Bermann on the Gateway Problem in International Commercial Arbitration

George A. Bermann, who is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, has published The "Gateway" Problem in International Commercial Arbitration in the last issue of the *Yale Journal of International Law*.

> *Participants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation, while still ensuring that its use is predicated on the consent of the parties and that the resulting awards command respect. A priori, at least, all participants—parties, counsel, arbitrators, arbitral institutions—have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora, while producing awards that withstand judicial challenge and otherwise enjoy legitimacy.*
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> *National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process. Among the ways courts do so is by ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner. But those same courts are commonly asked by a party resisting arbitration to intervene at the very outset to declare that a prospective arbitration lacks an adequate basis in party consent. No legal system that permits the arbitration of at least some disputes (and most do) is immune to the possibility that its courts will become engaged in an inquiry of that sort at the very threshold of arbitration. Each must decide how, at this early stage, to promote arbitration as an effective alternative to litigation, while at the same time ensuring that any order issued by a court compelling arbitration is supported by a valid and enforceable agreement to arbitrate. The challenge consists of identifying those issues that courts—in the interest of striking the proper balance between these two objectives—properly address at what is increasingly known, in common U.S. parlance, as the "gateway" of arbitration. This "gateway" problem is the*

focus of the present Article.

For purposes of this Article, I consider an arbitral regime to be effective to the extent that it operates to promote the procedural advantages I posited earlier—speed, economy, informality, technical expertise, and avoidance of national fora. While legitimacy might be defined in many different ways, I consider an arbitral regime to be legitimate (or to enjoy legitimacy) to the extent that the parties who were compelled to arbitrate rather than litigate, and will be bound by the resulting arbitral award, consented to step outside the ordinary court system in favor of an arbitral tribunal as their dispute resolution forum.

Legal systems differ in their responses to the challenge of reconciling efficacy and legitimacy in arbitration, and even in the extent to which they acknowledge that the challenge exists and try to articulate a framework of analysis for addressing it. This Article proceeds on the premise that legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion.

In the United States, Congress has largely ignored the challenge of reconciling efficacy and legitimacy in arbitration, as have the states even when establishing statutory regimes to govern arbitration conducted in their territory. The matter has accordingly fallen to the courts. In this Article, I reexamine the jurisprudence that American courts have developed, increasingly under the leadership of the U.S. Supreme Court, to address the fundamental tension between arbitration's efficacy and legitimacy interests that exists at the very threshold of arbitration. The exercise has come to consist largely of demarcating "gateway" issues (i.e., issues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent) from "non-gateway" issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially, if arbitration is to be an effective mode of dispute resolution).

This Article proceeds as follows. Part II briefly sketches the settings in which courts may be asked to conduct the early policing with which this Article is concerned. Part III identifies the terminological confusion that has hampered clear thinking on the subject, and proposes a coherent vocabulary for

overcoming it. Part IV then explores critically the conceptual devices that courts and commentators have traditionally employed in sorting through the issues. In so doing, it demonstrates that the two notions most widely relied upon for this purpose—Kompetenz-Kompetenz and separability—are unequal to the task, and explains why. A critical understanding of U.S. law in this regard is aided by comparing it to models—the French and German—that claim to have devised simple and workable formulae for reconciling efficacy and legitimacy interests at the outset of the arbitral process. That discussion will show how the often proclaimed universality of Kompetenz-Kompetenz and separability is in fact misleading.

Against this background, Part V traces how recent U.S. case law has progressively pursued a more nuanced balance between efficacy and legitimacy than the traditional conceptual tools tended to yield. The courts have achieved this result, not by erecting a single comprehensive framework of analysis, but rather through a series of pragmatic adjustments to the received wisdom associated with Kompetenz-Kompetenz and separability. I conclude that they have developed a suitably complex body of case law that ordinarily reaches sound results. But I am equally certain that, in doing so, they have failed adequately to rationalize the case law. The disparate strands of analysis—each of which is basically sound—have combined to produce a needlessly confusing case law to the detriment of clarity, coherence, and workability. I suggest that the case law can and should be recast, and that the central feature of that recasting must be a serious and frank confrontation of the underlying tradeoff between arbitration's efficacy and legitimacy interests. This Article is thus both descriptive and normative in outlook.