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"Competence-Competence and Separability-American Style", published as Chapter 8 in International Arbitration and International Commercial Law: Synergy, Convergence and Evolution

Jack M. Graves
Touro Law Center

Yelena Davydan

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Jack Graves[*] *& Yelena Davydan*[**]

CHAPTER 8

COMPETENCE-COMPETENCE AND SEPARABILITY – AMERICAN STYLE

1. INTRODUCTION

The doctrines of "separability" and "competence-competence" are often called the cornerstones of international commercial arbitration. Distinct, but very much related, these two doctrines serve, hand in glove, to maximize the effectiveness of arbitration as an efficient means of resolving international commercial disputes and to minimize the temptation and effect of delay tactics. Each of these principles arises from the autonomous nature of the arbitration agreement, even when included as a clause within a broader "container" agreement. "Competence-competence" provides an arbitral tribunal with the power to rule on its own jurisdiction,[1] thus avoiding any need to wait for a court determination of the issue and allowing the tribunal to move expeditiously to decide the merits of the parties' broader contract dispute. "Separability" provides that certain defects in the container agreement do not affect the arbitration agreement within it, unless those defects relate specifically to the arbitration agreement. This allows the tribunal to rule in an award on a variety of contract defences without affecting its jurisdiction under the arbitration agreement.

[*] Professor of Law, Touro College Jacob D. Fuchsberg Law Center, NY, USA.

[**] Attorney at Strongin Rothman & Abrams, LLP, NY, USA. Ms. Davydan was a visiting scholar at UNCITRAL in November and December 2008 and a member of the Touro Law Center team in the 15th Annual Vis International Commercial Arbitration Moot.

[1] In almost all legal systems, this determination by the tribunal is subject to review by a court of competent jurisdiction. This article will suggest, however, that current U.S. law does not provide for such review when the parties delegate the jurisdictional issue to the arbitral tribunal.

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Recognized in almost all modern legal regimes governing arbitration, these two doctrines are statutorily codified in most instances.[2] However, neither doctrine is specifically mentioned anywhere in the text of the U.S. Federal Arbitration Act ("FAA").[3] While the basic doctrine of separability was judicially established over forty years ago by the U.S. Supreme Court,[4] the development of any sort of "competence-competence" doctrine has been a much slower process and is only now beginning to take on an increasingly clear shape. The purpose of this article is to describe the current state of U.S. law on these two doctrines, taking particular note of the Supreme Court's recent decision in *Rent-A-Center, West, Inc. v. Jackson*[5] (Part 2), to suggest a few potential challenges presented by the nature of the Court's current approach (Part 3), and to offer a few predictions as to how these doctrines might continue to evolve in the foreseeable future (Part 4).[6]

2. THE DEVELOPMENT OF SEPARABILITY AND COMPETENCE-COMPETENCE UNDER U.S. LAW

In *Rent-A-Center*, the U.S. Supreme Court brought together two distinct lines of cases involving separability and competence-competence. When read in combination with the Court's decision in *Hall Street Assoc. v. Mattel, Inc.*,[7] the *Rent-A-Center* decision not only grants a tribunal the power to determine its own jurisdiction, but seemingly gives the tribunal the "final" word on the matter, without any subsequent court review. This newly emerging doctrinal confluence bears a remarkable resemblance to the German form of Kompetenz-Kompetenz

[2] See, *e.g.*, UNCITRAL Model Law on International Commercial Arbitration, Article 16(1) (both competence-competence and separability); English Arbitration Act of 1996, Article 30(1) (competence-competence) and Article 7 (separability); Swiss Federal Statute on Private International Law, Article 186(1) and Article 178(3) (separability); French Code of Civil Procedure Article 1466 (competence-competence); but see Jean-Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (Kluwer, 2007), 132 (noting the judicial recognition of the principle of separability through a series of decisions by French Courts).

[3] See generally 9 U.S.C. §§ 1–307.

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

[5] 130 S.Ct. 2772 (2010).

[6] At the outset, one might reasonably ask why an 85-year-old statute requires the continuing development of a significant body of "common law" on the subject. However, the U.S. Supreme Court has long ago "abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation." *Allied Bruce Terminix Co. v Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). See also Margaret Moses, 'Statutory Misconstruction: How The Supreme Court Created a Federal Arbitration Law Never Enacted by Congress', 34 *Fla. St. U. L. Rev.* 99, 99-100 (2006).

[7] 552 U.S. 576 (2008).

that pre-existed Germany's 1998 adoption of the UNCITRAL Model Law.[8] In order to better understand the genesis of the Court's decision in *Rent-A-Center*, a brief history of separability (2.1.) and competence-competence (2.2.) under the FAA is useful. Then, following a brief detour to explore the significance of *Hall Street* (2.3.), we can more fully explore the significance of the Court's rule and reasoning in *Rent-A-Center* (2.4.).

2.1. Separability

In 1967, the Supreme Court first adopted the doctrine of separability under the FAA in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[9] a case involving a contract defence based on "fraud in the inducement." Prima Paint argued that the contract, including the arbitration clause, was procured by fraud, and it would not have made any contract all with Flood and Conklin, but for the fraudulent misrepresentations at issue.[10] Thus, a court first had to determine whether the fraud vitiated the alleged arbitration agreement.[11] However, the majority relied on the language of FAA section 4, limiting court review to "only issues relating to the making and performance of the agreement to arbitrate."[12]

Because Prima Paint made no specific allegations of fraud targeting the arbitration agreement, itself, the case raised no issue for judicial determination under section 4's very limited scope. Thus, the district court was required to send the parties to arbitration to resolve their contract dispute – including any question of fraud in the inducement of the contract containing the arbitration clause.[13] The Supreme Court further buttressed its opinion by reference to the purpose of the FAA to provide a speedy process and the inevitable potential for delay and obstruction if invalidity defences had to be heard by courts.[14] Finally, the Court noted that the scope of the parties' arbitration agreement clearly included contract validity, thus requiring a reference of this issue to arbitration.[15]

[8] Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration*, (Kluwer, 2003), 338-39; Gerold Zeiler & Katarina Hruskovicova, 'The Principle of Kompetenz-Kompetenz According to the UNCITRAL Model Law on International Commercial Arbitration', in *The UNCITRAL Model Law on International Commercial Arbitration: 25 Years*, 109, 109 (2010).
[9] 388 U.S. 395.
[10] *Id.* at 408, 415, 423-24 (J. Black dissenting).
[11] *Id*.
[12] *Id*. at 403-04.
[13] *Id*.
[14] *Id*. at 404.
[15] *Id*. at 397, 406.

The Supreme Court's next significant case on separability arose almost 40 years later, when it extended the doctrine from voidable to void contracts in *Buckeye Check Cashing, Inc. v. Cardegna*.[16] In explaining why the doctrine of "severability"[17] applied equally to voidable or void contracts, Justice Scalia shifted the focus to FAA section 2.[18] Whereas, the Court's holding in *Prima Paint* had relied upon a narrow reading of any judicial review under section 4, its holding in *Buckeye* relied on a broad reading of the word "contract" in section 2 to include "contracts that later prove to be void."[19] The Court also addressed the basic practical problem that the doctrine of separability attempts to resolve. An arbitrator's decision that the main contract is void would logically deprive the arbitrator of jurisdiction, absent the doctrine of separability. However, a court's decision that the main contract is valid would deprive the parties' of their arbitration agreement. Separability resolves this "conundrum" in favour of arbitration, consistent with the Court's general pro-arbitration approach.[20] In effect, section 2 requires a broad application of separability to give effect to the parties' arbitration agreement.

In at least one respect, *Buckeye* was a much easier case than *Prima Paint*, because the issue of "consent" was not in dispute. There was no question that Cardegna had consented to his putative contract with Buckeye – the issue was solely whether that contract was legal under Florida law. While the case drew strong criticisms from consumer rights advocates, the Court was virtually unanimous in its view that the application of separability was appropriate in this case.[21] Thus, by the time the *Rent-A-Center* case arose, the basic doctrine of separability appeared to be fully established and accepted by the entire Court. Of significant note, however, the Court had specifically avoided, and reserved for another day, the arguably thornier question of the potential application of separability to questions of contract formation (as opposed to invalidity).[22]

[16] 546 U.S. 440 (2006).

[17] "Severability" is the current term used by the Supreme Court. See *id.* at 445-47. This article will generally use the more common term, "separability."

[18] *Id.* at 447.

[19] *Id*. at 448.

[20] *Id*. at 448-49.

[21] Justice Thomas dissented solely based on his view that the FAA does not apply in state courts. See *Buckeye*, 546 U.S. at 549. There was no disagreement regarding the basic doctrine of separability.

[22] *Id*. at 444, n. 1. As discussed below, this issue is the subject of Part 4.

2.2. Competence-Competence

In judicially fashioning the doctrine of separability, the Supreme Court was not required to overcome any contrary statutory language. In contrast, a tribunal's authority to determine its own jurisdiction under the FAA must overcome section 4, specifically assigning to courts the question of whether the parties agreed to arbitration. The Court has characterized this issue as a "question of arbitrability."[23] This question of "arbitrability," as the Court uses the term in this context, includes questions of the existence, validity, and scope of any arbitration agreement.[24] While consistently applying a presumption in favour of "arbitrability" in deciding *whether* a dispute is subject to arbitration, the Court explained in *First Options, Inc. v. Kaplan*[25] the requirement of a contrary presumption with respect to *who* should decide this question.[26] This presumption that a court must decide "arbitrability" may be overcome only by "clear and unmistakable" evidence that the parties wish to delegate this authority to the arbitral tribunal.[27]

The original articulation of this "clear and unmistakable" standard actually arose from a *limitation* on the authority of an arbitrator. In holding that a court must determine the scope of an arbitration clause within a collective bargaining agreement, the Supreme Court explained in *AT&T Technologies, Inc. v. Communications Workers of America*[28] that the question of "arbitrability" is undeniably an issue for judicial determination, "unless the parties clearly and unmistakably provide otherwise." This standard could easily have been restricted to the question of scope, which was the sole issue in *AT&T*.[29] However, in *First Options*, the Court further detailed and expanded the affirmative possibility that the parties could delegate questions of "arbitrability," generally, provided their intent to do so was sufficiently "clear and unmistakable."[30] Perhaps most

[23] *First Options*, 514 U.S. at 942-43; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Rent-A-Center*, 130 S.Ct. at 2777. This same term, "arbitrability," is more typically used on a very limited basis to address the issue of whether the subject matter of a given claim may be arbitrated. Here, the authors will generally avoid using the term "arbitrability," except where specifically focusing on the Court's actual use of the term.

[24] *Howsam*, 537 U.S. at 84.

[25] 514 U.S. 938 (1995).

[26] *Id.* at 944-45.

[27] *Id*. at 944.

[28] 475 U.S. 643, 649 (1986).

[29] *Id*. at 646-47.

[30] *First Options*, 514 U.S. at 943-45.

significantly, the Court anchored this contractual form of competence-competence in FAA section 2.

The Court explained that subjecting the basic jurisdictional question to arbitration was no different than subjecting any other contract dispute to arbitration.[31] Each is based on the parties' agreement, and an arbitrator's decision on either is subject to the same limited standard of review under FAA section 10.[32] The *only* difference between a provision for arbitration of the parties' main contract dispute and a provision for the arbitrators to decide their own jurisdiction was this apparently heightened standard of consent, requiring "'clear and unmistakable' evidence."[33] The Court's characterization of what it later would call a "delegation" agreement as no different from any other arbitration agreement under section 2 raised a number of questions and generated considerable commentary.[34] What sort of consent is required to meet this "clear and unmistakable" standard? Does the Court's reliance on FAA section 2 mean that an arbitrator's decision on jurisdiction is largely unreviewable, except under the narrow scope of section 10?

While the Supreme Court has not addressed the first question, the vast majority of courts have held that a mere incorporation of arbitration rules providing for competence-competence is sufficiently "clear and unmistakable" to vest the tribunal with the power to decide its own jurisdiction.[35] The Supreme Court has significantly clarified the answer to the second question in *Rent-A-Center*. However, before turning to *Rent-A-Center*, a brief discussion of *Hall Street* is necessary.

2.3. A Brief Detour: Limits on Expanded Judicial Review After Hall Street

Hall Street had nothing to do with separability or competence-competence directly. However, its outcome arguably has a profound effect on the nature of the latter. *Hall Street* raised the question of whether the grounds for vacatur

[31] *Id.* at 943.
[32] *Id*.
[33] *Id*. at 944-45.
[34] *See, e.g.*, William W. Park, 'The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic', 12 *Arbitration Int'l* 137 (1996).
[35] *See* Joseph L. Franco, Note, 'Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions', 10 *Lewis & Clark L. Rev.* 443, 469-70 (2006).

under FAA section 10 are exclusive or may be supplemented by contract.[36] In holding the statutory grounds exclusive, the Court focused on the mandatory language of section 10, stating that a court "must" confirm the award, "unless" the party resisting confirmation established one or more of the statutory grounds.[37] The Court further explained that allowing for expanded judicial review risked significantly complicating the arbitration process in contravention of its natural informal and efficient character.[38] Thus, any decision entrusted to an arbitral tribunal under FAA section 2 is final and binding, subject to court review *only* under the narrow grounds of section 10. Notably, these grounds do *not* include any claim that the parties did not conclude a valid arbitration agreement.[39] Having established the finality of a tribunal's decision under section 2, we can now more fully explore the significance of the Court's decision in *Rent-A-Center*.

2.4. A Remarkable, Yet Predictable, Convergence in Rent-A-Center

Rent-A-Center "lies at a seeming crossroads in [the Court's] arbitration jurisprudence," and represents a convergence of the Court's previously distinct lines of cases addressing separability and contractual competence-competence.[40] While acknowledging this apparent convergence, the dissent seemed quite shocked by the result, even calling into question the doctrine of separability so broadly embraced in *Buckeye*.[41] However, if one simply reads *Buckeye* and *First Options* for what they quite clearly said, it's hard to see how the Court's decision in *Rent-A-Center* is anything but predictable (Section (a)). Of perhaps more surprise is the effect of the further convergence of *Rent-A-Center* and *Hall Street*, which appear to provide the arbitrators with not only the "first" word on arbitral jurisdiction, but arguably the last (Section (b)). The decision also raises an interesting issue in treating the "delegation" clause as separable from the arbitration agreement in exactly the same way the arbitration agreement is separable from the main contract. One might reasonably ask just how deeply this sort of "nesting"[42] might go (Section (c)).

[36] *Hall Street*, 552 U.S. at 578.
[37] *Id*. at 582, 587.
[38] *Id*. at 588.
[39] See 9 U.S.C. § 10.
[40] *Rent-A-Center*, 130 S.Ct. at 2785 (Stevens, J., dissenting).
[41] See *id*. at 2785 (calling the decision in *Prima Paint* "'fantastic' and likely erroneous").
[42] *Id*. at 2786 (characterizing the majority's application of separability in these circumstances as "something akin to Russian nesting dolls").

(a) The Treatment of "Delegation" as an Arbitration Agreement, and the Predictable Application of Separability That Logically Follows

In *Rent-A-Center*,[43] the issue of contractual "competence-competence" was squarely presented. The Rent-A-Center contract executed by its employee, Jackson, included a provision within the arbitration agreement, "clearly and unmistakably" delegating to the arbitral tribunal the authority to decide its own jurisdiction, and assigning this decisional authority on an "exclusive" initial basis, though still subject to later judicial review.[44] Thus, the hypothetical possibility raised earlier in the *First Options* dicta was now squarely before the Supreme Court. Rent-A-Center predictably relied on *First Options* in arguing that this provision was fully enforceable, as written.[45] The Court need do no more than apply controlling precedent to the facts before it.

Jackson asserted an unconscionability defence to the purported arbitration agreement[46] and wanted the issue decided by a court under FAA section 4 – not by an arbitrator.[47] Jackson argued that an arbitrator's authority to determine jurisdiction could not logically rely on the very agreement that Jackson was contesting as unconscionable.[48] This would of course amount to a classic example of circular reasoning. Jackson also suggested a way the Court might reasonably limit the *First Options* dicta, arguing that the Court merely stated that the parties could grant the arbitral tribunal the authority to determine the "scope" of their arbitration agreement, provided the parties actually had an enforceable

[43] 130 S.Ct. 2772 (2010).

[44] See Joint Appendix, Motion to Dismiss Proceedings and Compel Arbitration by Defendant Rent-A-Center West, Inc., filed March 14, 2007, Exhibit 1 at 29, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (No. 09-497). Under the parties' agreement, this "exclusivity" was purely temporal. The arbitral tribunal would have the exclusive opportunity to decide the issue – as an initial matter. However, this decision was later to be subject to plenary court review under the parties' agreement. *Id.* As more fully explained below, the effect of the Court's decision in *Hall Street* likely renders this provision for plenary review ineffective. Interestingly, the agreement also delegated issues regarding the "formation" of the arbitration agreement to the arbitrators. *Id.*

[45] Brief for the Petitioner at 11-14, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (No. 09-497).

[46] Brief for Respondent at 3-4, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (No. 09-497). Jackson asserted that the arbitration agreement, specifically, was unconscionable, thereby attempting to avoid the doctrine of separability. *Id*. at 7-8.

[47] *See* Brief for Respondent at 10-11, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (No. 09-497)

[48] *Id.* at 10.

arbitration agreement in the first instance.[49] However, Jackson argued, the latter issue was necessarily one for the courts – no matter what the parties' agreement said.[50]

As presented, this case seemed to require the Court to either: (1) follow the *First Options* dicta to its logical conclusion, enforcing the parties' contractual delegation of "competence-competence" to the arbitrators; or (2) explain that the Court did not really mean precisely what it said in *First Options*, and in some manner limit the holding of that decision. In a 5-4 decision, the Court took the first course and did so, in large part, by relying on the doctrine of separability.[51] Taken at face value, the dicta from *First Options* had said, quite clearly, that the parties could delegate jurisdictional decisions to the arbitrator, whose decision on the issue would be equally final to that of a decision on the merits – as long as this delegation was "clear and unmistakable." Thus, unless the Court was prepared to in some way "refine" its earlier *First Options* dicta, its decision in *Rent-A-Center* was virtually a foregone conclusion – the question of whether Jackson's agreement to arbitrate might be unconscionable and, therefore, invalid had been "clearly and unmistakably" delegated to the arbitrator.

What apparently surprised some,[52] including the dissent,[53] was the majority's application of the doctrine of separability under the circumstances of this case. However, if the parties' "delegation" of the jurisdictional decision to the arbitrator is no different than their "delegation" of the decision on the merits of their main contract dispute, then the majority's approach seems perfectly logical. The "delegation provision" is logically separable from the arbitration agreement in exactly the same manner that the arbitration agreement is separable from the main contract, of which it often forms a part.[54] Moreover, this application of separability is fully consistent with its purpose. Absent the doctrine of separability, the arbitrator would be empowered only to make a positive decision on jurisdiction pursuant to the "delegation" clause, because a negative decision

[49] As noted *supra*, Part 2.2, the original *AT&T* decision was limited to the issue of scope, and a number of commentators had suggested such a limitation with respect to the *First Options* dicta, *see, e.g.*, Park, 'The Arbitrability Dicta in First Options', *supra* note 34 at 142.

[50] Brief for Respondent at 23-31, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (No. 09-497).

[51] See generally *Rent-A-Center*, 130 S.Ct. 2772.

[52] See, *e.g.,* Karen Halverson Cross, 'Letting the Arbitrator Decide Unconscionability Challenges', 26 Ohio St. J. on Disp. Resol. ___, ___ (forthcoming) http://ssrn.com/abstract=1552966.

[53] See *Rent-A-Center*, 130 S.Ct. at 2781-82 (Stevens, J., dissenting).

[54] *Rent-A-Center*, 130 S.Ct. at 2777-79.

would deprive the arbitral tribunal of its jurisdiction on the "delegation" question, thereby negating the preclusive effect of any decision.

The problem with the Court's decision in *Rent-A-Center* does not lie in its application of separability in that particular case. Instead, the problem arises from the earlier *First Options* dicta and the entire notion of contractual "competence-competence" under the FAA, which the majority in *Rent-A-Center* simply applied as previously articulated.

(b) Is the Arbitrator's Decision Ever Subject to Judicial Review?

The arbitration agreement at issue in *Rent-A-Center* included a provision for expanded judicial review of any decision of the arbitrator. Thus, while granting the arbitrator exclusive authority to make the initial determination, the agreement preserved the right of an objecting party to subsequent judicial review of the issue of whether the parties had concluded a valid arbitration agreement. However, this provision is almost certainly ineffective today based on the Court's decision in *Hall Street*, strictly limiting judicial review to the very narrow grounds provided in FAA section 10,[55] which do not include this question.[56] Thus, if we read *Rent-A-Center* and *Hall Street* together, as written, they suggest the arbitrator's decision on jurisdiction will be final and, essentially, unreviewable – at any stage – under the Court's interpretation of contractual competence-competence.[57] The reason for this somewhat bizarre result is found in the basic statutory structure of FAA Chapter 1.

FAA section 4 provides that a court "shall hear the parties" as to whether their dispute is subject to a valid arbitration agreement.[58] FAA section 9 provides that a court "must grant" a request for confirmation of an arbitral award, unless vacated under section 10.[59] On one hand, if each of these provisions is read as a

[55] *Hall Street*, 552 U.S. 576.
[56] *See* 9 U.S.C. § 10.
[57] Interestingly, a tribunal's decision under a "delegation" agreement that the parties did *not* agree to arbitration of their primary dispute would also be fully binding on a court that would otherwise have jurisdiction over that dispute, because the decision under the "delegation" agreement would be an "award" subject to full preclusive effect – just like any other award. Thus, a court could not send the parties to arbitration, even if it disagreed with the tribunal's decision under the "delegation" agreement.
[58] 9 U.S.C. § 4.
[59] 9 U.S.C. § 9. Section 9 also provides an exception where the award is subject to modification or correction under section 11; however, this provision has no bearing on the instant analysis.

mandatory rule – as one might reasonably read "shall" and "must" – then a court will always decide the jurisdictional issue as a threshold matter, and there is no need for subsequent review.[60] On the other hand, if each of these provisions is read as a default rule, then the parties are free to contract for competence-competence, notwithstanding section 4, *and* the parties are also free to contract for judicial review of the arbitrator's jurisdictional decision, notwithstanding sections 9 and 10. In fact, this is precisely what Rent-A-Center attempted to do in its arbitration agreement with Jackson. However, the Court has decided to read section 4 as a default rule, while reading sections 9 and 10 as mandatory.[61] Thus, any decision to delegate a court's section 4 authority to an arbitrator effectively leaves the parties without any judicial review on this issue.[62]

The FAA, as currently interpreted by the Supreme Court, seemingly provides for a contractual version of competence-competence that looks very much like the doctrine of Kompetenz-Kompetenz that pre-existed Germany's adoption of the UNCITRAL Model Law.[63] Notably, however, the German doctrine required the execution of a delegation agreement that was physically separate from the arbitration.[64] In contrast, even this minimal requirement is absent from the doctrine announced in *Rent-A-Center*. Moreover, this German version of arguably absolute Kompetenz-Kompetenz was abandoned in 1998 with Germany's adoption of new legislation based on the UNCITRAL Model Law.[65] It would appear that it has now re-emerged in the United States under the FAA.

(c) How Deep Can the "Nesting" Go?

A recalcitrant respondent might still try to avoid arbitration by attacking the validity of "delegation" clause. Assuming a viable argument for invalidity, a court would seemingly have to decide the issue under FAA section 4. However, one might reasonably ask if this "nesting" concept might be effectively infinite if

[60] The district court's decision will still be subject to a standard appeal process, *see* 9 U.S.C. § 16, but would not be subject to any subsequent review in an action to vacate the award.

[61] See David Horton, Essay, 'The Mandatory Core of Section 4 of the Federal Arbitration Act', 96 *Va. L. Rev.* 1, 4-6 (2010).

[62] Any attempt to construe any of the provisions of FAA section 10 to provide for such review is likely to present significant challenges, as more fully addressed *infra* in Part 3.2.

[63] Lew, Mistelis & Kröll, *supra* note 8 at 338-39.

[64] *Id*; Zeiler & Hruskovicova, 'The Principle of Kompetenz-Kompetenz', *supra* note 8 at 109.

[65] Lew, Mistelis & Kröll, *supra* note 8 at 338-39.

properly drafted.[66] The less "finite" the agreement at "bottom" of the "nest," the more difficult it would be to attack that specific agreement, as required by the Court's application of the doctrine of separability in *Rent-A-Center*. For example, one might draft a clause as follows:

> The Arbitrator, and not any court, shall have exclusive authority to resolve any dispute, controversy, or question arising out of, relating to, or concerning in any way this arbitration agreement, this delegation agreement, or any element thereof, including their formation, interpretation, performance, or validity, and including the arbitrability of any dispute, of any kind whatsoever, arising between the parties to this contract.[67]

Attacking such a clause at its most basic or "bottom" level would seem daunting – especially in view of the Court's strong overall pro-arbitration bias.

The Court's decision in *Rent-A-Center* leaves a number of open challenges and questions. Two are addressed below. First, to the extent a court cannot review a tribunal's decision on the validity of the parties' arbitration agreement under FAA section 10, how should this potential conflict with Article V of the New York Convention be resolved in international arbitration proceedings (Part 3)? Second, what do the Court's past decisions on separability and competence-competence tell us about how it may resolve the question it specifically reserved in *Buckeye* and *Rent-A-Center* – how, if at all, does separability operate in cases in which contract formation is at issue (Part 4)?

3. THE SIGNIFICANCE OF *RENT-A-CENTER* WITH RESPECT TO INTERNATIONAL AWARDS

Consistent standards for judicial review of arbitral awards help to ensure an effective international arbitration regime. Otherwise, an award may be reviewed under different standards in different jurisdictions during set aside and enforcement proceedings. The New York Convention provides a uniform review framework for enforcement proceedings in signatory jurisdictions, but does not address standards for vacatur. When the rendering jurisdiction faces proceedings to both vacate and enforce an award, consistency between the applicable legal instruments is particularly important in view of the significance of vacatur. This

[66] In dissenting from the majority decision in *Rent-A-Center*, Justice Stevens characterized this "nesting" effect as akin to Russian dolls. 130 S.Ct. at 2786. In theory, the number of smaller and smaller "nested" dolls could be infinite.

[67] This proposed clause is only slightly broader than that actually used by *Rent-A-Center*.

section will address the interplay between the FAA and the New York Convention when set aside and enforcement proceedings take place in the United States. FAA section 10 vacatur grounds are not identical with enforcement exceptions under New York Convention article V, but U.S. courts generally reconcile them by employing an "overlapping approach" (Part 3.1.). However, *Rent-A-Center* and *Hall Street* seemingly create a gap, if not a conflict, between the New York Convention and the FAA by providing for absolute unreviewable competence-competence (Part 3.2.).

3.1. The "Overlap" Between the New York Convention and the FAA

The New York Convention applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought."[68] Chapter 2 of the FAA, the Convention's implementing legislation in the United States, broadly defines such non-domestic awards as those arising out of a "commercial" "legal relationship" not "entirely between citizens of the United State" or those in which "the relationship involves property located abroad, envisages performances or enforcement abroad, or has some other reasonable relation with one or more foreign states."[69]

In line with the statutory definition, U.S. courts routinely apply the New York Convention to disputes with international flavour arbitrated in the United States.[70] Such awards fall under the ambit of both the FAA and the New York Convention. While the exclusive grounds of FAA section 10 govern the set aside proceedings, New York Convention article V applies to enforcement, even when it is sought in the United States. Unlike the UNCITRAL Model Law, however, the FAA grounds for vacatur do not mirror the non-enforcement grounds under the New York Convention. FAA section 10 provides for set aside in the event of fraud, partiality, corruption, arbitrator's misconduct that resulted in prejudice, or excess of arbitrators' powers.[71] Accordingly, in the context of cross-petitions to enforce and vacate a non-domestic award, U.S. courts must reconcile the vacatur

[68] United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, Article I.

[69] 9 U.S.C. § 202.

[70] See, *e.g.*, *F. Hoffman-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 2010 WL 3184228, at *5 (S.D.N.Y. Aug. 11, 2010); *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte*, 141 F.3d 1434, 1441 (11th Cir. 1998).

[71] 9 U.S.C. § 10(a)(1)–(4).

provisions of FAA section 10 and the non-enforcement grounds of New York Convention article V.

The courts have settled these inconsistencies by construing the FAA and the New York Convention as providing "overlapping coverage" to the extent they do not conflict.[72] For example, relying on article V(1)(e) of the New York Convention, the courts first apply FAA section 10 in determining whether an award is enforceable, which may, in effect, give rise to additional enforcement exceptions. After *Rent-A-Center*, the Ninth Circuit in *Polimaster Ltd. v. RAE Systems, Inc.*[73] confirmed the idea that the FAA vacatur grounds "generally track those under the New York Convention" and stated that it could "look to authority under the FAA" when determining whether to enforce under the New York Convention. As discussed below, *Rent-A-Center* and *Hall Street* seemingly create a gap, rather than an overlap, between these two instruments in the context of a challenge to arbitral jurisdiction.

3.2. The "Gap" Between the New York Convention and the FAA

Under *Rent-A-Center* and *Hall Street*, the arbitrator's decision on jurisdiction is unreviewable under either section 4 or section 10 of the FAA, if so delegated by the parties. Let us assume that a U.S. court is faced with cross-petitions to enforce and vacate a nondomestic award, which is challenged based on the invalidity of an arbitration agreement containing a delegation provision. While the New York Convention article V(1)(a) clearly contemplates judicial review of this challenge, FAA section 10 does not. Given that section 10 provisions are exclusive, courts presumably cannot use the New York Convention enforcement exceptions to vacate an award based on the "overlapping" approach. As a result, an award cannot be vacated when the validity of the arbitration agreement is challenged, but a court may refuse enforcement of such an award. Therefore, at least in the context of a challenge to the arbitrators' jurisdiction, the FAA and the New York Convention do not "overlap," but rather leave a significant gap. Most importantly, this gap seemingly leads to a rather impractical result because, absent a vacation mechanism, a party challenging arbitral jurisdiction is forced to oppose enforcement in potentially several jurisdictions.

[72] See, *e.g.*, *Bergsen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997); *Publicis Communication v. True North Communications*, 206 F.3d 725, 729 (7th Cir. 2000); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte*, 141 F.3d at 1443 n. 10.

[73] 2010 WL 3768064, at *3 (9th Cir. 2010).

It is unclear whether any effective "gap fillers" exist that would avoid the issue. Arguably, the courts may attempt to reconcile the instruments, but whether such reconciliation is possible when dealing with *missing*, rather than additional, grounds under the FAA is an open question. One may suggest that a challenge to arbitral jurisdiction may be read into FAA section 10(a)(4) addressing a decision exceeding the arbitrators' powers. While *Hall Street* interpreted Section 10 provisions as exclusive, it left open the question of whether the judicially developed vacatur ground, "manifest disregard of the law,"[74] falls within the specific section 10 grounds.[75] Some courts continue to apply the "manifest disregard" standard characterizing it as a "judicial gloss" on the section 10 provisions,[76] while others consider that *Hall Street* eliminated this standard.[77] However, the Supreme Court has continued to reserve the issue for future decision.[78] As long as the question remains open, courts may attempt to employ the same approach with a challenge to arbitral jurisdiction. Such approach, however, may open the proverbial "Pandora's box" to review of arbitral awards on the merits. Inasmuch as the Court has said that a "delegation" agreement is just another arbitration agreement, any attempt to review the arbitrator's decision on jurisdiction would open the door to the same standard of review of the main contract dispute. Even *Hall Street* emphasizes that section 10 is limited by the extraordinary nature of its specific grounds and cannot serve as a means for expansion of judicial review of the arbitrator's decision.[79]

[74] *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953).

[75] *Hall Street*, 52 U.S. at 585.

[76] *Ario v. Cologne Reinsurance (Barbados), Ltd.*, 2009 WL 3818626, at *5 (M.D. Pa Nov. 13, 2009) (concluding that the "manifest disregard" standard is a "judicial gloss" on FAA section 10 specific grounds for vacatur); *Stolt-Neilsen SA v. Animal Feeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *rev'd on other grounds*, *Stolt-Neilsen SA v. Animal Feeds Int'l Corp.*, 130 S.Ct. 1758 (2010).

[77] *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp.2d 228, 233 (S.D.N.Y. Jul. 7, 2008); *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp.2d 993, 999 (D. Minn. May 21, 2008).

[78] *See Stolt-Neilsen SA*, 130 S.Ct. at 1768.

[79] *Hall Street*, 52 U.S. at 586. The Supreme Court explained that the parties could not contractually expand judicial review. *Id.* Relying on the principle of *ejusdem generis*, the Court reasoned that even if the statutory vacatur grounds impliedly included any general terms, those general terms are "confined to covering subjects comparable to the specifics." *Id.* Judicial review for a legal error is not, however, comparable to fraud and corruption. *Id.* Therefore, the Court seemingly suggested that any "judicial gloss" on the statutory vacatur grounds cannot include a general legal review.

The parties' express choice of state arbitration law might serve as another alternative for resolution of this conflict. For example, eight U.S. states have adopted the UNCITRAL Model Law as their international arbitration statutes: California, Connecticut, Florida, Illinois, Louisiana, North Carolina, Oregon and Texas.[80] Model Law Article 34 vacatur provisions mirror the enforcement exceptions of the New York Convention and, therefore, provide the same standard of review. However, only Connecticut, Florida, Louisiana and Oregon adopted the Model Law in its entirety. The rest did not implement Chapter VII dealing with vacatur, presumably based on concerns over pre-emption by the FAA.[81] Because the pre-emption issue as to vacatur standards remains uncertain, state law is unlikely to fill the gap effectively.

4. Are Questions of Contract Formation Subject to Effective Arbitration Under the FAA?

In *Janiga v. Questar Capital Corp.*,[82] the U.S. Court of Appeals for the Seventh Circuit recently faced the question of whether an arbitrator can decide on the formation of a contract containing an arbitration clause. In other words, can the arbitral tribunal effectively decide *formation* of the main or "container" contract in the same manner it decides *validity*? The Seventh Circuit held that the formation issue could *only* be answered by a court – and not by an arbitrator.[83] This issue had been expressly reserved by the Supreme Court in *Buckeye*[84] and *Rent-A-Center,*[85] but Judge Wood stated that the Court had subsequently resolved the issue in *Granite Rock Co. v. International Brotherhood of Teamsters*,[86] decided just three days after *Rent-A-Center*. However, the impact of the Supreme Court's *Granite Rock* decision is not necessarily as clear as the *Janiga* case suggests, and the application of separability to various questions of formation of the container contract does not necessarily give rise to a single unitary result.

[80] Calif. Civ. Pro. §§1287.12–1297.337; Conn. Gen. Stat. §§ 50a-100–50a-139; Fla. Stat. §§ 684.0001–684.0048; 710 ILCS 30/1-5–30/25-30; La. R.S. §§ 9:4241–9:4276; N.C. Gen. Stat. §§ 1-567.31–1-567.67; ORS §§ 36.450–36.558; Tex. Civ. Prac. & Rem. Code §§ 172.001–172.175.

[81] Jack Graves, 'Arbitration as Contract: The Need for Fully Developed and Comprehensive Set of Statutory Default Legal Rules', 2 *William & Mary Bus. L. Rev.* ___, ___ (forthcoming) (2011).

[82] 2010 WL 3023945 (7th Cir. 2010).

[83] See generally *Janiga*, 2010 WL 3023945 (7th Cir. 2010).

[84] 546 U.S. at 444, n. 1.

[85] 130 S.Ct. at 2778, n. 2.

[86] 130 S.Ct. 2847 (2010).

In *Granite Rock*, an employer sought to bring an action in court over the unions' alleged violation of a "no-strike" clause in a collective bargaining agreement ("CBA"), which also contained an arbitration agreement.[87] The central question was when the CBA was concluded.[88] If prior to the strike activities, the employer's claim under the CBA was sound – if subsequent, then the CBA could not possibly bar the earlier strike activities.[89] The employer, asserting early formation, wanted this question decided by a court, while the unions, asserting later formation, wanted it decided by an arbitrator.[90] The problem of course was that each party's position was logically flawed. If the CBA was in place before the strike, so was the arbitration agreement, which the employer wanted to avoid – if not, then neither was the arbitration agreement, which the unions wanted to rely upon. The Court presumably found the employer's argument less flawed than the unions' and held that the date of formation of the CBA was an issue for a court.[91]

One might conclude, as the Seventh Circuit did, that the Supreme Court's decision in *Granite Rock* suggests that formation of the main contract is always an issue for a court. However, the Court's actual reasoning in *Granite Rock* is not particularly clear on this point. First, the language in *Granite Rock* cited by Judge Wood in *Janiga* is arguably mere dicta. Justice Thomas, writing for the majority in *Granite Rock*, simply reiterates the basic rule that certain threshold matters are "generally" for the courts to decide, citing *First Options* and *AT&T*, and then noting the specific reservation of questions involving formation in *Buckeye*.[92] None of these principles is particularly new or noteworthy. Moreover, immediately following its articulation of these established principles, the Court noted that they only answered "whether" the main contract was concluded – not "when," as required in the instant case.[93] In view of the fact that it was logically impossible for the unions to win, unless there was no CBA at the time of the disputed strike activities, it is perhaps understandable that the Court denied the

[87] *Granite Rock*, 130 S.Ct. at 2853.
[88] *Id*. at 2856.
[89] *Id*. at 2854, 2861.
[90] *Id*. at 2856.
[91] *Id*. at 2860.
[92] *See id*. at 2855-56. This is precisely the material cited in *Janiga*. See *Janiga*, 2010 WL 3203945 at 5.
[93] *See Granite Rock*, 130 S.Ct. at 2856 (explaining that each of the parties had conceded both formation and validity of the CBA, leaving *only* the question of when it was concluded).

unions' right to submit the issue to arbitration.[94] However, this unique case involving solely the "timing" of formation would hardly seem to provide a conclusive answer with respect to the authority of arbitrators to decide formation issues, generally.

Absent a "delegation" provision, any question involving the formation, validity, or scope of the arbitration clause, itself, must be decided by a court.[95] However, issues involving the *validity* of the main contract – but not specifically related to the arbitration clause – are solely for the arbitrator to decide.[96] In effect, the arbitration clause is "presumed" valid, absent an issue of validity specific to the arbitration clause.[97] This is simply a classic application of the doctrine of separability. The question, then, is "under what circumstances, if any, might the Supreme Court give effect to a similar 'presumption' allowing an arbitrator to decide issues involving the *formation* of the main contract under the FAA?"

This is more than a casual hypothetical question. At least one institution includes "formation" within the scope of its model arbitration clause for international agreements,[98] and the "delegation" clause in *Rent-A-Center* also included "formation" within its scope.[99] In each case, an arbitrator is asked to decide on the "formation" of the contract "containing" the arbitration clause that grants the

[94] Normally, a claimant attempts to invoke an arbitration clause in a contract it seeks to enforce, generally, and the respondent challenging jurisdiction will assert that the parties never concluded any contract and cannot, therefore, have concluded an arbitration agreement. In contrast, in *Granite Rock*, the unions were trying to invoke arbitration, but simultaneously arguing that the CBA had *not* been concluded at the time. Without even reaching the separability issue, a court might reasonably have barred the unions' argument on the basis of *estoppel*.

[95] *Granite Rock*, 130 S.Ct. at 2856; *Howsam*, 537 U.S. at 84; *see also* 9 U.S.C. § 4.

[96] *Buckeye*, 546 U.S. at 449; *see also Janiga*, 2010 WL 3023945 at 6-7 (having determined that the parties had in fact concluded a main contract, explaining further that any questions of the enforceability of that contract were reserved for determination by the arbitrator).

[97] *See First Options*, 514 U.S. at 944-45 (explaining the normal "presumption" in favour of arbitration with respect to issues of scope); *Rent-A-Center*, 130 S.Ct. at 2785 (Stevens, J., dissenting) (acknowledging that the doctrine of separability first announced in *Prima Paint* provides that an arbitrability is "presumptively valid," notwithstanding the invalidity of the main contract within which it is found). In effect, the doctrine of separability provides for presumptive validity of the arbitration agreement, as long as it meets the minimal requirements of FAA section 2, and absent a specific invalidity attack on the arbitration agreement itself.

[98] The JAMS Model International Arbitration Clause provides for arbitration of: "Any dispute, controversy or claim arising out of or relating to this contract, including the formation, ..." JAMS Guide to Dispute Resolution Clauses for Commercial Contracts (2006).

[99] *See supra* note 44.

tribunal its authority. Reliance on such a clause to decide formation of the main contract unquestionably involves bootstrapping. However, it is also the only way to give effect to the intent expressed in the clause that an arbitrator should decide contract formation issues. Unless the doctrine of separability can save the arbitration clause from a determination that the main contract was never formed, then the arbitrator can only decide the issue one way – in favour of formation. Any decision that the main contract was never concluded would necessarily require dismissal of the matter for lack of jurisdiction, without any conclusive award on the issue of formation. Thus, the ability of parties to provide for arbitration of contract formation issues – without completing an entirely separate prior arbitration agreement[100] – is fully dependent on whether the doctrine of separability can save an arbitration clause from a determination that the main contract was never concluded.

The Supreme Court might ultimately decide the issue as suggested by the Seventh Circuit – laying down a bright line rule that issues of container contract formation are always for the court. However, the Court's strong pro-arbitration bias might suggest otherwise, and, if the Court rejects a unitary approach denying the arbitrator's jurisdiction on this issue, it might take either of two possible approaches – each of which is considered briefly below. The Court might simply set out a "pro-arbitration" unitary standard giving rise to the "presumption" the parties agreed to arbitration in virtually any formation dispute involving a contract with an arbitration clause (Part 4.1.), or it might take a more nuanced approach, looking for specific indications of at least implied consent giving rise to this "presumption" on a case-by-case basis (Part 4.2.).

4.1. If You Touch It, You Bought It

Arbitration is, ultimately, all about giving effect to the intentions of the parties.[101] In determining the parties' intent, courts must apply ordinary contract law principles,[102] including a presumption in favour of arbitrability in determining "whether" the parties have agreed to arbitrate a particular dispute.[103] In the case

[100] This could of course be accomplished through a "framework agreement" governing a defined range of subsequent and fully independent agreements.

[101] The only significant exception involves limits on subject matter arbitrability, which are very narrow under U.S. law – especially in an international context. *See Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

[102] *First Options*, 514 U.S. at 944.

[103] *See supra* note 98.

of a dispute over the viability of the container contract, those general principles present a dilemma. On one hand, the extension of separability to the issue of formation would provide for enforcement of an arbitration agreement in a contract that the arbitrator ultimately finds was never concluded. On the other hand, a failure to apply separability under these circumstances allows a court to decide that a contract has been concluded – in direct contradiction to the arbitration clause within that contract providing that contract formation issues are to be determined by an arbitrator. As noted above, in Part 2.1., the Court has resolved this dilemma in favour of arbitration,[104] and there is arguably no principled reason for reaching any different conclusion with respect to issues of formation[105] – especially when the parties' arbitration agreement specifically includes this issue within its scope. To do otherwise, would deny effect to the parties' express intentions.

In determining whether a presumption for or against arbitration of a particular issue was appropriate, the Court has framed the issue as whether the "contracting parties would likely have expected a court" or arbitrator to decide the issue.[106] Parties engaged in negotiating a contract containing a provision requiring arbitration of formation disputes likely would have expected exactly that – arbitration of formation – unless one of the parties expressly stated a contrary intent. Thus, a failure to conclude the container agreement should not affect the viability of the arbitration agreement, absent specific objection to the arbitration agreement itself. Under this unitary approach, the issue of non-formation of the container agreement would be treated just like invalidity of the container agreement, provided the purported contract at issue contained an arbitration agreement that included contract "formation" within its scope, and absent any specific objection to that arbitration agreement.

4.2. Looking For Some Form of Implied Consent

Alternatively, the Court might take a more nuanced case-by-case approach, looking for at least some specific form of implied consent before presuming a

[104] *Buckeye*, 546 U.S. at 448-49. In *Buckeye*, the Court saw no reason to distinguish between void and voidable contracts, *id*. at 448, which might also suggest a unitary approach to the formation issue.

[105] Emmanuel Gaillard & John Savage, *Fouchard, Gaillard, and Goldman on International Commercial Arbitration* (Kluwer, 1999), 210-11.

[106] *Howsam*, 537 U.S. at 83-84.

party actually consented to arbitrate issues of contract formation. A few potential examples are illustrative of such an approach.

In some transactions, the parties will negotiate a contract by exchanging proposed drafts until they are satisfied with a final document, which they will then execute. However, such negotiations will also sometimes break down prior to any formal signing, in which case one of the parties may assert that a binding contract has already been concluded. If an arbitration clause is included at the outset or added during the drafting process, and the other party makes proposed changes to the agreement without specifically addressing or objecting to the arbitration clause, then one might reasonably find implied consent to this clause as an autonomous agreement providing for arbitration of their subsequent dispute over contract formation.

Other transactions may involve a distinct "offer," subject to acceptance by a potential contracting partner. If this offer contains an arbitration clause, and a dispute arises over whether the offer was effectively accepted, the issue of implied consent may depend on whether it is invoked by the party making or receiving the offer. For example, suppose an offeror sought to revoke an offer that included an arbitration clause, while the offeree asserts that it accepted the offer before any revocation. It seems reasonable to presume that the offeror has impliedly consented to arbitration of this formation question, absent a contrary indication specific to the arbitration agreement.[107] In contrast, if the offeror is seeking to enforce the purported contract in arbitration, and the offeree is asserting it never agreed to anything at all, it is much more difficult to find implied consent of the offeree to arbitrate sufficient to give rise to any sort of presumption.

A more complex question might arise with a "battle of forms" in which each party's form includes a different arbitration clause. For example, in a sale of goods transaction governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), the parties' exchange of forms including different arbitration provisions would not create a binding contract.[108] However, either party's performance may give rise to a contract on the other's terms.[109] To the extent this "formation" issue is disputed, it seems easy to imply

[107] This particular scenario was the subject of the 15th Annual Vis International Commercial Arbitration Moot.
[108] See CISG Article 19.
[109] See CISG Article 18.

consent to arbitration, generally. However, it is more difficult to imply the performing party's consent to the other's specific arbitration agreement, absent a finding that the parties concluded the main contract. In fact, where the arbitration agreement is at least one of the bases for the parties' failure to conclude a contract through their exchange of forms, the performing party might reasonably argue that its own form amounts to a *specific* rejection of the other party's arbitration clause, thereby, specifically precluding formation of the arbitration agreement.

One could of course imagine many other potential variations on the circumstances of contract formation. However, basic notions of contractual consent would seem to provide the necessary tools for this more nuanced approach to seeking implied consent as a basis for a presumption that the parties intended to arbitrate issues of formation. Of course, parties seeking to arbitrate formation would be well advised to include this issue specifically within the scope of the arbitration agreement, as implying such consent would seem considerably more challenging under a general scope clause. Finally, it's worth noting that an agreement providing for arbitration of formation issues (relating to the container contract) might also include a "delegation" clause, which itself includes issues of formation of the arbitration agreement – as did the *Rent-A-Center* clause – in which case this entire determination would be arguably unreviewable.

5. CONCLUSION

The Court's decision in *Rent-A-Center* has now firmly established a contractual version of competence-competence under the U.S. FAA, including the application of separability to jurisdictional decisions made pursuant to a valid "delegation" agreement. The tribunal's authority to decide such jurisdictional issues appears to be final and largely unreviewable under *Hall Street*, which creates a significant gap or inconsistency between FAA section 10 governing vacation of awards and New York Convention Article V governing enforcement. The Court's continued development and expansion of the presumption of arbitrability further suggests the possibility that it may in the future extend separability to issues of contract formation – at least in cases in which such formation issues are included within the scope of the parties' arbitration agreement. All of this, however, remains largely speculative inasmuch as the FAA, itself, provides little guidance until the Supreme Court decides to tell us what the statute means.