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The "Gateway" Problem in International Commercial Arbitration

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Article

The “Gateway” Problem in International Commercial Arbitration

George A. Bermann[†]

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I. INTRODUCTION

Participants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive

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alternative to litigation,¹ while still ensuring that its use is predicated on the consent of the parties and that the resulting awards command respect.² A priori, at least, all participants—parties, counsel, arbitrators, arbitral institutions—have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora, while producing awards that withstand judicial challenge and otherwise enjoy legitimacy.³

National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process. Among the ways courts do so is by ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner. But those same courts are commonly asked by a party resisting arbitration to intervene at the very outset to declare that a prospective arbitration lacks an adequate basis in party consent. No legal system that permits the arbitration of at least some disputes (and most do) is immune to the possibility that its courts will become engaged in an inquiry of that sort at the very threshold of arbitration. Each must decide how, at this early stage, to promote arbitration as an effective alternative to litigation, while at the same time ensuring that any order issued by a court compelling arbitration is supported by a valid and enforceable agreement to arbitrate. The challenge consists of identifying those issues that courts—in the interest of striking the proper balance between these two objectives—properly address at what is increasingly known, in common U.S. parlance, as the “gateway” of arbitration. This “gateway” problem is the focus of the present Article.

For purposes of this Article, I consider an arbitral regime to be effective to the extent that it operates to promote the procedural advantages I posited earlier—speed, economy, informality, technical expertise, and avoidance of national fora. While legitimacy might be defined in many different ways, I consider an arbitral regime to be legitimate (or to enjoy legitimacy) to the extent that the parties who were compelled to arbitrate rather than litigate, and

1. See generally Georges R. Delaume, *Reflections on the Effectiveness of International Arbitral Awards*, 12 J. INT'L ARB. 5 (1995) (relating the notion of final and binding effect of an award to the overarching effectiveness of international arbitration); Paul-A. Gélinas, *Arbitration Clauses: Achieving Effectiveness*, in IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 47 (Albert Jan van den Berg ed., 1999) (discussing, inter alia, how adequate drafting of the arbitration clause can increase the efficacy of international arbitration); Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 5 (highlighting the implications of arbitration becoming in the United States a “wide-ranging surrogate for civil litigation”); Quentin Tannock, *Judging the Effectiveness of Arbitration Through the Assessment of Compliance with and Enforcement of International Arbitration Awards*, 21 ARB. INT'L 1 (2005) (arguing that more empirical data concerning the rate of enforcement of awards would be helpful to better assess the effectiveness of international arbitration).

2. See, e.g., Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 215-16 (2005) (“The right of judicial supervision must be exercised to maintain arbitration’s effectiveness and to safeguard its legitimacy by correcting fundamental abuses.”); Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT'L L. REV. 489, 492-93 (2009) (“Without prejudice to autonomy, international arbitration does regularly interact with national jurisdictions for its existence to be legitimate and for support, help, and effectiveness.”).

3. Although this Article makes special reference to international commercial arbitration, the descriptive and normative claims pertain equally to domestic arbitration.

will be bound by the resulting arbitral award, consented to step outside the ordinary court system in favor of an arbitral tribunal as their dispute resolution forum.⁴

Legal systems differ in their responses to the challenge of reconciling efficacy and legitimacy in arbitration, and even in the extent to which they acknowledge that the challenge exists and try to articulate a framework of analysis for addressing it. This Article proceeds on the premise that legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion.

In the United States, Congress has largely ignored the challenge of reconciling efficacy and legitimacy in arbitration, as have the states even when establishing statutory regimes to govern arbitration conducted in their territory.⁵ The matter has accordingly fallen to the courts. In this Article, I reexamine the jurisprudence that American courts have developed, increasingly under the leadership of the U.S. Supreme Court, to address the fundamental tension between arbitration’s efficacy and legitimacy interests that exists at the very threshold of arbitration. The exercise has come to consist largely of demarcating “gateway” issues (i.e., issues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent) from “non-gateway” issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially, if arbitration is to be an effective mode of dispute resolution).

This Article proceeds as follows. Part II briefly sketches the settings in which courts may be asked to conduct the early policing with which this Article is concerned. Part III identifies the terminological confusion that has hampered clear thinking on the subject, and proposes a coherent vocabulary for overcoming it. Part IV then explores critically the conceptual devices that courts and commentators have traditionally employed in sorting through the issues. In so doing, it demonstrates that the two notions most widely relied

4. William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 55, 90 (Albert Jan van den Berg ed., 2007); see *infra* Parts III and V.

5. The Federal Arbitration Act has little to say on the gateway problem. 9 U.S.C. § 1 *et seq.* (2006). Sections 3 and 4 provide, respectively, for stays of court actions on claims subject to arbitration and for orders compelling arbitration. *Id.* §§ 3-4. Neither section addresses the issues that may specifically be raised, and not raised, on those occasions. Within Chapter Two, implementing the New York Convention, section 206 likewise authorizes court orders compelling arbitration, but without indicating the inquiries that are permissible and impermissible on that occasion. *Id.* § 206. Only slightly more helpful is the New York Convention itself, which, in Article II(3), requires a court to refer parties to arbitration pursuant to an arbitration agreement, “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.S.T. 2519, 330 U.N.T.S. 3 [hereinafter New York Convention].

At the state level, section 6 of the Uniform Arbitration Act provides generally that “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” On the other hand, it provides that: “[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.” UNIF. ARBITRATION ACT § 6(a)-(b) (amended 2000).

upon for this purpose—Kompetenz-Kompetenz and separability—are unequal to the task, and explains why. A critical understanding of U.S. law in this regard is aided by comparing it to models—the French and German—that claim to have devised simple and workable formulae for reconciling efficacy and legitimacy interests at the outset of the arbitral process. That discussion will show how the often proclaimed universality of Kompetenz-Kompetenz and separability is in fact misleading.

Against this background, Part V traces how recent U.S. case law has progressively pursued a more nuanced balance between efficacy and legitimacy than the traditional conceptual tools tended to yield. The courts have achieved this result, not by erecting a single comprehensive framework of analysis, but rather through a series of pragmatic adjustments to the received wisdom associated with Kompetenz-Kompetenz and separability. I conclude that they have developed a suitably complex body of case law that ordinarily reaches sound results. But I am equally certain that, in doing so, they have failed adequately to rationalize the case law.⁶ The disparate strands of analysis—each of which is basically sound—have combined to produce a needlessly confusing case law to the detriment of clarity, coherence, and workability.⁷ I suggest that the case law can and should be recast, and that the central feature of that recasting must be a serious and frank confrontation of the underlying tradeoff between arbitration's efficacy and legitimacy interests. This Article is thus both descriptive and normative in outlook.

II. THE SETTINGS

The tension between efficacy and legitimacy surfaces at virtually every point in the arbitral life cycle. Thus, during the arbitration itself, a tribunal will feel bound to conduct the proceedings with dispatch, but also with attentiveness to the ground rules to which the parties previously assented. Perhaps the most dramatic moments associated with this tension 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. Since parties commonly

6. See, e.g., Tanya J. Monestier, "Nothing Comes of Nothing" . . . Or Does It??? A Critical Re-Examination of the Doctrine of Separability in American Arbitration, 12 AM. REV. INT'L ARB. 223, 223-31 (2001); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 140-45 (1997); Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287 (1999) [hereinafter Rau, *Arbitrability Question*]; Alan Scott Rau, *Everything You Really Need To Know About 'Separability' in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 84-92 (2003) [hereinafter Rau, *Everything You Really Need to Know*]; Adam Samuel, *Separability and the US Supreme Court Decision in Buckeye v. Cardegna*, 22 ARB. INT'L 477 (2006); Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19 (2002); Carl Svernlöv, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8 J. INT'L ARB. 37 (1991); Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007).

7. Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT'L ARB. 159, 159 (2009) ("[T]he rules [in U.S. law] that govern the 'who is to decide' question once were well defined. Today, however, there exists significant confusion as to how a court is to decide which forum, the court or the arbitrator, has the jurisdiction to decide this threshold issue."); see *infra* Part V.

challenge awards that are unfavorable to them, managing the tension between the efficacy of the arbitral process and legitimacy of the arbitral outcome is a concern of paramount importance for every actor involved in international arbitration.

But it is at the outset of arbitration that the tradeoff between efficacy and legitimacy interests in arbitration assumes its purest form. The question occupying center stage at this moment is whether a party unwilling to arbitrate is obligated, on the basis of a prior undertaking, to do so.⁸ If a court compels a party to arbitrate despite its not having consented to arbitration,⁹ the legitimacy of both the arbitration and any resulting award is compromised.¹⁰ This follows from the fundamental principle that commercial arbitration is consent-based, and that a party cannot be bound by an agreement to arbitrate or by the resulting award unless it consented to be so bound.¹¹ On the other hand, arbitration becomes a less effective means of dispute resolution to the extent that, prior to arbitration, parties may have recourse to 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.

It is no wonder that challenges to the obligation to arbitrate tend to surface early in the arbitral life-cycle. Parties contending that they never agreed to arbitrate a dispute have every reason to press that assertion at the outset. The reason is not simply to avoid the very real risk that they will be held to have

8. Illustrative of this point is the language employed by Judge Easterbrook in *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001):

[A] person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. Courts have jurisdiction to determine their jurisdiction not only out of necessity (how else would jurisdictional disputes be resolved?) but also because their authority depends on statutes rather than the parties' permission. Arbitrators lack a comparable authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties *do* control the existence and limits of an arbitrator's power. No contract, no power.

9. Section 4 of the Federal Arbitration Act provides that courts may compel parties to arbitrate only “upon being satisfied that the making of the agreement for arbitration . . . is not in issue.” 9 U.S.C. § 4 (2006). See generally Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 *FORDHAM URB. L.J.* 167, 195 (1999) (criticizing the severability doctrine by arguing that compelling arbitration too early deprives the resisting party of her freedom of contract).

10. See, e.g., *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991) (“[B]ecause an ‘arbitrator’s jurisdiction is rooted in the agreement of the parties,’ a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision.” (quoting *George Day Constr. Co. v. United Bhd. of Carpenters, Local 354*, 722 F.2d 1471, 1474 (9th Cir. 1984) (citations omitted))).

11. *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’ This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.” (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))); see also *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”); *Volt Info. Scis., Inc. v. Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“[A]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”); *United Steelworkers*, 363 U.S. at 582 (“[A]rbitration is a matter of contract.”).

waived their objections if they do not raise those objections immediately.¹² Rather, if a party is truly averse to arbitrating, it will ordinarily prefer that a court, rather than an arbitrator, make the jurisdictional determination. It will likely assume, based on logic, experience, or mere intuition, that an arbitral tribunal will be more disposed than a court to affirm arbitral jurisdiction.

To help visualize this early point in time, I posit two basic scenarios, to which I shall return on occasion throughout this Article. In a first and very common scenario, a party brings to court a claim that is arguably subject to arbitration. It may be unaware of any ostensible obligation to arbitrate or, though aware of the obligation, may seek to avoid it. The complaint will then likely be met with a motion to dismiss on the basis of an arbitration agreement between the parties. The issue having been joined, a court will then be asked to decide whether the plaintiff had a legally enforceable obligation to arbitrate that particular dispute.¹³ In this scenario, the party impugning the agreement to arbitrate is by definition the first mover.

In a second scenario, the party seeking arbitration of a dispute is the first mover, initiating proceedings in an arbitral forum. If the respondent prefers a judicial to an arbitral forum for any reason, it may either present its objections to arbitral jurisdiction to the tribunal itself or repair to a court for a determination that the dispute, for one reason or another, is not subject to arbitration.¹⁴ Before the court, that party may seek relief in one of a variety of forms. It may seek declaratory relief¹⁵ or a stay of arbitration.¹⁶ Not uncommonly, it will bring to the court a related claim of its own, seeking a ruling on the merits.

By either of these two routes, the “gateway” problem on which this Article focuses will have landed in court. A court must then delineate those preliminary issues, if any, that it may (and arguably must) decide at the outset from those properly left to the arbitral tribunal in the first instance.¹⁷ Where a legal system draws that line goes a long way toward determining that system’s balance between arbitral efficacy and arbitral legitimacy. The greater a system’s interest in ensuring the legitimacy of the arbitral process and the resulting awards, the greater the number and scope of the jurisdictional

12. See, e.g., *Cabintree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995) (finding that a franchisor presumptively waived its right to arbitrate a dispute by proceeding before an arbitral tribunal for the resolution of his contractual claims and by failing to demand arbitration in the franchisee’s state court action, but instead seeking removal of action to federal court).

13. See *supra* note 8 and accompanying text. The revised Uniform Arbitration Act (amended 2000) specifically contemplates this scenario. Section 6(d) provides that “[i]f a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.”

14. See, e.g., *Three Valleys Mun. Water Dist.*, 925 F.2d at 1136.

15. See, e.g., *McLaughlin Gormley King Co. v. Terminix Int’l Co.*, 105 F.3d 1192 (8th Cir. 1997).

16. Concededly, although the rules may differ, all jurisdictions offer such an opportunity. For the example of France, see *infra* Section IV.A.

17. See José Carlos Fernández Rozas, *La collaboration entre juges et arbitres, présupposé d’une culture arbitrale*, in *LE ROLE DES JURIDICTIONS ETATIQUES DEVANT L’ARBITRAGE COMMERCIAL INTERNATIONAL* 23 (2001).

inquiries its courts will be permitted and possibly required to make, and perhaps also the greater the depth of those inquiries. The greater a system’s interest in arbitration, once initiated, moving forward without delay or distraction, the fewer and more limited the inquiries its courts will be allowed to make, and the shallower those inquiries will be.

III. SEMANTIC DIFFICULTIES

Defining the scope of judicial authority to decide issues of arbitral jurisdiction at the threshold of arbitration is difficult enough without courting terminological confusion. Unfortunately, two of the terms most commonly employed nowadays in this context—namely, “gateway issues” and “arbitrability”—suffer from seriously inconsistent usage. The resulting ambiguity has added unnecessary layers of confusion to any effort to achieve clarity and coherence.

A. *The Notion of “Gateway Issues”*

The term “gateway issues,” which has gained prominence in recent U.S. Supreme Court rulings,¹⁸ is susceptible of two meanings. It may be read broadly to signify any feature of a dispute, the parties to it, or the contract from which it arises that, when raised by a party resisting arbitration, can potentially keep an arbitration from going forward.¹⁹ This entire bundle of issues has traditionally been referred to simply as “jurisdictional” or “threshold” in character. However, on other occasions, the term “gateway issues” is used in a much narrower sense, designating only those threshold issues that courts agree to resolve, if raised on a timely basis, rather than leave for an arbitral tribunal to decide.²⁰

Like at least some members of the Supreme Court,²¹ I prefer to give the

18. See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002) (“gateway matters”).

19. Justice Breyer’s opinion for the court in *Howsam* uses the term “gateway issue” in the broadest possible sense: to mean essentially any threshold issue on which a court’s sending a case to arbitration might depend:

Linguistically speaking, one might call any potentially dispositive *gateway* question a “question of arbitrability,” for its answer will determine whether the underlying controversy will proceed to arbitration on the merits The Court has found the phrase [“arbitrable”] applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the *gateway* matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the *gateway* dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

537 U.S. at 83-84 (emphasis added).

20. See, e.g., *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

21. In *Rent-a-Ctr.*, Justice Scalia wrote for the majority:

The delegation provision [in this case] is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate “gateway” questions of “arbitrability,” such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce.

130 S. Ct. at 2777-78.

term “gateway issues” the narrower meaning, encompassing only those threshold issues that a court, if asked to do so, will decide at the outset, but excluding those that courts reserve for initial determination, along with the merits, to the arbitral tribunal itself. Graphically, it is easy to picture a “portal” through which a party seeking arbitration must pass before arbitration may commence, in the event that its opponent raises certain objections to arbitral jurisdiction at the outset. Given the saliency of the “who decides?” question in the world of arbitration,²² we stand to benefit considerably from a vocabulary that captures it and, more particularly, differentiates between those threshold issues that may be raised in court at the outset of arbitration and those that may not. Reserving the term “gateway issues” for the former set of questions promotes clear analysis. I continue to refer to the larger universe of issues—comprising gateway and non-gateway issues alike—simply as jurisdictional or threshold, as they have traditionally been. In fact, the term “jurisdictional” suits some threshold issues (e.g., does a valid arbitration agreement exist, and does it cover the dispute at hand?) better than others (e.g., has a party waived its right to arbitrate a given dispute?). Thus I prefer to speak of “threshold issues” in referring globally to all issues that determine whether an arbitration agreement exists and will be enforced.

This is not to suggest that the categories “gateway” and “non-gateway” issues are mutually exclusive. The fact that a particular threshold issue is a gateway issue (hence for a court to decide if raised at the outset) does not in the least mean that it is off-limits to the arbitral tribunal, should the issue first be raised before it. No mistake should be made about the fact that arbitral tribunals have authority to decide *all* threshold questions raised before them (subject to their being bound by the prior determination of a gateway issue by a competent court). What distinguishes gateway from non-gateway issues is that the former may be decided by a court if brought before it at the outset. Thus, gateway issues may be addressed either by a court or an arbitral tribunal, whichever is asked first; non-gateway issues are uniquely for the arbitrators to decide in the first instance.

While delineating gateway and non-gateway issues is essential, so too is fixing the time period in which gateway issues may be brought to court. It is neither necessary nor desirable to permit recourse to a court on gateway issues at any time a party resisting arbitration wishes. It would clearly be detrimental to arbitral efficacy to allow recourse to a court on a threshold issue—even a gateway issue—after the arbitral process is well underway. While courts of

22. Suggestive of this saliency are struggles to define relevant terms. Compare, e.g., William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, *supra* note 4, at 56 (“Often expressed as Kompetenz-Kompetenz . . . the precept has been applied to questions such as *who* must arbitrate, *what* disputes must be arbitrated, and *which* powers arbitrators may exercise.”), with John J. Barcelo III, *International Commercial Arbitration – Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1116 (2003) (“Separability and competence-competence are two of the best known concepts in international commercial arbitration. They are different, but often linked, because they share a common goal: to prevent early judicial intervention from obstructing the arbitration process. Both concepts address the question, ‘Who decides arbitrability—courts or arbitrators?’ but in different ways.”).

course have general authority to determine when a particular claim, for one reason or another, is no longer timely, it would be preferable to establish in advance a time period within which gateway issues in arbitration may be referred to a court. United States law does not do that. The Federal Arbitration Act (“FAA”) does not even specifically provide for recourse to a court prior to arbitration, much less subject any such recourse to a particular limitations period.

I suggest that a party resisting arbitration should be permitted to bring a gateway issue to court only prior to the start of the arbitration. Any benefits of allowing judicial recourse after that point in time are outweighed by the costs in terms of delay, disruption, and eventual derailment of the arbitral process. An arbitration may be said to begin, for these purposes, at the moment when the arbitral tribunal is fully constituted. In the first scenario described earlier, the resisting party will already have instituted an action in court before the prospect of arbitration has arisen. In my second scenario, the party resisting arbitration will have received a notice of arbitration to which it has jurisdictional objections. While presumably not yet before a court, it would be entitled under my proposal to invoke a court’s jurisdiction anytime between receipt of the notice of arbitration and the tribunal’s constitution. Such a party deserves ample, but not unlimited, time in which to secure a judicial ruling on the arbitration agreement’s validity and enforceability. Indeed, there is nothing inappropriate in requiring that threshold questions be raised at the threshold. Moreover, if a party fails to seek judicial recourse within that window of time, it does not waive any of its threshold objections to arbitration, whether of the gateway or non-gateway variety. They all may still be raised before, and decided by, the arbitral tribunal in the first instance.

It is not sufficient, however, merely to posit a brief threshold period, defined as the interval between initiation of the arbitration and constitution of the arbitral tribunal. Particularly in the second scenario, in which a party resisting arbitration repairs to court only after its opponent has initiated the arbitral process, threshold judicial intervention can significantly delay the arbitration. Although the window for threshold resort to a court may be short, the judicial process—even if focused on only one or two particular issues—may be long. All depends on the number, difficulty, and fact-intensiveness of the gateway issues raised, the pace and complexity of judicial procedures for resolving them, and the availability of appellate review. Excessive delay is cause for serious concern, particularly if the court ultimately rejects the gateway challenge. In such a scenario, legitimacy may have been purchased at too great a price in efficacy.

The problem is not insoluble. One solution would be for a legislature or the courts themselves to devise a streamlined procedural model for threshold judicial intervention. Summary proceedings could be made the norm, with discovery and other sources of judicial delay curtailed. Other indicia of “fast-track” adjudication could be added in the form, for example, of short procedural deadlines, concentrated evidence-taking, and the absence of a right of appeal. Arbitral procedure itself features numerous other procedural

shortcuts that may be borrowed in the interest of speed and efficiency.

More importantly, one should question any assumption that judicial intervention, once triggered, must necessarily cause the arbitration to be suspended until such time as the court finally resolves the gateway challenge. No such assumption need be made. It is perfectly conceivable for the judicial intervention and the arbitral process to go forward simultaneously.²³ Admittedly, some arbitral resources will have been wasted if, after the arbitration gets underway, a judicial ruling comes down in favor of the party resisting arbitration, and the arbitration then comes to an end. But that may be a small price to pay for discouraging frivolous or abusive recourse to courts at the threshold of arbitration. The very fact that arbitral proceedings are following their course uninterrupted may incentivize parties, and even courts, to accelerate the judicial process and not risk a substantial waste of resources.

All in all, ways exist to confine both the period of time during which gateway issues may be brought to court and the duration of judicial proceedings themselves. Moreover, an arbitration may be allowed to proceed even while its contractual basis is judicially contested.

B. *The Notion of Arbitrability*

Even more serious confusion surrounds the term “arbitrability.” This term has also increasingly come to be used very broadly, as if to denote every condition or requirement that must be met in order for an arbitration to go forward. Used in this way, arbitrability encompasses a wide and diverse range of issues.²⁴ Does an agreement to arbitrate exist?²⁵ Is that agreement valid and enforceable?²⁶ Are both parties signatories to the agreement or otherwise bound by it?²⁷ Does the agreement cover the particular dispute at hand?²⁸

23. The Revised Uniform Arbitration Act expressly provides that arbitral proceedings may go forward despite the pendency of a judicial challenge to the enforceability of the arbitration agreement: “If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.” UNIF. ARBITRATION ACT § 6(d) (amended 2000). The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as revised in 2006, contains a similar provision in Article 8(2): “Where an action [in a matter which is the subject of an arbitration agreement] has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.” 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]. For the German law to the same effect, see *infra* notes 88–90 and accompanying text.

24. Courts commonly signal as fundamental to the “arbitrability” of a dispute that a valid and enforceable agreement to arbitrate exists and that the particular dispute falls within the scope of that agreement. *See, 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); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 178 (3d Cir. 2010); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008).

25. *See, e.g.*, *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99 (3d Cir. 2000).

26. *See, e.g.*, *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643 (1986); *Cox*, 533 F.3d 1114.

27. *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964).

28. *See, e.g.*, *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008); *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532–33 (3d Cir. 2005); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004); *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 365 (2d

In fact, those questions represent only some of the issues that may fit under a broad umbrella of arbitrability. As developed more fully below,²⁹ a party resisting arbitration may argue that the contract of which the arbitration clause forms a part (i.e., the “main contract”) itself never came into existence,³⁰ or is itself invalid and unenforceable.³¹ That party may argue that its opponent waived its right to arbitrate.³² It may even argue that some other barrier to arbitration stands in arbitration’s way, whether time limits on the underlying claim,³³ failure to satisfy a condition precedent to arbitration,³⁴ or the principle of *res judicata*.³⁵ One can readily appreciate how the term arbitrability came to be understood so capaciously. It is certainly not illogical to employ the term as shorthand for any and all threshold issues, since a dispute may fairly be said to be “arbitrable” only if all threshold issues that are raised and upon whose resolution enforcement of the obligation to arbitrate depends are resolved in favor of the arbitration going forward. Only then is the dispute truly “able to be arbitrated.”

However, the term arbitrability may be used in a much narrower sense, confined to one specific question: did the legislature, in establishing or recognizing a particular cause of action, authorize its adjudication by an arbitral tribunal, or did the legislature reserve its adjudication to courts of law?³⁶ (By

Cir. 2003); *Drexel Burnham Lambert, Inc v. Mancino*, No. 91-3213, 1991 U.S. App. LEXIS 30181, at *5 (6th Cir. Dec. 19, 1991); 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.”); Reisberg, *supra* note 7 (noting that use of the term arbitrability is “a source of substantial confusion”).

29. See *infra* Parts III-V.

30. See, e.g., *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 277 (3d Cir. 2003); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590 (7th Cir. 2001).

31. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 425 (1967); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1990); *Nat’l Rail Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990).

32. See, e.g., *Doctors’ Assocs., Inc. v. Distajo*, 66 F.3d 438, 443 (2d Cir. 1995).

33. See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

34. See, e.g., *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1027-28 (11th Cir. 1982); *Eady v. Bill Heard Chevrolet Co.*, 274 F. Supp. 2d 1284, 1286 (M.D. Ala. 2003) (finding, in a case where the sale of the vehicle was subject to final credit approval, that the failure of the condition precedent rendered the contract invalid, and that therefore there was no consideration for the arbitration agreement).

35. See, e.g., G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623 (1988).

36. This is notably how the term is most often employed in international commercial arbitration. See, e.g., NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 122 (student ed. 2009) (“Arbitrability . . . involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts.”); 1 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 767 (2009) (“[Arbitrability] refers to subjects or disputes which are deemed by a particular national law to be incapable of resolution by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters.”); Loukas A. Mistelis, *Arbitrability—International and Comparative Perspectives: Is Arbitrability a National or International Law Issue?*, in *ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES* 1, 3-4 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009) (“Arbitrability . . . involves the simple question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings. While party autonomy espouses the right of parties to submit any dispute to arbitration, national laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration.”).

analogy, it may be asked whether a common law claim is one that the courts intended to be determined by courts alone and not by arbitral tribunals.) Used in this way, arbitrability denotes merely one among many objections to arbitral jurisdiction, namely that the underlying claim may not, as a matter of law, be submitted to arbitration.

Giving arbitrability this narrow definition yields important advantages. First, it serves to highlight those situations in which the legislature, rather than the parties—either directly or through operation of the law of contract—placed a claim outside arbitration’s bounds. In fact, legislatures can and, on occasion, do declare categories of disputes to be legally incapable of being arbitrated,³⁷ and courts on rare occasion may do so even if the legislature did not.³⁸ In the United States today, this prospect is more alive than ever.³⁹ The term “non-arbitrability” captures this important notion, providing shorthand for the more cumbersome locution, “not legally capable of arbitration.” In any event, other terms—such as jurisdictional and threshold—remain available to denote the complete range of issues upon which enforceability of an arbitration agreement depends.

Second, the definition of arbitrability suggested here conforms with international usage. Virtually everywhere else in the world, the term is given its narrow meaning—a meaning that is specifically expressed in the “non-arbitrability” ground found both in the 1958 New York Convention⁴⁰ and in the UNCITRAL Model Law.⁴¹

Third, and most importantly, an overly broad definition of arbitrability produces analytic mischief. Courts may have good reason not to treat all objections to arbitral jurisdiction in the same procedural fashion. Given the

37. JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 199 (2003) (“Every national law determines which types of disputes are the exclusive domain of national courts and which can be referred to arbitration. This differs from state to state reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration.”); *see, e.g.*, Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Law on Private International Law] SR 291, art. 177, ¶ 1 (Switz.), *translated in* BORN, *supra* note 36, at 777 (providing that “any dispute involving an economic interest [vermögensrechtlicher Anspruch] can be the subject-matter of an arbitration.”). German law uses a similar approach, since § 1030(1) of the German Zivilprozessordnung (ZPO) provides that “any claim involving an economic interest [vermögensrechtlicher Anspruch] can be the subject of an arbitration agreement. An arbitration agreement not involving an economic interest shall have legal effect to the extent that the parties are entitled to include a settlement on the issue.” Zivilprozessordnung [ZPO] [Code of Civil Procedure], Jan. 30, 1877, as amended, § 1030, ¶ 1 (Ger.), *translated in* BORN, *supra* note 36, at 778; *see also* BORN, *supra* note 36, at 811.

38. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (refusing, however, to infer the non-arbitrability of antitrust claims).

39. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 987 (2011). The proposed legislation would basically forbid and render unenforceable a pre-dispute arbitration agreement requiring arbitration of an employment, consumer, or franchise dispute, or a dispute arising under any statute intended to protect civil rights. For a discussion of previous versions of the proposal, *see*, Igor M. Brin, *The Arbitration Fairness Act of 2009*, 25 OHIO ST. J. ON DISP. RESOL. 821 (2010); Rebecca Lanctot, *Reality Check: Is the United States’ Arbitration Fairness Act of 2009 Likely To Cause Problems with International Arbitration Beyond Theory?*, 13 VINDOBONA J. 307 (2009); David Moora, *Arbitration Fairness Act of 2009 Introduced*, 15 No. 3 DISP. RESOL. MAG. 30 (2009).

40. New York Convention, *supra* note 5, arts. III(1), V(2)(a). These sections are implemented in the United States by 9 U.S.C. §§ 201-08 (2006).

41. UNCITRAL Model Law, *supra* note 23, arts. 34(2)(b)(i), 36(b)(1).

large number and wide range of threshold issues in arbitration, generalized propositions about them—and especially about the respective roles of courts and arbitrators in determining them—may be, at the very least, misleading and, at worst, bad policy.

The terms “gateway” and “non-gateway” issues are frequently invoked in the Parts that follow, precisely because they provide a terminology that is sufficiently general to encompass the full range of reasons parties advance for avoiding an apparent agreement to arbitrate. By contrast, the term “arbitrability” will seldom be used, precisely because I prefer to confine it to the specific argument that a claim may not, as a matter of law, be submitted to arbitration.

IV. TRADITIONAL TOOLS

Generations of law students have been taught that the doctrines of Kompetenz-Kompetenz and separability—doctrines to which virtually all arbitration systems today purport to adhere—hold the keys to unlocking the mysteries associated with arbitral jurisdiction.⁴² I argue that, while these doctrines have a role to play, they fall far short of providing fully adequate answers. They certainly cannot explain the results at which U.S. courts have lately been arriving.⁴³ Normatively, my claim in this Part is that neither Kompetenz-Kompetenz nor separability delivers on its promise to adequately illuminate the gateway/non-gateway issue distinction. Put differently, neither doctrine, whether taken alone or in combination with the other, is capable of offering strong assurances that gateway and non-gateway issues will be delineated in a way that strikes an appropriate balance between arbitration’s efficacy and legitimacy interests.

A. *Kompetenz-Kompetenz*

The doctrine of Kompetenz-Kompetenz, as generally understood, recognizes the authority of arbitral tribunals to determine their own

42. One text explains the doctrines in this fashion:

A well known question . . . is the question whether the arbitrators are entitled to judge upon their own competence, in the German language known as the question of Kompetenz-Kompetenz. A general tendency may be noticed to recognise the arbitrator’s authority to rule on its own jurisdiction, i.e., to decide whether there exists a valid agreement to arbitrate Closely connected . . . is the question of the separability of the arbitration clause Under the separability doctrine, which regards the arbitration agreement as distinct from the main contract in which it is incorporated, the arbitrators can decide upon the validity of the main contract including questions concerning the revocation or cancellation of the main contract. Not included is the question whether a contract with arbitration clause has been concluded at all. Here the arbitrator cannot decide the issue definitely.

PIETER SANDERS, TRENDS IN THE FIELD OF INTERNATIONAL COMMERCIAL ARBITRATION 277 (1975). The UNCITRAL Model Law, as revised in 2006, provides in article 16(1) the now-classic articulation of the Kompetenz-Kompetenz principle: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” UNCITRAL Model Law, *supra* note 23, art. 16(1).

43. See *infra* Part V.

jurisdiction.⁴⁴ The breadth of this formulation has unfortunately generated much misunderstanding.⁴⁵ All would appear to agree that Kompetenz-Kompetenz permits an arbitral tribunal to determine its own jurisdiction if it is challenged,⁴⁶ and this of course is no minor achievement. But for this understanding, a tribunal arguably would be required to suspend proceedings whenever a party before it challenges its jurisdiction—whatever the basis of the challenge might be—and refer the jurisdictional issue to a court for determination. Allowing a party to unilaterally halt an arbitration merely by advancing a colorable reason in law why it should not go forward would dramatically impair the efficacy of arbitration.

Shall we, however, infer from the fact that an arbitral tribunal *may* determine its own jurisdiction when a party challenges it that a court *may not* address that question if a party raises it in court prior to the start of arbitration? Consider the two scenarios described in Part II.⁴⁷ In the first scenario, a party has initiated a claim in court, eliciting a motion to dismiss on the basis of an arbitration agreement between the parties. The immediate question for the court is *its own* jurisdiction, even if the answer will in turn depend on the court's assessment of the jurisdiction of an eventual arbitral tribunal. There is, a priori, no reason why the court should not be entitled to assess its own jurisdiction. In another era, in which courts were thought to be hostile to arbitration,⁴⁸ that may have been a dangerous recipe. But that era is behind us.⁴⁹

Matters become more complicated in the second scenario. Here, a party has initiated arbitration and its opponent then goes to court—perhaps for a declaration that the dispute is not subject to arbitration, or for a stay of arbitration, or even for a ruling on a related claim of its own. That move has the effect, and often enough the purpose, of frustrating or at least delaying the arbitration. Arguably, the arbitral tribunal in this scenario is no less entitled to determine its own jurisdiction than the court in the first scenario. However, if we posit that the arbitral tribunal has not yet been fully constituted—and may not be for some time—permitting early judicial intervention on at least certain fundamental issues may be desirable. Moreover, it is not evident why as basic a

44. From the German “Kompetenz-Kompetenz” which literally means “the jurisdiction of jurisdiction.” French speakers use the term “compétence-compétence” to denote the same thing. Dominique T. Hascher, *Arbitration and National Courts: Conflict and Cooperation*, 21 AM. REV. INT'L ARB. 189, 191 (2010).

45. There is no consensus in U.S. law over the exact contours of Kompetenz-Kompetenz. See Smit, *supra* note 6, at 25-26.

46. See *supra* note 42.

47. See *supra* notes 13-16 and accompanying text.

48. Arbitration agreements were difficult to enforce at common law. For examples illustrating pre-FAA skepticism, see *Haskell v. McClintic-Marshall Co.*, 289 F. 405, 409 (9th Cir. 1923) (declining to give effect to an arbitration agreement because “[i]t was a settled rule of the common law that a general rule to submit to arbitration did not oust the courts of jurisdiction, and that rule has been consistently adhered to by the federal courts”); and *Jane Palmer v. French Republic*, 270 F. 609, 613 (S.D.N.Y. 1920) (refusing to enforce an arbitration agreement on the grounds that the “arbitration clause cannot be availed of by or against France to oust our courts of jurisdiction”).

49. The Federal Arbitration Act enacted a strong policy favoring arbitration. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

question as jurisdiction to determine jurisdiction should depend on who, as between the parties, was the first mover; it is for just this reason that U.S. courts are not as a general matter highly enamored of the doctrine of *lis pendens*.⁵⁰ A more pertinent consideration is whether an arbitral tribunal is already fully in place and capable of exercising its Kompetenz-Kompetenz. Under neither of the scenarios I have posited is that the case.

I conclude that the doctrine of Kompetenz-Kompetenz need not preclude a court from entertaining a challenge to arbitral jurisdiction prior to constitution of the arbitral tribunal. I do not claim that a court may or should determine at this early stage *every* threshold issue that a party resisting arbitration might present to the arbitral tribunal itself—far from it. Some issues may particularly warrant threshold judicial determination and others not. Delineating between them in this regard is the very vocation of the distinction between gateway and non-gateway issues—a vocation to which the notion of separability, discussed in a later section,⁵¹ has traditionally been central.

1. *Kompetenz-Kompetenz in French Law*

The view of Kompetenz-Kompetenz I espouse here is far from universally shared. French law, notably, understands Kompetenz-Kompetenz very differently and has exerted considerable international influence on the matter, as it has on so many other matters in international commercial arbitration.⁵² Like the American, the French approach has been heavily judge-made, but in January 2011, the French legislature codified the case law on this issue in the form of amendments to the Code of Civil Procedure.⁵³ The new

50. Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT’L L.J. 79, 113-14 (1999).

51. See *infra* Section IV.B.

52. Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1046 (1986) (“The use of privately created arbitral tribunals, though resting in the last analysis on practical considerations, requires theoretical explanation and justification. On both scores, French jurists and institutions have made enormous contributions.”). Even courts in the common law world have taken positions on Kompetenz-Kompetenz that are broadly similar to the French. In India, for example, the Supreme Court ruled that Section 45 of the Indian Arbitration and Conciliation Act required a court to do nothing more than conduct a prima facie review of an arbitration agreement’s validity before compelling arbitration. *Shin-Etsu Chemical Co. Ltd. v. Optifibre Ltd.*, (2005) Supp (3) S.C.R. 699 (India), available at <http://indiankanoon.org/doc/1192599>. This, according to the court, would further the goal of expediting proceedings at the initial stages of arbitration, while still affording the resisting party the opportunity to challenge the validity of the arbitration agreement either in the arbitration proceedings themselves or in a post-award action. See R. Doak Bishop, Wade M. Coriell & Marcelo Medina Campos, *The “Null and Void” Provision of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 284 (Emmanuel Gaillard & Domenico di Pietro eds., 2008). The Court did not enunciate a standard for conduct of this prima facie review, but judges clearly are not meant to make a full and final determination of whether the agreement is “null and void, inoperative or incapable of being performed.” *Id.* at 276.

The Hong Kong courts follow a broadly similar approach. See *Pacific Int’l Lines (Pte) Ltd. v. Tsinlien Metals & Minerals Co.*, [1993] 2 H.K.L.R. 249 (H.C.) (arbitration agreement to be enforced at the threshold of arbitration as long as there is “a plainly arguable case” that a valid arbitration agreement exists).

53. Décret n° 2011-48 du 13 jan. 2011 portant réforme de l’arbitrage [Decree 2011-48 of Jan. 13, 2011 on arbitration reform], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 14, 2011, p. 777, available at http://www.iaiparis.com/pdf/Decret_n_2011-

legislation innovates in certain respects beyond the scope of this Article. But the fact that it innovates so little in regard to Kompetenz-Kompetenz is itself revealing. The French regard their distinctive approach to Kompetenz-Kompetenz as vital to their jurisdiction's appeal as an international arbitration venue.

Like U.S. law, French law accords arbitral tribunals the authority to decide the scope and validity of an arbitration agreement if either is called into question before the tribunal itself.⁵⁴ But unlike U.S. law, French law treats the tribunal's authority to determine these issues as exclusive until after the arbitration is concluded and an award is rendered.⁵⁵ According to French commentators, Kompetenz-Kompetenz thus has not only a *positive* dimension (authorizing arbitrators to determine their own competence at the outset), but also a *negative* one (barring courts from determining the competence of arbitrators at the outset).⁵⁶ In its negative aspect, Kompetenz-Kompetenz requires courts to refrain from entertaining gateway challenges to an arbitration agreement, even if no arbitral tribunal has yet been formed. As Gaillard and Banifatemi put the matter, "the courts should refrain from engaging into [sic] the examination of the arbitrators' jurisdiction before the arbitrators themselves have had an opportunity to do so."⁵⁷

Negative Kompetenz-Kompetenz in French law is admittedly subject to an important exception. French law considers it intolerable to require a party to arbitrate a dispute when there is no plausible basis whatsoever for finding that

48_du_13_janvier_2011_portant_reforme_de_l_arbitrage.pdf [hereinafter Décret portant réforme de l'arbitrage].

54. See Antonias Dimolitsa, *Autonomie et "Kompetenz-Kompetenz,"* 2 REV. ARB. 305, 321-25 (1998); 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, *supra* note 52, at 257, 260.

55. The French Cour de cassation has repeatedly and emphatically affirmed that proposition. See, e.g., Société Spa Tagliavini, Cour de cassation [Cass.] [supreme court for judicial matters] Com., Nov. 25, 2008, Bull. civ. IV, No. 197; Société Ocea c. M. Bouet, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 9 2008, 2008 REV. ARB. 680, 681; Société Nat'l Broadcasting Co. (NBC) c. M. Bernadaux, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 11, 2006, Bull. civ. I, No. 364; Société Prodim c. époux Mohimont, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 4, 2006, Bull. Civ. I No. 338; Société Quarto Children's Books Ltd. c. Société Éditions du Seuil, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 16, 2001, Bull. civ. I, No. 254; Société American Bureau of Shipping c. Copropriétaire Maritime Jules Verne, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 26, 2001, Bull. civ. I, No. 183; Société Métru System France c. Société Sulzer Infra, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 1999, Bull. civ. I, No. 325; Emmanuel Gaillard, *Note—Cour de cassation (1re Ch. civile)*, 2001 REV. ARB. 529.

56. See Gaillard & Banifatemi, *supra* note 54, at 260.

57. *Id.* The textbook example is the case in which the parties had included in their contract both a choice of forum clause designating a national court and an arbitration clause. Société la Chartreuse c. Cavagna, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Dec. 18, 2003, Bull. civ. II, No. 393. The court ruled that the arbitral tribunal, and the arbitral tribunal alone, could determine the jurisdictional question; the chosen court could not:

In ruling as it did, without finding the arbitration clause to be manifestly null or manifestly inapplicable—these being the only circumstances that prevent an arbitral tribunal from determining the existence, validity and scope of the agreement to arbitrate—the court of appeal exceeded its powers and violated [the law] and the principle [of *compétence-compétence*].

Id. (author trans.).

it had bound itself to do so. Thus, if a French court determines that an arbitration clause *manifestly* does not exist⁵⁸ or is *manifestly* null,⁵⁹ it may so hold at the outset and, on that basis, decline to refer the parties to arbitration. Even prior to its reform in January 2011,⁶⁰ the French Code of Civil Procedure embodied both the rule of negative Kompetenz-Kompetenz and its exception.⁶¹ Thus, “where the case has not yet been brought before an arbitration tribunal, the court must also decline jurisdiction,” except in the circumstance in which it finds that “the arbitration agreement is manifestly null.”⁶² By analogy to manifest nullity, the courts have interpreted the Code provision as allowing them also to find that an arbitration agreement manifestly does not exist,⁶³ manifestly does not bind the party sought to be bound,⁶⁴ manifestly does not cover the dispute at hand,⁶⁵ or is otherwise manifestly unenforceable.⁶⁶ In other words, the only circumstance in which a French court is permitted to question arbitral jurisdiction is one in which no arbitral tribunal has yet been constituted *and* the agreement to arbitrate is, for one reason or another, manifestly ineffective or unenforceable.⁶⁷

The manifest nullity standard is meant to be—and is—very difficult to meet. As the term itself would suggest, a court must find, on the face of the proffered arbitration agreement itself, that it cannot serve as the basis for a valid arbitration.⁶⁸ “The requirement that the clause be ‘manifestly null and void’ means that this must be so clear that the court is not required to embark on any exercise of interpretation of the clause or its scope of application.”⁶⁹

58. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 16, 2004, Bull. civ. I, No. 82.

59. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] Com., Nov. 25, 2008, Bull. civ. IV, No. 197; Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., July 9, 2008, 4 REV. ARB. 680, 681 (2008); Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., June 26, 2001, no. 99-17.120, Bull. civ. 2001 I, No. 183; Société Coprodag c. dame Bohin, Cour de cassation [Cass.] [Supreme court for judicial matters] 2e civ., May 10, 1995, no. 93-12.676, Bull. civ. 1995 II, No. 135.

60. See *infra* notes 72-74 and accompanying text.

61. According to Article 1458 of the Code, “where a dispute, referred to an arbitration tribunal pursuant to an arbitration agreement, is brought before a court of law of the State, the latter must decline jurisdiction.” CODE DE PROCEDURE CIVILE [C. PR.CIV.] art. 1458 (Fr.), translated in *Code of Civil Procedure*, LEGIFRANCE (Sept. 30, 2005), http://195.83.177.9/upl/pdf/code_39.pdf.

62. Article 1458 went on to provide that “in both cases, the court may not raise *sua sponte* its lack of jurisdiction.” *Id.*

63. See, e.g., Navire Pella, Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 21, 2006, Bull. civ. IV, No. 41; Navimpex c. Wiking Trader, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 6, 1988, Bull. civ. II, No. 343.

64. Supermarket Champion France c. Company RECAP, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 4, 2006, Bull. civ. I, No. 337.

65. See Gaillard & Banifatemi, *supra* note 54, at 261-68.

66. Navire Tag Heuer, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 7, 2006, Bull. civ. I, No. 287 (referring to “inapplicabilité manifeste”).

67. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 11, 2006, Bull. civ. I, No. 368; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 30, 2004, Bull. civ. I, No. 96; République islamique d’Iran c. Société Framatome, Cour de cassation [Cass.] [Supreme court for judicial matters], 1e civ., Jan. 28, 1989, Bull. civ. 1989 I, No. 128; Gosset, Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., May 7, 1963, Bull. civ. 1963 I no. 246.

68. See, e.g., Levantina de Hydraulica y Motores, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 23, 2007, 3 REV. ARB. 279 (2007).

69. JEAN-LOUIS DELVOLVE, GERALD H. POINTON & JEAN ROUCHE, FRENCH ARBITRATION

French courts thus accept as sufficient what amounts to merely a prima facie showing on virtually all threshold issues.⁷⁰ It would be an understatement to say that parties seeking relief in a French court from an apparent obligation to arbitrate face a seriously uphill battle.⁷¹

The 2011 reform consolidates French case law with respect to the handling of threshold issues.⁷² The new Article 1465 forcefully reiterates the French version of Kompetenz-Kompetenz: “The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.”⁷³ Further, according to Article 1448, “[w]hen a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”⁷⁴ Thus, once the tribunal has been constituted, it exclusively resolves challenges to its own jurisdiction, whatever the basis of the objection. Before that time, a court is empowered only to determine whether an arbitration agreement is manifestly null or manifestly inapplicable.

In recognizing the “manifest nullity” exception, French law clearly acknowledges the legitimacy at stake in the enforcement of arbitration agreements. French law nevertheless strikes a very different balance between efficacy and legitimacy interests than U.S. law does. Its expansive understanding of Kompetenz-Kompetenz reduces to a bare minimum the inquiry that courts may make into the enforceability of arbitration agreements prior to enforcing them. This choice is a knowing one, crafted chiefly to thwart attempts by parties to delay or derail an arbitration. Efficacy concerns plainly prevail over legitimacy concerns at this stage of the proceedings. While sharing the vocabulary of Kompetenz-Kompetenz with American law, French law defines the concept differently and reaches strikingly different jurisdiction allocation outcomes.⁷⁵

Curiously, once an arbitration has ended in an award, French courts are

LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION 78 (2d ed. 2009); see also Olivier Cachard, *Le contrôle de la nullité ou de l'inapplicabilité manifeste de la clause compromissoire*, 4 REV. ARB 893 (2006).

70. The combination of the principles of validity and Kompetenz-Kompetenz prohibits the French judge from carrying out a substantive and thorough review of the arbitration agreement. The only limit to the judge's examination of the arbitration clause, before being asked to review its existence or validity in the context of an action brought against the award, is whether that clause is manifestly null or inapplicable. See Catherine Kessedjian, *Is Arbitration a Service to Business or to the Legal Profession?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2009, at 311, 313 (Arthur W. Rovine ed., 2010) (suggesting that the expression, “null and void, inoperative or incapable of being performed,” within the meaning of New York Convention, art. II(3), “has been so narrowly interpreted [by the French courts] that it has lost almost all potential for application”).

71. *Id.*

72. Décret portant réforme de l'arbitrage, *supra* note 53, at *9.

73. *Id.* art. 1465, translated in Decree 2011-48 of 13 January 2011 reforming the law governing arbitration (Int'l Arbitration Inst. trans., 2011), http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf [hereinafter Décret, translation].

74. Décret portant réforme de l'arbitrage, *supra* note 53, art. 1448, translated in Décret, translation, *supra* note 73.

75. See *infra* Part IV.

permitted to make all the inquiries into arbitral jurisdiction that they were barred from making initially. If a party seeks to have the award annulled in a French court following an arbitration, it may raise each and every possible challenge to the existence and enforceability of the arbitration agreement. Moreover, it can expect the court to address those challenges without any deference to jurisdictional findings the arbitral tribunal may have previously made. Although French law postpones full judicial inquiry into arbitral jurisdiction until after an award has been issued, it obviously is not indifferent to the principle of consent or to the legitimacy concerns that underlie it.⁷⁶

However, postponing meaningful review of the arbitration agreement until after an award has been rendered imposes efficiency costs of its own. If a defect in the arbitration agreement is less than manifest (as it far more often than not will be), the arbitration will go forward, consuming time and resources—an expenditure that will have been wasted if a French court at the arbitral situs ultimately decides that the arbitration agreement did not exist or was not enforceable at the instance of the party invoking it, and thus annuls the award. French law appears to be indifferent to that efficacy cost.⁷⁷ This arrangement is rational only if one assumes that annulment of an arbitral award in France, on the basis of one defect or another in the agreement to arbitrate, is truly a rarity.

2. *Kompetenz-Kompetenz in German Law*

German law more closely resembles American law in that it allows broad judicial intervention on certain issues at the threshold of arbitration, and expressly so provides in its Civil Procedure Code (“ZPO”). ZPO Section 1032(1) provides one avenue, entitling the defendant in a court action on a claim that it contends is subject exclusively to arbitration to seek a ruling that the court lacks jurisdiction to hear the matter on the merits. To prevail on the jurisdictional issue, plaintiff must demonstrate that the arbitration agreement is “null and void, inoperative or incapable of being performed.”⁷⁸ The court cannot content itself with a mere prima facie review of the arbitration agreement, i.e., with a determination that an agreement may at least plausibly be considered valid, operative and capable of being performed. Rather, the

76. See Gaillard & Banifatemi, *supra* note 54, at 260. The French approach has the incidental advantage of centralizing scrutiny of the arbitration agreement in a single forum since, in principle at least, only the courts of the arbitral situs have competence to set aside an award.

77. See Klaus Peter Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 FORDHAM INT’L L.J. 605, 619-20 (1989).

78. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, REICHSGESETZBLATT [R.G.B.L.] 83, as amended, § 1032, ¶ 1, translated in Peter Huber, § 1032 – Arbitration Agreement and Substantive Claim Before Court, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 139 (Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento eds., 2007) (“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.”). The language of Section 1032(1) tracks Article 8(1) of the UNCITRAL Model Law, whose language “null and void, inoperative or incapable of being performed” derives from Article II(3) of the New York Convention. See New York Convention *supra* note 5, art. II(3).

court makes a full and formal determination on the matter.⁷⁹

Second, section 1032(2) entitles a party against whom arbitration has been instituted to seek a ruling directly from an intermediate appellate court on “the admissibility or inadmissibility of arbitration,”⁸⁰ though it may do so only until such time as the arbitral tribunal has been constituted.⁸¹ Thereafter, the authority of the tribunal to make admissibility determinations becomes exclusive, though its determination is judicially challengeable on an interlocutory basis.⁸² Under section 1032(2), the court confines its inquiry to whether an effective and enforceable arbitration agreement exists, and whether the dispute falls within its ambit. While German law clearly posits “positive Kompetenz-Kompetenz,” it equally clearly does not share French law’s attachment to “negative Kompetenz-Kompetenz.”⁸³

The system just described was introduced legislatively in 1998 as part of the modernization of German arbitration law. ZPO Section 1032(2) represents a conscious deviation from the UNCITRAL Model Law, which otherwise forms the basis of the German legislation. Prior to 1998, the ZPO made no specific reference to judicial intervention on matters of arbitral jurisdiction until after the tribunal had issued its final award.⁸⁴ The reform’s legislative purpose was clear, namely, to address the risk that parties might spend considerable time and resources in an arbitral forum, only to discover in an action for post-award relief that that forum lacked jurisdiction from the start.⁸⁵ The German legislature plainly recognized that, while the arbitral process as such would run in a smoother and more streamlined fashion if the courts were essentially silenced on matters of arbitral jurisdiction during that process, that policy could prove highly inefficient in the long run, and so actually compromise

79. Huber, *supra* note 78, at 139, 140.

80. ZPO § 1032, ¶ 2, *translated in* Huber, *supra* note 78, at 139 (“Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether arbitration is admissible or inadmissible.”). The corresponding phrase in German is “die Zulässigkeit oder Unzulässigkeit eines schiedsrichterlichen Verfahrens.” The competent court for this procedure (known as “der Kontrollantrag” or “application for jurisdictional review”) is the state Oberlandesgericht (OLG) (higher regional court).

81. Constitution of the tribunal means the time when all the arbitrators have accepted their appointment and presumably all initial challenges to arbitrators have been resolved. For a general discussion, see 3 MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG ZPO § 1032, paras. 22-25 (Thomas Rauscher, Peter Wax & Joachim Wenzel eds., 3d ed. 2008) [hereinafter MÜNCHENER KOMMENTAR]; Huber, *supra* note 78, at 150. An application under Section 1032(2) may be made before arbitration has been instituted if the applicant demonstrates that it has a legitimate interest in having an early declaratory judgment that arbitration is “inadmissible,” as when it claims that the party seeking arbitration waived the right to arbitrate. *Id.*

82. ZPO section 1040(1) states that “the arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement.” However, its positive Kompetenz-Kompetenz can be short-lived. ZPO section 1040(3) authorizes, subject to a one-month statute of limitations, an immediate judicial challenge to a partial award by an arbitral tribunal finding jurisdiction over the case. ZPO § 1040(3), *translated in* Huber, *supra* note 78, at 248.

83. Stefan Michael Kröll, *Die schiedsrechtliche Rechtsprechung des Jahres 2010*, 2011 SCHIEDSVZ 131, 133. ZPO section 1032(2)’s rejection of “negative Kompetenz-Kompetenz” is only strengthened by section 1040(3)’s allowing immediate judicial review of a tribunal’s partial award finding in favor of arbitral jurisdiction. *See supra* note 82.

84. Karl-Heinz Böckstiegel et al., *Part I—Germany as a Place for International and Domestic Arbitrations—General Overview*, in *ARBITRATION IN GERMANY*, *supra* note 78, at 139.

85. *Id.*

arbitration’s efficacy interest.⁸⁶ So seriously is this “correction” taken that German law does not permit parties to agree in advance to assign final decision on the validity or enforceability of the arbitration agreement to the arbitrators.⁸⁷

On the other hand, the German legislature was sensitive to the cost of the new procedure in terms of delay in the event the arbitration commences only after the court upholds the arbitration agreement. It especially feared that jurisdictional challenges would be brought solely for purposes of delay, or otherwise frivolously. For this reason, the ZPO specifically provides that an arbitration, once initiated, must be allowed to proceed on its course, notwithstanding the respondent’s having resorted to a court under section 1032(2).⁸⁸ However serious the challenge, arbitral proceedings go forward concurrently with the judicial procedure. Indeed, even during the judicial proceedings, the party seeking arbitration is free to initiate it,⁸⁹ thus simultaneously contesting judicial jurisdiction and triggering the arbitral process.⁹⁰

Germany has thus consciously produced a regime that enables courts to intervene on certain challenges, whether they take the form of a jurisdictional defense to a proceeding on a claim in court prior to any arbitration having been initiated or a stand-alone action brought in the period between initiation of arbitration and constitution of the tribunal. To this extent, the German mechanism reflects a commitment to party consent and to the legitimacy that such consent fosters. At the same time, under neither scenario are arbitral proceedings delayed, much less derailed, unless of course the court concludes that there exists no valid and enforceable agreement to arbitrate that is applicable to the dispute; in that circumstance, derailment is appropriate and will have been achieved on a reasonably timely basis.⁹¹ Kompetenz-Kompetenz under German law is evidently a highly calibrated instrument, and consciously so.

B. Separability

The traditional starting point for delineating gateway and non-gateway issues in American law is not Kompetenz-Kompetenz, but the doctrine of

86. MÜNCHENER KOMMENTAR, *supra* note 81. The driving idea is that doubts as to the existence of a valid and enforceable arbitration agreement should be dispelled at the earliest possible stage. Ulrich G. Schroeter, *Der Antrag auf Feststellung der Zulässigkeit eines schiedsrichterlichen Verfahrens gemäß §1032 Abs. 2 ZPO*, 2004 SCHIEDSVZ 288, 288.

87. Peter Huber, *Das Verhältnis von Schiedsgericht und staatlichen Gerichten bei der Entscheidung über die Zuständigkeit*, 2003 SCHIEDSVZ 73, 75.

88. “Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court.” ZPO § 1032(3), *translated in* Huber, *supra* note 78, at 139.

89. *Id.*

90. So committed was the German legislature to avoiding arbitral delay on account of jurisdictional challenges in court that, even when a party seeks immediate judicial review of a tribunal’s partial award upholding its jurisdiction, *see supra* note 81, the tribunal may proceed with the arbitration, and even conceivably issue a final award, while the court challenge is still pending. ZPO § 1040(3).

91. For a discussion on what constitutes an “admissibility” challenge for the purposes of ZPO § 1032, or how gateway and non-gateway issues are delineated in German law, *see infra* notes 112-116 and accompanying text.

separability. That doctrine basically posits that an arbitration agreement constitutes an agreement separate and apart from the main contract.⁹² But, like Kompetenz-Kompetenz, separability has been asked to do too much work in assigning authority to determine arbitral jurisdiction between courts and arbitral tribunals. It has not proven equal to that task.

The difficulties associated with separability stem in part from the ambiguity surrounding it. Unlike elsewhere, separability in American law essentially serves two distinct purposes. One purpose—and indeed the one most widely ascribed to it in the international arbitral community—is to enable an arbitral tribunal to declare a contract invalid or unenforceable on the merits, without thereby necessarily destroying the basis of its authority to make that very ruling.⁹³ As an agreement separate and apart from the main contract, an arbitration clause remains valid even though the contract of which it forms a part is not, thus permitting the former to survive the demise of the latter. Having survived, the arbitration clause remains a valid basis for the award. So understood, separability serves a highly salutary purpose. Party expectations concerning arbitration would clearly be disserved if arbitral tribunals were deemed, by virtue of deciding that a contract is invalid, to deprive themselves of the legal authority to make that very decision.⁹⁴ Salutary though this purpose may be, it nonetheless has little if anything to do with delineating between gateway and non-gateway issues.

However, separability's second, and less universally acknowledged, function in U.S. law pertains directly to the demarcation between gateway and non-gateway issues. Under this species of separability, whether a court may initially determine a matter of arbitral jurisdiction depends on whether the jurisdictional challenge is based on a defect peculiar to the arbitration agreement, on the one hand, or applicable to the main contract as a whole, on the other. The Supreme Court, in the seminal *Prima Paint* case, traced that distinction to the language of the FAA, and its Section 4 in particular.⁹⁵ But

92. 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 23, 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.*

93. See LEW ET AL., *supra* note 37, at 334 ("While competence-competence empowers the arbitration tribunal to decide on its own jurisdiction, separability affects the outcome of this decision Without the doctrine of separability, a tribunal making use of its competence-competence would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract.").

94. See, e.g., UNICTRAL Arbitration Rules, G.A. Res. 65/11, U.N. Doc. A/RES/65/22, art. 21, (Dec. 6, 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; AM. ARBITRATION ASS'N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, art. 15(2) (2009), available at <http://www.adr.org/sp.asp?id=33994>; INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION, art. 6(4) (1998), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

The operation of the severability doctrine in relation to the notion of contractual consent is not unproblematic. Some have argued that this "fiction" is in reality a serious conceptual flaw. See, e.g., Ware, *supra* note 6, at 131. But see Rau, *Everything You Really Need to Know*, *supra* note 6.

95. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("Under § 4 [of the FAA], with respect to a matter within the jurisdiction of the federal courts save for the existence

other considerations were surely also at play. The question whether a contract on which a claim in arbitration is predicated exists and is valid and enforceable clearly forms part of the merits of a case, and as such falls in principle within the arbitrators’ province to resolve. The arbitration clause as such is situated differently. Not only does the arbitration clause not pertain to the merits of a contract dispute, but a challenge to that clause goes directly to the heart of the tribunal’s authority to decide anything—including the validity and enforceability of the main contract. Separability thus permits courts to entertain challenges specifically applicable to the arbitration agreement, and not to the contract as a whole.

The distinction drawn by separability for these purposes is of course logically dubious. If the main contract is indeed invalid or unenforceable, so too must be all of its parts, including the arbitration clause. The clause should fall with the contract containing it. However, employing separability in this context makes some sense. Defects in the specific clause of a contract from which the arbitrators derive their authority to resolve disputes between the parties are understandably seen as impugning the parties’ consent to arbitration more directly than defects in those clauses of the contract that set out the parties’ substantive rights and obligations. Accordingly, separability’s distinction between the main contract and the arbitration clause, while far from logically compelling, exerts a strong intuitive appeal.

Although separability in U.S. law performs the twin functions I have described, only the first of them—namely, allowing an arbitration agreement and the authority it vests in an arbitral tribunal to survive the demise of the underlying contract—has won worldwide acceptance. Employing the notion to

of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.’ Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.” (quoting 9 U.S.C. § 4 (2006) (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court [with jurisdiction] . . . for an order directing that such arbitration proceed in a manner provided for in such agreement . . . [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement”)) (citations omitted)).

In its later *Buckeye* decision, the Court predicated the separability rule on section 2, rather than section 4, of the FAA. It interpreted section 2 as establishing “as a matter of substantive federal arbitration law [that] an arbitration provision is severable from the remainder of the contract.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006); *see also id.* at 447 (discussing section 2’s “substantive command that arbitration agreements be treated like all other contracts”). According to section 2:

A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2006); *see also* *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (noting that “§ 2 states that a ‘written provision’ ‘to settle by arbitration a controversy’ is ‘valid, irrevocable, and enforceable’ *without mention* of the validity of the contract in which it is contained. Thus, a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate”) (quoting *Buckeye*, 546 U.S. at 445).

distinguish gateway from non-gateway issues is a distinctively, though not uniquely, American practice. Separability as a jurisdiction-allocating device remains contested in the academic literature,⁹⁶ but is well-entrenched in the case law. Though given many opportunities to do so, the U.S. Supreme Court has not wavered in its attachment to it as the touchstone for determining whether courts should initially entertain challenges to the enforceability of an arbitration agreement or refrain from doing so, referring the parties on those issues to arbitration instead.⁹⁷ However, separability, in this second function, has not stood the test of time very well. As Part V will make abundantly clear, it simply ignores a whole range of threshold issues. Moreover, it does not always deal adequately with those threshold issues that it does address, at least when viewed in terms of achieving the optimal tradeoff between efficacy and legitimacy.⁹⁸

1. *Separability in French Law*

French law is once again illuminating. At one time, the Cour de cassation, or Supreme Court, had posited a distinction between those threshold issues relating to the existence or validity of an arbitration agreement, on the one hand, and those relating to the scope of arbitral authority under that agreement, on the other.⁹⁹ More specifically, the court allowed arbitrators to decide what disputes were or were not covered by an arbitration agreement, but not whether an arbitration agreement ever existed and was valid, if either of those issues was contested.¹⁰⁰ The court considered that if a tribunal were to conduct arbitral proceedings and render an award on the basis of an agreement that did not exist, or that existed but was not valid, the consent on which contract-based arbitration in principle rests would be lacking, and the legitimacy of the

96. For critical views of separability, see, for example, Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 845 (2003) (“[S]eparability perverts contract law because it assumes away the fundamental principle of contractual consent”); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 137 (1996) (“[O]verruling *Prima Paint* [is a price that] must be paid to make the law well-suited to ensure that arbitration is based on significant consent.”); see also Ware, *supra* note 6, at 126. The Revised Uniform Arbitration Act does not fully articulate the principle of separability, but strongly implies it. Section 6(b) states: “The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”

97. *Rent-a-Ctr.*, 130 S. Ct. at 2778.

98. See *infra* Part V.

99. ERIC LOQUIN, JURISCLASSEUR PROCEDURE CIVILE, FASC. 1034, ¶ 50 (2009) (“The case law of the Cour de cassation prohibited arbitrators from . . . ruling on the validity of the arbitration agreement [However,] the case law permitted arbitrators to determine their competence, ‘so to speak, within the interior of the arbitration agreement,’ even while barring them from ‘ruling on its existence or validity.’” (quoting H. Motulsky, JCP 1942, II, 4899)).

100. *Id.* ¶ 51 (quoting Cass. com., Feb. 22, 1949, JCP G. 1949, II, 4899, note H. Motulsky): In the *Caulliez* decision, [the commercial chamber of the Cour de cassation ruled] that ‘every tribunal, even a specialized one, being the judge of its own competence, arbitrators have the power and duty to determine whether, under the terms of the arbitration agreement entered into by the parties, they have competence to adjudicate the dispute submitted to them.’ In fact, the change in case law was less than certain since what was contested in the case was less the validity of arbitral jurisdiction [“saisine”] than the extent of that jurisdiction.

proceedings and award undermined.¹⁰¹ By contrast, determining the scope of disputes encompassed by an arbitration agreement was viewed essentially as an exercise in contract interpretation, a paradigmatic arbitral function. Though advanced by the highest court, this approach did not, however, win favor with the Paris Court of Appeal, which considered it essential to arbitration’s efficacy that, at its threshold, tribunals have exclusive authority to determine not only the scope of their authority to arbitrate, but also the existence and validity of the arbitration agreement upon which that authority rested.¹⁰²

That view eventually prevailed in the French courts.¹⁰³ It also won favor with French legal scholars who, playing their customary role in conceptualizing the law, subsumed this emergent view under a more general principle of the “autonomy of the arbitration agreement.”¹⁰⁴ Article 1447 of the Civil Procedure Code now expressly affirms the principle of separability in this core sense.¹⁰⁵ French and American law thus converge in advancing the autonomy of an

101. *Id.* ¶ 51:

[T]he *Courtiou* decision of October 6, 1953 [Cour de cassation [Cass.] [Supreme court for judicial matters] com., Oct. 6, 1953, JCP G. 1954, II, 8293; Henri Motulsky, *Menace sur l'arbitrage: La prétendue incompétence des arbitres en cas de contestation sur l'existence ou la validité d'une clause compromissoire*, JCP 1954 I 1194] held that “since an action to nullify the incorporation of a company comes within the competence of the commercial court (tribunal de commerce), the arbitration clause contained within the articles of incorporation cannot be given effect, since the action called into question the validity of those articles of incorporation.” The Cour de cassation reiterated its case law in its *Vigneron* decision [Cour de cassation [Cass.] [Supreme court for judicial matters] com., Jun. 11, 1960, JCP G. 1960, II, 11764, note Garaud; Charles Carabiber, *Opening Address to the International Congress on Arbitration*, 1961 REV. ARB. 44]. The result of this case law . . . is that as long as the validity of the arbitration agreement is challenged the ordinary courts recover their exclusive jurisdiction. Only after a definitive ruling by the court rejecting the claim of nullification of the company’s incorporation that the jurisdiction of an arbitral tribunal may be invoked [Motulsky, *supra*, at 1194].

102. *See, e.g.*, Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 21, 1974, 1975 REV. ARB. 312, 316-17, note E. Mezger; Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Mar. 21, 1963, 1963 REV. ARB. 125; Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., June 14, 1962, 1962 REV. ARB. 107; Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. May 12, 1959, 1959 REV. ARB. 49; Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., May 22, 1958, 1958 REV. ARB. 57.

103. The Cour de cassation rallied to that view in its influential *Gosset* decision of 1963, Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., Gosset (“In international arbitration, the arbitration agreement, whether entered separately or included in the legal instrument to which it relates, is always, save in exceptional circumstances . . . in complete legal autonomy, which excludes the possibility that it might be affected by the invalidity of the [main] act.”). *See, e.g.*, Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., May 28, 2002, Bull. civ. I, No. 146 (reaffirming *Gosset*); Cour de cassation [Cass.] [Supreme court for judicial matters] 2e civ., Apr. 4, 2002, Bull. civ. II, No. 68 (extending *Gosset* to domestic arbitration); *see also* Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., Oct. 25, 2005, Bull. civ. I, No. 378; Jean-Baptiste Racine, *Note—Cour de cassation (1re Ch. civ.)*, 25 octobre 2005, 1 REV. ARB 106 (2006). Similarly, an allegation that the main contract never entered into force would not impair the effectiveness of the arbitration clause. *See, e.g.*, Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., Dec. 6, 1988, Bull. civ. I, No. 343; *see also* 1989 REV. ARB. 641, 642, note Berthold Goldman.

104. *See, e.g.*, Ph. Francescakis, *Le principe jurisprudentiel de l'autonomie de l'accord compromissoire*, 1974 REV. ARB. 67; F.-E. Klein, *Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international*, 1961 REV. ARB. 48.

105. Klein, *supra* note 104. Art. 1447 further provides that termination of the main contract does not imply termination of the agreement to arbitrate. Décrét, translation, *supra* note 73 (“An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.”).

arbitration agreement by insulating it from defects in the main contract.

Where French and American approaches part ways is over the additional role assigned to separability in American law, namely delineating between gateway and non-gateway issues. French courts deal with challenges to arbitral jurisdiction in the same way, regardless of whether they are directed at the main contract or at its arbitration clause in particular. Allowing courts to determine initially the existence or validity of the agreement to arbitrate is viewed in France as no less harmful to the autonomy of the arbitration agreement than allowing courts to determine initially the existence or validity of the main contract.¹⁰⁶ France thus reaches the opposite conclusion from the United States on this point. It embraces the doctrine of separability in the way it is most widely understood internationally, but rejects it as a basis for allocating authority over issues of arbitral jurisdiction.

As a result, all objections to the obligation to arbitrate are reserved in France for the arbitral tribunal itself, subject only to the “manifest nullity” and “manifest inapplicability” exceptions¹⁰⁷—and even then, only if no tribunal has yet been constituted. Thus, French courts reject the assertion that a dispute falls outside the scope of an arbitration agreement, as long as it is at least arguable that the dispute falls within it.¹⁰⁸ But the strong presumption in favor of arbitration comes into play whatever the reason advanced for resisting arbitration. It applies not only to the “whether” question (whether the parties agreed to arbitrate) and the “what” question (whether the parties agreed to arbitrate this type of dispute),¹⁰⁹ but also the “who” question (whether a non-signatory is subject to the agreement to arbitrate), and indeed to any other objection to the obligation to arbitrate. In the French view, to require anything more than a *prima facie* showing on any threshold issue would impermissibly compromise the autonomy of the arbitration agreement.¹¹⁰

French law thus offers a coherent model for reconciling efficacy and legitimacy interests in arbitration, albeit one that distinctly privileges efficacy over legitimacy values at the initial stage. The model proclaims an autonomy of the arbitration agreement built on the twin pillars of Kompetenz-Kompetenz and severability, as distinctively understood in French law.¹¹¹

106. Note that French law does not use the term severability (“séparabilité”); instead, it speaks of autonomy (“autonomie”). Some have proposed to use the former term, however. See PIERRE MAYER, L'AUTONOMIE DE L'ARBITRE INTERNATIONAL DANS L'APPRECIATION DE SA PROPRE COMPETENCE (1989); Pierre Mayer, *Les limites de la séparabilité de la clause compromissoire*, 2 ARB. REV. 359 (1998) [hereinafter Mayer, *Les limites*].

107. Mayer, *Les limites*, *supra* note 106; see also Ibrahim Fadlallah, *Priorité à l'arbitrage: entre quelles parties?*, 157 GAZETTE DU PALAIS 26 (2002); Emmanuel Gaillard, *The Negative Effect of Competence-Competence*, in 17 INT'L ARB. REP. 27 (Edie Scott ed., 2002).

108. Fadlallah, *supra* note 107.

109. See Cour de cassation [Cass.] [supreme court of judicial matters] 1e civ., July 9, 2008, 2008 REV. ARB. 680, 681.

110. Olivier Cachard, *Le contrôle de la nullité ou de l'inapplicabilité manifeste de la clause compromissoire*, 4 REV. ARB. 893 (2006).

111. See *supra* note 106 and accompanying text.

2. Separability in German Law

As discussed earlier,¹¹² German law carves out an important role for national courts in threshold determinations of arbitral jurisdiction. Under its Kompetenz-Kompetenz model, courts may examine the existence of a valid and enforceable agreement to arbitrate applicable to the case at hand, not only on the occasion of a jurisdictional objection to a court proceeding, but also in the immediate aftermath of a request for arbitration, though prior to constitution of a tribunal.¹¹³ The matters that a German court may examine on these occasions go by the global name of *Zulässigkeit*, or “issues of admissibility.” Unfortunately, the term “admissibility” in German law suffers from much the same generality and over-inclusiveness as afflicts the term “arbitrability” when used loosely in U.S. case law and doctrine.¹¹⁴ Distinguishing specifically between gateway and non-gateway issues in German law is accordingly no simple matter.

German scholars appear to agree that an “admissibility” challenge must be directed at the existence of an effective and enforceable agreement to arbitrate that covers the dispute at hand.¹¹⁵ In principle, all issues related to the arbitration agreement’s existence, validity, and scope are matters on which courts may rule under either Section 1032(1) or (2); all other threshold issues concerning the arbitration are reserved for the arbitrators. To that extent, German law embraces separability in its second as well as its first sense. But questions remain. How precisely is the universe of challenges to the arbitration agreement to be defined? What specific kinds of challenges does it encompass? Most pertinent, for present purposes, must a challenge, in order to raise an admissibility issue, be directed uniquely at the arbitration agreement and not otherwise implicate the contract in which it is found? Neither the case law nor the doctrine offers very sharp answers. One might say of German law that if an issue relates to the arbitration agreement, it is by definition a gateway issue. There are no further distinctions to be drawn.

Thus, unlike French law, German law does not confine the notion of separability to its core function, namely preventing an arbitral tribunal’s invalidation of the main contract from thereby invalidating its authority to make that very determination.¹¹⁶ To be sure, it avoids using the same term for both functions (thus helping to avoid confusion). But just as U.S. law does

112. See *supra* notes 78-91 and accompanying text.

113. As noted, German law provides a third avenue for early judicial intervention on the jurisdictional issue, by permitting an immediate challenge to a partial award by which a tribunal upholds its jurisdiction. See *supra* note 82 and accompanying text.

114. See *supra* notes 24-35 and accompanying text.

115. MÜNCHENER KOMMENTAR, *supra* note 81, § 1032, ¶ 25; WOLFGANG VOIT, MUSIELAK ZPO, ZPO § 1032(10) (8th ed. 2011); JENS PETER LACHMANN, HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS 665 (3d ed. 2008). For case support, see, for example, Bayerisches Oberstes Landesgericht [BAYOBLG] [Bavarian Higher Regional Court] Sept. 9, 1999, ENTSCHEIDUNGEN DES BAYERISCHEN OBERSTEN LANDESGERICHTS IN ZIVILSACHEN [BAYOBLGZ] 255, 269 (1999); Oberlandesgericht München [OLG München] [Higher Regional Court Munich] Feb. 12, 2008, 34 SchH 006/07, ¶ 17.

116. See *supra* note 93 and accompanying text.

through the notion of separability, German law organizes the allocation of authority over threshold issues around a distinction between the arbitration agreement and the main contract, albeit a distinction that is not drawn very finely and may entail some loss in predictability of results.¹¹⁷ Though the structure of German law is clear and crisp, the case law results are somewhat difficult to rationalize.¹¹⁸ We may put the matter this way. German law has constructed an institutionally and procedurally well-defined “gateway,” but settled for a highly generalized notion of what distinguishes a “gateway” from a “non-gateway” issue.

V. SHIFTING BOUNDARIES IN AMERICAN LAW

Having opted to give courts a meaningful role in threshold determinations of arbitral jurisdiction, U.S. law has no choice but to attempt to demarcate gateway from non-gateway issues. As we have seen, courts and commentators in the United States have proceeded for many years as if Kompetenz-Kompetenz and separability—as both notions are understood in American law—do and should explain the demarcation.¹¹⁹ I argue that in fact these doctrines, whether taken alone or in tandem, fail to offer an adequate descriptive or normative framework of analysis. Nor have they provided sufficient guidance to courts as the latter progressively confront new and different species of threshold issues. Courts are instead responding to new scenarios by constantly fashioning and refashioning their approach, sometimes drawing no apparent inspiration from either Kompetenz-Kompetenz or separability. For purposes of the task at hand, these doctrines are both descriptively and normatively deficient.

The U.S. Supreme Court initially put separability to work in delineating gateway and non-gateway issues, and it has taken the lead in recent years in devising new strategies for allocating jurisdiction over threshold issues in arbitration.¹²⁰ Although this case by case development of the law necessarily looks improvisational, the resulting pattern is best understood as the product of a search for a progressively more refined balance between efficacy and

117. See, e.g., Oberlandesgericht München [OLG München] [Higher Regional Court Munich] Feb. 12, 2008, 34 SchH 006/07, ¶¶ 18, 24 (holding that a claim that the main contract is void due to defects of form and deceit does not pertain specifically to the arbitration clause, and is therefore generally for the arbitral tribunal to decide, unless fraud in the making of the main contract also directly influenced the making of the arbitration agreement, but also noting that a claim that the main contract is contrary to good morals (*Sittenwidrigkeit*) or to statutory prohibitions (*Gesetzesverstosses*) may be subject to threshold judicial determination).

118. See, e.g., Oberlandesgericht Jena [OLG Jena] [Higher Regional Court Jena] June 5, 2003, NJW-RR 1506 (1506-07), 2003 (holding that the question of who is bound by an arbitration agreement is theoretically an issue of scope for a court, but nevertheless referred to arbitration); Hanseatisches Oberlandesgericht Hamburg [Higher Regional Court Hamburg] Sep. 7, 2009, No. 279 IPRSPR 723 (724-725), 2009 (holding that a court decides whether a party implicitly waived the right to arbitrate, but that arbitrators decide whether relitigation of an issue in arbitration was precluded by a prior determination).

119. See Smit, *supra* note 6, at 19.

120. 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).

legitimacy interests. The Court’s jurisprudence achieves a finer balance than the blunt instruments of Kompetenz-Kompetenz and separability themselves possibly could, though it nevertheless suffers from a lack of clarity and cogency.

The best way to understand and evaluate the emerging framework of analysis in American law is to make the same assumption that seems to be guiding the case law itself, namely, that not all threshold issues in arbitration are alike. The Sections that follow thus adopt a challenge-by-challenge analysis—precisely the exercise that French courts appear determined to eschew in the interest of sharpness and simplicity. Each Section below assesses the extent to which the logic of separability can or should explain the jurisdictional allocations we observe.

A. *Arbitrability*

We may dispose quickly of any notion that separability as such accounts for the fact that a claim’s arbitrability, in the narrow sense in which I have defined that term,¹²¹ is properly a matter for judicial decision prior to arbitration. Arbitrability, in the narrow sense, pertains more closely to the arbitration clause than to the main contract. To that extent, it falls under the separability doctrine for a court to decide, if asked to do so before arbitration has begun. But the real reason why courts are prepared to address arbitrability initially lies elsewhere. The question of whether a dispute is capable of being arbitrated, as a matter of law, is ordinarily a purely legal one—in the United States, essentially one of actual or probable congressional intent—as to which an arbitral tribunal can claim no particular authority or expertise. It also, by definition, entails basic considerations of public policy.

B. *Challenges to the Existence of the Main Contract*

Separability in U.S. law, it will be recalled, has as one of its functions to determine whether a court may at the threshold entertain a challenge to the obligation to arbitrate. A challenge relating specifically to the arbitration clause may be heard and decided by a court at the outset, whereas a challenge relating to the contract as a whole is initially for an arbitral tribunal to decide. The decisive criterion is whether the challenge to arbitration is specifically directed at the arbitration agreement, rather than at the contract of which it forms a part. In neither case have courts traditionally drawn any distinction according to whether the challenge targeted the *existence* of the agreement to arbitrate or its *validity*.¹²² Claims going to existence and validity—whether of the arbitration agreement as such or the contract as a whole—were treated alike for jurisdictional purposes.

Courts continue to draw no particular distinction between a claim that the parties never entered into an agreement to arbitrate, on the one hand, and a

121. See *supra* notes 24-41 and accompanying text.

122. See *supra* Section IV.B.

claim that while they may have agreed to arbitrate, their agreement is invalid and unenforceable. This is unsurprising. Since arbitral authority resides specifically in the arbitration clause, it matters little whether the clause does not exist on the one hand, or is invalid and unenforceable on the other. Both sets of defects, if established, directly implicate consent to arbitrate. Both call into question an arbitral tribunal's authority to make any binding legal determination on any issue, including the question of the agreement's very existence or validity.

1. *Existence Versus Validity of the Main Contract*

Equating existence and validity issues as they relate to the main contract is, however, another story. It does not seem at all unreasonable to require a party who concedes the existence of a contract, but only contests its validity, to have recourse to an arbitral tribunal for a ruling on the validity question. While the paradigmatic contract case raises questions of breach and remedy, a contract case may also entail a challenge to the validity of the contract. Thus invalidity constitutes not only a defense to a claim of contractual liability, but also the basis of a suit for rescission.¹²³ A claim that a contract is invalid and unenforceable is therefore a claim that arises out of or relates to the contract, even if the contract itself is invalid, and therefore falls within the scope of the agreement to arbitrate. Moreover, parties who concede both that they entered into a contract and that the contract contains a clause submitting all disputes under that contract exclusively to an arbitral tribunal should fully expect a tribunal, and not a court, to rule on the validity of the contract if it is called into question.

Quite different is the situation in which a party resisting arbitration contends that no contract was ever formed, much less a contract containing an arbitration clause. It is difficult to see why a party who genuinely asserts that an entire contract is non-existent should be required to prove that point to an arbitral tribunal whose very existence and whose very authority stem entirely from the putative contract. Under that view, a party who asserts that the entire contract relied upon is a forgery would nevertheless be required to refer the forgery issue to an arbitral tribunal that derives its authority, if any, from the allegedly forged contract.¹²⁴

The view that questions of the existence and validity of the main contract are qualitatively different in this respect has garnered considerable support in

123. See, e.g., *Poppe v. Jabaay*, 804 N.E.2d 789, 796 (Ind. App. 2004) (insisting that, for rescission of contracts, there must be "original invalidity, fraud, failure of consideration, or material breach or default"); *Radford v. Snyder Nat. Farm Loan Ass'n*, 121 S.W.2d 478, 480 (Tex. Civ. App. 1938) ("Want or failure of consideration is ground for cancellation or rescission of a contract, since, as to a person who receives nothing whatever of value in exchange for property, the transaction operates as constructive or legal fraud." (citations omitted)); *In re Frey's Estate*, 72 A. 317, 318 (Pa. 1909) ("Inadequacy of price, improvidence, surprise, and mere hardship, none of these, nor all combined, furnish an adequate reason for a judicial rescission of a contract. For such action something more is demanded—such as fraud, mistake, or illegality.").

124. E.g., *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992).

the academic literature.¹²⁵ The Supreme Court itself has shown interest in the distinction. In *Buckeye Check Cashing, Inc. v. Cardegna*,¹²⁶ the Court confronted the claim that a loan contract was null and void, because usurious, and that the contract’s arbitration clause was therefore unenforceable. The case called for straightforward application of the separability doctrine, inasmuch as the challenge clearly went to the contract as a whole and not to its arbitration clause in particular.¹²⁷ Consistent with *Prima Paint*, the Court placed the question of the main contract’s validity squarely in the hands of the arbitrators.¹²⁸ It did so despite the resisting party’s contention that, under the applicable state law, the contract was not merely voidable, but null and void, and that the difference between voidness and voidability should matter for these purposes. The Court in *Buckeye* was understandably not attracted by the prospect of making severability’s operation depend on doctrinal niceties such as the distinctions under state contract law between void and voidable obligations.¹²⁹ It applied the separability doctrine without further distinction.

However, while the Court could have comfortably stopped there, it went further. It observed, albeit only in a footnote, that it might have ruled differently if the party resisting arbitration had called into question, not the *validity* of the main contract, but its very *existence*.¹³⁰ (In that footnote, the Court gave forgery as a first example of a contract that does not exist.) The footnote is pure dictum, and in any event leaves the question unanswered. Still, the Court’s gratuitous distinction between the existence and validity of the main contract, when the case before it did not in the least require it to do so, suggests that the distinction is meant to be taken seriously. The Supreme Court subsequently reiterated the same dictum, although again only by way of a footnote.¹³¹ Importantly, in its subsequent ruling in the case of *Granite Rock Co. v. International Brotherhood of Teamsters*,¹³² the Court treated the existence of the main contract—and more particularly the date when it came into existence—as a gateway issue, as if that were already settled law.¹³³

125. See, e.g., Park, *supra* note 4, at 130; Rau, *The Arbitrability Question*, *supra* note 6; Smit, *supra* note 6, at 19.

126. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

127. *Id.* at 446.

128. *Id.*

129. *Id.*

130. *Id.* at 444 n.1:

The issue of the contract’s validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent. (citations omitted).

131. *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (“The issue of the agreement’s ‘validity’ is different from the issue whether any agreement between the parties ‘was ever concluded,’ and, as in [the *Buckeye Check Cashing* case], we address only the former.”).

132. 130 S. Ct. 2847 (2010).

133. In *Granite Rock*, the question was whether the parties had entered into a labor agreement, which contained an arbitration clause, at the time arbitration was requested. Justice Thomas determined that the time at which a contract is made raises as much of an existence question as whether a contract was ever formed at all, and accordingly declared it to be a question for judicial rather than arbitral

The Court has not yet explained why the distinction between the existence and the validity of the main contract should make a difference for the allocation of jurisdiction between courts and arbitral tribunals, but the legitimacy stakes easily justify that result. When a party denies entering into the very contract whose arbitration clause is invoked, it effectively denies ever having consented to arbitration. Requiring that party to prove that fact before a tribunal to whose authority it claims never to have consented raises serious legitimacy concerns. Lower courts have reason to follow the Supreme Court's increasingly clear indication that they may, and perhaps must, distinguish in this regard between claims that a contract never came into being and claims that, while a contract came into being, it is invalid and unenforceable.

2. *New Distinction, New Problems*

A distinction between the existence and the validity of the main contract is not without its difficulties, however. Existence challenges can take a wide range of forms, of which forgery is only one—albeit an extreme—example. Many other examples come to mind. A party resisting arbitration might maintain that, as a non-signatory of the contract, it never subjected itself to any obligations under the contract, including any obligation to submit to an arbitral tribunal the question of its contractual status as a non-signatory.¹³⁴ It is more than illogical to require a non-signatory to a contract, who denies being subject to the contract and who gives at least an appearance of independence from the signatories, to submit that question to a body that owes its very existence to that contract. As in the forgery example, if a party denies entering into or being otherwise bound by the very contract whose arbitration clause is invoked, it effectively denies ever having consented to arbitration. The contract may exist, but not for the party sought to be bound. The Supreme Court's *Buckeye* footnote anticipates precisely this situation.¹³⁵

Obviously, not all challenges to the main contract call its existence into question. The defense of changed circumstances provides an obvious example.¹³⁶ In some situations, changed circumstances may cause the main

determination.

The decision is fundamentally ambiguous, however. Justice Thomas describes the issue in some places in the opinion as entailing the existence of the contract as a whole, and in other places as entailing the existence of the arbitration agreement as such—almost as if that distinction no longer mattered, provided the existence of the one or the other is in issue. To that extent, *Granite Rock* lends additional force to the *Buckeye* footnote, which Justice Thomas cites, among other authorities.

134. See, e.g., *Sphere Drake Ins., Ltd. v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (holding that a claim of lack of agency is for the court to determine because it concerns the existence of an arbitration agreement); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 108 (3d Cir. 2000) (“[T]here does not appear to be any independent source of the validity of the arbitration clause once the underlying contract is taken off the table. If [the agent’s] signature is not binding, there is no arbitration clause.”); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (finding that the question whether the signatory had authority to bind the plaintiffs was a question for the courts to decide).

135. See *supra* note 130 and accompanying text.

136. See, e.g., *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 528-29 (1st Cir. 1985) (holding that an attempted rescission of an entire contract fell within the scope of the arbitration clause, and that since the arbitration clause was separable from the contract, it was not rescinded by one party’s attempt to rescind the entire contract based on mutual mistake and

contract to be denied enforcement, but even if they do, they do not render the contract non-existent. Somewhat more problematic are claims of fraud,¹³⁷ duress¹³⁸ or mistake¹³⁹ in the making of the main contract. By their nature, such contract defenses, if established, call into question the objecting party’s consent to arbitration. If consent is definitional of a contract, then arguably no contract will have been formed if any of these three defenses is established. However, there are good reasons to resist this analysis. To begin with, the very case in which the Supreme Court first invoked separability for jurisdictional purposes—namely, the *Prima Paint* case¹⁴⁰—grew precisely out of a claim of fraudulent inducement of contract. While one might conceivably distinguish for these purposes between fraud in the inducement and fraud in the making of a contract (treating the former as rendering the contract invalid and unenforceable, but the latter as rendering it fully non-existent),¹⁴¹ courts should not allow the jurisdictional result to turn on so arcane a doctrinal distinction. Similarly, some commentators have suggested that proof of duress vitiates consent and compels the conclusion that no contract ever came into existence,¹⁴² while others have insisted on distinguishing between two types of duress, one that is closely related to forgery (hence for a court to decide at the threshold), the other more closely related to fraudulent inducement (hence for the arbitrators to decide at the threshold).¹⁴³ I find that these distinctions border on the artificial. Moreover, whatever intrinsic merit they have is outweighed by the added complexity they inject into the exercise of demarcating gateway from non-gateway issues.¹⁴⁴

Finally, claims of fraud, duress, or mistake raise core substantive contract law issues that, at the very least, verge on the merits of a contract dispute. To that extent, arbitral tribunals, not courts, should be deciding them. Much the same may even more clearly be said of an unconscionability defense.¹⁴⁵ Calling

frustration of purpose).

137. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (“If the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it.”).

138. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. Unit B Feb. 1981) (“[C]laims regarding duress and unconscionability are ones that, in the event of arbitration, would be decided by an arbitrator, not the district court, since they go to the formation of the entire contract rather than to the issue of misrepresentation in the signing of the arbitration agreement.”); *Serv. Corp. Int’l v. Lopez*, 162 S.W.3d 801, 810 (Tex. App. 2005) (“This duress issue relates to the contract as a whole and not solely the arbitration provision. It is therefore an issue to be decided in arbitration.”).

139. *Tyco Labs., Inc. v. DASI Indus., Inc.*, 1993 U.S. Dist. LEXIS 12654 (N.D. Ill. Sept. 9, 1993).

140. 388 U.S. at 410-11 (Black, J. dissenting).

141. See, e.g., *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986).

142. See Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of “Consent,”* 24 ARB. INT’L 199, 205 (2008) [hereinafter Rau, *Arbitral Jurisdiction*]; see also Alan Scott Rau, “*Separability in the United States Supreme Court*,” 1 STOCKHOLM INT’L ARB. REV. 1, 25 (2006) (arguing that fraudulent inducement may also vitiate consent).

143. See Ware, *supra* note 6, at 124.

144. On the difficulty of determining whether a contract does not exist or exists but is simply unenforceable, see generally Christopher R. Drahozal, *Buckeye Check Cashing and the Separability Doctrine*, 1 Y.B. ARB. & MED. 55 (2009).

145. See *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 433 (5th Cir. 2004) (holding that

enforcement of a contract unconscionable is not the same thing as asserting that it was never formed.¹⁴⁶ An illegality defense is similarly situated. That defense may render a contract unenforceable, but it does not render the contract non-existent.

It may be argued that lack of capacity deserves similar treatment.¹⁴⁷ Under standard U.S. contract doctrine, lack of capacity does not prevent a contract from coming into existence; it merely renders the contract unenforceable.¹⁴⁸ (In fact, it is only unenforceable against the party lacking capacity. That party is ordinarily entitled to enforcement.¹⁴⁹ This suggests rather powerfully that the contract *does* exist, lack of capacity of one of the

substantive unconscionability of the arbitration clause is generally an issue for the court); *Bob Schultz Motors, Inc. v. Kawasaki Motors, Inc.*, U.S.A., 334 F.3d 721, 726-27 (8th Cir. 2003) (finding that substantive unconscionability of contract terms other than the arbitration clause is an issue for the arbitrator and finding that alleged unconscionability of attorneys' fees provisions are a question for the arbitrator). See generally Aaron-Andrew P. Bruh, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008) ("[T]he state law doctrine of unconscionability has in the last several years become a surprisingly attractive and successful tool for striking down arbitration agreements.").

146. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). The question of whether or not a contract or its arbitration clause is unconscionable is, in principle, a matter of state contract law. Section 2 of the Federal Arbitration Act states, with specific reference to agreements to arbitrate, that they "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006). The U.S. Supreme Court, however, has curtailed the states' freedom to treat certain contract provisions relating to arbitration as unconscionable. In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), a majority of the Court ruled that the California courts cannot, consistent with the Federal Arbitration Act, declare contractual waivers of class arbitration to be unconscionable and therefore unenforceable as a matter of law. For California to condition the enforceability of arbitration agreements in consumer contracts on the availability of class-wide arbitration would impermissibly interfere with party autonomy in determining whether to submit claims to arbitration and in fashioning the terms of the arbitration itself. The California Supreme Court had previously ruled that a provision in such an arbitration agreement excluding class-wide arbitration was unconscionable and therefore unenforceable. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

The majority in *AT&T Mobility* acknowledged, as it had to, that the FAA by its terms subjects the enforcement of arbitration agreements to generally applicable contract law principles under state law, among them the doctrine of unconscionability. Still, it found that a state's disallowing parties to arbitration agreements from agreeing on a class action waiver was inconsistent with the FAA's fundamental principle requiring courts to enforce arbitration agreements in the terms agreed upon by the parties—even if the state predicated the prohibition on the unconscionability doctrine under state contract law. The majority expressed the view that a state's imposing class-wide procedures on arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility*, 131 S. Ct. at 1748. The majority thought class-wide arbitration would render dispute resolution slower, more costly, more procedurally complex and more formal. It also found arbitration "poorly suited to the higher stakes of class litigation." *Id.* at 1752. The majority did not of course purport to exclude the enforcement of provisions for class-wide arbitration; nor could it have, consistent with the very principle of party autonomy in arbitration on which it relied.

147. The federal courts seem to split on the issue. Compare *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (holding that *Prima Paint* separability applies and an arbitrator is to decide the issue of mental capacity when a mental incapacity defense is directed not to the specific arbitration provision but rather to the entire contract), with *Spahr v. Secco*, 330 F.3d 1266, 1272-73 (10th Cir. 2003) (finding that separability does not apply in the context of mental incapacity, for an incapacity challenge goes both to the entire agreement and the arbitration clause, thus placing the issue of whether there is an agreement to arbitrate before the court).

148. RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (1981).

149. See, e.g., *Sarfaty v. PFY Mgmt. Co.*, 2008 WL 642641, at *2 (Conn. Super. Ct. Feb. 15, 2008) ("[T]he concept of capacity is a sword that may be wielded to attack the contract only by the incapable party. With respect to the obligations imposed by the contracts in dispute, capacity can be neither a sword nor a shield from responsibility in the hands of the other party.").

parties notwithstanding.) Unlike the law of France¹⁵⁰ and of countries whose civil code is patterned on French law, the common law does not generally make capacity a definitional element of contract. And yet, the Supreme Court’s *Buckeye* footnote identified incapacity of a party as a third situation, alongside forgery and non-party status, in which a contract fails to be formed.¹⁵¹ If and when the Court further develops the *Buckeye* footnote, it should rethink this example. It may well conclude that there is no warrant for treating incapacity in this respect any differently than fraud, duress, mistake, or unconscionability.

More basically, on none of these issues should a court’s sending the matter to the arbitrators for decision offend our sense of justice. The party resisting arbitration effectively concedes the existence of the contract containing the arbitration clause. Having acknowledged that the contract came into existence, and that the contract contains an otherwise valid arbitration clause, it should not object to allowing the arbitral tribunal, which derives its authority from that contract, to decide whether the contract is in fact for any reason unenforceable.

The situation becomes more difficult if the party resisting arbitration asserts that it never accepted the offer and that a contract was never formed.¹⁵² Offer and acceptance define a contract in the United States, since in principle, acceptance of an offer demonstrates the meeting of the minds on which a contract is formed.¹⁵³ Offer and acceptance are as definitional of a contract in U.S. law as capacity is in French law. Under that view, issues of offer and acceptance implicate a contract’s existence rather than its validity. In fact, offer-and-acceptance questions are legion. Was an offer so plainly made in jest that it is not capable of acceptance? Was an offer the subject of a timely acceptance? Was an offer validly revoked prior to acceptance? Did a purported acceptance so alter the terms of an offer as to render it at best a counter-offer?¹⁵⁴ And so on. Doubts as to whether there was a meeting of the minds

150. See CODE CIVIL [C. CIV.] art. 1108 (Fr.) (discussing the four requisites essential for the validity of an agreement: the consent of the party who binds himself, his capacity to contract, a definite object which forms the subject-matter of the undertaking, and a lawful cause in the obligation).

151. See *supra* note 130 and accompanying text. For the view that lack of capacity vitiates consent, which is a crucial ingredient of a contract, see Rau, *Arbitral Jurisdiction*, *supra* note 142, at 205. Under that view, incapacity implicates a contract’s very existence. See also Ware, *supra* note 6, at 124.

152. *Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Body Lines Inc.*, 320 F.3d 362, 372 (2d Cir. 2003) (finding that where documents drafted and signed by one party called for arbitration in New York but documents signed by the other party called for arbitration in California, “[t]his difference is significant and indicates that there was no meeting of the minds as to an agreement to arbitrate.”); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 102 (2d Cir. 2002) (holding that Defendant “submitted un rebutted evidence that arbitration is standard practice within the steel industry, thereby precluding [plaintiff] from establishing surprise or hardship”; and therefore “the arbitration provisions proposed in [the defendant’s] confirmation orders became part of the contract.”); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997) (holding that a claim of lack of consideration of contract must be heard by the court); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51 (3d Cir. 1980) (holding that a claim that final consent to contract was never given must be decided by court).

153. RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 30 (1981).

154. See, e.g., *Beneficial Nat’l Bank, U.S.A. v. Payton*, 214 F. Supp. 2d 679 (S.D. Miss. 2001) (addressing whether a credit-card holder is bound to arbitrate when the card issuer has sent him a notice to the effect that a provision for mandatory arbitration was to become a part of his agreement unless he

between the parties go to the heart of consent. Fortunately, bare contract formation issues do not arise with great frequency in international arbitration cases.¹⁵⁵ Even less likely to arise in a commercial context is the question of consideration, which, like offer and acceptance, is traditionally considered definitional of contract under the common law and thus likewise essential to a contract's formation.¹⁵⁶

Still, basic questions of the offer-and-acceptance variety may arise at the threshold and, when they do, present a special challenge. The findings on which a decision on such issues turns may be highly fact-intensive.¹⁵⁷ They also may largely anticipate findings that an arbitral tribunal, once empanelled, will be required to make in order to adjudicate the merits of the dispute.¹⁵⁸ In principle, neither of those circumstances should deter a court from addressing a threshold claim that no contract between the parties ever came into being.¹⁵⁹ Were courts to defer to arbitration the question of whether a contract containing an arbitration clause was ever formed, when a party resisting arbitration maintains otherwise, they would fail adequately to protect the legitimacy interest best served by an early judicial resolution of that question.

C. *The Elusive "Scope of Arbitration" Question*

Of all the threshold issues that arise with any frequency, the one that most defies easy categorization as a gateway or non-gateway matter is whether an agreement to arbitrate covers the particular dispute at hand. Agreements to arbitrate are drafted and may be interpreted differently. They may or may not be understood as limited to disputes that sound in contract. A broadly drawn clause may be construed to cover claims, such as ones sounding in tort,

rejected the change, and the cardholder did nothing); *Linea Naviera de Cabotaje, C.A. v. Mar Caribe de Navegacion, C.A.*, 169 F. Supp. 2d 1341, 1344 (M.D. Fla. 2001) (holding that when parties signed separate agreements, each providing for arbitration in New York although "on somewhat different terms" the "variance between the two arbitration provisions is 'an ancillary logistical concern' which is not integral to the underlying agreement, and does not preclude arbitration" (citing *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000))).

155. This is because of the sophistication characterizing the transactions that commonly contemplate international arbitration as a means for dispute resolution.

156. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

157. *See, e.g., Eng'rs & Architects Ass'n v. Cmty Dev. Dep't*, 35 Cal. Rptr. 2d 800, 805 (Cal. Ct. App. 1994) ("In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability, i.e., whether, under the facts before the court, the contract excludes the dispute from its arbitration clause or includes the issue within that clause.").

158. *See, e.g., Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775, 779 (3d Cir. 1984) (observing, in a different context, that "[t]he heart of the problem in this case is the fact that the question of arbitrability is intertwined with the merits of the commercial impracticability claim.").

159. The Supreme Court has squarely ruled that the question of *when* the main contract is formed is as critical to the contract's existence as the question of *whether* it was formed. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2860 (2010). In rare and exceptional circumstances, a court may be tempted to allow an arbitration to go forward despite objections to the existence of the main contract, but even then, it should do so, if at all, only on the understanding that the arbitral tribunal will entertain the objection at the immediate outset of the proceedings. *See, e.g., Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 530 N.E.2d 439, 447-48 (Ill. 1988) (finding that when the arbitration clause contains broad language and there is uncertainty as to whether the subject matter of the dispute falls within the parties' agreement, the question of substantive arbitrability should initially be determined by the arbitrator).

restitution, product liability, or the like. It may well also be found to encompass special statutory claims, such as antitrust,¹⁶⁰ securities,¹⁶¹ or claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁶² Even if the parties take the trouble to carve certain categories of claims out of their arbitration agreement, they may do so imprecisely, giving rise to disputes over coverage of the clause.

Threshold disputes over the applicability of an arbitration clause present courts with a dilemma. From a separability viewpoint, such matters are proper for a court to decide in the first instance, since they relate specifically and uniquely to the arbitration clause rather than to the contract as a whole. No less important, they significantly implicate party consent, and to that extent the legitimacy of the proceedings and the eventual award. Parties do not agree to arbitrate every imaginable dispute that may arise between them. They agree to arbitrate only a certain universe of claims that they themselves have defined. Under settled case law, courts enforce arbitration agreements for and against parties who subscribed to them, or are otherwise bound by them under law,¹⁶³ but only in regard to disputes of a kind that the parties agreed to arbitrate.¹⁶⁴ Questions concerning the scope of an agreement to arbitrate are accordingly often ranged alongside the question of whether an arbitration agreement was formed, whether it is valid and enforceable, and whether a given person is or may be deemed to be a party to it. Like them, these are gateway matters, for judicial determination at the threshold. All indications thus point to the conclusion that determining whether the parties agreed to arbitrate a particular dispute is a task for a court to perform, if asked to do so before an arbitral tribunal has been constituted.

But there are countervailing considerations. Determining the scope of an agreement to arbitrate essentially entails contract interpretation, a function ordinarily entrusted to arbitral tribunals.¹⁶⁵ (Coverage of the arbitration clause will ordinarily not be the only matter of contract interpretation over which the parties disagree.) Moreover, a court called upon to decide whether a dispute between the parties falls within the scope of their agreement to arbitrate may have no choice but to make factual inquiries into the parties' intentions, which may in turn entail witness testimony and even justify pretrial discovery.¹⁶⁶ To

160. *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

161. *E.g.*, *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754 (9th Cir. 1988); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

162. *E.g.*, *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987).

163. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

164. *See, e.g.*, *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986).

165. *See, e.g.*, *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991) (sending a dispute arising out of a "Memorandum of Intent" to arbitration); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989) (finding that the issue of whether a draft contract contained an agreement to arbitrate must be submitted to arbitration in the absence of "a challenge to the arbitration provision which is *separate* and *distinct* from any challenge to the underlying contract").

166. *Park, supra* note 4, at 57 ("In the business world, determining the scope of arbitration clauses may implicate time-consuming investigations into complex questions of fact and law related to matters such as agency relationships and the corporate veil."). American courts may order full examination of the validity of an arbitration clause to determine whether, as a matter of fact and law, the

this extent, they resemble the offer-and-acceptance questions discussed earlier.¹⁶⁷ While legitimacy considerations point in the direction of treating such matters as gateway issues, efficacy considerations point in the opposite direction, and both sets of concerns are substantial. Courts understandably relish neither referring parties to arbitration when their willingness to arbitrate the particular dispute at hand is truly subject to doubt, nor engaging in threshold factual determinations of intent that may significantly delay the arbitration and draw the court down avenues of inquiry more properly traveled by arbitrators.

In many ways, U.S. judicial practice reflects this dilemma. First, 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.¹⁶⁸ Sometimes they purport to relax the inquiry, referring the parties to arbitration as long as the clause may plausibly be thought to cover the dispute, thus effectively leaving initial determination of the scope issue to the arbitrators. When courts confine themselves to a mere screening function at the threshold, they require only a *prima facie* showing that the dispute falls within the scope of the arbitration clause. To this extent, they do something not unlike what French courts do as a general matter through their “manifest nullity” approach to the full range of threshold issues.¹⁶⁹ Either way, U.S. courts tend to make a discernibly more casual inquiry into the scope question than they make in regard to the existence or validity of the arbitration agreement, or the identity of persons bound by it.

Judicial ambivalence in the face of a scope question may take still a different form. Courts have broadly accepted the notion that the parties to an arbitration agreement may delegate to an arbitral tribunal itself primary authority to determine the scope of the agreement and, more particularly, whether a given dispute falls within it,¹⁷⁰ though they generally require that the parties clearly and unmistakably evince that intention.¹⁷¹ Courts and scholars

parties have indeed agreed to arbitrate. *See, e.g.,* *Bridas S.A.P.I.C. v. Gov’t of Turkm.*, 447 F.3d 411 (5th Cir. 2006) (discussing whether the government manipulation of an oil company made it the state’s alter ego); *InterGen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003) (addressing litigation between two parent entities, neither of which had signed an arbitration clause); *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99 (3d Cir. 2000).

167. *See supra* notes 152-159 and accompanying text.

168. *AT&T Techs.*, 475 U.S. at 650 (holding that the “presumption of arbitrability” is particularly applicable when the arbitration clause is broadly drafted and may be rebutted only if “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”) (quoting *United Steelworkers of Am. v. Warrior & Gulf N. Co.*, 363 U.S. 574, 582-83 (1960)); *see also Republic of Nicaragua*, 937 F.2d at 478 (“the most minimal indication of the parties’ intent to arbitrate must be given full effect, especially in international disputes”).

Courts could conceivably invoke the *Kompetenz-Kompetenz* doctrine in support of the presumption in favor of arbitration. However, U.S. courts rarely invoke the doctrine, mostly because they do not espouse the view, prevalent in French law, that the doctrine has a “negative” as well as a “positive” dimension.

169. *See supra* Part IV.

170. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 938 (1995).

171. *AT&T Techs.*, 475 U.S. at 649 (“Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate [a particular dispute] is to be decided

disagree over whether the parties may delegate other gateway issues to the tribunal, or whether the scope of authority question is unique in this regard.¹⁷² Drawing on somewhat loose language in the Supreme Court’s *First Options* opinion,¹⁷³ some courts permit parties to shift authority to the arbitrators even to determine the existence and validity of the arbitration agreement,¹⁷⁴ though other courts and certain scholars disagree as a matter of principle.¹⁷⁵ But at least with respect to the issue of scope, a consensus seems to have developed that the parties may, by express language, restrict the courts to making prima facie determinations at the threshold of arbitration.¹⁷⁶ The Supreme Court has not yet squarely addressed the matter. When the Court does, it would do well to endorse this consensus. By doing so, it would acknowledge that the distinction between gateway and non-gateway issues can be problematic when it comes to determining whether a particular dispute falls within the scope of an arbitration agreement. While nuancing the gateway/non-gateway distinction in this regard complicates the analysis somewhat, doing so serves to improve the balance between efficacy and legitimacy interests that Supreme Court case law appears to have been pursuing.¹⁷⁷

by the court, not the arbitrator”); see also *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006) (holding that a lower court should not determine whether a dispute falls within the agreement to arbitrate if the parties clearly and unmistakably delegated that decision to the arbitrator). *But see* *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989) (concluding that the parties had delegated the “scope of authority” question to the arbitrators themselves by selecting as rules of arbitration the ICC rules providing for Kompetenz-Kompetenz).

172. Reisberg, *supra* note 7, at 166-72.

173. 514 U.S. at 939.

174. Compare *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998), and *Abram Landau Real Estate v. Bevonna*, 123 F.3d 69, 73 (2d Cir. 1997) (holding that parties may clearly and unmistakably give arbitrators the authority to determine the existence and validity of the arbitration agreement), with *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 287-88 (3d Cir. 2003), and *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (finding that where parties contest the very existence of the agreement they are entitled to a judicial determination of that matter).

In *Rent-a-Center*, the Supreme Court did not reach the question whether the parties may delegate to the tribunal the authority, exclusive of the courts at the threshold of arbitration, to determine the existence and validity of an agreement to arbitrate. It found that the party resisting arbitration had not challenged the delegation provision specifically, but rather the general arbitration provision to which it was linked. *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010).

175. Reisberg, *supra* note 7, at 167-70.

176. See, e.g., *Mercury Telco Grp., Inc. v. Empresa De Telecomunicaciones De Bogota*, 670 F. Supp. 2d 1350 (S.D. Fla. 2009); *Morse 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 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).

177. Like reasoning might lead courts to adopt a similar stance in regard to the question of whether an arbitration clause is merely a “prorogation” rather than a “derogation” agreement (i.e., offers an arbitration alternative rather than an arbitration obligation). This question also raises matters of contract interpretation and party intent. But courts should not entertain such a question. If a party before the court maintains that the arbitration agreement was meant to be non-exclusive only (i.e., without derogation from the exercise of jurisdiction by otherwise competent courts), the court should always resolve the matter itself, rather than refer the parties to arbitration on the ground that the clause is

In sum, the separability doctrine as such does rather little to help courts navigate their way around the question of the scope of the agreement to arbitrate. It also comes up short in predicting judicial behavior regarding that issue. The reason why the question of scope defies analysis under separability is straightforward. It requires a tradeoff between efficacy and legitimacy that is much too subtle for a simple dichotomy between challenges generally applicable to the main contract and challenges specific to its arbitration clause.¹⁷⁸

D. *“Procedural Questions that Grow out of the Dispute and Bear on its Final Disposition”*

In the previous sections, I sought to demonstrate that the notion of separability is an incomplete and often poor guide to distinguishing between gateway and non-gateway issues. Worse yet, it risks producing jurisdiction allocation results that poorly reflect what should be the driving consideration in these cases, namely, the relative weight of efficacy and legitimacy interests at stake in the particular type of challenge at hand.

The inadequacy of separability for both descriptive and normative purposes is even more far-reaching. Most discussions of threshold issues in arbitration tend to focus on those issues that, by their nature, separability can most plausibly address, while largely ignoring others.¹⁷⁹ The best candidates for separability analysis are challenges to the existence and validity of both the main contract and its arbitration clause,¹⁸⁰ as well as determinations as to persons who may invoke and be bound by the arbitration agreement. But practice shows that threshold issues in arbitration run a far wider gamut than that, and that applying to all of them a blunt notion of separability—and its core dichotomy between challenges to the contract and challenges to the arbitration clause—would produce highly questionable results. To demonstrate the point, I consider here a diverse set of threshold challenges: lapse of the time period for bringing a claim in arbitration, waiver of the right to invoke arbitration, failure to satisfy preconditions to arbitration, *res judicata*, and an assertion that class action arbitration is barred.

1. *Limitation Periods*

A party resisting arbitration may assert that the time period in which the

“arguably” exclusive. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Courts may justifiably treat the scope and exclusivity questions differently. If the parties never meant arbitration to be anything more than an option, the jurisdiction of the otherwise competent court is indeed untouched, and a court would behave improperly if it declined jurisdiction on the basis of the arbitration clause.

178. Scope of the arbitration agreement is not the only issue with regard to which the efficacy/legitimacy tradeoff may be unclear. For example, the parties may dispute at the threshold whether an arbitration agreement has retroactive application. This question implicates issues of both consent and contract interpretation. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

179. *See supra* Section V.B.

180. *Id.*

arbitration agreement allows a claim to be pursued has passed.¹⁸¹ Strict application of separability would counsel a court to entertain that challenge as a threshold matter, since it is directed to the obligation to arbitrate in particular. Although a timing objection calls into question neither the existence nor the validity of an arbitration agreement, it does pertain specifically to the obligation to arbitrate rather than to any other contractual matter. Moreover, compelling arbitration of a dispute that can no longer in any event be arbitrated, due to the passage of time, would seem pointless. Yet, that is neither the result at which courts have arrived,¹⁸² nor the result at which courts should arrive if they are to be guided by the need to balance efficacy and legitimacy interests.

In the case of *Howsam v. Dean Witter Reynolds, Inc.*,¹⁸³ a majority of the Supreme Court held that arbitrators should be allowed to decide this timing issue for themselves in the first instance, since it represents a matter that “parties would likely expect that an arbitrator would decide.”¹⁸⁴ According to the Court, “‘procedural’ questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.”¹⁸⁵ Though unable to summon anything more than intuition, the Court in *Howsam* asserted that a question such as passage of the time limit for arbitration is one that, had they thought about the matter, the parties to a contract containing an arbitration clause would most likely have expected an arbitral tribunal to decide.¹⁸⁶

181. I refer here to the time limit, if any, on invoking a contract’s arbitration provision. In most cases, the statute of limitations attaches to the underlying cause of action itself. *See, e.g.,* *PaineWebber v. Landay*, 903 F. Supp. 193 (D. Mass. 1995) (holding that the six-year time limit for bringing a claim under the National Association of Securities Dealers (NASD) Code of Arbitration Procedure is a question for the arbitrator to decide); *Smith Barney v. Luckie*, 647 N.E.2d 1308 (N.Y. 1995) (holding that statute of limitations questions must be resolved by courts). *See generally* Park, *supra* note 6 (“In many cases statutes of limitation implicate the merits of the dispute rather than arbitral jurisdiction”). But the limitations period may also be built into the arbitration agreement, and thus applicable to all claims sought to be arbitrated, irrespective of the underlying cause of action.

182. *See* *United Steelworkers of Am. v. St. Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417 (6th Cir. 2007) (holding that time limit is a matter presumptively for the arbitrator); *Smith v. Dean Witter Reynolds, Inc.*, 102 F. App’x 940 (6th Cir. 2004) (finding that the interpretation of the six-year eligibility rule is a matter for the arbitral tribunal); *Assoc. Brick Mason Contractors of Greater N.Y., Inc. v. Harrington*, 820 F.2d 31, 36 (2d Cir. 1987) (noting that the issue of whether a demand for arbitration is timely is for the arbitrators to decide); *Tile Setters & Tile Finishers Union, Local 7 v. Speedwell Design/BFK Enter., LLC*, 2009 U.S. Dist. LEXIS 27270, at *22-23 (E.D.N.Y. Mar. 31, 2009) (same).

In the case of *Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150 (2d Cir. 2011), the court reversed a lower court ruling permanently staying arbitration on the ground that the claims were time-barred. The contract provided for application of New York law, under which a party may assert a statute of limitations in court, prior to arbitration, as a bar to arbitration. N.Y. C.P.L.R. § 7502(b) (McKinney 2005). The court’s decision was made more difficult by the fact that, while the contract called for arbitration of all disputes, it had designated New York law as applicable not only to the substantive claims but also to the “procedure and administration” of an arbitration. 638 F.3d at 152. The appellate court nevertheless found that the contract as a whole evidenced the parties’ intention to submit all issues to arbitration which, combined with the presumption that arbitration clauses should be interpreted liberally, meant that the timeliness of the claim was solely a matter for arbitral determination.

183. 537 U.S. 79 (2002).

184. *Id.* at 84.

185. *Id.* (quotation marks and citations omitted).

186. *Id.* at 85; *see also* *Int’l Union of Operating Eng’rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) (holding that a defense of laches must be decided by the arbitral tribunal).

2. Waiver

The Court had no occasion in *Howsam* or in any later decision to catalogue “[the] ‘procedural’ questions which grow out of the dispute and bear on its final disposition”¹⁸⁷ for these purposes, but lower courts have identified other examples and handled them accordingly. For example, a party resisting arbitration may argue that its opponent, whether by words or by conduct, waived its right to invoke an agreement to arbitrate. Like a time limit on arbitration, waiver of this sort targets the obligation to arbitrate rather than the contract’s substantive obligations and, in separability terms, should be treated as a gateway issue. But a look at the cases shows a rather different picture. In fact, courts commonly leave the question of waiver of the right to arbitrate for the arbitrators to decide, even if raised at the very outset, often citing *Howsam*.¹⁸⁸ The decisions are not, however, uniform in that regard. A good number of courts have drawn a distinction between contract-based waiver and conduct-based waiver, holding that the former is for the arbitral tribunal to decide, while the latter may be determined at the threshold by a court.¹⁸⁹ These courts advance two reasons for treating conduct-based waiver as a gateway matter. First, invoking the *Howsam* criterion of reasonable party expectations, they suggest that contracting parties would not likely expect an arbitral tribunal to resolve the issue, since it has little if any bearing on the merits of the underlying claim and since courts are generally better equipped than arbitrators

187. 537 U.S. at 79 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

188. See, e.g., *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393-94 (2d Cir. 2011); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871-72 (8th Cir. 2004); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109-10 (11th Cir. 2004); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 430 (5th Cir. 2004); *Feldman v. Empire Today, LLC*, 2011 U.S. Dist. LEXIS 44574, at *4-6 (N.D. Ill. Apr. 26, 2011); *Josko v. New World Sys. Corp.*, 2006 U.S. Dist. LEXIS 64681, at *25-28 (D.N.J. Aug. 29, 2006); cf. *Mulvaney Mech., Inc. v. Sheet Metal Workers Int’l Ass’n, Local 38*, 351 F.3d 43, 45-46 (2d Cir. 2003) (holding that the question of whether conduct constituted contract termination was an issue for the district court, and not an arbitration panel).

189. See *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008) (holding that a party’s deliberate effort to derail arbitration sought by its opponent would constitute waiver of the right to arbitrate, though a deliberate effort was not established in this case). The court observed that, most often, conduct-based waiver is established by a party’s failure to invoke arbitration in a timely fashion after being sued or its interference with a plaintiff’s pre-litigation efforts to arbitrate. *Id.* at 394; see also *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App’x 921 (11th Cir. 2010) (per curiam) (finding that a party’s litigation activity was not so extensive and the burden caused to the other party was not so great as to warrant a finding of waiver), *cert. granted*, 131 S. Ct. 1556 (2011), *cert. dismissed*, 131 S. Ct. 2955 (2011); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114 (9th Cir. 2008) (finding that an employer statement that an employee’s claim is not ripe for arbitration does not amount to a waiver); *Khan v. Parsons Global Servs. Ltd.*, 521 F.3d 421, 428 (D.C. Cir. 2008) (finding that filing a motion for summary judgment waives the right to invoke arbitration); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-18 (3d Cir. 2007) (holding that a party seeking arbitration waived that right by actively litigating its opponent’s claims); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 3, 12-13 (1st Cir. 2005) (rejecting the argument that the failure to invoke arbitration during the pendency of administrative proceedings before the Equal Employment Opportunity Commission constituted waiver); *Windward Agency, Inc. v. Cologne Life Reins. Co.*, 123 F. App’x 481, 484 (3d Cir. 2005) (finding that appellant’s failure to comply with the district court’s order to initiate arbitration proceedings for many years constituted a timeliness issue for the district court to decide); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App’x 462, 464 (5th Cir. 2004) (per curiam) (holding that delaying the motion to compel does not amount to waiver); *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir. 2003) (finding that declining arbitration by letter constitutes waiver).

to determine whether a party has abused the litigation or pre-litigation process.¹⁹⁰ Second, it is said that referring claims of conduct-based waiver to the arbitrators would be inefficient, because if such waiver were found, the case would in any event be referred back to court.¹⁹¹

The distinction between contract-based and conduct-based waiver is unconvincing. There is no sound basis for supposing that parties have any expectations as to who would decide waiver issues generally, much less that one species of waiver claim would be decided by judges and the other by arbitrators. The courts’ second argument, namely that an arbitral finding of conduct-based waiver would send the case back to court anyway, is equally applicable to a finding of contract-based waiver. By that criterion, both species of waiver deserve gateway issue treatment, a result that would be inconsistent with *Howsam*. Some courts have either rejected the distinction¹⁹² or applied it disapprovingly.¹⁹³

More general considerations of efficacy and legitimacy suggest that all claims of waiver should be determined initially by the arbitrators. Little damage is done to the principle of consent, and therefore to arbitral legitimacy, by allowing an arbitral tribunal to address the waiver question first. But postponing arbitration until a court decides that question would exact an efficacy price, especially since an arbitral tribunal can and probably will determine the matter as an early, if not the first, order of business.

3. *Conditions Precedent*

Frequently, an arbitration agreement requires the parties to comply with certain procedures or preconditions before they may initiate arbitration. They may have to submit to mediation or conciliation, for example, or exhaust other named remedies. Whether a party invoking arbitration has satisfied such a requirement undoubtedly counts as a threshold issue and, like time limitations and waiver, is arbitration-clause-specific. Arguably, a court should determine whether a requirement of mediation or other precondition to arbitration has been met, if asked to do so, rather than refer the parties to arbitration for a ruling on that issue. While judicial practice is mixed, courts commonly refer the matter for decision by arbitrators in the first instance.¹⁹⁴

190. *JPD, Inc.*, 539 F.3d at 394.

191. *Id.* According to the court, “[waiver based in prior inconsistent conduct] is different in kind from the arbitrator’s normal resolution of a gateway issue: normally, the resolution of such an issue would bar not only arbitration but any sort of litigation on the issues by either side.” *Id.* (quoting *Marie*, 402 F.3d at 13-14).

192. *See, e.g.*, *Nat’l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *Bellevue Drug Co. v. Advance PCS*, 333 F. Supp. 2d 318, 324 (E.D. Pa. 2004).

193. One lower court, while applying the distinction between contract-based and conduct-based waiver, criticized it as seemingly inconsistent with the Supreme Court’s *Howsam* ruling. *Clyde Bergemann, Inc. v. Sullivan, Higgins & Brion, PPE L.L.C.*, 2008 U.S. Dist. LEXIS 70670 (D. Or. Sept. 18, 2008).

194. The leading case is *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-59 (1964). *See also* *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs.*, 623 F.3d 476, 477 (7th Cir. 2010) (finding that whether necessary preconditions to arbitration have been satisfied is a question for the arbitrator); *3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1200 (8th Cir. 2008) (holding that condition precedent is a matter of procedural arbitrability, which is decided by the arbitrator); *JPD, Inc.*, 539 F.3d

4. *Res Judicata*

On occasion, a party resisting arbitration maintains that the dispute sought to be arbitrated has already been adjudicated, resulting in a judgment or award entitled to claim-preclusive effect, so that the case should not be heard again, either in arbitration or litigation. This objection, too, is arbitration-specific. Moreover, it makes little sense to enforce an agreement to arbitrate if the outcome of the dispute has already been determined as a matter of law. The fact remains, however, that application of the *res judicata* principle is not always straightforward, if only because parties commonly disagree over whether the conditions (such as identity of parties and identity of claims) required by law to be met in order for an adjudication to enjoy preclusive effect are satisfied. In practice, courts almost invariably reserve the claim preclusion question for the arbitrators.¹⁹⁵ While courts seldom express their preference in terms of efficacy

at 392 (same); Int'l Ass'n of Bridge Ironworkers, Shopman's Local 493 v. EFCO Corp., 359 F.3d 954, 956 (8th Cir. 2004) (stating that the timeliness of procedural steps as a precondition to arbitration is an issue for the arbitrator); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 748 (8th Cir. 1986) (finding that failure to comply with pre-arbitration steps in a grievance procedure is an issue of procedural arbitrability for the arbitrator). *But see* Welborn Clinic v. Medquist, Inc., 301 F.3d 634, 638 (7th Cir. 2002) (compelling arbitration since, under Indiana law, time limits and other requirements are not conditions precedent).

The Revised Uniform Arbitration Act, UNIF. ARBITRATION ACT § 6(c) (2000), entrusts to the arbitral tribunal authority to determine "whether a condition precedent to arbitrability has been fulfilled." Some courts, however, have decided for themselves whether a condition precedent was met and declined to compel arbitration where it was not met. *See* Kan. Gas & Elec. Co. v. Westinghouse Elec. Corp., 861 F.2d 420, 422 (4th Cir. 1988) (noting that the district court's denial of a motion compelling arbitration upon finding condition precedent had not been met, after the parties had agreed to let the court decide the issue); N-Tron Corp. v. Rockwell Automation, Inc., No. 09-0733, 2010 U.S. Dist. LEXIS 14130, at *35 (S.D. Ala. Feb. 18, 2010) (staying an action to compel where the plaintiff failed to satisfy the condition precedent); Bombardier Corp. v. Nat'l R.R. Passenger Corp., 298 F. Supp. 2d 1, 4-5 (D.D.C. 2002) (holding that a contract's dispute resolution procedure was not a condition precedent because it was not clearly defined as such), *aff'd*, 333 F.3d 250, 257 (D.C. Cir. 2003).

If parties do not seriously dispute that mediation was pursued, or other precedent conditions are satisfied, courts have declined to compel arbitration. *See, e.g.*, HIM Portland, L.L.C. v. Devito Builders, Inc., 317 F.3d 41, 44 (1st Cir. 2003) (finding that mediation was required as a condition precedent and was not fulfilled); Kemiron Atlantic, Inc. v. Aguakem Int'l Inc., 290 F.3d 1287, 1291 (11th Cir. 2002) (stating that mediation was required as a precondition and neither party requested it).

Courts do appear willing to determine whether mediation was performed when required as a precondition to litigation rather than arbitration. *E.g.*, DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 336 (7th Cir. 1987); Tattoo Art, Inc. v. TAT Int'l, L.L.C., 711 F. Supp. 2d 645, 651 (E.D. Va. 2010); Centaur Corp. v. On Semiconductor Components Indus., L.L.C., 2010 U.S. Dist. LEXIS 8495 (S.D. Cal. 2010); 3-J Hospitality, LLC v. Big Time Design, Inc., 2009 U.S. Dist. LEXIS 100601, at *3-4 (S.D. Fla. 2009); Ziarno v. Gardner Carton & Douglas, L.L.P., 2004 U.S. Dist. LEXIS 7030, at *3 (E.D. Pa. 2004); Mortimer v. First Mount Vernon Indus. Ass'n, 2003 U.S. Dist. LEXIS 24698, at *3 (D. Md. 2003). Where a court is asked to decline to exercise its *own* jurisdiction due to failure to meet a prior obligation to mediate, it has no choice but to resolve the question. There is no prospective arbitration panel to determine whether the condition precedent was met.

Courts have sent cases to arbitration, even when the parties agree that payment of arbitration fees was a condition precedent to arbitration and the parties agree that the condition has not been met. *See* Dealer Computer Servs. v. Old Colony Motors, Inc., 588 F.3d 884 (5th Cir. 2009) (compelling arbitration when one party refused to pay fees, since the issue was a procedural one to be resolved by the arbitrators); Lifescan, Inc. v. Premier Diabetic Servs., 363 F.3d 1010, 1012 (9th Cir. 2004) (holding that a dispute over payment of fees, a precondition to arbitration, is not for the district court to decide).

195. *See, e.g.*, Shell Oil Co. v. CO2 Comm., Inc., 589 F.3d 1105, 1109-10 (10th Cir. 2009); Emilio v. Sprint Spectrum, L.P., 315 F. App'x 322, 324 (2d Cir. 2009); Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union, 425 F.3d 938, 947 (11th Cir. 2005); Klay v. United Healthgroup, 376 F.3d 1092, 1109-10 (11th Cir. 2004); Shanks v. Swift Transp. Co., 2008 U.S. Dist. LEXIS 55063 (S.D. Tex.

and legitimacy interests, they do strike a sound balance between them. Permitting arbitrators to confront the intricacies of claim preclusion makes arbitration more effective overall, without undermining the legitimacy of the award ultimately rendered.

5. Class Arbitration

The availability of class arbitration is only the latest and most lively threshold issue to attract the attention of the arbitration community. The question whether a dispute is susceptible of class arbitration goes primarily to the arbitration clause rather than the main contract and so, under separability shorthand, is appropriately viewed as a gateway issue. Yet, once again, the case law does not look in that direction. In *Green Tree v. Bazzle*, the Supreme Court characterized the question whether the parties contemplated class arbitration of their dispute as one that the parties would have expected the arbitral tribunal to decide.¹⁹⁶ Although the Court’s later decision in *Stolt-Nielsen, S.A. v. Animalfeeds International Corp.*¹⁹⁷ laid down a standard that makes it decidedly more difficult for arbitrators to conclude that the parties contemplated class arbitration,¹⁹⁸ that determination nevertheless remains one for the arbitral tribunal to make in the first instance.¹⁹⁹

Certain common threads unite all of these scenarios. First, many, if not all, of these inquiries can be highly fact-intensive. Waiver of the right to arbitrate is a particularly good example. Second, some of them, such as whether there is an identity of parties for purposes of claim preclusion, may turn out to be sufficiently tied to the merits of the dispute to warrant their resolution being joined, as threshold issues in arbitration often are, to the merits of the case. Other threshold issues, such as satisfaction of conditions precedent to

June 19, 2008); *Enter. Assoc. Metal Trades Branch Local Union 638 v. Empire Mech., Inc.*, 1992 U.S. Dist. LEXIS 4749 (S.D.N.Y. Apr. 9, 1992). *But see FleetBoston Fin. Corp. v. Alt*, 2011 U.S. App. LEXIS 5853 (1st Cir. Mar. 23, 2011).

196. 539 U.S. 444, 452-53 (2003).

197. 130 S. Ct. 1758 (2010).

198. *Id.* at 1775 (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”). In the case of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), a majority of the Supreme Court barred California from treating class arbitration waivers as unenforceable, essentially finding such a prohibition to be inconsistent with the Federal Arbitration Act.

199. *See, e.g., Guida v. Home Savings of Am., Inc.*, 2011 U.S. Dist. LEXIS 69159, at *9-10 (E.D.N.Y. June 28, 2011).

Although the question whether an arbitration agreement contemplates class arbitration remains primarily for the arbitral tribunal, the question of whether a class action waiver is enforceable as a matter of law is to be decided by the courts. *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.*, 634 F.3d 187 (2d Cir. 2011); *see also Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 188 (3d Cir. 2010) (holding that an unconscionability challenge to a class action waiver is for the court to decide).

The fact that an arbitration clause is interpreted as not authorizing class arbitration does not necessarily mean that the case will go forward in arbitration on an individual basis. In *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 403 (S.D.N.Y. 2011), the court, while acknowledging that under *Stolt-Nielsen*, class arbitration could not be compelled, nevertheless declined to compel arbitration on an individual basis. It concluded that the plaintiff’s statutory rights under Title VII, on gender discrimination in employment, would not be capable of vindication through arbitration on an individual basis, and that in that circumstance, the court was permitted to declare an otherwise operative arbitration unenforceable, citing *In re Am. Express Merchs. Litig.*, 634 F.3d 187, 194 (2d Cir. 2011).

arbitration, may commonly be neither fact-intensive nor especially tied to the merits, but nevertheless be conveniently referred to the arbitrators as yet another procedural question that grows out of the dispute and bears on its final disposition.²⁰⁰ As for whether the parties contemplated class arbitration, that is a matter of contract interpretation, traditionally the province of arbitrators.

As new issues of this “procedural” sort arise at the threshold of arbitration, courts will likely refer them to the arbitrators.²⁰¹ Although the strength of the argument in favor of deferring these questions to an arbitral tribunal may vary from issue to issue and from case to case, there is an analytic and practical advantage in treating this entire series of objections to arbitration in a consistent and predictable manner.²⁰² If courts can properly characterize issues as “procedural questions which grow out of the dispute and bear on its final disposition,” and conclude that the parties would expect an arbitral tribunal rather than a court to decide them, it should place them in the non-gateway category. Satisfaction of party expectations is a perfectly respectable consideration to consult on issues of private legal ordering.

As I have sought to show, the results reached in such cases are sound for a fundamental reason. The main purpose to achieve in delineating gateway and non-gateway issues should be to strike the most appropriate balance between efficacy and legitimacy interests. The goal of making arbitration more effective militates in favor of committing this entire series of “procedural” issues to the arbitral tribunal, at least in the first instance.²⁰³ A tribunal is as well situated to

200. *PTA-FLA, Inc. v. ZTE USA, Inc.*, 3:11-CV-1605-CMC, 2011 WL 4549280 (D.S.C. Oct. 3, 2011) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 (2002)).

201. *See Emp’rs Ins. Co. v. Century Indem. Co.*, 443 F.3d 573 (7th Cir. 2006) (finding that the permissibility of consolidation is a procedural question for the arbitrators); *Pro Tech Indus. v. URS Corp.*, 377 F.3d 868, 872 (8th Cir. 2004) (explaining that questions of whether waiver occurred and whether demand was sufficient and timely under the agreement involve issues of procedural arbitrability, matters presumptively for the arbitrator, not for the judge); *Mulvaney Mech., Inc. v. Sheet Metal Workers Int’l Ass’n, Local 38*, 351 F.3d 43, 46 (2d Cir. 2003) (noting that the equitable defense to arbitration based on repudiation is a matter “such as waiver, estoppel, or delay,” and therefore reserved to the arbitrator); *Shaw’s Supermks, Inc. v. United Food & Commercial Workers Union, Local 791*, 321 F.3d 251 (1st Cir. 2003) (stating that the permissibility of consolidation is a procedural question for the arbitrators); *Munich Reins. Am., Inc. v. Nat’l Cas. Co.*, 2011 U.S. Dist. LEXIS 44759 (S.D.N.Y. 2011) (finding that the question whether arbitration agreement provision that the insurers “act as one party” permits one of the insurers to initiate arbitration in the absence of other insurer is a procedural issue for the arbitrators to decide). *But see* *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (reversing the district court ruling that an arbitration agreement did not apply retroactively, finding that the agreement did have retroactive effect, without referring that issue to the arbitrators); *United Food & Commercial Workers, Local 21 v. MultiCare Health Sys.*, 2011 WL 834149, at *3 (W.D. Wash. Mar. 3, 2011) (finding that the Supreme Court’s *Stolt-Nielsen* decision is to be read as requiring courts, not arbitrators, to rule on the consolidation of claims in arbitration).

202. For this reason, courts should take care not to draw excessively refined or fact-based distinctions within any given category of cases. For examples of the distinction drawn by some courts between contract-based waiver and conduct-based waiver, see *supra* note 189.

203. This is not to say that the category of “procedural” questions that grow out of the dispute and bear on its final disposition” has sharply defined contours. In a decision rendered during the same term in which it decided *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 591, 592 (2002) and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), the Supreme Court in *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), ruled that the lower court should have left it to the arbitral tribunal to decide whether a provision barring an award by the arbitrators of punitive damages should be understood as excluding treble damages, as provided for by the RICO statute. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. The Court’s decision to leave the matter to the arbitral tribunal makes sense only if the question of punitive damages was arguably procedural. The

make these determinations as a court, and in some circumstances better situated, due to the fact-intensiveness of the issues and their linkage to the merits of the dispute. The question then arises whether legitimacy considerations point in the opposite direction. I submit that they do not. By comparison to claims that an arbitration agreement was never entered into, or for one reason or another is invalid and unenforceable, or fails to encompass the dispute at hand, the claims in the present category barely even touch on the principle of party consent to arbitration, and so entail relatively low legitimacy stakes. Though the class action question certainly has legitimacy implications, those concerns do not relate to the question of who decides. Parties resisting class arbitration normally contend that class arbitration was not contemplated and is not appropriate, but do not contest the authority of the arbitral tribunal to make that determination. Viewed in the light of legitimacy interests, the Supreme Court’s seemingly cavalier assumption that parties to an arbitration agreement most likely intended to submit threshold issues of this sort to an arbitral tribunal, and not a court, begins to sound more convincing.

In sum, not all the reasons for resisting arbitration pertain to the existence or validity of either the arbitration agreement or the main contract. To the extent they do not, the utility of separability in delineating gateway and non-gateway issues is limited both from a descriptive and normative perspective. The “procedural” issues canvassed in this section decisively demonstrate that fact.

E. *Party Autonomy in the Delineation of Gateway Issues*

To this point I have largely assumed an arbitration agreement that reflects no attempt by the parties to determine for themselves where the line between gateway and non-gateway issues in arbitration should be drawn. But parties may well make that attempt. It is difficult, as a general matter, to see why parties should not be free to agree on moving a threshold issue from the non-gateway to the gateway column, provided they express that intention clearly enough. Unlike attempts to heighten the level of judicial scrutiny of awards in vacatur actions, which the Supreme Court has disallowed at least in cases governed by the FAA,²⁰⁴ parties are at liberty to withhold issues from arbitration in the first place.²⁰⁵

However, the question of whether parties are equally free to move a threshold issue from the gateway to the non-gateway column is more complicated. At one extreme lies arbitrability, as I have defined it. Determining whether a given dispute is legally capable of being arbitrated is necessarily a question for the courts and cannot properly be delegated to the arbitrators.²⁰⁶ At

question of whether a contract clearly barring arbitrators from awarding treble damages in a RICO case offends public policy is surely appropriate for judicial determination at the outset.

204. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2007).

205. *See generally* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (explaining that the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute).

206. *See supra* notes 24-36 and accompanying text.

the other extreme lies the question of whether a given dispute falls within the scope of an agreement to arbitrate. As noted earlier,²⁰⁷ courts generally allow the parties to confer on an arbitral tribunal primary authority to determine the reach of an arbitration agreement, provided they express that intention clearly enough. Each of these positions in its own way reflects a perfectly appropriate accommodation between efficacy and legitimacy interests.

Harder cases, however, can be imagined. The claim that an arbitration agreement is unconscionable represents a case in point, and one that the Supreme Court had a recent opportunity to address in *Rent-A-Center, West, Inc. v. Jackson*.²⁰⁸ The lower court in that case held that the parties could not validly delegate to an arbitral tribunal the authority to determine whether an arbitration agreement itself is unconscionable.²⁰⁹ The Supreme Court ultimately disposed of the case on the ground that Jackson, the party resisting arbitration, had failed specifically to challenge the delegation of authority to determine unconscionability to the arbitrators. The Court found that Jackson had instead challenged the arbitration agreement as a whole and, applying the separability doctrine by analogy, concluded that that question was one for an arbitral tribunal to decide.²¹⁰ The Court did not indicate what the result would have been if Jackson had been found to challenge the delegation clause in particular. But if the Court were deeply troubled by the delegation, it would have given some indication of that, which it did not. However the Court eventually resolves the matter, the outcome will inevitably reflect its assessment of how deeply the kind of unconscionability claim advanced in *Rent-A-Center* implicates fundamental legitimacy concerns.

VI. CONCLUSION

Judicial treatment of threshold issues in arbitration in the United States has been evolving steadily, with traditional American understandings about Kompetenz-Kompetenz and separability serving only as a point of departure. The analysis has moved well beyond them. The Kompetenz-Kompetenz story is the simpler of the two. 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, 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. By contrast, under prevailing U.S. law, at least some threshold issues are properly subject to judicial determination at the very outset. However, the doctrine of Kompetenz-Kompetenz does not even attempt to determine which issues those are. Its

207. See *supra* notes 176-177 and accompanying text.

208. 130 S. Ct. 2772, 2778 (2010).

209. *Jackson v. Rent-a-Ctr. W., Inc.* 581 F.3d 912, 917 (9th Cir. 2008) (“[W]here . . . a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.”).

210. 130 S. Ct. at 2779.

utility for these purposes is correspondingly limited.

The task of delineating gateway and non-gateway issues in U.S. arbitration law has largely been assigned to the doctrine of separability, functioning outside its usual role of enabling the authority conferred on an arbitral tribunal by an agreement to arbitrate to survive an award to the effect that the main contract is invalid or otherwise unenforceable. Closer examination, however, shows that separability does not fully accomplish this secondary function.

Illustrations abound. The Supreme Court now plainly envisages the possibility of treating the existence of the main contract, as distinct from its validity, as a gateway issue, separability notwithstanding. The Court also has carved away a whole category of threshold issues of a broadly procedural character that pertain specifically to the arbitration clause, but that the Court evidently believes arbitral tribunals ordinarily should address in the first instance. Even the basic question whether an arbitration clause encompasses a given dispute has in many ways received intermediate treatment that the separability doctrine simply does not contemplate. Separability would not have predicted these outcomes. The courts treat arbitrability, in the narrow sense in which I define that term, as a gateway matter, but not because the inquiry has an arbitration-specific character; they do so because it entails the core judicial function of statutory interpretation and because the issue has a sufficient public policy dimension to warrant early judicial determination.

The central claim of this Article, however, is a normative one, namely that the allocation between courts and arbitrators of competence to determine threshold issues in arbitration should be driven by the goal of achieving an optimal balance between efficacy and legitimacy, the latter measured largely in terms of party consent. The equilibrium that U.S. law pursues stands in sharp contrast with French law, which posits that arbitration’s attractiveness depends on its real and reputed efficacy, and that efficacy in turn dictates an even more conspicuously pro-arbitration bias than the one that prevails in U.S. law. It therefore posits a version of *Kompetenz-Kompetenz* that reduces the policing role of courts at the threshold of arbitration to a bare minimum across the board, drawing essentially no distinctions among grounds for resisting arbitration, whether along separability lines or otherwise. American law more closely resembles German law, which goes so far as to establish a specific procedural mechanism for early judicial intervention on threshold issues. However, German law stops short of cleanly demarcating gateway from non-gateway issues.

Commentators have suggested that what best explains the difference between the U.S. and French approaches is the former’s lesser commitment to the “autonomy” of international arbitration.²¹¹ That is not in my view an

211. See Gaillard & Banifatemi, *supra* note 54, at 269:

[T]he more international arbitration is viewed as a fully autonomous process that is not anchored in any particular national legal system and that operates in accordance with specific rules, the more firmly the negative effect of competence-competence is recognized and applied. Conversely, the more hesitations remain as to the autonomous

adequate explanation, for U.S. law is by no means insensitive to arbitral autonomy. In the United States, the arbitral process, once initiated is allowed to proceed without undue judicial interference.²¹² Tribunals are free to conduct proceedings in an expeditious manner, unbound by formalities that typically accompany proceedings in court.²¹³ And the review that courts conduct, whether at the annulment or at the recognition and enforcement stage, is exceedingly narrow, with merits review off-limits.²¹⁴ Even the position espoused in this article—namely that courts be allowed to treat certain threshold issues as gateway issues, and address them if asked to do so at the outset of arbitration—confines that prospect to the relatively short period prior to constitution of the tribunal and would not in any event suspend the arbitral proceedings. In all these respects, arbitration enjoys what may fairly be called “autonomy.” But allowing arbitral proceedings to get underway in the first place, despite a party’s raising serious consent-based objections in court at the threshold, represents arbitral autonomy of a very different and more questionable stripe, and one that poses substantial legitimacy risks.

To the extent that the Supreme Court has brought about these changes, it has done so not in one single operation, but rather through a progressive refinement of the case law that is paradigmatic of the common law method. The progression has admittedly been non-linear and has produced considerable doctrinal complexity. Given the high stakes, some degree of complexity is warranted. But so too are clarity and coherence. The best way to achieve those goals is to transcend the vocabulary of *Kompetenz-Kompetenz* and separability. Though the twists and turns of the case law have seldom if ever been articulated precisely in terms of balancing efficacy and legitimacy interests, I believe they all reflect the same common impulse to reconcile these two imperatives, and are best understood when viewed through that lens. This is as it should be, for if the future of international arbitration turns on anything, it turns on our success in that core pursuit.

character of international arbitration, the more interventionist the courts become.

The authors describe the position that jurisdictions take on the matter of court intervention in relation to arbitral jurisdiction as “archetypal” of the degree to which they recognize the autonomy of international arbitration. *Id.* at 273.

212. *See, e.g.*, *Aerojet-General Corp. v. Am. Arbitration Ass’n*, 478 F.2d 248, 251 (9th Cir. 1973).

213. *See, e.g.*, *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990).

214. *See, e.g.*, *I/S Stavborg Nat’l Metal Converters, Inc. v. Nat’l Metal Converters*, 500 F.2d 424, 432 (2d Cir. 1974).