

⁵⁹ See *supra* notes 10-12.

⁶⁰ See *supra* note 50.

⁶¹ See *supra* notes 14-17, 39.

intention to transfer to arbitrators primary authority over challenges that implicate party consent as strongly as the “whether” and “who” questions do.

VII. CONCLUSION

Questions about the allocation of authority between courts and arbitrators have been around for a very long time, occasioning the spilling of a great deal of ink. To this day, much uncertainty still surrounds them, and the loose talk of arbitrability coming recently from U.S. courts and commentators has not improved the situation. At the same time, such loose talk compromises our ability to address important contemporary misgivings related to matters of consent and legitimacy in arbitration, on the one hand, and to arbitration’s efficacy and utility, on the other. That is even more serious.