IN THE SUPREME COURT OF FLORIDA

AIRBNB, Inc.,

Petitioner,

v.

Case No.: SC20-1167
L.T. No.: 2D19-1383

JOHN DOE and JANE DOE,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

AMICUS BRIEF OF PROFESSOR GEORGE A. BERMANN IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS

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 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 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 addresses a central but unsettled issue of domestic and international arbitration law: whether incorporation 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 Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). The United States Supreme Court has recognized that the issue of who—court or arbitrator—has primary responsibility to decide arbitrability "can make a critical difference to a party resisting arbitration" by removing a party's right to have a court determine the arbitrability of a dispute. *Id.* at 942.

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 v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal citations omitted). The Supreme Court repeatedly has 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. A party must not lightly

be deprived of this right, since it implicates the fundamental value 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*, the Supreme 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 ordinarily would 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 presence of a simple competence-competence provision in procedural rules that the parties reference in their arbitration clause falls short of "clear and unmistakable" evidence that the parties intended to withdraw from courts the authority they presumptively enjoy to determine issues of arbitrability.

First, the competence-competence text 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 confers on arbitral tribunals jurisdiction to determine their own jurisdiction. But while competence-competence *empowers* tribunals, in U.S. law it 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 undermines the principle enunciated in *First Options.* Virtually every set of arbitration rules and every modern international arbitration law now contain a competence-competence provision.

Finally, even if general competence-competence language could be viewed as a delegation, it still cannot be regarded as "clear and unmistakable" when it is buried in a lengthy and detailed set of incorporated procedural rules. 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 set of procedural rules understood as addressing only how the arbitration is to be conducted, rather than the basic relationship between a court and an arbitral tribunal in determining the arbitrability of a dispute.

ARGUMENT

I. *First Options* entitles parties to an independent judicial determination of arbitrability unless they have "clearly and unmistakably" agreed otherwise.

The issues that arbitrability entails are important to acknowledge in order to appreciate what is at stake in determining arbitrability. Did the parties reach an agreement to arbitrate? Is that agreement valid? May a non-signatory invoke the agreement or be bound by it? Is the dispute covered by the agreement? These "gateway" issues implicate the consent of the parties to submit a dispute to an arbitral rather than a judicial forum.

A. The *First Options* Test.

In some cases, a party initially raises an issue of arbitrability before an arbitral tribunal. 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.

For example, in *First Options*, 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 federal district court confirmed the award. On appeal, the Court of Appeals reversed, deciding that the couple was not obligated to arbitrate. The Supreme Court unanimously affirmed, agreeing that the Kaplans had not "clearly and unmistakably" delegated to the arbitrators primary authority to determine arbitrability. *First Options*, 514 U.S. at 946. The Court explained:

> 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.

Id. at 944–45.

In other cases, 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. That was the case in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). The Supreme Court reaffirmed there that, to constitute a delegation, the language used by the parties must unambiguously establish their "manifestation of intent" to withdraw from courts the authority to determine arbitrability. *Id.* at 69 n.1.

Thus, whether a party chooses to contest arbitrability initially before a court or a tribunal, it is entitled to an independent judicial determination of arbitrability—an entitlement that cannot be overcome with anything less than "clear and unmistakable" evidence.

B. Application by the federal courts.

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

won favor among the U.S. Courts of Appeals,[1] none of those courts' decisions provides any—let alone persuasive—analysis for reaching that conclusion. They instead assume without any basis that if arbitrators *have* authority to determine arbitrability, then courts necessarily *do not*. In one of the earliest such decisions, the Eighth Circuit said only:

> [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.

FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1312–13 (8th Cir. 1994). Worse yet, the great majority of the federal appellate decisions that followed do not even purport to address the issue. All they do is

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[1] *See, e.g.*, *Oracle Am., 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).

"join" the view of another circuit. *E.g.*, *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017).

Despite the solidity of support among the circuits, a district court in one of the few federal 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.

Taylor v. Samsung Elecs. Am., Inc., No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020).[2]

[2] Although a district court in another circuit felt obliged to follow the Court of Appeals' adoption of the prevailing view, it called that view "incongruous," "ridiculous" and "bordering on the absurd." *Ashworth v. Five Guys Ops., LLC*, No. 3:16-06646, 2016 WL 7422679, at *3 (S.D. W. Va. Dec. 22, 2016).

C. Application by Florida and other state courts.

The situation is different at the state court level, where some courts have rejected the notion that the incorporation by reference of a generic competence-competence clause establishes "clear and unmistakable" evidence under *First Options*. The difference of views among state courts is particularly salient in Florida. Although some intermediate appellate courts have adhered to the view prevailing in the federal courts, others have declined to do so. One such decision, *John Doe & Jane Doe v. Natt & Airbnb, Inc.,* 299 So. 3d 599 (Fla. 2d DCA 2020), is now before this Court.

Here, the parties agreed to submit all contract-related claims between them to arbitration pursuant to the rules of the American Arbitration Association ("AAA"), more particularly the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules"). Article 7 of the AAA Rules represents a typical competence-competence provision, stating that "[t]he 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 or the arbitrability of any claim or counterclaim."

The Second District rejected the notion that the contract language could qualify as "clear and unmistakable" evidence of a delegation:

> [W]e will begin by pointing out what is conspicuously missing in the … agreement's language. The agreement itself is silent on the issue of who should decide arbitrability. … And although the circuit court concluded that the AAA Rules had been "incorporated" into the parties' … agreement for purposes of determining arbitrability (which, the court then determined, precluded its authority to decide arbitrability), the agreement did not actually say that. Indeed, whatever may be gleaned from the AAA Rules, …those rules were referenced in the … agreement as a generic body of procedural rules, and that reference was limited to how "the arbitration" was supposed to be "administered." … But if the question were put, "Who should decide if this dispute is even subject to arbitration under this contract?" to respond, "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes," is not a very helpful answer and not at all clear.
>
> Moreover, the reference to the AAA Rules was broad, nonspecific, and cursory: the agreement simply identified the entirety of a body of procedural rules. The agreement did not quote or specify any particular provision or rule, such as the one Airbnb now relies upon. And the AAA Rules were not attached to the agreement. Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules, [w]hich strikes us as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court.

> Assuming the … agreement's passing reference to AAA and the AAA Rules sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability, there is then the added uncertainty of whether the AAA Rules, in fact, *did* so. Again, the pertinent arbitration rule Airbnb relies upon … 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. In our view, the parties' "manifestation of intent" in the … agreement fell short of the clear and unmistakable evidence of assent that *First Options* requires.

Natt, 299 So. 3d at 606-07.

Thereafter, and changing course from its previous approach, the Fourth District rallied to the well-reasoned views expressed by the Second District, concluding that a "general reference to 'AAA rules' did not 'clearly and unmistakably' supplant the trial court's authority to decide what is arbitrable." *Fallang Family Ltd. P'ship v. Privcap Cos., LLC*, 316 So. 3d 344, 349 (Fla. 4th DCA 2021). After distinguishing other cases involving agreements with specific incorporations, that court continued:

> [I]n this case, the arbitration agreement was one paragraph stating merely that "the AAA rules and procedure shall apply." … Like the Second District, we conclude that "the reference to the AAA Rules was broad, nonspecific, and cursory." *Natt*, 299 So. 3d at 606. The AAA rules were not attached and no information was

> given as to where to find the rules. *Id.* Additionally, we agree that even if we were to assume that a general reference to "AAA rules" was sufficient to show an intent that the trial court's authority *could* be supplanted, there is still the uncertainty of whether the parties *did* intend to supplant the trial court's authority. We also agree with our sister court that AAA Commercial Arbitration Rule R-7 language stating that the arbitrator "shall have the power" does not grant *exclusive* authority to the arbitrator.

Id. at 350.

The decisions to the contrary rendered by other Florida appellate courts are bereft of reasoning. In *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1280 (Fla. 5th DCA 2017), the Fifth District only quoted the conclusory remark by a federal court of appeals that "when parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." Similarly, in *Glasswall, LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248, 251 (Fla. 3d DCA 2016), the court did nothing more than find that its decision was consistent with "the majority of federal courts."

The Second District rightly disagreed:

> [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-court presumption" that is supposed to attend this inquiry. *See Howsam*, 537 U.S. at 86. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same. …
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> … In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction. It is at best ambiguous. … Otherwise, we will be treating the "who decides" issue of arbitrability no differently than any other issue of arbitration, when the Supreme Court has instructed, repeatedly, that it is a qualitatively different inquiry with a different analysis.

Natt, 299 So. 3d at 608-09.

Florida courts are not alone in rejecting the prevailing federal view.[3] The Montana Supreme Court, for example, observed that one

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[3] *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).

would consult the AAA Rules only for the purposes of "implementation of procedural and logistical rules," and nothing more. *Glob. Client Sols.*, 367 P.3d at 369. Intermediate state appellate courts in California[4] have reached a similar conclusion.

II. Competence-competence language in arbitration rules does not constitute "clear and unmistakable" evidence under *First Options*.

Four reasons support this Court's affirmance of the Second District. First, the language of the competence-competence provision in this case, as in others, fails to support the proposition that the parties foreswore their right to a judicial determination of arbitrability. Second, competence-competence in U.S. law signifies only that tribunals may determine their authority; it does not make that authority exclusive. Third, treating standard competence-competence language as sufficient to establish "clear and unmistakable" evidence reverses *First Options*' strong presumption that parties are entitled to an independent judicial determination of

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

arbitrability. Fourth, to be "clear and unmistakable," delegation language, however drafted, belongs in an arbitration agreement itself, not buried in referenced rules of arbitral procedure.

A. The competence-competence language in this case.

The standard competence-competence clause in Rule 7 of the AAA confers on arbitrators authority to determine their jurisdiction. But it gives no indication that it also divests courts of their presumptive authority to make that determination if so requested. To conclude that Rule 7 produces a delegation, one must read into the Rule the word "exclusive." That is a big and serious leap lacking textual support.

It is not necessary, in order for competence-competence language to have real utility, to read into it a deprivation of courts' jurisdiction to determine arbitrability. 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 happily serves to avoid that result.

B. The meaning of competence-competence in U.S. law.

The view that a competence-competence clause necessarily excludes judicial authority to determine an arbitrability question misconceives that term's meaning in U.S. law. 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." As understood in U.S. law, competence-competence does no more than authorize arbitral tribunals to determine their own authority.[5] 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 to the efficacy of arbitration as a dispute resolution mechanism.

Even a casual reading of the key instruments of domestic and international arbitration law reveals the fallacy underlying the

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[5] 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*, No. 15-40 Bos. Univ. Sch. of L. 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.").

notion that, if tribunals have authority to determine their jurisdiction, courts necessarily do not. In FAA, 9 U.S.C. § 4, Congress 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. has been a party since 1970, directs 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.

The principle of competence-competence in U.S. law has never entailed the corollary that, if arbitrators *may* decide arbitrability, courts *may not*. By contrast, other jurisdictions, 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).[6] This sharp divide between the U.S. and French versions of competence-competence pervades the international arbitration literature.[7]

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 fails to meet the *First Options* test.[8]

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[6] *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).

[7] *See, e.g.*, Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, in Int'l Arb. and Int'l Commercial Law: Synergy, Convergence and Evolution (2011).

[8] 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).

C. A reversal of presumptions.

The Court in *First Options* made judicial authority to determine arbitrability the rule and delegation the exception. Parties must "go out of their way" to displace the authority to decide issues of arbitrability that courts ordinarily enjoy.

But today competence-competence provisions are ubiquitous. They are found in virtually every modern set of arbitral procedure rules; the AAA 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 extremely rare arbitration 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 unmistakable" evidence thus destroys the strong presumption in favor of judicial determination of arbitrability that *First Options* established. General competence-competence language is 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 arbitrability.

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 procedural 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 removing judicial authority to determine matters of arbitral *jurisdiction* would be found in rules addressing arbitral *procedure* only. 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*, 561 U.S. at 66.

III. A delegation fully disables courts from ensuring the arbitrability of a dispute.

It would be a 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). According 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 the Supreme 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 a given dispute. That is too drastic a result to follow from the mere presence of standard competence-competence language in referenced rules of procedure. 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.[9] Thus, French courts 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

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

without their consent and that (b) they are entitled, upon request, to an independent judicial decision on that threshold issue.

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.[10] 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.[11] That makes it all the more essential that, to the fullest extent possible, nothing is done to place that legitimacy at risk.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Second District.

Respectfully submitted,

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

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

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.370(b).

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