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### Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law

William W. Park

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#### Recommended Citation

William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, in 8 Nevada Law Journal 135 (2007).

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# DETERMINING AN ARBITRATOR’S JURISDICTION: TIMING AND FINALITY IN AMERICAN LAW

William W. Park\*

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## INTRODUCTION

In arbitration law, few matters engender more stimulating debate than the interaction of arbitrators and judges with respect to jurisdictional determinations. When one side asserts that it never agreed to arbitrate, or contests the arbitrator’s substantive mission or procedural powers, someone must determine the existence, validity, and/or scope of the arbitration clause.

As a consensual process, arbitration rests on some objective expression of party assent to waive recourse to otherwise competent courts, either in whole or in part. Such assent can raise multiple factual and legal matters. Does the conduct of a corporate parent imply consent to arbitrate pursuant to an agreement signed by its subsidiary? Will an investment treaty give arbitrators

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authority to decide an expropriation claim? Can arbitrators order consolidation of cases in a “class action” or make an award of punitive damages?

Weighing the relative costs and benefits of competing paradigms, this Article makes several modest suggestions with respect to an arbitrator’s power to rule on his or her own authority. First, the arbitrator’s right to make jurisdictional rulings remains relatively uncontroversial. Rather, what remains at stake is the deference that any such ruling might receive by courts asked to decide the same question and the timing for their consideration of the matter. Second, agreements to submit jurisdictional questions to arbitration should be honored but not presumed. Finally, although arguments about timing remain finely balanced, the heavier concerns favor delay of judicial inquiry into arbitral authority until after the award.

## I. JURISDICTIONAL BASICS

### A. *Kompetenz-Kompetenz*

Often expressed as *Kompetenz-Kompetenz* (literally “jurisdiction on jurisdiction”),<sup>1</sup> the precept that arbitrators may rule on their own authority possesses a chameleon-like quality that changes color according to the national and institutional background of application.<sup>2</sup> Less a single rule than a constellation of related notions, the principle that arbitrators may decide jurisdictional questions says nothing about who (judge or arbitrator) will ultimately decide any particular case. Rather, it is not improper for the arbitrators themselves to address the existence and extent of their own authority. After examining the relevant facts and law, an arbitrator may either decide to hear the case or decline to give the matter any further consideration.

Moreover, to say that arbitrators may make jurisdictional decisions tells only part of the story and begs two further questions. When will courts intervene to consider challenges to arbitral authority? What finality (if any) will be accorded to the arbitrator’s decision?

The timing question asks when judges should intervene in the arbitral process to monitor possible jurisdictional excess. If an unhappy respondent denies

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<sup>1</sup> Normally interchangeable, *compétence-compétence* and *Kompetenz-Kompetenz* often take their usage by the speaker’s preference for a French or a German formulation. See generally GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION ch. 6 (3d ed. forthcoming 2008); ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION chs. 4 & 5, at 177-274 (1989); Emmanuel Gaillard, *L’effet négatif de la compétence-compétence*, in ÉTUDES DE PROCÉDURE ET D’ARBITRAGE EN L’HONNEUR DE JEAN-FRANÇOIS POUURET 385 (Jacques Haldy, Jean-Marc Rapp & Phidias Ferrari eds., 1999) [hereinafter Gaillard, *Compétence*]; Pierre Mayer, *L’Autonomie de l’arbitre dans l’appréciation de sa propre compétence*, 217 RECUEIL DES COURS 320 (Académie de droit international de La Haye 1989); William W. Park, *Jurisdiction to Determine Jurisdiction*, in ICCA CONGRESS SERIES 13, PERMANENT COURT OF ARBITRATION (forthcoming 2007) [hereinafter Park, *Jurisdiction*].

<sup>2</sup> When the very existence of the arbitration agreement is challenged, the term “arbitrator” may turn out to be a misnomer. However, to avoid an unduly heavy style, discussions of arbitral jurisdiction often speak of “arbitrator” (rather than “alleged arbitrator”) even when that status remains an open question. In that context, the term is used for convenience, with no intent to presume ultimate conclusions on the matter.

having agreed to arbitrate, a court might be requested to declare the arbitration clause invalid. Should a judge entertain a “mid-arbitration” request to stop the proceedings? Or should the respondent be required to wait until an award has been rendered and only then seek vacatur for alleged jurisdictional excess?

Each alternative carries its own risks and opportunities for mischief. Delay in judicial scrutiny can subject respondents to the expense of unauthorized proceedings before overreaching arbitrators.<sup>3</sup> However, early access to courts increases opportunities for dilatory tactics. 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.<sup>4</sup>

The second question relates to the effect that judges should give to arbitrators' jurisdictional rulings. In what circumstances (if any) should an arbitrator's decision on his or her authority be final?

Legal systems differ on whether and when an arbitrator's decision on his or her authority should foreclose judicial determination on the matter. Courts in the United States will generally accept the litigants' agreement to have arbitral authority determined by the arbitrators themselves. Judges must still ask whether (and to what extent) the parties did indeed give such a role to the arbitrators. However, if courts ascertain that the contract confers on arbitrators the role of jurisdictional decision-makers, the matter is settled.

Other countries (notably Germany<sup>5</sup>) seem to preclude such agreements to arbitrate jurisdictional matters. This approach sacrifices liberty of contract in order to provide an extra measure of protection against inadvertent loss of the proverbial day in court.

As a preliminary matter, it is important to distinguish the arbitrator's right to rule on jurisdiction from the principle that an arbitration clause remains autonomous from the main agreement in such it has been encapsulated, often conceptualized as “separability.”<sup>6</sup> The difference between separability and

<sup>3</sup> Under some circumstances (depending on the applicable institutional rules and arbitral situs) the arbitrators may award costs against the losing party, including attorneys' fees. Not always, however, as proven by recent American case law. See *CIT Project Fin., LLC v. Credit Suisse First Boston LLC*, No. 600847/03, 2004 WL 2941331, at \*5 (N.Y. Sup. Ct. June 17, 2004) (holding an award of attorneys' fees to be permissible only if explicitly provided in the parties' agreement).

<sup>4</sup> See, e.g., *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 447 F.3d 411, 420 (5th Cir. 2006) (government manipulation of oil company made it the state's alter ego); *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) (parent should not arbitrate pursuant to arbitration clause signed by subsidiary); *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) (litigation between two parent entities, neither of which had signed arbitration clause, with one side seeking a plaintiff-friendly court).

<sup>5</sup> See *infra* note 35 and accompanying text.

<sup>6</sup> In the United States, the autonomy of the arbitration clause was established in the landmark *Prima Paint* decision, where the purchaser of a paint business alleged “fraud in the inducement” in an attempt to have the contract rescinded in an action in court rather than before the bargained-for arbitral tribunal. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967). The separability of the arbitration clause permitted the fraud charge to be addressed on its merits by the arbitrator. The principle was affirmed in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), in the context of a consumer dispute heard in state court and involving an alleged violation of state statute. This classic separability case involved a challenge to arbitral jurisdiction based on the alleged invalidity of a loan

*Kompetenz-Kompetenz* might be illustrated by reference to an arbitration clause included in a marketing agreement by which a consultant agreed to help an American corporation obtain a public works contract in the Ruritania. In a subsequent dispute, it might be alleged that (i) the person who signed the agreement for the American corporation was not authorized to do so and (ii) the consulting agreement was void because the payments were earmarked in part to bribe government officials. Separability would permit the arbitrators to find the main contract void for illegality without destroying their power under the arbitration clause to do so. However, some notion of *Kompetenz-Kompetenz* would be required to permit the arbitrators to decide (on either an interim or a final basis) whether the individual who signed the agreement was authorized to bind the corporation.

### B. An Anti-Sabotage Mechanism

In its most primitive form, the principle that arbitrators may rule on their jurisdiction serves as a measure to protect against having an arbitration derailed before it begins. The arbitral tribunal (and/or the relevant arbitral institution) need not halt the proceedings just because one side questions its authority. The principle reduces the prospect that proceedings will be derailed through a simple allegation that an arbitration clause is unenforceable.

The rule is not foolproof, of course, given the eternal ingenuity with which fools often acquit themselves. Recalcitrant parties can still mount troublesome court challenges (even if not ultimately successful) designed to slow the train. However, the principle does avoid conceptual barriers to arbitration that would exist if legal systems considered jurisdictional powers of judges and of arbitrators to be mutually exclusive.

Although most countries accept that a jurisdictional objection does not automatically stop an arbitration, little consensus exists on other aspects of an arbitrator's ruling on his or her authority. An arbitrator's jurisdictional power (at least in commercial arbitration<sup>7</sup>) derives largely from national law and institutional rules<sup>8</sup> While commentators sometimes refer to "the internationally rec-

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agreement. Had the view of the state court prevailed, the arbitrators would have had no power to consider their own jurisdiction since the allegedly invalid loan agreement would have been inseparably linked to the arbitration clause. See generally Alan Scott Rau, *Separability in the United States Supreme Court*, 2006 STOCKHOLM INT'L ARB. REV. 1; Adam Samuel, *Separability and the U.S. Supreme Court Decision in Buckeye v. Cardegna*, 22 ARB. INT'L 477 (2006).

<sup>7</sup> A different regime obtains for investment arbitration under the International Centre for Settlement of Investment Disputes Rules ("ICSID Rules"), under which awards are subject to review not by national courts, but by an internal annulment process. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, March 18, 1965, 17 U.S.T. 1270, 1290, 575 U.N.T.S. 159, 192 (1966) [hereinafter ICSID Rules]. Treaty foundations also exist for other supranational adjudicatory bodies, such as the European Court of Justice, the International Court of Justice, and the European Court on Human Rights.

<sup>8</sup> For institutional incarnations of the principle, see, for example, U.N. Commission on International Trade Law ("UNCITRAL") Arbitration Rules art. 21 (1998); American Arbitration Association ("AAA") International Arbitration Rules art. 15 (2000); ICSID Rules, *supra* note 7, at art. 41; International Chamber of Commerce ("ICC") Rules of Arbitration

ognized doctrine” of *Kompetenz-Kompetenz*,<sup>9</sup> it would be more accurate to speak of doctrines in the plural.

To illustrate, if German courts are asked to hear a matter which one side asserts is subject to arbitration, they decide immediately on the validity and scope of the arbitration agreement.<sup>10</sup> In neighboring France, such challenges normally wait until an award has been made.<sup>11</sup> Across the Channel in England, litigants have a right to declaratory decisions on arbitral authority, but only if they take no part in the arbitration.<sup>12</sup> In Sweden<sup>13</sup> and in Finland,<sup>14</sup> as in the United States,<sup>15</sup> courts may entertain applications for jurisdictional declarations at any time.

In Switzerland, courts asked to appoint an arbitrator will normally apply a *prima facie* standard in deciding whether the arbitration clause is valid but engage in full consideration of jurisdiction (at least as to law) in the context of award review.<sup>16</sup> American courts, however, may order full examination of the validity of an arbitration clause at *any* stage of the arbitral process to determine whether, as a matter of fact and law, the parties have indeed agreed to arbitrate.<sup>17</sup>

The United States generally permits parties to give arbitrators the final word on some aspects of arbitral power.<sup>18</sup> A similar result would seem to obtain in Finland.<sup>19</sup> In other countries, however, the effect of such agreements remains far from clear.

### C. Judicial Intervention: When and to What Extent?

#### 1. Timing

From the perspective of any national legal system, the first inquiry with respect to an arbitrator's jurisdictional ruling concerns the *timing* of judicial intervention. Paradigms range from the American approach (courts may intervene at any moment) to the French model (courts wait until after an award is rendered). The difference becomes significant when one side to the dispute

art. 6 (1998) [hereinafter ICC Rules]; London Court of International Arbitration (“LCIA”) Rules art. 23 (1998).

<sup>9</sup> Compare DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT § 13.23, at 392 (2005), with Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 117 (Emmanuel Gaillard ed., 2005) (suggesting that “in upholding their jurisdiction, arbitrators implicitly declare that any other court . . . is prevented from ruling on the same matter”).

<sup>10</sup> Zivilprozeßordnung [ZPO] § 1032(1) (Ger.) [hereinafter ZPO].

<sup>11</sup> Nouveau code de procédure civile [N.C.P.C.] art. 1458 (Fr.) [hereinafter N.C.P.C.]; see also discussion *infra* note 21.

<sup>12</sup> English Arbitration Act § 72 (1996).

<sup>13</sup> Swedish Arbitration Act § 2 (1999), discussed in Kaj Hobér, *Arbitration Reform in Sweden*, 17 ARB. INT'L 351, 357-358 (2001).

<sup>14</sup> Petri Taivalkoski, *Le nouveau droit finlandais de l'arbitrage international*, in RECHERCHE SUR L'ARBITRAGE EN DROIT INTERNATIONAL ET COMPARÉ 126 (1997).

<sup>15</sup> See *infra* notes 17, 28, 47 and accompanying text.

<sup>16</sup> Loi fédérale sur de droit international privé (“LDIP”) arts. 7 & 179(3) (1989) (Switz.).

<sup>17</sup> See *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000).

<sup>18</sup> See discussion of *First Options*, *infra* note 83.

<sup>19</sup> Gustaf Möller, *The Arbitration Agreement*, in LAW AND PRACTICE OF ARBITRATION IN FINLAND 7 (Mika Savola ed., Finnish Arb. Ass'n 2004).

makes application to a court with supervisory (curial) competence over the arbitration, asking that the proceedings be stopped or that a case be heard notwithstanding an alleged arbitration clause.

Between these two extremes, many legal systems provide hybrid timing solutions that vary according to the specific posture in which arbitral jurisdiction has been challenged. One standard might apply when a legal action is brought in respect of matters purportedly referred to arbitration. Another standard might pertain to motions for declaratory judicial determination of preliminary jurisdictional questions. Distinctions might be made depending on whether the applicant has or has not taken part in the arbitration.

### 2. *Effect of an Arbitrator's Determination*

The other question to be considered by any arbitral régime relates to the *effect* of an arbitration agreement on jurisdictional questions. A legal system might take the position that all arbitral decisions on jurisdiction may be reviewed *de novo* by the appropriate court.<sup>20</sup> However, such is not the only option, or even the most sensible one. An alternative would be for courts to ask what jurisdictional matters the parties agreed the arbitrator would decide and to defer accordingly.

Each choice presents its own risks, requiring lawmakers to navigate between policy dangers much as Odysseus had to sail between Scylla and Charybdis. If courts may defer to arbitrators on jurisdictional matters, intellectual sloppiness (or a desire to clear dockets) might lead judges to accept mere contract recitals rather than to engage in rigorous inquiry into what the parties really meant. The other risk lies in undue rigidity, precluding recognition even of the litigants' clearly expressed wishes for finality in arbitral determinations about jurisdiction issues.

In systems where courts may defer to an arbitrator's jurisdictional determination, judges must still examine arbitral authority. However, the analysis takes place at a different level, asking whether the parties intended an arbitrator to have the last word on a particular jurisdictional issue. The pertinent question is what the contract provides. Courts must examine the facts of each case as they bear on the parties' pre-dispute expectations. If (and only if) the litigants intended arbitration of a particular jurisdictional question, the matter would be given to the arbitrator for ultimate disposition.

### 3. *Review Standards*

Differences in national law relate not only to when and whether courts may address arbitral jurisdiction, but also to the standards of review applied when they do examine the validity of the arbitration clause. The most significant dividing line relates to whether the judge will make a full inquiry into the parties' intent, or simply a summary examination, applying what is sometimes called a *prima facie* standard.

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<sup>20</sup> In most cases, courts *will* have the last word on jurisdiction, rendering misplaced the fretting about arbitrators' "unfettered discretion" such as evidenced in *Ottley v. Sheephead Nursing Home*, 688 F.2d 883, 898 (2d Cir. 1982) (Lumbard, J., dissenting).

For example, a seller might bring a judicial action to collect the price of an engine. In response, the buyer (who alleges the engine was defective) might move to stay litigation, asserting that the parties had agreed to arbitrate their dispute. The seller might reply with allegations that the arbitration clause was void.

In the alternative, the buyer might file an arbitration for product malfunction, alleging an engine explosion that caused personal injury and loss of profits. Here it would be the seller (preferring to be in court) who asks a judge to address the validity and scope of the arbitration agreement, perhaps arguing that the person who signed the clause lacked authority or that the clause was not broad enough to cover the tort action for personal injury or the financial claim for lost profits.

In either instance, judges will need to decide whether to examine arbitral jurisdiction in depth or to do so under a summary (*prima facie*) standard. In the latter event, they would leave fuller review to the time after an award has been rendered.

In France, until an award had been rendered, judges address the validity and scope of an arbitration clause *only* in the most superficial manner and *only* in the event no arbitral tribunal has been constituted.<sup>21</sup> The court can ask whether the clause was clearly void (for example, whether the arbitration clause exists at all) but may not address more complex questions, such as whether the corporate officer signing the arbitration agreement had authority to do so. Once arbitration has started, however, judges sit on their hands until the award is made.<sup>22</sup>

By contrast, in the United States courts may engage in full examination of arbitral power regardless of whether the arbitration has begun, and irrespective of whether they are being asked to hear the merits of the claims. The court might decide that the lawsuit should stop and the arbitration should proceed. Or vice versa. The court might also pass this jurisdictional question back to the arbitrators themselves for their determination.<sup>23</sup>

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<sup>21</sup> N.C.P.C., *supra* note 11, at art. 1458 (permitting pre-arbitration review only to determine if the arbitration clause is “clearly void” (*manifestement nulle*)). The statute provides:

When a dispute which has been brought before an arbitral tribunal pursuant to an arbitration agreement is brought before a governmental court, the court must declare itself without jurisdiction. If the dispute has not yet been brought before the arbitral tribunal, the court must also declare itself without jurisdiction unless the arbitration agreement is clearly void.

(Author's translation.) Standards for judicial review are contained in other provisions, for example article 1502 for international arbitration.

<sup>22</sup> For a recent decision of the Canadian Supreme Court opting for the minimum standard of review at the time an arbitration begins, see *Dell Computer Corp. v. Union des consommateurs*, [2007] S.C.R. 34 (Can.). The Canadian decision interpreted the jurisdictional provisions of the UNCITRAL Model Arbitration Law as enacted in Québec. Unlike the French statute, however, the Model Law permits judicial intervention even after an arbitration has commenced. See generally Frédéric Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*, 22 *ARB. INT'L* 463 (2006).

<sup>23</sup> In some countries, courts distinguish between arbitration held at home or abroad. Swiss courts, for example, make a comprehensive review of the validity of the arbitration clause when the arbitration has its seat abroad. By contrast, when the arbitration is held in Switzerland, judges engage only in a summary examination of arbitral jurisdiction (*examen sommaire*) delaying fuller review until the award stage. Compare Swiss Tribunal fédéral



As a general matter, a *prima facie* standard would be relevant only with respect to pre-award requests for declarations and injunctions, which implicate a prophylactic role for courts in the sense of preventing an arbitrator from making an unauthorized decision. The jurisdictional foundation of an arbitral proceeding must be monitored before anyone knows what the arbitrator will decide. The arbitrator's jurisdiction becomes an issue because judges are asked to make a respondent participate, or to tell a claimant that the arbitration lacks jurisdictional foundation.<sup>24</sup>

By contrast, when arbitral jurisdiction becomes an issue in the endgame, after an award is rendered, judges exercise a *remedial* function, correcting mistakes that allegedly occurred earlier in the arbitral process. The validity of an award might be subject to judicial scrutiny at the arbitral seat, through motions to vacate or to confirm under local law,<sup>25</sup> or to recognize an award rendered abroad under the New York Arbitration Convention.<sup>26</sup> At this point, a different set of concerns present themselves, calling for a deeper judicial scrutiny of both the arbitrator's jurisdiction and the relevant public policy implications of the award.

#### D. *Three Contexts for Jurisdictional Rulings*

When questions are raised about the validity or scope of a particular arbitration clause, one option would be for the arbitration to stop automatically, until matters have been clarified by a judge. It is against this extreme position, which denies arbitrators any right at all to rule on their own authority, that lawyers most often invoke the so-called *Kompetenz-Kompetenz* principle. If a legal system *does* allow the arbitration to proceed in the face of a jurisdictional challenge, the story could unfold in several ways. At least three different approaches might be envisaged.

##### 1. *No Automatic Stop to the Arbitration*

Under the first hypothesis, the arbitrator's right to make jurisdictional rulings operates in tandem with a principle allowing judges to examine an arbitrator's jurisdiction before an award has been rendered.<sup>27</sup> The arbitrators might

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decisions in *Fondation M. v. Banque X*, ATF 122 III 139 (Apr. 29, 1996) (arbitration in Switzerland), *with* *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Co. SA*, ATF 121 III 38 (Jan. 16, 1995) (arbitration abroad).

<sup>24</sup> 9 U.S.C. § 4 (2000) provides that courts may compel arbitration "upon being satisfied that the making of the agreement for arbitration . . . is not in issue."

<sup>25</sup> 9 U.S.C. § 10 permits vacatur of an award "where the arbitrators exceeded their powers."

<sup>26</sup> United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. For an award found subject to *neither* the domestic nor the international enforcement scheme, see *International Bechtel Co. v. Department of Civil Aviation of Dubai*, 360 F. Supp. 2d 136 (D.D.C. 2005). For a case implicating *both* a national statute and the New York Convention, see *Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15 (2d Cir. 1997).

<sup>27</sup> In this regard, it is important not to confuse the allocation of tasks between courts and arbitrators with the repartition of functions between arbitrators and a private supervisory institution. For example, under the Arbitration Rules of the International Chamber of Commerce, the ICC Court might be "prima facie satisfied" that an arbitration agreement exists,

offer an opinion on the limits of their own authority but without in any way restricting the court's consideration of the same question.

Although the arbitration does not necessarily stop, neither does any related judicial action. Courts proceed pursuant to whatever motions might be available under local law. In some countries, courts may step in from day one, at any time in almost any circumstance.<sup>28</sup> In others, courts might have full power to address arbitral jurisdiction in the context of lawsuits on the merits of the claim, but only limited margin to maneuver through declaratory judgments.<sup>29</sup>

The arbitrator's right to rule on jurisdiction holds significant practical value (at least for the party wishing to arbitrate) notwithstanding the possibility of court intervention. A recalcitrant respondent cannot bring the proceedings to a halt just by challenging jurisdiction. Moreover, whether courts ultimately substitute their own views for those of the arbitrators depends on the facts of each case. In some instances a judge might order the proceedings suspended, either permanently or until the jurisdictional facts have been determined.<sup>30</sup> In others, the arbitration clause may be found to be robust enough to cover the controverted dispute.<sup>31</sup>

## 2. Giving Arbitrators the First Word

A second context in which arbitrators make jurisdictional rulings requires courts to refrain from entertaining any jurisdictional motions until *after* an award has been rendered. The arbitrators would then have the first word on jurisdiction. Recourse to judicial action must await the end of arbitration. This version of *Kompetenz-Kompetenz* lays down rules about the stages in the arbitral process at which judges may intervene. The positive part of the principle addresses itself to arbitrators, permitting them to decide challenges to their own authority. The so-called "negative effect" of the principle speaks to courts,<sup>32</sup> telling the judge to wait until arbitration ends before inquiring about the validity or effect of an arbitration clause.

Under French law, if an arbitrator has already begun to hear a matter, courts must decline to hear the case. The judge has a limited jurisdiction to hear a case only if the arbitration has not begun and only if the alleged arbitration agreement is found to be clearly void (*manifestement nulle*).<sup>33</sup>

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thus permitting any jurisdictional challenge of a deeper nature goes to the arbitrators. This does not mean, however, that national courts will be deprived of power to make jurisdictional determinations when asked to stay litigation, enjoin arbitration, or vacate an award.

<sup>28</sup> See *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (courts determine whether contracts are void because of signatory's lack of power to bind principals); see also *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) (jury to determine whether party agreed to arbitrate); *Engalla v. Permanente Med. Group*, 938 P.2d 903 (Cal. 1997) (malpractice claim against health care provider referred to ad hoc arbitration that left administration to the parties rather than independent institution; habitual delays in the process found to constitute evidence of fraud by health care provider).

<sup>29</sup> See ZPO, *supra* note 10, § 1032(2).

<sup>30</sup> See *Sandvik*, 220 F.3d 99; see also *supra* note 17 and accompanying text.

<sup>31</sup> See discussion *infra* note 99 of *PacifiCare v. Book*.

<sup>32</sup> Gaillard, *Competence*, *supra* note 1. The "negative effect" might be considered as part of the arsenal of doctrinal tools to combat dilatory tactics of a party wishing to sabotage the proceedings.

<sup>33</sup> N.C.P.C., *supra* note 11, at art. 1458.

At issue here is the timing, rather than the extent, of judicial review. Going to court at the beginning of the proceedings can save expense for a defendant improperly joined to the arbitration. On the other hand, judicial resources may be conserved by delaying review until the end of the process, by which time the parties might have settled.

### 3. *The Arbitrator's Decision is Final*

The third context in which arbitrators might rule on their own authority involves judicial deference to the finality of an arbitrator's decision about his or her own authority. The arbitrator gets the last word as well as the first, assuming that judges first determine that the parties did in fact agree to such finality.<sup>34</sup>

#### a. *American Doctrine: Arbitrability for the Arbitrator*

Regardless of when judges entertain motions on arbitral jurisdiction, the parties might consent, expressly or impliedly, to subject the jurisdictional question to arbitration. As discussed below, case law in the United States often characterizes such consent as an agreement on "the arbitrability question" by which the parties' agreement transforms the jurisdictional difference into a disputed question of fact or law, of which the substantive merits the litigants submit to final determination by an arbitrator.

The application of this line of reasoning will in all events depend on the facts of each case. In some instances, the parties may indeed have agreed to submit a jurisdictional question to final and binding arbitration. In other instances, an assertion that they have done so will be preposterous, unable to withstand analysis. The parties' agreement, determined on a case-by-case basis, will determine which conclusion makes sense. In each instance, the judges will ask this question: What did the parties intend to submit to arbitration?

Giving arbitrators the last word on jurisdictional questions means that some litigants may well lose their access to court. The peril derives not so much from isolated mistakes, whether by arbitrators or by courts, but from the risk that an overburdened judiciary might fall into a systematic proclivity toward granting jurisdictional authority to arbitrators, even when contracts are ambiguous on the matter. By contrast, a judicial monopoly on ultimate resolution of jurisdictional questions restricts party autonomy, particularly among sophisticated business managers. The result is a serious limit on the liberty of contract that has long bolstered healthy commercial transactions.

#### b. *German Doctrine: Then and Now*

Prior to Germany's adoption of the UNCITRAL Model Law in 1998, court decisions had recognized that an arbitral tribunal might be granted the power to rule on its own jurisdiction pursuant to a specific clause, accepted by both parties, that implicitly dispensed with subsequent judicial review. In a

<sup>34</sup> Depending on the legal system, judicial proceedings to address the finality of the arbitrator's ruling could take place either before or after the award had been rendered. This question of timing would be a separate issue from the matter of finality.

landmark decision, Germany's highest court, the *Bundesgerichtshof*, had decided that the parties to a commercial contract could submit the question of arbitral authority to final and binding arbitration.<sup>35</sup> What the court called a *Kompetenz-Kompetenz-Klausel*, or "jurisdiction on jurisdiction clause," was deemed sufficient to insulate the arbitrator's decision on the matter from judicial scrutiny.

Currently, the prevailing opinion in Germany (both scholarly and judicial) seems to hold that such *Kompetenz-Kompetenz* clauses are invalid. Germany case law has held that the parties may not restrict judges from examining arbitral jurisdiction in the context of challenges to either interim or final awards.<sup>36</sup> Whether such a position constitutes sound doctrine remains open to debate, as discussed later.

*c. The American "Arbitrability Question"*

In the United States, a clear line of judicial pronouncements holds that in some situations arbitrators may rule on their own powers without subsequent de novo review by courts. Such grants of jurisdictional power are not legal fictions, but require evidence of the parties' real intent expressed in concrete language. Absent an express or implied waiver of the right to go to court, a litigant will not normally be denied recourse to otherwise competent tribunals. However, once such a waiver has been established, in the form of an agreement to arbitrate the question of arbitral authority, the party will not be permitted to renege on this bargain to arbitrate.

Jurists from outside the United States may find the terminology unfamiliar. Court decisions speak of the "arbitrability question" in the same way that the rest of the world refers to a jurisdictional issue. If an "arbitrability question" has been submitted to arbitration, then courts defer to the arbitrator on the matter. After the "arbitrability" decisions have been decorticated, one finds that judges in the United States have been using the same conceptual framework as the old German cases on *Kompetenz-Kompetenz* clauses.

In this context, one might recall how the middle-aged cloth merchant in Molière's *Bourgeois Gentilhomme* learned, much to his delight, that he had actually been speaking prose all along, without ever being aware of this rhetorical skill.<sup>37</sup> The difference, however, is that courts in the United States seem

<sup>35</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] May 5, 1977, 68 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 356 (358) (F.R.G.).

<sup>36</sup> See Bundesgerichtshof [BGH] [Federal Court of Justice] Jan 13, 2005, III ZR 265/03. See generally commentary on that case in Stephan Wilske & Claudia Krapfl, *A Final Farewell to the German Concept of Kompetenz-Kompetenz*, 2 *IDR* 93 (2005). See also Stefan Kröll & Peter Kraft, *Ten Years of UNCITRAL Model Law in Germany*, 1 *WORLD ARB. & MEDIATION REV.* 439, 452-457 (2007).

<sup>37</sup> JEAN-BAPTISTE POQUELIN (MOLIÈRE), *LE BOURGEOIS GENTILHOMME*, Act II, Scene 4 (1670). Monsieur Jourdain, a *nouveau riche* draper, has hired a philosophy teacher to increase his oratorical skill. On learning that language, which is not poetry is prose, the newly enlightened merchant exclaims with amazement and pride, "Par ma foi! il y a plus de quarante ans que je dis de la prose sans que j'en susse rien." ("My Lord! For more than forty years I have been saying prose without knowing anything at all of the matter.") (Author's translation).

happily oblivious to the link between American legal notions and the doctrines elaborated in the rest of the world to meet similar juridical problems.

The American approach asks not only “who decides what,” but also “who decides who decides.”<sup>38</sup> Depending on what the parties agreed, an otherwise jurisdictional matter (normally for courts) may be transformed into the substantive merits in the arbitration itself, for the arbitrators to decide. If the parties agreed to entrust to the arbitrator an adjudication of jurisdictional disputes (for example, eligibility requirements for arbitration), then the arbitrator’s word would normally be final on that matter.

When the very existence of an agreement to arbitrate is disputed, courts generally refuse to compel arbitration until they resolve whether the arbitration clause exists,<sup>39</sup> which may be determined by a jury.<sup>40</sup> However, when questions relate to the scope of an otherwise valid arbitration clause, American judges show a willingness to defer to the arbitrators’ jurisdictional decisions, assuming the parties submitted the matter to arbitration in their contract.

The American approach might well be illustrated by the federal court of appeals decision in *Alliance Bernstein Investment v. Schaffran*<sup>41</sup> where a former employee of a New York hedge fund alleged wrongful termination, claiming dismissal motivated by cooperation with government investigations into the employer’s wrongdoing.<sup>42</sup>

The employment relationship was subject to rules of the National Association of Securities Dealers (“NASD”), which provided for arbitration, except with respect to claims of discrimination.<sup>43</sup> The arbitrator’s authority thus depended on whether the claim could be characterized as an “allegation of discrimination” within the meaning of rules.

The court did not see its role as deciding whether the arbitrator possessed jurisdiction to hear the claim.<sup>44</sup> Rather, the question was *who* (judge or an arbitrator) would decide whether the allegations of termination for “whistle blowing” amounted to the type of discrimination claim that was carved out of the scope of the arbitration clause.

<sup>38</sup> See, e.g., Alan Scott Rau, “*The Arbitrability Question Itself*,” 10 AM. REV. INT’L ARB. 287 (1999); see also discussion of *First Options of Chicago, Inc. v. Kaplan*, *infra* note 83.

<sup>39</sup> See *Sandvik AB v. Advent Int’l Corp.*, 220 F. 3d 99 (3d Cir. 2000).

<sup>40</sup> *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 282 (3d Cir. 2003).

<sup>41</sup> *Alliance Bernstein Inv. Res. & Mgmt., Inc. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006). Contrary to the suggestion by some commentators, this case seems to be focused on jurisdiction from a contractual perspective, not subject matter arbitrability in the public policy sense. Compare note in 17 WORLD ARB. & MEDIATION REP. 171, 172 (2006).

<sup>42</sup> The former employee asserted that his employer had violated the “whistle-blower” provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a) (2000).

<sup>43</sup> NASD R. 10201(b) provides that “[a] claim alleging employment discrimination . . . in violation of a statute is not required to be arbitrated” unless the parties have explicitly agreed to arbitration of the discrimination action either before or after the dispute arose. In other words, the submission of a discrimination claim must be specific, rather than covered in a broad “blanket” arbitration clause covering disputes in general.

<sup>44</sup> The claim of non-arbitrability related to the scope of a contract provision (NASD R. 10201), not any public policy limits on arbitration of “whistle-blower” claims. If public policy had been at issue, the result would likely have been different.

Reading the NASD Rules and contract language in the context of the parties' employment relationship, the court determined that the question of whether "whistle blower" claims were arbitrable was for the arbitrators themselves. The consequence was that the arbitrators' finding on that matter would normally be insulated from review for "[excess of] powers" under the Federal Arbitration Act.<sup>45</sup>

Reasonable people, of course, might argue about what the parties had in mind when they made their bargain. However, these debatable matters of fact do not call into question the jurisdictional principle that the parties to a dispute may empower arbitrators to decide controversies about the pre-conditions to arbitration.

### E. Paradigms and Policy

Fixing the point in time for court intervention involves a relatively clear (albeit difficult) choice between costs and benefits related to the expenditure of either public or private resources. One model suggests that a party may go to court at *any* moment for the purpose of contesting arbitral power. Another paradigm, however, provides for court challenge of arbitral authority only *after* an award is rendered.

Court challenges to jurisdiction at the beginning of the process can save time and expense for the litigants. If a judge finds the alleged arbitral clause to be void, or too narrow in scope to cover the dispute, then neither side need waste time or money in arbitration. By contrast, delaying judicial review until after the award has been rendered can preserve government funds. The arbitrators may get it right, or the case may settle.<sup>46</sup>

If questions of authority are left to the end game, perhaps there will not even be a jurisdictional challenge in court. The case might settle, or the party resisting arbitration might prevail. And if the matter does go to court, the arbitrator may have done much of the intellectual heavy lifting, sorting facts and law to provide the reviewing judge a helpful analytic roadmap.

American arbitration law traditionally has given parties a right to raise a matter of arbitral authority at any time, whether before or after the award. Such

<sup>45</sup> 9 U.S.C. § 10(4) (2000). Of course, the award might well be attacked on jurisdictional grounds derived from other factual allegations. For example, the arbitrator would lack authority if the person who signed was not authorized to do so, or, the signature had been compelled by a gun at the head or was forged. But the decision on jurisdiction over the "whistle-blower" claim could not be disregarded because a judge later disagreed with the arbitrator's interpretation of the rules.

<sup>46</sup> In the United States, analogous concerns about economy of judicial resources impose restraints on appeal of interlocutory court decisions. See Federal Arbitration Act § 16, 9 U.S.C. § 16. See also the discussion of the "collateral order" doctrine in *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989), and *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994). See also 28 U.S.C. § 1292(b) (2000) (involving appeal when an order involves "a controlling question of law as to which there is substantial ground for difference of opinion"); *Int'l Ass'n of Machinists and Aerospace Workers Local Lodge 2121 v. Goodrich Corp.*, 410 F.3d 204 (5th Cir. 2005); *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091 (6th Cir. 2002); *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90 (2d Cir. 2002). For conversations on this topic, thanks are due to Ward Farnsworth, Gary Lawson, and Louise Ellen Teitz.

determinations would usually be made pursuant to litigation under sections 3 and 4 of the Federal Arbitration Act, providing for stay of court litigation and orders to compel arbitration.<sup>47</sup> This approach means that a party who never agreed to arbitrate will not need to waste time and money in a proceeding that lacks an authoritative foundation. Moreover, either side can request clarification about the scope of the arbitrator's power before substantial sums are spent needlessly. The prospect of award vacatur on jurisdictional grounds cannot be excluded, but it may be less likely to hang as a Sword of Damocles in cases of obvious jurisdictional defect.

By contrast, the French model delays court consideration of jurisdictional matters until the award review stage. This approach reduces the prospect of dilatory tactics designed to derail an arbitration. A bad-faith respondent will be less able to add the cost of a court challenge at the same time that the arbitration is going forward.<sup>48</sup>

Another benefit from the French paradigm lies in its potential for higher quality jurisdictional review by judges, who will be able to benefit from the arbitrators' earlier consideration of the matter. And government resources may be conserved for the simple reason that a settlement might obviate the need for judicial review.

A cynic, of course, might note that the French rule can have practical advantages for arbitrators themselves, who will not be declared incompetent until after collecting their fees. But as Rudyard Kipling might have written, that is another story.

## II. TAXONOMY: WHAT IS A JURISDICTIONAL QUESTION?

### A. *Existence, Scope, and Public Policy*

In practice, an arbitrator's right to decide a question will often depend on how that question is characterized by the reviewing court. Labeling matters as "jurisdictional" puts them into the realm where judges would normally expect to exercise some scrutiny, depending on the circumstances of the case and the approach of the relevant legal system.

To reduce the risk of simply presuming one's own conclusions about what is or is not jurisdictional, it might be helpful to suggest three common categories of defects in arbitral authority: (i) existence and validity of an arbitration agreement; (ii) scope of authority (substantive and procedural); and (iii) public

<sup>47</sup> See generally *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991). In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), judges determined arbitral jurisdiction at the outset of the process, rather than waiting to see what the arbitrators would decide. See also the U.S. Supreme Court decisions in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

<sup>48</sup> N.C.P.C., *supra* note 11, at art. 1458. For a recent case of the *Cour de Cassation* interpreting the French version of *compétence-compétence* in the context of an ICC arbitration, see *SARI Métu System France*, Cass. 1re civ., Dec. 1, 1999, holding that only the clear nullity of an arbitration agreement would bar application of the principle by which an arbitrator was permitted to rule on his own jurisdiction.

policy. There is no magic in this tripartite classification, which commends itself only as a starting point for analysis.

The first two flaws relate to the contours of the parties' contract. The third derives from public policy, regardless of what the parties might have agreed. Each poses its own analytic framework.

### 1. Existence and Validity

With respect to the very existence of the arbitration clause, it will be highly unlikely that an arbitrator can make a final jurisdictional ruling. Any enforcement forum will want to make sure that the party against whom the award is invoked did in fact agree to arbitrate. In many countries, however, the arbitrator could make an initial interpretation of whether the non-signatory was bound to arbitrate<sup>49</sup> but would not have the last word on the matter. A final determination would be possible only pursuant to a second agreement legitimately concluded by the party sought to be bound. Such a result has been accepted in some legal systems<sup>50</sup> but not others.<sup>51</sup>

Determinations related to the existence or validity of the arbitration clause implicate the following common questions: agency (actual or implied),<sup>52</sup> waiver of right to arbitrate (for example, by initiation of court litigation or undue delay<sup>53</sup>), survival of an arbitration clause after assignment,<sup>54</sup> and limitation periods.<sup>55</sup> It might be asserted that there is no valid agreement to arbitrate because of alleged forgery, fraud or duress, or lack of authority by the individual who executed the contract.<sup>56</sup>

<sup>49</sup> See survey of national jurisdictions in Park, *Jurisdiction*, *supra* note 1.

<sup>50</sup> See *Astro Valiente Compania Naviera v. Pak. Ministry of Food & Agric. (The Emmanuel Colocotronis)* [1982] (No. 2), 1 W.L.R. 1096, 1 All E.R. 823 (Eng.) (disagreement on whether charter party terms incorporated into a bill of lading).

<sup>51</sup> See discussion of the German BGH decision of 13 January 2005, *supra* note 36 and accompanying text.

<sup>52</sup> See, for example, *Southern Pacific Properties, Ltd. v. Arab Republic of Egypt*, where an arbitral tribunal had to determine whether the government of Egypt was bound by an arbitration clause in an investment contract concluded by an Egyptian state-owned corporation but also initialed by a government minister with the ambiguous words "approved, agreed and ratified." *S. Pac. Props., Ltd. v. Arab Republic of Egypt*, Cour de cassation, Judgment of Jan. 6, 1987, Cass. civ. I, 1987 J.D.I. (Clunet) 469 (with commentary by Ph. Leboulanger) (Fr.), reprinted in 26 I.L.M. 1004 (E. Gaillard trans. 1987).

<sup>53</sup> See *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995).

<sup>54</sup> See *Hewlett-Packard Co. v. Berg*, 61 F.3d 101 (1st Cir. 1995); see also discussion *infra* note 96.

<sup>55</sup> See *PaineWebber, Inc. v. Landay*, 903 F. Supp. 193 (D. Mass. 1995) (holding that six year time limit for bringing claim under NASD Code of Arbitration Procedure was a question for arbitrator to decide); *Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308 (N.Y. 1995) (statute of limitations questions must be resolved by courts; New York law not pre-empted by Federal Arbitration Act).

<sup>56</sup> See *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (concerning securities law violations brought by government entities against investment company); see also *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126 (7th Cir. 1997); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992) (forgery). Compare *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001), with *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000). See generally BERNARD HANOTIAU, *COMPLEX ARBITRATIONS* (2005).



An attempt might be made to bring a non-signatory corporation into the proceedings on the basis of conduct that implied consent to an arbitration commitment of an affiliate.<sup>57</sup> Or an assertion might be made that the corporate veil should be pierced on a ground such as undercapitalization.

The process for constitution of the arbitral tribunal also affects arbitral power. If the parties agreed to arbitration by a tribunal appointed by the International Chamber of Commerce, there is no basis to oblige the defendant to participate in an arbitration convened by the American Arbitration Association.<sup>58</sup> Interpreting the parties' intent as to the constitution of the arbitral tribunal becomes particularly problematic when courts are called to repair pathological clauses lacking particulars about the arbitral situs or institutional rules.<sup>59</sup>

## 2. Scope

By contrast, the arbitrator's authority to address problems of scope might often be addressed in the initial arbitration clause itself. At the time of concluding their transaction, foresighted parties could give arbitrators explicit power to adjudicate, in a final way, challenges to the extent of their powers and the range of matters covered by the arbitration clause. The timing for challenge, however, remains a question separate from the effect of the jurisdictional decision and the parties' intention in that regard.

Frequently invoked questions of scope relate to the substantive and procedural limits of an arbitration clause or involve arbitral jurisdiction over tort claims and statutory causes of action (such as competition law), the arbitrators' application of a particular governing law,<sup>60</sup> or alleged disregard of certain contractual limits on their authority.<sup>61</sup> An arbitrator might be asked to decide substantive questions, which one side asserts were never submitted to arbitration.<sup>62</sup>

<sup>57</sup> See *ICC Award No. 4131 of 1982 (Dow Chemical v. Isover St. Gobain)* permitting joinder of non-signatories on the basis of the so-called "group of companies" doctrine. The award can be found in 1 COLLECTION OF ICC ARBITRAL AWARDS 1974-1985, at 146 [RECUEIL DES SENTENCES ARBITRALES DE LA CCI, 1974-1985] (Sigvard Jarvin & Yves Derains eds., 1990); 110 J. DROIT INT'L 899 (1983) (Fr.). The award was upheld by the Paris *Cour d'appel*, 21 October 1983, 1984 Rev. arb. 98. English language extracts in 9 YEAR-BOOK OF COMMERCIAL ARBITRATION 132 (1984).

<sup>58</sup> For an analogous problem, see *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982); Geneva Office des Poursuites, 26 I.L.M. 382 (1987).

<sup>59</sup> See, e.g., *Marks 3-Zet-Ernst Marks GMBH & Co. v. Presstek, Inc.*, 455 F.3d 7 (1st Cir. 2006); *Jain v. de Méré*, 51 F.3d 686 (7th Cir. 1995); *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987). In *Presstek*, the contract between German and American entities provided only for "arbitration in the Hague under the International Arbitration rules." 455 F.3d at 9.

<sup>60</sup> For example, arbitrators who apply provisions of United States antitrust law, notwithstanding the merchants' agreement that the contract shall be subject to the laws of another country, might exceed their jurisdiction, unless the mandatory norms of the United States (as place of performance) preempt the contractually-designated law. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>61</sup> See, e.g., *Mobil Oil Indon., Inc. v. Asamera Oil (Indon.) Ltd.*, 487 F. Supp. 63 (S.D.N.Y. 1980).

<sup>62</sup> See *Wachovia Bank Nat'l Ass'n v. Schmidt*, 445 F.3d 762 (4th Cir. 2006). In an action against a bank for bad financial and tax advice, an arbitration clause in a loan agreement was

Or it might be asserted that certain remedies such as attorneys' fees or punitive damages fall outside the arbitrator's mission.

The arbitrators' procedural powers constitute a particularly fertile ground for jurisdictional conflict. Did the parties authorize the arbitrators to consolidate two proceedings? Did the parties give arbitrators the right to punish a party for failing to produce documents or to award compound interest?

### 3. Public Policy

Violations of public policy, of course, may defeat arbitral jurisdiction regardless of the parties' wishes, at least within the forum whose norms have been offended. These public policy limits might relate to matters that the relevant legal system (asked to enforce either the agreement to arbitrate or the resulting award) says may not be arbitrated. Or public policy might be implicated by an award giving effect to illegal conduct that the forum does not wish to condone.<sup>63</sup>

An arbitrator may lack authority not only due to the absence of the parties' mutual consent, but also because legal systems sometimes draw boundaries around an arbitrator's power to protect sensitive public norms that affect all of society. The restrictions on arbitral power often take the form of limits on subjects that may generally not be arbitrated (such as the prohibition on arbitration of competition law claims<sup>64</sup>) or for a specific case.<sup>65</sup>

In the United States, consumer and employment transactions present special public policy wrinkles. Unlike many countries, no general national statute serves to protect consumers and employees against abusive arbitration agreements.<sup>66</sup> To a large extent, this American exceptionalism finds its roots in yet

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held not to bar a lawsuit for fraudulently inducing the investor's tax shelter participation. Compare *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), where a tax shelter sponsor was held bound to arbitrate on the basis of an arbitration clause in a brokerage contract related to the tax shelter transaction. See also *Vassaluzzo v. Ernst & Young LLP*, No. 06-4215-BLS2, 2007 WL 2076471 (Mass. Super. Ct. June 21, 2007). In this malpractice action for advice on an unsuccessful tax shelter, the arbitration clause in a 2001 engagement letter was found to cover some but not all transactions.

<sup>63</sup> An arbitrator would not likely be permitted to render an award giving effect to a sale of illegal arms to terrorists or ordering payment for slaves or heroine. Nor would an arbitrator be permitted to reinstate a pilot dismissed from employment for showing up drunk at the cockpit.

<sup>64</sup> See *Mitsubishi*, 473 U.S. 614. For a case interpreting *Mitsubishi* in the context of an award that allegedly disregarded mandatory antitrust norms, see *Baxter International, Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003).

<sup>65</sup> For an example of a public policy limit applicable to a particular dispute rather than an entire subject matter, see *United States v. Stein*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006). The case involved indictment of former partners of the KPMG accounting firm, accused of conspiracy and tax evasion in connection with abusive tax shelters. *Id.* at 237. The partners asserted that by contract KPMG must advance the legal fees incurred for their defense, a claim that the firm argued must be arbitrated pursuant to the partnership agreement. *Id.* at 239-60. The judge in the tax case held that arbitration of the legal fees issue would violate public policy, positing that arbitration involves "unpredictable timing and the likelihood of delay" and thus would force the court to do violence to important public interests. *Id.* at 255.

<sup>66</sup> The U.S. Congress, however, can and has passed legislation limiting arbitration on behalf of special interest groups. See the Motor Vehicle Franchise Contract Act of 2002, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (codified at 15 U.S.C. § 1226 (2000)), some-

another national idiosyncrasy: the role of the civil jury in deciding contract claims, often beginning with a bias in favor of the consumer or employee (the proverbial “little guy”) against the manufacturers or employers. Concerned about the lack of rationality in jury verdicts, the business community sees arbitration as a more reasonable alternative to court litigation.

The lack of a general scheme to protect consumers and employees means that courts often stretch to protect consumers and employees through ordinary contract principles. On a case-by-case basis, doctrines such as “unconscionability,” “excessive cost,” and “mutuality of remedy” have been pressed into service to safeguard the interests of weaker parties to adhesion contracts.<sup>67</sup> Moreover, on some occasions, some misguided and ill-instructed courts have gone so far as to deny arbitrators any authority to address jurisdictional matters, even on an interim (non-binding) basis.<sup>68</sup>

### B. Admissibility

Often we understand better what something is by considering what it is not. The essence of arbitral jurisdiction might be put into starker relief through a comparison with what is sometimes called “admissibility.”

A precondition to arbitration (limiting an arbitrator’s right to hear the case) is not the same thing as a precondition to recovery (restricting one side’s right to obtain damages). For example, arbitrators might well have authority to hear a dispute over mismanagement of a brokerage account but might deny the claim on the basis that the statute of limitations had passed.<sup>69</sup> The claim is

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times known as the Bono Bill in recognition of its original sponsor, the late Sonny Bono. Recently, Senator Jeff Sessions (Rep. Alabama) proposed legislation intended to provide broad protection of consumer interests, albeit perhaps of an over-inclusive nature that sacrifices vital elements of party autonomy and efficient dispute resolution. *See* Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007). The Canadian Supreme Court has recently considered consumer protection in the context of its decision in *Dell Computer Corp. v. Union des consommateurs*, [2007] S.C.R. 34 (Can.).

<sup>67</sup> *See, e.g.*, *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002), *reh’g denied*, 57 P.3d 41 (Mont. 2002), *cert. denied*, 538 U.S. 956 (2003). In refusing to compel arbitration against a financial adviser accused of negligence and breach of fiduciary duty (the alleged victim was a ninety-five-year old widow), the Montana Supreme Court held the arbitration clause to be an impermissible attempt to waive basic rights guaranteed by the Montana constitution.

<sup>68</sup> In *MBNA America Bank, N.A. v. Credit*, 132 P.3d 898 (Kan. 2006), the court vacated an arbitration award used to collect on a credit card debt of one Ms. Loretta K. Credit. The Bank had been unable to produce an arbitration agreement, and reason existed to suspect that the arbitration service provider might have been showing a systematic sympathy to financial institutions inconsistent with the impartiality one expects of arbitral institutions. To reach its decision, the court need only have noted that the bank had provided no evidence of an agreement to arbitrate. Unfortunately, however, the court added dictum stating, “[w]hen the existence of the [arbitration] agreement is challenged, the issue must be settled by a court before the arbitrator may proceed.” *Id.* at 900. The assertion has no foundation in logic, policy, or law.

<sup>69</sup> Other illustrations of pre-conditions to recover can be found in long-term supply contracts, which often provide for arbitration of disputes about price adjustments. Frequently, price modification will require the arbitrators (i) first to find a change in market conditions, and (ii) then to establish how far (and in what direction) the prices should be modified to reflect such changed conditions. Both questions remain matters of the substantive merits of

properly before the arbitrators, and thus the arbitrators' decision would usually *not* be reviewable in court.<sup>70</sup>

Admissibility often relates to whether a claim is ripe enough (or too stale) for adjudication, or to arbitral preconditions (such as mediation) or time bars (a prohibition on claims more than six years after the alleged wrong). In particular, distinctions must often be made between (i) the time bar in a statute of limitations and (ii) a time restriction on arbitration eligibility. The difference is crucial. The statute of limitations (a matter of admissibility) bars recovery itself, whether before courts or arbitrators. The limitation applies to the claimant's right to receive damages, regardless of the forum. By contrast, a jurisdictional limit restricts eligibility for arbitration. The restriction tells us that the case must be brought in court (rather than before the arbitrator) but says nothing about whether the claim itself is time barred.

### C. *The Nature of Authority: Out of Bounds or Just Wrong?*

A defect in jurisdiction does not necessarily mean an incorrect decision about whatever question has been put at issue.<sup>71</sup> Rather, jurisdictional challenges remain neutral of the merits of the case, addressed to the question of whether arbitrators have gone (or will go) out of bounds. At stake is *not* whether claimant breached the contract or owes \$10 million, but rather the identity of the forum (arbitration or court proceeding) that will address and adjudicate the questions of contract breach and damages. Even if the respondent did breach, and does owe the money, an arbitrator lacking jurisdiction would not be authorized to hear the arguments.

A jurisdictional challenge asserts that the arbitrator has no right at all to hear a matter or exercise a procedural power. The challenge may be directed at the case in its entirety, a particular question (such as a competition counterclaim), or the exercise of a procedural power (such as imposing sanctions for failure to produce documents or granting interest). The problem may also rest with the absence of a precondition to arbitration, such as the expiry of time limits.<sup>72</sup>

The labels applied to excess of authority may vary from country to country, with related terms ("jurisdiction," "authority," "powers," and "mission") often pressed into service almost interchangeably. In the United States, excess

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the case since the parties intended them to be addressed by the arbitrators rather than courts. The two-fold nature of the arbitrators' task simply represents the parties' assessment of the most efficient and logical way for analysis to proceed. *See generally* contribution by Jan Paulsson in INTERNATIONAL LAW, COMMERCE & DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601 (2005).

<sup>70</sup> There might, however, be some situations in which valid jurisdictional challenges could be mounted to improper decisions on admissibility. If a contract says no actions may be filed before 2010, a putative award in 2005 would appear to most observers as an *excès de pouvoir* (subject to annulment) rather than simply an unreviewable mistake about calendars.

<sup>71</sup> See discussion of the illustration *infra* note 77.

<sup>72</sup> A precondition to recovery, of course, is not the same thing as a precondition to arbitration. For example, arbitrators might well have the right to hear a case, but deny the claim on the basis that the statute of limitations had passed. The distinction is sometimes referred to as between jurisdiction and "admissibility."

of authority sometimes overlaps with notions related to legal error when courts set aside awards for “manifest disregard of the law.”<sup>73</sup>

Attempts to grapple with the nature of arbitral jurisdiction raise a difficult intellectual challenge. Analysis sometimes conflates substantive errors on the merits (misinterpretation of the law) with errors of jurisdiction for the purpose of subjecting arbitral decisions to judicial review. After all, it might be argued, the parties never authorized the arbitrators to make a mistake. Thus from one perspective, each time the arbitrators go wrong in law they go beyond their mandate.<sup>74</sup> According to this view, since mistakes are not authorized, by definition they constitute an excess of authority.

Admittedly, it is not easy to articulate an intellectually rigorous test for distinguishing jurisdictional error from other types of mistakes, either for commercial arbitration or for law in general.<sup>75</sup> As with most legal problems, the difficulties lie at the fringes.<sup>76</sup> However, definitional difficulty does not mean that vital distinctions cease to exist between a decision that is wrong and one that exceeds the authority of the purported decision-maker.<sup>77</sup>

In deciding challenges to arbitral authority, the parties’ intent should serve as the touchstone and the lodestar. If the arbitrators have addressed (or are likely to address) questions that the parties submitted to arbitration, they do not exceed their power.

This distinction between a mistake on the merits and an excess of authority goes to the heart of what arbitration is all about. Arbitration is a consensual process unfolding within an enclosure created by contract. Litigants accept the risk of arbitrator mistake only for decisions falling within the borders of arbitral authority. A simple error is normally not subject to challenge since the parties

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<sup>73</sup> See, e.g., Noah Rubins, “Manifest Disregard of the Law” and *Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT’L ARB. 363 (2001); Hans Smit, *Manifest Disregard of the Law in New York Court of Appeals*, 15 AM. REV. INT’L ARB. 315 (2004); see also Stephan Wilske & Nigel Mackay, *The Myth of the ‘Manifest Disregard of the Law’ Doctrine: Is This Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned?*, 24 ASA BULL. 216 (2006).

<sup>74</sup> Such was the position once taken in England by Lord Denning, who suggested (albeit in an administrative context) that “whenever a tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void.” LORD DENNING, *THE DISCIPLINE OF LAW* 74 (1979). Happily for the health of English law, the House of Lords in 2005 rejected this position in the *Lesotho Highlands* decision.

<sup>75</sup> For an inquiry into similar questions in public international law, see W. MICHAEL REISMAN, *NULLITY AND REVISION* (1971).

<sup>76</sup> In some instances, the very same facts might be relevant both to the merits of a dispute and to jurisdiction. See *Jackson v. Fie Corp.*, 302 F.3d 515 (5th Cir. 2002).

<sup>77</sup> The world of education provides a relatively simple illustration of the difference between simple mistake and excess of authority. In American law faculties, the professor who teaches a course normally bears responsibility for grading exams. If the lecturer decides that a paper merits a “B,” then the student receives a “B,” perhaps adjusted for classroom participation, again by the professor. Now assume that a colleague happens by chance to read the exam, and finds the grade excessively severe (the student deserved an “A”) or unduly generous (the paper merits only a “C”). The second professor’s views do not matter, whether correct or not. Each professor bears the authority and duty to grade his or her exams. That being said, not all authors would agree that a distinction can be made between the merits of a dispute and jurisdiction, at least in the context of court actions.

asked an arbitrator to decide the legal and factual merits of their dispute. But no court should recognize an award falling beyond the arbitral authority that gives legitimacy and integrity to the process.

A party disappointed by an award will sometimes attempt a “backdoor” appeal through arguments that depict the arbitrator’s mistake as an excess of authority rather than a contract misinterpretation. Errors of law in contract interpretation seem to lend themselves to being portrayed as excess of jurisdiction. An award allowing lost profits, for example, might be portrayed as an arrogation of power not granted by the contract.

The distinction between simple mistake and excess of authority derives from a tension between two principles. The first confirms that agreements to arbitrate mean acceptance that the arbitrator might get it wrong. Arbitration would become mere foreplay to court litigation if litigants automatically got a second bite at the apple. Equally important, however, is the principle that litigants in arbitral proceedings do not expect to be bound by overreaching intermeddlers. Decisions on matters never submitted to arbitration deserve no more deference than the opinions of a random commuter passing through the Paris Métro or New York’s Grand Central Station.

While such extreme examples may be rare (due to the *in terrorem* effect of judicial scrutiny), they do exist. Until enjoined by a federal court, a Florida “arbitration service” recently conducted 114 “arbitrations” against a bank.<sup>78</sup> In each instance, a credit card holder received an “award” in the precise amount of the cardholder’s outstanding debt, even though the bank had never signed an agreement authorizing the arbitration service to decide these disputes.

In the more normal line of cases, sound analysis requires different thresholds for various types of consent. An agreement to arbitrate must be explicit and normally must be evidenced in writing. However, once that “writing” exists, the scope of the arbitrator’s procedural authority might be inferred or presumed from practice in related disputes or trade usage. Consent implicates a continuum of commitment. Once the major step (an agreement to arbitrate) has been taken, the details (for example, arbitrator power on matters such as interest) might yield more easily to presumptions.<sup>79</sup>

This should not be surprising, given the varying manifestations of consent in aspects of life other than arbitration. Only the most unromantic (or unrealistic) individual would argue that a woman’s consent to receive tenderness from her boyfriend must be in writing. A glance or a phrase can supply the invitation (and consent) to hold her hand. By contrast, her consent to be married normally requires a higher degree of formality, evidenced by ceremony and explicit words of acceptance.

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<sup>78</sup> Chase Manhattan Bank USA, N.A. v. Nat’l Arbitration Council, Inc., No. 3:04-CV-1205-J-32HTS, 2005 WL 1270504 (M.D. Fla. May 27, 2005). One Mr. Charles Morgan acted as sole arbitrator under the auspices of the National Arbitration Council (“NAC”), of which he was sole proprietor. The arbitration clause in the credit agreement listed three arbitral institutions: American Arbitration Association, JAMS, and National Arbitration Forum. The court granted an injunction against NAC and Mr. Morgan from conducting arbitrations or issuing awards involving the bank (Chase) and from accepting any monies from Chase cardholders for arbitration services. *Id.* at \*4.

<sup>79</sup> For an exploration of consent as a series of concentric circles, see Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169 (2007).

## III. THE "ARBITRABILITY QUESTION"

A. *Legal Framework*

With respect to the timing of judicial intervention on jurisdictional matters, the Federal Arbitration Act creates no statutory presumption that courts should await the award before pronouncing themselves on an arbitrator's authority to hear a dispute. At any stage in the arbitral process, courts can decide whether a particular matter has been (or can be) submitted to arbitration, usually in the context of a motion to compel arbitration or to stay litigation.<sup>80</sup> Courts remain free to order jurisdictional questions to be resolved by a jury.<sup>81</sup> In this respect, American law differs from that of many other countries, which provide full jurisdictional review by courts only after an award has been rendered.

On the matter of the finality, American law also possesses a special character, although operating in a way often more generous to arbitrators than in other nations. In some instances, arbitrators get both the first and the last word in determining their own authority. The conceptual underpinning of this approach relies on a finding that "the parties intended that the question of arbitrability [used in the sense of jurisdiction] shall be decided by the arbitrator."<sup>82</sup>

With a different vocabulary, American courts have in essence adopted the old German concept of a *Kompetenz-Kompetenz* clause, by which the parties may agree to submit a jurisdictional matter to final and binding arbitration.<sup>83</sup> In essence, the litigants' consent permits a jurisdictional matter to fall within the realm of substantive issues to be resolved by arbitrators. The court reviewing the matter must ask simply what (if anything) was (or is) intended.

This exercise remains regardless of whether allegations are made that the contract (or the arbitration agreement) was "void" as opposed to "voidable."<sup>84</sup>

<sup>80</sup> See 9 U.S.C. § 3 (2000) (FAA section 3 provides that federal courts shall stay competing litigation "upon being satisfied that the issue involved in such [judicial] suit or proceeding is referable to arbitration.").

<sup>81</sup> See *China Minmetals Materials Imp. & Exp. Co., v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000).

<sup>82</sup> See *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996); see also *Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran*, 445 F.3d 121, 125 (2d Cir. 2006). The principle has also been extended to class actions in *Surgutneftegaz v. Harvard College*, 167 F. App'x 266 (2d Cir. 2006). A motion to vacate the arbitrators' construction of the contract language was denied in *Surgutneftegaz v. Harvard College*, No. 04 Civ. 6069 (RMB), 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007).

<sup>83</sup> American courts are often unwilling to use the same vocabulary as other nations, preferring to talk of "the arbitrability question" rather than jurisdiction. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 596-98 (1st Cir. 1996).

<sup>84</sup> In the past, judicial decisions often distinguished between "void" and "voidable" clauses. A void clause could never serve as authority for any putative arbitrator, while a voidable clause might. The instinct is understandable. *Ex nihilo nihil fit*: nothing comes from nothing. However, the void/voidable distinction seems unnecessary if courts ask simply whether an intent to arbitrate exists, and was mercifully laid to rest by the United States Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447-48 (2006). See generally, Robert H. Smit, *Separability and Competence-Competence in International Arbitration*, 13 AM. REV. INT'L ARB. 19, 34-36 (2002). For cases involving allegedly void clauses, see *Sandvik*, 220 F.3d 99; *Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256

Courts now ask (or should ask) simply, "Is there consent to arbitrate?" If the litigants did *not* intend to arbitrate, it might be because the alleged consent was void or non-existent from the beginning, due to lack of capacity or forgery. Or consent might have once existed, but now be lacking because one side was induced to arbitrate by fraud aimed directly at the arbitral process (not the main agreement), making the arbitration clause subject to rescission.<sup>85</sup>

### B. *The Dictum in First Options*

To understand the "arbitrability question" approach, the most convenient starting point might be *First Options of Chicago v. Kaplan*.<sup>86</sup> In dictum, this U.S. Supreme Court decision supplied a verbal hook on which much subsequent case analysis has been hung. Almost invariably, these cases cite *First Options* for the dual proposition that (i) contracting parties may agree to arbitrate jurisdictional matters (questions about "arbitrability") but (ii) such agreement must be founded on clear evidence.

Prior to that decision, general American contract principles certainly existed to provide a doctrinal foundation for deference to arbitrators' decisions on their authority. *First Options*, however, supplied a high level of visibility and authoritative endorsement for such deference.<sup>87</sup>

In *First Options*, an arbitral award had been rendered against both an investment company and its owners with respect to debts owed to a securities clearing house. The owners (husband and wife) argued that they had never signed the arbitration agreement and consequently were not bound by the award. The Supreme Court carefully distinguished between three questions: (i) Did the Kaplans owe money (the substantive merits)? (ii) Did the Kaplans agree to arbitrate (jurisdiction, which the court called "arbitrability")? and (iii) Who (court or arbitrator) should decide whether the Kaplans agreed to arbitrate (which the Court called the "standard of review" question)?<sup>88</sup>

On the facts of the case, the Supreme Court affirmed the lower court's finding that the owners had not agreed to arbitrate, without any judicial deference to the arbitrator's determination.<sup>89</sup> Whether Manuel and Carol Kaplan

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F.3d 587 (7th Cir. 2001); *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991); and *Canada Life Assurance Co. v. Guardian Life Insurance Co. of America*, 242 F. Supp. 2d 344 (S.D.N.Y. 2003). With respect to voidable clauses, see *Pollux Marine Agencies v. Louis Dreyfus Corp.*, 455 F. Supp. 211 (S.D.N.Y. 1978).

<sup>85</sup> For a case involving fraud related to the arbitral process, see *Engalla v. Permanente Medical Group*, 938 P.2d 903 (Cal. 1997), involving a malpractice claim against a health care provider in which habitual delays in arbitration were found to constitute fraud by the provider.

<sup>86</sup> *First Options*, 514 U.S. at 943. See generally, William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996), reprinted in 11 INT'L ARB. REP. 28 (1996).

<sup>87</sup> See *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986); discussion *infra* note 92. See also Rau, *supra* note 38, at 294, suggesting that the dictum of *First Options* can be "found fully developed in earlier Supreme Court opinions." Not all observers have noticed such full development.

<sup>88</sup> *First Options*, 514 U.S. at 942.

<sup>89</sup> The Supreme Court also dealt with the standard a court of appeals should apply when reviewing a district court decision relating to vacatur or confirmation of an arbitral award under section 10 of the Federal Arbitration Act. The Court held that a district court's find-



were bound to arbitrate by virtue of a clause signed by their investment company was a question for courts. It was for a judge, not arbitrator, to provide the ultimate determination on whether Mr. and Mrs. Kaplan were in fact bound to arbitrate by reason of the actions of their investment company, on theories such as agency, alter ego, or lifting the corporate veil.

Although unnecessary to the holding of the case, the Supreme Court went further and suggested that in some situations (although not under the facts of *First Options*) “the arbitrability question itself” might be submitted to arbitration.<sup>90</sup> In such a situation, the courts must defer (“give considerable leeway”) to arbitrators’ decisions on the limits of their own jurisdiction. However, the burden of showing that a non-signatory intended to arbitrate remained with the party seeking arbitration.<sup>91</sup> The dictum’s critical language (which in some situations may eclipse the holding of the case) reads as follows:

If [the parties agreed to submit arbitrability to arbitration] then the court’s standard for reviewing the arbitrator’s decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.<sup>92</sup>

Given the longevity of Supreme Court dictum in the field of arbitration,<sup>93</sup> its teaching on “the arbitrability question” can be expected to weigh heavily on the future allocation of functions between courts and arbitrators. At the least, the dictum now requires judges to ask not only whether arbitrators exceeded their powers, but also whether the arbitrators were given authority to decide a jurisdictional matter in a way deserving deference.<sup>94</sup>

One difficulty with the dictum is that the term “arbitrability” can cover so many different matters: whether a person ever agreed to arbitrate at all; the

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ings of fact should be accepted unless “clearly erroneous,” but that questions of law should be decided de novo. The Third Circuit agreed with the owners that they were not bound by the arbitration agreement and therefore had reversed the district court confirmation of the award against them.

<sup>90</sup> *First Options*, 514 U.S. at 943.

<sup>91</sup> In the United States, given the absence of any federal common law, the bindingness of an arbitration clause would be a matter for state law principles.

<sup>92</sup> *First Options*, 514 U.S. at 943 (internal citations omitted). For the proposition that arbitrability can be submitted to arbitrators, the Court cited to alleged authority in labor arbitration: *AT&T Technologies*, 475 U.S. at 649, and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960). Invocation of these labor cases must be approached with caution. In the United States, the statutory basis for labor arbitration lies in section 301 of the Labor-Management Relations Act of 1947 (commonly called the “Taft-Hartley Act”), rather than the Federal Arbitration Act. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). Admittedly, the law under the FAA and the LMRA has seen a convergence, with courts routinely citing cases decided under one statute in connection with another. Neither of the two cited cases actually found an agreement to arbitrate the question of arbitrability. In *AT&T Technologies*, the Court held that the lower court’s decision to allow the arbitrator to decide arbitrability was error. 475 U.S. at 651-52. *Warrior & Gulf* said that “[i]t is clear . . . in this case [that] . . . the question of arbitrability is for the courts to decide.” 363 U.S. at 583 n.7 (internal citation omitted).

<sup>93</sup> See, e.g., the Court’s obscure pronouncement on arbitrator “manifest disregard” of the law in *Wilko v. Swan*, 346 U.S. 427 (1953), which has continued to be invoked long after the holding in the case was overruled.

<sup>94</sup> See, e.g., *PaineWebber, Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996).

scope of an admittedly valid arbitration clause; and public policy limits on what arbitrators can and cannot decide. Only the second of those issues (scope of the parties' agreement) would normally be capable of delegation to arbitrators in a single agreement. The third category (public policy) would never be capable of delegation.

### C. *Strangers to the Arbitration*

Perhaps the most serious challenge to the dictum arises in connection when a respondent in an arbitration asserts that it never agreed to arbitrate or a respondent in a judicial action claims the benefit of an arbitration clause. Delegation of jurisdictional authority on that question would normally require a separate agreement. A contract clause purporting to give arbitrators power to determine their own authority does not, in itself, insulate from judicial review a decision to add a party that never agreed to arbitrate. The mere narration or recital of the arbitrator's power on a printed form cannot be confused with a genuine grant of authority.

The suggestion that arbitrators can determine their own jurisdiction with respect to the identity of the parties, without a separate agreement submitting that question to arbitration, brings to mind the picture of Baron Münchhausen pulling himself up by his own pigtail. In many cases such a principle will assume the very proposition (arbitral jurisdiction) that remains to be proven. In the absence of an arbitration agreement accepted by the person alleged to be bound with respect to the dispute in question, the person rendering the award would seem better characterized as a vigilante, intermeddler, or imposter.

This does not mean that a contract may never be interpreted as giving the arbitrator power to determine whether a particular person agreed to arbitrate at all. Rather, such agreements must be truly distinct from, and chronologically subsequent to, the alleged principal agreement. For example, a buyer might sign a purchase contract with a seller corporation. When a dispute arises, the seller might allege that an arbitration clause in the contract bound not only the seller corporation, but also its parent entity. Or, the seller's parent might claim the benefit of the arbitration clause in attempting to avoid a court action brought against the parent by the seller. The theory might be advanced that the subsidiary had contracted as agent for the parent, or that the parent was the alter ego of the subsidiary.

After a dispute arises, nothing would prevent the parent from agreeing to ask an arbitrator to determine whether it was in fact bound by the arbitration clause. The arbitral tribunal to whose authority the parent has consented under the second agreement would be convened to determine whether the parent bound itself under the first agreement. In such a case, an arbitral tribunal so constituted would do no more than decide the merits of a question of fact and/or law about whether the initial agreement empowered the arbitrator to the extent asserted.<sup>95</sup>

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<sup>95</sup> This is exactly what happened in *Astro Valiente Compania Naviera v. Pakistan Ministry of Food & Agriculture* (The Emmanuel Colocotronis No. 2), [1982], 1 W.L.R. 1096, 1 All E.R. 823 (Eng.). Buyers of wheat at first refused to arbitrate a dispute with the shipper over demurrage, on the theory that the arbitration clause in the charter party had not been incorpo-

Courts must be vigilant not to accept contract recitals of arbitral authority without looking at what the parties actually agreed. For example, in *Apollo Computer v. Berg*<sup>96</sup> a contract between a Massachusetts computer company and a Swedish distributor was terminated, and the rights of the bankrupt Swedish distributor were assigned to a third party. The Massachusetts company claimed that the contract's non-assignment provision covered the arbitration clause, which became void as a consequence of the assignment.

The court held that the arbitrators' jurisdiction over the claims was a question for the arbitrators themselves to decide. An arbitral tribunal was appointed pursuant to the Rules of the International Chamber of Commerce ("ICC"), which call for jurisdictional objections to be referred to the arbitrators as long as the ICC is *prima facie* satisfied that an arbitration agreement exists.<sup>97</sup>

On this basis, the American court reasoned that the parties had agreed to submit the arbitrability question to the arbitrators. On closer examination, the decision might reveal itself as an exercise in circular reasoning, presuming its own conclusion. The problem is not that the parties lacked the power to submit the jurisdictional question to arbitration, but whether they actually did so. If the arbitration agreement was in fact automatically terminated by the assignment, then the ICC Arbitration Rules become relevant.<sup>98</sup>

#### IV. AMPLIFYING *FIRST OPTIONS* IN SUBSEQUENT CASE LAW

Recent decisions of the United States Supreme Court provide a perspective on how American jurisdictional methodology plays itself out in practice. The following two cases, *Howsam* and *Bazzle*, address which threshold preconditions for arbitration are to be determined by judges and which are for arbitrators.<sup>99</sup>

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rated in the bill of lading, which by the charter party's terms was to "supersede" the charter party. The parties submitted to ad hoc arbitration the question of whether the arbitration clause had been incorporated into the bill of lading.

<sup>96</sup> *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989). See also the sequel to *Apollo* in *Hewlett Packard Co. v. Berg*, 61 F.3d 101 (1st Cir. 1995), vacating a confirmation order and remanding for further proceedings the award, confirmed in 867 F. Supp. 1126 (D. Mass. 1994). Similar questions were discussed in *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d 863 (1st Cir. 1981).

<sup>97</sup> ICC Rules, *supra* note 8, at art. 6(2). At the time, the applicable rule was found in Article 8 and referred to the "*prima facie*" existence of the arbitration agreement, rather than the ICC Court being *prima facie* satisfied.

<sup>98</sup> A better approach might have been simply to make a finding about the effect of the assignment under Massachusetts law, which seemed to provide that a general non-assignment clause bars the delegation of duties, but not the assignment of rights, including the right to arbitrate. For better or for worse, the court of appeals refused to address the issue, instead resting its decision on the principle that the effect of the assignment was a question for the arbitrators. Such was the approach of the federal district court. See *Apollo Computer*, 886 F.2d at 472.

<sup>99</sup> See generally William W. Park, *The Contours of Arbitral Jurisdiction: Who Decides What?*, 3 INT'L ARB. NEWS 2 (2003), reprinted in 18 INT'L ARB. REP. 21 (2003). A third Supreme Court opinion, *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), is often discussed in connection with *Howsam* and *Bazzle*. In a puzzling footnote, the Court stated that the question at issue was "not a question of arbitrability." *Id.* at 407 n.2. In light of its somewhat different rationale, courts wait to see how the arbitrators will decide. *Pacifi-*

### A. Time Limits

Securities arbitration has been a particularly fruitful ground for jurisdictional conflict with respect to time limits. The investor generally tells of a “nest egg” lost due to a financial adviser’s misconduct, with golden retirement years turned into a financially harsh old age due to unsuitable investments. The adviser, of course, replies that the customer was well aware of the risks and pushed hard for aggressive growth stocks.

The reason time bars are so frequently invoked in brokerage disputes is that the investor is a bit like a casino gambler: happy when winning, but likely to complain in the event of a loss.<sup>100</sup> If stock rises in value, there would be no loss and thus no grumbling that the investment advice was “unsuitable.” Only when things later go sour will the broker be accused of misbehavior, even though the purchase of securities might be many years in the past.<sup>101</sup>

In *Howsam v. Dean Witter*,<sup>102</sup> the drama played itself out through an investment in limited partnerships in which the performance proved unsatisfactory, causing the investor to allege broker misrepresentation of the investment’s quality. The brokerage firm then filed suit in federal court requesting an injunction against the arbitration on the ground that the original investment advice was more than six years old and thus barred by the NASD “eligibility rule” requiring that any claim be brought within six years of the relevant occurrence.<sup>103</sup> The Supreme Court gave the arbitrators a green light to determine whether their power to hear the case was affected by time limits contained in the arbitration rules.

Resolving a split among the circuits over who (judge or arbitrator) decides on “eligibility” requirements, the U.S. Supreme Court in *Howsam* held that time limits were for the arbitrator. An opinion by Justice Breyer paid lip service to the principle that judges would normally decide gateway jurisdictional matters unless the parties clearly provided otherwise. However, the Court presumed (rightly or wrongly) the parties’ intent that the NASD Rules be construed by the arbitrators themselves, who were supposed to possess (according to the Court) special familiarity and expertise in interpreting these rules.<sup>104</sup>

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*Care* has been discussed earlier, along with *Lesotho Highlands*, in relation to the impact of contract interpretation on arbitral jurisdiction.

<sup>100</sup> While the investment in *Howsam* had occurred sometime between the account opening in 1986 and its closing in 1994, the arbitration was begun only in 1997.

<sup>101</sup> One recalls the vignette from the 1942 movie *Casablanca*, starring Humphrey Bogart and Ingrid Bergman. The French police captain, played by Claude Rains, closed down Rick’s Café because he was “shocked” to find gambling going on—all the while being quite happy to take his winnings.

<sup>102</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). The unanimous decision was written by Justice Breyer. A concurrence by Justice Thomas rested solely on the basis that New York law (applicable to the contract in question) had held that time bars under the NASD Rules are for arbitrators to decide.

<sup>103</sup> NASD Code of Arbitration section 10304 (formerly rule 15), states that no dispute “shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.” *Id.* at 81.

<sup>104</sup> The court also noted that section 10324 of the NASD Rules (formerly Rule 35) gave arbitrators power to “interpret and determine the applicability of all [NASD code provisions.]” *Id.* at 86. For another case on time limits, see *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426 (1st Cir. 1998) (time limits for challenging award do

### B. Class Actions

A plurality of the Court followed a similar line of reasoning in *Green Tree Financial Corp. v. Bazzle*,<sup>105</sup> which involved an attempt at class action arbitration of disputes arising from consumer loans used to purchase mobile homes and finance residential improvements. Once again, the Supreme Court punted the question to the arbitrator.

In violation of South Carolina's Consumer Protection Code, the lender allegedly neglected to give borrowers notice about the right to name their own lawyers and insurance agents. Two groups of borrowers filed separate suits in the South Carolina state courts seeking class certification of their claims against the lender. Ultimately, the two actions were consolidated and proceeded to arbitration before the same arbitrator.<sup>106</sup>

After the arbitrator awarded each class several million dollars plus attorneys' fees, the South Carolina Supreme Court consolidated the lender's appeals and ruled that the relevant loan contracts permitted class actions in arbitration.<sup>107</sup> The U.S. Supreme Court granted certiorari to determine whether the state court holding was consistent with the Federal Arbitration Act. The plurality opinion by Justice Breyer announced that the permissibility of class action arbitration was a matter of contract interpretation for the arbitrator, not the courts. For Justice Breyer and his plurality, the question was "what kind of arbitration proceeding [had] the parties agreed to?" If the contract is silent, the question was for the arbitrator, they said.<sup>108</sup> The state court decision was vacated and remanded for further consideration.<sup>109</sup>

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not apply when existence of an arbitration agreement is challenged). *Contra* MBNA Am. Bank, N.A. v. Hart, 710 N.W.2d 125 (N.D. 2006); MBNA Am. Bank, N.A. v. Swartz, No. Civ.A. 1192-N, 2006 WL 1071523 (Del. Ch. Apr. 13, 2006) (time bar for challenging clause).

<sup>105</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). The interesting plurality decision split 4-1-3-1. Four Justices concluded that it was for the arbitrator to decide whether the contracts allowed class action arbitration. One concurred in the judgment although he would have preferred to affirm the South Carolina decision that ordered arbitration to proceed as a class action. Three Justices dissented on the basis that any imposition of class-wide arbitration contravened the parties' contract, and one dissented on the ground that the FAA should not apply in state courts.

<sup>106</sup> *Id.* at 449.

<sup>107</sup> The South Carolina Supreme Court had determined that the loan contracts were silent with respect to class action. By contrast, at the U.S. Supreme Court, the dissenting opinion by Justice Rehnquist found that that the contracts forbid class arbitration, while the opinion by Justice Breyer delivered for the Court essentially ducked the issue and held that it was for the arbitrator to determine whether the contract allowed class arbitration.

<sup>108</sup> *Bazzle*, 539 U.S. at 452-53 (emphasis omitted). With respect to the implications of silence, one is reminded of the playful comparisons of European legal systems. In Germany, all which is not permitted is forbidden. In France, all which is not forbidden is permitted. To which some add that in Italy all which is forbidden is also permitted.

<sup>109</sup> A dissent by Chief Justice Rehnquist (joined by Justices O'Connor and Kennedy) argued that any imposition of class-wide arbitration contravened the parties' contract as a matter of law. Justice Thomas dissented on the ground that the Federal Arbitration Act should not apply in state courts. Justice Stevens concurred in the judgment but dissented from its reasoning. Believing that the state court was correct as a matter of law that class action arbitration was permitted, Stevens would have affirmed the South Carolina decision. However, to

It is, of course, possible that litigants might agree to give an arbitrator broad power to determine whether an arbitration clause includes the possibility of class action. However, such a conclusion is by no means obvious from the language of the relevant contracts, each of which was accepted by an individual borrower and provided for an arbitrator to be selected for all disputes arising from reference to the singular (not plural) expression: "this contract."<sup>110</sup> In commercial arbitration, the normal presumption has always been that parties agree to arbitrate with particular claimants or respondents, not with the whole world. Moreover, prior to *Bazzle*, the FAA did not authorize forced joinder of different arbitrations arising out of related claims.<sup>111</sup>

In one post-*Bazzle* case (on appeal as of this writing), a federal district court vacated an arbitral award that had interpreted a maritime transport contract to include a class action stipulation.<sup>112</sup> In finding "manifest disregard" of the law, the court stressed both the maritime nature of the contracts (as to which expert testimony established a clear presumption against class actions) and the principle of New York law that when contracts are silent on an issue no agreement has been reached.<sup>113</sup>

A new twist was added by a court of appeals decision arising from customer disputes with a cable television provider. *Kristian v. Comcast Corp.*<sup>114</sup>

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avoid the absence of any controlling majority (only three out of nine Justices agreed with Rehnquist), Stevens concurred with Breyer in the judgment.

<sup>110</sup> In passing, one might ask to what extent the result in *Bazzle* was influenced by the somewhat unusual language in the arbitration clause, which specified arbitration to resolve not only contract-related disputes claims or controversies, but also controversies arising from or relating to "the relationships that result from this contract."

<sup>111</sup> Prior to *Bazzle*, the FAA did not authorize forced joinder of different arbitrations arising out of related claims except as agreed by the parties or when conducted pursuant to a statute that explicitly so provides. See *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) (denying consolidation of arbitrations with Boeing and Textron, Inc. relating to contract with the British Ministry of Defense to develop an electronic fuel system). That result might in some instances be modified by state statute. See, e.g., MASS. GEN. LAWS, c. 251, § 2A (2007), which calls for consolidation as provided in the MASS. R. CIV. P. 42, which permits joinder of actions "involving a common question of law or fact." *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), has held that a federal court sitting in Massachusetts may order consolidation of related arbitrations pursuant to state statute. Cf. CAL. CIV. P. CODE § 1281.3 (West 2007).

<sup>112</sup> *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382 (S.D.N.Y. 2006).

<sup>113</sup> *Id.* at 387. As to the parties' intent, the court might well have reached the right result. Given the long tradition of non-consolidation for international maritime arbitration, something quite special would be needed to justify a determination that the litigants granted the arbitrators authority to create a class action process. However, it is by no means certain that the arbitrators' mistake (if it was one) could be characterized as "manifest disregard" of law. The job of interpreting the parties' intent falls to the arbitrators. This task, which implicates mixed questions of fact and law, as well as evaluation of industry custom and practice, has always been entrusted to the arbitrators.

<sup>114</sup> *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). See also *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), declaring a class action waiver to be unconscionable, and *Strand v. U.S. Bank National Association*, 693 N.W.2d 918 (N.D. 2005), upholding such waivers.

held that a ban on class actions would invalidate the arbitration agreement,<sup>115</sup> but for the possibility of severing the class action prohibition. In an action for antitrust violations under both state and federal law, the court applied a consumer protection rationale to conclude that the validity of the ban on arbitrability of the class action should be decided by courts rather than arbitrators. The court allowed the arbitration to proceed only after striking down and severing this prohibition.

### C. *Arbitral Jurisdiction and Contract Interpretation*

In a commercial agreement, broadly drafted arbitration clauses often give the arbitrator authority to construe contract language. In some instances, the relevant language may affect the arbitrator's procedural powers on matters such as attorneys' fees<sup>116</sup> and punitive damages,<sup>117</sup> or the right to make an award in foreign currency.<sup>118</sup>

Consequently, arbitral authority may depend on how arbitrators interpret specific provisions in the parties' agreement, causing a tension that arises between two fundamental and equally important principles. On the one hand, arbitrators (not judges) interpret the contract. On the other hand, arbitrators have no power to "bootstrap" themselves into a job by creating powers that never existed. As in so many other matters, proper resolution of this conflict will depend on the particular facts of each case.

The struggle between these principles can be illustrated by *PacifiCare Health Systems v. Book*,<sup>119</sup> where a group of doctors had filed a nationwide class action against several health maintenance organizations, alleging that the organizations had conspired to refuse proper reimbursement for services provided under the health plans accepted by the physicians. The action included claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),<sup>120</sup> which allows awards of damages three times greater than any actual damage proven.

There was a catch, however. The physicians had agreed to resolve disputes with the health care providers through arbitration. And some of the arbi-

<sup>115</sup> The arbitration clause itself provided (in bold face capitals!) that "there shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis." *Kristian*, 446 F.3d at 31.

<sup>116</sup> See *Stone & Webster, Inc. v. Triplefine Int'l Corp.*, 118 F. App'x 546 (2d Cir. 2004); *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996). Compare *CIT Project Finance, L.L.C. v. Credit Suisse First Boston LLC*, No. 600847/03, 2004 WL 2941331 (N.Y. Sup. Ct. June 17, 2004), a distinguishable case in which the contract gave the arbitrator power to decide only a narrow question whose resolution did not dispose of the claim.

<sup>117</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

<sup>118</sup> See the decision of the English House of Lords with respect to awards in non-Sterling currency: *Lesotho Highlands Dev. Auth. v. Impreglio SpA* [2005] 3 W.L.R. 129, 3 All E.R. 789 (Eng.). The 1996 Arbitration Act permitted arbitrators to make foreign currency awards, but only "unless otherwise agreed" by the parties. See generally William W. Park, *The Nature of Arbitral Authority: A Comment on Lesotho Highlands*, 21 *ARB. INT'L* 483 (2005).

<sup>119</sup> *PacifiCare Health Sys. v. Book*, 538 U.S. 401 (2003), reversing *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002).

<sup>120</sup> 18 U.S.C. §§ 1961-1968 (2000). Section 1964 provides that persons injured by violations of RICO shall recover "threefold the damages he sustains" as well as attorney's fees.

tration agreements to which they had agreed were explicit in prohibiting arbitrators from awarding punitive damages.<sup>121</sup>

The Supreme Court allowed the arbitrators themselves to determine, as an initial matter, whether they could grant treble recovery under the RICO, notwithstanding the contract limitation on punitive damages. While the case is sometimes presented as an example of judges deferring to arbitrators on jurisdictional matters, the Court in fact followed a different (and rather murky) line by denying that it was engaged in jurisdictional analysis at all.

In a relatively brief opinion by Justice Scalia, a unanimous Supreme Court upheld the health care organizations' right to compel arbitration. Justice Scalia asserted that it was not clear (at least to him) that the power to award punitive damages presented a gateway "arbitrability question," which is to say, a jurisdictional issue.

The key to the Court's reasoning lies in its assumption about the ambiguity of the term "punitive damages" and the nature of treble damages in the RICO statute. The Court suggested that some judicial decisions had given treble damages a compensatory character, "serving remedial purposes in addition to punitive objectives."<sup>122</sup> Consequently, the Court expressed agnosticism about whether an arbitrator would or would not interpret the punitive damage prohibitions in a way that might cast doubt on the permissibility of treble damages.<sup>123</sup>

In essence, the Court decided not to decide but to pursue a "wait and see" policy. On the theoretical level, therefore, the case cannot be said to give the arbitrators' power to make final a determination on the matter of their authority. Justice Scalia might have been saying no more than that the matter is not ripe for determination until the court knows whether the arbitrators will in fact exceed their jurisdiction or violate public policy.<sup>124</sup>

Justice Scalia, however, added to the suspense with an intriguing footnote. "If the conceptual ambiguity [about what the prohibition on punitive damages might mean] could itself be characterized as raising a 'gateway' question of arbitrability," he reasoned, then "it would be appropriate for a court to answer it [the arbitrability question] in the first instance."<sup>125</sup> The Court then concluded,

<sup>121</sup> The various agreements provided either that (i) "punitive damages shall not be awarded [in the arbitrations]," (ii) "arbitrators . . . shall have no authority to award any punitive or exemplary damages" or (iii) "arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages." *PacifiCare*, 538 U.S. at 405.

<sup>122</sup> *Id.* at 406. Referring to statutory remedies such as those at issue in RICO claims, Justice Scalia described treble damages as lying "on different points along the spectrum between purely compensatory and strictly punitive awards." *Id.* at 405.

<sup>123</sup> "[W]e do not know how the arbitrator will construe the remedial limitations," wrote Justice Scalia, and thus it would be "mere speculation" (using the vocabulary of an earlier decision in *Vimar Seguros y Reaseguros, S.A. v. Sky Reefer*, 515 U.S. 528 (1995)) to presume that arbitrators might deny themselves the power to grant punitive damages. The Court would not take upon itself the authority to decide "the antecedent question" of how the ambiguity concerning punitive damages is to be resolved. *PacifiCare*, 538 U.S. at 405-07.

<sup>124</sup> Of course, when an arbitration award can be enforced against assets abroad, this may be of little consequence.

<sup>125</sup> *PacifiCare*, 538 U.S. at 407 n.2. But the footnote continues that the phrase "question of arbitrability" should be applicable only in the kind of narrow circumstance where contracting



“Given our presumption in favor of arbitration, we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability.”<sup>126</sup>

What the Court seems to be saying is that arbitrators would construe a particular expression in the contract (“punitive damages”) in the same way they interpret any other contract phrase, taking into account the context of the parties’ relationship and other terms in the agreement. While the meaning given to these terms might affect one side’s recovery, it would not enlarge arbitral authority, given that it is already broadly defined under the common arbitration clause, which gives arbitrators the job of interpreting the language in the parties’ agreement and the applicable law, even (and especially) in close cases.

The troubling aspect of this decision lies in its susceptibility to giving arbitrators de facto power to determine their own jurisdiction to award treble damages simply by interpreting the notion of punitive damages. If the arbitrators held that treble damages under RICO were not “punitive” in the context of the physicians’ claims, then by definition these damages would be within their jurisdiction. Such a result may not be implausible under the circumstances. Arguments have been made that treble damages make “rough justice” compensation for the disruption that may result from contract breach but be difficult to quantify. The slope, however, does not continue indefinitely. At some point language imposes definite boundaries.

#### D. *The Next Step*

As with many legal problems, the heart of jurisdictional dilemmas in arbitration lies in the fact that language, while often ambiguous, is not infinitely plastic. Some questions fall within the spectrum of matters the parties intended the arbitrator to decide. Others do not.

To illustrate, the Second Circuit has held that an International Chamber of Commerce (“ICC”) arbitrator may address claims for costs incurred in a court action allegedly brought in breach of an arbitration clause.<sup>127</sup> This is hardly remarkable. In reaching the conclusion that the parties bargained to arbitrate “questions of arbitrability,” the court simply noted that the parties had signed a broad arbitration clause, which would be given effect under the ICC Rules.<sup>128</sup>

Let us change the facts a bit, however, and imagine a contract that provides for arbitration under the rules of the American Arbitration Association (“AAA”). If the claimant files its request for arbitration with the ICC, perceived as more likely to appoint an arbitrator predisposed to claimant’s case, it

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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.” There are those who might observe, however, that the heart of arbitral jurisdiction turns on what the parties were “likely to have thought” about the decisions an arbitrator was supposed to make.

<sup>126</sup> *Id.* (internal citation omitted).

<sup>127</sup> *Stone & Webster, Inc. v. Triplefine Int’l Corp.*, 118 F. App’x 546 (2d Cir. 2004); *Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115 (2d Cir. 2003). The arbitration clause at issue covered disputes “concerning or arising out of [the parties’] Agreement.”

<sup>128</sup> *Shaw Group*, 322 F.3d. at 125.

is difficult to see how an individual appointed by the ICC (an unlikely event given the well-known vigilance of ICC staff) could render a final and binding award, absent modification of the parties' agreement.

Much of the work in allocating tasks between courts and arbitrators will turn on characterization of the analytic task. One formulation might ask, "May persons who call themselves arbitrators determine their jurisdiction free from judicial review?" An affirmative answer would be conceptually problematic, implying that a piece of paper labeled "award" could be enforced without regard to the legitimate mission of the alleged arbitrator.

An alternate phraseology could pose the jurisdictional question differently: "By agreeing to arbitrate, did the parties intend to waive their right to have courts determine a particular jurisdictional precondition to arbitration (such as time bars) or a particular substantive question (such as liability for costs of litigation begun in breach of the arbitration agreement)?" Answering the latter question would require a factual inquiry into the parties' true intent. In some instances the consent may reveal itself only through an explicit agreement. In other circumstances, presumptions and inferences might suffice. On this matter, considerable analytical toil remains.

#### CONCLUSION: COSTS AND BENEFITS

The arbitrator's right to rule on jurisdictional matters implicates both the timing of court intervention to examine arbitral authority and the finality of arbitrators' decisions on their own authority. The former looks to when judges should examine arbitral authority, while the other addresses the extent (if any) of court deference to arbitrators' jurisdictional decisions.

With respect to the timing of judicial intervention on matters of arbitral jurisdiction, the United States may well have something to learn from the French. By leaving most judicial intervention until after the award, when the arbitrator's decision is known, the Gallic approach limits opportunities for dilatory measures that might derail or sabotage an arbitration. Moreover, postponing jurisdictional motions may preserve judicial resources. Judges need not get involved if the case is settled or decided in a way acceptable to both sides. If the case does not settle, judges may receive the benefit of an arbitrator's discussion and findings on the jurisdictional questions, particularly for international cases where reasoned awards remain the norm.

The French rule has its cost, however. A person who never agreed to arbitrate may need to hedge bets by taking part in a bogus arbitration, at substantial cost of time and money. Herein lies the proverbial fly in the Gallic ointment: Innocent respondents must wait until the end of proceedings to challenge even the most obvious jurisdictional defects. While frivolous attacks on arbitral authority are sometimes used as a delaying tactic, unwarranted arbitrations also pose their own risk. Believing its chances better in arbitration than in court, a claimant playing hardball might bring an arbitral proceeding with weak jurisdictional foundation, hoping for an easy win that will exert undue settlement pressure.

Out of fairness, a rapid and summary mechanism should exist to permit courts to halt proceedings when the arbitration clause is manifestly void or

clearly against public policy. Without some evidence of a valid arbitration agreement, the respondent's burden of costly hearings (a possible default award being the only alternative) usually outweighs any societal benefit from reducing dilatory tactics in other cases. An arbitration would go forward only if a court has been *prima facie* satisfied of the validity and application of the arbitration clause (no forgery or gun at the head during signing), subject to more extensive review at the award stage.

Moving from the timing of judicial intervention to the finality of an arbitrators' jurisdictional rulings, observers will note the need for nuanced navigation between two extremes. One resides in a lack of judicial rigor in examining the validity of agreements to arbitrate questions of arbitrator jurisdiction. The other lies in blanket rejection of all such clauses, no matter how clearly the evidence might support their validity in a given factual context.

Arbitrators should never be given jurisdiction on the basis of a mere contract recital (such as "the arbitrator has jurisdiction over all questions"), absent verification of the true consent of the party sought to be bound. That being said, the concern that contracts will be misinterpreted need not lead to a public policy that bans all forms of jurisdictional clauses in arbitration. Legitimate bargains should not be trumped by fears of occasional abuse.

While not entirely free from doubt, the American cases are probably getting things more right than wrong. While exceptions exist, judges in the United States seem to be asking the correct question: What did the litigants actually agree to arbitrate? On public policy issues, of course, arbitrators can never be empowered to make binding determinations. Judicial review will in all events involve examination of the validity of the initial agreement, allegedly granting the arbitrators power on questions related to their authority. Such agreements will be most plausible when related to jurisdictional matters such as the time limits, scope of procedural powers, and range of issues submitted to arbitration.

When one side challenges the very existence of an arbitration clause, the arbitrators' authority does not always yield to routine presumptions. Many cases present their own peculiar facts and issues. Was the arbitration clause forged or signed with a gun at the head? Did the corporate officer who executed the contract have power to commit the company? With respect to such questions, the supervisory court must be satisfied of the parties' informed and explicit consent (normally in the form of a distinct second agreement) to submit the precise jurisdictional question to arbitration.

In all these lines of inquiry, legal maxims can facilitate analysis by communicating general norms quickly. The expressions lose their value, however, if subject to the type of thoughtless mimicry that parrots perform. When lawyers invoke contract recitals divorced from context, much as wizards incant magic words, the result is a voodoo jurisprudence that has no place in a healthy legal system. The articulation of workable standards requires thoughtful analysis by policy-makers and practitioners aiming toward an arbitral system that gives effect to the parties' legitimate expectations about what questions are subject to binding arbitration.