Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective

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I. INTRODUCTION

Separability and competence-competence[1] are two of the best known concepts in international commercial arbitration. They are different, but often linked, because they share a common goal: to prevent early judicial intervention from obstructing the arbitration process. Both concepts address the question, "Who decides arbitrability–courts or arbitrators?" but in different ways. I will discuss those differences later in this comment.

In his excellent paper delivered at this Symposium, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*,[2] Professor Rau focuses principally on separability. His purpose is to defend separability in U.S. arbitration law from the surprisingly common and even recent attacks leveled at it by U.S. scholars and commentators.[3] His defense is penetrating and convincing.

This comment takes a different tack. It focuses primarily on competence-competence and discusses the "who decides" problem from a transnational perspective. Whereas the separability principle has been adopted, with very much the same content, in most of the world's legal orders,[4] competence-competence functions differently from country to country, though a general consensus may be emerging. This comment focuses on competence-competence because it is controversial and has more to say about the "who decides" issue.

I stress a transnational perspective out of the conviction that international commercial arbitration can (and should) be studied, and in fact is practiced, as a body of transnational law. One of the field's most striking and fascinating features is that, in any given dispute, the parties, their counsel, the arbitrators, and the applicable law are generally drawn from several different national jurisdictions, and the award's enforcement often involves legal proceedings in more than one country. The field has transnational coherence, however, because a surprisingly large number of countries apply the same major principles and concepts. That uniformity derives principally from the wide acceptance of the New York Convention[5] and the influence of

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1. *Kompetenz-Kompetenz* in German, and *compétence-compétence* in French.

2. Alan S. Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions,* Mar. 14, 2003 (paper delivered at this Symposium, to be published in AM. REV. INT'L ARB.).

3. *See id*.

4. *See id.*; *see also* Sojuznefteexport v. JOC Oil, Ltd., 15 Y.B. COM. ARB. 384, 415-18 (1990) (Ct. App. Berm. 1990).

5. U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. The Convention and an up-to-date list of parties can be found at

the UNCITRAL Model Law.[6] The New York Convention now boasts 133 parties,[7] and the Model Law has served as the paradigm for most recently enacted national arbitration statutes.[8]

Of course there are areas of disuniformity, and they deserve special attention. Variability can have advantages, for example, in disclosing the potential benefits of mutations from the norm and in allowing room for the expression of different national values and cultures. Nevertheless, scholars and commentators can also be expected to seek some form of informed consensus respecting the most desirable direction the general uniformity in the field should take. This comment strives for a modest contribution to that goal.

Section II introduces a simplifying framework and briefly reviews well-known terrain: the policy concerns that underlie the separability and competence-competence doctrines. Section III takes up separability, in particular Professor Rau's penetrating defense of it in U.S. law. Section IV turns to competence-competence, which addresses the truly controversial aspects of the "who decides" question in transnational arbitration law. Section V states a brief conclusion.

When the United States adopts a modern arbitration statute (which we can hope will be sooner rather than later)[9] competence-competence will inevitably be on the agenda. What approach to the doctrine should the United States take? As UNCITRAL continues to review the efficacy of the Model Law in practice, should it consider revising the Model Law's treatment of competence-competence? To aid scrutiny of these issues, this comment seeks a better understanding of how various legal orders approach the competence-competence principle and the policy justifications underlying the differences.

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http://www.un.or.at/uncitral. *See also*, UNCITRAL, Status of Conventions and Model Laws, 36th Sess., U.N. Doc. A/CN.9/537 (2003).

6. U.N. Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration of 1985, U.N. GAOR, 40th Sess., Annex I, U.N. Doc. A/40/17 (1985) [hereinafter Model Law], *available at* http://www.uncitral.org/english/texts.

7. For a current list of parties, *see* the UNCITRAL website: http://www.uncitral.org/english/status/status-e.htm.

8. Including the English Arbitration Act of 1996, *reprinted in* 36 I.L.M. 155 (1997); the German Arbitration Law of 1998 arts. 1025-66 ZPO; the Swedish Arbitration Act of 1999, *available at* http://www.chamber.se/arbitration/english/laws/skiljedomsla-gen_eng.html); the Indian Arbitration and Conciliation Act of 1996, *in II International Council for Commercial Arbitration*, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION India: Annex I (Jan Paulsson, ed., 2000); and many others, *see* UNCITRAL, Status of Conventions and Model Laws, 36th Sess., U.N. Doc. A/CN.9/537 (2003) (listing 40 countries and 5 states of the United States as having adopted legislation based on the Model Law).

9. *See generally* William Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1243 (2003) (advocating enactment of such a new, modern U.S. arbitration statute).

II. THE "WHO DECIDES?" QUESTION AT DIFFERENT STAGES OF THE COURT-ARBITRATION PROCESS

For purposes of analysis, this comment divides the court-arbitration process into three stages. Stage 1 encompasses litigation, generally at the outset of the dispute, over whether the court should hear the dispute or send the parties to arbitration. Stage 2 encompasses decision making by arbitrators concerning whether to hear the dispute or decline jurisdiction. Stage 3 encompasses court review of an award (set-aside or recognition and enforcement) respecting whether the arbitrators had good jurisdiction. The parties may bypass Stage 1 altogether and go directly to Stage 2. Or Stage 1 and Stage 2 may proceed concurrently, with one party urging a court to take jurisdiction and the other, an arbitral tribunal.

Stage 1 is generally the point at which judges and scholars ask the "who decides" question. Who decides—court or arbitrator—whether a dispute goes to arbitration or stays in court? If the parties go directly to Stage 2, but one of them nevertheless challenges the jurisdiction of the arbitral tribunal, the arbitrators will decide whether they have jurisdiction. This, at a minimum, is what is meant by competence-competence: the arbitrators are authorized to decide their own jurisdiction, at least as an initial matter.

Sometimes the "who decides" question arises at Stage 3. The arbitrators have decided they have jurisdiction, either in a preliminary award or in the final award itself. When a court reviews that award, in either a set-aside or a recognition and enforcement proceeding, the court must decide how much weight to give the arbitrators' decision upholding arbitral jurisdiction.[10] They may give it no weight at all (de novo review) or various levels of deference (from affirming if the arbitrators' award is reasonable, to affirming if there is any colorable justification for it, to affirming without second guessing the arbitrators at all). Although the discussion below occasionally deals with the "who decides" question at Stage 3, its primary focus will be on Stage 1.

Stage 1 is crucial concerning whether arbitration is allowed to go forward efficaciously or is obstructed by court intervention. At Stage 1, a party opposing arbitration may raise any of a series of legal issues requiring court, rather than arbitrator, decision. These may include any or all of the following claims: (1) the container contract is invalid (for a reason that would not directly invalidate the arbitration clause); (2) no arbitration agreement came into existence between the parties; (3) an existing arbitration agreement is either formally invalid (for example, not in writing) or materially invalid (for

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10. I do not discuss the issue of court review of a decision by arbitrators to refuse jurisdiction. Although this is an important issue, it arises less frequently.

example, violative of mandatory law); (4) a disputed issue is not within the scope of the arbitration agreement; (5) mandatory law prohibits a disputed issue, though within the scope of the parties' arbitration agreement, to be arbitrated (a special type of material invalidity respecting a specific issue fraught with public policy concerns, such as (formerly) antitrust or securities fraud); (6) some precondition for permissible arbitration has not been met (for example, a time-limit on initiating arbitration); (7) the party seeking arbitration has waived its right to arbitrate or is estopped from claiming that right.

The greater the number of these claims required to be fully litigated at Stage 1, the greater the potential for disruption of the arbitration process–or, in other words, the greater the potential for an obstructing party to frustrate a genuine agreement to arbitrate. Thus at Stage 1, an extremely proarbitration legal order might send all of these questions to the arbitrators, with no, or perhaps minimal (prima facie), judicial scrutiny. But of course arbitration is not the holy grail. Not all parties resisting arbitration are obstructionists. A party should be entitled to its day in court unless it has agreed to arbitrate. That is the competing value. A legal order must decide what weight to give to these competing values and how to structure the process to maximize overall value by reducing opportunities for obstructionism while preserving legitimate claims for reasonably prompt judicial decision. The doctrines of separability and competence-competence operate at this tension point in a legal order.

III. DEFENDING *PRIMA PAINT* AND SEPARABILITY

A. Prima Paint *and Ordinary Contract Interpretation*

It is easy to see how the *Prima Paint* separability doctrine relates to the "who decides" question, holding, in effect, that when parties enter a main contract (container contract) and include in it a broadly worded arbitration clause, a court will treat them as having concluded two separate contracts, the container contract and an arbitration agreement.[11] This means that if a party challenges the validity of the container contract (the first of the seven claims listed above), a court should send that issue to the arbitrators as long as nothing in the claim attacks the validity of the arbitration agreement directly.

Articulated in this way, a challenge to the container contract's validity would not seem ipso facto to question the arbitrators'

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11. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

jurisdiction. Separability discontents see such a claim as challenging the legitimacy of arbitration, however, because they subscribe to the logical proposition that if the container contract is invalid, everything in it must also be invalid. "Nothing can come from nothing" is the argument.

Professor Rau defends separability through a more sophisticated line of analysis.[12] His argument actually accepts that the container-contract-validity issue bears on the arbitrators' jurisdiction, but for a different reason than just articulated. Properly analyzed the claim raises a question of the scope of the arbitration clause and the parties' intent respecting scope. Did the parties intend to include within the scope of their arbitration agreement a claim challenging the container contract's validity? Scope questions clearly implicate the arbitrators' jurisdiction. Arbitrators have no jurisdiction over issues the parties did not include within the scope of their arbitration agreement.

As Rau shows, answering the scope question requires a default rule for interpreting a broadly worded arbitration agreement.[13] The separability doctrine chooses, as a default rule, presumptive inclusion of the container-contract-validity question. Whereas Justice Fortas' *Prima Paint* opinion expressly refers to proarbitration policy considerations to justify separability,[14] Rau shows that ordinary notions of contract interpretation also support a default rule favoring inclusion.[15]

A particularly good approach to choosing a default rule is to select an outcome that rational parties in the same position as the contracting parties would have chosen had they thought about the specific issue. Rau argues that such an approach would send the container-contract-validity dispute to the arbitrators for several reasons, including these two: (1) Any decision on this issue is likely to be closely intertwined with other merits-based issues in the container contract that the parties clearly intended to have arbitrated, and (2) it is efficient to have one decision making process, rather than a split process (one stop adjudication).[16] Thus, Rau is able to justify separability with ordinary contract interpretation reasoning, not sleight of hand or legal legerdemain, and not even proarbitration policy considerations.[17]

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12. Rau, *supra* note 2.

13. Rau, *supra* note 2.

14. *See Prima Paint*, 388 U.S. at 404 (referring to the "clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

15. Rau, *supra* note 2.

16. Rau, *supra* note 2.

17. Professor Rau of course acknowledges that pro-arbitration policy supports the separability doctrine. *See* Rau, *supra* note 2.

B. *Do* First Options *and* Howsam *Affect Separability?*

Surprisingly, at least one separability discontent, Professor Reuben, sees *First Options*[18] and perhaps even *Howsam*[19] as prefiguring *Prima Paint*'s demise.[20] Rau will have none of this and argues cogently and convincingly that *First Options* poses no threat to *Prima Paint*.[21] I would add that *Howsam*, in particular, marches in the opposite direction—that is, in the direction of giving more, not less, power to the arbitrators.

Recall that *First Options* holds questions of "arbitrability" to be presumptively for courts, not arbitrators.[22] A dispute is "arbitrable" if the parties have agreed to arbitrate it. Thus, issues of the existence, validity, and scope of the arbitration agreement are all "arbitrability" questions—presumptively for courts.

How could such a decision challenge *Prima Paint*? As Professor Rau says, Reuben's argument seems to require one to assume in advance that *Prima Paint* is wrong.[23] The reasoning might be as follows. If the container contract is invalid, everything in it, including the arbitration clause is invalid. Hence, if the container contract is invalid, the arbitrators have no jurisdiction. Thus, the validity of the container contract is an "arbitrability" question presumptively for the court. If this is in fact the reasoning, it is circular and unpersuasive.

But Professor Reuben can be read as saying something different. *First Options* requires actual, not implied, consent to arbitrate. Hence *First Options* undercuts *Prima Paint* because *Prima Paint* relies on implied consent to arbitrate.[24] This reasoning, however, misses an important part of the *First Options* holding. *First Options* states expressly that the presumption is reversed on questions of scope. If the parties have agreed on a broad arbitration clause, an issue arguably includable within its scope is to be included unless the parties clearly exclude it. Thus the scope question—an arbitrability issue—is in fact decided by a court, but the court must use a presumption favoring inclusion. That is precisely what *Prima Paint* did in adopting the separability doctrine.

How *Howsam* can be seen as threatening *Prima Paint* is more obscure to me. Professor Reuben seems to reason as follows. *Howsam* clarifies what the arbitrability concept in *First Options* means. After

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18. First Options of Chicago v. Kaplan, 514 U.S. 938 (1995).
19. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
20. *See* Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 870-72 (2003).
21. Rau, *supra* note 2.
22. *First Options*, 514 U.S. at 943.
23. *See* Rau, *supra* note 2.
24. *See* Reuben, *supra* note 20, at 860-61.

Howsam we know that the following questions are classified as "procedural arbitrability" issues: whether a time limit for bringing a claim has been observed (the precise issue in *Howsam*) and whether a party has waived its right to arbitrate.[25] *Howsam* holds that these are special "gateway" questions going presumptively to arbitrators, not to courts. This clarification reinforces, however, the need for "actual consent" on "substantive arbitrability" issues—that is, questions respecting whether there really is an agreement to arbitrate. Such issues go presumptively to courts and presumably include the container-contract-validity issue.[26]

Here, though, we are led back to the question discussed above under *First Options* of how the container-contract-validity issue is to be seen as an arbitrability question presumptively for courts. Because the container-contract-validity issue is actually one of scope, *First Options* reverses the presumption and sends the issue to the arbitrators. That, of course, describes the *Prima Paint* separability outcome. Like *First Options*, *Howsam* poses no threat to *Prima Paint*.

Indeed, *Howsam* is surely proarbitration in outlook. It empowers arbitrators, at the expense of courts, and not the other way around. The Supreme Court's steady march in a proarbitration direction can be traced from *Prima Paint*, to *Mitsubishi*,[27] to *Sky Reefer*,[28] to *First Options* (the reverse presumption on scope) to *Howsam*. Whether that march will carry the Court to a robust competence-competence doctrine is more doubtful. The discussion at the end of the next section addresses that issue.

IV. COMPETENCE-COMPETENCE

Whereas separability sends only the first of the seven issues listed in Section II to the arbitrators, competence-competence may send the other six issues to them as well, following no, or only prima facie, judicial scrutiny. Under a robust competence-competence doctrine even issues of the existence and validity of the arbitration agreement may go initially to the arbitrators. Competence-competence thus addresses the "who decides" question on a broader scale and is more central to resolving the policy tension between protecting arbitration from obstruction, on one hand, and preserving legitimate disputes over arbitrator jurisdiction for a prompt court

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25. *Howsam's* treatment of waiver is technically dictum. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 79-80 (2002).

26. *See* Reuben, *supra* note 20, at 860-82.

27. *See generally* Mitsubishi Motors Corp. v. Soler, 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

28. *See generally* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).

hearing, on the other. Competence-competence is also the more controversial of the two "who decides" doctrines. Whereas separability is universally accepted, competence-competence is controversial and has spawned a range of different national responses.

At several points Professor Rau dismisses competence-competence—not his principal focus—as merely a question of timing.[29] By that he means that even if one allows arbitrators to decide their own jurisdiction at the outset, courts are not completely displaced. They will have the final say at the award enforcement stage, Stage 3, and judicial review at that stage may be de novo. Although this observation is technically correct, I believe it undervalues the importance of competence-competence.

Even if Stage 3 review is available on a de novo basis, whether courts or arbitrators are the preferred decision makers at Stage 1 impacts the effectiveness of arbitration. To the extent that courts are preferred outright and without qualification, parties opposing arbitration have an incentive to raise as many of these Stage 1 judicial questions as possible. This can tie up arbitration significantly and charge courts with decisions that may preempt the merits. Moreover, the availability of de novo judicial review at Stage 3 does not truly undercut a number of consequences that flow from early arbitrator decision making. First, if the arbitrators' award is convincing, there may never be a Stage 3. The losing party may prefer to pay or negotiate a settlement. Second, even if Stage 3 review is de novo, a court will not confront a tabula rasa. A well-reasoned award can strongly influence the judicial outcome. Third, and perhaps most important, in international arbitration an award set aside at the seat may nevertheless be enforced in another jurisdiction.[30] Thus, it matters whether courts stay their hand at Stage 1 and allow arbitrators to proceed to an award.

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29. Rau, *supra* note 2.

30. Note also that if arbitration is to take place outside of the territory of the court ordering the parties to arbitrate, the country where the ordering court sits will not exercise set-aside jurisdiction. Set-aside jurisdiction is generally vested in the courts of the seat of arbitration. Thus, even if the ordering court's law provides for de novo review, that law will not apply in a set-aside proceeding. The final award will also not necessarily come within the ordering court's jurisdiction, because the award creditor may choose to seek recognition and enforcement elsewhere. *Cf.* Compagnie de Navigation et Transports SA v. Mediterranean Shipping Co. SA, 21 Y.B. INT'L ARB. 690, 694-95 (DTF 1996) (holding that court review at Stage 1 should be complete and not merely prima facie, when arbitration is to take place outside of Switzerland—i.e., when New York Convention Article II(3) applies). *See also*, Willam Park, *The Arbitrability Dicta in* First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic*?, 12 ARB. INT'L 137, 150-51 (1996) (discussing *Compagnie de Navigation et Transports* and explaining the result as apparently based on a Swiss court's inability to guarantee itself a role in judicial review when arbitration takes place outside of Switzerland).

A. *Positive and Negative Competence-Competence*

Most discussions of competence-competence, especially in U.S. literature, treat only the positive aspect of the doctrine, which is a simple and uncontroversial notion. It means that, at Stage 2, arbitrators are empowered to rule on their own jurisdiction; they are not required to stay the proceeding to seek judicial guidance.

The doctrine has another, much more consequential aspect, known as the negative effect of competence-competence. It originated in French law, which is well known for its proarbitration character.[31] The negative effect doctrine holds that in order to allow arbitrators to rule on their own jurisdiction at Stage 2 as an initial matter, court jurisdiction at Stage 1 should be constrained.

The core challenge underlying the doctrine is to find the right amount of and context for court restraint. A legal order needs the right balance between avoiding arbitration-obstructing tactics at Stage 1 and protecting parties from being forced to arbitrate without their legitimate and genuine consent. Because this is a complex issue, a number of procedural permutations have surfaced in different countries—primarily in Europe. The next subsection first discusses the leading approaches and the justifications for them and then closes with an assessment of where U.S. law stands on these issues.

B. *The Negative Effect Doctrine in Transnational Law*

1. The French Approach[32]

The negative competence-competence principle was codified in French law with the 1981 enactment of Article 1458 of French New Code of Civil Procedure:

> Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before the court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null.[33]

Although Article 1458 concerns domestic arbitration in France, the principle has been extended by court decision to international arbitration.

The French approach turns on two principal considerations. First, if an arbitration tribunal has already been seized of the matter, the French court will refuse jurisdiction and leave questions

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31. *See* discussion of the French approach *supra* Section IV.B.

32. *See generally* FOUCHARD, GAILLARD, GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 661-88 (Emmanuel Gaillard & John Savage eds., 1999).

33. *See generally id.* ¶ 672.

respecting the arbitration agreement's existence, validity and scope to the arbitrators.[34] Second, if an arbitration tribunal has not been seized, the court will undertake a limited scrutiny of those questions and will retain jurisdiction only if the arbitration agreement is manifestly null. Thus, if the court finds prima facie existence, validity and scope, it will refer the parties to arbitration. After an award is rendered—that is, at Stage 3—French courts will review the arbitrators' jurisdiction de novo.[35]

The primary policy justification for this approach is to prevent a party from obstructing or delaying arbitration.[36] The French doctrine allows greater court scrutiny if a party goes to court before the case has been presented to arbitrators, on the theory that such a party is more likely to be acting in good faith with legitimate concerns about the arbitrators' jurisdiction.[37] But even here, initial court review is only to establish a prima facie case for arbitration. If this prima facie test is met, or if an arbitral tribunal is already seized, the arbitrators themselves must be the first to give full consideration to jurisdictional challenges. Since most arbitration statutes and institutional rules provide for the arbitrators to render a preliminary award on jurisdiction,[38] in most cases such a preliminary award will not be long in coming. Such an early award on jurisdiction can then be the subject of annulment proceedings at the seat of arbitration. If the seat is in France, the annulment review will be de novo.

Thus, in the vast majority of cases the arbitral process will go forward, but parties with a legitimate basis for objecting to the

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34. *See generally id.* ¶¶ 661-88.

35. Concerning international awards in French law, recognition and enforcement will be rejected "[i]f there is no valid arbitration agreement or the arbitrator ruled on the basis of a void or expired agreement. . . ." N.C.P.C. art. 1052 (Fr.), *reprinted in* Jean-Louis Devolve, ARBITRATION IN FRANCE: THE FRENCH LAW OF NATIONAL AND INTERNATIONAL ARBITRATION 86 (1982). *See also* Arab Republic of Egypt v. Southern Pacific Properties, Ltd. & Southern Pacific Properties (Middle East), Ltd., 23 INT'L LEGAL MAT'L 1048, 1061 (1984) (setting aside an award because the court found de novo that Egypt was not a party to the arbitration agreement).

36. *See* Gaillard, *supra* note 32, ¶¶ 679-80. A second policy reason underlying the French approach is to preserve the exclusive jurisdiction of the courts of appeal in France for review of arbitral awards. The negative competence-competence doctrine delays de novo judicial review until Stage 3, and in France that review occurs before the courts of appeal. If at Stage 1 French courts took jurisdiction for full (not just prima facie) review of an arbitration agreement's existence and validity, such a review would take place initially before a first instance court, not a court of appeal. *See* Gaillard, *supra* note 32, ¶ 681. This policy consideration is apparently shared by Switzerland, *see id.*, but may not be of much concern in many jurisdictions.

37. *See* Gaillard, *supra* note 32, ¶ 680.

38. Respecting arbitration statutes, *see* Model Law, *supra* note 6, art. 16(3). Respecting institutional rules, *see* American Arbitration Association International Rules of 2001, art. 15(3), *available at* http://www.adr.org/ftp; Arbitration Rules of the London Court of International Arbitration of 1998, art. 23.3, *available at* http://www.lcia-arbitration.com/lcia.

arbitrators' jurisdiction will have an opportunity, after only moderate delay, to make their case to a judge. Presumably those with principally obstructionist motives, who might consider such jurisdictional challenges at Stage 1 cost-justified, could reach a different conclusion at Stage 3—especially in the face of a well-reasoned award.

A problem arises, however, where the arbitrators take advantage of the discretion arbitration statutes and institutional rules generally accord them and delay their decision on jurisdiction until the final award. They might do so, for example, either out of lack of sensitivity to the consequences of delaying judicial review or because the questions involved are so intertwined with the merits that a full proceeding is needed to resolve them. Even considering the possibility that the arbitrators might not rule on jurisdiction until the final award, one might still prefer the French solution. In the first place, such cases presumably will not be plentiful. But even where they arise, the party resisting arbitration for sound reasons presumably will ultimately prevail before a court most of the time. In many legal systems the prevailing party will be able to recoup the arbitration and litigation costs against the losing party. (A special rule allowing this result would seem appropriate in legal systems that would not normally allow it.) The party preferring arbitration who ultimately loses will of course suffer the wasted cost of the arbitral proceeding, but one might argue that this is the concomitant risk of proceeding with arbitration in the face of a strong jurisdictional challenge.[39]

2. The 1961 Geneva Convention[40]

If parties to an arbitration agreement have their habitual residence or seat in a contracting party to the 1961 Geneva Convention on International Commercial Arbitration,[41] a version of the negative competence-competence doctrine, going part way toward the French approach, will apply. Article VI(3) of that convention provides:

> Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with . . . the question

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39. It is worth noting in this context that the 1996 English Arbitration Act approach to negative competence-competence, discussed more fully in Section IV below, would have the advantage of allowing a party favoring arbitration but concerned about such risks to agree with the party opposing arbitration to have the matter resolved in advance by a court.

40. European Convention on International Commercial Arbitration of 1961, 484 U.N.T.S. 349.

41. As of February 2002, there were 28 parties to the 1961 Geneva Convention. An up-to-date list of state parties can be found at http://untreaty.un.org/ENGLISH/bible/englishintrnetbible/partI/chapterXXII/treaty2.asp.

> whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.[42]

On its face this provision is not as aggressive in favoring arbitration as is the French approach. No negative competence-competence effect arises at all if a court proceeding occurs before arbitration is initiated. The logic here must be that such first-filed-in-court cases are more likely to involve legitimate objections to arbitral jurisdiction, rather than dilatory or obstructionist tactics. The latter are more likely to surface and seem cost-justified to a respondent fishing for a defense or hoping for delay after arbitration is initiated.

Given this reasoning, the 1961 Geneva Convention trigger point (initiation of arbitral proceedings)[43] seems more rational than that of French Article 1458 (when the arbitrators are seized).[44] From the French perspective one might argue that considerable delay could follow the mere initiation of arbitration because empanelling arbitrators is often time-consuming. This could delay any preliminary award on jurisdiction and corresponding court review. The countering consideration is that even if a party has initiated arbitral proceedings, Article VI(3) seems to authorize prima facie court scrutiny of the agreement's existence and validity.[45] If a court cannot find even a prima facie arbitration agreement binding the parties, that would surely be "a good and substantial reason" for a court to proceed to the merits.[46] In France, even prima facie scrutiny is barred if arbitrators have been seized,[47] but in such cases a preliminary award on jurisdiction should generally not be far behind.

3. The UNCITRAL Model Law

Two different provisions of the Model Law are relevant to the negative competence-competence doctrine–Article 8(1) and Article 16.[48] Article 8(1) deals directly with a judicial decision at Stage 1 respecting the existence of a valid arbitration agreement:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement of the substance of the dispute, refer the parties to arbitration unless it finds that the

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42. European Convention on International Commercial Arbitration of 1961, 484 U.N.T.S. 349, art. VI(3) (1961)

43. *See id.*

44. N.C.P.C. art. 1458.

45. European Convention on International Commercial Arbitration of 1961, *supra* note 40, art. VI(3).

46. *See* Gaillard, *supra* note 32, ¶ 674.

47. N.C.P.C. art. 1458.

48. Model Law, *supra* note 6, arts. 8(1), 16.

> agreement is null and void, inoperative or incapable of being performed.[49]

On its face the language "unless it finds that the agreement is null and void, inoperative or incapable of being performed" could be read to authorize a full judicial determination of the arbitration agreement's existence and validity. The legislative history significantly buttresses that view. During the early 1980s, after enactment of the 1981 revision of the French Code of Civil Procedure, the Model Law drafters specifically refused to add the word "manifestly" before "null and void."[50] The intent of that proposed addition was to limit the court to a prima facie finding that a valid arbitration agreement exists. The drafters apparently preferred, however, for the court to "settle" the issue before referring the parties to arbitration.[51]

One consideration cuts the other way and introduces the possibility of ambiguity. It is the way in which Article 8(1) tracks identically the wording of the New York Convention, Article II(3): "unless [the court] finds that the said [arbitration] agreement is null and void, inoperative, or incapable of being performed."[52] One of the leading commentators on the drafting of the New York Convention has observed that the pro-enforcement bias of the Convention should lead courts construing Article II(3) to accept the arbitration agreement's invalidity "in manifest cases only."[53] Indeed, Swiss courts have apparently interpreted language in the 1987 Swiss Private International Law Act, virtually identical to New York Convention Article II(3), as requiring only a prima facie verification of the arbitration agreement's existence and validity at Stage 1.[54]

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49. Model Law, *supra* note 6, art. 8(1).

50. HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 303 (1989).

51. *Id.*

52. The New York Convention states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New York Convention, *supra* note 5, art. II(3)

53. "Having regard to the 'pro-enforcement bias' of the Convention, the words [of Article II(3)] should be construed narrowly, and the invalidity of the arbitration agreement should be accepted in manifest cases only." ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 155 (1981).

54. *See* Gaillard, *supra* note 32, ¶ 675 (citing at n.136 Swiss Fed. Trib., Apr. 29, 1996, Fondation M. v. Banque X., 1996 BULL. ASA 527, and the note by C.U. Mayer at 361; 1996 REV. SUISSE DR. INT. ET DR. EUR. 586, and observations by F. Knoepfler).

Model Law Article 16 deals more directly with the competence-competence principle. Whereas, Article 16(1) codifies the positive competence-competence concept,[55] Articles 16(3) and 8(2) go further and adopt at least a partial negative competence-competence doctrine. Article 16(3) reads:

> The arbitral tribunal may rule on a plea . . . [that it does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.[56]

Article 8(2) reads: "Where an action . . . [in a matter that is subject to an arbitration agreement] has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."[57]

These provisions certainly do not codify a French-version, negative competence-competence doctrine. At the same time, however, they clearly accommodate it. The legislative history shows that the doctrine was controversial.[58] The adopted text was a compromise.[59] Article 8(2) allows arbitral proceedings to go forward, despite court consideration of the arbitrators' jurisdiction.[60] Thus, the court might be encouraged to defer to the arbitrators entirely or to give the arbitration agreement only prima facie scrutiny at Stage 1. Article 16(3) further encourages this outcome by allowing, even encouraging, arbitrators to rule on their jurisdiction as a preliminary question and providing for rapid, unappealable judicial review of that decision. Indeed, in jurisdictions that have adopted the Model Law, some courts seem to have read the negative competence-competence principle into Article 16.[61]

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55. "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Model Law, *supra* note 6, art. 16(1).

56. Model Law, *supra* note 6, art. 16(3).

57. Model Law, *supra* note 6, art. 8(2).

58. *See* Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session, U.N. GAOR, 40th Sess. Supp. No. 17, Annex, at 1 U.N. Doc. A/40/17 (1985), *reprinted in* 1 MODEL ARB. L. Q. REP. 101, 134 (1995). Some participants favored the French approach under which a court should stay its consideration of the arbitrators' jurisdiction if the arbitration were underway (to avoid dilatory tactics). Others felt that a court seized of the jurisdiction issue should decide it (to avoid the cost of proceedings lacking jurisdiction). *Id*.

59. *See* HOLTZMANN & NEUHAUS, *supra* note 50, at 486.

60. Model Law, *supra* note 6, art. 8(2).

61. *See* Pacific Int'l Lines Ltd. v. Tsinlien Metals & Minerals Co., 18 Y.B. INT'L ARB. 180, 185-86 (S.C. H.K. 1992) (interpreting Article 16 as requiring that the court give only a prima facie consideration to whether a valid arbitration agreement exists, leaving to the arbitrators a full examination of that issue). *See also* Rio Algom Ltd. v.

4. The British Variation on the Model Law[62]

The British Arbitration Act of 1996, which is based on the Model Law, contains the standard Model Law Article 8(1) provision requiring a court to stay legal proceedings "unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."[63] The negative competence-competence issue here concerns whether "unless satisfied" entails only a prima facie review. Indeed, it seems arguable that "unless satisfied" is closer to "unless it is manifest" than is the Model Law terminology "unless it finds."[64]

The true innovation in the British Act occurs in Sections 30-32.[65] Like the Model Law, the British Act allows the arbitrators to render a decision on jurisdiction either in a preliminary award or in the final award.[66] To deal with the difficulty noted above concerning the possibility that arbitrators might abuse that discretion and refuse to render a preliminary award, and thus delay judicial review, the British Act allows the parties by agreement to force the arbitrators to decide jurisdiction preliminarily.[67] The party opposing arbitration could have no objection to such a procedure. Thus, the party favoring arbitration but concerned about wasteful proceedings would control, in effect, whether to insist on an early arbitrator decision on jurisdiction followed by rapid court review.

The British Act also protects the legitimate interests of the party opposing arbitration.[68] Even before the arbitrators render a decision on jurisdiction, a party may petition a court for an immediate determination of the jurisdictional issues. The court must render a decision if the arbitrators agree to the petition (or alternatively if all the parties agree). The arbitrators will presumably agree only if they conclude that dilatory tactics are not involved and the issue is truly a close question. If only the arbitrators have agreed, but not the other party or parties, then the court itself must also be satisfied that there are good reasons for it to intervene.[69]

Sammi Steel Co., 18 Y.B. INT'L ARB. 166, 170-71 (Ont. Ct. Justice 1991) (stating in dictum that Model Law Articles 8 and 16 mean that the arbitrators are to decide the arbitration agreement's existence and validity in the first instance, with court review to follow).

62. For a discussion favoring the French, over the British, approach to negative competence-competence, *see* Gaillard, *supra* note 32, ¶ 682.

63. Arbitration Act, 1996, § 9(4) (Eng.), *reprinted in* 36 I.L.M. 155 (1997).

64. Model Law, *supra* note 6, art. 8(1).

65. Arbitration Act §§ 30-32.

66. Arbitration Act § 30(1), (2).

67. Arbitration Act § 31(5).

68. Arbitration Act § 32(1).

69. Arbitration Act § 32(1), (2).

5. The German Variation on the Model Law

The German law of *Kompetenz-Kompetenz* prior to the new 1998 German Arbitration Act was relatively unique, or at least arguably so.[70] Some commentators maintain that during the pre-1998 period if the parties expressly provided in the arbitration clause that the arbitrators had the power to decide their own jurisdiction, then this provision would exclude all judicial scrutiny of the question, even at Stage 3.[71] Whether or not this was ever an accurate description of German law, it is certainly not an accurate description today because the 1998 German Arbitration Act is now based on the Model Law.

The new German statute's major variation from the Model Law respecting negative *Kompetenz-Kompetenz* arises in Section 1032(2), which is the German equivalent of Model Law Article 8.[72] Under 1032(2) a German court may only decide the arbitrators' jurisdiction if requested to do so before "the arbitral tribunal is constituted." In this respect it follows the French approach.[73] On the other hand, at least one commentator has maintained that when a court is properly seized of the jurisdictional issue, it is to make a full determination, not merely a prima facie one, as required in French law.[74]

Section 1040 of the new German statute essentially follows the provisions of Model Law Article 16.[75] One difference is that the German law expressly states a preference for the arbitrators to decide their jurisdiction in an interim award. That award would of course be subject to immediate set-aside proceedings.

6. The American Approach to Negative Competence-Competence

a. Domestic Arbitration

First Options and *Howsam* are the leading cases delimiting the American approach to negative competence-competence, though the

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70. *See* Klaus P. Berger, *The New German Arbitration Law in International Perspective*, 26 FORUM INTERNATIONALE 8-9 (2000).

71. *See id.*; s*ee also*, Gaillard, *supra* note 32, at 396-97 (citing other authorities); Klaus P. Berger, *Germany Adopts the UNCITRAL Model Law*, 1 INT'L ARB. L. REV. 121, 122 (1998).

72. § 1032 Nr. 2 ZPO (F.R.G.).

73. There is not much practical difference between the German triggering point (constitution of the arbitral tribunal), § 1032 Nr. 2 ZPO, and the French one (when the arbitral tribunal is seized of the matter). N.C.P.C. art. 1458 (Fr.).

74. *See* Peter Schlosser, *La nouvelle législation allemande sur l'arbitrage*, 1998 REV. ARB. 291, 298.

75. § 1040 ZPO (F.R.G.).

opinions do not use this terminology.[76] These precedents deal with domestic arbitration in the United States. The discussion in the following subsection will address whether the distinction between domestic and international arbitration is important. *First Options* rules that arbitrability questions—such as the arbitration agreement's existence and validity—are presumptively for courts.[77] But it also reverses that presumption on scope issues because in case of doubt a merits-based issue goes to arbitration. *Howsam* clarifies that "procedural arbitrability" issues, such as time limits on a claim and waiver, are also presumptively for arbitrators.[78]

That *First Options* was decided at Stage 3 is of no consequence. By holding that a court should review existence and validity questions de novo, *First Options* implicitly held (one could call it dictum) that at Stage 1 courts should decide those issues before sending the dispute to the arbitrators. *Howsam*, which arose at Stage 1, certainly treats *First Options* as having so decided.

From these decisions, one can draw several conclusions respecting the content of a U.S. negative competence-competence doctrine. First, the presumption in *First Option* is rebuttable. Though this is true,[79] it should not be misunderstood. One can imagine a future litigant arguing rebuttal in any of the following situations: (1) the parties include a competence-competence clause in the arbitration agreement; (2) they agree to be bound by the rules of an arbitration institution, rules that incorporate the competence-competence principle;[80] (3) they agree to arbitrate in a Model Law jurisdiction and hence implicitly include the Model Law's competence-competence provisions in their agreement. In each of these cases a rebuttal claim would amount to bootstrapping.[81] Where a party directly attacks the arbitration agreement itself, a court must find that the agreement exists and is valid before its provisions can have effect.[82]

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76. *See generally* First Options of Chicago v. Kaplan, 514 U.S. 938 (1995); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

77. *First Options*, 514 U.S. at 944.

78. *Howsam*, 537 U.S. at 84-85.

79. At least the *First Options* Court calls its rule one of "presumptive" preference for court jurisdiction. Technically of course this is dictum. *See* Park, *supra* note 30, at 141-42 (labeling this aspect of *First Options* as dictum).

80. See UNCITRAL Arbitration Rules G.A. Res. 98, U.N. GAOR, 21st Sess. Supp. No. 17, U.N. Doc. A/RES/31/98 art. 21 (1976); American Arbitration Association International Rules of 2001, art. 15 (2001), *available at* http://www.adr.org; London Court of International Arbitration Rules of 1998 art. 23 (1998), *available at* http://www.lcia-arbitration.com/lcia/arb/uk.htm.

81. Professor Park reaches this conclusion in Park, *supra* note 30, at 147.

82. It is interesting that French commentators have not tried to explain the French doctrine as deriving from the parties' agreement, but rather from national arbitration law at the arbitral seat or where recognition and enforcement is sought. *See* Gaillard, *supra* note 32, ¶ 658. Presumably the point should be stated even more

A non-bootstrapping rebuttal of the *First Options* presumption could presumably take place in two scenarios. Scenario One would occur if, after a dispute arises, involving both a merits-based and a related arbitrability dispute, the parties enter into an agreement to submit the entire dispute to arbitration. Scenario Two would occur where the parties enter a general agreement (perhaps called a "Memorandum to Agree") containing an arbitration clause committing them to arbitrate all disputes, including arbitrability issues, arising out of or related to their obligation to negotiate in good faith for the formation of future agreements containing arbitration clauses.[83]

A second conclusion from *First Options* is that absent rebuttal of the anti-arbitration presumption—and any such rebuttal will surely be very rare—existence and validity questions will not be subject to a negative competence-competence doctrine in the United States. This conclusion is not affected by whether one party has initiated arbitral proceedings or whether arbitrators have been seized of the matter. Court jurisdiction to decide arbitrability at Stage 1 will also be full and not limited by a prima facie standard.

A third conclusion is that scope questions, though involving arbitrability, will as a practical matter go to the arbitrators. Perhaps a better way of putting the consequence of *First Options*' reverse presumption on scope questions is that a court will almost always decide to include a disputed merits-based issue and hence will send that merits-based issue to the arbitrators. But, once the arbitrators get the dispute, they would presumably be entitled to reopen and decide the scope issue for themselves, though it seems highly unlikely that they would decide to exclude a merits-based issue that a U.S. court had previously found includable.[84]

Fourth, because of *Howsam*, "procedural arbitrability" issues are subject to a negative competence-competence outcome that is probably stronger than would be obtained under the French doctrine.

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broadly to include the arbitration law of a country called upon to enforce the arbitration agreement, even if the arbitral seat is not in that country.

Note that the pre-1998 German Kompetenz-Kompetenz doctrine seems to have had a bootstrapping aspect to it. Apparently inclusion of a Kompetenz-Kompetenz clause in the arbitration agreement excluded all judicial scrutiny. After enactment of the 1998 German Arbitration Act adopting the Model Law approach to competence-competence, the German Institute of Arbitration (DIS) deleted the Kompetenz-Kompetenz provision from its model arbitration clause. See Klaus P. Berger, *Germany Adopts the UNCITRAL Model Law*, 1 INT'L ARB. L. REV. 121, 122 (1998).

83. *Cf.* Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 471 (9th Cir. 1991). The case would have been more clearly on point had the "Memorandum of Intent"—which might or might not have formed an agreement—been undeniably a binding contract.

84. Because the case is likely to be so rare, I have not attempted to analyze how a U.S. court at Stage 3 would react to an award excluding a merits-based issue that under the *First Options*' reverse presumption would be includable.

Howsam concludes that such issues—for example, time limits on claims and possible waiver or estoppel issues—are presumptively for the arbitrators at Stage 1. *Howsam* reasons that the parties are to be understood as intending this. Thus, one could presumably conclude that, at Stage 3, the arbitrators' conclusions will be subject only to deferential and not de novo court review. In France, Stage 3 review would presumably be de novo.

Note that the *Howsam* "procedural arbitrability" issue might be seen as simply an example of a scope problem. The parties accept that they have an existing and valid arbitration agreement and disagree only over whether the "procedural arbitrability" issue is itself arbitrable. In other words, is the issue within the scope of the arbitration agreement. *Howsam*'s presumption of arbitrability for "procedural arbitrability" questions accords fully, of course, with *First Options*' reverse presumption for questions of scope. The only difference—and not one of any evident import—is that *First Options* sends a merits-based issue to the arbitrators, whereas *Howsam* sends a "gateway" issue to them. Thus, in *Howsam* the arbitrators are empowered to decide whether or not to hear the merits-based issue. As stated above, their decision on this "gateway" issue is presumably subject only to deferential review at Stage 3.

In sum, U.S. domestic arbitration law does not contain a robust negative competence-competence doctrine. Questions of the existence and validity of an arbitration agreement are for full, non-truncated decision by courts at Stage 1, whether or not arbitrators have been previously seized of the dispute. Would this conclusion be different if the dispute involved international arbitration subject to the New York Convention?

b. International Arbitration

First Options and *Howsam* involved domestic arbitration arising under Chapter 1 of the Federal Arbitration Act (FAA). Technically, these cases involved an interpretation of FAA section 3,[85] which provides:

> If any suit . . . be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . ., upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement, shall on application of one of the parties . . . [refer the parties to arbitration].[86]

If the suit involves international arbitration subject to the New York Convention, however, then Chapter 2 of the FAA would apply. An

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85. This is true of *First Options* by implication, because it arose at Stage 3.
86. United States Federal Arbitration Act of 1925, 9 U.S.C.A § 3 (2003).

agreement to arbitrate would fall under the New York Convention for the purposes of a U.S. proceeding, if (1) the agreement contemplates an award in a New York Convention country other than the United States or (2) although the seat of arbitration is within the United States, the United States does not regard the arbitration as domestic.[87] Though these provisions raise complex questions, case (1) is relatively straightforward. If the arbitration is to take place in a Convention country other than the United States the New York Convention applies.

In such a case, the "who decides" question technically turns on interpretation of New York Convention Article II(3).[88] This is because FAA Section 201 incorporates the Convention into U.S. law,[89] and Section 208 provides that FAA Chapter 1 applies only to the extent that it is not inconsistent with the Convention.[90] In other words, the Convention has priority.

The relevant language of the New York Convention Article II(3) is as follows:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed.[91]

How should a U.S. court interpret the language "unless it finds that the said agreement is null and void, inoperative or incapable of being performed"? Recall that at least one leading commentator has argued that this language should be understood as calling for only a prima facie determination of the existence and validity of an arbitration agreement.[92] If the Supreme Court accepts that interpretation in a future case, the U.S. law of negative competence-competence would approach that of the French, at least respecting international arbitration.

Such an outcome is not impossible to imagine. The U.S. Supreme Court has frequently been more receptive to proarbitration arguments respecting international, as opposed to domestic, agreements.[93] An important consideration is that these agreements are commercial and involve sophisticated, generally well-advised parties. The desire for uniformity of interpretation under the New

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87. See New York Convention, *supra* note 5, art. I(1) ("It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought.")

88. New York Convention, *supra* note 5, art. II(3).

89. Federal Arbitration Act. § 201.

90. Federal Arbitration Act § 208.

91. New York Convention, *supra* note 5, art. II(3).

92. *See* VAN DEN BERG, *supra* note 53, at 155, 169.

93. *See, e.g.*, Mitsubishi Motors Corp. v. Soler, 473 U.S. 614, 615 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

York Convention could also influence the Court, but perhaps only if more countries than at present subscribe to the prima facie interpretation.

V. CONCLUSION

The more likely path to a more robust negative competence-competence doctrine in U.S. law is through legislation overhauling the outmoded Federal Arbitration Act. In any such legislative undertaking, valuable lessons can be drawn from the various approaches to the negative competence-competence doctrine in other jurisdictions discussed above. A legislative solution would allow a nuanced and balanced approach, including provisions favoring preliminary awards on jurisdiction, rapid, perhaps non-appealable, judicial review of such decisions, and the flexibility seen in the British approach allowing the arbitrators or the parties to call upon judges for assistance in an appropriate case. The upshot then is another call for a modern United States arbitration statute.