



ARBITRAL JURISDICTION IN THE UNITED STATES: WHO DECIDES WHAT? WILLIAM W. PARK*

[Keywords to follow]

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Introduction

In law as elsewhere, the United States often follows its own evolutionary path, marching to the beat of a different drummer. One intriguing manifestation of American exceptionalism can be seen in the principles applied to determine arbitral jurisdiction.

The framework for arbitration in the United States derives from the Federal Arbitration Act, a statute of ancient vintage that might be called either venerable or antiquated depending on perspective.¹ The Act says little about arbitral jurisdictional, except that awards may be vacated if arbitrators exceed their powers.² Consequently, courts have undertaken the task of elaborating general standards and protocols to address questions related to arbitral authority.

Following a line of judicial decisions on the matter, American judges hearing jurisdictional challenges normally begin by asking who (court or arbitrator) determines "arbitrability". The question is not "who decides" but rather "who decides who decides?" Pursuant to this exercise, what might otherwise seem a jurisdictional question can be transformed into a matter of substance for the arbitrator to decide with finality.

Imagine, for example, that an arbitrator attempts to consolidate multiple claims into a single "class action" proceeding. One party objects that such consolidation lies beyond the arbitrator's power. A judge hearing the challenge might begin *not* by asking whether class action arbitration should be ordered, or even whether the arbitrator has authority to make such an order. Rather, the starting point for analysis would be to ask whether a court should be deciding *either* matter. If the judge reads

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1. The core of the Act (9 U.S.C.) dates from 1925, when the general provisions now found in Ch.1 were enacted. In 1988 Congress added two sections addressing (i) the Act of State doctrine and (ii) appeals from court orders to stay litigation or compel arbitration. Chapter 2 was enacted in 1970 to implement the New York Arbitration Convention with respect to foreign and "non-domestic" awards. In 1975 the Act grew to include Ch.3, enforcing the Panama Convention for arbitration involving Latin American parties.

2. 9 U.S.C. § 10(a)(4).

the relevant contract as entrusting arbitrators with the job of ruling on the scope of their power concerning class actions, then the arbitrators themselves decide the matter. That ruling would be entitled to the same deference as a determination on the substantive merits of the case.

If the judge does allocate this "arbitrability question" to the arbitrators, their first order of business would be to ask, "Does a proper construction of the contract give us authority to order a class action arbitration?" Only if the answer is "yes" do the arbitrators consider the appropriateness of actually directing consolidation into a class action.

It is important to remember that such grants of jurisdictional authority are not automatic, and do not constitute "legal fictions". Concrete contract language must express the parties' intent to have arbitrators decide questions related to their authority.

In practice, much will depend on how a question is presented to the reviewing court. Labeling a controversial matter as "substantive" creates a presumption that it should be given to the arbitrator. By contrast, calling a question "jurisdictional" moves it to the realm where judges normally expect to exercise heightened scrutiny over the parties' intent about who decides the matter. As a springboard for analysis, therefore, let us begin by looking at the nature arbitral power itself.

Jurisdictional Basics

The Nature of Arbitral Authority

In commercial disputes, several terms get pressed into service almost interchangeably to address which (if any) aspects of the controversy should be decided by arbitrators rather than courts. The labels include "jurisdiction", "authority", "power", "mission" and (particularly in the United States) "arbitrability". Each might be applied, for example, to describe the nature of disagreements over a parent company's duty to arbitrate pursuant to a clause signed by its subsidiary, or an arbitrator's power to decide tort claims and to award punitive damages.

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

(A) Professor of Law, Boston University. Portions of this article have been adapted from a report to the 2006 ICCA Conference. Copyright 2007, William W. Park.

of defects in arbitral authority related to: (i) the existence and validity of an arbitration agreement; (ii) the scope of authority (substantive and procedural); and (iii) public policy. There is no magic in this 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 has an effect regardless of what the contract might say.

Existence and Validity of the Agreement to Arbitrate

With respect to the existence of the arbitration clause, it will be highly unlikely that an arbitrator will be able to make a final jurisdictional ruling. Any enforcement forum will want to safeguard against awards made against persons who did not agree to arbitrate. The arbitrator might make an initial interpretation of whether a non-signatory was bound to arbitrate, but would not normally have the last word on the matter.³

With respect to the existence and validity of the arbitration clause, questions arise with respect to several common subjects: the power of state instrumentalities to bind the government itself to arbitrate;⁴ waiver of right to arbitrate, for example by initiation of court litigation or undue delay;⁵ survival of an arbitration clause after assignment;⁶ and limitation of action periods.⁷ It might be asserted that no valid agreement to arbitrate exists because of alleged forgery, fraud or duress, or lack of authority by the individual who executed the contract.⁸ An argument might be made that a non-signatory corporation must arbitrate on the basis of its conduct implying consent to an arbitration commitment signed by an affiliate.⁹ Or an assertion might be made that the corporate veil should

3. Final arbitral determination would be possible only pursuant to a second arbitration agreement. See *The Emmanuel Cocolotronics* [1982] 1 All E.R. 823 (charter party terms incorporated into bill of lading), discussed below.

4. 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 initiated by a government minister with the ambiguous words "approved, agreed and ratified." Cour de cassation, January 1987, Cass. civ. Irc, 1987 J.D.I. (Clunet) 469 (commentary by Ph. Leboulanger), reprinted in 26 I.L.M. 1004 (E. Gaillard trans. 1987).

5. See *Cabinetree of Wis. Inc v Kraftmaid Cabinetry Inc* 50 F.3d 388 (7th Cir. 1995).

6. See *Hewlett-Packard Co v Berg* 61 F.3d 101 (1st Cir. 1995).

7. 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).

8. See *Three Valleys Mun. Water Dist. v E.F. Hutton & Co* 925 F.2d 1136 (9th Cir. 1991). 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); *Sphere Drake Ins. Ltd v All Am. Ins. Co* 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v Advent Int'l Corp* 220 F.3d 99 (3d Cir. 2000).

9. See *ICC Award No.4131 of 1982, Dow Chemical v Isover St Gobain* (upheld by the Paris Cour d'appel, October

be pierced on a ground such as undercapitalization. The process for constituting 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.¹⁰

Scope of Authority

By contrast, the arbitrator's power to address the scope of his or her authority 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 related to the range of matters covered by the arbitration clause.

Frequently invoked questions of scope relate to the arbitral jurisdiction over tort claims and statutory causes of action.¹¹ An arbitrator might be asked to decide questions that one side asserts were never submitted to arbitration.¹² Or it might be asserted that certain remedies (such as attorneys' fees or punitive damages) fall outside the arbitrator's mission. Procedural powers constitute a particularly fertile ground for jurisdictional conflict, including the arbitrator's right to consolidate proceedings, to punish non-production of documents, or to award compound interest.

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. The restrictions on arbitral power often take the form of limits on subjects that may be arbitrated (such as competition

21, 1983, [1984] Rev. Arb. 98) permitting joinder of non-signatories on the basis of the so-called "group of companies" doctrine. The award can be found in Sigvard Jarvin & Yves Derains (eds), *1 Recueil des Sentences Arbitrales de la CCI, 1974-1985* (1990).

10. For an analogous problem, see *Maritime International Nominees Establishment v Republic of Guinea* 693 F.2d 1094 (D.C. Cir. 1982). The Swiss aspect of the case (Geneva Office des Poursuites) was reported at 26 I.L.M. 382 (1987). Interpreting the parties' intent as to the constitution of the arbitral tribunal becomes problematic when courts face pathological clauses lacking particulars about the situs or institutional rules. 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).

11. See, e.g., *Mobil Oil Indonesia Inc v Asamera Oil Ltd* 487 F. Supp. 63 (S.D.N.Y. 1980).

12. 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 held not to bar lawsuits for fraudulently inducing the investor's tax shelter participation. Compare *Reddam v KPMG LL* 457 F.3d 1054 (9th Cir. 2006), where a tax shelter sponsor was bound to arbitrate on the basis of an arbitration clause in a brokerage contract. See also *Vassalluzzo v Ernst & Young LLP* 2007 WL 2076471 (Mass. Super. Ct. June 21, 2007), where the arbitration clause in an engagement letter was found to cover some but not all transactions giving rise to a malpractice action for advice on an unsuccessful tax shelter.

claims), imposed by the legal system asked to enforce the arbitration agreement or the resulting award.¹³ Or, public policy may be implicated by an award giving effect to conduct that the forum does not wish to condone, such as sale of arms to terrorists or reinstating a pilot dismissed for showing up drunk at the cockpit. The legal system draws boundaries around an arbitrator's power in order to safeguard norms that affect all of society.¹⁴

As discussed more fully below in connection with the co-called 2007 "Fairness Act," American consumer and employment transactions present special public policy wrinkles. Unlike many countries, the United States has no general national statute that serves to protect consumers and employees against abusive arbitration agreements. To a large extent, this American exceptionalism finds its roots in yet 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 protect consumers and employees through ordinary contract principles. On a case-by-case basis, doctrines such as "unconscionability" and "mutuality of remedy" have been pressed into service to safeguard the interests of weaker parties to adhesion contracts.¹⁵

13. 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). In the United States, subject matter barriers to arbitration have fallen steadily during the past few decades (antitrust in 1985, age discrimination in 1987, and securities actions in 1989), some restrictions remain. Certain circuits (albeit the minority) still prohibit arbitration of warranty claims under the Magnuson-Moss Warranty Act. See *Koons Ford of Baltimore v Lobach* 398 Md. 38 (2007). The arbitrability of insurance claims remains very much an issue in domestic cases. But see *Murphy Oil USA Inc v SR Intern. Business Ins. Co* 2007 WL 2752366 (Slip Opinion, W.D. Ark., 2007), holding that the state law limits on arbitrability of insurance claims (which take precedence over federal law through the McCarran-Ferguson Act) apply only to domestic transactions.

14. In some cases, public policy limits may apply 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) (conspiracy and tax evasion in connection with abusive tax shelters) where the court refused to allow arbitration of the defendants' right to have their legal fees paid by the employer, positing that arbitration involves "unpredictable timing and the likelihood of delay." *United States v Stein* at 255.

15. 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. For another case touching on a number of trouble spots, see *Simpson v MSA of Myrtle Beach* 373 S.C. 14 (2007), where

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). The former sounds in jurisdiction, while the latter relates to admissibility. 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.¹⁶ The claim is properly before the arbitrators, and thus the arbitrators' decision would usually *not* be reviewable in court.¹⁷

Admissibility often touches on whether a claim is ripe for adjudication, or whether arbitral preconditions (such as mediation) have been met. Time bars frequently pose conceptual difficulties, requiring distinctions between (i) statutes of limitations, denying recovery if suit is not brought within a specific period after the cause of action arises, and (ii) eligibility requirements, prohibiting arbitrators from hearing claims more than a fixed number of years after the alleged wrong occurred. 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 the right to arbitrate. While arbitration eligibility requirements might be drafted or interpreted to serve also as bars to bringing a cause of action (and such seems to be the practice), no general principle requires that a jurisdictional restriction necessarily be co-extensive with a limit on recovery.

a South Carolina court invalidated as "unconscionable" an arbitration clause in an automobile sales contract, citing the absence of any requirement that the dealer arbitrate, restrictions on punitive damages and a bar of class action claims by the consumer.

16. Other illustrations of pre-conditions to recovery can be found in long-term supply contracts, which often provide for arbitration of disputes about price adjustments. Frequently, modification will require the arbitrators first to find a change in market conditions and 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 merits of 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 J. Paulsson, *International Law, Commerce & Dispute Resolution: Liber Amicorum In Honour Of Robert Briner* (2005), p.601.

17. 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.

An Arbitrator's Mistake: Out of Bounds or Simply Wrong?

Jurisdictional challenges remain neutral of the merits of the case. They relate to the question of whether arbitrators have gone (or will go) out of bounds. At stake is *not* whether respondent 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 power. The challenge may be directed at the case in its entirety, or 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).¹⁸ In the United States, excess of authority sometimes overlaps with notions related to legal error when courts set aside awards for "manifest disregard of the law."¹⁹

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.²⁰ 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. As with most legal problems, the difficulties lie at the fringes.²¹ 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.²²

18. 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".

19. 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).

20. 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.

21. 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).

22. The world of education provides a relatively simply illustration of the difference between simple mistake

In deciding challenges to arbitral authority, the parties' intent must 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. 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 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.

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 rare (perhaps due to an *in terrorem* effect of court scrutiny), extreme examples do exist. A Florida "arbitrator" once conducted over one hundred "arbitrations" against a single bank, awarding credit card holders the precise amount of each cardholder's outstanding debt to the financial institution. The bank, however, had never agreed to have any of the cases decided by that "arbitrator" or anyone appointed by the service provider of which he was sole owner.²³

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"

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.

23. *Chase Manhattan Bank USA N.A. v Nat'l Arbitration Council Inc* 2005 WL 1270504 (M.D. Fla., 2005). Mr Charles Morgan acted as sole arbitrator under the auspices of the National Arbitration Council (NAC), notwithstanding that relevant arbitration clauses listed three other arbitral institutions (American Arbitration Association, JAMS, and National Arbitration Forum) to provide the arbitrators. Ultimately, a federal court enjoined Mr. Morgan and his company from conducting arbitrations involving Chase Manhattan.

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.

This should not be surprising, given the varying manifestations of consent in aspects of life other than arbitration. Only the most unromantic 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 agreement to hold hands, while consent to be married normally requires a higher degree of formality, evidenced by ceremony and explicit words of acceptance.

The Kompetenz-Kompetenz Doctrine(s)

The Core Principle: No Need to Stop the Arbitration

On matters of arbitral authority, the judicially-created principles that guide American courts often intersect with a spectrum of notions grouped under the rubric *Kompetenz-Kompetenz* (literally "jurisdiction on jurisdiction"), and sometimes called *compétence-compétence* by speakers who prefer a French rather than German label. At a minimum, the term means that arbitrators may rule on their own authority without having to stop the proceedings when a jurisdictional question arises. As we shall see, the term's broader ramifications give it a chameleon-like quality that changes color according to the background of its application.²⁴

In Germany, the term originally had a more particular meaning, related to judicial practice during much of the last century. Prior to adopting the UNCITRAL Model Law in 1998, German courts recognized that litigants might grant an arbitral tribunal power to rule on its own jurisdiction pursuant in a way that dispensed with subsequent judicial review.²⁵ The so-called *Kompetenz-Kompetenz-Klausel* was deemed sufficient to insulate the arbitrator's jurisdictional decision from judicial scrutiny.²⁶ Although the doctrine has been abandoned in Germany, it has to some extent been resurrected (albeit quite by accident) in the American practice of allowing the "arbitrability question" to be submitted for arbitration, free from judicial review.

24. See generally Pierre Mayer, "L'Autonomie de l'arbitre dans l'appreciation de sa propre competence", 217 *Recueil des Cours* 320 (Academie de droit international de La Haye 1989); Gary Born, *International Commercial Arbitration*, 3rd edn, (forthcoming 2008), Ch.6; Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration* (1989), Chs 4 & 5 at pp.177-274.

25. In a landmark decision, Germany's highest court held that parties by contract could submit disputes about arbitral authority to binding arbitration. *Bundesgerichtshof*, May 5, 1977.

26. The prevailing opinion in Germany now seems to hold that such *Kompetenz-Kompetenz* clauses are invalid, and that parties may not restrict judges from examining arbitral jurisdiction in the context of challenges to awards. *Bundesgerichtshof*, January 13, 2005, III ZR 265/03.

Aside from this historical context, however, what is commonly called *Kompetenz-Kompetenz* constitutes less a single rule than a constellation of concept. Its core principle serves to protect against an arbitration being derailed before it begins. The arbitral tribunal (and/or the relevant arbitral institution) need not halt its work just because one side questions its authority. Recalcitrant parties can still mount troublesome court challenges (even if not ultimately successful) designed to slow the train. However, the principle avoids conceptual barriers to arbitration that would exist if a legal system considered powers of judges and of arbitrators to be mutually exclusive. When questions are raised about the extent of an arbitration clause, the arbitration may still proceed until a court of competent jurisdiction says otherwise.

In the United States, however, 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.²⁷ The arbitrators might 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 will the related judicial actions, and may step in from day one, at any time in almost any circumstance.²⁸

Nevertheless, 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. Proceedings will not be disrupted through a simple allegation that an arbitration clause is unenforceable. 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. The arbitration

27. 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, 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.

28. 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). By contrast, in Germany courts 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. See ZPO, § 1032(2).

clause may be found to be robust enough to cover the controverted dispute.

In any event, whether a judge or an arbitrator ultimately decides any particular case depends on nature of judicial intervention and the finality of an arbitrator's jurisdictional decision, which are addressed in the next section.

Timing, Finality and Review Standards

To say that arbitrators may make jurisdictional decisions begs three further questions. One relates to the timing of judicial intervention: when should courts intervene to consider challenges to arbitral authority? Another concerns the effect of an arbitrator's jurisdictional determination: what finality (if any) that should be accorded to the decision? The final question asks what standards courts will apply in reviewing an arbitrator's jurisdictional decision: full scrutiny or *prima facie* review? Each becomes relevant whenever litigants disagree on who consented to what.

In commercial arbitration,²⁹ answers to these questions derive largely from national law and institutional rules,³⁰ making it more accurate to speak of *Kompetenz-Kompetenz* doctrines in the plural. To illustrate, in the United States courts may entertain applications for jurisdictional declarations at any time, and may order full examination of the parties' intent to arbitrate.³¹ If German courts are asked to hear a matter which one side asserts must be arbitrated, they decide immediately on the validity and scope of the arbitration agreement.³² In neighboring France, such challenges normally wait until an award has been made.³³ In England, litigants have a right to declaratory decisions on arbitral authority, but only if they take no part in the arbitration.³⁴

Timing

An initial 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). 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

29. A different regime obtains for ICSID arbitration, which relies on an internal annulment process, rather than review by national courts. See Art.52, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965.

30. 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 Art.41; International Chamber of Commerce (ICC) Rules of Arbitration Art.6 (1998) [hereinafter ICC Rules]; London Court of International Arbitration (LCIA Rules Art.23 (1998).

31. See *Sandvik AB v Advent Int'l Corp* 220 F.3d 99 (3d Cir. 2000).

32. Zivilprozeßordnung (ZPO) § 1032(1) (Ger.) [hereinafter ZPO].

33. Nouveau code de procédure civile Art.1458.

34. English Arbitration Act § 72 (1996).

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.

Let us imagine that an accountant files an arbitration seeking payment of fees from a client, and the client denies having agreed to arbitrate. Should a judge entertain a "mid-arbitration" request to examine the validity of the arbitration clause? Or should the client have to wait until an award has been rendered, and then seek vacatur for alleged jurisdictional excess? Does the answer change if the dispute resolution process begins in court, with the client suing the accountant for malpractice for negligent tax advice? In that event, should the court stay the lawsuit until an award is rendered, or examine the alleged arbitration agreement immediately.

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. 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.

In France, courts refrain from entertaining any jurisdictional motions until *after* an award has been rendered. If an arbitrator has already begun to hear a matter, courts must decline to hear the case. The judge may 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*).³⁵

The arbitrators thus have the first word on jurisdiction. This version of *Kompetenz-Kompetenz* lays down two 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. However, the so-called "negative effect" of the principle speaks to courts, telling the judge to wait until arbitration ends before inquiring about the validity or effect of an arbitration clause.³⁶

By contrast, 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 determinations would usually be made pursuant to litigation under ss.3 and 4 of the Federal Arbitration Act, providing for stay of court litigation and orders to compel arbitration.³⁷ This approach means that a party who never

35. Nouveau code de procédure civile Art.1458.

36. See Emmanuel Gaillard, "L'effet négatif de la compétence-compétence" in Jacques Haldy, Jean-Marc Rapp and Phidias Ferrari (eds), *Études de Procédure et d'Arbitrage en l'Honneur de Jean-François Poudret* (1999) p.385.

37. 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, SA v M/V Sky Reefer* 515 U.S. 528 (1995), judges determined arbitral jurisdiction at the

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.

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. As mentioned, 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. 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. On the other hand, judicial resources may be conserved by delaying review until the end of the process. The case may settle, avoiding any jurisdictional challenge in court.³⁸ 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. This yields a potential for higher quality jurisdictional review by judges, who will be able to benefit from the arbitrators' earlier consideration of the matter.

From the litigants' perspective, perhaps the most significant aspect of the French model lies in its tendency to reduce the prospect of dilatory tactics designed to sabotage 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.³⁹ A cynic, of

outset of the process, rather than waiting to see what the arbitrators would decide. See also the US 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).

38. 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 (2000). 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 Goodyear 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.

39. For a case of the *Cour de Cassation* interpreting the French version of *compétence-compétence* in the context of an ICC arbitration, see *SARI Méta System France*, Cass. 1re civ., December 1, 1999, holding that only the clear nullity of an arbitration agreement would bar application

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.

Finality

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. 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.

Again, 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.

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. Nevertheless, judges must still examine arbitral authority. However, the analysis takes place at the level of 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.

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.

For example, an engine manufacturer might seek arbitration to collect the price of products sold. In response, the buyer might assert that the arbitration clause was void, asking for a stay of arbitration, asserting that the person who signed the clause lacked authority. Or, the buyer might bring a court action on claims for engine malfunction, asserting that hidden defects caused

of the principle by which an arbitrator was permitted to rule on his own jurisdiction.

an explosion leading to personal injury and lost profits. In this event it would be the manufacturer who would raise the matter of arbitration, contending that the dispute should be referred to arbitration.

In either instance, judges must decide whether to examine arbitral jurisdiction in depth or to do so under a summary (*prima facie*) standard. In the latter event, fuller review would be left to a 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.⁴⁰ 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.

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.

In Switzerland, courts asked to appoint an arbitrator will normally apply a *prima facie* standard (*examen sommaire*) in deciding whether the arbitration clause is valid.⁴¹ However, Swiss courts engage in fuller consideration of jurisdiction (at least as to law) in the context of award review. When the arbitration has its seat abroad, courts make a comprehensive review of the validity of the arbitration clause. By contrast, when the arbitration is held in Switzerland, judges may engage only in a summary examination of arbitral jurisdiction, delaying fuller review until the award stage.⁴² 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.⁴³ The jurisdictional foundation

40. N.C.P.C. Art.1458 permitting pre-arbitration review only to determine if the arbitration clause is “clearly void” (*manifestement nulle*). Standards for judicial review are contained in other provisions, for example Art.1502 for international arbitration.

41. Loi fédérale sur de droit international privé (LDIP) Arts 7 & 179(3).

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

43. 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.

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.⁴⁴

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,⁴⁵ or to recognize an award rendered abroad under the New York Arbitration Convention.⁴⁶ 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.

The “Arbitrability Question”

A Preliminary Inquiry

In the United States, the term “arbitrability” has served diverse purposes, often with little thought given to the conceptual difference between or among different functions. One usage describes the *subjects* that arbitrators may or may not address, pursuant to policy constraints imposed by the legal system.⁴⁷ For example, one might say that antitrust and securities disputes are generally “arbitrable” but that child custody battles are not.

44. 9 U.S.C. § 4 provides that courts may compel arbitration “upon being satisfied that the making of the agreement for arbitration . . . is not in issue.”

45. 9 U.S.C. § 10 permits vacatur of an award “where the arbitrators exceeded their powers.”

46. 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 Convention, see *Yusuf Ahmed Alghanim & Sons v Toys ‘R’ Us Inc* 126 F.3d 15 (2d Cir. 1997).

47. Some authors (particularly Francophone) use “objective arbitrability” in a way that overlaps “subject matter arbitrability” to address public policy constraints on the objects of arbitration, including matter not “capable of settlement by arbitration” under the New York Arbitration Convention. These authors also speak of “subjective arbitrability” to address limits on persons or collectivities that may be actors (subjects) in the arbitral drama. For example, some legal systems restrict arbitration by state entities and consumers. Objective arbitrability thus relates to *what* may be arbitrated, while subjective arbitrability looks at *who* may arbitrate. See Bernard Hanotiau, *L’Arbitrabilité* 45-93 (2003) (296 *Recueil des cours, Académie de Droit International de la Haye*, 2002 Lectures); Ph. Fouchard, Emmanuel Gaillard & Berthold Goldman, *Traité de l’Arbitrage Commercial International* (1996), pp.534-558 (arbitrabilité subjective) and pp.559-589 (arbitrabilité objective).

In addition, American courts often speak of “arbitrability” to designate what in other countries would be more familiar as a “jurisdictional issue” related to the proper scope of arbitral authority under the contract. Such arbitrability relates to the parties’ intent under a particular agreement. Thus, for example, saying that class action claims are “arbitrable” means that the parties’ contract provides for such claims to be decided by an arbitrator.

Pushing analysis one step further, American courts often speak of the “arbitrability question” to describe a threshold jurisdictional issue that may be open to decision by either the judge or the arbitrator, depending on what the contract says about the extent of the arbitrator’s power.⁴⁸ After looking at the terms of parties’ agreement, a court might find that the parties wanted arbitrators, not judges, to decide the particular jurisdictional controversy. If so, the arbitrator’s decision will be final. Or, the court might decide that the jurisdictional question cannot be arbitrated, and decide the matter itself.

In determining who decides what, courts sometimes combine analysis of contract language with educated assumptions about the parties’ true expectations. One recent decision held that courts, not arbitrators, should assess whether the right to arbitrate was waived by active participation in court litigation.⁴⁹ The court admitted that the parties might have asked the arbitrator to decide this matter. The relevant arbitration clause, however, did not do the trick, even though it provided for arbitration of “arbitrability of any claim or dispute.” The court reasoned that no “clear and unmistakable intent” existed with respect to procedural questions arising only *after* the parties had actively litigated the underlying dispute in court.⁵⁰

In essence, the American approach contemplates multiple levels of decision-making, with a concomitant increase in linguistic complexity. A court first determines whether the parties wanted the jurisdictional issue (“arbitrability question”) to be decided by a judge or given to an arbitrator. If the contract says the question goes to an arbitrator, then he or she must construe the contract language to determine the limits of his or her authority. If the arbitrator finds that the agreement provides for arbitration of disputes about jurisdiction, then the arbitrator proceeds to decide not only the substantive merits of the dispute, but also the extent of his or

her power. To return to the class action example, let us assume that investors seek arbitration against a corporation for non-payment of dividends. The claim is filed on behalf of all similarly situated shareholders. If the respondent corporation resists, someone must determine whether the parties’ contract permits an arbitrator to order class action arbitration. Surprisingly, perhaps, that question will not necessarily be answered by the court.

Rather, the court would initially ask who—judge or arbitrator—makes the determination about the arbitrator’s power. If the judge finds that this “arbitrability question” is for the arbitrator, then the arbitrator’s decision on the matter would normally receive judicial deference in any subsequent challenge.⁵¹

The court and the arbitrator each construe the contract, but for different purposes. The court asks whether parties wanted the arbitrator to rule on the admissibility of class action arbitration. The arbitrator then asks whether the contract did in fact confer power for him or her to direct arbitration on a class action basis. If it does, the arbitrator determines whether class action is appropriate under the circumstances. These decisions, of course, remain preliminary to any determination on the merits of claims against the corporation for non-payment of dividends.

This process for determining “who decides who decides” does not prevent courts from entertaining a request to intervene 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.⁵² Courts remain free to order jurisdictional questions to be resolved by a jury.⁵³ 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 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

48. See Alan Scott Rau, “The Arbitrability Question Itself” (1999) 10 Am. Rev. Int’l Arb. 287.

49. *Ehleiter v Grapetree Shores Inc* 482 F.3d 207 (3rd Cir. 2007), involving a casino dealer who slipped and fell in the casino, and then brought a personal injury action against the casino’s owner/lessor. Presumptions and default rules, of course, can play a role in determining party intent, particularly in the absence of clear language. In this regard, it would not be unreasonable to presume (as did the court in *Grapetree*) that without explicit language to the contrary the parties intend court-related litigation activity to be supervised by judges, given their familiarity with the facts of the litigation.

50. The court concluded, “Litigants would expect the court, not an arbitrator, to decide the question of waiver based on litigation conduct, and the Agreement here does not manifest a contrary intent. *Ehleiter v Grapetree Shores Inc* 482 F.3d 207 at 222.

51. See also *Surgutneftegaz v Harvard College* 167 Fed. App’x 266 (2d Cir. 2006) (directing the arbitrators to determine whether allowing the classand. 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. October 11, 2007). Whether all courts understand the Supreme Court’s instruction on this matter remains open to question. See *Stolt-Nielsen SA v Animalfeeds Int’l Corp* 435 F. Supp. 2d 383 (S.D.N.Y. 2006).

52. See 9 U.S.C. § 3, providing that federal courts shall stay competing litigation “upon being satisfied that the issue involved in such [judicial] suit or proceeding is referable to arbitration”.

53. 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).

[used in the sense of jurisdiction] shall be decided by the arbitrator.”⁵⁴

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. 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.”⁵⁵ 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.⁵⁶

The Dictum in First Options

To understand the “arbitrability question” approach, the most convenient starting point might be *First Options of Chicago v Kaplan*.⁵⁷ In dictum, this US 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

54. See *PaineWebber Inc v Bybyk* 81 F.3d 1193 at 1199 (2d Cir. 1996); *Alliance Bernstein Inv. Research & Mgmt. Inc v Schaffran* 445 F.3d 121 at 125 (2d Cir. 2006).

55. 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 Cardega* 546 U.S. 440 at 447–448 (2006). See generally, Robert H. Smit, “Separability and Competence-Competence in International Arbitration”, (2002)13 Am. Rev. Int’l Arb. 19, 34–36.

56. 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.

57. *First Options of Chicago v Kaplan* 514 U.S. at 943.

level of visibility and authoritative endorsement for such deference.⁵⁸

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)?

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. Whether Manuel and Carol Kaplan 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.⁵⁹ 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.⁶⁰ 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.”⁶¹

58. See *AT&T Techs. Inc v Commc’ns Workers of Am.* 475 U.S. 643 (1986).

59. *First Options* 514 U.S. at 943.

60. 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.

61. *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 at 583, n.7 (1960). Invocation of these labor cases must be approached with caution, however, since the statutory basis for labor arbitration in the United States lies in s.301 of the Labor-Management

This 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.

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 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.

Amplifying the Dictum

To gain a deeper perspective on how American jurisdictional methodology plays itself out in practice, we might examine three problems not uncommon to commercial arbitration provide the context: time limits for bringing a claim; consolidation of several proceedings; and categories of claims carved out of the arbitration agreement.

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.⁶² 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.⁶³

In *Howsam v Dean Witter*,⁶⁴ the drama played itself out through an investment in limited partnerships in

Relations Act of 1947 (commonly called the “Taft-Hartley Act”), rather than the Federal Arbitration Act.

62. 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.

63. 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.

64. *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.

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.⁶⁵ 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 decides on “eligibility” requirements, the US Supreme Court held that time limits were for the arbitrator. An opinion by Justice Breyer paid lip service to the principle that judges normally decide gateway jurisdictional matters unless the parties clearly provided otherwise. The opinion then went on to find the parties’ intent that 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.⁶⁶

Class Actions

A plurality of the Court followed a similar line of reasoning in *Green Tree Financial Corp v Bazzle*,⁶⁷ 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,

65. NASD Code of Arbitration s.10304 (formerly r.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.” *Howsam v Dean Witter Reynolds Inc* 537 U.S. 79 (2002) at 81.

66. The court also noted that s.10324 of the NASD Rules (formerly r.35) gave arbitrators power to “interpret and determine the applicability of all [NASD code provisions.]” *Howsam v Dean Witter Reynolds Inc* 537 U.S. 79 (2002) at 86. For another case on time limits, see *MCI Telecommunications Corp v Exelon Industries, Inc* 138 F.3d 426 (1st Cir. 1998) (time limits for challenging award do 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. April 13, 2006) (time bar for challenging clause).

67. *Green Tree Financial 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 Federal Arbitration Act should not apply in state courts.

the two actions were consolidated and proceeded to arbitration before the same arbitrator.⁶⁸

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.⁶⁹ The US 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.⁷⁰ The state court decision was vacated and remanded for further consideration.⁷¹

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."⁷² On the other side of the argument, the

68. *Green Tree Financial Corp v Bazzle* 539 U.S. 444 (2003) at 449.

69. The South Carolina Supreme Court had determined that the loan contracts were silent with respect to class action. By contrast, at the US 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.

70. *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.

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

72. Prior to *Bazzle*, the Federal Arbitration Act did not authorize forced joinder of different arbitrations except as agreed by the parties or pursuant to a statute that explicitly so provides. See *United Kingdom v Boeing Co* 998 F.2d 68 (2d Cir. 1993). That result might in some instances be modified by state statute. See, e.g., Mass. Gen. Lawsc.251, § 2A (2007), which calls for consolidation as provided in the Mass. R. Civ. P. 42, permitting joinder of actions "involving a common question of law or fact." In *New England Energy Inc v Keystone Shipping Co* 855 F.2d 1 (1st Cir. 1988) it was

arbitration clause did provide for arbitration to resolve controversies arising from "the relationships [plural] that result from this contract."

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.⁷³ 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. 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. However, it is by no means certain that the arbitrators' mistake (if it was one) could be characterized as "manifest disregard" of law, since the job of interpreting the parties' intent (implicating mixed questions of fact and law) falls to the arbitrators.

Some drafters now include bans on class actions in the relevant contract language. At least for consumer cases, such clauses remain of doubtful validity, except for the possibility of severing the class action prohibition.⁷⁴

"Whistle Blowing"

The American approach to "arbitrability questions" might also be illustrated by the federal court of appeals decision in *Alliance Bernstein Investment v Schaffran*⁷⁵ 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.⁷⁶ The employment relationship was subject to rules of the National Association of Securities Dealers (NASD), which provided for arbitration, except with respect to

held that a federal court in Massachusetts may consolidate related arbitrations pursuant to state statute, cf. Cal. Civ. P. Code § 1281.3.

73. *Stolt-Nielsen SA v Animalfeeds Int'l. Corp* 435 F. Supp. 2d 382 (S.D.N.Y. 2006).

74. See *Kristian v Comcast Corp* 446 F.3d 25 (1st Cir. 2006), 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, and then struck down the prohibition after severing it from the main agreement. The arbitration clause itself provided (in bold capitals) that "there shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis." Compare *Discover Bank v Superior Court* 113 P.3d 1100 (Cal. 2005), declaring a class action waiver unconscionable, and *Strand v U.S. Bank Nat'l Ass'n* 693 N.W.2d 918 (N.D. 2005), upholding such waivers.

75. *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 (2006) 17 *World Arb. & Mediation Rep.* 171, 172.

76. 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).

claims of discrimination.⁷⁷ 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.⁷⁸ 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.

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.⁷⁹

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.

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.⁸⁰ A printed form's mere recital of the arbitrator's power cannot be

77. 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.

78. 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.

79. 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.

80. This is exactly what happened in *Astro Valiente Compania Naviera v Pakistan Ministry of Food & Agriculture* (The Emmanuel Colocotronis No.2) [1982] 1 All E. R. 823. Buyers of wheat refused to arbitrate a dispute with the shipper over demurrage, on the theory that the arbitration clause in the charter party had not been incorporated in the bill of lading. The parties submitted to

confused with a genuine grant of authority for arbitrators to determine their authority. Without such a separate agreement, the suggestion that arbitrators determine the existence of the arbitration clause in a final and binding fashion would bring to mind the legendary Baron Münchhausen pulling himself up by his own pigtail. It would assume the very proposition (arbitral power) that must be proven. Absent a clause accepted by the person sought to be bound, the label "arbitrator" designates little more than an intermeddler or imposter.

Any contract giving an arbitrator power to determine who agreed to arbitrate should 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 binds not only the buyer, but also its parent entity, perhaps on a theory that one acted as agent for the other.

After a dispute arises, nothing prevents the parent from agreeing to ask an arbitrator to determine whether it was in fact bound by the arbitration clause signed by its subsidiary. The arbitral tribunal to whose authority the parent has consented under the second agreement would be convened to determine who was bound under the first agreement, and would do no more than decide the merits of a question of fact and/or law about the scope of the initial agreement.

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*⁸¹ 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. Faced with an argument that the contract's non-assignment provision covered the arbitration clause, the court held that the arbitrators' jurisdiction was a question for the arbitrators themselves to decide. Much of the court's reasoning rested on the arbitration rules of the International Chamber of Commerce (mentioned in the contract), which call for jurisdictional objections to be referred to the arbitrators as long as the International Chamber of Commerce is *prima facie* satisfied that an arbitration agreement exists.⁸² On this basis, the court reasoned that the parties had agreed to submit the jurisdictional question to arbitration. On closer examination, the decision might reveal itself as an

ad hoc arbitration the question of whether the arbitration clause was incorporated into the bill of lading. Arbitrators held that buyers were bound to arbitrate, based on language in the bill of lading providing "All other conditions ... as per ... charter party".

81. *Apollo Computer Inc v Berg* 886 F.2d 469 at 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 SA v Raytheon European Management and Systems Co* 643 F.2d 863 (1st Cir. 1981).

82. ICC Rules Art.6(2). At the time, the applicable rule was found in Art.8 and referred to the "*prima facie*" existence of the arbitration agreement, rather than the ICC Court being *prima facie* satisfied.

exercise in circular reasoning. If the arbitration agreement was in fact automatically terminated by the assignment, then the ICC Arbitration Rules become relevant.⁸³ The problem is not that the parties lacked power to arbitrate a jurisdictional question, but whether they actually did so.

Arbitral Jurisdiction and Contract Interpretation

The Pacificare Decision

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' fees⁸⁴ and punitive damages,⁸⁵ or the right to make an award in foreign currency.⁸⁶

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, including the applicable rules.⁸⁷ The struggle between these principles can be illustrated by *PaciFiCare Health Systems v Book*,⁸⁸

83. By contrast, the lower court rested its decision on a finding that assignment under Massachusetts law bars the delegation of duties but not the assignment of rights, including the right to arbitrate. See *Apollo Computer* 886 F.2d at 472.

84. See *Stone & Webster Inc v Triplefine Int'l Corp* 118 Fed. 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 v Credit Suisse First Boston LLC* No. 600847/03, 2004 WL 2941331 (N.Y. Sup. Ct. June 17, 2004), in which the contract gave the arbitrator power to decide only a narrow question whose resolution did not dispose of the claim.

85. *Mastrobuono v Shearson Lehman Hutton Inc* 514 U.S. 52 (1995).

86. 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.

87. The current version of the American Arbitration Rules (both domestic and international) give extremely broad authority to determine their own jurisdiction with respect to the scope of their powers. See AAA Commercial Rules R-7 (a) and AAA International Rules (ICDR) Art.15(a). Each provides that the tribunal (international version) or arbitrator (domestic version) "shall have the power to rule on [its / his or her] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

88. *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).

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),⁸⁹ 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 arbitration agreements to which they had agreed were explicit in prohibiting arbitrators from awarding punitive damages.⁹⁰

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."⁹¹ 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.⁹²

89. 18 U.S.C. §§ 1961-1968. Section 1964 provides that persons injured by violations of RICO shall recover "threefold the damages he sustains" as well as attorney's fees.

90. 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.

91. *PaciFiCare*, 538 U.S. 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." *PaciFiCare* 538 U.S. at 405.

92. "[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, SA 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

In essence, the Court decided to pursue a “wait and see” policy. Thus the arbitrators were not in fact given power to make final a determination on their authority. Justice Scalia might have been saying no more than that the matter is ripe for determination only when the court knows if the arbitrators will in fact exceed their jurisdiction or violate public policy.⁹³

For better or for worse, however, Justice Scalia added to the suspense with an intriguing footnote. He reasoned, “If the conceptual ambiguity [about the prohibition on punitive damages] could itself be characterized as raising a ‘gateway’ question of arbitrability, it would be appropriate for a court to answer it [the arbitrability question] in the first instance.”⁹⁴ He concluded, “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.”⁹⁵

What the Court seems to say 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 are difficult to quantify. The slope, however, does not continue indefinitely. At some point language imposes definite boundaries.

ambiguity concerning punitive damages is to be resolved. *PacifiCare* 538 U.S. at 405–407.

93. Of course, when an arbitration award can be enforced against assets abroad, this may be of little consequence.

94. *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 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.

95. *PacifiCare* 538 U.S. at 407 n.2.

The Limits of Language

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. If a contract provides for arbitration under the rules of the American Arbitration Association, and the claimant files its request with an alternative arbitral institution perceived as more favorably predisposed toward its claims, it is difficult to see how an individual appointed by the latter institution could render a legitimate award.

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 whether preconditions to arbitration were met, or whether the arbitrators properly interpreted the scope of their own powers. Answering the latter question would require a factual inquiry into the parties’ true intent, which may reveal itself only through an explicit agreement in some instances and through presumptions or inferences in other circumstances.

Looking to the Future

As this note is being written, the United States Congress has been considering an “Arbitration Fairness Act” that would (if enacted) bring sweeping changes to the American arbitration landscape.⁹⁶ Although aimed principally at consumer and employment disputes, the bill contains significant provisions that could bring dramatic changes to all arbitration conducted in the United States.

A bit of background may be in order. American consumers and employees benefit from few systematic statutory schemes similar to those put into place by other industrialized nations to guard against abusive arbitration. As mentioned earlier, the Federal Arbitration Act remains unfettered by any consumer protection regime analogous to those operating in Western Europe.⁹⁷

96. Arbitration Fairness Act of 2007 s.1782, 110th Cong. (2007). The companion bill in the House of Representatives is H.R. 3010.

97. Article 6 of the European Union Council Directive 93/13, providing that “unfair” terms shall not be binding. A Directive Annex provides an indicative list of items to be regarded as unfair, including terms with the effect of hindering a consumer’s right to take legal action or requiring a consumer “to take disputes exclusively to arbitration not covered by legal provisions.” Similar legislation is found in the national law of many of the United States’ allies and trading partners, including

Nor does the American legal system provide special labor courts with jurisdiction over employment disputes, such as the *Conseil de Prud'hommes* in France or the *Arbeitsgerichte* in Germany.⁹⁸ For contracts between parties of disparate bargaining power, the United States has no general tradition of distinctions between pre-dispute and post-dispute arbitration agreements,⁹⁹ or providing special safeguards at the time of signature.¹⁰⁰

While some groups with special political clout have obtained limited special exemptions from status with respect to arbitration,¹⁰¹ such paternalistic regimes remain the exception rather than the rule. State anti-abuse rules have been largely pre-empted by federal law.¹⁰²

In consequence, safeguards against potentially abusive proceedings have been left to judge-made rules about "unconscionable" contracts and "manifest disregard of the law".¹⁰³ Industry groups have generally resisted discussion of broader statutory protection schemes, fearing that the plaintiffs' bar will derail reform proposals to require that contract claims be heard by civil juries, with the expectation of greater recovery for punitive damages and a correlative increase in lawyers' fees.¹⁰⁴

Canada (Ontario Consumer Protection Act, S.O., 2002, c.30, §§ 7 & 8 and Quebec Consumer Protection Act, R.S.Q. c. P-40.1, § 11.1) and the United Kingdom (Art.89(1) of the 1996 Arbitration Act, referring to the Unfair Terms in Consumer Contracts Regulations).

98. See e.g., French Code de procedure civile Art.879, referring employment matters to the *Code du travail*.

99. For example, France distinguishes the pre-dispute *clause compromissoire* from the post-dispute *compromis*, the former being valid only in contracts between merchants (*commerçants*) or persons contracting with respect to a professional activity (*les contrats conclus à raison d'une activité professionnelle*). See C. Civ. Art.2061.

100. In Germany, arbitration agreements in consumer transactions must be contained in a separate document or be certified by a *Notar*. ZPO Art.1031(5). The *Notar* in Germany (like the *notaire* in France, Switzerland, Belgium and other Continental European countries) remains a legal official with greater expertise and no resemblance to the American "notary".

101. For example, automobile dealers may invoke the Motor Vehicle Franchise Contract Act 15 U.S.C. § 1226.

102. See *Doctor's Associates v Casarotto* 517 U.S. 681 (1996); *Allied-Bruce Terminix v Dobson*, 513 U.S. 265 (1995); and *Southland Corp v Keating* 465 U.S. 1. The whole matter of state preemption may come into play in the US Supreme Court review of *Preston v Ferrer* 145 Cal.Rptr.3d 628 (Cal. Ct. App. November 30, 2006), cert. granted, 128 S.Ct. 31 (US September 25, 2007) (No.06-1463).

103. See *Wilko v Swan*, 346 U.S. 427 (1953). Although its holding was overruled in a line of cases allowing arbitration of securities claims, the dictum permitting award vacatur for "manifest disregard of the law" remains robust.

104. See contributions by Messrs. Jack Coe, Richard Hulbert, William Park and John Townsend, Symposium "Whether and How to Amend the Federal Arbitration Act" (April 2004) sponsored by the American Arbitration Association, published in 4 Int'l Arb. News 10 (ABA, Summer 2004). A summary of some of the arguments can be found in William W. Park, "Saving the FAA" reprinted 19 Int'l Arb. Rep.27 (November 2004).

Not surprisingly, this state of affairs has led to backlash. Rightly or wrongly, the present framework for arbitration in the United States has been portrayed as unfair to "the little guy" and out-of-step with the rest of the world.¹⁰⁵ To address this perceived injustice, the Act in s.2(b) provides as follows:

"No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."

In itself, such a change would reduce the scope of arbitrator jurisdiction, in that arbitrators would simply have no power to hear cases involving any of the designated dispute categories. However, for business-to-business arbitration the real bite lies in a provision that would effectively end the arbitrator's power to consider jurisdictional matters.

In what the French might call an *excès de zèle*, the Fairness Act addresses not only consumer and employment transactions, but also arbitration between large corporations run by sophisticated business managers advised by qualified counsel. Section 2(c) of the Act applies to all arbitration, and states as follows:

"An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity of enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement."

This language seems to eliminate the arbitrator's right to rule on jurisdictional questions in contracts between large companies, and might be interpreted to deny arbitrators any authority to address jurisdictional matters, even on an interim (non-binding) basis.¹⁰⁶

The "Fairness Act" would also eliminate another deeply entrenched element of American arbitration, the

105. See generally Jean Sternlight, "Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World" (2002) 56 U. Miami L. Rev. 831.

106. For problematic decision taking exactly that position, see *MBNA America Bank, N.A. v Credit* 132 P.3d 898 (Kan. 2006), where 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 suspicion existed that the arbitration service provider manifested a systematic sympathy toward financial institutions. Under the circumstances, the court need only have noted that the bank provided no evidence of an arbitration agreement. Unfortunately, however, the court added, "When the existence of the [arbitration] agreement is challenged, the issue must be settled by a court before the arbitrator may proceed." *MBNA America Bank, N.A. v Credit* 132 P.3d 898 at 900. Under current federal law, this dictum has no foundation.

"separability" doctrine by which an arbitration clause remains autonomous from the principal agreement which encapsulates it.¹⁰⁷ This widely recognized principle may be even more important than *Kompetenz-Kompetenz* notions.¹⁰⁸ Only time will tell whether the fall-out from concern about consumers and employees will reach that far.

Conclusion

When one side contests the arbitrator's mission or powers, someone must determine the existence, validity, and/or scope of the arbitration clause. Debate on the arbitrators' powers implicates two distinct questions, related to timing and finality of jurisdictional determinations. First, when should courts intervene to examine arbitral authority? Secondly, should an arbitrator's decision on his or her own authority be treated as final?

With respect to the timing of judicial intervention, the United States may well have something to learn from the French paradigm. By leaving most judicial intervention until after the award, when the arbitrator's decision is known, the French approach limits opportunities for dilatory measures that might derail or sabotage 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 a substantial cost in time and money. Innocent respondents must wait until the end of proceedings to challenge even the most obvious jurisdictional defects. While frivolous attacks on

107. In the United States, the autonomy of the arbitration clause was established in a landmark decision where the purchaser of a paint business alleged "fraud in the inducement" in an attempt to have the contract rescinded in a court action rather than before the bargained-for arbitrator. *Prima Paint Corp v Flood & Conklin Mfg. Co* 388 U.S. 395 (1967). The principle was affirmed in *Buckeye Check Cashing, Inc v Cardega* 546 U.S. 440 (2006), in the context of a consumer dispute heard in state court and involving an alleged violation of state statute.

108. The difference between the two doctrines 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 a subsequent dispute, it might be alleged that the person who signed the agreement was not authorized to do so and the consulting agreement was void because payments were earmarked 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

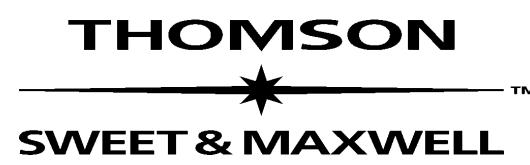
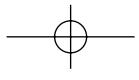
arbitral authority are sometimes used as a delaying tactic, unwarranted arbitrations also pose their own risk.

Some 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 matters of timing to the finality of arbitrators' jurisdictional rulings, the most reasonable solution requires a nuanced navigation between two extremes. Courts should be careful to avoid both (i) a lack of rigor in examining agreements to arbitrate jurisdictional questions and (ii) a blanket rejection of all such clauses, no matter how clearly the evidence supports their validity.

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. A healthy arbitral regime requires thoughtful analysis aimed at giving effect to the parties' legitimate expectations, not thoughtless mimicry in the way wizards incant magic words. However, concern that contracts not be misinterpreted should not lead to a 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 over 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. In any event, the curial court must be satisfied of the parties' informed consent to submit a precise jurisdictional question to arbitration.



Queries from the Typesetter to Sweet & Maxwell:

TS1: Kindly provide the footnote text.

