

12-1-2001

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Recommended Citation

Adrianna Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle*, 2 Pepp. Disp. Resol. L.J. Iss. 1 (2001)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol2/iss1/3>

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First Options of Chicago, Inc. v. Kaplan and The Kompetenz-Kompetenz Principle

Adriana Dulic*

I. INTRODUCTION

An arbitral tribunal usually consists of private practitioners engaged in the business of providing legal services for a fee, often faced with financial and competitive pressures to earn more money and handle more cases.¹ Yet, according to the leading institutional rules, it is within the scope of the arbitral tribunal to rule on its own jurisdiction (i.e. to decide whether an issue is arbitrable).² Who should have such a power - the arbitral tribunal or the courts? In 1995, the United States Supreme Court in *First Options of Chicago, Incorporated v. Kaplan* considered whether arbitral tribunals or courts should have the primary power to decide if parties agreed to arbitrate the merits of the dispute and whether the court of appeals should accept the district court's findings of fact and law or apply a de novo standard of review.³ The Court unanimously held that, unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to

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1. See *Tumey v. Ohio*, 273 U.S. 510 (1927):

Arbitrators are not national court judges; they are usually private practitioners, of some sort, engaged in the business of providing legal services for a fee. Often, they face significant financial and competitive pressures to earn more money and handle more cases. That is true for many arbitrators suitable for international commercial disputes. On the other hand, it is recognized in many nations that judges and other governmental authorities ought not have a personal financial interest in the outcome of their official decisions. If the judge's compensation depended on how he decided an issue, would that be just?

Id. See also *Trafalgar Shipping Co. v. Int'l Milling Co.*, 401 F.2d 568, 573-74 (2d Cir. 1968)(Lumbard, C.J., dissenting)("[I]t is not likely that arbitrators can be altogether objective in deciding whether or not they ought to hear the merits. Once they have bitten into the enticing fruit of controversy, they are not apt to stay the satisfying of their appetite after one bite.")*Id.*

2. See, e.g., UNCITRAL Rules (United Nations Commission on International Trade Law 1976), the ICC Rules of Arbitration (International Chamber of Commerce 1998), LCIA Rules (London Court of International Arbitration 1998), AAA International Rules (American Arbitration Association 1997), and ICSID Convention (The International Center for Settlement of Investment Disputes 1965).

3. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

be decided by the court, not the arbitral tribunal.⁴ Furthermore, in such a case, the court of appeals should not accept the district court's findings of fact, but rather apply de novo standard of review.⁵

This note will examine the *First Options* decision and discuss the effects of the case on lower court decisions in applying its reasoning.⁶ Part II will discuss the background of the "Kompetenz-Kompetenz" principle under Federal Arbitration Act and various institutional rules.⁷ Part III will provide a statement of the facts in *First Options*.⁸ Part IV will provide an explanation of the opinion.⁹ Part V will give a critical analysis of the opinion, examine the impact the Court's decision had on the lower courts applying the decision as well as the consequences of the decision and proposing a resolution to the conflicting interpretations of the opinion.¹⁰ The purpose of this article is not to argue that the power to determine the jurisdiction of the arbitral tribunal should rest with the courts rather than with the arbitral tribunal, nor vice versa. Rather, the purpose of this article is to point out the need for clearer guidance, as well as provide insight into some of the potential solutions to these problems.

II. BACKGROUND

A. *The Kompetenz-Kompetenz*¹¹ Principle Under the Federal Arbitration Act

The Kompetenz-Kompetenz principle refers to the allocation of the authority between an arbitral tribunal and a national court over the interpretation and enforceability of arbitration agreements. The principle, as developed by German case law and scholarly commentary, authorizes an arbitral tribunal to determine its own jurisdiction without requesting a judicial decision.

4. *Id.* at 943.

5. *Id.*

6. *See infra* notes 11-116 and accompanying text.

7. *See infra* notes 11-27 and accompanying text.

8. *See infra* notes 28-42 and accompanying text.

9. *See infra* notes 43-48 and accompanying text.

10. *See infra* notes 49-113 and accompanying text.

11. Note that this comment will utilize the German term "Kompetenz-Kompetenz," (meaning literally "jurisdiction concerning jurisdiction") largely for historical purposes, as the doctrine originated in the German courts. The doctrine refers to the ability of arbitrators to rule on their own jurisdiction over a party or dispute. *See Shirin Philipp, Is Supreme Court Bucking The Trend? First Options v. Kaplan In Light Of European Reform Initiatives In Arbitration Law*, 14 B.U. INT'L L.J. 119, 134-37 (1996).

It presents an extreme version of the regulation of an arbitral tribunal's power to determine its own jurisdiction. Kompetenz-Kompetenz allows parties to agree, before any dispute arises, to confer upon the arbitral tribunal the exclusive power to determine its own jurisdiction. Subsequent judicial review is limited to an examination of whether the parties did indeed create a valid Kompetenz-Kompetenz agreement. Parties may not challenge the competence decision of the arbitral tribunal in court.¹²

There are two different interpretations of the FAA in regards to the power to rule on arbitrability.¹³ Under the traditional interpretation, "Section 3 of the Act empowers the courts to decide all arbitrability issues."¹⁴ Section 3 of the Act states:

If any suit or proceeding 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* in which such suit is pending, *upon being satisfied that the issue involved* in such suit or proceeding *is referable to arbitration under such an agreement*, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceedings with such arbitration.¹⁵

Prior to *First Options* the Supreme Court interpreted sections 2 and 3 of the Act as conferring all issues of arbitrability on the federal court, including

12. *Id.* at 123.

13. See Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 356-57 (1997).

14. *Id.* at 356.

15. *Id.* (quoting the United States Federal Arbitration Act (FAA) 9 U.S.C. § 3 (2000)); See also Philipp, *supra* note 11, at 149.

The Federal Arbitration Act does not provide parties with a mechanism by which to efficiently and promptly challenge an arbitral tribunal's competence. Perhaps in an indirect way, Section 3 of the Act might be said to allow an objecting party to challenge the arbitrators' jurisdiction immediately. Section 3 provides for a stay of court proceedings, if an arbitration proceeding has been properly commenced where the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement . . ." Therefore, a party seeking to resist arbitration on the grounds of lack of arbitral competence, would have to commence separate litigation on the same subject, thereby invoking the opposing party's defense that arbitration properly governs the dispute. Section 3 does not envision a party's direct challenge to jurisdiction before the courts.

Id. at 124 n.24 (citing *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991)). In *Three Valleys*, the court stated, "[B]ecause an 'arbitrator's jurisdiction is rooted in the agreement of the parties,' . . . [a contesting party] . . . cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate." *Three Valleys*, 925 F.2d at 1140-41 (quoting *George Day Constr. Co. v. United Bhd. Of Carpenters, Local 354*, 722 F.2d 1471, 1474 (9th Cir. 1984)).

the ability to rule on the validity and scope of the arbitration agreement.¹⁶ Under such interpretation, a court could “examine the arbitration agreement to determine its validity, thereby allowing the court to announce its opinion as to the jurisdictional competence of the arbitral tribunal.”¹⁷

The other interpretation (as the dicta contained in *First Options* suggests), “adoption of the more drastic Kompetenz-Kompetenz as a means of settling the issue of jurisdictional competence of the arbitral tribunal.”¹⁸

[T]he scope of the court’s inquiry is initially limited to the existence of the *kompetenz-kompetenz* clause itself . . . [or rather to] who has the power to rule on arbitrability . . . and, if the parties clearly mandate that this issue is arbitrable, then the court has little choice under section 3 but to stay its proceedings.¹⁹

B. Kompetenz-Kompetenz Principle Under Various Institutional Rules

The leading institutional arbitration rules (the United Nations Commission on International Trade Model Law, the United Nations Commission on International Trade Rules of Arbitration, the International Chamber of Commerce Rules of Arbitration, the AAA International Rules, the London Court of International Arbitration Rules, and the International Center for Settlement of Investment Disputes Rules) all provide that the arbitral tribunal has the power to rule on its own jurisdiction, including the cases in which the claim is that the contract containing the clause is not binding or is invalid.²⁰

Article 21 of the UNCITRAL Rules of Arbitration gives the power to the arbitral tribunal to determine the validity of the objections to its jurisdiction, including those objections relating to the existence and validity of the arbitration agreement.²¹ Also, under Article 6 of the ICC Rules of Arbitration, there is a two-stage process for determining the Kompetenz-Kompetenz issue.²² If the validity or existence of an arbitration agreement is challenged,

16. See Wyss, *supra* note 13, at 356.

17. Philipp, *supra* note 12, at 123.

18. See *id.*

19. See Wyss, *supra* note 13, at 357.

20. See Article 21 of UNCITRAL Rules, Article 15(1) of AAA International Rules, Article 23 of LCIA Rules, Article 6(2) of ICC Rules, and Article 41(1) of ICSID Convention Rules at <http://www.uncitral.org/>.

21. See Article 21, Arbitration Rules of the United Nations Commission on International Trade Law stating 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” (available at <http://www.uncitral.org/en-index.htm>). These Rules were adopted by the United Nations Commission on International Trade Law (UNCITRAL) on April 28, 1976. The General Assembly of the United Nations approved the Rules unanimously in December, 1976. *Id.*

22. See Article 6 (2), International Chamber of Commerce Rules of Arbitration stating

“any decision as to the jurisdiction of the arbitral tribunal shall be taken by the Arbitral Tribunal itself” once the court is satisfied as to the prima facie existence of such an agreement.²³ This rule has been interpreted to give very wide discretion to the arbitral tribunal to decide its own jurisdiction. Also, Article 15(1) of AAA Rules gives the arbitral tribunal an express power to rule upon an objection as to its jurisdiction.²⁴ Furthermore, Rule 41(1) of the ICSID Convention states the arbitral tribunal shall be the judge of its own jurisdiction.²⁵ Moreover, Article 23 of LCIA Rules also gives the arbitral tribunal the power to rule on its own jurisdiction.²⁶ In fact, under Article 23(4), by

that:

if the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

(available at http://www.iccwbo.org/court/english/arbitration/rules.asp#article_6.)

23. See *id.*

24. See Article 15, American Arbitration Association International Arbitration Rules “(1) 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.”

(available at <http://www.adr.org/rules/international/AAA175-0900.htm#Article 15>).

25. See Rule 41(1), The International Center for Settlement of Investment Disputes (ICSID). ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened to signature on March 18, 1965 (the Convention is known as the ICSID Convention or the Washington Convention). Pursuant to Article 6(1) of the Convention, the ICSID Arbitration Rules were adopted,

(available at <http://www.worldbank.org/icsid/basicdoc/80.htm>).

26. See Article 23, London Court of International Arbitration Rules stating that:

23.1 The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause . . . 23.4 By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal’s jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisa-

agreeing to arbitration under the LCIA Rules, the parties are agreeing to “not . . . apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal’s jurisdiction or authority, except with the agreement in writing of all parties”²⁷

III. STATEMENT OF FACTS

First Options of Chicago, Inc., was a firm that cleared stock trades on the Philadelphia Stock Exchange.²⁸ Kaplan, his wife, and his wholly owned investment company MK Investments, Inc. (MKI) had a trading account with First Options, and, as a result of the stock market collapse of October 1987, the Kaplans incurred a substantial trading deficit leaving it in debt to First Options.²⁹ In an effort to resolve the debt, the parties entered into a series of agreements.³⁰ Kaplan, as the president and sole shareholder of MKI, signed an agreement containing an arbitration clause on behalf of MKI.³¹ Kaplan, in his individual capacity, signed an additional agreement that did not contain an arbitration clause. The dispute concerned the compliance with the “workout” agreement, which governed the “working out” of debts to First Options that MKI and the Kaplans. Upon MKI’s loss of additional \$1.5 million, First Options took control of and liquidated certain MKI assets, demanded immediate payment of the entire MKI debt, and insisted that Kaplans personally pay any deficiency.³² When its demands were not met, First Options sought arbitration.³³ MKI accepted arbitration, but the Kaplans, who had not personally signed the document that contained the arbitration clause, denied that the dispute was arbitrable.³⁴ The arbitral tribunal decided that they had the power to rule on the merits of the parties’ dispute, and did so in favor of First Op-

tion of the Arbitral Tribunal or following the latter’s award ruling on the objection to its jurisdiction or authority.

(available at <http://www.lcia-arbitration.com/town/square/xvc24/rulecost/english.htm#w>).

27. *Id.*

28. First Options, 514 U.S. at 940.

29. *Id.*

30. *Id.* These agreements consisted of the following: “(1) a Letter Agreement executed by First Options, MKI, Mr. Kaplan, Mrs. Kaplan, and certain other entities and individuals; (2) a Guaranty executed only by MKI; (3) a Subordinated Loan Agreement executed by First Options, MKI, and a separate entity; and (4) a Subordinated Promissory Note executed by MKI.” Kevin Michael Flowers, *First Options of Chicago, Inc. v. Kaplan*, 12 OHIO ST. J. ON DISP. RESOL. 801, 810 n.7 (1997).

31. *Id.* at 941.

32. *Id.* at 940.

33. *Id.*

34. See First Options, 514 U.S. at 941.

tions.³⁵ The Kaplans asked the Federal District Court to vacate the arbitration award, while the First Options requested its confirmation.³⁶ The court confirmed the award:

[f]inding that Kaplan had “waived” his jurisdictional objections: “[A] party who voluntarily and unreservedly submits an issue to arbitration cannot later maintain that the arbitrators acted without authority to resolve that issue.” Because Kaplan, rather than “consistently maintain[ing] an objection to the arbitration panel’s jurisdiction” had filed a motion expressly asking the panel to decide the jurisdictional issue and had “expressed no unwillingness to abide by the arbitrators’ decision,” he had thereby “manifest[ed] a clear acceptance of the arbitration panel’s authority.”³⁷

On appeal, the Court of Appeals reversed the District Court’s confirmation of the award finding that the dispute was not arbitrable.³⁸

The Third Circuit found that:

[b]efore “arbitrators” could purport to take jurisdiction over Kaplan personally, it is necessary to show that Kaplan had consented to their exercise of authority. . . . [that] Kaplan had maintained consistently that he had never personally consented to arbitration—and therefore, he had not ‘waived’ or ‘surrendered’ that defense. . . . [and as such the] determination that he had consented to arbitration must be made by a court.³⁹

Additionally, the Third Circuit, applying de novo review, determined Kaplan’s jurisdictional defense was in fact well-founded.⁴⁰ Specifically, “[h]e had never consented, in his individual capacity, to allow the arbitrators to determine the merits of the dispute.”⁴¹ The Supreme Court granted certiorari to consider who should have the primary power to decide arbitrability.⁴²

IV. ANALYSIS OF THE COURT OPINION

Justice Breyer delivered the opinion of the court.⁴³ The Court unanimously held the question of whether arbitral tribunals or courts have primary

35. *Id.*

36. *Id.*

37. Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT’L. ARB. 287, 290 (1999).

38. *First Options*, 514 U.S. at 941.

39. *See Rau, supra* note 37, at 291.

40. *Id.*

41. *Id.*

42. *First Options*, 514 U.S. at 941.

43. *Id.* at 940.

power to decide if parties agreed to arbitrate merits of the dispute depends on whether parties agreed to arbitrate; the court of appeals should apply de novo standard of review, with no deference to the arbitral tribunal's decision, unless there is a "clear and unmistakable evidence" that the parties intended to submit the arbitrability issue to arbitral tribunal", and if the parties' intent that the arbitral tribunal should decide issues of arbitrability is "clear and unmistakable", the presumption of court competence on the issue is rebutted and courts must give considerable leeway to the arbitral tribunal setting aside its decision only in certain, narrow circumstances.⁴⁴ The Court reasoned that the question whether an arbitral tribunal or courts have the primary power to decide if parties agreed to arbitrate merits of the dispute depends on whether parties agreed to arbitrate because the allocation of functions between judges and arbitrators is based on contract principles.⁴⁵ In other words,

[A] party who is found to have submitted a dispute to arbitration essentially gives up his right to have a court independently decide on the merits of the dispute . . . because a court will only set aside an arbitrator's decision on the merits of a dispute . . . where the arbitrator exceeded his powers due to corruption, fraud, undue means or in 'manifest disregard' of the law.⁴⁶

Furthermore, the Court justified the difference in the allocation of the presumption as "understandable" because where "the parties have a contract that provides for arbitration of some issues . . . the parties likely gave at least some thought to the scope of arbitration."⁴⁷ On the other hand, when the agreement is silent as to arbitral jurisdiction, the parties may not have even considered the possibility of arbitration, much less the scope, and forcing them into arbitration would be unfair.⁴⁸

V. IMPACT

A. *Analysis of Court's Opinion*

As pointed out by some critics, the Supreme Court's use of the term "arbitrability" in *First Options* seems to include several ideas, and as such has led to conflicting interpretations and applications of the Court's dicta in lower courts.⁴⁹ The term "arbitrability" is generally used to refer to two dif-

44. *Id.* at 944-49.

45. *Id.*

46. Flowers, *supra* note 30, at 804.

47. *First Options*, 514 U.S. at 945.

48. *See id.*

49. Conrad K. Harper, *The Options in First Options: International Arbitration and Arbitral Competence*, 771 PLLCOMM. 127, 136-37 (1998).

ferent concepts:

1) [W]hether the parties agreed to arbitrate the dispute, the two prongs of which are a) whether the parties are party to the arbitration agreement and b) whether the arbitration agreement encompasses the dispute at issue; and 2) whether the subject matter of a dispute is amenable to arbitration for public policy reasons.⁵⁰

Issues relating to the scope of an arbitration agreement, though, are not within the province of the courts, and the courts usually refer such to the arbitrators.⁵¹ The Supreme Court's general reference to "arbitrability" in dicta leaves the lower courts in its interpretation of dicta with the opportunity to apply the higher evidentiary burden to all of the arbitrability issues when determining whether the arbitrator or the court should decide the disputed issue.⁵² Post-*First Options* cases reveal that:

[B]efore courts even reach the question of who - the court or the arbitrator - decides an issue of arbitrability, there is conflict among the Circuits as to what constitutes an issue of arbitrability, and thus conflict as to what is for the court and what is for the arbitrator [to decide].⁵³

As such, the Supreme Court's imprecise and ambiguous use of the term means that the lower courts have no clear guidance as to whether a jurisdictional issue should be decided by them rather than by the arbitral tribunal.

B. The Conflicting Interpretations of the First Options Decision Among the Circuits

An example of the conflicting interpretations of the Supreme Court's *First Options* decision is provided by cases concerned with the arbitration mechanisms of the securities industry. In the securities industry, the rules of self-regulatory organizations, like the NASD⁵⁴ and NYSE⁵⁵, impose a limit of six years after which no customer claim "shall be eligible for submission to arbitration"⁵⁶ There are cases that apply *First Options* to require that

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. The National Association of Securities Dealers Code.

55. The New York Stock Exchange.

56. Rule 10304 of the NASD Code provides: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This rule shall not ex-

the “eligibility” of a claim under this provision is a question to be determined by the courts unless the parties have stipulated otherwise.⁵⁷ Other courts have found that *First Options* does not require such a result and so the question whether the claim is time-barred may be left to the arbitrator.⁵⁸

In the post-*First Options* decisions, five circuits - the Third, Sixth, Seventh, Tenth, and Eleventh - held that the court must decide the applicability of the time bar because they found that the bar is a substantive eligibility requirement constituting a jurisdictional prerequisite to arbitration.⁵⁹ The Seventh Circuit’s decisions in *Smith Barney Inc. v. Schell*,⁶⁰ *Edward D. Jones & Co. v. Sorrells*,⁶¹ and *PaineWebber Inc. v. Farnam*,⁶² are typical majority decisions. In these cases, the Seventh Circuit held that the court must decide the applicability of the time bar based upon:

the language of section 15, [the fact that] NASD itself considers section 15 to be a jurisdictional bar, [and the finding that] section 35 [of the NASD Code] is not a “clear and unmistakable” expression of the parties’ intent to give the arbitrators the power to decide whether section 15 bars it from exercising jurisdiction.⁶³

In contrast, five Circuits—the First ... Ninth—held that the arbitral tribu-

tend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction” (*available at* http://www.nasdaq.com/arb_code/arb_code1.asp#10304). Rule 603 of the NYSE’s arbitration rules states: “No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.” (*available at* <http://www.nyse.com/regulation/regulation.html>). The NASD has proposed a new rule that would make the organization’s Director of Arbitration the sole judge of whether the six-year deadline has expired (“The proposed rule establishes that all claim are eligible for arbitration unless the Director decides otherwise, and it removes the courts and the arbitrators from any role in determining the eligibility of a claim”). *See generally* Linda Fienberg, *NASDR Dispute Resolution: How to use it to your advantage*, SD70 ALI-ABA 177, 192-99 (1999).

57. *See infra* notes 59-63.

58. *See infra* notes 54-73.

59. *Cogswell v. Merrill Lynch*, 78 F.3d 474, 478-81 (10th Cir. 1996); *See also* *Merrill Lynch v. Cohen*, 62 F.3d 381, 383-84 (11th Cir. 1995)(same); *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1378 (3d Cir. 1993)(same); *Roney and Co. v. Kassab*, 981 F.2d 894, 898-900 (6th Cir. 1992)(same); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512-13 (7th Cir. 1992)(same); *See also generally* Emil Bukhman, *Time Limits on Arbitrability of Securities Industry Disputes Under the Arbitration Rules of Self-Regulatory Organizations*, 61 BROOK. L. REV. 143 (1995) (describing the division among the courts and the NASD’s response and arguing that courts, not arbitrators, should determine whether section 15 applies).

60. *Smith Barney Inc. v. Schell*, 53 F.3d 807 (7th Cir.).

61. *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir.).

62. *PaineWebber Inc. v. Farnam*, 870 F.2d 1286 (7th Cir.).

63. *Coswell*. 78 F.3d at 477.

nal must decide whether the NASD time bar precludes arbitration.⁶⁴ Various circuits based their decision on a different rationale. The First Circuit found that the question of time limits is a question for arbitral tribunal because, while the court acknowledged the principle stated in *First Options* that the parties normally intend for the courts alone to decide matters related to arbitrability, the first court determined that the time limits would not be considered an “arbitrability issue” at all as it is not a matter related to arbitrability.⁶⁵ The court stated that “issues other than (1) the existence of an arbitration agreement between the parties and (2) whether the subject matter of the underlying dispute is within the scope of the arbitration clause are presumptively not ‘arbitrability’ issues.”⁶⁶ The court concluded by citing Section 35 of the NASD arbitration rules, which allows the arbitral tribunal to interpret the applicability of all provisions under the NASD Arbitration Code as confirmation of the parties’ intent to arbitrate time limits.⁶⁷

In *Smith Barney Shearson, Inc. v. Boone*, the Fifth Circuit drew a distinction between issues of “substantive arbitrability” and “procedural arbitrability.”⁶⁸ In lieu of the Fifth Circuit precedent that timeliness issues are procedural and must be decided by the arbitrator, the court held that only an arbitral tribunal can determine whether section 15 applies.⁶⁹ The Eighth Circuit based its decision, in *FSC Securities Corporation v. Freel*, on the finding that “the parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure . . . [which] means [that] they adopted the entire NASD Code, including Section 35.”⁷⁰ Therefore, the court held “that the parties’ adoption of this provision is a ‘clear and unmistakable’ expression of their intent to leave the question of arbitrability to the arbitrators.”⁷¹ Finally, and most recently, the Second Circuit held that the arbitral

64. *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 598-99 (1st Cir. 1996); *See also* *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 753-54 (5th Cir. 1995); *Miller v. Prudential Bache Secs., Inc.*, 884 F.2d 128, 132 (4th Cir. 1989), *cert. denied*, 497 U.S. 1004 (1990); *FSC Secs. Corp. v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1196, 1198-99 (2d Cir. 1996); *O’Neel v. National Ass’n of Secs. Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982); *Conticommodity Services v. Philipp & Lion*, 613 F.2d 1222, 1224-26 (2d Cir. 1980).

65. *PaineWebber, Inc.*, 87 F.3d at 599.

66. *Id.*

67. *Id.* at 601.

68. *Smith Barney Shearson*, 47 F.3d at 753-54.

69. *Id.* at 754.

70. *See FSC Secs. Corp.*, 14 F.3d at 1312.

71. *Id.* at 1312-13.

tribunal must decide the applicability of the time bar without any analysis.⁷² However, the court in *PaineWebber Inc. v. Bybyk* did find that “the broad arbitration agreement (‘any and all controversies which may arise concerning the account’ were to be arbitrated) was clear and unmistakable evidence of the parties’ intent to have the arbitrator determine arbitrability.”⁷³

Furthermore, the Fourth Circuit, which has not decided the question presented here, appears to accept the “substance v. procedure” approach of the Fifth Circuit.⁷⁴ It appears that the Fourth Circuit’s analytical approach wherein the procedural rules of the arbitral forum are incorporated into an arbitration agreement only to govern arbitration procedure, would lead to the same result with respect to the NASD time bar (which is that the NASD Code of Arbitration Procedure, including section 15, is for the arbitral tribunal to interpret and apply).⁷⁵

C. *The Consequences – Uncertainty and Unfairness*

a. Uncertainty

One of the consequences of these conflicting interpretations is uncertainty or unpredictability. International commercial arbitration has flourished in recent decades as the business community has realized the advantages of choosing arbitration as a means of dispute resolution. Such advantages include the ability to have an expert as a judge, the ability to enforce arbitration awards anywhere more readily than foreign judgments so long as the country is a signatory to the New York Convention,⁷⁶ the ability to choose the neutral or more favorable and less hostile situs than the host country, the ability to choose the law to be applied in the resolution of the dispute, the

72. See *PaineWebber, Inc.*, 81 F.3d at 1196, 1198-99; See also *PaineWebber Inc.*, 87 F.3d at 598.

73. See *PaineWebber, Inc.* 81 F.3d at 1199.

74. See *Miller*, 884 F.2d at 132 (holding that a clause in a broker-client agreement providing that “arbitration was to be conducted in accordance with the rules of the arbitration forum governed *only* arbitration procedure.” The court also held that although the NASD’s procedural rules made the NASD’s anti-fraud provisions inapplicable, the NASD arbitrator was not barred from applying the anti-fraud provisions of other stock exchanges to which Prudential-Bache belonged. That result followed from the court’s finding that the NASD arbitration rules related only to arbitration “procedure”, and not the “substantive rules that may bear on the merits of the underlying dispute”).

75. See *id.* (holding that the NASD Code of Arbitration Procedure, including section 15, is for the arbitral tribunal to interpret and apply).

76. United Nations Convention on the Recognition and Enforcement Of Foreign Arbitral Awards (known as the “New York Convention”) was adopted 1958 in order to promote and ensure the enforceability of foreign arbitral awards.

ability to bypass the courts and to have a potentially speedier process, etc.⁷⁷ There is already evidence of attempts to curtail and bypass this uncertainty by the business community. The NASD has already proposed a new rule that would make the organization's Director of arbitration the sole judge of whether the six-year deadline has expired. The rule resolves the uncertainty resulting from the conflicting interpretations.⁷⁸ It may be argued that this consequence may be avoided by making sure that there is a "clear and unmistakable" evidence that the parties intended to submit the arbitrability issue to the arbitral tribunal.⁷⁹ So, what is considered "clear and unmistakable" evidence of the parties' intent to submit the arbitrability issue to the arbitral tribunal?

In order to determine whether there is a "clear and unmistakable" evidence of the parties' intent to submit the arbitrability issue to the arbitral tribunal, the court must refer to the "ordinary state-law principles that govern the formation of contracts."⁸⁰ If the agreement contains specific language that refers to, and delegates as to, who should decide the issue of arbitrability, there is no question that the court will find "clear and unmistakable" evidence of the parties' intent to submit such issue to the arbitral tribunal.⁸¹ In *Telectronics Pacing Systems*, the court held that the language of section 11.02 of the licensing agreement was specific and unambiguous and, as such, constituted "clear and unmistakable" evidence of the parties' intent to submit the issue of arbitrability to the arbitral tribunal.⁸² Section 11.02 of the licensing agreement stated that "[a]ny dispute . . . shall be resolved' by binding arbitration but it provid[ed] for one type of exception and that is when 'the arbitrators determine that third party . . . is a necessary party.'⁸³ The language, thus, "specifically mentions arbitration in connection with determination of any necessary third party issue . . . [and as such] offers 'clear and unmistakable evidence' that the parties agreed to arbitrate whether the condition that triggers the exception to arbitration applies."⁸⁴ Therefore, the court reasoned that the parties clearly focused on this issue and considered who would de-

77. Robert D. Fisher & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 948-956 (1996).

78. See Fienberg, *supra* note 56 at 192-99.

79. See *First Options*, 514 U.S. at 944-45.

80. See *id.* at 944.

81. See *Telectronics Pacing Systems, Inc. v. Guidant Corp.*, 143 F.3d 428 (8th Cir. 1998).

82. See *id.* at 431.

83. *Id.*

84. *Id.*

cide whether the exception applies.⁸⁵

On the other hand, when the language is so broad as to include “any dispute arising out of or relating to this agreement,” but contains no specific reference to the issue of arbitrability, the court will most likely find that there was no “clear and unmistakable” evidence of the parties’ intent to submit the issue of arbitrability to the arbitral tribunal.⁸⁶ In *Riley Manufacturing*, the court held that the language of the arbitration clause in the manufacturing agreement did not constitute “clear and unmistakable” evidence of the parties’ intent to submit the issue of arbitrability to the arbitral tribunal.⁸⁷ The court reasoned that there was no “clear and unmistakable” evidence of such intent because “although the arbitration clause in the manufacturing agreement is broadly written, referring to ‘any and all disputes arising out of or relating to’ the contract, there was no hint in the text of the clause or elsewhere in the contract that the parties expressed a specific intent to submit to an arbitrator the question of whether an agreement to arbitrate exists”⁸⁸ However, when the language of the arbitration clause is just as broad, but it incorporates institutional rules granting the arbitral tribunal the authority to rule on its own jurisdiction,⁸⁹ the court will find that there is “clear and unmistakable” evidence of the parties’ intent to submit the issue of arbitrability to the arbitral tribunal.⁹⁰ In *Amgen, Incorporated v. Ortho Pharmaceutical Corp.*, the court held that the language of the arbitration clause in the agreement was “clear and unmistakable” evidence of the parties’ intent to submit the issue of arbitrability to the arbitral tribunal.⁹¹ The court reasoned that there was “clear and unmistakable” evidence of such intent because the parties not only agreed to submit all procedural matters to the arbitral tribunal under this broad language, but they further agreed to it by accepting the commercial rules of AAA.⁹² This is the only logical finding considering that, as stated earlier,⁹³ the institutional rules mandate that the issue of arbitrability be de-

85. *See id.*

86. *Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775 (10th Cir. 1998); *See also Scott v. Prudential Securities, Inc.*, 141 F.3d 1007 (11th Cir. 1998); *American Life Insurance Co. v. Parra*, 25 F. Supp. 2d 467 (Del. Dist. Ct. 1998).

87. *See Riley Manufacturing Co. Inc.*, 157 F.3d at 780.

88. *Id.*

89. *See, e.g.*, ICC, AAA.

90. *See Harper, supra* note 49, at 141-42; *see also Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989); *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Sys. Co.*, 643 F.2d 863 (1st Cir. 1981); *Amgen, Inc. v. Ortho Pharmaceutical Corp.*, 303 Ill. App. 3d 370 (1999).

91. *See Amgen*, 303 Ill. App. 3d at 378.

92. *See id.* at 378-79.

93. *See supra* notes 20-27.

cided by arbitral tribunal. This leads us to another problematic consequence—unfairness.

b. Unfairness

Unfairness occurs as a result of the use of complex legalistic language, disparity in sophistication or bargaining power of the parties, or the lack of opportunity to study the contract and inquire about the contract terms. The Supreme Court has expressed concern for unfairness by stating that any other rule would “too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.”⁹⁴ The Court has further stated that the parties to the agreement often may not focus on the significance of having the arbitral tribunal decide the scope of their own powers.⁹⁵ By finding that the broad language used in the standard arbitration clause does not constitute “clear and unmistakable” evidence of the parties’ intent to submit the issue of arbitrability to the arbitral tribunal, the court manages well this concern for unfairness.⁹⁶ While the business community is likely to be aware of the difference between the use of the broad language only, and the use of the broad language coupled with the statement that the arbitration is being governed by one of the many institutional rules in the arbitration clause, is it likely that an average person would know such a difference? Is it more likely that an average person reasonably would have thought that the judge would decide the scope of the arbitral tribunal’s powers when broad language of the standard arbitration clause is used, yet reasonably would have thought that such would be decided by the arbitral tribunal when the exact same language is used but coupled with the brief statement that the arbitration is to be governed by one of the institutional rules? It is doubtful.

c. The solution

One solution to this problem of conflicting interpretations is a modification of the American arbitration law (Federal Arbitration Act) by Congress. Unlike the United States, many foreign and international legislatures have

94. *First Options of Chicago v. Kaplan*, 514 U.S. at 945.

95. *Id.*

96. *See supra* notes 86-88 and accompanying text.

chosen to “spell out” and include the Kompetenz-Kompetenz principle in their statutory law.⁹⁷ For example, many countries have chosen to adopt Article 16 of the UNCITRAL Model Law. The variations in working drafts considered by UNCITRAL in adoption of Article 16 of UNCITRAL Model Law:⁹⁸

indicate a struggle between insufficient and excessive judicial control of the arbitral process, in an effort to confer upon the arbitrators substantial authority without damaging the integrity of the dispute resolution system or the judiciary . . . The first working draft recognized the arbitral tribunal’s power to determine its own jurisdiction by delaying court review of the arbitral ruling ‘until the arbitral award is made, unless [the court] has good and substantial reasons’ to exercise its review earlier . . . Comments to the second working draft indicate a concern that the first draft did not sufficiently emphasize the concurrent power of national courts. In the third draft, the writers rejected a proposal allowing a party to appeal directly to a court, without prior challenge to the arbitral tribunal regarding its jurisdiction.⁹⁹

The final draft of Article 16, just like other leading institutional arbitration rules, grants arbitral tribunals the initial authority to determine the scope

97. See *Harper, supra* note 49, at 130 (analyzing and comparing different approaches that various countries have taken as opposed to institutional rules).

98. Article 16. Competence of arbitral tribunal to rule on its jurisdiction:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence [sic]. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article 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.

(available at UNCITRAL’s website at <http://www.uncitral.org/en-index.htm>). Article 16 of The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on June 21, 1985. The United Nations has encouraged Member States to adopt the Model Law in order to harmonize the laws governing enforcement practices and judicial control of arbitral procedure.

99. See *Philipp, supra* note 12, at 126-27.

of their jurisdiction.¹⁰⁰ Therefore, it expressly embraces the principle of Kompetenz-Kompetenz.

Looking at the individual countries that embrace the principle of Kompetenz-Kompetenz, Swiss Law on Private International Law states: 1. An arbitral tribunal has the power to consider and make awards on its own jurisdiction; 2. It is immediately appealable; and 3. The arbitral tribunal has discretion to proceed to hear a dispute on the merits before judicial review.¹⁰¹ In addition, Article 48 of the French Code of Civil Procedure provides that the courts must decline jurisdiction, even if arbitral proceedings have not yet commenced, unless the arbitration agreement is manifestly null and void determined before the constitution of the arbitral tribunal.¹⁰² Furthermore, there are examples of judicial authority reasserting itself using statutory law, including a new amendment to the German Arbitration Code establishing judicial authority over the arbitral process.¹⁰³ The new amendment (section 1040)

100. *See id.*

101. See Article 186(1) stating that “[t]he arbitral tribunal shall decide on its own jurisdiction” and Article 186(3) stating that “[t]he arbitral tribunal shall, in general, decide on its own jurisdiction by a preliminary decision.” Swiss Private International Law Statute of December 18, 1987 (“Loi federale de droit international privé”) (Fr.), translated in Andreas Bucher & Pierre-Yves Tschanz, INTERNATIONAL ARBITRATION IN SWITZERLAND, 225 (1989) (“(1) Le tribunal arbitral statue sur sa propre compétence; (2) L’exception d’incompétence doit être soulevée préalablement a toute défense sur le fond; (3) En général, le tribunal arbitral statue sur sa compétence par une décision incidente.” available at <http://www.admin.ch/ch/fr/rs/291/a186.html>); *See also* Article 190(3) stating that “[a]s regards preliminary decisions, setting aside proceedings can only be initiated on the grounds of the above paragraphs 2(a) and 2(b); the time-limit runs from the communication of the decision.” *Id.* Art. 190(3) translated in Bucher & Tschanz (“En cas de décision incidente, seul le recours pour les motifs prévus au 2^e alinéa, lettres a et b, est ouvert; le délai court dès la communication de la décision.” available at <http://www.admin.ch/ch/fr/rs/291/a190.html>). The grounds contained in paragraphs 2(a) and 2(b) are either an improper jurisdictional decision by the arbitral tribunal or where the arbitral tribunal has been incorrectly chosen. *Id.* Thus, the parties need not wait until a final award to challenge the arbitral tribunal’s jurisdictional decision.

102. *See* Nouveau Code de Procedure Civile [N.C.P.C.] art. 1458, § 2 (Fr.) stating that “Lorsqu’un litige dont un tribunal arbitral est saisi en vertu d’une convention d’arbitrage est porté devant une juridiction de l’Etat, celle-ci doit se déclarer incompétente.” available at <http://www.legifrance.gouv.fr/citoyen/code.ow?lalangue=FR?heure=140759314081>.

103. *See* Philipp, *supra* note 12, at 135-38. (providing information regarding German law prior to amendment):

In the absence of clear and efficient guidelines in the Code regarding the jurisdictional powers of the arbitrators and judicial limitations on this power, a solution developed from the practice of parties and, ultimately, the courts. In a judgment of May 5, 1977, the Bundesgerichtshof (BGH) considered a dispute between parties to a charter agreement

allows the court to review the arbitral tribunal's jurisdictional decision immediately after that decision has been made, so long as the party makes a plea to the court within a month after receiving written notice of that ruling rather than upon completion of the arbitral proceedings.¹⁰⁴ In addition, the English Arbitration Act of 1996, though codifying the principle of Kompetenz-Kompetenz, allows direct access to a court for a decision on jurisdiction at any point during the arbitration upon application of both parties or one party with the permission of the arbitral tribunal.¹⁰⁵ Under the Arbitration Act of

[(Judgment of May 5, 1977, Bundesgerichtshof [Supreme Court], 68 BGHZ 356 (F.R.G.)) . . . This May 5, 1977 opinion has been interpreted as stating that the contracting parties may enter, first, into an agreement to arbitrate certain disputes, and second, into an agreement granting the arbitral tribunal the last word on the validity of the original arbitration agreement as well as the scope of the tribunal's jurisdiction. The opinion appears to indicate that one agreement containing both clauses would suffice, but seems to go even further by suggesting that the existence of a Kompetenz-Kompetenz clause means, in and of itself, that the parties agreed to submit their disputes to arbitration. Because the parties agreed to give the arbitral tribunal the power to determine its own jurisdiction, court control over the arbitrator's exercise of power over certain parties or subject matter is excluded. The courts could only review the validity of the second Kompetenz-Kompetenz agreement, but not the substantive decision of the arbitral tribunal. Jurisdictional decisions of the arbitral tribunal are, like all other arbitral awards, subject to set-aside and enforcement proceedings on specific grounds. Under this case law, German law minimizes judicial control of arbitration proceedings.]

Id. See also Klaus Peter Berger, *Germany Adopts the UNCITRAL Model Law*, INT'L. A.L.R. 1998, 1(3), 121-26 (1998). (providing a comparison of German law prior to the amendment with the current state of the law under the new amendment). Under the old German arbitration law, the parties could authorise [sic] the arbitral tribunal to render a final decision on its own jurisdiction. In this case, the tribunal was not just empowered to rule on its jurisdiction subject to subsequent court control. Rather, the German courts qualified this agreement as a separate arbitration clause in which the parties had agreed that the question of jurisdiction should be dealt with and decided exclusively by the arbitral tribunal, thus ousting the jurisdiction of the state courts. However, there has always been strong opposition against this broad view of Kompetenz-Kompetenz. The doctrine was accused of circumventing the mandatory court control of arbitral awards provided for in the old arbitration law. The new law in section 1040 adopts the solution found in Article 16 of the Model Law. Section 3 of this Article provides for mandatory court control of the arbitrators' decision that they have jurisdiction to hear the case. Thus, under the new law, the parties are no longer authorized [sic] to exclude the competence of the German courts in these cases. *Id.*

104. See Book 10 on ARB. PROC. of the CODE OF CIV. PROC. (ZPO), § 1040(3) (Bericht mit einem Diskussionsentwurf zur Neufassung des Zehnten Buchs der ZPO adopted by the Bundestag, on November 27, 1997, and the Bunderat on December 19, 1997, effective as of January 1, 1998) (Gr.) stating that "Halt das Schiedsgericht sich für zuständig, so entscheidet es über eine Rüge nach Absatz 2 in der Regel durch Zwischenentscheid. In diesem Fall kann jede Partei innerhalb eines Monats nach schriftlicher Mitteilung des Entscheids eine gerichtliche Entscheidung beantragen. Während ein solcher Antrag anhängig ist, kann das Schiedsgericht das schiedsrichterliche Verfahren fortsetzen und einen Schiedsspruch erlassen." available at <http://www.internationaladr.com/germany.htm>).

105. See U.K. Arb. Act, 1996, § 30 (Eng.) stating that:

1996, “[a]rbitrators may rule on the extent of their jurisdiction either through an interim decision or in the final award on the merits . . . [but] [i]n either case, a court may vary, confirm or set aside the award in whole or in part.”¹⁰⁶ Such challenge must be raised directly in a timely fashion or the party loses its right to raise it later.¹⁰⁷ Both the German legislation and the English Arbitration Act base their jurisdictional provisions on Article 16 of the UNCITRAL Model Law.¹⁰⁸

In recent history, many countries have decided to adopt new arbitration statutes. New arbitration statute reforms can be found in legislation of England (1979 and 1996), France (1981), Belgium (1985), The Netherlands (1986), Portugal (1986), Switzerland (1987), Spain (1988), Hong Kong

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to - (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

(available at <http://www.hmso.gov.uk/acts/acts1996/1996023.htm>).

106. See William W. Park, *The Interaction of Courts and Arbitrators in England: The 1996 Act as a Model for the United States*, INT'L A.L.R. 1(2), 54-67. (1998); See also generally Thomas Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. L.J. 131, 142-45 (1997).

107. See U.K. Arb. Act, 1996, § 73 (Eng.) stating that:

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-(a) that the tribunal lacks substantive jurisdiction, (b) that the proceedings have been improperly conducted, (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection. (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-(a) by any available arbitral process of appeal or review, or (b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

(available at <http://www.hmso.gov.uk/acts/acts1996/1996023.htm>).

108. See Mahir Jalili, *Kompetenz-Kompetenz: Recent U.S. and U.K. Developments*, 13 J. INT'L ARB. 169 (Dec. 1996); See also *Recent Developments in Arbitration Law and Practice*, XXI Y.B. COM. ARB. 367 (1996).

(1990), Italy (1994), Germany (1997), as well as in the UNCITRAL Model Law (1985).¹⁰⁹ If the arbitration statute is clearly inadequate, it needs to be replaced with a new one.¹¹⁰ In England, for example, an entirely new Arbitration Act, the Arbitration Act of 1996, was needed because it consolidated arbitration law in a single accessible statute.¹¹¹ “However, in a country with an established arbitration case law that has long been applied by sophisticated judges and practitioners, a new statute . . . ” may not be needed.¹¹² The United States has a unified Federal Arbitration Act¹¹³ and as such, arbitration reform may be more productive in the form of an amendment rather than through adoption of an entirely new arbitration statute, and the allocation of functions between judges and arbitrators in determining arbitral jurisdiction may be one of the areas that need to most urgently be addressed.¹¹⁴

VI. CONCLUSION

Certainty is crucial to the vitality of the business community. Legal rules that are easy to ascertain, with predictable consequences, reduce the cost of business transactions.¹¹⁵ Yet, it should never be forgotten that society is made up of individuals who are not likely to be familiar with the latest developments in the case law or who are not likely to be able to, or be in a position to, break down the intricacies and ambiguities of some decisions.

Perhaps it is time for, and the responsibility of, the United States Congress to follow the lead of so many other countries¹¹⁶ by reforming their arbitration statutes and updating or amending the FAA, and providing clear guidance for the courts to determine arbitrability. Arbitration under the FAA has grown to the point where legislative intent can no longer be ascertained. Justice O'Connor admitted this by saying “over the past decade, the Court has

109. See generally Adam Samuel, *Arbitration in Western Europe-A generation of Reform*, 7 *ARB. INT'L* 319 (1991). For new arbitration statute reform in Germany, see generally Klaus Peter Berger, *Germany Adopts the UNCITRAL Model Law*, *INT'L A.L.R.* 1998, 1(3), 121-26 (1998).

110. See Park, *supra* note 106, at 65. Hence, the adoption of the UNCITRAL Model Law is more appropriate for developing nations that have no legal framework established for the type of private dispute resolution increasingly common in transnational business. *Id.*

111. See *id.* at 65.

112. *Id.* at 65.

113. See 9 U.S.C. 1 *et seq.*

114. See Park, *supra* note 106 at 65.

115. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 *AM. U. L. REV.* 757, 779 (1995) (“If the rules are unpredictable, the risks inherent in a proposed course of conduct cannot be calculated, and potentially beneficial transactions will be deferred or avoided altogether”).

116. See *supra* note 109.

abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."¹¹⁷ Perhaps, it is time for the Supreme Court to revisit this issue and provide clearer guidance.

In the meantime, in order to protect itself, the business community should make sure any arbitration is governed by institutional rules. Consumers should keep up to date with the latest developments in the case law, hire a lawyer, or, at the very least, have the issue of arbitrability on their laundry list of things to be considered prior to entering into any kind of contract.

117. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring)(citing *Perry v. Thomas*, 482 U.S. 483, 493 (1987)(Stevens, J., dissenting)).

