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NAVIGATING THE “GATEWAY” TO INTERNATIONAL ARBITRATION IN THE U.S. COURTS – A DECADE OF ADVENTURES, POST-HOWSAM

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I. INTRODUCTION

The Supreme Court of the US coined the notion of there being a “gateway” to arbitration in its 2002 decision in *Howsam v. Dean Witter Reynolds, Inc.*, which defined “gateway” issues as “dispositive” questions that determine whether an issue will “proceed to arbitration on the merits.”¹ In cases governed by the Federal Arbitration Act, the Court explained, “a gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide;”² however, there may be certain “gateway matters” of arbitrability that the arbitrator is empowered to decide.³ Thus, in *Howsam*, the Court held that a contractual statute of limitations, applicable to a securities arbitration, was not a “gateway” matter at all, but a procedural question exclusively for the arbitrators to consider.

Under *Howsam*, therefore, a US court’s “gateway” role with respect to arbitration is generally limited to determining whether there exists an arbitration agreement between the parties that covers the dispute. This inquiry may be significant when there are genuine threshold questions concerning the “consent” of the parties to arbitrate (*e.g.*, in disputes over “class action arbitration” and/or involving non-signatories), but in other situations, issues of “consent” are less acute. Indeed, under *First Options* and *Howsam*, the “gateway” role of courts is narrower still where

¹ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

² *Id.* at 84 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995)).

³ *Id.* at 86.

there is “clear and unmistakable” evidence of an intention to submit questions of “arbitrability” to the arbitral tribunal.

As many commentators have already observed, the gateway concept requires us to navigate two competing principles: one, that parties should only be forced to arbitrate that which they have agreed (consent); the other, that arbitration agreements should be construed to give full force and effect to their provisions, and to minimize ways of evading arbitration (effectiveness).⁴ This duality can explain the seemingly different “moods” of the courts in different scenarios: its willingness to be more deferential in some situations (*e.g.*, where there is evidence that the tribunal was granted *kompetenz-kompetenz*, or the ability to decide contested issues of arbitrability), and less deferential in others (especially in cases involving non-signatories). Above all, however, the proper functioning of the “gateway” depends on sound judicial method, occasional restraint, and an appreciation of the policies behind international arbitration.

II. LEGISLATIVE SOURCES OF THE “GATEWAY”

The “gateway” role of courts in the arbitral process has some legislative underpinnings. Under the FAA, the courts must treat a “written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction” as being “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,”⁵ and furthermore enforceable through a motion to compel arbitration.⁶ Article II(3) of the New York and Panama Conventions likewise requires courts to “refer” disputes to arbitration if there exists a written agreement to arbitrate. The FAA has often been said to express a strong policy desire that arbitration agreements be

⁴ Bermann refers to a “tension between efficacy and legitimacy.” George A. Bermann, *The “Gateway” Problem in International Arbitration*, 37 YALE J. INT’L L. 1, 4 (2002).

⁵ 9 U.S.C. § 2 (emphasis added).

⁶ See 9 U.S.C. § 4.

enforced,⁷ and the same is true of the New York and Panama Conventions.⁸

Though some commentators have urged that “gateway” issues should only be brought up at the beginning of arbitration,⁹ the present reality, as discussed below, is that US courts have had occasion to address “gateway” issues on the “return leg” of arbitration. This is partly due to the structure of the FAA and the two Conventions: Section 10(a)(4) of the FAA allows an award to be vacated if the arbitrators manifestly exceed their power,¹⁰ and Article V(1)(c) of the New York and Panama Conventions similarly allows a court to decline recognition of an award if it “deal[s] with a

⁷ The Supreme Court memorably stated in *Moses H. Cone*:

Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (citations omitted); *see also* *Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60, 65 (2d Cir. 1996) (the FAA’s strong presumption in favor of arbitration requires a district court to compel arbitration “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute” (citation omitted)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (enforcing arbitration agreement and noting benefits of arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (noting that “provisions [of the FAA] manifest a ‘liberal federal policy favoring arbitration agreements’” (citation omitted)); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 847 (2d Cir. 1987) (the presumption of arbitrability requires courts “to construe arbitration clauses as broadly as possible”).

⁸ *See* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (“The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”).

⁹ *See* *Bermann*, *supra* n.4, at 9 (“I suggest that a party resisting arbitration should be permitted to bring a gateway issue to court only prior to the start of the arbitration.”).

¹⁰ *See* 9 U.S.C. § 10(a)(4).

difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.” US courts “‘have consistently accorded the narrowest of readings’” the power to vacate based upon excess of power, “‘especially where that language has been invoked in the context of arbitrators’ alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance,’”¹¹ and Article V(1)(c) likewise has been construed narrowly.¹²

III. CONSENT VERSUS EFFECTIVENESS

The Supreme Court has said several times that arbitration “‘is a matter of consent, not coercion.’”¹³ Thus, in *Howsam*, it was explained that the “gateway” function involves a balancing between two competing principles. One is the elemental rule of *contractual consent*. *Howsam* encapsulated matters nicely when it explained that the court's responsibility, in “gateway” situations, is to “avoid[] the risk of forcing parties to arbitrate a matter that they

¹¹ *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 220 (2d Cir. 2002) (Sotomayor, J.) (citation omitted); *accord* *Davis v. Chevy Chase Fin., Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981):

It is particularly necessary to accord the ‘narrowest of readings’ to the excess-of-authority provision of [the FAA Section 10(a)(4)]. That provision does not, it must be stressed, confer on courts a general equitable power to substitute a judicial resolution of a dispute for an arbitral one; rather, where the interpretation of a contract is at issue, ‘it is the arbitrator's construction which was bargained for,’ and not that of the courts.

(citation omitted) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

¹² *See, e.g.*, *SEI Societa Esplosivi Industriali SpA v. L-3 Fuzing & Ordnance Sys., Inc.*, 843 F. Supp. 2d 509, 515 (D. Del. 2012) (“Review of the scope of arbitration should favor arbitration ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” (citation omitted)).

¹³ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (citation omitted); *accord* *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 (2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland*, 489 U.S. 468, 479 (1989); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

may well not have agreed to arbitrate.”¹⁴ In *First Options*, it stated that arbitration offers parties to a contract “a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.”¹⁵ In *Prima Paint*, the Court warned that while the FAA expresses a strong federal policy in favor of arbitration, “the purpose of Congress [in enacting the FAA] was to make arbitration agreements as enforceable as other contracts, *but not more so*.”¹⁶ In *Stolt-Nielsen*, the Court struck down a “class-action arbitration” ruling on the grounds that a party cannot be required to submit to arbitration with “*any parties*[] that are not already covered” by an arbitration agreement.¹⁷

The requirement of consent does not yield to general pro-arbitration “policy” considerations. In *Fuller v. Guthrie*, it was said that “federal policy alone cannot be enough to extend the application of an arbitration clause far beyond its intended scope.”¹⁸ In *Waffle House*, the Court stated that “we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the

¹⁴ *Howsam*, 537 U.S. at 83-84.

¹⁵ *First Options*, 514 U.S. at 943.

¹⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added). In making this observation, the Court drew attention to the “savings clause” in Section 2 of the FAA, which provides that arbitration clauses are enforceable, save on “such grounds as exist at law or in equity for the revocation of any contract.” *Id.* at 400. The Supreme Court observed that “[t]o immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract – a situation inconsistent with the ‘saving clause.’” *Id.* at 404 n.12.

¹⁷ *Stolt-Nielsen*, 130 S. Ct. at 1772, 1774 (citation omitted).

¹⁸ *Fuller v. Guthrie*, 565 F.2d 259, 261 (2d Cir. 1977). As *Granite Rock* explains, the “presumption” favoring arbitration applies “only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand,” 130 S. Ct. at 2850, *i.e.*, after the Court has determined that a binding arbitration clause exists between the parties to the dispute. *See id.* at 2859 (explaining that the FAA’s pro-arbitration “policy” is “merely an acknowledgment of the FAA’s commitment to ‘overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts’” (citation omitted)).

policy favoring arbitration is implicated.”¹⁹ In *Adamovic*, the Seventh Circuit explained:

[T]he federal policy favoring arbitration does not give [a court] license to compel arbitration absent an agreement to do so. True, the scales tip in favor of arbitration when we construe an arbitration clause, but only after we find, as an initial matter, that an enforceable arbitration clause exists.²⁰

The other competing consideration is one of *effectiveness*, that is, the need to give effect to arbitration clauses where they exist, to prevent parties from avoiding arbitration through artful pleading, and to preserve the integrity of the arbitration agreement against collateral challenges. This accounts for the Supreme Court’s endorsement in *AT&T* of the so-called “presumption of arbitrability,” which holds that, where an arbitration agreement exists, doubts about its coverage should be resolved in favor of arbitration.²¹ It also explains the Supreme Court’s various holdings which permit statutory claims to be arbitrated.²² In part it also explains *Concepcion*, in which the Court refused to allow a principle of California state law to “stand as an obstacle to the accomplishment of the FAA’s objectives.”²³ And, of course, it explains decisions in *Prima Paint* and *Buckeye*, which dealt with challenges to the validity of a contract. Under this rule, a party

¹⁹ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

²⁰ *Adamovic v. METME Corp.*, 961 F.2d 652, 654 (7th Cir. 1992) (citations omitted); *see also* *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (“Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.”); *Ross v. Am. Express Co.*, 547 F.3d 137, 143 (2d Cir. 2008) (“a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit”) (quotations omitted).

²¹ *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986).

²² *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632-33 (1985) (anti-trust claims can be arbitrated); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 236-40 (1987) (finding claims under RICO and under the Securities Exchange Act of 1934 arbitrable); *see also* *Am. Express Co. v. Italian Colors Rests.*, 133 S. Ct. 2304, 2309 (2013) (reiterating that the FAA requires arbitration of “claims that allege a violation of a federal statute, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”) (citations omitted).

²³ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743 (2011).

cannot escape the effect of an arbitration clause simply by claiming that its overall commercial bargain is invalid; rather, a challenge to arbitrability must be confined to allegations that specifically address the arbitration clause itself, *not* the validity of the contract as a whole, which is exclusively for the arbitrator to decide. To quote the Court in *Buckeye*, “unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.”²⁴

IV. *HOWSAM*, *BUCKEYE* AND “EXISTENTIAL” ISSUES

Under *Howsam*, disputes over the *existence* of an arbitration agreement are for the courts. Furthermore, *Howsam* states the general principle that “a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court,”²⁵ although *Howsam* did not explore the issue further. *Howsam* also suggested that issues of fulfillment of “conditions precedent” to arbitration were for the arbitrators,²⁶ and indeed some post-*Howsam* decisions have treated pre-dispute requirements (*e.g.*, pre-dispute mediation clauses) as being “conditions precedent” to arbitrability which are reserved for the arbitrator.²⁷

²⁴ *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006); *accord Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 395, 402-04 (1967).

²⁵ *Howsam*, 537 U.S. at 84 (citing *AT&T Techs.*, 475 U.S. at 651-52 (holding that “a court should decide whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement”); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241-43 (1962) (holding that a court should decide whether a clause providing for arbitration of various “grievances” covers claims for damages for breach of a no-strike agreement), *overruled on other grounds by* *Boys Mkts, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970)).

²⁶ *Howsam* quoted the Revised Uniform Arbitration Act of 2000 (“RUAA”), promulgated by the National Conference of Commissioners on Uniform State Laws, which states that “an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.” *Howsam*, 537 U.S. at 85 (quoting RUAA § 6(c), 7 U.L.A. 12 (Supp. 2002)).

²⁷ *See, e.g.*, *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) (holding that compliance with “supposed pre-condition that the parties engage in good faith negotiations prior to arbitration” was a matter for the arbitrators to determine). Other so-called “conditions precedent” might include payment of arbitral fees. *See, e.g.*, *Union Cent. Life Ins. v. Andraos, Nos.*

The Supreme Court addressed formation issues again in *Buckeye*. There, it was argued that a court had power to determine whether a contract containing an arbitration clause was wholly void, and if it was, this would negate the existence of the clause and preclude arbitrability. The *Buckeye* court disagreed, reaffirming the *Prima Paint* principle that collateral attacks on the validity of the contract as a whole will not be viewed as gateway issues at all, but will be matters for the arbitrators. To get beyond this and find a true “gateway” issue, one either needs to attack the validity of the arbitration clause itself, or else raise a more fundamental issue of contractual formation, *i.e.*, to quote *Buckeye*, “whether any agreement between the alleged obligor and obligee was ever concluded.”²⁸

The Supreme Court in *Buckeye* did not exhaustively enumerate these existential issues, but in a footnote, signaled that issues of forgery,²⁹ “mental incapacity”³⁰ or questions of whether a signatory possessed “authority to bind” its alleged principal might be gateway matters for a court to decide.³¹ A few years

1:09-cv-758 & 1:11-cv-75, 383 2011 U.S. Dist. LEXIS 141583, at *14 (S.D. Ohio Oct. 21, 2011) (“The payment of arbitration fees is a condition precedent to arbitration, similar to the required submission of documents and abiding by time limits, which are considered procedural issues to be decided by an arbitrator.”).

²⁸ *Buckeye*, 546 U.S. at 444 n.1 (emphasis added).

²⁹ *Id.* See *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 279 (3d Cir. 2003) (allegation of forgery required threshold ruling on arbitrability by Court); *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 369-70 & n.3 (2d Cir. 2003) (court considered allegation as to whether the contract in question was forged); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (similar holding).

³⁰ See *Spahr v. Secco*, 330 F.3d 1266, 1268 (10th Cir. 2003) (court examined allegations that a party signed an arbitration clause while suffering from Alzheimer's disease, thus vitiating consent).

³¹ See *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (Easterbrook, J.):

a person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. Courts have jurisdiction to determine their jurisdiction not only out of necessity (how else would jurisdictional disputes be resolved?) but also because their authority depends on statutes rather than the parties' permission. Arbitrators lack a comparable authority to determine

later, in *Rent-a-Center*, the Court suggested that an attack on an arbitration clause as itself being unconscionable might be a gateway matter for the courts, unless (as occurred in that case) the parties agreed for the arbitrator to decide the issue.³²

Two noteworthy “existential” issues have generated case law. One concerns “waiver” of the right to arbitrate. *Howsam* suggested that waiver was a matter for the arbitrators, but some subsequent circuit and district cases have distinguished this rule by suggesting that, where waiver consists of litigation conduct (*i.e.*, pursuing a court case in disregard of the arbitration clause), then the court should decide whether a waiver has occurred.³³ Nevertheless, in 2011 the Second Circuit held, in *Republic of Ecuador*, that a “waiver” issue is properly for arbitrators to decide, where the alleged “waiver” supposedly arose from past (concluded) litigation.³⁴

their own authority because there is a non-circular alternative (the judiciary) and because the parties *do* control the existence and limits of an arbitrator's power. No contract, no power.

See also Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000) (similar holding).

³² *See Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2775-76 (2010) (stand-alone arbitration agreement conferred on the arbitrator “exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement,” thus committing to the arbitrator the task of determining whether the arbitration agreement as a whole was unconscionable).

³³ *See Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 610 F. Supp. 2d 226, 231 (E.D.N.Y. 2009) (“Although the Second Circuit has not ruled on this specific issue, courts in [the Second Circuit] have continued to . . . address the waiver issue in cases involving litigation conduct before the Court.”); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008) (“[W]e conclude that *Howsam* did not disturb the traditional rule that the courts presumptively resolve waiver-through-inconsistent-conduct claims.”); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 219 (3d Cir. 2007) (“Properly considered within the context of the entire opinion, however, we believe it becomes clear that [*Howsam*] was referring only to waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, and not to claims of waiver based on active litigation in court.”); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) (same).

³⁴ *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011).

Another "existential" issue involves the so-called "illusory" arbitration clause. In *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, the Maryland Supreme Court addressed an arbitration clause in an employment agreement that gave the employer the right to "modify" or "revoke" the arbitration clause in any fashion, at its sole discretion.³⁵ The Maryland Supreme Court held, as matter of state law, that there was no arbitration agreement because the "promise to arbitrate was illusory."³⁶ More recently, in *Noohi v. Toll Bros., Inc.*, the Fourth Circuit was confronted with a "non-mutual" arbitration clause, which obligated the buyer of real estate to arbitrate grievances, but gave the seller the option of choosing arbitration or litigation. The Fourth Circuit first held that, under *First Options*, it was appropriate to apply state contract law to determine whether an arbitration agreement had been formed.³⁷ It then held, applying Maryland state law as stated in *Cheek*, that there was no arbitration agreement at all, because the arbitration clause lacked mutuality of remedy.³⁸ It furthermore considered, and rejected, an argument that, by virtue of Section 2 of the FAA and the Supreme Court's decision in *Concepcion*, the Maryland state law rule was pre-empted.³⁹

The result in *Noohi* derived from the requirement, in Maryland contract law, of "mutuality"; a requirement that is not necessarily reflective of other states' laws (and may even represent a minority viewpoint).⁴⁰ It remains to be seen whether other

³⁵ *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003).

³⁶ *See id.* at 663-64, 669.

³⁷ *Noohi v. Toll Bros., Inc.*, No. 12-1261, slip op. at 12 (4th Cir. Feb. 26, 2013) ("The Supreme Court has directed that we 'apply ordinary state-law principles that govern the formation of contracts' when assessing whether the parties agreed to arbitrate a matter." (quoting *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (quoting *First Options*, 514 U.S. at 944))).

³⁸ *See id.* at 16, 19, 24.

³⁹ *See id.* at 20-23.

⁴⁰ Other states, such as New York, have held that a non-mutual or "one-way" arbitration agreement is enforceable, provided that one party's promise to arbitrate is supported by "consideration" elsewhere in the contract. *See, e.g.*, *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (N.Y. 1989) ("Mutuality of remedy is not required in arbitration contracts."); *see also* *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-53 (2d Cir. 1995) (noting that "[m]ost courts" in other

Circuits will take a similar view of the relationship between state contract law and the FAA in determining gateway issues.

V. *KOMPETENZ-KOMPETENZ*, ARBITRABILITY AND THE “GATEWAY”

Modern international arbitral rules, including the UNCITRAL Arbitration Rules as well as most institutional rules, typically empower arbitrators to decide issues of jurisdiction.⁴¹ Such clauses are associated with, or reflect, the principle of *kompetenz-kompetenz*, “the precept that arbitrators may rule on their own authority.”⁴²

US courts do not speak of *kompetenz-kompetenz*, preferring instead to speak of “arbitrability,” a seemingly equivalent (if incompletely-defined) term.⁴³ In *First Options*,⁴⁴ it was held that

states have “arrived at the same conclusion” as *Sablosky* and holding that Connecticut law provides that when an arbitration agreement is integrated into a larger contract, consideration for the contract as a whole would cover the arbitration clause as well).

⁴¹ See, e.g., UNCITRAL Rules 2010, art. 23(1) (“The . . . tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”); UNCITRAL Rules 1976, art. 21 (same); ICC Rules, art. 6(5) (2012) (“[A]ny decision as to the jurisdiction of the arbitral tribunal. . . shall then be taken by the arbitral tribunal itself.”); ICDR Arb. Rules, art. 15 (1) (2010) (“The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”); AAA Commercial Arb. Rules, R-9(a) (2009) (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”); LCIA Rules, art. 23.1 (1998) (“The Arbitral Tribunal shall have the power to rule on its own jurisdiction . . .”).

⁴² William W. Park, *Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 136 (2007). Park notes, however, that this precept is “[l]ess a single rule than a constellation of related notions.” *Id.*; see, generally, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 851-1001 (2009).

⁴³ See, e.g., William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 56 (Albert Jan van den Berg ed. 2007) (explaining that “arbitrability” is “[o]ften expressed as Kompetenz-Kompetenz . . . the precept has been applied to questions such as *who* must arbitrate, *what* disputes must be arbitrated, and *which* powers arbitrators may exercise.”); Bermann, *supra* n.4, at 10 ,12 (noting that U.S. courts use the term “arbitrability” to “denote every condition or requirement that must be met in order for an arbitration to go forward, rather than adopting the more limited use

“[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.”⁴⁵ Continuing in this theme, *Howsam* stated that “[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the ‘*question of arbitrability*,’” is an exception to the normal federal policy favoring arbitration.⁴⁶ Thus, a “question of arbitrability . . . is undeniably an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise”⁴⁷ *Rent-A-Center* put it more positively: it held that where there exists “an agreement to arbitrate a gateway issue,” it should be treated as “simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce,” which is subject to the same validating principles that would apply to any arbitration agreement falling within the FAA Section 2.⁴⁸

In light of *First Options*, several courts have found the adoption of the UNCITRAL Arbitration Rules,⁴⁹ ICC Rules⁵⁰ and/or

of the term common in most of the rest of the world to denote only those matters that are ‘legally incapable of being arbitrated.’”).

⁴⁴ Although *First Options* was governed solely by the “domestic arbitration” provisions of the FAA, subsequent authority has applied it to international cases governed by Chapters 2 and 3 of the FAA. See *China Minmetals*, 334 F.3d at 280-81 (3d Cir. 2003) (*First Options* also applies to international arbitral awards where enforcement is sought under the New York Convention); *accord* *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322, 325-26 (2d Cir. 2013).

⁴⁵ *First Options*, 514 U.S. at 943 (citations omitted).

⁴⁶ *Howsam*, 537 U.S. at 83.

⁴⁷ *AT&T Techs.*, 475 U.S. at 649.

⁴⁸ *Rent-A Center*, 130 S. Ct. at 2777-78 (2010).

⁴⁹ See *Republic of Ecuador*, 638 F.3d at 394-95:

By signing the BIT, Ecuador agreed to resolve investment disputes through arbitration under the UNCITRAL rules. . . . Therefore, Ecuador consented to sending challenges to the 'validity' of the arbitration agreement to the arbitral panel Because Ecuador's waiver and estoppel claims go to the validity of the arbitration agreement, Article 21 requires that they be decided by the arbitral panel in the first instance.

AAA/ICDR Rules⁵¹ to be “clear and unmistakable evidence” of an intention to refer issues of arbitrability to the arbitrators. In *Schneider*, for example, an UNCITRAL tribunal awarded €30 million in favor of a German investor, following the Thai Government's breaches of the Germany-Thailand BIT.⁵² In seeking to have the US courts deny recognition of the award, Thailand argued that the tribunal lacked jurisdiction because the investor's enterprise (a tollway project) was not an “approved investment[],” as defined by the investment treaty.⁵³ The Second Circuit held that the jurisdictional question of whether an “investment” existed was reserved, under the terms of the treaty, for the arbitrators, a conclusion that was fortified by the UNCITRAL Rules, which stated

⁵⁰ See *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 122 (2d Cir. 2003) (noting Article 6(2) of the ICC Rules; holding “the parties['] intent to arbitrate arbitrability is further evidenced by” the agreed submission to ICC arbitration); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (ICC Rules “clearly and unmistakably allow the arbitrator to determine her own jurisdiction”); *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991) (same rule evidences the parties' agreement “to let the arbitrator decide questions of arbitrability”); see also *VRG*, 717 F.3d at 326-27 (holding that if an “[a]ddendum” signed by certain entities could be construed as incorporating the terms of an ICC arbitration clause contained in another contract, then this would mean that the addendum signatories “clearly and unmistakably committed questions of scope to the [ICC tribunal]” such that the ICC tribunal could determine which claims were, and were not, arbitrable against the addendum signatories).

⁵¹ See *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (by expressly incorporating the AAA Rules into their agreement, the parties had clearly and unmistakably agreed to arbitrate arbitrability; thus the court would not independently review the arbitrators' determination); *Bar-Ayal v. Time Warner Cable Inc.*, No. 03 CV 9905, 2006 U.S. Dist. LEXIS 75972, at *32 (S.D.N.Y. Oct. 16, 2006) (“The Court concludes that the arbitration provision at issue here, both in its explicit language and its incorporation of the AAA's Commercial Rules, constitutes sufficiently clear and unmistakable evidence that the parties intended to have issues of arbitrability decided by the arbitrator.”); *Maisel v. McDougal Littell*, No. 06 Civ. 0765, 2006 U.S. Dist. LEXIS 32501, at *6-7 (S.D.N.Y. May 22, 2006) (same); *JSC Surgutneftegaz v. President & Fellows of Harvard Coll.*, No. 04 Civ. 6069, 2005 U.S. Dist. LEXIS 15991, at *18 (S.D.N.Y. Aug. 3, 2005) (“[I]ncorporation of the AAA rules serves as clear and unmistakable evidence of the parties' submission of arbitrability to the arbitrator.”), *aff'd*, 167 F. App'x 266 (2d Cir. 2006).

⁵² *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 70 (2d Cir. 2012).

⁵³ *Id.*

(in relevant part) that “[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”⁵⁴

Some warn that “an overly broad definition of arbitrability produces analytic mischief,” especially as there are some “arbitrability” issues that arbitrators cannot determine.⁵⁵ Even when there is a broad submission of “arbitrability” issues to the arbitrator, the cases suggest that there may be threshold issues for the courts to address – not just the “existential” issues of forgery and the like noted in *Buckeye’s* first footnote, but possibly others as well.⁵⁶ Moreover, and as further discussed below, an agreement between *signatories* that an arbitrator may determine issues of arbitrability *between each other* will not necessarily solve all issues with non-signatory parties.⁵⁷

VI. ARBITRATION WITH NON-SIGNATORIES AS A “GATEWAY” ISSUE

To an extent, courts have asserted a greater “gateway” role in determining issues involving so-called “non-signatories” – a term that, as Rau notes, often really is intended to refer to “third

⁵⁴ *Id.* at 72 (quoting UNCITRAL Arb. Rules 1976, art. 21(1)).

⁵⁵ Bermann, *supra* n.4, at 11.

⁵⁶ *See, e.g.,* Telenor Mobile Commc'ns v. Storm LLC, 524 F. Supp. 2d 332, 350-51 (S.D.N.Y. 2007) (although a shareholders agreement adopted UNCITRAL rules, issues of “arbitrability” over statutory claims remained a question for the court), *aff’d*, 584 F.3d 396 (2d Cir. 2009); World GTL Inc. v. Petroleum Co. of Trinidad & Tobago Ltd., No. 10 Civ. 1542, 2010 U.S. Dist. LEXIS 83244, at *8 (S.D.N.Y. Aug. 11, 2010) (“Plaintiffs, however, dispute that their claims fall under the Project Agreement or the Shareholders Agreement, which are governed by [LCIA Rules]. . . It is, therefore, proper for this Court to determine which agreement governs Plaintiffs’ claims and then, accordingly, rule on the motion to compel arbitration.”).

⁵⁷ *See, e.g.,* Republic of Iraq v. ABB AG, 769 F. Supp. 2d 605, 611 (S.D.N.Y. 2011) (bilateral contract calling for UNCITRAL arbitration between “the Parties” did not mean that a UNCITRAL tribunal should determine arbitrability questions involving a non-signatory), *aff’d sub nom.* Republic of Iraq v. BNP Paribas USA, 472 F. App’x 11 (2d Cir. 2012).

parties,” or perhaps “non-mentioned parties.”⁵⁸ Non-signatory issues are varied, and may involve situations: (1) where a party that signed an arbitration clause seeks to arbitrate claims against parties that did not sign the clause (the reluctant non-signatory); (2) where a non-signatory seeks to arbitrate claims against someone who did sign an arbitration clause (the eager non-signatory); and (3) where one party to a bilateral arbitration clause tries to invoke “class action arbitration” on behalf of non-signatory class members. The Supreme Court in *Stolt-Nielsen*, in addressing the third scenario, remarked that, as arbitration is a creature of consent, a party should not be compelled to submit to arbitration with “any parties[] that are not already covered” by an arbitration agreement.⁵⁹

As Rau notes, a “reasonably coherent narrative thread” emerges from the jurisprudence, in that courts will be generally more reluctant to infer “consent” to arbitrate issues where the party opposing arbitration did not sign any arbitration clause at all.⁶⁰ Courts have thus played a more active “gateway” role in those circumstances, as shown in *Sarhank*, where the Second Circuit held that the US courts should independently review the issue of “consent” to arbitrate enforceability of a foreign award in which the losing parties did not sign any arbitration clause,⁶¹ and

⁵⁸ See Alan Scott Rau, “Consent” to Arbitral Jurisdiction: Disputes with Non-Signatories, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: CONSENT, PROCEDURE & ENFORCEMENT 69, 105-07 (Belinda Macmahon ed., 2009). Rau notes, for example, that in many situations a binding contract can arise without physical signature. *Id.* at 105.

⁵⁹ *Stolt-Nielsen*, 130 S. Ct. at 1774 (citation omitted).

⁶⁰ Rau, *supra* n.58, at 107, *see also id.* at 111-21 (discussing case law on non-signatories opposing arbitration). Rau notes, based on a case survey, that “an arbitration clause may sweep more broadly when asserted against a signatory to the agreement.” *Id.* at 123.

⁶¹ *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 659-60 (2d Cir. 2005). As Rau notes, *Sarhank* has generated criticism, including over whether the Second Circuit was correct to insist upon the issue of arbitrability against non-signatories being analyzed according to “American” law. *See* Rau, *supra* n.58, at 113-14 n.143; *see also* Barry H. Garfinkel & David Herlihy, *Looking For Law in All the Wrong Places: The Second Circuit Decision in Sarhank Group v. Oracle Corp.*, 20 MEALEY’S INT’L ARB. RPT. No. 6 (June 2005). Some cases suggest that arbitrability issues involving non-signatories are potentially governed by applicable foreign arbitral law and/or a choice of law clause accompanying the

Bridas, where the Fifth Circuit similarly conducted a post-award review of whether Turkmenistan, a non-signatory, was directly bound by an arbitral clause in a contract signed by a Turkmeni state-owned enterprise.⁶²

Even where the party opposing arbitration is a signatory to an arbitration clause, however, courts may have a “gateway” role. It has been said that “[w]here the party seeking arbitration is not a party to the arbitration agreement, the question of arbitrability is for the court, not the arbitrator,”⁶³ and whether or not this is true in all cases, courts have been willing to play the “gateway” role in determining arbitrability in some cases involving the “willing” non-signatory and “reluctant” signatory, *e.g.*, where the arbitration

arbitration clause. *See* *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004) (applying Swiss arbitral law to decide whether non-signatories were bound by arbitration clause which itself was governed by Swiss law); *Felman Prod., Inc. v. Bannai*, 476 F. Supp. 2d 585, 586-87 (S.D. W.Va. 2007) (applying English arbitral law to determine whether a non-signatory could compel arbitration of issues in London). Since these cases were decided, the Supreme Court has ruled in *Carlisle* that the arbitrability of disputes vis-à-vis third parties potentially calls for examination of a state contract law relating to the status and obligations of third parties. *See* *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896, 1901-02 (2009) (noting that although Section 2 of the FAA requires courts “to place [arbitration] agreements upon the same footing as other contracts,” it does not “purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)”; thus, the issue of whether non-signatories could be bound by (or invoke) arbitration agreements is one of “state law.”).

⁶² *See* *Bridas S.A.P.I.C v. Gov't of Turkmenistan*, 447 F.3d 411, 420 (5th Cir. 2006) (applying veil-piercing principles and holding state of Turkmenistan directly liable for \$495 million arbitral award arising out of contractual dispute against Turmmeneft, a state-owned entity); *see, generally*, Timothy G. Nelson, *BRIDAS v. Government of Turkmenistan: U.S. Courts Uphold an Arbitrator's Power to Hold A Foreign Sovereign Liable for the Acts of its State-Owned Enterprise*, 24 ASA BULL. 584 (2006).

⁶³ *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 57 (2d Cir. 2001) (quoting *In re Application Herman Miller, Inc.*, No. 97 Civ. 7878, 1998 U.S. Dist. LEXIS 5557, at *11-12 (S.D.N.Y. Apr. 21, 1998)); *see also* *Crossville Medical Oncology, P.C. v. Glenwood Sys., LLC*, 485 F. App'x 821, 825 (6th Cir. 2012) (holding award should be vacated because counterclaim-defendant had not signed arbitration clause; holding that under *First Options* there was no evidence of intention for AAA tribunal to decide arbitrability: “[o]nly if the parties have agreed to arbitrate do the AAA's rules apply”).

clause explicitly applies only to certain named parties.⁶⁴ The Second Circuit, however, has held that there is an exception to this rule where the non-party and the signatories “have a sufficient relationship to each other and to the rights created under the agreement”; in such circumstances, it has indicated that there might be clear and unmistakable evidence of an intention to submit arbitrability to the arbitrators.⁶⁵ Recently, in *Thai-Lao Lignite*, the respondent, the government of Laos, challenged the standing of one of the two claimants who was not a signatory to the contract containing the arbitration agreement. In a decision recently affirmed by the Second Circuit, a New York federal court held that Laos' agreement to arbitrate under the UNCITRAL rules constituted a “clear and unmistakable intent” to arbitrate arbitrability, *including as regards a non-signatory claimant*.⁶⁶

The “gateway” rules concerning class action arbitration have been in flux over the last decade. In *Green Tree v. Bazzle*,⁶⁷ a

⁶⁴ See, e.g., *Republic of Iraq*, 769 F. Supp. 2d at 611 (described *supra* n.57); *Ross v. Am. Express Co.*, 547 F.3d 137, 143, 146 (2d Cir. 2008) (non-party could not claim to arbitrate where its “only relation with respect to the [] agreements was as a third party allegedly attempting to subvert the integrity of the [] agreements”).

⁶⁵ In *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 209 (2d Cir. 2005), the non-party seeking arbitration was a corporate successor to the signatory and the parties “apparently continued to conduct themselves as subject to the [agreement at issue] regardless of change in corporate form.” *Id.* The “undisputed relationship” between the non-party and its predecessor, as well as the parties' subsequent conduct, was sufficient evidence of an intention to be bound by all aspects of the arbitration provision, including the obligation to arbitrate arbitrability. *Id.*

⁶⁶ See *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, No. 10 Civ. 5256 (KMW), 2011 U.S. Dist. LEXIS 87844, at *51-68 (S.D.N.Y. Aug. 3, 2011), *aff'd*, No. 11-3536-cv, 2012 U.S. App. LEXIS 14340 (2d Cir. July 13, 2012), *cert. denied*, 133 S. Ct. 1473 (2013). It is understood that the French and Malaysian courts have taken the opposite viewpoint, and have declined to enforce the Thai-Lao Lignite award on the grounds that the arbitrators exceeded their authority. See *French court refuses to enforce Laos award*, GLOBAL ARB. REV. (Feb. 26, 2013).

⁶⁷ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). The dispute in *Green Tree* involved compliance by a financial institution with state truth-in-lending laws. The South Carolina courts certified the case as a class action, but then referred it to arbitration based on the language in the customer's contract, leading to an arbitrator awarding over \$10 million in favor of the class. *Id.* at 449-50.

sharply-divided Supreme Court vacated a class action arbitral award and returned it to the state courts, with instructions that the arbitrators should have ruled on whether class actions were available in that particular case. Writing for the plurality, Justice Breyer held that the issue of whether class action was available was a “procedural” matter for the arbitrators to determine, and should not have been determined by the courts.⁶⁸

Almost ten years later, however, a 5-4 majority of the Court ruled in *Stolt-Nielsen* that a class action should not proceed where the source of arbitral agreement (an arbitration clause in a business contract) was silent on the issue. Arbitration, it observed, is a creature of contractual consent, under which “parties may specify *with whom* they choose to arbitrate their disputes.”⁶⁹ To infer that in the absence of express language, parties had agreed to class arbitration was “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”⁷⁰ The Court then proceeded to adjudicate the gateway issue of arbitrability, holding that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator,”⁷¹ and vacating the AAA arbitration panel's determination in favor of class action arbitration pursuant to Section 10(a)(4) of the FAA as representing an excess of power.⁷²

In 2013, the Supreme Court in *Oxford Health Plans*⁷³ had the opportunity to clarify its prior decision in *Stolt-Nielsen* and to explain the extent of a court's power to review an arbitrator's determination regarding class arbitration. In *Oxford Health Plans*, an arbitration clause in a health insurance contract provided that “[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such

⁶⁸ *Id.* at 453-54.

⁶⁹ *Stolt-Nielsen*, 130 S. Ct. at 1774.

⁷⁰ *Id.* at 1775.

⁷¹ *Id.*

⁷² *See id.* at 1767-68, 1774-75.

⁷³ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the [AAA]. . . .”⁷⁴ An AAA arbitrator construed this clause as permitting class arbitration, on the basis that the “‘intent of the clause’ was ‘to vest in the arbitration process everything that is prohibited from the court process,’” which necessarily included class action, as this was “‘plainly one of the possible forms of civil action that could be brought in a court.’”⁷⁵ When the insurer’s motion to vacate this ruling pursuant to Section 10(a)(4), which had been rejected at district and Circuit court level, reached the Supreme Court, the insurer argued that *Stolt-Nielsen* supported a relatively assertive gateway role in non-party situations. The Supreme Court clarified, however, that Section 10(a)(4)’s “excess of power” standard only supported vacatur “if ‘the arbitrator act[s] outside the scope of his contractually delegated authority’ – issuing an award that ‘simply reflect[s] [his] own notions of [economic] justice’ rather than ‘draw[ing] its essence from the contract.’”⁷⁶ Writing for the Court, Justice Kagan explained that “the sole question” in dealing with excess of power challenges “is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.”⁷⁷ As the arbitrator’s decision, on its face, involved interpretation of the parties’ agreement, it could not be construed as an excess of power, regardless of whether the interpretation was correct or not.⁷⁸

In this regard, Justice Kagan explained that the Court’s earlier holding in *Stolt-Nielsen* (in which the Court overturned the arbitrators’ class action ruling) was distinguishable because the determination in that case was not just a case of misinterpretation, but constituted an “abandon[ment]” by the arbitrators of “their interpretive role.”⁷⁹ Section 10(a)(4) thus

⁷⁴ *Id.* at 2067 (internal quotation marks omitted).

⁷⁵ *Id.* (citations omitted).

⁷⁶ *Id.* at 2068 (alteration in original) (quoting *Eastern Assoc. Coal Corp. v. United Mine Workers of Am., Dist.*, 531 U.S. 57, 62 (2000) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987))).

⁷⁷ *Id.*

⁷⁸ *Id.* at 2069.

⁷⁹ *Oxford Health*, 133 S. Ct. at 2069.

“permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.”⁸⁰ Indeed, as Justice Kagan remarked, the “potential for mistakes” is part of the “price of arbitration,” with the result that “convincing a court of an arbitrator’s error – even his grave error – is not enough.”⁸¹ Or, to put it in even starker terms, “[t]he arbitrator’s construction holds, however good, bad, or ugly.”⁸²

VII. THE “RETURN LEG”: PROBLEMS WITH GATEWAY ISSUES AT THE POST-AWARD STAGE

At the “return leg” stage, there are often strong policy grounds favoring finality and enforcement that would, in turn, disfavor an extensive “gateway” discussion. In *Schneider*, the Second Circuit observed that there would be an “enormous waste of resources contrary to the purposes of the New York Convention” if the court failed to “give any deference” to the UNCITRAL tribunal’s determinations on jurisdiction, especially after 13 days of hearing and years of briefing.⁸³ For these reasons, and because the relevant treaty incorporated UNCITRAL rules allowing the tribunal to determine jurisdiction, Thailand was “not entitled to an independent judicial re-determination of that same question.”⁸⁴

On the other hand, there may be cases, particularly involving awards rendered against non-signatories, where a court is prepared to engage in more extensive review of jurisdictional issues *after* the award is rendered. *Bridas* and *Sarhank* are examples of such a case, and similar themes were present in the (unsuccessful) motion for *en banc* review of the Second Circuit’s *Thai-Lao Lignite* decision.⁸⁵ The English *Dallah* case also involved a post-award review of the question of whether Pakistan was

⁸⁰ *Id.* at 2070.

⁸¹ *Id.*

⁸² *Id.* at 2071.

⁸³ *Schneider*, 688 F.3d at 73-74.

⁸⁴ *Id.* at 74.

⁸⁵ *See supra* nn.61, 65.

bound by an arbitration clause signed by a state-owned trust, with the UK Supreme Court holding that it was not.⁸⁶

The risks of courts dealing with gateway issues on the “return leg” are illustrated in *BG Group v. Argentina*. That case, which eventually reached the U.S. Supreme Court, represented a host state's challenge to an award made by an UNCITRAL tribunal under an investment treaty. In 2007, a Washington, D.C.-based tribunal found Argentina's 2001-02 “pesification” of gas utilities tariffs to have violated various investment protection guarantees in the UK-Argentina Bilateral Investment Treaty, awarding \$185 million in damages.⁸⁷ The basis for bringing the arbitration was found in Article 8 of the UK-Argentina BIT, permitting UNCITRAL arbitration of treaty “disputes” against Argentina in certain “circumstances,” including where, “after a period of eighteen months,” the relevant investor (here, BG) had submitted the dispute to “the competent tribunal” of Argentina.⁸⁸ Rather than challenge the pesification measures in the Argentine courts, however, BG instituted UNCITRAL arbitration in 2003, arguing that the Argentine government had effectively blocked recourse to the Argentine courts. In its final 2007 award of damages against Argentina (which followed a lengthy series of hearings in Washington, D.C.), the *BG Group* tribunal accepted BG's argument that compliance with Article 8 was unnecessary: it held that the emergency “pesification” legislation had restricted the ability to challenge Argentina's measures in its own courts, including through a decree staying of “all suits brought by those whose rights were allegedly affected by the emergency measures adopted by the government”⁸⁹ The emergency legislation had the effect, it held, of “directly interfering with the normal operation of [Argentina's] courts,” thus rendering it unreasonable for Argentina to insist upon investors conducting litigation in those courts for 18 months before seeking international

⁸⁶ *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs*, [2010] UKSC 46.

⁸⁷ *BG Group Plc. v. Argentina*, Final Award ¶¶ 63-77 (UNCITRAL Dec. 24, 2007) (“*BG Group Award*”).

⁸⁸ U.K.-Arg. Bilateral Investment Treaty, art. 8(2)(a) (“UK-Argentina BIT”).

⁸⁹ *Id.* ¶ 149.

arbitration under Article 8.⁹⁰ The tribunal “consequently” found BG's claims “admissible.”⁹¹

Argentina then challenged the award in the D.C. federal courts, arguing (among other things) that the UNCITRAL tribunal lacked jurisdiction because BG Group had failed to observe the 18-month litigation rule in Article 8 of the BIT. In a 2010 opinion, the D.C. district court rejected this argument, holding that:

the [UNCITRAL Tribunal] correctly turned to the text of Article 8(2)(a)(i) of the [BIT] and relevant international law sources in attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable.⁹²

Thus, on the basis that the UNCITRAL tribunal's jurisdictional findings warranted deference, its conclusions concerning the 18-month rule were not disturbed.

In a 2012 opinion, however, a three-judge panel of the D.C. Circuit reversed this decision and ordered that the UNCITRAL award be vacated. In doing so, it invoked the “gateway” concept:

The “gateway” question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.⁹³

⁹⁰ *Id.* ¶¶ 155-56.

⁹¹ *Id.* ¶ 157. This holding rendered it unnecessary for the Tribunal to address BG Group's alternative argument that the MFN clause in Article 3 of the UK-Argentina BIT allowed it to invoke dispute clauses in other BITs signed by Argentina, which did not have the “18-month home court” requirement. *Id.*

⁹² *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 122 (D.D.C. 2010).

⁹³ *See Republic of Argentina v. BG Group PLC*, 665 F.3d 1363,1369 (D.C. Cir. 2012).

The D.C. Circuit held that compliance with the home-court litigation rule was not a matter for the UNCITRAL tribunal to decide, because the threshold availability of arbitration depended on the 18-month rule being observed.⁹⁴ It added:

The contracting parties likely never conceived of the need to specify that a *court* should decide whether Article 8(1) and (2)'s requirement that disputes first be brought to a *court* should be respected. The Treaty provides a prime example of a situation where the “parties would likely have expected a court” to decide arbitrability. It would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed. At the very least, there is no clear and unmistakable evidence, that the contracting parties intended an arbitrator to decide the gateway question.⁹⁵

Having decided that the courts should determine this issue, the D.C. Circuit then proceeded to hold that the 18-month period could not be excused. This was not a case of disregarding “informal resolution steps,” but of an “explicit” condition to arbitration. Thus, it held, “there can be only one possible outcome on the [arbitrability question] . . . ,’ namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained.”⁹⁶ The award was vacated in its entirety. BG Group then petitioned successfully to appeal to the U.S. Supreme Court.

On March 5, 2014, the U.S. Supreme Court, by a 7-2 vote, reversed the D.C. Circuit’s decision and reinstated the 2007 UNCITRAL award.⁹⁷ Writing for the majority, Justice Breyer framed the issue as follows:

⁹⁴ *Id.* at 1370-71 (alterations in original; citations omitted).

⁹⁵ *Id.* (citations omitted) (quoting *Howsam*, 537 U.S. at 83; citing *First Options*, 514 U.S. at 944).

⁹⁶ *Id.* at 1373 (alteration in original) (quoting *Stolt-Nielsen*, 130 S. Ct. at 1770).

⁹⁷ *BG Group v. Republic of Argentina*, No. 12-138, 2014 WL 838424, at *6 (Mar. 5, 2014) (to be published in 572 U. S. ____).

[T]he question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8’s local court litigation provision. Put in terms of standards of judicial review, should a United States court review the arbitrators’ interpretation and application of the provision *de novo*, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration?⁹⁸

Justice Breyer then proceeded to analyze whether, if Article 8 appeared in an ordinary contract, it would be construed as committing such questions to the arbitrators.⁹⁹ Drawing heavily on *Howsam*, he answered the question in the affirmative. He held that Article 8’s 18-month litigation requirement was a “procedural precondition” to arbitration, closely analogous to the internal contractual statute of limitations in *Howsam*.¹⁰⁰ In the words of the court the 18-month litigation requirement “determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.”¹⁰¹

Furthermore, he noted, Article 8 did not give any “substantive weight to the local court’s determinations on the matters at issue between the parties”; in fact, only the international arbitrators’ determinations were final and binding.¹⁰²

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *7.

¹⁰¹ *Id.*

¹⁰² *Id.* at *8-9. As Bjorklund notes, the D.C. Circuit’s “infelicitous” comment about the role of the “courts” has already created “mischief” in that it:

has led some commentators to conclude that the requirement in the treaty that parties seek local remedies (in Argentina) for 18 months prior to arbitration conferred on that Argentine court the power to assess whether or not that 18-month period was a jurisdictional requirement. This has to be wrong, and it does not seem to be what the Court intended. Seeking local remedies for a period of time as a condition precedent to the submission of a claim to arbitration does not in and of itself confer on that court any power with respect to the arbitration.

Andrea K. Bjorklund, *Case Comment: Republic of Argentina v BG Group*, 27 ICSID REV. 4, 7 (2012).

Having addressed the issue in strictly contractual terms, the Court then addressed whether the BIT’s status as a treaty provided any reason to alter its interpretation. On the basis that treaties, like contracts, should be construed to give effect to the parties’ mutual intent, the Court adhered to its interpretation of Article 8.¹⁰³ And it rejected the argument put forward by the Republic of Argentina (and supported by the U.S. Solicitor-General) that Article 8 of the BIT should be construed as a strict pre-condition to Argentina’s “consent” to arbitrate matters with private investors.¹⁰⁴ Article 8(3), it held, imposed “a procedural condition precedent to arbitration—a sequential step that a party must follow before giving notice of arbitration.”¹⁰⁵

Then, in words that may well resonate in future international cases (and again citing *Howsam*) the Court held:

The Treaty nowhere says that the provision is to operate as a substantive condition on the formation of the arbitration contract, or that it is a matter of such elevated importance that it is to be decided by courts. *International arbitrators are likely more familiar than are judges with the expectations of foreign*

¹⁰³ See *BG Group*, 2014 WL 838424, at *10-11, 14-15. Interestingly, the Court’s discussion of the principles of treaty interpretation drew on its own domestic jurisprudence rather than any sources of international law such as the Vienna Convention on the Law of Treaties, which ordinarily would have been expected to govern this issue.

¹⁰⁴ *Id.* at *12-13. The Court’s opinion side-stepped the issue of whether a differently-worded treaty, which explicitly imposed pre-conditions to its “consent” to arbitration, might be interpreted in a different manner. See *id.* at *12 (“We leave for another day the question of interpreting treaties that refer to “conditions of consent” explicitly.”). In passing, however, it remarked that the mere inclusion of the word “consent” was “unlikely to be conclusive.” *Id.* at *11. In her separate concurrence, Justice Sotomayor strongly contested this dictum, expressing the view that “it is far from clear that a treaty’s express use of the term ‘consent’ to describe a precondition to arbitration should not be conclusive in the analysis.” *BG Group*, 2014 WL 838424, at *14 (concurring opinion of Justice Sotomayor).

¹⁰⁵ *Id.* at *10.

*investors and recipient nations regarding the operation of the provision.*¹⁰⁶

And to fortify this conclusion, the Court noted that *both* the institutional rules contemplated in Article 8 (the ICSID Convention and the UNCITRAL Rules) authorized *arbitrators* to determine issues of jurisdiction.¹⁰⁷ Yet again, it analogized the matter with *Howsam*, in which the parties' selection of NASD arbitration procedures was "evidence that [the parties] intended arbitrators to 'interpret and apply the NASD time limit rule.'"¹⁰⁸ Although the Court did not use the phrase *kompetenz-kompetenz*, its holding appears to mark an embrace of the concept.

Because questions of arbitrability were reserved to the Tribunal, the Court held, its review function was limited to ascertaining whether the arbitrators had "exceeded their power" for purposes of Section 10(a)(4) of the FAA. As it had previously held in *Oxford Health Plans*,¹⁰⁹ the Court stated that such a review is deferential: vacatur is warranted only where the arbitrators "'stra[y] from interpretation and application of the agreement" or otherwise "'effectively 'dispens[e]'" their "'own brand of . . . justice.'"¹¹⁰ The UNCITRAL tribunal's findings in this case were that: (1) Article 8(3) could not impose an "absolute" requirement for compliance with the 18-month rule, because otherwise the Treaty's protections could be rendered nugatory; (2) Argentina's 2002 legislation had in fact impeded access to the courts; and (3) in the view of the Tribunal, this excused strict compliance with Article 8(3). Only the third of these propositions was even potentially "controversial," and the Court held that, in any event, such a determination was within the "lawful" scope of arbitral

¹⁰⁶ *Id.* (citing *Howsam*, 537 U.S. at 85 (comparative institutional expertise a factor in determining parties' likely intent)).

¹⁰⁷ *Id.* (citing UNCITRAL Arbitration Rules 2010, art. 23(1); ICSID Convention, art. 41(1) (2006)).

¹⁰⁸ *Id.* (quoting *Howsam*, 537 U.S. at 85).

¹⁰⁹ *See supra* nn.73-79 and accompanying text.

¹¹⁰ *BG Group*, 2014 WL 838424 at *13 (citations omitted).

authority.¹¹¹ The D.C. Circuit’s decision was reversed and the 2007 award reinstated.

The dissent of Chief Justice Roberts (in which Justice Kennedy joined) framed the issues in a completely different manner to the majority. Embracing the view posited by Argentina’s counsel on appeal, he construes Article 8 of the BIT as being a conditional, unilateral offer to arbitrate with private investors – which can only become effective if the private investor fulfills those conditions. The issue is one of “contract formation,” not arbitrability – and if the conditions are not fulfilled, there simply is no arbitration agreement.¹¹² The “formation” issue is for the courts to decide.

Notably, however, even the dissent refuses to endorse the analysis of the D.C. Circuit on whether the dispute was properly arbitrable. Chief Justice Roberts described the reasoning of the D.C. Circuit on this issue as “perfunctory,”¹¹³ and would have remanded the case for a substantive analysis *by the D.C. courts* of whether Argentina’s conduct, in precluding access to its own domestic courts, had frustrated fulfillment of the 18-month rule, thereby excusing compliance with this condition.¹¹⁴

Although the Court’s decision in *BG Group* (and indeed that of the dissent) provides a much more thoroughgoing discussion of how Article 8 should be interpreted than in the court below, its discussion of investment treaty issues is relatively sparse

¹¹¹ *Id.* The Court pointedly refused to indicate whether it agreed with the arbitrators’ stated view that Argentina’s actions had rendered compliance with Article 8(3) “absurd” or “unreasonable.” *Id.*

¹¹² *Id.* at *11 (dissenting opinion of Chief Justice Roberts (joined by Kennedy, J.)). The Chief Justice was also sharply critical of the majority’s decision to analyze arbitrability primarily as a contractual matter, rather than an exercise in treaty interpretation. *See id.* at *15-16. He also drew attention to the unique features of BIT arbitration, which arises out of a treaty between nations, but confers benefits on a class of private third parties (here, U.K. investors). *See id.* at *16. These features, he considered, justified an interpretation of Article 8 as “only a unilateral standing *offer* by Argentina with respect to U. K. investors—an offer to submit to arbitration where certain conditions are met.” *Id.* at *18.

¹¹³ *Id.* at *24.

¹¹⁴ *Id.*

compared with that of modern treatise writers and arbitral tribunals. Perhaps this is for the best: as the majority notes, such matters are best left to the specialists. Still, it is interesting that the only opinion to cite ICSID/BIT authority on the matter was that of the dissent – and even then, such authority was cited selectively: Chief Justice Roberts referred only to the *ICS*, *Daimler* and *Wintershall* decisions,¹¹⁵ *i.e.*, the cases that supported his own interpretation of Article 8.¹¹⁶ Neither he nor the majority addressed the wealth of other ICSID/BIT cases on the issue indicating a diversity of opinion on the 18-month requirement.

- In several cases, a comparable 18-month provision has been held not to be a “jurisdictional” bar but “a condition relating to the manner in which the right to have recourse to arbitration must be exercised – as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal.”¹¹⁷
- Other BIT tribunals have upheld jurisdiction – usually based on a factual finding that compliance with the 18-

¹¹⁵ See *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶¶ 115-18, 172, 197-98 (Dec. 8, 2008) (Germany-Argentina BIT, upholding 18-month rule as jurisdictional requirement and dismissing claim as claimant had failed to comply with it); *accord Daimler Fin. Servs. AG v. Argentina*, ICSID Case No. ARB/05/1, Award ¶¶ 204, 281, 286 (Aug. 22, 2012) (majority opinion); *ICS Inspection & Control Servs. Ltd. v. Argentina*, Award on Jurisdiction, ¶¶ 321-27 (UNCITRAL, Feb. 10, 2012) (similar holding under UK-Argentina BIT). The *Daimler* decision was accompanied by a lengthy and spirited dissent by Judge Charles Brower.

¹¹⁶ *BG Group*, 2014 WL 838424, at *18 (dissenting opinion of Roberts C.J.).

¹¹⁷ *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction ¶ 96 (Oct. 24, 2011); see *Teinver S.A. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction ¶¶ 172-86 (Dec. 21, 2012) (similar holding with respect to the 18-month rule in the Spain-Argentina BIT); *Telefónica S.A. v. Argentina*, ICSID Case No. ARB/03/20, Decision on Jurisdiction ¶ 93 (May 25, 2006) (“this requirement, or precondition, is best qualified as a temporary bar to the initiation of arbitration. The objection is therefore technically an exception of inadmissibility raised by Argentina against the Claimant for not having complied with the requirement.”). The *BG Group* tribunal itself referred to the 18-month provision as going to “admissibility,” not jurisdiction. See *BG Group Award* ¶¶ 140-57.

month rule was dispensed with by reason of futility,¹¹⁸ which is much the same as the *BG Group* tribunal's finding.

- Still others have held that the “Most Favored Nation” clause in the treaty in question (*e.g.*, the Germany-Argentina BIT) enables investors to avoid the 18-month period entirely – a possibility that the *BG Group* tribunal considered, but did not reach.¹¹⁹

¹¹⁸ See *Ambiente Ufficio S.p.A. v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility ¶¶ 615-28 (Feb. 8, 2013) (compliance with 18-month litigation requirement in Italy-Argentina BIT excused by reason of “futility” where bondholders would have been precluded from receiving effective remedies in Argentine courts); *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility ¶¶ 568, 585-90 (Aug. 4, 2011) (similar result under same BIT; holding that Argentina's laws had blocked effective means of challenging measures in question); *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, Decision on Jurisdiction ¶ 202 (Dec. 19, 2012) (holding that the 18-month home court litigation provision of Spain-Argentina BIT could not be invoked where “none of the various possible alternative means” of litigating in Argentina were open to claimants; adding it would be “useless and unfair” to impose litigation requirements where a local proceeding could not reasonably be expected to deliver a result within 18 months); *cf.* *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award ¶¶ 7.6.9, 7.6.13-16 (July 2, 2013) (remarking, with respect to the MFN clause in the Spain-Argentina BIT, that “[b]ased on the plain meaning of [the clause], the Tribunal can understand a decision that [its] MFN provisions encompass the BIT’s [dispute resolution provisions] is apparently supported by the text”; tribunal commenting further that it “understands why the [dispute resolution provisions] of the Argentina-Germany BIT might reasonably be seen to fall within the scope of the treaty's MFN clause” and making similar comments with respect to UK-Argentina BIT and Italy-Argentina BIT; but finding that the clause in the Turkmenistan BIT was not susceptible of the same interpretation).

¹¹⁹ See *Hochtief* ¶¶ 75-99 (holding by majority that a German investor could invoke the MFN clause in the Germany-Argentina BIT and thus rely upon the dispute resolution provisions of the Chile-Argentina BIT as a means of avoiding the strict application of the 18-month litigation rule); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction ¶ 109 (Aug. 3, 2004) (same holding); *Teinver* ¶¶ 149, 186 (similar majority holding with respect to the Spain-Argentina BIT; investor entitled through MFN clause to invoke Australia-Argentina BIT); *Telefónica* ¶¶ 102-08 (similar holding); *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award ¶¶ 95-108 (June 21, 2011) (similar holding under Italy-Argentina BIT); *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction ¶¶ 34-37, 64 (Jan. 25, 2000) (similar holding, Spain-Argentina BIT); *Gas Natural SDG S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction ¶¶ 29-31 (June 17,

The Supreme Court's majority's decision in *BG Group* gives some basis to expect that any of the above conclusions might be within the permissible range of arbitral determinations – assuming that the treaty in question is substantively similar to the UK-Argentina BIT. This is in line with the recent ICSID annulment committee decision in *Impregilo*, which refused to annul an arbitral tribunal's decision on the issue (the arbitral tribunal had held that the MFN clause in the Italy-Argentina BIT excused compliance with the 18-month rule).¹²⁰ In this respect at least, there appears to be some convergence between the approach to be taken by U.S. courts and the approach of ICSID annulment committees on the issue of whether arbitrators exceeded their power.

VIII. CONCLUSION

As can be seen, *Howsam's* “gateway” concept did not reduce the potential for litigation concerning the scope and meaning of arbitration clauses, but it did provide a useful point of analysis for courts in determining their role.

As a practical reality, US case law has raised “gateway” issues both at the inception of a case, where arbitration is compelled, and at the conclusion of the case, when an award is sought to be recognized. In either case, the two clashing principles of “consent” and “effectiveness” come into play. Given the high stakes involved, for arbitrators and litigants alike, it becomes imperative that the courts define and apply the “gateway” functions correctly, especially when the issue arises at the “return leg,” after potentially large amounts of money and years of effort

2005) (same); *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction ¶¶ 57-60, 66-67 (May 16, 2006) (same holding under Spain-Argentina and UK-Argentina BITs); *Nat'l Grid plc v. Argentina*, Decision on Jurisdiction ¶¶ 53, 93 (UNCITRAL June 20, 2006) (same holding under UK-Argentina BIT).

¹²⁰ *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Decision on Annulment ¶¶ 94-108 (Jan. 24, 2014) (holding that the issue of whether the MFN clause in the Argentina-Italy BIT operated to excuse compliance with the 18-month rule was “a complex issue, subject to debate, with opposite views that were discussed by the majority and the dissenting arbitrator”; that a determination on this issue was not, “*per se*, as a manifest excess of powers” and that an annulment committee would not “review in detail and *de novo* the complex issues involved in the jurisdictional debate” (*id.* ¶ 140)).

have already been expended on the case. If not, the policy balance between consent and effectiveness can become misaligned, potentially at great cost both to parties and to the institutions involved.



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The views expressed herein are solely those of the author and are not those of his firm or the firm's clients. This paper reflects comments delivered at the ITA/ASIL Conference on April 3, 2013 in Washington, D.C., and has been updated to October 23, 2013. At the time of writing, therefore, the fate of *BG Group plc v. Argentina*, discussed above, has yet to be determined.

