The Arbitrability Dicta in *First Options* v. *Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?

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I. INTRODUCTION

IN MAY of 1995 the United States Supreme Court handed down a significant decision about the allocation of functions between judges and arbitrators. *First Options of Chicago* v. *Kaplan*[1] arose from an arbitral award rendered against both an investment company and its owners with respect to debts owed to a securities clearing house. The owners argued that they had never signed the arbitration agreement from which the arbitral tribunal drew its power, and consequently were not bound by its award. The Supreme Court held that the scope of the arbitration agreement was a matter for courts to decide independently (*i.e.*, without deference to the arbitral finding on the matter), and affirmed the Court of Appeals' decision that the owners had not agreed to arbitrate.[2] So far so good.

The problematic part of the Supreme Court's opinion lies in dicta suggesting that in some situations (although not under the facts of *Kaplan*) what the Court called 'the arbitrability question itself' may be submitted to arbitration,[3] in which case the courts must defer ('give considerable leeway'[4]) to arbitrators' decisions on the limits of their own jurisdiction.

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1 115 S Ct. 1920 (1995).

2 The Supreme Court also dealt with the standard a court of appeals should apply when reviewing a district court decision that refused to vacate, or confirmed an arbitral award under s.10 of the Federal Arbitration Act. The Court held that a district court's findings of fact should be accepted unless 'clearly erroneous', but that questions of law should be decided *de novo*. The Third Circuit agreed with the owners that they were not bound by the arbitration agreement, and therefore had reversed the District Court confirmation of the award against them.

3 115 S Ct. 1923 (1995).

4 *ibid.*

What exactly this dicta means is unclear. Human nature being what it is, however, the securities industry and other groups relying on arbitration clauses in standard form contracts can be expected to give the dicta an expansive interpretation, tending to further a degree of arbitral autonomy that may be at odds with sound arbitration policy.

II. WHEN AND WHY ARBITRAL JURISDICTION MATTERS

(a) The Public Side of Private Adjudication

As the volume[5] and scope[6] of non-judicial dispute resolution increases, so does the need for scholars to address how courts should deal with jurisdictional challenges in private adjudication. Truly private forms of dispute resolution, such as conciliation and mediation, depend for their effectiveness on the moral force of the adjudicator and the socio-economic pressures brought to bear within trade associations and relatively homogeneous communities that sponsor the adjudicatory process. Victims of procedural irregularity in such non-binding adjudication reserve the right to walk away from their execution, turning the process into little more than expensive foreplay to litigation.[7]

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[5] For example, over the past 20 years, most major arbitration institutions have reported a marked increase in the number of claims filed annually. The American Arbitration Association has indicated an increase from 43,712 total claims in 1977 to 59,424 filed in 1994; the International Chamber of Commerce has witnessed a jump from 250 claims in 1980 to 384 filed in 1994; and the National Association of Securities Dealers showed an increase from 318 in 1980 to 5,554 claims in 1994. American Arbitration Association 1994 Overall Case Filings: Ten Year Analysis, prepared by the Department of Case Administration (Feb. 1995); American Arbitration Association Total Case Filings from 1977-1987, prepared by the Department of Case Administration (1988); *1994 Statistical Report,* The ICC International Court of Arbitration Bulletin, Vol. 6, No.1, May *1995,* at p.3; *Arbitration Cases Handled by Securities Organizations,* Securities Industry Conference on Arbitration, Report 8 (June 1994), at pp. 25-29. This increased importance of arbitration is due in part to overcrowded dockets. According to Judge Irving Kaufman, former Chief Judge of the Second Circuit, the number of law suits filed in the Southern District of New York during his tenure increased by over 430 per cent, from 53,421 in 1949 to 233,293 in 1989. Irving Kaufman, 'Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts' in (1990), *59 Fordham L. Rev.* 1 at p. 3.

[6] Arbitrable disputes now include controversies implicating sensitive public policies such as securities regulation (*Rodriguez de Quijas* v. *Shearson/American Express, Inc.,* 490 US 477 (1989), age discrimination (*Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 US 20 (1991) and competition law (*Mitsubishi Motors* v. *Soler Chrysler-Plymouth,* 473 US 614 (1985).

[7] The terms 'binding' and 'non-binding' are here used with reference to the government-established judicial system. While the settlement of a dispute by a private tribunal (such as a religious body) might be binding under its own 'micro-legal system', it would not necessarily be so under the law of the country in which the private tribunal had its seat, unless of course the disputing parties submitted to the private tribunal's jurisdiction in a form that met the requirements for a binding arbitration agreement. *See Avitzur* v. *Avitzur,* 58 NY 2d 108 (1983), *cert. denied,* 464 US 817 (1983). *Compare Congregation Darech Amuno* v. *Blasof, reported in N.Y. Law J.,* 8 July 1994 at p. 27, col. 13 (order to proceed to arbitration under submission to Beth Din when services disrupted by accusations that rabbi committed rape). On micro-legal systems that may run parallel to those of governments, see W. Michael Reisman, 'Lining up: The Microlegal System of Queues' in (1988) *54 U. of Cinn. L. Rev.* 412; W. Michael Reisman, 'Looking, Staring and Glaring: Microlegal Systems and Public Order' in (1983) 12 *Denver J. Int'l L. & P.* 165.

Arbitration, however, exists in the shadow of public coercion. When one party to an arbitration agreement regrets the decision to renounce recourse to courts, the state lends its power to enforce the agreement to arbitrate. Court proceedings are stayed; arbitral awards are given *res judicata* effect; and the loser's assets may be seized. Therefore the contours of an arbitrator's power must concern judges as well as business managers, if for no other reason than to maintain confidence in the integrity of the judicial system on whose power the arbitral process relies.

Commercial actors will care about the jurisdictional legitimacy of private dispute resolution for reasons different than judges. The business manager's need for some reasonable measure of certainty in contract enforcement requires that arbitrators do more than roll dice or flip coins. Fidelity to the parties' shared *ex ante* expectations in dispute resolution constitutes as basic an element of voluntary and optimally efficient conflict settlement as do speed and economy. Rational business actors will not long tolerate a private adjudicatory scheme that decides cases quickly and cheaply at the expense of respect for the arbitrators' contractually-defined mission.

(b) The Arbitrator: Neither Judge nor Vigilante

Unlike a judge, who receives decision-making authority from the state, or a vigilante, whose role in furthering justice is self-generated, an arbitrator's power derives from the consent of the individuals or entities involved in a particular dispute.[8] Absent this comment, commercial arbitrators will normally have no connection to the controverted event sufficient to justify deference to their authority, either by the parties to the dispute or by courts called upon to recognize and to enforce the arbitral process.

The consent on which private dispute resolution rests is qualitatively different from the implied submission to government courts that arguably results from living in society. Arbitration agreements empower a particular adjudicator to decide specific questions with respect to identified individuals or entities, constrained by the bounds of contractually-conferred authority and the fundamental public interests of jurisdictions that directly or indirectly lend support to the arbitral process.

An efficient and fair arbitration system will implicate several principles that may sometimes be in tension one with another. First, the arbitrator's decision on the merits of the dispute must be final. Second, an arbitral award must be rendered within the scope of the arbitrators' jurisdiction with respect to the persons alleged to be bound and the adjudicated questions. Finally, the arbitral award must not violate basic notions of public policy of the place of the award or its enforcement.

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[8] The state may, of course, supplement the parties' express mission to the arbitrator with standards of fairness and procedural regularity that are imposed as a condition for recognition of the arbitral award.

Renunciation of the right to seek justice through government courts means that an arbitrator has the right to get it wrong, in the sense of evaluating a controverted event differently than would the otherwise competent judge.[9] Assuming the risk of a bad award on the merits of the dispute does not, however, mean giving arbitrators power to decide matters never submitted to them. Therefore the relevant political communities that enforce the arbitral process arguably have a duty to monitor the existence and extent of an alleged waiver of judicial jurisdiction through arbitration.

III. AN OVERVIEW OF *FIRST OPTIONS* V. *KAPLAN*

The United States Supreme Court decision in *First Options of Chicago* v. *Kaplan* serves as a springboard for discussion of the allocation of power between judge and arbitrator.[10] An investment company's losses during the October 1987 stock market crash led to an arbitration award in favour of a securities clearinghouse (First Options) against the company (MK Investments) and its owners (Carol and Manuel Kaplan) to cover unpaid debts owed by the company to the clearinghouse. The 'workout agreement' that submitted to arbitration any disputes arising from the rescheduling of the investment company's debts was signed by the corporation but not its shareholders. Nevertheless, the arbitral tribunal hearing the claim pierced the corporate veil to render an award against the owners as well as their company. This award was confirmed by the federal district court.

The Court of Appeals disagreed with the arbitral tribunal on the matter of its jurisdiction, and determined that the Kaplans were not bound to arbitrate, thus reversing the lower court confirmation of the award. A unanimous Supreme Court affirmed the Court of Appeals, stating that in the case at bar the arbitrability of the owners' debt was a question for the courts.

The Supreme Court distinguished three elements in the interaction of judges and arbitrators: the merits of the dispute (whether the Kaplans were personally

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[9] In mandated, court-annexed, 'arbitration' within the United States however, the parties normally retain a right to a *de novo* trial, making the so-called arbitrator a conciliator in reality. *See* 28 USC § 655. *See generally* Lisa Bernstein, 'Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs' in (1993) 141 *U. Penn. L. Rev.* 2169. Some state statutes, however, seem to ignore the principle of consensuality. See *e.g.* Minnesota's statute requiring arbitration of motor vehicle accident claims not in excess of $10,000 (Minn. Statutes § 65B.525), where the state has in essence given an adjudication franchise to the American Arbitration Association.

[10] 115 S Ct. 1920 (1995). The Supreme Court decided three other cases implicating the validity or scope of an arbitration agreement: *Allied-Bruce Terminix Cos., Inc.* v. *Dobson*, 115 S Ct. 834 (1995) (Congress intended the FAA to extend to the full reach of the Commerce Clause, pre-empting the application of an Alabama anti-arbitration statute); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 115 S Ct. 1212 (1995) (arbitrators had the authority to grant punitive damages despite a choice of New York law which reserves to courts the right to order such damages); *Vimar Seguros Y Reseguros* v. *M/V Sky Reefer*, 115 S Ct. 2322 (1995) (arbitration clause does not violate prohibition on 'lessening of liability' under Carriage of Goods by Sea Act).

liable for the investment company's debt); the arbitrability of the dispute (whether the Kaplans agreed to arbitrate the matter of their liability); and the allocation of functions between courts and arbitrators with respect to determinations of arbitrability (whether courts show deference to arbitrators' ruling on jurisdiction). In dealing with the last of these issues (the respective roles of judges and arbitrators) the Court held that the question of jurisdiction was for courts rather than arbitrators under the facts in *First Options*, which is to say, when jurisdictional issues had not been clearly submitted to the arbitrators.[11]

In the context of the United States' federal system, the *First Options* opinion also commented on the role that state law should play in determinations of arbitral jurisdiction. The Court said that any decisions about whether the parties agreed to submit arbitral jurisdiction to arbitration should be resolved by reference to 'ordinary state law principles governing the formation of contracts', but added a caveat to the effect that any silence about who decides jurisdictional questions should be interpreted against arbitration.[12]

The Court's pronouncements on state law require the exercise of extreme caution when determining applicable *procedural* law in international arbitration.[13] Since in the United States there exists no federal common law of contract, state law would normally determine the validity of an arbitration agreement just as it would determine the validity of any other contract. However, state law must not run afoul of the policies of the Federal Arbitration Act by making the implementation of arbitration agreements more difficult than other contractual commitments. For example, a state might pass a law requiring all contracts to be written in capital letters; but presumably a state could not enact legislation requiring only arbitration clauses to be in capitals.[14]

IV. THE *FIRST OPTIONS* ARBITRABILITY DICTA

The Supreme Court's decision in *First Options* seems clearly correct in its holding. Whether Manuel and Carol Kaplan were bound to arbitrate by virtue of a clause signed by their investment company (for example, under the theory that

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[11] For other lower federal court cases considering the question of who should determine arbitral jurisdiction, see the Eleventh Circuit decisions in *Chastain* v. *Robinson-Humphrey Co.*, 957 F 2d 851 (11th Cir. 1992) and *Wheat, First Securities, Inc.* v. *Green*, 993 F 2d 814 (11th Cir. 1993). Both of these cases cited a test developed by the former Fifth Circuit in *T&R Enterprises* v. *Continental Grain Co.*, 613 F 2d 1272 (5th Cir. 1980), which required a party seeking to avoid arbitration to introduce some evidence to substantiate denial that it was bound by the controverted agreement to arbitrate.

[12] 115 S Ct. 1924. On the other hand, the Court starts with a different presumption as to *what* issues might be covered by an otherwise valid arbitration agreement, assuming that the scales should tip in favour of arbitration on this matter.

[13] See *Allied-Bruce Terminix* v. *Dobson*, 115 S Ct. 834 (1995) and *Mastrobuono* v. *Shearson*, 115 S Ct. 1212 (1995).

[14] See *e.g. Securities Industry Association* v. *Connolly*, 883 F 2d 1114 (1st Cir. 1989). Compare *Casarotto* v. *Lombardi* 901 P.2d.596 (Mont. 1995).

the company had a *de facto* agency relationship with its shareholders) should normally be a question for independent determination by courts.

Problematic dicta, however, suggests that in some cases courts must defer to the arbitrators' decision on their own jurisdiction. The potentially troublesome 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 the matter should not differ from the standard courts apply when they review any other matter that the 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.[15]

In other words, an arbitration agreement covering the merits of the dispute could be supplemented by an 'arbitrability submission' that would in some cases shield the arbitrators' jurisdictional determination from independent judicial scrutiny.[16]

Like the Court's 'second look' dicta in *Mitsubishi*,[17] the dicta says either too much or too little, making it a dangerous instrument in the hands of judges, arbitrators and attorneys with limited understanding of arbitration law and policy. Since awards may still be reviewed for excess of authority under section 10 of the Federal Arbitration Act, judicial deference to arbitrators' decisions on their own jurisdiction may be an illusion no matter how the arbitration clause is drafted. At some point in any chain of agreements, some consensual basis for arbitral authority must exist. On the other hand, courts straining to give meaning to the dicta in a way that reduces their workload might interpret the pronouncement liberally (and incorrectly), such as to permit an inappropriate degree of arbitral autonomy.

Given the longevity of Supreme Court pronouncements in the area of arbitration,[18] one must hope that the Court will soon amplify the dicta's meaning.

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[15] For the initial proposition that arbitrability can be submitted to arbitrators, the Court cited to alleged authority in labour arbitration: *AT&T Technologies* v. *Communications Workers*, 475 US 643 at 649 (1986) and *Steelworkers* v. *Warrior & Gulf Navigation*, 363 US 574 at 583, n. 7 (1960). Citation to this authority is questionable. In the United States, the statutory basis for labour arbitration lies in s. 301 of the Labour-Management Relations Act of 1947 rather than the Federal Arbitration Act. See *Textile Workers* v. *Lincoln Mills*, 353 US 448 (1957). Moreover, neither of the cited cases actually dealt with an agreement to arbitrate the question of arbitrability. In *AT&T Technologies* the Court held that the lower court's decision to allow the arbitrator to decide a question of arbitrability was error. And in *Warrior & Gulf* the Court said that 'it is clear in this case [that] a question of arbitrability is for the courts to decide', 363 US 583, n. 7.

[16] In such cases, the Court said, review must be conducted according to the 'narrow' standard found in s. 10 of the Federal Arbitration Act. Ironically, reference to s. 10 might have the effect of completely eating up the dicta. Grounds for vacatur under s. 10 of the FAA include procurement of the award by fraud or undue means, arbitrator excess of authority, partiality or corruption in the arbitrators, and arbitrator misbehaviour by which the rights of any party have been prejudiced. Federal Arbitration Act, 9 USC § 10.

[17] *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 US 614 at 638 (1985), where the Court said that at the award enforcement stage courts could 'ascertain that the [arbitral] tribunal took cognizance of anti-trust claims and actually decided them'. *See generally* William W. Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration', 63 *Tulane L. Rev.* 647 (1989).

[18] *See e.g.*, the Court's obscure pronouncement on arbitrator 'manifest disregard' of the law in *Wilko* v. *Swan*, 346 US 427 (1953), which has continued to be invoked long after the holding in the case was overruled.

For as it now reads, the dicta can be expected to complicate considerably the respective functions of courts and arbitrators in connection with challenges to an arbitral award. It has always been problematic to draw the thin line between an arbitrator's simple (and non-reviewable) error of fact or law, and an arbitrator's excess of authority, which would normally be subject to challenge in the appropriate court. After *First Options*, however, judges will need to ask not only whether arbitrators exceeded their jurisdiction, but also whether they did so in a context deserving judicial deference. And indeed, within less than a year of the Supreme Court's decision in *First Options*, this new element in analysing arbitral jurisdiction has already begun to sow confusion.[19]

V. WHAT THE DICTA MIGHT MEAN

Even the best of rules can be misunderstood and misapplied, bringing discredit to the objectives they were intended to promote. While an intellect like that of Justice Breyer will deal logically with future variations on the theme of the *First Options* dicta, it is not certain that the dicta will be construed with equal clarity and wisdom by all arbitrators and judges.

The arbitrability dicta in *First Options* lends itself to misunderstanding and mischief principally because the catch-all term 'arbitrability' can cover several elements of the arbitrator's power to hear a dispute: whether the person alleged to be bound did indeed agree to arbitration; the scope of the arbitration clause; and public policy limits on what arbitrators can and cannot decide. As a matter of both logic and sound arbitration policy, only the second of those issues - the scope of the parties' agreement - should be capable of delegation to arbitrators in a single agreement. Regardless of how expansive the words of an arbitration clause might be in granting power to arbitrators, neither the identity of the parties nor the constraints of public policy should be immune from independent review by courts at the arbitral situs or the enforcement forum.

(a) Elements of Arbitrability

As suggested above, whether an arbitrator has jurisdiction to hear a matter will depend on three conceptually distinct (albeit sometimes overlapping) matters:

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[19] *See e.g.* decision by Judge Woodlock in *Paine Webber* v. *Landay*, Civ. Act. No. 94-10957, US Dist. Mass., 21 September 1995, involving the six-year time limit for bringing an arbitration under s. 15 of the NASD Code of Arbitration Procedure. Judge Woodlock uses the term 'arbitrability' to refer to the question of 'whether the parties intended to have an agreement to arbitrate in the first place'. *ibid.* at p. 6 of slip opinion. For an early expression of scholarly concern over the potential for confusion, *see* Thomas Carbonneau, 'Beyond the Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration' forthcoming in (1995) 6 *Am. Rev. Int. Arb* 1.

(i) the existence of the arbitration agreement; (ii) the scope of the arbitration agreement; and (iii) public policy that on occasion overrides the litigants' wishes.

(i) Existence of the arbitration agreement

Whether an arbitration agreement exists on which arbitral jurisdiction might be founded often implicates questions with less-than-obvious answers. Did one company, through a *de facto* or implied agency, bind a related corporate entity to arbitrate? Was the right to arbitrate waived by initiation of court litigation, or by undue delay in filing the claim? Did the arbitration clause survive an arguably impermissible assignment to another party? Was the contract signed by a corporate officer (or officers) authorized to waive the right to litigate in court?

(ii) Scope of the arbitrator's power

Even if a valid arbitration agreement exists, its substantive and procedural limits may be circumscribed in ways that require serious examination. Did the parties intend that tort claims arising out of the contract would be subject to the arbitrator's jurisdiction? Were statutory claims (for example, relating to anti-trust violations) included within the arbitrator's mission? Did the arbitrators exceed their authority by disregarding the applicable law[20] or the basic terms of the contract?[21]

The borders of the arbitrators' power also have a procedural aspect. An arbitral tribunal possesses jurisdiction only if constituted according to the parties' agreement and if respectful of the parties' procedural wishes. If the parties agreed to arbitration by a British barrister in London under the rules of the International Chamber of Commerce, there is no basis to oblige the defendant to participate in AAA arbitration by an American engineer in New York.[22] Interpreting the parties' intent as to the constitution of the arbitral tribunal becomes particularly problematic when courts are called to repair pathological clauses lacking particulars about the arbitral situs or institutional rules.[23] In some cases, the arbitrators' qualifications will be established in part by the institutional rules to which the arbitration agreement refers.[24]

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[20] For example, arbitrators who apply provisions of United States anti-trust law, notwithstanding the merchants' agreement that the contract shall be subject to the laws of another country, might exceed their jurisdiction, unless the mandatory norms of the United States (as place of performance) pre-empt the contractually-designated law. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 US 614 (1985).

[21] *See e.g., Mobile Oil* v. *Asamera*, 487 F Supp. 63 (SDNY 1980).

[22] *See Guinea* v. *MINE*, 693 F 2d 1094 (DCC 1982), and *Geneva Office des Poursuites*, 26 ILM 382 (1987).

[23] *See e.g. Jain* v. *De Méré*, 51 F 3d 686 (7th Cir. 1995); *National Iranian Oil Company* v. *Ashland Oil, Inc.*, 817 F 2d 326 (5th Cir. 1987).

[24] For example, the rules of the International Chamber of Commerce require arbitrator 'independence'. Arbitration qualifications incorporated into a contract through reference to institutional rules often overlap public policy limits on biased arbitrators, just as arbitration rules on notice and the right to present one's case will frequently echo due process requirements of municipal arbitration law.

(iii) Public policy

Notwithstanding the protagonists' desires, arbitration has on occasion been limited for public policy reasons with respect to sensitive subject matters such as competition law, securities regulation or civil rights violations. An attempt to empower an arbitrator to hear a particular dispute might be impermissible because the state has taken a monopoly on implementation of the law in areas where arbitrators (much like foxes guarding a chicken coop) present too great a risk of getting it wrong. Public policy may be invoked as a catch-all prohibition on the arbitration of certain categories of disputes, as well as to protect the integrity of the arbitral process in matters such as arbitrator bias or lack of due process.

(b) Plausible Application of the Dicta

(i) A second arbitration agreement

An 'arbitrability agreement' giving arbitrators sole competence to rule on their jurisdiction could make sense if contained in a truly distinct, and chronologically subsequent, contract that refers to arbitrators any disputes about arbitral jurisdiction arising under a pre-existing agreement. For example, a buyer might allege that an arbitration clause in a purchase contract signed with seller Corporation S also bound its parent Corporation P as well, on the theory that the subsidiary had contracted as agent for the parent. After a dispute arises, nothing would prevent the parent from agreeing to ask an arbitrator to determine whether it was in fact bound by the arbitration clause. The arbitral tribunal to whose authority the parent has consented under the second agreement would be convened to determine whether the parent bound itself under the first agreement. In such a case, an arbitral tribunal so constituted would do no more than decide the merits of a question of fact and/or law about whether the initial agreement empowered the arbitrator to the extent asserted.[25]

(ii) Questions for the arbitrator

CONTRACT TERMS

An arbitration agreement containing language submitting questions of arbitral jurisdiction itself to arbitration might plausibly permit arbitrators to interpret contract terms bearing incidentally on their jurisdiction without later being second guessed by judges. If the contract provided for arbitration of disputes arising out of the sale of fruit, then the arbitrators could rule on whether 'fruit'

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[25] This is exactly what happened in *Astro Valiente Compania Naviera* v. *Pakistan Ministry of Food & Agriculture (The Emmanuel Colocotronis)* No. 2 [1982] 1 WLR 1096; 1 All ER 578. Buyers of wheat at first refused to arbitrate a dispute with the shipper over demurrage. on the theory that the arbitration clause in the charter party had not been incorporated in the bill of lading which by the charter party's terms was to 'supercede' the charter party. The parties submitted to *ad hoc* arbitration the question of whether the arbitration clause had been incorporated into the bill of lading.

was used in the botanical sense (the contents of any developed seed plant ovary) to include pecans as well as apples.

Not all contract terms, however, lend themselves to such binding interpretation by arbitrators. For instance, in the example above, it is not evident that a court should accept an arbitrator's determination that 'fruit' includes typewriters. Similarly, courts presumably would not need to accept arbitrators' interpretation of a clause binding 'Sarah Smith' to include Sarah's colleague Rosemary Ryan on the erroneous assumption that Sarah had given Rosemary a power of attorney.

WAIVER AND DELAY

Arbitrators might also be empowered to deal with jurisdiction-related questions arising out of events subsequent to contract formation. For example, the arbitrator might be permitted to determine whether one party's recourse to courts constitutes waiver of the right to compel arbitration, or whether delay in bringing a claim bars arbitration by virtue of a statute of limitations or an eligibility requirement contained in arbitration rules.[26]

OPEN-ENDED ARBITRATION CLAUSES

In disputes that do not implicate non-signatory parties, an arbitration clause giving arbitrators absolute power to determine their own jurisdiction could be characterized as a clause with open-ended language about the disputes subject to arbitration. The arbitrators' power in a clause covering 'all disputes ever arising between the parties' is still subject to court control, although the broad language in the clause would make it unlikely that courts would intervene.

Even here, however, an arbitrability agreement contained in the same contract as the arbitration clause itself can be problematic. Imagine that a university president asks a lawyer to represent his wayward child in litigation arising out of an auto accident. A retainer agreement signed by the president includes an arbitration clause stating that the arbitral tribunal will have power to decide questions relating to its own jurisdiction. After a dispute about the number of hours spent on the accident case is referred to a properly constituted arbitral tribunal, the lawyer (who is also an adjunct member of the university's law faculty) includes in her submission to the arbitrator a claim for a substantial salary increase for the course she teaches. Must a judge defer to an arbitral tribunal's decision to hear the salary claim as well as the retainer disagreement? Normally one would think not, at least if the president was contracting in a personal capacity (as parent) rather than as an academic administrator.

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[26] *See e.g., Paine Webber* v. *Landay,* discussed *supra* (six-year time limit for bringing claim under NASD Code of Arbitration Procedure held to be a question for arbitrator to decide); *Smith Barney* v. *Luckie,* New York Ct. App., 21 February 1995, 63 *US Law Week* 2531 (7 March 1995) (statute of limitations questions must be resolved by courts; New York law not pre-empted by Federal Arbitration Act; compare New York cases cited in *Paine Webber* v. *Landay, supra,* at n. 5 of Judge Woodlock's opinion); *Zwitserse Maatschappij van Levensverzekering en Lijfrente* v. *ABN International Capital Markets,* 996 F 2d 1478 (2nd Cir. 1993) (initiation of judicial proceedings in the Netherlands resulted in waiver of right to arbitrate); *Khalid Bin Alwaleed Foundation* v. *E.F. Hutton,* US Dist. Ct. ND Ill., ED (1990), reported in XVI *Yearbook Comm. Arb.* 645 (1991) (participation in pre-trial discovery did not constitute waiver of right to arbitrate).

(c) Dubious (Mis)Applications of the Dicta

(i) Binding non-signatories through voodoo jurisprudence

The Supreme Court in *First Options* did not limit its dicta to arbitral determinations of contract terms, or to arbitrability agreements separate from and subsequent to the contested arbitration agreement. There is a risk, therefore, that a clause purporting to submit arbitrability to the arbitrator, inserted in the same contract as the arbitration agreement, might be interpreted to limit judicial review of an arbitrator's assertion of jurisdiction over a non-signatory to the contract. Overly zealous arbitrators, or insufficiently vigilant courts, might confuse a mere contract recital of the arbitrator's power to determine jurisdiction, with a genuine grant of such power by the person purportedly bound by the arbitration agreement.

The suggestion that arbitrators can determine their own jurisdiction with respect to the identity of the parties, on the basis of a single agreement containing both an arbitration clause and a submission of arbitrability to the arbitrators, brings to mind the picture of Baron Münchhausen pulling himself up by his own pigtail. In many cases such a principle will assume the very proposition (arbitral jurisdiction) that remains to be proven. The careful observer will ask where one finds an 'arbitrator' whose decision is entitled to deference. In the absence of an arbitration agreement accepted by the person alleged to be bound with respect to the dispute in question, the person rendering the award would seem better characterized as a vigilante or an intermeddler than an arbitrator.

To illustrate, imagine an arbitration clause signed by MK Investments in *First Options* that includes the phrase suggested by the dicta: 'The arbitrability question itself is subject to arbitration'. Could the addition of these eight words change the fact that Carol and Manuel Kaplan had not agreed to arbitration? An affirmative answer would suggest a voodoo jurisprudence in which verbal formulae contain power to change rights and duties independent of their context. In an arbitration clause combined with an arbitrability submission, the limits and defects inherent in the arbitration clause itself will usually taint the submission of arbitrability to the arbitrator. Arbitral power ought not to be generated by words unsupported by the consent of the person sought to be bound.

(ii) Prima facie *existence of the arbitration clause*

Even before *First Options*, there were hints that some courts were abdicating responsibility for determining the jurisdictional limits of arbitration clauses. In *Apollo Computer* v. *Berg*,[27] a contract between a Massachusetts computer company and a Swedish distributor was terminated, and the rights of the now bankrupt Swedish

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[27] 886 F 2d 469 (1st Cir. 1989), at 473. *See also* sequel to *Apollo* in *Hewlett Packard, Inc.* 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 *SGS* v. *Raytheon*, 643 F 2d 863 (1st Cir. 1981).

distributor were assigned to a third party. The Massachusetts company claimed that the non-assignment clause in the contract covered the arbitration clause itself, which became void as a consequence of the assignment.

The court held that the arbitrators' jurisdiction over the claims was a question for arbitrators themselves to decide. The arbitral tribunal was appointed pursuant to the Arbitration Rules of the International Chamber of Commerce, Article 8 of which calls for the ICC to refer to the arbitrators any objections to the validity of an arbitration agreement, as long as the ICC is satisfied as to the '*prima facie* existence' of the arbitration agreement. On this basis the court reasoned that the parties had agreed to submit the arbitrability question to the arbitrators.

On closer examination the reasoning in *Apollo* reveals itself to presume its own conclusion. If in reality, on a full examination of the facts of the case, the arbitration agreement was in fact terminated by the assignment, then it is hard to see how Article 8 of the ICC Arbitration Rules could be relevant.

For example, imagine that the arbitration clause had contained a proviso, typed in large bold letters, to the effect that **'THIS ARBITRATION CLAUSE IS COMPLETELY VOID AFTER CONTRACT ASSIGNMENT'**. In such a case, could any arbitrators pull themselves up by their jurisdictional bootstraps? The separability doctrine (discussed *infra*) would not necessarily save an incorrect award on the question, since the invalidity of the arbitration clause itself is at issue. If in this situation the decision about arbitral jurisdiction would be for the courts, why should the result be different when the facts of the case make more complicated the task of sorting through arguments about the validity of the arbitration clause?

As a matter of policy the rule in *Apollo* is also troubling, despite its appeal as a device to reduce crowded dockets. For a private arbitral institution like the International Chamber of Commerce to leave the difficult issues to the arbitrator may be acceptable as an efficiency device if national courts later exercise a fuller control over the clause's validity.[28] However, the aggregate social and economic consequences of such a *prima facie* approach are likely to be less acceptable when a judge imposes state power to enforce an arbitral award without an independent examination of the authenticity and scope of the alleged arbitration agreement. The result may well be a loss of confidence by the business community in both the arbitral system and the judiciary that enforces arbitration agreements and awards.

(iii) Public policy

Public policy limits on arbitrability *per se* are less important than they used to be, in the sense that courts now tend to allow arbitration to proceed with respect to

[28] Even for arbitral institutions, however, this approach may not be free from problems. An arbitration agreement with a forged signature, or a real signature forced by a gun at the head, ought to be no less a complete nullity because it gives the appearance of being valid.

public law claims related to anti-trust, securities regulation, patents, bankruptcy and state franchise statutes.[29] Nevertheless, there still exist situations in which courts might feel it proper to deny arbitrators jurisdiction to hear questions relating to certain statutory claims, out of concern that the arbitrator might 'get it wrong' in a way that injures vital public interest. In such cases, it would be hard to see how any submission of arbitrability to the arbitrator - regardless of whether it was in fact accepted by the parties - could possibly be immune from independent judicial review. To revive an old metaphor, allowing deference to arbitrators' determination of what affects the public would be similar to leaving matters of war only to generals.

VI. ANALYTIC TOOLS

(a) 'Jurisdiction to Decide Jurisdiction'

(i) A tale of several meanings

The opinion in *First Options* took no note of the extensive European literature on the amalgam of concepts referred to as *compétence-compétence* (among francophones) or *Kompetenz-Kompetenz* (among German speakers).[30] This catch-phrase, literally 'jurisdiction concerning jurisdiction', serves as a focal point to analyse precisely the issue raised in *First Options*: who decides - judge or arbitrator - whether Mr and Mrs Kaplan are bound to arbitrate?

The term *compétence-compétence* often links together under a single rubric a constellation of notions that resolve logical difficulties in legal systems where the powers of arbitrators and judges were once seen as mutually exclusive. Most versions of *compétence-compétence* lend themselves to misunderstanding by inexperienced lawyers, and to misapplication by judges seeking to leave to arbitrators (or putative arbitrators) the hard questions which should be answered by courts.[31] At least three different meanings have been given to the term.

ENGLISH COMPÉTENCE-COMPÉTENCE: NO NEED TO STOP THE ARBITRATION

In its simplest formulation, a doctrine of *compétence-compétence* might mean no more than that arbitrators could look into their own jurisdiction without waiting for a court to do so. In other words, arbitrators would not be required to

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[29] In recent years, both inside and outside of the United States, courts have abandoned much of their earlier hostility to arbitration of statutory claims that implicate vital societal interests. *See generally,* William W. Park, *International Forum Selection* (1995) at pp. 97-100.

[30] *See generally, Adam Samuel, Jurisdictional Problems in International Commercial Arbitration* (1989) at pp. 177-185.

[31] Compare the provisions of French NCPC, Articles 1458 and 1466 with the description of *compétence-compétence* in Janet Rosen, 'Arbitration under Private International Law: The Doctrines of Separability and Compétence de la Compétence' (1994) in 17 *Fordham Int'l L.J. 599.*

stop arbitral proceedings to refer a jurisdictional issue to judges.[32] However, the arbitrators' determination about their power might be subject to a court's review of the question at any time, either in connection with a motion to compel arbitration or in the context of parallel judicial proceedings on the merits of the dispute.[33]

THE ARBITRATOR GETS FIRST TRY: THE FRENCH MODEL

In France the doctrine of *compétence-compétence* has served as a timing device to delay court intervention in the arbitral process until *after* an award is rendered. Arbitrators decide jurisdictional questions as a preliminary matter without prejudice to the judiciary's ultimate power to monitor the procedural integrity of the dispute. The French law that gives the arbitrators jurisdiction to decide their own jurisdiction (for example, to pass on the validity and scope of the arbitration agreement),[34] operates in tandem with an explicit statutory disposition requiring courts to stay litigation until arbitration is finished.[35] Article 1458 of the *Nouveau code de procédure civile* provides that if an arbitral tribunal has already taken jurisdiction of a matter, courts must declare themselves incompetent to hear the case. In situations in which an arbitral tribunal has not yet been constituted, court litigation will go forward only if the alleged arbitration agreement is clearly void (*manifestement nulle*).

A COMMON SENSE APPROACH IN SWITZERLAND

Swiss law provides that an arbitral tribunal shall rule on its own jurisdiction, normally ('en général'/'in der Regel') through an interlocutory decision.[36] Moreover, objections to arbitral jurisdiction must be raised prior to any defence on the merits.[37]

Swiss law, however, contains nothing equivalent to the extreme position in Article 1458 of the French *Noveau code de procédure civile*, requiring courts to refrain from hearing challenges to the validity of the arbitration clause until the end of the arbitration. On the contrary, Swiss courts will verify the existence of an arbitration clause, at least in a summary fashion (*l'existence prima facie*), when asked to hear a dispute allegedly covered by an agreement to arbitrate.[38]

Moreover when the arbitral seat lies outside of Switzerland, the Swiss *Tribunal fédéral* has recently called for a fuller examination of the validity of the

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[32] *See e.g.* opinion by Delvin J in *Christopher Brown Ltd.* v. *Genossenschaft Oesterreifchischer Waldbesitzer* [1954] 1 QB 8.

[33] Some state legislation within the United States contains provisions to this effect. *See e.g.*, the Florida International Arbitration Act, Florida Statutes Chapter 684, § 684.06(2). See generally, Carlos Loumiet, 'Introductory Note to the Florida International Arbitration Act' in (1987) 26 ILM 949.

[34] French *Nouveau code de procédure civile*, Art. 1466.

[35] *ibid.*, Art. 1458.

[36] Art. 186 of the *Loi fédérale sur le droit international privé.*

[37] *ibid.*, Art. 186(2).

[38] *See* Art. 7 and 176 of the *Loi fédérale sur le droit international privé.*

arbitration agreement.[39] This inquiry would generally occur at the time the clause is invoked in a Swiss court action on the merits of the dispute, brought in disregard of the alleged arbitration clause. The logic of this distinction - which has not gone unquestioned by Swiss scholars[40] - seems to be that when arbitration occurs abroad, Swiss courts may not later get a chance to correct an arbitrator's erroneous decision about jurisdiction under the questionable agreement.

GERMAN DOCTRINE: LIMITING JUDICIAL REVIEW

For German scholars, 'jurisdiction to decide jurisdiction' (*Kompetenz-Kompetenz*) has taken on a meaning different from the French notion of *compétence-compétence*. In essence, the expression has been used to describe a situation (not unlike that evoked by the dicta in *First Options*) in which an arbitral tribunal is given competence to rule in a binding way (*i.e.*, without independent judicial review) on its own jurisdiction.[41] The concept was discussed in a decision of the Bundesgerichtshof involving a complicated set of relationships arising out of the charter party of a refrigerated transport ship.[42] The court admitted the possibility of an agreement on jurisdiction (*eine Kompetenz-Kompetenz-Klausel*) that would give the arbitral tribunal power to render a binding decision on its jurisdiction, but left to the lower level appellate court the job of deciding whether in fact such a clause in the relevant freight contract existed and bound the party resisting arbitration. The proposed reform of arbitration law in Germany, however, may change this situation.[43]

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[39] *Tribunal fédéral* decision in *Compagnie de Navigation et Transports SA* v. *MSC Mediterranean Shipping Company SA*, ATF 121 III 38 (16 January 1995). The court stated, at p. 42: 'si le tribunal arbitral a son siège à l'étranger, le juge étatique suisse, devant lequel une exception d'arbitrage est soulevée, doit statuer sur ce moyen de défense avec plein pouvoir d'examen quant aux griefs soulevés, et en particulier celui déduit de l'article II al. 3 de la Convention de New York, sans pouvoir se limiter à un examen prima facie'.

[40] See Jean-François Poudret and Gabriel Cottier, 'Remarques sur l'Application de Article II de la Convention de New York' in (1985) 13 *ASA Bulletin* 383. The authors write: 'Si cette solution doit certes être approuvée, la motivation qui la soutient repose toutefois sur une distinction peu convaincante et même infondée . . .' *ibid.* at p. 387.

[41] *See generally* Peter Schlosser, 'The Competence of Arbitrators and of Courts' in (1992) 8 *Arbitration International* 189 at pp. 199-200. See also Klaus Peter Berger, *International Economic Arbitration* (1993) at p. 359.

[42] Zivilsenat. Urt. v. 5 Mai 1977 i. S. Fa. A. GmbH (AG.) w. Fa. F. SA (ASt.). III ZR 177/74. Reported in 68 BGHZ 356. See discussion in Peter Schlosser, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit* (1989) at § 556.

[43] *See Entwufeines Gesetze zur Neuordnung des Schiedsverfahrensrechts*, July 1995, at p. 132, which states that after adoption of draft law s. 1040 (the equivalent of UNCITRAL Model Law Art. 16, discussed *infra*), courts would always have the last word on arbitral jurisdiction. It is not evident (at least to the author of this article) why adoption of the UNCITRAL rule on interim jurisdictional awards - with nothing more - would necessarily preclude the possibility of parties entering into a *Kompetenz-Kompetenz-Klausel*. The draft law s. 1040 provides that arbitrators normally (*in der Regel*) rule on their own jurisdiction in the form of an interim award, which of course would be subject to judicial review.

(ii) Timing alternatives

Judicial control of arbitral jurisdiction traditionally has been afforded either through a right to go to court at any time to contest arbitral power, or by providing for challenges to an arbitrator's competence only after an award is rendered. Each of these positions, however, assumes that the arbitrators' determination of their own jurisdiction ought normally to be subject to some scrutiny by a judge.

Going to court at the beginning of the proceedings can save time and expense for the litigants, assuming lack of any valid arbitration clause of appropriate scope. On the other hand, judicial resources may be conserved by delaying review until the end of the process, when the parties may have settled or, *mirabile dictu*, the arbitrator has gotten it right. As discussed earlier, France endorses the latter view, although with significant differences in their respective approaches. English[44] and American[45] arbitration law traditionally has given parties a right to raise a matter of arbitral authority with the courts even before an award is rendered.

The UNCITRAL Model Arbitration Law provides yet another twist on timing of judicial review by giving the arbitral tribunal an explicit right to determine its own jurisdiction in the form of an interim award subject to challenge within 30 days.[46] The Model Law provision has been seen by some as a compromise between the traditional French and English positions. One may question how much of a compromise the UNCITRAL Model really represents, since arbitrators may choose to delay decisions on jurisdictional matters until the final award. Moreover, the Model Law does not prevent a court from finding the arbitration clause to be void in the context of a judicial action on the substantive merits of the case, assuming that the court has jurisdiction over the relevant parties and/or the dispute.[47]

Yet another option would permit an agreement giving arbitrators competence to rule on their own jurisdiction, such as contemplated by the dicta in *First Options* or the German doctrine of *Kompetenz-Kompetenz.* As discussed earlier, submitting arbitrability questions to arbitrators would be plausible from

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[44] *See e.g.* opinion by Devlin J in *Christopher Brown Ltd.* v. *Genossenschaft Oesterreichischer Waldbesitzer* [1954] 1 QB 8.

[45] Such determinations would usually be made pursuant to litigation under s. 3 and 4 of the Federal Arbitration Act, providing for stay of court litigation and orders to compel arbitration. *See generally* discussion in *Three Valleys Municipal Water District* v. *E.F. Hutton*, 925 F 2d 1136 (9th Cir. 1991). In the recent US Supreme Court decisions in *Allied-Bruce Terminix* v. *Dobson*, 115 S Ct. 834 (1995) and *Vimar Seguros* v. *Sky Reefer*, 115 S Ct. 2322 (1995) judges determined arbitral jurisdiction at the outset of the process, rather than waiting to see what the arbitrators would decide.

[46] Art. 16, Model Arbitration Law of the United Nations Commission on International Trade Law.

[47] Art. 8 of the UNCITRAL Model law provides that a court must refer parties to arbitration only if it finds the arbitration agreement not to be 'null and void, inoperative or incapable of being performed'. *See generally*, Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989) at p. 486. Holtzmann and Neuhaus note that 'a court might still consider the jurisdiction of the tribunal in considering whether a substantive claim should be referred to jurisdiction . . .'. *ibid.*

the standpoint of logic and policy only if limited to the scope of the arbitral mission under an unquestionably valid agreement to arbitrate, or if contained in a truly distinct and chronologically subsequent agreement covering disputes about arbitral jurisdiction arising under a pre-existing arbitration clause.

(iii) The Draft Arbitration Bill in England

The 1995 English Draft Arbitration Bill includes adapted versions of many of the UNCITRAL Model Law's provisions relating to the interaction of judges and arbitrators.[48] Court actions covered by an arbitration agreement must be stayed, unless the agreement is 'null and void, inoperative or incapable of being performed'.[49] The person contesting an arbitrator's jurisdiction due to an allegedly void arbitration clause could do so before the arbitral tribunal, or in the alternative during an independent judicial action on the merits of the dispute, assuming of course that the English court would have jurisdiction over the other party or the dispute. In the former case, any objections to arbitral jurisdiction must be raised either at the beginning of the proceedings or as soon as possible after the questionable matter has been raised.[50] However, a person who takes no part in the arbitral proceedings is not precluded from making a later challenge to the jurisdiction of the arbitral tribunal. Thus the Draft Bill provides for a different result than the one obtained in the 1994 *Westland* decision of the Swiss *Tribunal fédéral*.[51]

(b) Separability of the Arbitration Agreement

Compétence-compétence is distinct from, but intersects functionally with, the notion that an arbitration agreement can be operationally detached from the main contract in which it is found. Often conceptualized as a matter of 'separability', the principle that an arbitration clause possesses contractual autonomy permits the arbitrators to do their job, notwithstanding what their award might say about the validity of the contract in dispute. The separability doctrine gives the arbitration clause the status of a contract autonomous from the principal agreement in which it is encapsulated.[52] Thus arbitrators may decide issues relating to the validity of the main contract (such as allegations of fraud in

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[48] See Consultation Paper on Proposed Arbitration Bill, as recommended by Departmental Advisory Committee on Arbitration Law, Department of Trade and Industry. Scotland has already adopted the UNCITRAL Model Law.

[49] Draft Bill, s. (4)(a). In domestic arbitrations, courts may also refuse to stay litigation on finding 'sufficient grounds for not requiring the parties to abide by the arbitration agreement'. *ibid.* s. 86.

[50] Draft Bill, s. 31.

[51] *See Westland Helicopters* v. *Emirats Arabs Unis, Arabie Saoudite, Etat du Qatar, ABH et Arab Organization for Industrialization (AOI)*, Swiss Tribunal fédéral decision of 19 April 1994 reported in *Recueil official des arrêts du T.F.*, 119 II/1994, at p. 155; also reported in (1994) 3&4 *ASA Bulletin* 404.

[52] *See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 US 395 (1967). Surprisingly, one recent decision has involved *First Options* v. *Kaplan* to question the validity of the separability doctrine. *See Maye* v. *Smith Barnly*, 897 F. Supp. 100 (SDNY 1995).

the inducement, or '*per se*' violations of anti-trust law) without risk that their power will fall retroactively. The autonomy of the arbitration clause recognizes the contracting parties' presumed intent that the arbitrator should be empowered to decide on the validity or survival of the principal commercial contract. Otherwise the arbitrators might be stripped of power at the very moment when evaluating important aspects of the parties' business relationship.[53]

(c) Compétence-Compétence and Separability Contrasted

Separability and *compétence-compétence* can serve much of the same function, in that both notions create mechanisms to prevent a bad faith party from stopping the arbitral proceedings before they have begun. The autonomy of the arbitration clause operates with respect to defects in the main contract which might otherwise taint the arbitrator's jurisdiction.The doctrine of *compétence-compétence*, on the other hand, gives the arbitrator the right to pass upon even alleged infirmities in the arbitration clause itself.

To illustrate the difference between the separability of the arbitration clause and *compétence-compétence*, assume that an arbitration clause has been included in a marketing agreement by which a consultant agreed to help an American corporation obtain a public works contract in the Middle East. It might be alleged both that (i) the person who signed the agreement for the American corporation was not authorized to do so and (ii) the consulting agreement was void because the payments thereunder were earmarked in part to bribe government officials.[54] Separability notions would permit the arbitrators to find the main contract void for illegality without destroying their power under the arbitration clause to do so.[55] Separability would not, however, prevent the court from determining whether the individual who signed the agreement was authorized to bind the corporation to arbitrate; nor would separability save from ultimate annulment or non-recognition an award based on an arbitrator's erroneous assumption about such corporate power.

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[53] Many countries permit the arbitration agreement to be subject to a different law than that of the main contract. On separability, *see generally* Peter Gross, 'Separability Comes of Age in England' in (1995) 11 *Arbitration International* 85 (discussing *Harbour Assurance Co. (UK)* v. *Kansa General International Assurance Co.* [1993] 3 All ER 897); Matthieu de Boisseson, *U&IC Ltd. Droit Français de L'Arbitrage* (1990 2nd ed.) at pp. 482-484 and 491-493 (§§575 and 579); and cases discussed in Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration* (1989) at pp. 155-172.

[54] Or the illegality might be due to the fact that the contract violated anti-trust law or that a lender was not authorized to engage in banking in the relevant jurisdiction. *See Worthen B. & T. Co.* v. *United Underwrit. Sales Corp.*, 251 Ark. 454 (1971) *but see Shepard* v. *Finance Associates of Auburn, Inc.*, 366 Mass. 182 (1974). *Compare Harbour* v. *Kansa General International Insurance Co.* [1993] QB 701 and (1994) 10 *Arbitration International* 194; *Note by Peter Gross*, 'Separability Comes of Age in England' in (1995) 11 *Arbitration International* 85.

[55] Contracts to engage in bribery are generally void throughout the world, while contracts to arbitrate are not. A court probably could, however, refuse to enforce the award if the arbitrator had decided that the contract did *not* implicate bribery when in fact (in the court's view) it did. While the arbitrator's finding on the validity of the contract would normally be entitled to deference, many statutes and treaties contain explicit provisions for judicial refusal to enforce awards that violate public policy. *See e.g.*, French NCPC, Art. 1502(5) and New York Convention, Art. V(2)(b).

On the other hand, under French *compétence-compétence* principles, judges would allow the arbitrators to go to the end of the proceedings and decide the matter of the corporate signature, rather than permitting the question to be referred to the appropriate court at the outset of the arbitration.[56] However, without a separability principle, the doctrine of *compétence-compétence* would not save the validity of an award that had declared the main contract void because of illegality.

(d) Analogies from Administrative Law[57]

Judicial review of an arbitral tribunal's award involves analysis not dissimilar to that required of courts when examining an administrative agency's exercise or determination of its authority. Unfortunately, lawyers seeking useful administrative law analogies are likely to be disappointed. In the United States, some courts have assumed that they owe deference to administrative agency decisions about their jurisdiction.[58] The matter is not free from doubt, however,[59] and courts may claim to show deference to administrative agency decisions while nevertheless reviewing them in a thorough and searching way.[60] Neither do English cases relating to the authority of administrative tribunals always satisfy those looking for relatively clear standards.[61]

Deference to administrative agency determinations is likely to pose less of a risk to both public and private interests than deference to decisions of arbitrators

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[56] German law as it now stands might permit the parties to enter into a '*Kompetenz-Kompetenz* clause' that could insulate the arbitrator's findings on the signature from any judicial review, although it is not clear whether such findings would withstand a challenge to the validity of the *Kompetenz-Kompetenz* clause itself.

[57] *See generally* Ronald Levin, 'Judicial Review and the Uncertain Appeal of Certainty on Appeal' in (1995) 44 *Duke Law Journal* 1081.

[58] *See generally Chevron* v. *Natural Resources Defense Council*, 467 US 837 (1984), involving statutory construction by the Environmental Protection Agency with respect to requirements imposed upon states under the Clear Air Act Amendments of 1977.

[59] *See Mississippi Power & Light* v. *Mississippi ex rel. Moore*, 487 US 354 (1988). The concurring opinion by Scalia questions the intelligibility of a distinction between 'an agency's exceeding its authority and an agency's exceeding authorized application of its authority'.

[60] *See The Business Roundtable* v. *Securities and Exchange Commission*, 905 F 2d 406 (DC Cir. 1990), in which the court held that the Securities Exchange Commission exceeded its statutory authority in promulgating rules barring national security exchanges from listing stock of corporations that restrict per share voting rights of common shareholders. The opinion in Business Roundtable began by saying: 'we assume that we owe the Commission deference under *Chevron USA* v. *NRDC*, even though the case might be characterized as involving a limit on the SEC's jurisdiction'.

[61] *See Anisminic* v. *Foreign Compensation Commission* [1969] 2 AC 147 (reversing decision of the Foreign Compensation Commission notwithstanding statutory provision stating that Commission determinations 'shall not be called into question in any court of law'). *Compare Pearlman* v. *Keepers & Governors of Harrow School* [1978] 3 WLR 736, CA (reversing county court judgment concerning right of tenant to purchase a house, although the County Courts Act provided that 'no judgment [of the county court] shall be removed by appeal, motion, certiorari or otherwise into any other court whatever'). The assumption of both of these cases, to use the words of Lord Denning, seems to have been that 'the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is ... so fine indeed that it is rapidly being eroded ...'. *ibid.* at 743–744.

or alleged arbitrators. The public usually exercises some control over the selection of those who direct government agencies. Selection of arbitrators, on the other hand, is entirely a private matter. At best the arbitrators are selected by the parties. At worst, an arbitral tribunal may be composed of members who have arrogated power over a person who never consented to their adjudicatory authority.

(e) Common Problem Areas

Application - or misapplication - of the basic analytic tools examined above will vary according to the contextual configuration in which jurisdictional questions are asked. The five problem areas sketched below have in the past nourished disagreements about arbitral authority. It is these scenarios that most often provide the soil from which controversy about arbitrators' power has grown.

(i) Ab initio *invalidity of the arbitration agreement*

The validity of an arbitration clause may be in doubt not only because of gross consensual defects related to physical duress and forgery, but also due to the lack of authorized signatures required by the corporate by-laws or inadequate incorporation of institutional arbitral rules.[62]

(ii) Events subsequent to signature

An arbitration clause may become invalid after signature due to procedural events such as assignment,[63] waiver of the right to arbitrate,[64] failure to observe statutory or contractual time limits or undue delay in pursuing a claim.[65]

(iii) Third parties

When arbitrators assume jurisdiction over a non-signatory to the arbitration agreement (perhaps because two or more corporations are related through common ownership), the task of determining who agreed to arbitrate may be complicated by the form in which contract documents were signed.[66] Corporate

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[62] *See Three Valleys Municipal Water District* v. *E.F. Hutton & Co.*, 925 F 2d. 1136 (9th Cir. 1991), concerning securities law violations brought by government entities against investment company. The government entities resisted arbitration on the grounds that the individual who signed the agreement allegedly on their behalf did not have authority to do so. The Court of Appeals held that whether the signatory had authority to bind the plaintiffs was a question for the courts to decide, and remanded the case to the district court for a determination on the matter.

[63] *Apollo* v. *Berg*, 886 F 2d 469 (1st Cir. 1989).

[64] *Cabintree* v. *Kraftmaid*, 50 F 3d 388 (7th Cir. 1995).

[65] *Smith Barney Harris Upham & Co.* v. *Luckie*, 85 NY 2d 193; 647 NE 2d 1308 (1995).

[66] For example, in *South Pacific Properties* v. *Egypt*, 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 initialled by a government minister with the ambiguous words 'approved, agreed and ratified'. *Egypt* v. *Southern Pacific Properties Ltd.*, Judgment of 12 July 1984, Cour d'appel, Paris 1987 JDI (*Clunet*) 129; [1986] *Rev. Arb.* 75. *See* 23 *ILM. 1048 (E. Gaillard trans. 1984).*

restructuring provides another fertile source for confusion as to the proper party to an arbitration agreement.[67]

(iv) Excess of authority

SUBSTANCE

Arbitral authority is generally circumscribed by reference to specific factual and legal controversies. An arbitrator authorized to hear a dispute between two farmers about Blackacre will not normally have power to settle a misunderstanding arising between them concerning Whiteacre, unless of course the arbitral mandate is enlarged to cover the second disagreement. Unfortunately, the line between arbitral excess of authority that makes an award a nullity, and an error of law or fact that makes an award wrong but not *ultra vires*, is thin enough that any judge who ventures to correct excess of authority risks imposing his or her own opinions about the merits of the dispute. Defining arbitrator excess of authority involves subtleties of characterization that sometimes lead to vacatur of an award by a judge who disagrees with the arbitrator's conclusions, while in other cases an award may be recognized although arguably rendered in disregard of the contract terms.

PROCEDURE

In addition to excess of jurisdiction with respect to substantive contract questions, an arbitral tribunal may act outside the limits of their authority set by the parties with respect to procedural matters. For example, the arbitral tribunal may be improperly constituted (under a set of institutional rules other than the ones specified in the contract), or the arbitral tribunal may deny one side its right to be heard during the arbitral proceedings. An increasingly important source of jurisdictional difficulty lies in the multiparty dimension of many business disputes. Problems arise from attempts to consolidate related arbitrations[68] and appoint arbitrators for claims against more than one defendant.[69] For better or worse, the Federal Arbitration Act does not authorize forced consolidation of different arbitration proceedings, even if they present similar questions of law

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cont.

Affirmed by Cour de cassation Judgment of 6 January 1987, Cass. civ. lre, 1987 JDI (*Clunet*) 469 (with commentary by Ph. Leboulanger), *reprinted in* 26 ILM 1004 (E. Gaillard trans. 1987). The ICC award itself (Case No. 3493) is published in 22 ILM 752 and [1986] *Rev. d'Arbitrage* 105. Following a subsequent ICSID award against Egypt (ICSID Case No. ARB/84/3, 20 May 1992), the parties reached a final settlement in December 1992. *See* (Jan. 1993) 8 *Int. Arb. Rep.* 328.

67 *See Kyocera* v. *Prudential Bache* (May 1995) 10 International Arbitration Report No. 5, at p. 7.

68 *See* Michael Kerr's story of the Macao sardine case in Michael Kerr, '*Arbitration* v. *Litigation*' in (1987) 3 *Arbitration International* 79.

69 *Seimens and BKMI* v. *Dutco*, Cour de cassation (France), 7 January 1992, Chambre Civile No. 1, Cass., (1992) *Rev. d'Arbitrage* 470. (two defendants and a three person arbitral tribunal).

and fact.[70] Forced consolidation will depend on whether the arbitration takes place in a jurisdiction (like Massachusetts) that does provide for joinder of related claims.[71]

(v) Public policy and the interaction of choice-of-law and choice of forum

An arbitrator will not always be able to apply the party-chosen law when mandatory norms of the place of contract performance trump the otherwise applicable choice-of-law principles. For example, an arbitrator deciding a dispute involving sales within New York could probably not ignore the Sherman Act or other United States anti-trust laws, even though the parties had instructed application of Swiss rather than American law.[72] But by applying the mandatory norms of the place of contract performance, the arbitrator may exceed his or her jurisdiction under the law of a country called to enforce the award or monitor the integrity of the process. In the above example, the arbitrator who applied American anti-trust rules even though the parties asked for a decision according to Swiss principles could expose the award to annulment for excess of authority in an arbitral situs that did not share the United States' perspective on the proper role of competition law.

VII. CONCLUSION

In *First Options* v. *Kaplan*, the United States Supreme Court reaffirmed the basic principle that the scope of an arbitration agreement is normally a matter for courts to decide independently of the arbitrators' own jurisdictional findings. For better or worse, however, the Court also suggested in dicta that when 'the arbitrability question' was submitted to the arbitrators, an arbitral tribunal's decision on its own jurisdiction might be entitled to judicial deference. The approach evoked by this dicta might make sense in certain limited contexts, in

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[70] *See United Kingdom* v. *Boeing*, 998 F 2d 68 (1993). The United Kingdom moved to consolidate arbitrations with Boeing and Textron, Inc., both of which had contracted with British Ministry of Defence to develop an electronic fuel system. The Court of Appeals ruled that the district court cannot order consolidation of separate proceedings absent the parties' consent, distinguishing the Court's prior decision in *Neurus Shipping*, 527 F 2d 966 (2nd Cir. 1975).

[71] *See, e.g.*, Massachusetts Gen. Laws, c. 251, § 2A; California Code of Civil Procedure, § 1281.3. It has been held that the Massachusetts statute will withstand challenges based on pre-emption under the Federal Arbitration Act. *See New England Energy* v. *Keystone Shipping*, 855 F 2d 1 (1st Cir. 1988). The laws of several non-American jurisdictions, notably Hong Kong and the Netherlands, contain provisions authorizing court-ordered consolidation of different arbitrations. *See* s. 6B of the Hong Kong Arbitration Ordinance, Ch. 351, applicable to domestic arbitration, but not contained in the UNCITRAL Model Law adopted for international arbitration. The Netherlands consolidation provisions are contained in s. 1046 of the Dutch Code of Civil Arbitration Law Procedure, discussed in Albert Jan van den Berg, R. van Delden and H. J. Snijders, *Arbitration in the Netherlands* (1993).

[72] *See* n. 19 *supra*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 US 614 (1985). Pro-consumer usury prohibitions might also impose themselves on the arbitration of a loan transaction expressly made subject to the laws of a country without limits on interest rates.

particular when the arbitrability submission is contained in an agreement chronologically distinct from the arbitration clause in question. In other contexts the dicta can be expected to invite considerable mischief. Arbitrators and judges must be careful to distinguish between cases in which the power to determine arbitral jurisdiction really was conferred on the arbitrators by the person allegedly bound to arbitrate, and a simple contract recital (perhaps in a pre-printed form), purporting to confer such power on the arbitral tribunal.

If arbitration is to fulfil its promise as a dispute resolution system that enhances efficient and neutral contract enforcement, the scope of this 'arbitrability dicta' requires clarification. Courts in the past have rightly had to struggle with the delicate distinction between an arbitral award that is wrong in law (normally not reviewable) and an award that was rendered in excess of the arbitrator's authority (subject to full and independent judicial scrutiny). It would be regrettable if the *First Options* dicta were to trigger abdication by ill-informed judges of this judicial function in promoting the integrity of the arbitral process.