Objections to the Jurisdiction of the Arbitration Tribunal Under the US Federal Arbitration Act: How to Preserve the Right to Judicial Review[1]

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An objection by a party to the jurisdiction of an arbitral tribunal remains one of the most difficult issues to navigate under the US Federal Arbitration Act ("FAA"). The purpose of this article is to provide guidance as to some of the important issues that must be taken into account if a party intends to preserve a jurisdictional objection for judicial review. The issues addressed include: (i) when and how an objection to jurisdiction needs to be asserted; (ii) how to present a jurisdictional objection to the arbitrator, while avoiding waiver of the right to judicial review; (iii) the right to a jury trial of challenges to the making of an arbitration agreement; and (iv) the standard applied by the courts in ruling on such an objection after the conclusion of an arbitration.

A Brief Introduction to the U.S. Court System

The court system in the United States includes both the federal courts, comprising the judicial branch of the US Federal Government, and the state courts of the individual US states. Under the federal court system, the trial courts are the US district courts, which are organised into 12 regional circuits. Each regional circuit has a US court of appeals that, with limited exceptions, reviews decisions from the district courts located within its circuit.[2] Each state has its own court system, typically including trial courts, intermediate appellate courts, and a supreme court of appeals. The Supreme Court of the United States has jurisdiction over both the federal and state courts.

The Federal Arbitration Act is a federal law binding on all federal and state courts.[3] However, the FAA does not completely pre-empt the arbitration laws of the individual states.[4] In fact, only certain provisions of the FAA have been held to apply in state court proceedings.[5] As a result, there are situations where both the FAA and state arbitration law will apply.[6] In the event of a conflict between state law and the FAA, the FAA controls. The FAA establishes a strong federal policy in favour of arbitration, and any state law provision found to conflict with the FAA is preempted.[7] The law as to which matters are governed exclusively by the FAA and which may be governed by state law evolves on a case by case basis.[8]

There can be important procedural and substantive differences between the FAA and a state's arbitration law. This requires that special attention be paid as to whether state law, in addition to the FAA, may apply.[9] For example, while the grounds upon which an arbitration award can be challenged are usually very similar, in some cases there are significant differences.[10] At present, there are also unresolved issues relating to whether and how parties may use state arbitration law to craft grounds for vacating an arbitral award, instead of those set forth in the FAA.[11]

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[2] To illustrate, the United States Court of Appeals for the Second Circuit hears appeals (with limited exceptions) from the district courts located in New York, Connecticut, and Vermont.
[3] See *Southland Corp v Keating*, 465 U.S. 1 at 14–16 (1984).
[4] *Volt Info. Scis. Inc v Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 at 477 (1989). ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.")
[5] See *Southland*, 465 U.S. 1 at 16 fn.10 ("In holding that the [Federal] Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the [Federal] Arbitration Act apply to proceedings in state courts".); *Buckeye Check Cashing Inc v Cardegna*, 546 U.S. 440 at 447 (2006) (s.2 of the FAA is "the only provision that we have applied in state court").
[6] This is always the case when a case subject to the FAA is being heard in a state court. See *Southland*, 465 U.S. 1 at 16 fn.10. ("The Federal Rules [of Civil Procedure] do not apply in such state court proceedings.") It also occurs where the contract or arbitration clause is found to have incorporated not only the substantive law, but also the arbitration law, of a specific state. See, e.g. *Volt.*, 489 U.S. at 476–77 (California arbitration law). *Compare Mastrobuono v Shearson Lehman Hutton Inc*, 514 U.S. 52 at 58–61 (1995) (choice of law clause providing that the agreement "shall be governed by the laws of the State of New York" does not indicate that the parties intended to incorporate New York arbitration rules) with *Smith Barney Harris Upham & Co v Luckie*, 647 N.E.2d 1308 at 1311–14 (N.Y. 1995) (choice of law clause providing that the "agreement *and its enforcement* shall be governed by the laws of the State of New York" incorporates state arbitration law).
[7] In *Volt*, 489 U.S. at 478 (1989), for example, a California arbitration act provision allowing for a stay of an arbitration pending the resolution of related litigation was held not preempted by the FAA. But in *Preston v Ferrer*, 552 U.S. 346 (2008), a California law that vested primary jurisdiction of certain disputes in an administrative agency, thereby rendering the parties' arbitration provision a nullity, was held superseded by the FAA. Similarly, a Montana law requiring that an arbitration clause must be in capital letters to be valid was held preempted by the FAA—*Doctor's Assocs. Inc v Casarotto*, 517 U.S. 681 (1996).
[8] See generally Stephen L. Hayford, "Federal Preemption and Vacatur: The Bookend Issues Under The Revised Uniform Arbitration Act" (2001) *Journal of Dispute Resolution* 67; Edward Brunet, "The Minimal Role of Federalism And State Law In Arbitration" (2007); 8 *Nev. L. J.* 326 Alan Scott Rau, "Federal Common Law and Arbitral Power" (2007) 8 *Nev. L. J.* 169, 171.
[9] In *Ekstrom v Value Health Inc* 68 F.3d 1391 (D.C. Cir. 1995), for example, a petition to vacate an arbitration award was dismissed as untimely because the 30-day time limit to challenge an award under Connecticut state law, and not the three month period provided by the FAA, was found to apply.
[10] Under the FAA an arbitral award may be vacated for manifest disregard of the law, but this is not a ground for vacatur under New York arbitration law. See *Wein & Malkin LLP v Helmsley-Spear Inc*, 12 A.D.3d 65 at 66–67 (N.Y. App. Div. 2004).
[11] See *Hall Street Assocs. v Mattel Inc*, 552 U.S. 576 at 590 (2008). ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.")

As a matter of practice, cases involving international arbitrations will be heard in federal court. The FAA grants the federal courts jurisdiction over any arbitration agreement that is within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. See 9 USC s.203. As a result, a party may commence any such an action directly in fedral district court, or, if the other party had commenced the action in a state court, the action may be removed to district court. See 9 USC ss.202, 205. Domestic arbitrations, such as those between citizens of the United States, will be heard in state court or, provided there is basis for federal jurisdiction, in federal court.[12]

In general, there also is a preference towards having matters related to an arbitration heard in federal court.[13] This is partly because the federal courts have developed extensive experience with arbitration cases, have a history of such cases being heard expeditiously, and there is a very well-developed body of case law under the FAA. As a general matter, it is also viewed as more predictable to have a federal district court interpreting and applying the FAA, which is a federal statute. Accordingly, proceedings to compel (or to stay) an arbitration and proceedings with respect to the enforcement, recognition or vacatur of an international arbitration award will virtually always be heard in federal court.

This article will focus on the law under the FAA and the procedures that apply in the federal courts.

Motion to Compel or Stay an Arbitration and the Right to a Jury Trial

The FAA provides that a district court may issue an order to compel arbitration upon being satisfied that "the making of the agreement for arbitration … is not in issue" (9 USC s.4). A party that claims it is not bound by an arbitration agreement has placed the "making of the agreement for arbitration" at issue. When the "making of the arbitration agreement" is disputed, the district court is required to "proceed summarily to the trial thereof" (9 USC s.4). Indeed, s.4 of the FAA provides the right to have this issue tried to a jury (9 USC s.4).

This leads to the question, does a court need to have a trial in order to rule on a motion to compel arbitration? Can a court rule on a motion to compel arbitration without holding an evidentiary hearing? Are there any limits on the right of a party to have this issue decided by a jury?

Courts, of course, often rule on motions to compel arbitration, without trial, on the basis of affidavits and memoranda of law. What the practitioner must keep in mind is that in ruling on such a motion the court is required to apply the same legal standard as it would when ruling on a motion for summary judgment. See *Bensadoun v Jobe-Riat*, 316 F.3d 171 at 175 (2d Cir. 2003); *Par-Knit Mills Inc v Stockbridge Fabrics Co*, 636 F.2d 51 at 54 and fn.9 (3d Cir. 1980). Accordingly, the district court, when considering a motion to compel arbitration on the basis of written submissions, must "give to the opposing party the benefit of all reasonable doubts and inferences that may arise". *Par-Knit Mills*, 636 F.2d at 54. "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary": *Bensadoun*, 316 F.3d at 175. But, "an issue of fact" requires that there be evidence; conclusory allegations are not sufficient. Just as in the case of motions for summary judgment, if the party fails to present sufficient admissible evidence to support its challenge to the arbitration agreement, then it is not entitled to a trial—before either the court or a jury. See *Sphere Drake Ins. Ltd v Clarendon Nat'l Ins. Co*, 263 F.3d at 30 (2d Cir. 2001).[14]

Motions to Stay Arbitration

The FAA does not itself contain a provision providing for motions to stay an arbitration.[15] The federal courts in the United States, however, have accepted that they have such authority. A motion for a stay of an arbitration was heard in connection with a complaint for declaratory judgment seeking a declaration that a party was not bound by any arbitration agreement. See *Bensadoun*, 316 F.3d at 175. Similarly, courts have implied the power to enjoin arbitrations as concomitant to the power to compel arbitrations under s.4 of the FAA. See, e.g. *Am. Broad. Cos. v Am. Fed'n of Television & Radio Artists*, 412 F. Supp. 1077 at 1082 (S.D.N.Y. 1976). Federal courts have also found the power to enjoin arbitrations by applying the arbitration law of the State in which the federal court is located. See, e.g. *Societe Generale de Surveillance SA v Raytheon European Mgmt. & Sys. Co*, 643 F.2d 863 at 868 (1st Cir. 1981) (Massachusetts arbitration law). Also at least one court has found a right to a jury trial in connection with a motion to stay arbitration, where the existence of a binding arbitration agreement is disputed. See *PMC Inc v Atomergic Chemetals Corp*, 844 F. Supp. 177 (S.D.N.Y. 1994).

[12] If the arbitration agreement is between parties who are both citizens of the United States, there must be an independent basis of federal jurisdiction, most commonly diversity jurisdiction under 28 USC s.1332, in order for the action to be commenced or removed to the district court. This is because Ch.1 of the Federal Arbitration Act does not provide for federal question jurisdiction. See *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp*, 460 U.S. 1 at 25 fn.32 (1983).

[13] This can vary. Certain states, particularly New York, have state courts that have extensive experience in arbitration related matters and New York state's arbitration law may be viewed as superior to the FAA in certain respects. See fnn.12 and 15 above.

[14] For cases involving jury trials see, for example, *Chastain v Robinson-Humphrey Co*, 957 F.2d 851 (11th Cir. 1992) (genuine issue entitling party to trial where the party claimed that signature on one agreement was a forgery and that the person who signed the second agreement was without authority); and *Gen. Elec. Co v Deutz AG.*, 270 F.3d 144 (3d Cir. 2001) (jury trial as to whether guarantor, who was a signatory to only certain provisions of the contract, was bound by the arbitration clause). In General Electric Co v Deutz, the motion to compel an international arbitration was submitted to a jury: at 152–156.

[15] FAA s.3 addresses when a court should stay a judicial proceeding because the matter is subject to arbitration. Section 3 itself does not provide for the further right to obtain an order compelling arbitration. A request for an order to compel must be made under s.4 of the FAA. If there is a dispute as to the existence of an arbitration agreement, s.3 does not contain a right to a jury trial, but a jury trial might be available in a s.3 proceeding if there is also a motion filed to compel arbitration. See *Matterhorn Inc v NCR Corp*, 763 F.2d 866 at 874 (7th Cir. 1985).

What is the Standard of Review on Appeal of a District Court's Decision on a Motion to Compel Arbitration?

Where a district court rules on a motion to compel arbitration, without holding a trial, such decision is reviewed by the Court of Appeals *de novo*. See *Bank Julius Baer & Co v Waxfield Ltd*, 424 F.3d 278 at 281 (2d Cir. 2005). The standard of review applied by the appellate court is the same as that applied to a decision made by the lower court on a motion for summary judgment. See *Par-Knit Mills*, 636 F.2d at 54; *Bensadoun*, 316 F.3d at 175.

When the district court decides a motion to compel arbitration by conducting a bench trial, questions of law are reviewed *de novo* and findings of fact for clear error. See *Datatreasury Corp v Wells Fargo & Co*, 522 F.3d 1368 (Fed. Cir. 2008). When a jury trial is held, the standard rules applicable to the review of any jury verdict should apply. See, e.g. *Gen. Elec. Co v Deutz AG*, 270 F.3d 144 at 155 (3d Cir. 2001):

> "([J]ury verdicts can be overturned only if the record fails to contain the minimum quantum of evidence from which the jury could have rationally reached a verdict."(Internal quotations omitted.)

Does a Party Waive the Right to Challenge the Existence, Validity, Enforceability or Scope of an Arbitration Agreement if it Fails to Raise such Objection Prior to the Arbitration?

Under the FAA, it appears to be clear that "[a] party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction". *Kaplan v First Options of Chi. Inc*, 19 F.3d 1503 at 1510 (3d Cir. 1994), affirmed, 514 U.S. 938 at 946 (1995); *China Minmetals Materials Imp. & Exp. Co v Chi Mei Corp*, 334 F.3d at 290 (3d Cir. 2003).[16] This rule of law appears to be generally accepted, as evidenced by the numerous cases that hold that a party may seek to vacate or to oppose confirmation of an award on jurisdictional grounds, provided that it has objected to the arbitrator's authority to decide that specific issue during the arbitration. See, e.g. *Opals on Ice Lingerie v Body Lines Inc*, 320 F.3d 362, 368 (2d Cir. 2003); *Nagrampa v MailCoups Inc*, 469 F.3d 1257 at 1277–80 (9th Cir. 2006). However, there is at least one decision to the contrary.[17]

A party that participates in a court proceeding to compel or stay an arbitration would be well advised to pursue any available appeal of the resulting decision.[18] Failure to pursue an appeal of an adverse district court decision will bar any attempt under the FAA to challenge the existence of a valid agreement to arbitrate *after* the award has issued. See *Comedy Club Inc v Improv W. Assocs.*, 553 F.3d 1277 at 1283 (9th Cir. 2009) (district court order compelling arbitration may not be reviewed in connection with appeal of order confirming arbitration award as time to appeal had expired); *Trivisonno v Metro. Life Ins. Co*, 39 F. App'x 236 at 241 (6th Cir. 2002) (finding appellant waived right to object to arbitrability of dispute as she failed to object to the magistrate's recommendation of arbitration).

Where appeal is not available, no waiver will be found. See *Sanford v Memberworks Inc*, 483 F.3d 956 at 960–61 (9th Cir. 2007) (claim of waiver rejected because where district court action is stayed, not dismissed, there is no final decision that can be appealed); *Am. Int'l Specialty Lines Ins. Co v Elec. Data Sys. Corp.*, 347 F.3d 665 (7th Cir. 2003) (no waiver where party participated in arbitration due to apparent non-appealability of order compelling arbitration). Where the district court action compelling arbitration is stayed pending the completion of the arbitration, an appeal from such decision may be taken after the arbitration is concluded. See *Sleeper Farms v Agway Inc*, 506 F.3d 98 (1st Cir. 2007).

May a Party Participate in the Arbitration Proceedings while Preserving an Objection to the Arbitrator's Jurisdiction?

Participation in the Arbitration Without Objection is a Waiver

It is well settled that a party who participates in an arbitration without asserting an objection to the jurisdiction of the arbitrator will be held to have waived

[16] The rule may be different under the arbitration law of certain states. The Revised Uniform Arbitration Act 2000, which has been adopted in a number of states, does not require that a party seek judicial relief prior to participating in the arbitration in order to preserve its jurisdictional objections. See RUAA s.23(a)(5). However, under the arbitration law of the State of New York, a party may be required to assert any objection to arbitration prior to participation in the arbitration. See, e.g. N.Y. CPLR s.7503(c) (McKinney 2010). If a party is served with a notice of intention to arbitrate, the opposing party must make an application to stay such arbitration within twenty days or be precluded from objecting to the arbitration on the grounds that a valid arbitration agreement was not made. See also N.Y. CPLR 7511 (McKinney 2010) (grounds to vacate an award); *Lurie v Sobus*, 289 A.D.2d 578 at 579 (N.Y. App. Div.) ("the absence of an agreement to arbitrate is not a basis upon which either a person who has been served with a notice of intention to arbitrate or a person who has participated in the arbitration may seek vacatur of an award"). As to the issue of when New York State arbitration law may apply, see *Diamond Waterproofing Systems Inc v 55 Liberty Owners Corp*, 826 N.E.2d 802 (N.Y. 2005) (reference to "enforcement" in choice of law clause deemed to incorporate state arbitration law).

[17] A recent decision by the North Carolina Court of Appeals interpreting the FAA has concluded to the contrary. In *Advantage Assets Inc II v Howell*, 663 S.E.2d 8 (N.C. Ct. App. 2008), Mr Howell, the defendant, was provided notice by Advantage Assets Inc ("Advantage") of an intent to arbitrate. Howell, in response, did not file any judicial proceeding to enjoin the arbitration and also did not participate in the arbitration. When Advantage sought to confirm the award, Howell opposed on the grounds that he "never entered into *any* agreement to arbitrate, or *any* contract" and claimed he was entitled to a jury trial to determine whether any such contract existed: *Advantage Assets Inc* at 9. While the North Carolina Court of Appeals could have arrived at the same result for other reasons, it held that under the FAA, which it found preempted state law, that because Howell had received notice of the arbitration hearing, "and chose not to challenge the existence of the arbitration agreement" at that time, he could not assert such objection in opposition to a motion to confirm the award: *Advantage Assets Inc* at 11.

[18] One should not be misled by the apparent limitations in S.16(b) of the FAA on the right to appeal an order compelling arbitration, refusing to enjoin an arbitration, or granting a stay under S.3 of the FAA. See 9 USC s.16(b). The limitations on the availability of a right to appeal do not apply when the decision by the district court is a "final decision". See *Green Tree Fin. Corp.-Ala. v Randolph*, 531 U.S. 79 (2000); *Apollo Computer Inc v Berg*, 886 F.2d 469 at 471 and fn.3 (1st Cir. 1989) (discussing legislative history).

any such objection. If a party participates in the arbitration without timely "questioning the arbitrator's authority to resolve the dispute", that party cannot challenge the authority of the arbitrator to have ruled on such issue or claim at a later date. See *Jones Dairy Farm v Local No.P-1236*, *United Food and Commercial Workers Int'l Union*, AFL-CIO, 760 F.2d 173 at 175–76 (7th Cir. 1985); *Gvozdenovic v United Air Lines Inc*, 933 F.2d 1100 at 1105 (2d Cir. 1991). Accordingly, a party that does not assert an objection to jurisdiction of the arbitral tribunal will have waived any such objection to the enforcement of the award under the FAA on the grounds that the arbitrator did not have jurisdiction to resolve the dispute.

The Objection Must be to the Jurisdiction of the Arbitrator

It is important to emphasise that the objection must be to the *jurisdiction* of the arbitrator in order to avoid waiver. There are two distinct types of objection, and failure to recognise the difference between them can result in waiver. A party may object to the arbitration on the grounds, for example, that an agreement to arbitrate does not exist or that the particular dispute is outside the scope of the arbitration clause. This is *not* an objection to the jurisdiction of the arbitrator deciding such issues. See *Rock-Tenn Co v United Paperworkers Int'l Union AFL-CIO*, 184 F.3d 330 at 335–36 (4th Cir 1999) (party in the arbitration proceeding had disputed "whether the dispute was arbitrable", but this is not an objection to jurisdiction of the arbitration panel to decide the issue).

In order to preserve the jurisdictional objection for later court review after the award has issued, a specific objection to the authority of the arbitrator to decide the issue is necessary. In other words, the party must specifically assert the objection that the arbitrator does not have the jurisdiction or authority to resolve the dispute.

This important distinction is illustrated in *Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group*, 491 F. Supp. 2d 413 (S.D.N.Y. 2007). In May 2004, Stolt-Nielsen Transportation Group ("Stolt-Nielsen") filed a demand for arbitration against Halcot Navigation Ltd Partnership ("Halcot"). Halcot did not dispute its obligation to arbitrate its dispute with Stolt-Nielson. However, in December 2004, Stolt-Nielsen filed an amended demand for arbitration asserting the demand on behalf of itself and Anthony Radcliffe Steamship Co, Ltd. ("Radcliffe Steamship"), which was not a signatory to the agreement. Halcot agreed to appoint an arbitrator in response to the amended demand for arbitration, but its:

> "letter specifically state[d] that 'this appointment is made without prejudice to Halcot's position that the claim is not properly one for arbitration under the time charter party between Halcot and Stolt'."(*Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group,* at 417.)

The arbitration panel issued a partial award finding that Stolt-Nielsen and Radcliffe Steamship had standing to assert claims against Halcot (*Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group,* at 417).

Halcot asserted that the award should be vacated, "because whether Radcliffe [Steamship] is entitled to assert its claim in arbitration is a matter for the court to decide, not the arbitrators" (in *Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group,* at 417). Halcot asserted that, "from the beginning it had made clear that it was proceeding without prejudice to its assertion that the claim at issue was not arbitrable" *Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group, Re* at 418). The court held that Halcot's objection was not adequate to preserve the issue for judicial review:

> "Halcot's assertion that it was proceeding in arbitration without prejudice to its position that the claim was not arbitrable does not equate to asserting a position that the arbitrators should not decide arbitrability."(*Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group,* at 419.)

In short, Halcot's general objection was not sufficient to constitute an objection to the authority of the arbitrators to decide. The court concluded, therefore, that Halcot had waived its right to have a court determine whether Radcliffe Steamship, an admitted non-party to the agreement, could assert a claim against it in the arbitration. This is because in its objection:

> "Halcot never objected to the arbitration panel determining the arbitrability issues it raised. In fact, Halcot urged the panel to do so."(*Arbitration Between Halcot Navigation Ltd Partnership & Stolt-Nielsen Transp. Group,* at 418.)

In short, Halcot objected to Radcliffe Steamship being a party to the arbitration. However, Halcot never adequately objected to the jurisdiction of the arbitrators to decide this question. As a result, waiver was found.

A Party May Argue its Jurisdictional Objection to the Arbitrator Without Waiver, Provided it has Previously Asserted a Timely Objection to the Jurisdiction of the Arbitrator Deciding that Issue

May a party, without waiving its objection, ask the arbitrator to rule on the issue of jurisdiction? The US Supreme Court has ruled on this issue under the FAA, and the answer is yes. "[A]rguing the arbitrability issue to an arbitrator", does not waive a party's right to have such issue decided by the court after the conclusion of the arbitration, provided that the party has also objected to the jurisdiction of the arbitrators to decide such issue. *First Options*, 514 U.S. at 946.

Accordingly, a party may address the issue of the arbitrator's jurisdiction during the arbitration on the merits, without risk of waiver, provided it has also objected to the arbitrator's authority to decide such issue. See *China Minmetals*, 334 F.3d at 291–92 (finding no waiver where party "consistently objected to [arbitrator's] jurisdiction throughout the proceedings"); *Opals on Ice*, 320 F.3d at 368 (finding no waiver where party "objected repeatedly to arbitration"); *Nagrampa*, 469 F.3d at 1277–80 (finding no waiver where party "forcefully objected to arbitrability at the outset of the dispute, [and] never withdrew that objection"); *Coady v Ashcraft & Gerel*, 223 F.3d 1 at 9 fn.10 (1st Cir. 2000) (finding no waiver where a party "consistently and vigorously maintained its objection to the scope of arbitration"); *AGCO Corp v Anglin*, 216 F.3d 589 at 593 (7th Cir. 2000) (finding no waiver where a party "carefully and explicitly, in unambiguous language", preserved its objection to arbitrability); *Nationwide Mut. Ins. Co v Home Ins. Co*, 330 F.3d 843 at 846 (6th Cir. 2003) (finding no waiver where a party "never submitted or acquiesced in the submission of the issue" to the arbitration panel).

The Objection to the Arbitrator's Authority to Decide the Dispute must be Asserted in a Timely Manner

The objection to the jurisdiction of the arbitrator should be asserted both clearly and early in the proceedings. Courts have found waiver where a party tries to assert such an objection after actively participating in the arbitration, even though such objection was asserted before any award was issued. See *ConnTech Dev. Co v Univ. of Conn. Educ. Props. Inc*, 102 F.3d 677 at 685 (2d Cir. 1996) (finding waiver where party objected after participating in 45 days of arbitration hearings); *Fortune Alsweet & Eldridge Inc v Daniel*, 724 F.2d 1355 at 1357 (9th Cir. 1983) (finding waiver where party "voluntarily participated over a period of several months", and did not object until "shortly before the arbitrator announced her decision"); *Nghiem v NEC Elec. Inc*, 25 F.3d 1437 at 1440 (9th Cir. 1994) (finding waiver where the plaintiff, "attended the hearings with representation, presented evidence, and submitted a closing brief of fifty pages", but only then filed suit in state court before the arbitrator's decision).

Waiver also will be found where no objection is made until after the award has issued. See *Cleveland Elec. Illuminating Co v Utility Workers Union of Am.*, 440 F.3d 809 at 813–814 (6th Cir. 2006) (finding waiver where party submitted the matter to arbitration "without reservation", and did not object until filing a brief to vacate the award); *Envtl. Barrier Co. v Slurry Sys. Inc*, 540 F.3d 598 at 606 (7th Cir. 2008) (finding waiver where party "voluntarily submitted to the arbitrator's authority", and failed to object until his opponent filed a motion to confirm the award); *Lewis v Circuit City Stores Inc*, 500 F.3d 1140 at 1150 (10th Cir. 2007) (finding waiver where the party "never adequately objected in arbitration to the arbitrability of his claims", and did not do so until after the arbitrator's decision, when he filed another suit); *Piggly Wiggly Operators' Warehouse Inc v Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No.1*, 611 F.2d 580 at 584 (5th Cir. 1980) (finding waiver where the party presented the grievance to the arbitrator "without reservation" and did not object until after the arbitrator announced the decision).

What Standard does the District Court Apply in Ruling on a Jurisdictional Objection in the Context of a Motion to Confirm or Vacate an Award?

Where a party has preserved its objection to the arbitrator's jurisdiction, the court is to review such objection as an independent matter, without any deference to what the arbitrator may have ruled as to such issue. Indeed, as will be shown below, it appears that a party's right to have the court review the matter *de novo* may include the same rights a party would have if such objection had been raised by it in a judicial proceeding prior to the arbitration. On the other hand, where a party has failed to preserve a challenge to the jurisdiction of the arbitrator, and the arbitrator has ruled on such issue, then such objection is not subject to independent judicial review under the FAA, but, instead, the arbitrator's ruling on the issue of jurisdiction is subject to a strongly deferential standard of review.

The Standard of Review to be Applied where a Party has Failed to Preserve an Objection to the Jurisdiction of the Arbitrator

Where a party has failed to preserve an objection to the jurisdiction of the arbitrator, then judicial review of the arbitrator's decision on jurisdiction will be given substantial deference. As the Supreme Court stated in *First Options,* where an issue is submitted to the arbitrator for decision, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances". *First Options*, 514 U.S. at 943. As the Court explained, the:

> "party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. *See*, e.g., 9 U.S.C. § 10."(*First Options*, 514 U.S. at 942.)
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> "Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration."(*First Options*, 514 U.S. at 942.)

This is illustrated in *TC Arrowpoint L.P. v Choate Construction Co.,* 2006 WL 91767 at *8 (W.D.N.C. January 13, 2006), where the defendant asserted that the arbitration award should be vacated because the arbitrators had exceeded their authority by arbitrating, "in the absence of a valid agreement to arbitrate between" the

parties, as it "was not a signatory to the Contract". The district court ruled that it first had to determine the appropriate standard of review: should it apply a highly deferential standard of review or should it make its own independent determination?

First, the court found that the defendant had *not* preserved the jurisdictional issue for independent judicial review. It found that the defendant participated in the arbitration, including arguing this issue before the arbitrators on the merits, but without raising the further independent objection to the arbitrators deciding the issue.

Accordingly, the district court concluded that in determining whether the arbitrators had exceeded their authority under s.10(a)(4) of the FAA it was to apply a highly deferential standard of review. The court held:

> "An arbitrator's award is entitled to a 'special degree of deference on judicial review' and '[e]very presumption is in favor of the validity of the award.'"(*T.C. Arrowpoint*, 2006 WL 91767 at *10.)
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> "In short, upon judicial review, the question is 'whether the arbitrator did his job - not whether he did it well, correctly or reasonably, but simply whether he did it.'"(*T.C. Arrowpoint* at *10.)
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> "Given the strong federal policy in favor of enforcing arbitration agreements, the burden of proving that the arbitrators exceeded their powers is very great."

Federated Dep't Stores Inc v J.V.B. Indus. Inc, 894 F.2d 862 at 866 (6th Cir. 1990); see *Action Indus. Inc v U.S. Fid. & Guar. Co.*, 358 F.3d 337 at 343 (5th Cir. 2004) ("A reviewing court examining whether arbitrators exceeded their powers 'must resolve all doubts in favor of arbitration.'") (citation omitted).

The Standard of Review to be Applied Where a Party has Preserved an Objection to the Jurisdiction of the Arbitrator

First Options is an example where the Court found that the respondent *had preserved* the objection to the jurisdiction of the arbitrators. *First Options*, 514 U.S. at 946 ("the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options"). As a result, the question of whether or not the Kaplans were subject to an arbitration agreement with First Options was preserved and was to be reviewed by the district court *de novo*:

> "We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts."(*First Options*, 514 U.S. at 947).

The point is illustrated in *China Minmetals*, where Minmetals had commenced an arbitration against Chi Mei before CIETAC, pursuant to the arbitration clauses contained in two contracts (*China Minmetals*, 334 F.3d at 278). Chi Mei, a New Jersey corporation, had objected to CIETAC's jurisdiction to hear the dispute on the grounds:

> "[t]hat the two contracts were entirely fraudulent, containing a forged signature of a nonexistent Chi Mei employee as well as a forged corporate stamp."(*China Minmetals*, 334 F.3d at 277.)

The arbitral tribunal rejected Chi Mei's arguments that the documents were forged and issued an award in favour of Minmetals in excess of $4 million.

Minmetals filed a proceeding before the district court to confirm the foreign arbitration award pursuit to s.203 of the FAA. Chi Mei objected to confirmation of the award. The arbitrators had considered and rejected Chi Mei's argument that there was no valid written arbitration agreement between the parties. As this was a case governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), the court needed to consider whether the rule as announced in *First Options* applied and whether Chi Mei had a right to an independent judicial determination of its claim of forgery.

The Third Circuit noted that art.V of the Convention, "requires enforcement of foreign awards in all but a handful of very limited circumstances" and stated that none of the art.V grounds expressly require that there "be a valid written agreement providing for arbitration" (*China Minmetals*, 334 F.3d. at 279). The court of appeal noted that if this matter had been a domestic matter governed by Ch.1 of the FAA, then *First Options* controlled and the district court would be required to conduct an independent review of Chi Mei's claims that the contracts were forged (*Minmetals* at 281).

The Third Circuit concluded that this same rule applies in a case where the challenge is made to a foreign arbitral award under the Convention. The Third Circuit noted that:

> "[I]t is clear that if Minmetals had initiated proceedings in the district court to compel arbitration [pursuant to s.4 of the FAA], the court would have been obligated to consider Chi Mei's allegations that the arbitration clause was void because the underlying contract was forged."(*Minmetals* at 281–82.) [19]

On the other hand, here, "an arbitral tribunal already has rendered a decision, and has made explicit findings concerning the alleged forgery of the contract" (*China Minmetals*, 334 F.3d at 282). The Third Circuit recognised that there is a strong public policy of enforcement of foreign arbitral awards, and that the grounds to set aside an award, "enumerated in Article V of the Convention

[19] See also *Deutz AG*, 270 F.3d 144 at 152–56 (motion to compel international arbitration submitted to jury).

are the *only* grounds available for setting aside an arbitral award" (*China Minmetals* at 283, quoting *Yusf Ahmed Alghanim & Sons W.L.L. v Toys 'R' Us Inc*, 126 F. 3d 15, 20 (2d Cir. 1997)).

Indeed, the Third Circuit specifically found that:

> "The absence of a written agreement is not articulated specifically as a ground for refusal to enforce an award under Article V of the Convention."(*China Minmetals*, 334 F.3d at 283.)

The Third Circuit then made the important observation that the *First Options* decision:

> "[D]id not involve an implied ground for relief under the FAA … Rather, it involved the more fundamental question of whether the party opposing enforcement was ever a party to a valid agreement to arbitrate."(*China Minmetals* at 285.)

This is significant in that it is a recognition that *First Options* did not find the Kaplans' right to an independent judicial review to be based on s.10(a)(4) of the FAA, which allows a court not to enforce an arbitration award "where the arbitrators [have] exceeded their powers" (9 USC s.10(a)(4)). Nor did the Court in First Options create an additional implied ground for setting aside an arbitration award under s.10 of the FAA, such as arguably exists as to manifest disregard of the law.

The Third Circuit therefore held that:

> "[T]he absence of any reference to a valid written agreement to arbitrate in Article V does not foreclose a defense to enforcement on the grounds that there never was a valid agreement to arbitrate."(*China Minmetals*, 334 F.3d at 286.)

Importantly, the Third Circuit did not seek to create an additional implied ground to vacate an award under art.V. Instead, it found that the Convention when read as a whole, "contemplates that a court should enforce only valid agreements to arbitrate and only awards based on those agreements (*China Minmetals* at 286). In particular, that:

> " Article IV requires a party seeking to enforce an award under Article V to supply '[t]he original agreement referred to in Article II' along with its application for enforcement."(*China Minmetals* at 286.)

In other words, that the presence of a valid agreement to arbitrate is a precondition to enforcement under the Convention. It therefore did not need to be articulated as a specific ground for not enforcing an award under art.V.

The Third Circuit further supported its conculsion by noting that:

> "[E]very country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed."(*China Minmetals* at 287–89.)

> "We therefore hold that a district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate, at least in the absence of a waiver of the objection to arbitration by the party opposing enforcement."(*China Minmetals* at 286.)

Judge Alito (as he was then) in a concurring opinion wrote, "separately to elaborate on the importance of Article IV, Section 1(b) of the Convention", stating that this provision required the district court to hold a hearing and make factual findings on the genuineness of the agreement at issue (*China Minmetals* at 292, Alito J., concurring).

Similarly, in *Telenor Mobile Commc'ns AS v Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y.), a party opposed confirmation of an award on the grounds that the agreement was void because the alleged signatory to the agreement lacked the requisite authority. The district court found that the party was entitled to an:

> "independent inquiry into the arbitrability of the dispute, as the Court has an independent obligation to determine the threshold issue of arbitrability … Thus, the Court will not 'merely defer to' the Tribunal's findings on the issue of arbitrability… and Storm is entitled to an independent determination on that issue."(*Telenor Mobile Commc'ns AS v Storm LLC* at 352 (quotation and citation omitted).)

Indeed, the court stated that this included the right to a jury trial (*Telenor Mobile Commc'ns AS v Storm LLC* at 352).[20]

In short, the rule announced by the Court in *First Options* for domestic awards has been held in the United States to apply to awards under the Convention. This means that a party is entitled to have the district court conduct an independent judicial review of a challenge to the arbitrator's jurisdiction, which includes the right to present evidence, and where the matter cannot be resolved as a motion for summary judgment, to conduct such further proceedings, such as a trial, where appropriate (*China Minmetals*, 334 F.3d at 289–90, 292).

In summary, where a party has preserved its objection to the jurisdiction of the arbitrator, such party is entitled in the United States under the FAA and the Convention to an independent judicial determination of that issue. Because this includes the right to present evidence, this implies that the party should also have the rights of discovery that are available under the Federal Rules of Civil Procedure. This independent judicial review can take the form of a ruling on a motion for summary

[20] On the facts of the case, the court found that because Storm LLC had not presented sufficient evidence that Nilov lacked authority to enter into the agreement, it had not satisfied the threshold standard needed to qualify for a jury trial: *Telenor Mobile Commc'ns AS v Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y.) at 352–53.

judgment, where appropriate. But where sufficient evidence is presented to raise a disputed issue of material fact, then a trial must be held, and a party may be entitled to have certain issues submitted to a jury.