No. 20-695

IN THE

Supreme Court of the United States

DEREK PIERSING, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

DOMINO'S PIZZA FRANCHISING LLC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and director of the Center for International Commercial and Investment Arbitration at Columbia Law School. A faculty member since 1975, Professor Bermann teaches and writes extensively on transnational dispute resolution, European Union law, administrative law, and comparative law. He is a *professeur affilié* of the School of Law of Sciences Po (Paris) and lecturer in the MIDS Masters Program in International Dispute Settlement (Geneva).

Professor Bermann is also an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center; co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the ICC International Court of Arbitration's Governing Body.

Professor Bermann is interested in this case because it presents an opportunity for the Court to address a central but unsettled issue of domestic and international arbitration law: whether incorporation

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Each party has consented to the filing of this brief.

by reference of rules of arbitral procedure in arbitration clauses constitutes "clear and unmistakable" evidence that the parties intended "to arbitrate arbitrability," within the meaning of *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995). The Court has recognized that the issue of who has primary responsibility to decide arbitrability – court or arbitrator – "can make a critical difference to a party resisting arbitration." *Id.* at 942. This is because where a party has been found to have delegated to arbitrators exclusive authority to determine arbitrability, the effect of such a delegation is to remove a party's right to have a court determine the arbitrability of a dispute.

Today, state and federal courts have interpreted this Court's words in *First Options* differently. The court below and other federal circuits that have concluded that the incorporation of arbitral procedure rules in an arbitration agreement signifies an intent to delegate arbitrability issues to arbitrators rely on the presence in those rules of a "competence-competence" clause, enabling arbitral tribunals to make a determination of their own jurisdiction. However, all modern arbitral procedure rules contain a "competence-competence" clause, so that treating such language as clear and unmistakable evidence of a delegation means that parties will almost invariably lose their right to a judicial determination of what this Court has multiple times referred to as the very cornerstone of arbitration, viz. consent to arbitrate. Due to the paramount importance of consent to the arbitration process, the Court has reiterated that issues of arbitrability are "for judicial determination." See, *e.g.*, *Howsam* v. *Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002).

The delegation question presented in this case was raised before the Court on two recent occasions in

Henry Schein, Inc. v. *Archer & White Sales, Inc.*[2] While acknowledging the importance of the issue, the Court noted in both instances that the issue was not included in the question presented for review. However, the delegation question is presented front and center for review in this case.

Whether incorporation of procedural rules such as those in this case constitutes clear and unmistakable evidence of an intent to delegate arbitrability from a court to an arbitral tribunal requires the Court's consideration now. Although there is at present no split among the Circuits, there is a serious split between state and federal courts, as well as among the state courts themselves. State courts have concurrent jurisdiction under the Federal Arbitration Act ("FAA"), and they will continue to address the meaning of *First Options*. The divergence of views between state and federal courts, and among state courts, poses a risk to the consistency of the law on this important question.

In addition, none of the federal circuits has offered any meaningful reason for taking the position they do. In virtually every case, they say nothing more than that they "join," without explanation, the opinion of other courts. The question presented here is too important to be decided without analysis. Significantly, every state court that has addressed the question, and provided reasons for its decision, has come to the conclusion that incorporation of arbitration rules cannot constitute clear and unmistakable evidence within the meaning of *First Options*. Only this Court

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[2] *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 19-963 (S. Ct. argued Dec. 8, 2020).

can resolve the uncertainty over the meaning of its own words.

SUMMARY OF ARGUMENT

Since *First Options*, the law has been settled that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.,* the '*question of arbitrability*' is an 'issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam*, 537 U.S. at 83 (internal citations omitted).

It is important, in appreciating what is at stake in "arbitrability," to acknowledge the issues that arbitrability entails. Did the parties reach an agreement to arbitrate? Is that agreement valid? May a nonsignatory invoke the agreement or be bound by it? Is the dispute covered by the agreement? All of these "gateway" issues directly implicate the consent of the parties to submit a dispute to an arbitral rather than a judicial forum.

This Court has repeatedly held that "arbitration is a matter of contract" and that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83 (quoting *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *accord Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415, 1419 (2019); *Granite Rock Co.* v. *Int'l Bhd. Of Teamsters*, 561 U.S. 287, 299 (2010); S*tolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

It is equally well settled that a party is entitled, upon request, to a judicial determination of arbitrability. The reason is that a party must not lightly be deprived of the right to judicial determination of arbitrability, since it implicates the fundamental issue of party consent. Under a delegation, the arbitrability of a dispute ends up being determined, not by a court, but exclusively by a body whose authority stems from the very arbitration agreement whose existence, validity or applicability is in question.

In *First Options*, this Court struck an important balance. It recognized that "party autonomy" entitles parties to allocate issues of arbitral jurisdiction between courts and arbitral tribunals and, more particularly, to delegate to arbitrators issues that courts would ordinarily decide. On the other hand, it viewed the question of whether the parties validly agreed to arbitrate as so fundamental as to require that judicial authority over that question be preserved unless the parties clearly and unmistakably agree otherwise.

The proper answer to the question is that the presence of a simple competence-competence provision in procedural rules that the parties reference in their arbitration clause falls far short of clear and unmistakable evidence that the parties intended to withdraw from courts the authority to determine issues of arbitrability.

First, as a purely textual matter, the competence-competence language in this case, as in virtually all cases, simply confers authority on an arbitral tribunal to determine arbitrability. It says nothing about the historic authority and responsibility of courts to determine arbitrability.

Second, the term competence-competence has a well-established meaning in U.S law. It is consistent-

ly understood as simply conferring on arbitral tribunals jurisdiction to determine their own jurisdiction. Under U.S. law, competence-competence empowers tribunals, but does not disempower courts.

Third, the proposition that competence-competence language in incorporated rules of procedure amounts *per se* to "clear and convincing" evidence of a delegation does violence to the very principle enunciated in *First Options*. Virtually every set of arbitration rules now contains a competence-competence provision. So too does every modern international arbitration law. Treating generic competence-competence language as if it were necessarily "clear and convincing" evidence effectively reverses the presumption that *First Options* established.

Finally, even if general competence-competence language could be viewed as a delegation – and it cannot – such a clause cannot be regarded as "clear and unmistakable" when it is buried in a lengthy and detailed set of incorporated rules of procedure. In order for an intention to be clear and unmistakable, it must be conspicuous. The way to make delegation language conspicuous is to place it in the arbitration agreement itself, *not* in a separate document consisting of procedural rules that are generally understood as addressing only how the arbitration is to be conducted, not the relationship between a court and an arbitral tribunal in determining arbitrability.

For all these reasons, neither the letter nor the spirit of *First Options* permits a competence-competence provision in a set of incorporated arbitral rules to be treated as "clear and unmistakable" evidence of an intention to deprive parties of an independent judicial determination of arbitrability.

ARGUMENT

I. *FIRST OPTIONS* ENTITLES PARTIES TO AN INDEPENDENT JUDICIAL DETERMINATION OF ARBITRABILITY UNLESS THEY HAVE "CLEARLY AND UNMISTAKABLY" AGREED OTHERWISE

A. The *First Options* Test

In some cases, a party initially raises an issue of arbitrability before an arbitral tribunal. In that situation, the tribunal, exercising its competence-competence, makes a jurisdictional determination. If it finds jurisdiction and issues an award, the losing party may seek to vacate the award. The court, upon request, will then make a *de novo* determination of arbitrability.

This was exactly the situation in *First Options*. There, a couple, the Kaplans, argued to the arbitral tribunal that they were not bound by an arbitration agreement concluded by their wholly-owned company. The tribunal rejected their argument and rendered an award against both them and their company, and the district court confirmed the award. On appeal, the Court of Appeals reversed, deciding, upon *de novo* review, that the couple was not obligated to arbitrate. In an opinion by Justice Breyer, this Court unanimously affirmed:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.
>
> . . . .
>
> [The] "who (primarily) should decide arbitrability" question is rather arcane. A party often might not focus upon that question or upon the

> significance of having arbitrators decide the scope of their own powers. . . . And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."

First Options, 514 U.S. at 944–45. The Court agreed with the Court of Appeals that the Kaplans had not clearly and unmistakably delegated to the arbitrators primary authority to determine arbitrability. *Id.* at 946.

In other cases, unlike *First Options*, a party that has instituted litigation is met with a jurisdictional defense based on an arbitration agreement. If the plaintiff then contests the enforceability of the arbitration agreement, the court must independently resolve that question. Such was the situation in *Rent-A-Center West, Inc.* v. *Jackson*, 561 U.S. 63 (2010), where this Court reaffirmed that, in order to constitute a delegation, the language used by the parties must unambiguously establish their "manifestation of intent" to withdraw from courts authority to determine arbitrability. *Id*. at 69 n.1.

The important point is that, whether a party chooses to contest arbitrability in a court prior to arbitration or initially before a tribunal, it is entitled to an independent judicial determination of arbitrability – an entitlement so strong that it cannot be overcome with anything less than "clear and unmistakable" evidence.

B. Application of *First Options*

In most delegation cases thus far, litigants have argued that, if an arbitration agreement incorporates by reference rules of arbitral procedure containing competence-competence language, that fact alone renders "clear and unmistakable" the parties' intention to give tribunals exclusive authority to determine arbitrability.

The Sixth Circuit's position in this case is illustrative. The arbitration clause there contained no language, much less "clear and unmistakable" language, suggestive of a delegation by the parties:

> Employee and Company mutually promise, agree, and consent to resolve any claim covered by this Agreement through binding arbitration, rather than through court litigation. Employee and Company further agree that such binding arbitration pursuant to this Agreement shall be the sole and exclusive remedy for resolving any claims or disputes covered by this Agreement.
>
> . . . .
>
> The American Arbitration Association ("AAA") will administer the arbitration and the arbitration will be conducted in accordance with then-current AAA National Rules for the Resolution of Employment Disputes.[3]

There is nothing in this arbitration agreement that puts a party on notice of a delegation from a court to an arbitrator. A party reading it would have no idea that, by signing the agreement, it was relinquishing its right to have a court determine whether it had consented to arbitration, *i.e.*, that the agreement was

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[3] Pet. App. 41, 43.

never formed, is invalid or inapplicable to it or to its dispute. Yet, that is exactly the right to which this Court has consistently held a party is entitled, absent language of delegation that is clear and mistakable.

II. COMPETENCE-COMPETENCE LANGUAGE IN ARBITRATION RULES DOES NOT CONSTITUTE "CLEAR AND UNMISTAKABLE" EVIDENCE UNDER *FIRST OPTIONS*

Although the view that incorporation of procedural rules with competence-competence language meets the *First Options* test has won favor among the Courts of Appeals,[4] none of those decisions provides serious reasons for reaching that conclusion. They simply assume that if arbitrators *have* authority to determine arbitrability, then courts necessarily *do not*. That is not the case.

First, the language of the competence-competence provision in this case, as in others, fails to support any such inference. Second, it is well established that competence-competence in U.S. law signifies only that tribunals may determine their authority; it does

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[4] *See, e.g., Oracle America, Inc.* v. *Myriad Grp. A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) (the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green* v. *SuperShuttle Int'l, Inc.,* 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability"); *Awuah* v. *Coverall North Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (incorporation of AAA rules provides "clear and unmistakable evidence" that parties meant to arbitrate arbitrability).

That said, multiple lower federal courts and state courts have concluded that the mere incorporation of arbitral rules of procedure is insufficient. *See infra* pp. 13–16.

not make that authority exclusive. Third, treating standard competence-competence language as sufficient to establish "clear and unmistakable" evidence effectively reverses *First Options*' strong presumption that parties are entitled to an independent judicial determination of arbitrability. Fourth, to be truly "clear and unmistakable," delegation language belongs in an arbitration agreement itself, not buried in referenced rules of arbitral procedure.

A. The Competence-Competence Language in this Case

The AAA Employment Arbitration Rules, R. 6(a) (2009) contains a standard competence-competence clause:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

Rule 6(a) confers on arbitrators authority to determine their jurisdiction. It gives no indication that it also divests courts of their presumptive authority to make that determination if so requested.

In order to reach the result that this language constitutes a delegation, one must read into Rule 6(a) the word "exclusive." That is a big and very serious leap, and one that parties could easily have accomplished by instead (a) placing a clause that addresses who decides arbitrability in the arbitration agreement itself, rather than in incorporated rules and (b) expressly stating in that clause that the tribunal's competence is "exclusive." Taking those two simple steps is all one needs to do if one truly wants to render an intention to delegate arbitrability "clear and unmistakable."

The drafters of the delegation in *Rent-A-Center* did precisely that. They placed the delegation provision directly in the arbitration agreement and they expressly made the arbitrators' authority to determine arbitrability exclusive. 561 U.S. at 66.

Nor is it necessary, in order to give competence-competence language meaning and value, to read it as depriving courts of jurisdiction to determine arbitrability. Competence-competence language has real utility. But for such language, tribunals whose jurisdiction is challenged on arbitrability grounds might be stopped in their tracks and have to await a court's determination of the matter. The resulting delay and expense would compromise two of arbitration's strongest selling points: speed and economy. Competence-competence language serves to avoid that result.

Courts have offered no serious support for the proposition that incorporated competence-competence language meets *First Options*' "clear and unmistakable" evidence test. They arrive at that result perfunctorily. In one of the earliest such decisions, *FSC Sec. Corp.* v. *Freel*, 14 F.3d 1310 (8th Cir. 1994), the Court of Appeals said only this:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure. . . . [W]e hold 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.

Id. at 1312–13. Worse yet, the great majority of decisions that followed do not even purport to address the issue. All they do is "join" the view of another circuit. Typical is the Fourth Circuit, which said only the following:

> We agree with our sister circuits and therefore hold that, in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability.[5]

Interestingly, despite the solidity of support among the circuits, a district court in one of the few circuits that has not yet spoken, has forcefully bucked the trend:

> It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to 'clear and unmistakable' evidence that the contracting parties agreed to . . . preclude a court from answering them. To the contrary, that seems anything but 'clear.' And the AAA rule itself does not make the purported delegation of authority any more 'clear' or 'unmistakable.' The AAA rule simply says that the arbitrator has the authority to decide these questions. It does not say that the arbitrator has the sole authority, the exclusive authority, or anything like that. The language of the rule does not suggest a *delegation* of authority; at most it indicates that the arbitrator possesses authority, which is not the same as an agreement by the parties to give him sole authority to decide those issues.[6]

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[5] *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017).

[6] *Taylor* v. *Samsung Elecs. Am., Inc.*, No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020). Although a district court in another circuit felt obliged to follow the Court of Ap-

In the decision below, the Sixth Circuit advanced the argument that the AAA amended the language of its rules in order to meet the *First Options* test.[7] That may well be so, but is of little import. It does not matter what *the AAA* thought it was doing. What matters is what the rules say and what *parties signing an arbitration agreement* think they are doing. That the AAA thinks its amended clause constitutes clear and unmistakable evidence does not mean that it does. In fact, as shown, the rules do not.

Since FAA Chapter One does not create federal subject-matter jurisdiction, much less exclusive jurisdiction, state courts have also had to consider whether the presence of competence-competence language in rules of arbitral procedure constitutes clear and unmistakable evidence under *First Options*. Although the Courts of Appeals are not as yet divided over this question, state courts most certainly are, and several of them, while fully cognizant of the view among the federal circuits, have ruled the other way, and given cogent reasons for doing so.

Three state Supreme Courts have specifically rejected the view prevailing at the federal level.[8] The Montana Supreme Court, for example, observed that one would consult the AAA Rules only for the purposes of "implementation of procedural and logistical

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peals' adoption of the prevailing view, it called that view "incongruous," "ridiculous" and "bordering on the absurd." *Ashworth* v. *Five Guys Operations, LLC,* No. 3:16-06646, 2016 WL 7422679, at *3 (S.D. W.Va. Dec. 22, 2016).

[7] Pet. App.16–17..

[8] *Glob. Client Sols., LLC* v. *Ossello*, 367 P.3d 361, 369 (Mont. 2016); *Morgan* v. *Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016); *Flandreau Pub. Sch. Dist. #50-3* v. *G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005).

rules," and nothing more.[9] Intermediate state appellate courts in California[10] and Florida[11] have reached the same conclusion. There is disagreement even among state courts at the same level. Less than a year after a Florida district court of appeal embraced the prevailing federal court view, albeit without reasoning,[12] another Florida district court of appeal, in a reasoned opinion, expressly rejected it:

> [W]e find something missing. This [arbitration] rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction [citations omitted] … [The language in the Rules] fell short of the clear and unmistakable evidence of assent that *First Options* requires.
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> . . .
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> We respectfully disagree with [holdings finding otherwise] because we do not believe they comport with what *First Options* requires. . . . [N]one of these cases have ever examined how or why the mere "incorporation" of an arbitration rule such as the one before us . . . satisfies the heightened standard the Supreme Court set in *First Options*, nor how it overcomes the "strong pro-

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[9] *Glob. Client Sols.,* 367 P.3d at 369.

[10] *See Ajamian* v. *CantorCO2e L.P.*, 137 Cal. Rptr. 3d 773, 782–783 (Cal. Dist. Ct. App. 2012); *Gilbert St. Developers, LLC* v. *La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1195–96 (Cal. Ct. App. 2009).

[11] *Doe* v. *Natt*, 299 So. 3d 599, 609 (Fla. Dist. Ct. App. 2020).

[12] *Miami Marlins, L.P.* v. *Miami-Dade Cty.*, 276 So. 3d 936, 940 (Fla. Dist. Ct. App. 2019).

> court presumption" that is supposed to attend this inquiry. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same.[13]

It is plainly undesirable to have conflicting decisions between state courts and federal courts, and among state courts, on so fundamental an issue as the meaning of *First Options*.

B. The Meaning of Competence-Competence in U.S. Law

The decisions of the Sixth Circuit and its sister courts are based on a serious misunderstanding of the meaning of the term competence-competence. Competence-competence, as consistently understood in U.S. law, does no more than authorize arbitral tribunals to determine their own authority. It does nothing else.[14] As noted, that authority is neither negligible nor to be taken for granted. Avoiding the need to suspend proceedings and await a court ruling on the matter contributes importantly to the efficacy of arbitration as a dispute resolution mechanism.

Even a casual reading of the key instruments of U.S. domestic and international arbitration law re-

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[13] *Doe*, 299 So. 3d at 609.

[14] Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 Pepp. L. Rev. 17, 25 (2014) (U.S. law does not "even contemplat[e] negative Kompetenz-Kompetenz"); William Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules*, 15 Bos. Univ. Sch. of L. Scholarly Commons 1, 16 (2015) ("[C]ourts will provide early decisions on the validity of a dispute resolution clause alleged to be void *ab initio* because, for instance, the person signing the contract lacked authority to commit the company sought to be bound.").

veals the fallacy underlying the Sixth Circuit's position. In the FAA, 9 U.S.C. § 4, Congress specifically provided that courts should compel arbitration only once they were "s*atisfied that the making of the agreement for arbitration . . . [was] not in issue.*" (emphasis added). Similarly, Article II of the New York Convention, to which the U.S. is a party since 1970, requires courts to withhold enforcement of an arbitration agreement if they find the agreement to be "*null and void*, *inoperative or incapable of being performed*." Art. II, June 10, 1958, 330 U.N.T.S. 3 (emphasis added). U.S. courts could not possibly perform the function that these instruments require if the principle of competence-competence or arbitration rules containing competence-competence language foreclosed them from doing so.

In sum, the principle of competence-competence in U.S. law has never entailed the corollary that, if arbitrators *may* decide arbitrability, courts *may not*. Other jurisdictions, most notably France, define competence-competence differently, attributing to it both a "positive" dimension (vesting tribunals with authority to determine arbitrability) and a "negative" dimension (divesting courts of that authority).[15] This sharp divide between the U.S. and French versions of competence-competence pervades the international arbitration literature.[16]

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[15] *See generally* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators*, in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

[16] *See, e.g.*, Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, in Int'l Arb. and

In short, competence-competence under U.S. law does not deprive courts of the authority to determine the arbitrability of a dispute, much less "clearly and unmistakably." Placing such language in a set of procedural rules does not change its meaning.

C. A Reversal of Presumptions

The Court in *First Options* deliberately made judicial authority to determine arbitrability the rule, and delegation of that authority the exception. Parties must decidedly "go out of their way" to withdraw from courts the authority to decide issues of arbitrability that they are ordinarily obligated to make. The "clear and unmistakable" standard cannot be understood any other way.

But today, competence-competence provisions are ubiquitous. They are found in virtually every modern set of arbitral procedure rules; the AAA Employment Arbitration Rules are by no means exceptional. They are also found in virtually every modern arbitration law that States enact to regulate international arbitrations conducted on their territory.

As a result, it is the rare arbitration indeed that is conducted in the absence of competence-competence language. Such language has become, for all practical purposes, "boiler-plate." Parties do not need to "go out of their way" to subject their arbitrations to competence-competence. All modern arbitration laws and rules do that for them.

Treating competence-competence language as "clear and mistakable" evidence effectively destroys the strong presumption in favor of judicial determination

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Int'l Commercial Law: Synergy, Convergence and Evolution (2011).

of arbitrability that *First Options* established. That simply cannot be the result that this Court had in mind.

The inescapable conclusion is that general competence-competence language is altogether too oblique and inconspicuous a means of informing parties of a matter as momentous as loss of the right to have a judicial determination of the issue of arbitrability – a right that this Court has often reiterated. Again, this Court emphasized in *First Options* that predicating a delegation on anything less than "clear and unmistakable" evidence would "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." 514 U.S. at 945.

The delegation question received sustained attention at the time the recently-adopted ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration was prepared. After lengthy deliberations, the ALI membership in May 2019 unanimously endorsed the view that the presence of competence-competence language in incorporated rules of procedure does not satisfy the *First Options* test.[17]

D. A "Clear and Unmistakable" Delegation Belongs in Arbitration Agreements, not in Incorporated Procedural Rules

Given the profound implications for a party's right to a judicial determination of arbitrability, a delegation clause should be placed in an arbitration agreement itself, not relegated to a set of incorporated pro-

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[17] Restatement of the U.S. Law of Int'l Commercial and Investor-State Arb. § 2.8, art. *b*, Reporter's n. *b* (iii), (Am. L. Inst. 2019).

cedural rules. Parties can reasonably be expected to read a contractual arbitration clause carefully before agreeing to it. But they cannot realistically be expected to scrutinize lengthy and detailed rules of arbitral procedure, especially when only incorporated by reference and long before any dispute is on the horizon. Nor is there any reason to suppose that a provision taking judicial authority to determine matters of arbitral *jurisdiction* and giving it to an arbitrator would be found in rules addressing arbitral *procedure.*

The simple fact is that any contract drafter genuinely wanting to make a delegation clause clear and unmistakable would place it in the arbitration agreement, as did the drafters in *Rent-A-Center*. That is where a person contemplating the issue would expect to find it.

III. THE EFFECT OF A DELEGATION IS TO FULLY DISABLE COURTS FROM ENSURING THE ARBITRABILITY OF A DISPUTE

It would be a great mistake to assume that, if courts lose their authority to determine the arbitrability of a dispute prior to arbitration, they will recover it at the end of the process. Under U.S. law, once a proper delegation is made, courts are sidelined, not only pre-arbitration but also in post-award review. Case law holds that, under a proper delegation, courts also cannot, in a vacatur or confirmation action, meaningfully ensure that the award debtor consented to arbitration. They are required to accord extreme deference to a tribunal's determination whether an arbitration agreement exists, is valid, is applicable to a non-signatory and encompasses the dispute at hand. *Schneider* v. *Kingdom of Thai.*, 688 F.3d 68, 71 (2d Cir. 2012); *Chevron Corp.* v. *Republic of Ecuador*, 949 F. Supp. 2d 57, 65–67 (D.D.C. 2013). Accord-

ing to the Restatement, Section 4.12, Reporters' note *d*, in order to be overturned, a tribunal's finding of arbitrability must be "baseless," resting this conclusion on this Court's ruling in *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 569 (2013).

Accordingly, if a delegation is made, *at no point* in the arbitration life-cycle will parties have the benefit of an independent judicial determination of whether they validly consented to arbitrate the dispute in issue. That is too drastic a result to follow from the mere presence of standard competence-competence language in the rules of procedure referenced in an agreement to arbitrate. Even French law, which essentially precludes courts from determining the arbitrability of a dispute on a *pre-arbitration* basis, authorizes courts to examine arbitrability at the *post-award* stage, and to do so on a fully *de novo* basis.[18] Thus, French courts fully regain at the end of the process the role they were denied at the outset. Under a delegation clause, U.S. courts do not.

IV. THE PRESUMPTIVE AUTHORITY OF COURTS TO DETERMINE THE ARBITRABILITY OF A DISPUTE IS CENTRAL TO ARBITRATION'S LEGITIMACY AS A MEANS OF INTERNATIONAL DISPUTE RESOLUTION

Depriving parties of the right to a judicial determination of questions of arbitrability is inimical to the fundamental principles that (a) parties are not required to submit their claims to arbitration without their consent and that (b) they are entitled, upon request, to an independent judicial decision on that threshold issue.

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[18] Ina C. Popova, Patrick Taylor & Romain Zamour, *France*, in European Arbitration Review 2020, p. 29.

But there is more. Preserving that right, absent clear and unmistakable evidence that a party has abandoned it, is essential to the legitimacy of arbitration itself.[19] Issues of arbitrability, such as the question whether the parties actually and validly agreed to arbitrate a particular dispute, go to the heart of that legitimacy. It is not news that arbitration is increasingly under attack.[20] That makes it all the more essential that, to the fullest extent possible, nothing is done to place that legitimacy at risk.

CONCLUSION

In sum, the stakes associated with the delegation of authority to determine arbitrability are considerable. Though the issue is one of federal law, it arises regularly in state as well as federal courts because these courts share concurrent jurisdiction over actions to enforce arbitration agreements under the FAA. Yet state courts are divided on the question of whether simple competence-competence language in procedural rules incorporated by reference in an arbitration agreement satisfies *First Options*, some of them taking a position squarely at odds with what has become the prevailing view in the federal courts.

Only this Court can definitively resolve that issue and ensure that parties do not forfeit their right to a judicial determination of arbitrability unless they manifest that intention clearly and unmistakably.

Twenty-five years have elapsed since *First Options* was decided. Over that time, the Court has had no

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[19] George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

[20] *See generally, Practising Virtue: Inside International Arbitration* (David D. Caron, Stephan W. Schill, Abby Cohen Smutny & Epaminontas E. Triantafilou, eds. Oxford Univ. Press 2015).

occasion to clarify what it meant by "clear and unmistakable" evidence. The question of whether incorporation by reference of arbitration rules containing standard competence-competence language meets the "clear and unmistakable" test is now fully crystallized. The state and federal courts, as well as all users of arbitration in the United States, need clarity and certainty as to whether incorporated rules of arbitral procedure containing simple competence-competence language qualifies as "clear and unmistakable" evidence of an exclusive delegation within the meaning of *First Options*.

Respectfully submitted,

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