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Bg Group v. Argentina: a Reiteration of Undesired Complexity for a Simple Principle: Kompetenz-Kompetenz Under the FAA and the UNCITRAL Model Law

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I. INTRODUCTION

Different jurisdictions across the world adopt different models of national arbitration laws. These laws provide the external parameters within which any arbitration taking place in that country must fall. There are peculiarities in these laws, whether it is in England, Germany, the United States or other jurisdictions that have adopted the UNCITRAL Model Law, for instance.

1 “External parameters” refers to the fact that the Rules chosen by parties will primarily guide their proceedings. The domestic arbitration law comes into play in these three situations: (1) to provide guidance where parties have not agreed; (2) to supplement the Rules where the chosen Rules do not provide for certain issues in the process; and (3) it applies regardless of parties’ agreement where the provision is of a mandatory character.

2 Arbitration Act 1996, 2 (Eng.).


5 UNCITRAL, supra note 3. (As the name suggests, this is a model law prepared and adopted by the United Nations Commission on International Trade Law (UNCITRAL) with the hope that states will incorporate or adopt its provisions into their domestic arbitration regime. The current version was adopted in 2006. Presently, 78 states have adopted this law in some form as their domestic arbitration law) See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration_status.html (last visited Mar. 26, 2018) (UNCITRAL is also simply referred to as “the Model Law”).
Unlike many other countries that are major venues for international arbitration, the United States has not enacted the UNCITRAL Model Law. In the U.S., the 92-year-old Federal Arbitration Act (“FAA”) provides the legislative framework for arbitration. In general, the FAA, like the Model Law, provides certain similar features and bases for international arbitration. For instance, the FAA supports the principles of party autonomy and limited local curial involvement in the arbitration. Under the FAA, arbitration agreements are to be enforced in accordance with their terms, and arbitral awards are shielded from judicial review on the merits.

Nonetheless, the FAA and the Model Law differ in several ways, most notably with respect to: (1) the basis for setting aside an award; (2) the power to modify or correct an award; (3) the procedure for appointment of arbitrators; and, most importantly, (4) the arbitral tribunal’s power to rule on its own jurisdiction, which is the focus of this paper. Of course, a well-drafted arbitration agreement that incorporates recognized arbitration rules will render academic most, if not all, of these differences, as the parties’ agreement will generally trump or supplement the default provisions of the FAA and the Model Law.

The differences between the FAA and Model Law may be significant in situations where the parties’ agreement fails to address some of these issues. In *BG Group PLC v. Republic*

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7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
of Argentina, the U.S. Supreme Court addressed the issue of arbitral jurisdiction. Notably, the BG Group arbitration was an investment arbitration decided outside the International Centre for Settlement of Investment Disputes ("ICSID") framework. Because it was a non-ICSID investment arbitration, the parties chose Washington, D.C., as the juridical seat for the proceedings, which meant that the FAA applied automatically as the "lex arbitri." Consequently, certain features of the FAA (or lack thereof) kicked in, particularly with respect to the arbitral tribunal’s jurisdiction to determine its own jurisdiction, the so-called Kompetenz-Kompetenz. The Kompetenz-Kompetenz principle is treated much differently in the U.S. under the FAA than in most other jurisdictions that

12 In most cases, investor-state arbitrations are conducted under the auspices of the ICSID. However, there is a certain category commonly referred to as "non-ICSID investment arbitration." These kinds of investment arbitrations, as the name implies, are conducted outside ICSID. Parties choose a juridical seat for the proceedings, thereby subjecting the proceedings to the national law of the state.
have adopted the UNCITRAL Model Law. This difference is responsible for the fact that in *BG Group*, the issue of jurisdiction was appealed all the way to the Supreme Court. The foregoing therefore raises the following questions: would this dispute have been resolved much quicker than the eleven years it took, if it were decided under the Model Law? Are states better off leaving their investment disputes to be decided under the ICSID framework? Would *Kompetenz-Kompetenz* in the U.S. be clearer, and therefore more efficient, if there were an express textual basis under the FAA?

In this paper, I will focus not so much on the substance of the decision in *BG Group*; rather, I will utilize the *BG Group* decision as a platform to discuss the differences in the treatment of *Kompetenz-Kompetenz* under the U.S. system, the FAA, and the UNCITRAL regime. The FAA does not expressly provide for *Kompetenz-Kompetenz*—this principle derives from U.S. jurisprudence. In Part II, I will reexamine the jurisprudence that American courts have developed to address the issue of *Kompetenz-Kompetenz*. This will necessarily involve exploring the principle of arbitrability as a mechanism utilized by U.S. courts to determine arbitral jurisdiction. Part III discusses *Kompetenz-Kompetenz* under the UNCITRAL regime, highlighting the clear textual foundation it provides for *Kompetenz-Kompetenz*. Part III also looks at the limitations on the exercise of this authority. Part IV provides a brief comparative analysis from different jurisdictions to showcase how courts have applied this principle in other parts of the world. Part V shows how this principle was applied by the U.S. Supreme Court in *BG Group*. I conclude with some recommendations in Part VI.
II. KOMPETENZ-KOMPETENZ IN THE UNITED STATES

A. THE UNITED STATES FEDERAL ARBITRATION ACT

After “The doctrine of Kompetenz-Kompetenz, as generally understood, recognizes the authority of arbitral tribunals to determine their own jurisdiction.”\textsuperscript{14} The breadth of this formulation has unfortunately generated much misunderstanding.”\textsuperscript{15} The FAA, unlike most other arbitration statutes, does not expressly provide, in clear language, for this authority. Section 3 of the FAA refers to motions to stay court proceedings where issues before the court are subject to arbitration. This section “is notorious among world arbitration statutes for its failure to incorporate the [K]ompetenz-[K]ompetenz doctrine.”\textsuperscript{16} It reads:

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

\textsuperscript{14} Bermann, supra note 13, at 13-14.
\textsuperscript{15} Id. at 14.
agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.17

In addition to staying the proceedings, section 4 provides for authority of the court to compel arbitration. It reads in part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition [the court] . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.18

These provisions of the FAA come closest to textually addressing the threshold issue of arbitral jurisdiction. As is hopefully evident from these provisions, they empower the court only to decide such threshold issues.19 On the FAA provisions’ face, however, they appear to exclude arbitral authority to make such a decision.20 This position was subsequently espoused in case law.21

In giving effect to the FAA, the Seventh Circuit Court of Appeals gradually adopted a “federal policy that, when construing arbitration agreements, every doubt is to be

18 Id. § 4.
19 Wyss, supra note 16, at 356.
resolved in favor of arbitration.”22 Indeed, so widespread was the adoption of this “policy” that by 1981 the Seventh Circuit felt comfortable declaring it “axiomatic.”23 On the basis of this lower court consensus, the Supreme Court itself ruled in 1983 that, “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[].”24

B. FIRST OPTIONS: REVERSE PRESUMPTION AND JUDICIAL ACTIVISM?

The “presumption of arbitrability” seemed to suggest that the arbitration panel, rather than the court, would be empowered to determine the arbitrability of disputes unless the parties expressly agreed that arbitrability would be decided by a court. After all, if “doubts concerning the scope of arbitrable issues” were to be resolved in favor of arbitration, then any doubt regarding who was to decide arbitrability should likewise be resolved in favor of arbitration, at least absent a clear agreement to the contrary.25

The U.S. Supreme Court, however, rejected this conclusion in 1995. The Court utilized the opportunity in First

23 Id.
*Options* to define the bounds of *Kompetenz-Kompetenz* in American jurisprudence. In its opinion, the Court took a contractual view of *Kompetenz-Kompetenz*, in the sense that its existence is solely based on a “‘clea[r] and unmistakabl[e]’” agreement of the parties, which could be determined from the language of the agreement. Thus, under this “clear and unmistakable” standard, American courts begin their jurisdictional analysis with the presumption that tribunals do not have *Kompetenz-Kompetenz* to determine jurisdiction. This implies that in order to overcome this presumption, a party must show that it agreed to submit the “arbitrability question” to arbitral determination. In dictum in *First Options*, the Supreme Court “supplied a verbal hook” on which the analysis of *Kompetenz-Kompetenz* “has been hung.” Subsequent cases, including *BG Group*, invariably “cite *First Options* for the dual proposition that (i) contracting parties may agree to arbitrate jurisdictional matters (questions about

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27 *Id.* (alteration in original) (quoting *First Options*, 514 U.S. at 944).

28 *See First Options*, 514 U.S. at 944. The Court employs a higher threshold requirement for parties to provide a tribunal with *Kompetenz-Kompetenz*; in contrast, the arbitrability of a merits issue is given the presumption of assent by the Court when the agreement is silent as to the particular issue, but the Court reverses the presumption on the jurisdictional issue. *Id.* at 944-45. The Court’s rationale was that it is less likely that a party will realize that it is forfeiting its jurisdictional right when it signs an arbitration agreement. *Id.* at 945.

“arbitrability”) but (ii) such agreement must be founded on clear evidence.”

In *First Options*, an arbitral award had been rendered against both an investment company and its owners with respect to debts owed to a securities clearing house. The owners (the Kaplans) argued that they had never signed the arbitration agreement and consequently were not bound by the award. The Supreme Court carefully distinguished between three questions: (i) did the Kaplans owe money (the substantive merits)? (ii) did the Kaplans agree to arbitrate (jurisdiction, which the Court called “arbitrability”? And (iii) Who (court or arbitrator) should decide whether the Kaplans agreed to arbitrate (which the Court called the “standard of review” question)?

On the facts of this case, the Supreme Court held that the Kaplans had not agreed to arbitrate. The Court decided this without any judicial deference to the arbitrator’s determination. Whether the Kaplans were bound to arbitrate by virtue of a clause signed by their investment

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30 *Id.* at 157.
31 *First Options*, 514 U.S. at 942. Question (iii) was the main issue in *BG Group* regarding the interpretation of the local litigation requirement of the bilateral investment treaty. The Court stated:

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

32 *First Options*, 514 U.S. at 947.
company was a question for the courts. It was for a judge, not arbitrator, to provide the ultimate determination on whether Mr. and Mrs. Kaplan were in fact bound to arbitrate by reason of the actions of their investment company, on theories such as agency, alter ego, or lifting the corporate veil. The Court went further and suggested that “the arbitrability question itself” might be submitted to arbitration.33 What then is “arbitrability”? 

C. ARBITRABILITY AS A TOOL FOR KOMPETENZ-KOMPETENZ

Arbitrability is a term of art. It is fair to state that the term “arbitrability” in the U.S. has a broader meaning than the traditional meaning accorded this term in other parts of the world. The disparity in meaning contributes to the lack of clarity in the principle of Kompetenz-Kompetenz in the U.S. Arbitrability in the U.S. “denote[s] every condition or requirement that must be met in order for an arbitration to go forward.”34 This version of arbitrability encompasses an array of diverse issues.35 This poses the following questions: “Does an agreement to arbitrate exist?36 Is that agreement valid and enforceable?37 Are both parties signatories to the agreement

33 Id. at 943.
34 Bermann, supra note 13, at 10.
35 Id.
37 See, e.g., AT & T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643 (1986).
or otherwise bound by it? Does the agreement cover the particular dispute at hand?”

Other questions commonly characterized as issues of arbitrability include where a party resisting arbitration argues that the other party has failed to satisfy a condition precedent to arbitration, or that some other barrier to arbitration stands in arbitration’s way, whether time limits on the underlying claim or the principle of res judicata. Thus, court decisions in the US speak of the “arbitrability question” in the same way that the rest of the world refers to jurisdictional issue. The American approach asks not only “who decides what,” but also “who decides who decides.”

On the other hand, the term may be used in a much narrower sense, confined to one specific question: Did the legislature, in establishing or recognizing a particular cause of

40 See, e.g., Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1027-28 (11th Cir. 1982); Eady v. Bill Heard Chevrolet Co., 274 F. Supp. 2d 1284, 1286 (M.D. Ala. 2003). This was one of the arguments advanced by the Republic of Argentina in the BG Group decision. Argentina argued that the Article 8 local litigation requirement under the UK-Argentina BIT was a condition precedent to arbitration. Consequently, Argentina essentially submitted that the issue fell in the realm of arbitrability and therefore within the competence of the Court to decide, based on First Options.
43 Park, supra note 29, at 145.
action, authorize its adjudication by an arbitral tribunal, or did the legislature reserve its adjudication to courts of law?\textsuperscript{45} This is the more widespread understanding of the term in other parts of the world. This meaning is evidenced in the “non-arbitrability” ground found both in the 1958 New York Convention\textsuperscript{46} and in the UNCITRAL Model Law\textsuperscript{47}. Used in this way, arbitrability denotes only one of the many objections

\textsuperscript{45} This is notably how the term is most often employed in international arbitration. See, e.g. Nigel Blackaby et al., Redfern and Hunter on International Arbitration 122 (student ed. 2009) (“Arbitrability …involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts”); Gary B. Born, International Commercial Arbitration 767 (2009) (“[Arbitrability] refers to subjects or disputes which are deemed by a particular national law to be incapable of resolution by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters.”); Loukas A. Mistelis, Arbitrability – International and Comparative Perspectives: Is Arbitrability a National or International Law Issue?, in Arbitrability: International & Comparative Perspectives 1, 3-4, (2009). (“Arbitrability …involves the simple question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings. While party autonomy espouses the right of parties to submit any dispute to arbitration, national laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration.”).


to arbitral jurisdiction, namely that the underlying claim may not, as a matter of law, be submitted to arbitration.48

With respect to the timing of judicial intervention on jurisdictional matters, the FAA creates no statutory presumption that courts should await the award before pronouncing themselves on an arbitrator’s authority to hear a dispute.49 At any stage in the arbitral process, courts can decide whether a particular matter has been (or can be) submitted to arbitration, usually in the context of a motion to compel arbitration or to stay litigation.50 As fully developed below, the UNCITRAL Model Law has an additional approach to these threshold issues.51 Recent decisions of the United States Supreme Court provide practical instances on the methodology of determining these jurisdictional questions by American courts. Usually, to allocate the jurisdictional authority between courts and arbitrators, the court looks at the kind of jurisdictional issue involved in the case. Thus, the threshold issues are usually divided into procedural and substantive arbitrability issues.

48 Bermann, supra note 13, at 12.
49 Park, supra note 29, at 156.
50 See United States (Federal) Arbitration Act, supra note 4.
51 Article 16(3) of the UNCITRAL Model Law provides for courts determination of these issues at the preliminary stage of the proceedings or after an award has been rendered. The important distinction, which is the main purport of this paper, is to understand the consequences of the court’s determination of these threshold issues as a preliminary matter. In that case, particular restrictions come into play with respect to timing and appeals of the court’s review of arbitrator’s determinations.
1. PROCEDURAL ARBITRABILITY

Time limits is an issue that the court has characterized as “procedural”. In *Howsam v. Dean Witter Reynolds, Inc.*, a majority of the Supreme Court held that arbitrators should be allowed to decide this timing issue in the first instance, since it represents a matter that “parties would likely expect that an arbitrator would decide.” According to the Court, “‘procedural’ questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.” Therefore, The Court in *Howsam* concluded that a question on time limits for arbitration is one that, had they thought about the matter, the parties to a contract containing an arbitration clause would most likely have expected an arbitral tribunal to decide.

The Supreme Court in *Howsam* did not catalogue “[the] ‘procedural’ questions which grow out of the dispute and bear on its final disposition,” but lower courts have identified other examples and handled them accordingly. For instance, a party resisting arbitration may argue that its opponent, whether by words or conduct, waived its right to invoke an agreement to arbitrate. Like time limits on arbitration, waiver of this sort targets the obligation to arbitrate rather than the contract’s substantive obligations.

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52 *Howsam v. Dean Witter Reynolds, Inc.*, supra note 41, at 79.
53 Id. at 84.
54 Id.
55 Id. at 85; see also *Int’l Union of Operating Eng’rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) (holding that a defense of laches must be decided by the arbitral tribunal).
56 Id. at 79 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).
and should be treated as issues meant for the court rather than arbitrators. However, current case law tells a different story. In fact, courts commonly leave the question of waiver of the right to arbitrate for the arbitrators to decide, even if raised at the outset, often citing *Howsam.* Even so, the decisions are not uniform in that regard. A good number of courts have drawn a distinction between contract-based waiver and conduct-based waiver, holding that the former is for the arbitral tribunal to decide, while the latter may be determined at the threshold by a court. This provides one instance of

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58 See *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008) (holding that a party’s deliberate effort to derail arbitration sought by its opponent would constitute waiver of the right to arbitrate, though a deliberate effort was not established in this case). The court observed that, most often, conduct-based waiver is established by a party’s failure to invoke arbitration in a timely fashion after being sued or its interference with a plaintiff’s pre-litigation efforts to arbitrate. *Id.* at 394; see also *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App’x 921 (11th Cir. 2010) (per curiam) (finding that a party’s litigation activity was not so extensive and the burden caused to the other party was not so great as to warrant a finding of waiver), *cert. granted*, 131 S. Ct. 1556 (2011), *cert. dismissed*, 131 S. Ct. 2955 (2011); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114 (9th Cir. 2008) (finding that an employer statement that an employee’s claim is not ripe for arbitration does not amount to a waiver); *Khan v. Parsons Global Servs. Ltd.*, 521 F.3d 421, 428 (D.C. Cir. 2008) (finding that filing a motion
confusion and lack of clarity in the US with respect to Kompetenz-Kompetenz. This lack of clarity is based on the fact that Kompetenz-Kompetenz is, to a large extent, hinged on the US understanding of arbitrability.

Further, there may be certain requirements the parties must comply with before they initiate arbitration. Whether a party complies with these preconditions is undoubtedly a threshold issue, and arbitration-clause-specific. Thus, by authority of First Options, should be left for the court to determine. While judicial practice is mixed, courts often characterize such matters as “procedural” and refer them for decision by arbitrators in the first instance. Again, this for summary judgment waives the right to invoke arbitration; Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217-18 (3d Cir. 2007) (holding that a party seeking arbitration waived that right by actively litigating its opponent’s claims); Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 3, 12-13 (1st Cir. 2005) (rejecting the argument that the failure to invoke arbitration during the pendency of administrative proceedings before the Equal Employment Opportunity Commission constituted waiver); Windward Agency, Inc. v. Cologne Life Reins. Co., 123 F. App’x 481, 484 (3d Cir. 2005) (finding that appellant’s failure to comply with the district court’s order to initiate arbitration proceedings for many years constituted a timeliness issue for the district court to decide); Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am., 97 F. App’x 462, 464 (5th Cir. 2004) (per curiam) (holding that delaying the motion to compel does not amount to waiver); Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 573 (6th Cir. 2003) (finding that declining arbitration by letter constitutes waiver).

59 These preconditions may include submitting the dispute first to mediation or conciliation, or exhaust other remedies before initiating arbitration.

mixed judicial attitude is a consequence of the lack of clear textual basis under the FAA for Kompetenz-Kompetenz. Notably, the “local litigation” requirement in BG Group was characterized as a procedural precondition. Thus, in resolving the dispositive issue as to “who-court or arbitrator-bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy?,” the Court held that the matter is for the arbitrators.61

Sometimes, a party resisting arbitration maintains that the dispute sought to be arbitrated has already been adjudicated, resulting in a judgment or award entitled to claim-preclusive effect, so that the case should not be heard again, either in arbitration or litigation. This is the issue of res judicata. This objection, too, is arbitration-specific, and should be for the courts to determine. Moreover, it makes little sense to enforce an agreement to arbitrate if the outcome of the dispute has already been determined as a matter of law.

However, in practice, courts almost invariably reserve the claim preclusion question for the arbitrators.62

The availability of class arbitration is another threshold issue of the procedural category. The question of whether a dispute is susceptible of class arbitration goes primarily to the arbitration clause rather than the main contract, and so is yet another matter that would ordinarily be appropriate for the court to determine. However, available cases do not reflect that. Thus, in Green Tree v. Bazzle, the Supreme Court characterized the question, whether the parties contemplated class arbitration of their dispute, as one that the parties would have expected the arbitral tribunal to decide.63 Although the Court’s later decision in Stolt-Nielsen, S.A. v. Animalfeeds International Corp.64 laid down a standard that makes it decidedly more difficult for arbitrators to conclude that the parties contemplated class arbitration,65 that determination


65 Id. at 1775 (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”); See also AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011) (barring California from treating class arbitration waivers as unenforceable, essentially finding such a prohibition to be inconsistent with the FAA).
nevertheless remains one for the arbitral tribunal to make in the first instance.66

Courts will refer issues of this “procedural” sort to the arbitrators. Although the strength of the argument in favor of referring these questions to an arbitral tribunal may vary from issue to issue and from case to case it will be more useful to treat these entire series of objections to arbitration in a consistent and predictable manner. This is particularly necessary under the FAA because of the absence of defined authority for arbitrators to determine their own jurisdiction. This situation is comparable to the clear position under the UNCITRAL Model Law.67

The foregoing depicts the uncertainty in classifying issues of arbitrability in US courts. From a logical standpoint, most of these issues relate to arbitration-specific questions. Thus, based on First Options, they should not be treated as mere procedural issues but questions that go to the very heart of the arbitration.

Instances have come up more recently as to how Howsam’s framework has proven difficult to apply in practice. In Rent-A-Center West, Inc. v. Jackson, for example, the plaintiff sued his former employer for employment discrimination, and the defendant responded by seeking to compel arbitration pursuant to a written arbitration agreement that expressly delegated to the arbitrator the “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of” the arbitration agreement.

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The plaintiff opposed arbitration on the ground that the arbitration agreement was unconscionable under controlling state law. A split court ruled that the plaintiff’s unconscionability argument was for the arbitrator, not the court. The reasoning was that this argument was directed at the arbitration agreement as a whole and not at the specific provision. The court characterized the agreement as antecedent, severable agreement, thereby vesting the arbitrator with authority to adjudicate challenges to enforceability of the agreement as a whole. Characterizing the entire arbitration agreement as a single facet of a broader employment agreement, the dissent argued that under First Options the plaintiff’s unconscionability argument was a question of arbitrability requiring judicial resolution.71

Rent-A-Center shows continued uncertainty regarding how courts identify questions of arbitrability. The same uncertainty was raised in the Second Circuit’s 2014 decision in NASDAQ Group, Inc. v. UBS Securities, LLC. There, a broker-dealer sought to arbitrate claims against the NASDAQ exchange related to the exchange’s alleged mishandling of the Facebook IPO. Although the parties had an agreement containing a broad arbitration clause that would otherwise have constituted “clear and unmistakable” evidence of an intent to vest the arbitration panel with authority to determine arbitrability, the clause was expressly drafted subject to a set of NASDAQ rules that arguably immunized

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69 Id. at 66.
70 Id. at 70-73.
71 Id. at 80-81 (Stevens, J., dissenting).
72 NASDAQ OMX Group, Inc. v. UBS Sec., LLC., 770 F.3d 1010 (2d Cir. 2014).
73 Id. at 1016-17.
the exchange from liability for the sorts of claims asserted by the broker-dealer. Rather than construing the NASDAQ rules as raising the sort of defense to liability that Howsam suggested would be subject to resolution by the arbitrator, the Second Circuit ruled that reference to the rules in the arbitration clause itself raised an ambiguity regarding whether the parties had in fact intended to vest the arbitrator with authority to determine the arbitrability of the specific claims asserted.

In short, while First Options purported to answer the question of who decides arbitrability, it appears that the focus shifted from the question “who decides” to the question “what is being decided.” Despite the Supreme Court’s efforts to resolve that issue in Howsam, it is clear that confusion and uncertainty remains.

2. Substantive Arbitrability

Every other threshold issue not characterized as “procedural”, is, at least a priori, substantive and are to be decided by the court. Generally, issues such as “[w]hether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy” are characterized as substantive arbitrability issues. This is however not always clear. For instance, threshold disputes over the applicability of an arbitration agreement present courts with a dilemma. This is the elusive “scope” of arbitration question. From a

74 Id. at 1031-32.
75 Id.
76 Green Tree Fin. Corp, supra note 63, at 452.
separability viewpoint, such matters are substantive arbitrability matters, because they relate specifically and uniquely to the arbitration clause rather than to the contract as a whole. Moreover, they significantly implicate party consent. In that connection, the legitimacy of the proceedings and the eventual award. Parties do not agree to arbitrate every imaginable dispute that may arise between them. They agree to arbitrate only a certain universe of claims that they themselves have defined.

Questions concerning the scope of an agreement to arbitrate are accordingly often ranged alongside the question of whether an arbitration agreement was formed, whether it is valid and enforceable, and whether a given person is or may be deemed a party to it. They are therefore substantive arbitrability issues left for courts to determine. There are several arguments as to where the question of scope properly belongs. However, that is slightly beyond the scope of this paper.

III. **Kompetenz-Kompetenz under the UNCITRAL Model Law**

The situation with regard to the process of determining arbitral jurisdiction is different under the Model law. It is different in two main respects, namely (1) under the UNCITRAL Model Law, there is a clear textual basis for Kompetenz-Kompetenz, and (2) under the UNCITRAL Model

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77 Bermann, *supra* note 13, at 37.
Law, there is stipulation of a time limit for challenge of arbitral determination on their own jurisdiction.

A. TEXTUAL FOUNDATION FOR KOMPETENZ-KOMPETENZ

Unlike the FAA, the UNCITRAL Model Law expressly provides for the authority of arbitral tribunals to decide on their jurisdiction, if challenged.79 In this regard, article 16 of the UNCITRAL Model Law provides as follows:

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.80

In addition, article 8 of the UNCITRAL Model law provides that:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.81

79 See, UNCITRAL Model Law, supra note 67.
80 Id.
81 Id.
Article 8 of the UNCITRAL Model Law is quite similar in effect to sections 3 and 4 of the FAA which authorizes the relevant US district court to stay judicial proceedings and compel arbitration in proceedings referable to arbitration. German law, which is fashioned towards the UNCITRAL Model Law, is also similar in this respect. It allows for broad judicial intervention on certain issues at the threshold of arbitration. Section 1032(1) of the German Civil Procedure Code ("ZPO") entitles the defendant in a court action on a claim that it contends is subject exclusively to arbitration to seek a ruling that the court lacks jurisdiction to hear the matter on the merits. To prevail on the jurisdictional issue, plaintiff must demonstrate that the arbitration agreement is "null and void, inoperative or incapable of being performed."82

However, the difference is American courts may entertain applications for jurisdictional declarations at any time.83 They may order a full examination of the validity of an

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82 ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, REICHSGESETZBLATT [RGBL.] 83, as amended, § 1032, ¶ 1, translated in Peter Hubert, § 1032 – Arbitration Agreement and Substantive Claim Before Court, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 139 (Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento eds., 2007) (“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed”). The language of section 1032(1) tracks Article 8(1) of the UNCITRAL Model Law, whose language “null and void, inoperative or incapable of being performed” derives from Article II (3) of the New York Convention.
83 See Park, supra note 29, at 139.
arbitration clause at any stage of the arbitral process to determine whether, as a matter of fact and law, the parties have agreed to arbitrate.84 Under the Model law, such delay may be a waiver.85 In this regard, article 16(2) provides that:

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. 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.

Certainly, an argument can be made that based on the last sentence of this provision, the tribunal has discretion to entertain an objection regarding its own jurisdiction. However, it is important to notice that the requirement objecting before the submission of the statement of defense is couched in mandatory terms by the use of the word “shall.” The tribunal may only admit a subsequent plea in rare

85 See, UNCITRAL Model Law, supra note 67. In this respect, Art. 16(2) of the UNICTRAL Model Law provides that (“A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence”); Similarly, Art. 4 of the UNICTRAL Model Law provides for (“Waiver of right to object”).
circumstances because of the wording of the provision. This is an important issue to also consider in terms of the efficiency of arbitration under the UNCITRAL Model Law regime, as opposed to the United States system under the FAA. The American position is different from several other jurisdictions. For instance, if German courts are asked to hear a matter which one side asserts is subject to arbitration, they decide immediately on the validity and scope of the arbitration agreement. In France, such challenges normally wait until an award has been made. In England, litigants have a right to declaratory decisions on arbitral authority, but only if they take no part in the arbitration.

In addition, the UNCITRAL Model Law expressly prevents unnecessary intervention by the courts. The Model law provides that “[i]n matters governed by this law, no court shall intervene except where so provided in this Law.” The FAA does not have a similar provision, making arbitration under the FAA less efficient compared to proceedings under the UNCITRAL Model Law. A follow up question would be whether the US is as pro-arbitration as it is said to be? It is difficult to say that this pro-arbitration perception is accurate in light of the possible ways in which the FAA needs to be improved.

86 ZPO, supra note 82, at § 1032(1).
87 Nouveau Code de Procédure Civile [N.C.P.C.], art. 1458. This permits pre-arbitration review only to determine if the arbitration clause is “clearly void” (manifestement nulle).
88 English Arbitration Act 1996, c. 27 (Eng.) § 72 (1996). In a sense, this is similar to the UNCITRAL Model Law which limits the right to object to situations where the objecting party has not waived the right based on the grounds provided under the Model Law.
89 See, UNCITRAL Model Law, supra note 67, at art. 5.
B. LIMITS ON REVIEW OF ARBITRATOR’S DETERMINATION

Not only does the UNCITRAL Model Law expressly stipulate that an arbitral tribunal has the competence to rule on its own jurisdiction,\(^90\) it also authorizes the tribunal to rule on the jurisdictional challenge as a preliminary question.\(^91\) In that regard, the Model Law provides that:

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 … to decide the matter, which decision shall be subject to no appeal…"\(^92\)

Two important features are available under the UNCITRAL Model Law regime, which do not exist under the FAA. These are critical features which are likely to impact the time spent in resolving a dispute, depending on which law applies as the \textit{lex arbitri}. These features include: (1) the thirty-day time limit within which a party may seek a review of arbitral determination on jurisdiction, and (2) the fact that a finding from a court on the said arbitral determination on jurisdiction is “subject to no appeal.” These differences between the FAA and the UNCITRAL Model Law are significant. They play out when one side to the dispute applies to a court with supervisory (curial) competence over the arbitration, asking that the proceedings be stopped or that

\(^{90}\) Id. at Art. 16.  
\(^{91}\) Id.  
\(^{92}\) Id.
a case be heard notwithstanding an alleged arbitration agreement. This happens a majority of the time in arbitral proceedings and as such, the importance of these provisions cannot be overemphasized.

In *BG Group*, Argentina claimed that the tribunal lacked jurisdiction to hear the dispute because (1) BG Group was not a Treaty-protected investor; (2) BG Group’s interest in MetroGAS was not a Treaty-protected investment; and (3) BG Group initiated arbitration without litigating its claims in Argentina’s courts, despite Article 8’s local litigation requirement.93 In late December 2007, the arbitration panel in *BG Group* determined it had jurisdiction to consider the merits of the dispute. Under the UNCITRAL Model Law, as soon as that decision on jurisdiction was rendered, parties would have an automatic right to seek a review by the relevant court of the seat. Further, a decision of such a court would be open to review for thirty days after which a party loses the right to seek further review of that decision. What is more, such a decision is not subject to appeal.

Contrasting this UNCITRAL Model Law position with what happened in *BG Group*, we find that Argentina first applied to the District Court for the District of Columbia seeking to vacate the award in part on the ground that the arbitrators lacked jurisdiction.94 The District Court denied Argentina’s claims. Under the Model Law, appeals would have ended and the decision of the arbitrators would have prevailed. However, since the dispute was decided under the FAA, Argentina had the right to further appeal, and it did so. Argentina appealed the District Court’s decision to the Court

94 Id. at 1205.
of Appeals for the district of Columbia Circuit. The DC Circuit reversed the arbitral determination on jurisdiction. In the Court of Appeal’s view, the interpretation and application of Article 8’s local litigation requirement was a matter for courts to decide de novo, i.e. without deference to the views of the arbitrators.95 Thus, the Court of Appeals held that the circumstances did not excuse BG Group’s failure to comply with the requirement. Rather, BG Group must “commence a lawsuit in Argentina’s courts and wait eighteen months before filing for arbitration.” 96 Because BG Group had not done so, the arbitrators lacked authority to decide the dispute. The Court of Appeals ordered the award vacated.

The judicial challenge did not end there. BG Group appealed to the Supreme Court. Appealing arbitral determination on jurisdiction without restriction defeats the purpose of international arbitration. It is essentially bringing a dispute under the domestic court system of the seat of arbitration. This could lead to the so-called “Russian Doll” effect, where arbitral decisions are appealed all the way to the highest court. 97 The point here is that from 2007 when the jurisdictional issue was determined by the tribunal, parties took turns in appealing that decision to the highest court in the United States. The final decision was issued in 2014. Thus, for about seven years, parties fought over whether the

95 Id.
96 Id.
tribunal had jurisdiction (although the merits formed part of the appeal).

Judges in the United States, particularly in locations such as Washington, D.C., New York, California, etc. are quite familiar with arbitration as a dispute resolution mechanism. Even so, the BG Group case took seven years from the tribunal’s decision to finally lay the issue of arbitral jurisdiction to rest at the US Supreme Court. One wonders how this would play out in other less arbitration-friendly jurisdictions, especially ones that have not adopted progressive laws such as the UNCITRAL Model Law. It would take much longer—the more reason jurisdictions need to adopt arbitration laws with efficient regulation of the proceedings.

C. STANDARDS OF REVIEW OF ARBITRAL DETERMINATION

In addition to adopting a unique form of “arbitrability” as a tool in determining competency to decide jurisdictional issues lies, U.S. Courts have also adopted certain standards of review in the allocation of said competence. The most significant dividing line relates to whether the judge will make a full inquiry into the parties’ intent, or simply a summary examination, applying what is sometimes called a prima facie or deferential standard. To a large extent, the jurisprudence regarding the standards of review mirrors the analysis under procedural and substantive arbitrability.98 Thus, issues characterized as those of procedural arbitrability are generally for the arbitrator to determine. Courts generally

98 See subheading III(C)(1) & (2) above, on procedural and substantive arbitrability.
engage in deferential or *prima facie* review with regard to those issues. On the other hand, issues of substantive arbitrability are for the courts to review *de novo*, without any deference to the arbitrator’s determination.

For example, a seller might bring a judicial action to collect the price of an engine. In response, the buyer (who alleges the engine was defective) might move to stay litigation, asserting that the parties had agreed to arbitrate their dispute. The seller might reply with allegations that the arbitration clause was void.

In the alternative, the buyer might file an arbitration for product malfunction, alleging an engine explosion that caused personal injury and loss of profits. Here, it would be the seller (preferring to be in court) who asks a judge to address the validity and scope of the arbitration agreement, perhaps arguing that the person who signed the clause lacked authority or that the clause was not broad enough to cover the tort action for personal injury or the financial claim for lost profits.

In either instance, judges will need to decide whether to examine arbitral jurisdiction in depth or to do so deferentially or under summary (*prima facie*) standard. In the latter event, they may leave fuller review to the time after an award has been rendered.

In France, until an award is rendered, judges address the validity and scope of an arbitration clause *only* in the most superficial manner and *only* in the event no arbitral tribunal has been constituted.99 The court can ask whether the clause was clearly void (for example, whether the arbitration clause exists at all) but may not address more complex questions, _

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such as whether the corporate officer signing the arbitration agreement had authority to do so. Once arbitration has started however, judges sit on their hands until the award is made.100

By contrast, U.S. courts may engage in full examination of arbitral power regardless of whether the arbitration has begun, and irrespective of whether they are being asked to hear the merits of the claims. The court might decide that the lawsuit should stop and the arbitration should proceed. Or vice versa. The court might also pass this jurisdictional question back to the arbitrators themselves for their determination.101

As a general matter, a prima facie standard would be relevant only with respect to pre-award requests for declarations and injunctions, which implicate a prophylactic role for courts in the sense of preventing an arbitrator from

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100 Compare the Canadian case of Dell Computer Corp. v. Union des consommateurs [2007] S.C.R. 34 (Can.) (where The Canadian Supreme Court opted for the minimum standard of review at the time an arbitration begins. The Canadian decision interpreted the jurisdictional provisions of the UNCITRAL Model Law as enacted in Québec. Unlike the French statute, however, the Model Law permits judicial intervention even after arbitration has commenced); See generally Frédéric Bachand, Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal’s Jurisdiction? 22 ARB. INT’L 463 (2006).

101 In some countries, courts distinguish between arbitration held at home or abroad. Swiss courts, for example, make a comprehensive review of the validity of the arbitration clause when the arbitration has its seat abroad. By contrast, when the arbitration is held in Switzerland, judges engage only in a summary examination of arbitral jurisdiction (examen sommaire) delaying fuller review until the award stage. Compare Swiss Tribunal federal decisions in Fondation M. Banque X, ATF 122 III 139 (Apr. 29, 1996) (arbitration in Switzerland), with Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Co. SA. ATF 121 III 38 (Jan. 16, 1995) (arbitration abroad).
making an unauthorized decision. The jurisdictional foundation of an arbitral proceeding must be monitored before anyone knows what the arbitrator will decide. The arbitrator’s jurisdiction becomes an issue because judges are asked to make a respondent participate, or tell a claimant that the arbitration lacks jurisdictional foundation.\footnote{See United States (Federal) Arbitration Act \textit{supra} note 4.}

By contrast, when arbitral jurisdiction becomes an issue in the endgame, after an award is rendered, judges exercise a \textit{remedial} function, correcting mistakes that allegedly occurred earlier in the arbitral process. The validity of an award might be subject to judicial scrutiny at the arbitral seat, through motions to vacate or to confirm under local law,\footnote{Id. (See for instance, 9 U.S.C.\S 10 which provides for vacatur of an award “where the arbitrators exceeded their powers”).} or to recognize an award rendered abroad under the New York Convention. At this point, a different set of concerns present themselves, calling for a deeper judicial scrutiny of both the arbitrator’s jurisdiction and the relevant public policy implications of the award.

\section*{IV. Brief Comparative Perspectives}

As mentioned earlier, the struggle to determine who decides questions of arbitrability is largely an American phenomenon, the result of the FAA’s silence on the issue and the American court’s subsequent need to develop rules of decision in light of perceived Congressional intent and fundamental principles of contract law. Other jurisdictions have managed to avoid the lasting uncertainty catalogued above by codifying the rules of decision.
In France, the Code of Civil Procedure expressly vests arbitration tribunals with “exclusive jurisdiction” to determine their jurisdiction. The Code also provides that the existence of an arbitration agreement divests the courts of jurisdiction entirely, except where the arbitration panel “has not yet been seized of the dispute” and the arbitration agreement is “manifestly void or manifestly not applicable” – an exception that is strictly interpreted. Application of this principle, “compétence-compétence,” means that even where the arbitration tribunal’s jurisdiction is in question, the arbitration tribunal itself enjoys “chronological priority” to decide the issue and the courts remain divested of jurisdiction unless the parties mutually consent to judicial intervention. This is commonly referred to as negative Kompetenz-Kompetenz.

Whereas the American approach to the question of who determines arbitrability is directed primarily at vindicating the parties’ contract, the French approach places a greater premium on preventing dilatory tactics and encouraging the centralized and efficient resolution of all disputes surrounding the subject of the arbitration. This does not mean, however, that the courts have no role. It simply means that whereas American courts exercise chronological

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104 N.C.P.C., supra note 87, at Art. 1465.
105 Id. at Art. 1448 para. 1.
106 Id. at Art. 1448 para. 2. (stating court “may not decline jurisdiction on its own motion,” giving parties the ability to jointly consent to judicial intervention).
107 See Emmanuel Gaillard & Yas Banifatemi, Negative Effect of Competence-Competence; The Role of Priority in Favour of the Arbitrators, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, 260.
precedence, acting as a gate-keeper to arbitration, the French courts act as a back-stop. In that sense, the French courts exercise a limited review of the arbitration panel’s decision – including its decision regarding arbitrability – once that decision had been delivered.108

English law strikes something of a balance between the American and French approaches. Like the French Code, the English Arbitration Act expressly empowers an arbitration panel to “rule on its own substantive jurisdiction,” including “what matters have been submitted to arbitration in accordance with the arbitration agreement.”109 Unlike the French approach, however, the English courts are not divested of jurisdiction,110 and may be called on to make a determination as to the jurisdiction of the arbitral tribunal (and hence the arbitrability of the parties’ dispute) – but only when all parties agree to seek such ruling, or when the tribunal itself allows a party to do so.111 Otherwise, a party must await issuance of an award before challenging the arbitration panel’s arbitrability determination.112

108 See N.C.P.C., supra note 87, at Art. 1492, para. 1 (allowing a court to “set aside” domestic award where the “arbitral tribunal wrongly upheld or declined jurisdiction”); See also Id. at Art. 1520, para. 1 (which holds the same with respect to international awards).
110 Id. at § 9.
111 Id. at § 32.
112 Id. at § 67(1).
V. **BG Group Majority Opinion**

A. **Summary of Facts and Decision**

Article 8 of a Bilateral Investment Treaty (BIT) between the United Kingdom and the Republic of Argentina contained a requirement which authorized a party to submit a dispute “to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made,”\(^\text{113}\) such as a local court, and allowed arbitration, “where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [that] tribunal..., the said tribunal has not given its final decision.” (the local litigation requirement).\(^\text{114}\) BG Group PLC, a British firm, belonged to a consortium with a majority interest in MetroGAS, an Argentine entity awarded an exclusive license to distribute natural gas in Buenos Aires.

At about the same period when BG Group’s consortium acquired the interest in MetroGAS, Argentina enacted statutes providing that regulators would calculate gas “tariffs” in US dollars, and that those tariffs would be set at levels sufficient to assure gas distribution firms, such as MetroGAS, a reasonable return on their investment in the country.\(^\text{115}\)

In 2001 and 2002, Argentina, faced with economic crisis, enacted new laws which changed the calculation of gas tariffs from Dollars to Pesos. The effect was that MetroGAS


\(^{114}\) Id.

\(^{115}\) Id. at 1204
started losing money. BG Group believed that the changes, among others, violated the Treaty. A dispute arose.116

In 2003, BG Group submitted the dispute to arbitration. Parties agreed that the seat of arbitration would be Washington, DC. BG Group essentially claimed that Argentina’s new laws and regulatory practices violated provisions in the BIT forbidding the “expropriation” of investments and requiring that each nation give “fair and equitable treatment” to investors from the other.117 Argentina denied these claims, while also arguing that the arbitration tribunal lacked “jurisdiction” to hear the dispute. According to Argentina, the arbitrators lacked jurisdiction because: (1) BG Group was not a Treaty-protected “investor;” (2) BG Group’s interest in MetroGAS was not a Treaty-protected “investment;” and (3) BG Group initiated arbitration without first litigating its claims in Argentina’s courts, despite the Article 8 local litigation requirement. Argentina’s argument on the jurisdictional issue was that, failure by BG Group to bring its grievance to Argentine courts for 18 months rendered its claims in the arbitration inadmissible.118

In December 2007, the tribunal determined that it had jurisdiction. The tribunal concluded that BG Group was an investor, that its interest in MetroGAS amounted to a Treaty-protected investment, and that Argentina’s conduct waived, or excused, BG Group’s failure to comply with Article 8’s local litigation requirement. These conducts include, among others, the fact that the President of Argentina issued a decree staying the execution of its courts’ final judgment for 180 days

116 Id.
117 Id.
118 Id.
in suits claiming harm as a result of the new economic measures. In addition, Argentina established a renegotiation process for public service contracts such as its contract with MetroGAS, to alleviate the negative impact of the new economic measures. However, Argentina simultaneously barred from participation in that process firms that were litigating against Argentina in court or arbitration. Thus, requiring a private party in such circumstances to seek relief in Argentina’s courts for 18 months, the tribunal concluded, would lead to absurd and unreasonable results. Therefore, on the merits, the tribunal agreed with Argentina that it had not “expropriated” BG Group’s investment, but also found that Argentina had denied BG Group “fair and equitable treatment.” The tribunal awarded BG Group $185 Million in damages.119

In March 2008, both parties filed petitions for review in the District Court for the District of Columbia—BG Group to confirm the award under the New York Convention and the FAA, and Argentina to vacate the award, in part, because the tribunal lacked jurisdiction. The District Court denied Argentina’s claims and confirmed the award.120 The Court of Appeals, D.C. Circuit, reversed. In the D.C. Circuit’s view, the interpretation and application of Article 8’s local litigation requirement was a matter for courts to decide de novo, without deference to the views of the arbitrators. The court held that the circumstances in Argentina did not excuse BG Group’s failure to comply with the requirement. Rather, BG Group must “commence[d] a lawsuit in Argentina’s courts and wait eighteen months before filing for arbitration.” Because BG

119 Id. at 1204–1206.
120 Id. at 1206.
Group had not done so, the arbitrators lacked authority to
decide the dispute. The D.C. Circuit ordered the award
vacated.121

BG Group appealed to the United States Supreme
Court. The issue there was: who, court or arbitrator, bears
primary responsibility for interpreting and applying the local
litigation provision of the BIT? In other words, should a US
court review the arbitrators’ interpretation and application of
the provision de novo, or with the deference that courts
ordinarily show arbitral decisions on matters the parties have
committed to arbitration? The Court held that the matter was
for the arbitrators, and courts must review the arbitrators’
determinations with deference.122

B. APPLICATION OF ARBITRABILITY AND KOMPETENZ-
KOMPETENZ IN BG GROUP

In dealing with the issue at hand, the Supreme Court
started out by treating the treaty in question as an ordinary
contract between private parties. The Court restated the
general position that where ordinary contracts are in issue, it
is up to the parties to determine whether a particular matter
is primarily for arbitrators or for courts to decide.123 The Court
went ahead to state that “[I]f the contract is silent on the
matter of who primarily is to decide ‘threshold’ questions

121 Id.
122 Id.
123 Id. at 1207; See also, Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574,
582 (1960) (“[A]rbitration is a matter of contract and a party cannot be
required to submit to arbitration any dispute which he has not agreed to
so submit”).
about arbitration, courts determine the parties’ intent with the help of presumptions.”124

As mentioned earlier, on one hand, US courts generally presume that parties intend courts, not arbitrators, to decide “disputes about arbitrability.”125 On the other hand, when the arbitrability question has to do with the meaning and application of particular procedural preconditions for the use of arbitration, courts presume that the parties intend arbitrators, not courts, to decide such disputes.126 Thus, the Supreme Court decided that the local litigation requirement of the BIT was of the procedural variety because the text and structure of the provision clearly makes it operate as a procedural condition precedent to arbitration.127 This, the court reasoned, was based on the fact that the local litigation requirement “determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all.”128 This was hinged on a couple of the Court’s previous decisions. In Howsam v. Dean Witter Reynolds, the Court held that whether a party filed notice of arbitration within the time limit provided by the rules of the chosen arbitral forum “is a matter presumptively for the arbitrator, not for the judge.”129 Similarly, in John Wiley & Sons, Inc. v. Livingston, the Court held that a mandatory pre-arbitration grievance procedure that involved holding two conferences

124 Id.
125 First Options, supra note 21, at 941, 943-947.
126 Howsam, supra note 41, at 79-84. (“courts assume parties ‘normally expect a forum-based decision-maker to decide forum-specific procedural gateway matters’”)
127 BG Group, supra note 61, at 1207.
128 Id.
129 Howsam, supra note 41, at 85.
was presumptively for the judge to decide.\textsuperscript{130} Further, since the BIT itself did not provide for anything contradicting this presumption, the Court therefore concluded that the arbitrators had the primary authority to interpret and apply the local litigation provision.\textsuperscript{131}

As a general matter, this is the default process undertaken by American courts faced with questions of arbitrability and \textit{Kompetenz-Kompetenz}. It is unnecessary to go through such a process in determining arbitral competence to determine their own jurisdiction. It amounts to a waste of judicial resources. Under the UNCITRAL Model Law, the process is perfunctory. Article 16 provides that the arbitrator has the authority to decide on their competence. It does not require a court to delve into unnecessarily intricate analysis of what is procedural or substantive. Under the UNCITRAL Regime, as long as the challenge is geared towards the jurisdiction of the tribunal, such tribunal always has the power to determine the issue.

VI. CONCLUSION AND RECOMMENDATIONS

In light of the Supreme Court’s decision in \textit{BG Group}, it is important to take a step back and understand the ramifications of the FAA on arbitration conducted in the United States. When the FAA applies, much of the issues

\textsuperscript{130} John Wiley \& Sons, Inc. v. Livingston, 376 U.S. 543, (1964). See also, Dialysis Access Center, LLC v. RMS Lifeline, Inc., 638 F. 3d 367, 383 (1st Cir. 2011) (the court held the same in respect to a pre-arbitration “good faith negotiations” requirement); see also Lumbermens Mut. Cas. Co. v. Broadspire Management Servs., Inc., 623 F. 3d 476, 481 (7th Cir. 2010) (holding the same, in respect to a pre-arbitration filing of a “Disagreement Notice”).

\textsuperscript{131} BG Group, \textit{supra} note 61, at 1208.
relating to arbitrability and Kompetenz-Kompetenz are guided by the framework which U.S. courts have established over time. Parties do not consciously, with knowledge of the implications, submit their disputes to this uncertain regime. For the most part, parties who choose any state of the US as the seat of their dispute do not fully understand the consequences of such a choice. Often, hundreds of millions of dollars are at stake in these disputes. It does not make sense that parties would consciously want to leave such high-stakes disputes to the vagaries of the US arbitration regime. Particularly when they have the choice of a more stable and predictable framework, the UNCITRAL Model Law.

It took 11 years for this dispute to be resolved. The issue of jurisdiction was appealed through the US court system all the way to the Supreme Court. Would it have been different had the UNCITRAL Model Law applied as the *lex arbitri*? Very likely yes. As already mentioned, first, the Model Law expressly provides that arbitrators have the power to determine their jurisdiction. With such express declaration, there is little need to seek interpretation of the provision from courts. Tribunals would simply apply the provision, and parties get the outcome. Second, a review of such a decision is to be sought within 30 days. Third, there is no appeal on that decision under the Model Law. Undoubtedly, this would make for a faster resolution of disputes in the US. In *BG Group*, this would have meant that the District Court’s decision confirming the award would have been the final recourse for the parties. Interestingly, the Supreme Court upheld the District Court’s decision years later. Considering the Supreme Court’s decision was the same as the district court’s, it is fair to say, at least in the *BG Group* case, that not limiting the appeals process was a waste of judicial resources.
In addition, this raises a curious question regarding the wisdom behind “non-ICSID” investment arbitration cases. By “opting out” of the ICSID system, parties subject their dispute to so much unpredictability, especially if they do not choose a seat that has fully adopted laws similar to the UNCITRAL Model Law. This is exactly what happened in BG Group. ICSID is a closed, self-contained system which provides for faster and more efficient dispute resolution. Parties are better off using the ICSID system than having their dispute heard outside the system. Contracting states should therefore be mindful of terms negotiated in the dispute resolution provisions of their BITs.

The United States Congress must seriously consider amending the FAA, if only to provide a textual basis for the current jurisprudential position regarding Kompetenz-Kompetenz. This will bring some certainty to the system. In addition, there should be a time limit and limitation on the appeals process, similar to the relevant provisions of the UNCITRAL Model Law. This simple addition to the FAA could prevent situations like the one in BG Group where the issue of jurisdiction was appealed to the Supreme Court. If the BG Group situation continues, then the whole essence of international arbitration as a fast, efficient and cost-effective means of dispute resolution would be defeated. As mention earlier, this will encourage the so-called “Russian-Doll” effect, which may discourage users of the process.

Further, there should be conscious effort by states to avoid non-ICSID investment arbitration. Had BG Group been decided under the ICSID framework, there is little doubt that the dispute would have been decided much faster, saving time and money. The ICSID system, like the UNCITRAL
regime, expressly recognizes Kompetenz-Kompetenz.\textsuperscript{132} In addition, awards from ICSID are not subject to any national court review,\textsuperscript{133} even though they are seen as court judgments of member states’ courts.\textsuperscript{134}

From the foregoing, can one then say that the US is as pro-arbitration as it claims to be? Until the FAA regime is fixed to provide clear guidance on basic and important arbitration issues like Kompetenz-Kompetenz, my position is that the US is in fact not as pro-arbitration as it claims to be. Certain things remain to be done in order to lift the country to a complete pro-arbitration status. I believe that countries that adopt the UNCITRAL Model Law are the quintessential pro-arbitration systems. Any country that grapples with a very basic feature of international arbitration should not be seen as pro-arbitration. The rest of the world is settled on the issue of Kompetenz-Kompetenz, but as seen in this paper, the US is still having an unnecessary “difficult time.”

\textsuperscript{132} Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 41, Mar. 19, 1965, 4 I.L.M. 524 (“The Tribunal shall be the judge of its own competence”).
\textsuperscript{133} Id. at art. 53(1). (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”).
\textsuperscript{134} Id. at art. 54(1). (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”).
In the meantime, given the continued uncertainty regarding how to determine who should decide these “gateway” questions of arbitrability in the United States, parties wishing to ensure resolution of such questions by a specific decision-maker – whether court or the arbitrator—should spell out their preference as clearly as possible. Conversely, parties seeking to challenge a decision-maker’s authority to decide arbitrability should be attentive to circumstances that might implicate unresolved aspect of this vexing issue. Parties who seek to avoid litigation over this threshold question – and who are comfortable with having an arbitration panel determine its own jurisdiction in the first instance – may wish to consider contracting for arbitration in France or the United Kingdom, where judicial involvement is generally delayed until completion of the arbitration itself.