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**WHO TAKES THE LEAD?: COMPARATIVE INSIGHTS ON
ARBITRABILITY, THE DELEGATION CLAUSE, AND THE
SUPREME COURT OF THE UNITED STATES**

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ABSTRACT

Determining jurisdiction on threshold issues between courts and arbitral tribunals is a massive debate at the international level. Although

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arbitral agreements involve parties across all countries, different country-specific provisions in each country's arbitration act shows how a primary issue—a dispute's arbitrability—needs additional reform, aiming for a more uniform application of the competence-competence rule. Hence, the purpose of this Article is to evaluate the possible implications emerging from a U.S. Supreme Court decision on arbitrability and the delegation clause. This Article will also consider rules of additional venues, outside the boundaries of U.S. law. The two legal families of civil and common law play a crucial role in interpreting alternative dispute resolution. In particular, this Article explores how the competence-competence principle—generally recognized in European arbitration acts—should be renewed in its specific regulation, favoring a general negative effect, and on the contrary, concurrent jurisdiction by the court.

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INTRODUCTION

In *Henry Schein, Inc. v. Archer & White Sales, Inc.* (“*Henry Schein*”), the Supreme Court of the United States unanimously decided whether arbitrators or courts must take the lead on the arbitrability of a dispute.¹ The Court examined a dispute originating from a sales contract containing an arbitral agreement which stated:

Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Associations.²

The *Henry Schein* case is noteworthy because it involves controversial topics of U.S. arbitration law, particularly the delegation clause of arbitrability³ and the competence-competence principle.⁴ Although arbitration does not always resolve every question parties may have, it is considered a commonplace for resolving disputes.⁵ More precisely, the question regarding the determination of arbitral jurisdiction and the role of courts in solving such issues involves arbitration and its policies. *Henry Schein* and other Supreme Court decisions “have had the cumulative effect of eliminating virtually all defenses to arbitrability and converting [pre-dispute arbitral agreements] into ‘super contracts.’”⁶ Furthermore, *Henry Schein* creates an expansive interpretation of Section 2 of the Federal

1. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

2. *Id.* at 528.

3. *Id.* at 527; see also David Horton, *Arbitration about Arbitration*, 70 STAN. L. REV. 363, 363 (2018).

4. *Competence-Competence Doctrine*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The principle that arbitrators may decide challenges to their own jurisdiction.”); see also Robert H. Smit, *Separability and Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT’L. ARB. 19, 19 (2002).

5. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005); see also Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 119 (2019).

6. Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 196 (2019).

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Arbitration Act (“FAA”), which began in the 1980’s as “an emphatic federal policy in favor of arbitral dispute resolution.”⁷

Undoubtedly, the relationship between the increasing acceptance of arbitration as a means of resolving disputes and the enforceability of contracting procedures by the arbitral agreement represents an extraordinary portrayal for continental legal scholars.⁸ It could provide a new perspective in considering which range of the competence-competence principle may apply within each country-specific arbitration act. Additionally, we may consider the broad extension of parties’ consensus in reducing the role played by the judiciary’s power. These ideas are commonly discussed within the civil legal context.

Thus, the purpose of this Article is to suggest a different and alternative view. This view requires starting with a comprehensive analysis of *Henry Schein*’s arguments and situating them within the U.S. legal debate on the topic. This Article will also analyze significant implications within the global context as well as a comparative overview of the arbitration acts in the common law and in Europe.

This Article proceeds in two main stages. Part I explains how *Henry Schein* has developed new outlooks on the traditional debate on arbitral jurisdiction. Diving deeper into these views, one may discover ways to reframe the discussion on separability and the competence-competence principle. Part II connects the comparative legal analysis with the implications of those arguments on existing rules set by arbitration law in civil legal systems. Finally, this Article’s conclusion offers new rules that may be adopted, irrespective of a few variances in both legal families, suggesting a more global vision for arbitration law.

I. THE *HENRY SCHEIN* V. *ARCHER & WHITE* CASE

A. *Background and Legal Issues*

The *Henry Schein* case discusses whether a court may neglect a delegation clause on the arbitrability issue when the argument in favor of arbitration is wholly groundless.⁹ In *Henry Schein*, Archer & White

7. *Id.* at 195.

8. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 593-94 (2005); see also Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 511 (2011).

9. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

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Sales, Inc. (“Archer & White”) brought a lawsuit against Henry Schein, Inc. (“Schein”) for violations of antitrust law, requesting injunctive relief as one of the remedies.¹⁰ Schein defended itself by using its delegation clause to compel arbitration.¹¹ Archer & White argued that the dispute was not subject to the delegation clause.¹² However, Schein’s response petition argued that the exception to arbitrability was in contrast to the FAA and the delegation clause on arbitrability must be respected, even if the court assumed the argument in favor of arbitration was wholly groundless.¹³

Consequently, several threshold issues emerged from the parties’ dispute. The first arises from the arbitration agreement itself. The agreement expressly referred to the American Arbitration Association (“AAA”) rules regarding the competence-competence clause’s relation to the case’s arbitrability.¹⁴ Despite AAA’s rules, the delegation clause was unclear because it is was not absolute. The clause provides exceptions to arbitrability for certain claims, including injunctive relief.

The U.S. Court of Appeals for the Fifth Circuit affirmed the district court’s decision to follow that exception and held in favor of Archer & White.¹⁵ The Fifth Circuit found the case could not be subject to mandatory arbitration.¹⁶ Accordingly, the Court held that the arbitrability issue and the delegation clause provision were not binding in reaching their conclusion.¹⁷ This argument was crucial to the U.S. Supreme Court’s reasoning.

Schein argued to the U.S. Supreme Court that the wholly groundless exception violated the FAA. The Court rejected four arguments raised by Archer & White on the wholly groundless exception.¹⁸ The Court decided that, according to FAA rules, courts do not have the power to determine the arbitrability issue when the parties’

10. *Id.* at 526.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 528.

15. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497-98 (5th Cir. 2017), *vacated*, 139 S. Ct. 524 (2019).

16. *Id.*

17. *Id.* at 496.

18. *Henry Schein*, 139 S. Ct. at 530.

contract textually delegates that issue to the arbitrators.¹⁹ In other words, courts cannot override the contract because the wholly groundless exception is inconsistent with the FAA.

B. The Decision's Arguments

The Court's decision in *Henry Schein* and the arguments on which the decision is grounded are fascinating for legal scholars. As we will see, *Henry Schein*'s central holding is open to the possibility that the existing rules on arbitration in civil law countries will be significantly changed and renewed. The U.S. Supreme Court grounds its opinion on precedent. *Henry Schein*, therefore, outlines an evolution of its decision's path and was specifically focused on the relation between the wholly groundless exception and the delegation clause previously signed by the parties in the contract.

Specifically, the Court premises its opinion on relevant precedents, which set forth several cornerstones. First, the Court reaffirmed that "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."²⁰ Second, the Court focuses its opinion on the crucial implications of the delegation clause.²¹ The Court expressly cites *AT&T Technologies* and held "a court may not 'rule on the potential merits of the underlying claim' that is assigned by contract to an arbitrator, 'even if it appears to the court to be frivolous.'"²²

These considerations pair with the discussion of the delegation clause in determining who takes the lead in accordance with the U.S. Supreme Court's decision in *First Options of Chicago Inc. v. Kaplan* ("*First Options*")²³ and the more recent determinations set forth in *Rent-A-Center*.²⁴ These decisions revolve around the clear and unmistakable written language of the delegation clause to determine the court's lack of jurisdiction in deciding the arbitrability issue in the case.

19. *Id.* at 526.

20. *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986).

21. *Henry Schein*, 139 S. Ct. at 530.

22. *Id.* at 529 (citing *AT&T Technologies*, 475 U.S. at 649-650).

23. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

24. *Rent -A-Center, W., Inc., v. Jackson*, 561 U.S. 63 (2010).

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Accordingly, *Henry Schein* confirmed these decisions. However, by ruling that courts must respect a clear and unmistakable delegation clause, the Court rejected the wholly groundless exception and considered it in contrast with the FAA.²⁵ A clear and unmistakable delegation clause inhibits courts to determine who takes the lead to attribute the jurisdiction on a dispute.

Among the four arguments on which the U.S. Supreme Court grounded its decision, the first has already been indirectly examined. Archer & White assumed that, according to the FAA rules, the Court must first decide the arbitrability issue because the proceedings must cease after the court is satisfied on the arbitral jurisdiction.²⁶ The Court ruled in favor of the delegation clause as the pillar of the exclusive arbitrators' power on the arbitrability issue.²⁷ In other words, the existence of a delegation clause within the arbitral agreement implies a self-determination of jurisdiction.

The second argument refers to the FAA rules concerning judicial review of the final arbitral award. This argument is common in arbitration regulatory regimes all over the world as the primary form of complementarity between the courts and the arbitral tribunals. In *Henry Schein*, the Court held FAA rules do not allow courts to decide on the arbitrability issue first.²⁸ On the contrary, a clear and unmistakable delegation clause is enough to limit the arbitrators power to freely decide first on that threshold question.²⁹

In the third argument, the Court moved to a twofold consideration, in which injunctive relief emerged as contradictory to the case. The first consideration involves the various and divergent evaluation of what might be considered groundless because "an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious."³⁰ Second, the Court noted that allowing it to first decide the arbitrability issue "would inevitably spark collateral litigation (with briefing, argument, and opinion writing), over whether a seemingly unmeritorious argument for arbitration is *wholly*

25. *Henry Schein*, 139 S. Ct. at 531.

26. *Id.* at 530.

27. *Id.* at 531.

28. *Id.* at 527.

29. *Id.* at 530.

30. *Id.* at 531.

groundless, as opposed to groundless.”³¹ That is, on the contrary, exactly what parties were seeking to avoid through the arbitral agreement, particularly the delegation clause.

The last argument is also grounded in policy. Archer & White argued the wholly groundless exception is needed to deter compelling arbitration.³² The Court found this argument incoherent because “arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable.”³³ Further, the Court enhanced this argument by introducing indirect coercive measures for the parties standing for frivolous motions.³⁴ These measures included compelling arbitration through the wholly groundless exception by imposing fee and cost-shifting sanctions.³⁵

C. Implications Toward a Global Scenario

The U.S. Supreme Court concluded that “when the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”³⁶ In so doing, the Court first strengthens its precedents, setting the rule of enforcing the arbitral agreement as it is written.³⁷ Concurrently, *Henry Schein* leaves unanswered the related question of whether a delegation clause that is incorporated in the arbitral agreement under AAA rules satisfies the standard of clear and unmistakable words that qualifies as delegation authority under *First Options*.³⁸

Regardless of whether the text of delegation clauses prompted by AAA or similar arbitral organizations fits the clear and unmistakable standard, the implications raised by *Henry Schein*’s arguments represent the starting point in partially rethinking the competence-competence rule as well as the related separability rule.³⁹ The inherent issue is not on the interpretation of each single delegation clause

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 528.

37. *Id.*

38. *Id.* at 531.

39. *Id.*

whenever it can be qualified as clear and unmistakable on the arbitrability issue. The issue is the question of who takes the lead to deliver such interpretation. This gives credence to the rejected wholly groundless exception.⁴⁰ There is not a matter of concurrent jurisdiction between courts and the arbitral tribunals; there is instead a matter of the competence-competence rule's application, related to the willingness declared by the parties in the agreement's clauses.

Nevertheless, moving toward a comparative context implies that the competence-competence rule is universally known and adopted differently in each country. The fascinating new term of comparison, therefore, is to evaluate whether the U.S. precedents—as investigated in *Henry Schein*—can suggest possible reforms in the continental arbitration acts as introduced by the U.S. Supreme Court.

II. THE COMPARATIVE VIEW

A. *Framing the Debate on Arbitral Jurisdiction: The Role of the Comparative View*

Why might a comparative analysis help explain the current debate on the arbitral delegation clause relaunched by *Henry Schein*? The answer lies in turning back to the origins of the arbitral delegation clause and, more specifically, to the terms established before the recent U.S. Supreme Court decision. It is worth discussing the competence-competence rule in the continental arbitration acts to help establish a global and harmonized rule.

On the one hand, *Henry Schein* undoubtedly supports a new venue on the classical debate on arbitral jurisdiction. Thus, a global comparative perspective is needed since the U.N. Commission on International Trade Law (“UNCITRAL”) proposed a soft-law to focus the debate around each country's arbitration rules.⁴¹ On the other hand, while the international debate can be viewed in the light of *Henry Schein*'s arguments, the disparity between each arbitration act in the western legal tradition can be reduced to a more straightforward and efficient provision.

40. *Id.*

41. Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 MICH. J. INT'L L. 433, 456 (2019).

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B. The Scope of the Competence-Competence Principle in the United States: A Brief Overview

One of the most important aspects of both domestic and international arbitration law is preventing a jurisdictional conflict. The solution to these jurisdictional conflicts is found in the competence-competence principle.⁴² Since it has been rightly defined as the “conceptual cornerstone” of international arbitration law, this principle moves from the assumption that access to the courts within parallel proceedings also demands the allocation of jurisdiction.⁴³ This is problematic because it risks one party delaying the process. Accordingly, a balance between legitimacy and efficiency of the arbitration process could be conditioned by prejudices relating to the necessary interference of the courts as they determine jurisdiction on the merits.

For this reason, it is essential to begin with a brief examination of the U.S. mainstream view on this issue. The FAA rules do not involve specific provisions that come close to the competence-competence principle as it is traditionally understood and reflected by the domestic statutory law of other countries, including common law systems, with the exception of Section 4.⁴⁴ This Section indirectly provides:

“[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”⁴⁵

However, U.S. courts traditionally construe the FAA rules as providing courts the power to resolve issues on arbitral jurisdictions before the suit is over.⁴⁶ The first FAA rules were interpreted in a moderately conservative manner in accordance with the competence-

42. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1046 (2d ed. 2014).

43. *Id.*

44. The Federal Arbitration Act, 9 U.S.C. § 4 (1925).

45. *Id.*

46. William W. Park, Annotation, *Arbitral Jurisdiction in the United States: Who Decides What?*, 1 INT. A.L.R. 33, 37 (2008).

competence principle.⁴⁷ The primary purpose of these rules was to authorize the court to decide particularly debated issues before any other arbitral determination.⁴⁸ While the U.S. courts were providing for the interlocutory judicial determination of the jurisdiction allocation of the dispute, the courts were also opening the door to an alternative way of interpretation: no contract, no power.⁴⁹

Despite this preliminary guidance, the key issue for determining whether the competence-competence principle can operate within the FAA rules is notably rooted in the U.S. Supreme Court decision in *First Options*.⁵⁰ *First Options*' approach to arbitrability is the opposite of the classic opinion previously adopted. As such, Sections 2 and 3 of the FAA had to be interpreted as conferring jurisdiction exclusively on the courts.⁵¹ Although largely only implied, *First Options* acknowledged that the FAA recognized the competence-competence of the arbitrators within their own jurisdiction.⁵² *It therefore* changed the classic approach by adopting a contractual interpretation of the arbitration clause. Under this approach, the arbitrator's power to establish its jurisdiction on the merits can be rooted exclusively in the language of the parties in making a clear and unmistakable reference to the adoption of the *competence-competence* principle.⁵³

First Options suggests a possible *finality* of the arbitral tribunal's exclusive power to rule on its jurisdiction over the matter in law. Ultimately, the Court encourages parties to pursue arbitration when they have clearly and unmistakably agreed to the application of that principle.⁵⁴ This connection between courts and the arbitral tribunals, considering "arbitration is simply a matter of contract,"⁵⁵ seems to be the result of two backgrounds within the context of U.S.

47. *Id.*

48. *Id.*

49. *Dean Witter Reynolds, Inc. v. McCoy*, 995 F. 2d 649, 650 (6th Cir. 1993).

50. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 940 (1995).

51. Shirin Philipp, *Is the Supreme Court Bucking the Trend? First Options v. Kaplan In Light of European Reform Initiatives in Arbitration Law*, 14 B.U. INT'L L.J. 119, 135 (1996); Adrianna Dulic, *First Options of Chicago, Inc v. Kaplan and the Kompetenz-Kompetenz principle*, 2 PEPP. DISP. RES. L.J. 77, 77-78 (2001).

52. *First Options*, 514 U.S. at 938.

53. *Id.* at 944 (quoting *AT&T Technologies*, 475 U.S. at 649).

54. *Id.* at 944.

55. *Id.* at 938.

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arbitration law. First, despite the public context of ordinary courts' jurisdiction, there is a contractual view of arbitration.⁵⁶ Second, there is a preference for the courts to declare its jurisdiction when the parties to the contract did not "certainly" agree on the arbitrators' competence-competence.⁵⁷

These conclusions enhance the arguments discussed in *Rent-A-Center, West, Inc. v. Jackson* ("*Rent-A-Center*"), where the U.S. Supreme Court analyzed the doctrine of delegation agreement as separate from the overall core agreement.⁵⁸ In addition, *Rent-A-Center* focuses on a different but primary argument to legitimize the delegation clause. According to the separability doctrine and its interpretation notably raised by the Court and subsequent literature, the delegation clause has to be treated as an independent arbitration agreement.⁵⁹ *Rent-A-Center* thus distinguishes between (1) the validity and enforceability of that delegation clause; and (2) the determination of the *First Options*' requirements on the "clear and unmistakable" language of the agreement.⁶⁰

While *First Options* ruled courts should look to the parties' intent to determine the dispute's arbitrability,⁶¹ *Rent-A-Center* further defined intent within a separate party's agreement, such as the delegation clause.⁶² *Henry Schein* determined the wholly groundless exception to the delegation clause was inconsistent with inhibiting arbitrators from determining jurisdiction.⁶³ *Henry Schein* ruled that the delegation clause was a separate agreement utilized solely by arbitrators to help

56. *Id.* at 943.

57. *Id.* at 944.

58. *Rent -A-Center, W., Inc., v. Jackson*, 561 U.S. 63, 70 (2010).

59. *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967); see also Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM R. INT'L. ARB 1 (2003); John J. Barceló III, *Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L. L. 1115, 1119 (2003); George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 21 (2012).

60. *Rent-A-Center*, 561 U.S. at 66 (discussing the district court's prior ruling on the contractual language).

61. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

62. *Rent-A-Center*, 561 U.S. at 79.

63. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

determine the arbitrator's threshold issues.⁶⁴ This occurs regardless of any questions on the clause's validity, at first glance, and follows *First Options* standards as to determine the parties' actual intent in such delegation. The change in power allocation regarding arbitral tribunals' jurisdiction, as it is stigmatized by the contractual view developed by *First Options* and *Rent-A-Center*, entails the evolution of the negative role assigned to arbitrators as institutional judges. *First Options* and *Rent-A-Center* must be viewed as expressing a favorable view of arbitrators who must decide whether the parties have agreed that the decision to arbitrate should be clear and unmistakable.

First Options authorizes courts to decide on any competence-competence principle that an arbitral agreement may contain.⁶⁵ The courts decide on the parties' clear intentions as to an arbitrator's power to determine jurisdictional issues and whether the parties agreed to give arbitrators power to rule on the arbitrability issues. *First Options* certainly reinvigorates the notion of arbitrability and moves away from considering arbitrators as private judges remunerated by fees. However, in light of *First Options*, the FAA rules preserve the prominent role of the courts regarding this matter of law, even if an optimistic interpretation would give the parties the exclusive power to choose who is called upon to decide the allocation of jurisdiction.

The cornerstone of such a controversial matter partially changes with *Henry Schein*. First, arbitration is favored because it assigns a proactive role to arbitrators: "arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable."⁶⁶ This argument endorses trust for arbitrators. It also rejects the wholly groundless exception as a matter of a court's competence and assigns due respect to the delegation clause. Because arbitration is a private matter, whether the parties intend to delegate arbitrators to decide jurisdiction on the threshold issues, such as arbitrability, remains salient.

Therefore, even though *Henry Schein* focused on the wholly groundless exception in light of the delegation clause, the decision did not fully address jurisdiction in relation to *First Option's* requirements when a delegation clause is present. In particular, the consideration of

64. *Id.*

65. *First Options*, 514 U.S. at 945.

66. *Henry Schein*, 139 S. Ct. at 531.

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the concurrent jurisdictions between courts and arbitrators, which could be raised by *Henry Schein*, is that the “time-consuming sideshow” may assign arbitrators exclusive power to determine the jurisdiction.⁶⁷ This occurs when the delegation clause is known by incorporating some tribunal rules (in this case, the AAA rules) because the incorporation must be considered clear and unmistakable evidence of delegation.⁶⁸

This central issue is deeply treated by the Restatement (Third), and the opinion is generally contrary to “render exclusive the competence of arbitral tribunals to make jurisdictional determination.”⁶⁹ It is worth noting that the arbitrability issue is considered in light of the parties’ consensus. The parties are entitled “to delegate to an arbitral tribunal primary authority over whether a given dispute falls within the scope of an arbitration agreement.”⁷⁰ The rationale is quite simple. It moves from the belief that “whether a given dispute falls within the scope of an arbitration agreement is ultimately a question of contract interpretation.”⁷¹

The final questions are, given the well-established distinction between gateway and non-gateway issues,⁷² how *Henry Schein* may impact all threshold issues of arbitration proceedings, including the other gateway issues? In other words, could the delegation clause assign exclusive jurisdiction to arbitral tribunals even if different gateway issues are involved, such as the validity of the arbitral agreement? *Henry Schein* allows a renewed view for replying to those questions while also serving as a useful case comparison to other legal systems and statutory arbitration laws.

Additionally, the question of whether a competence-competence clause in an arbitration agreement justifies the arbitrators’ exclusive jurisdiction on the validity of the same agreement has been widely debated. Such concepts have been discussed in *Rent-A-Car* and *Henry Schein*. While the former decision considers the delegation of the unconscionability of the arbitral agreement to arbitrators sufficiently

67. *Id.*

68. *Id.* at 530.

69. Restatement (Third) of U.S. Law of Int’l Comm. Arb. § 2.8 PFD (2019) [hereinafter Restatement].

70. *Id.*

71. *Id.*

72. George A Bermann, *The “Gateway Problem” in International Commercial Arbitration*, 37 YALE J. INT.’L L. 1, 3 (2012).

clear and unmistakable, the latter enforces the parties' intentions, revealing itself as the cornerstone of arbitration. The U.S. Supreme Court refers to the "contract as written,"⁷³ which could represent the key issue by which it would not be surprising if the written intention of the parties is sufficient to exclude the discretionary interpretation by the court on what is clear and unmistakable or not.

The "carve-out" provision within a broadly worded arbitration agreement could be interpreted differently if the agreement refers to the application of tribunal rules. It is worth noting that district courts still hold "reference to AAA rules in the Consulting agreement does not, by itself, evidence clear and unmistakable intent to delegate the question of arbitrability to the arbitrator"⁷⁴ where the arbitration clause "includes a carve out provision that expressly reserves certain issues for the courts."⁷⁵ Nevertheless, the consideration of the parties' intent in *Henry Schein* is a crucial and distinctive signal of what courts want—what courts have expressly written—and might move toward a clear and unmistakable interpretation. This could suggest a twofold trend. First, a written contract allows a clear and unmistakable indication that the parties want arbitrators rather than courts to resolve their disputes. Since they are written in the delegation clause, they carve out certain remedies showing the parties' willingness to arbitrate all disputes that were not carved out by the written exception. Second, the implication is that claims brought to the court on the arbitrability issue must be declined and readdressed to the arbitral tribunal, even if at first glance the arbitration agreement on the claim is wholly groundless.

Given this renewed scenario, a comparative view is necessary. The comparative view allows us to consider a broader understanding of how these provisions are regulated in common law and civil legal systems, and also how these provisions were suggested by the soft law in the UNCITRAL Model Law ("Model Law"). In acknowledging this set of rules at the international level, it would be useful to move toward a renewed provision on the arbitral jurisdiction and the role of courts. This may serve a global scenario and stand in favor of arbitration in accordance with the *Henry Schein* decision.

73. *Henry Schein*, 139 S. Ct. at 529.

74. *Armor All/STP Prod. Co. v. TSI Prod., Inc.*, 337 F. Supp. 3d 156, 165 (D. Conn. 2018)

75. *Id.* at 164.

C. The Comparative Approach

The delegation clause and the *Henry Schein* decision's implications on arbitrators' authority lie within a national legal system that, in the absence of the clause, permits interim judicial decisions on arbitrability issues before any arbitral resolution. Courts are relatively free to decide jurisdictional issues either before arbitral tribunals' determinations or through a de novo review on the challenged award.⁷⁶ However, issues with concurrent jurisdiction occur when parties do not have clear intent to delegate the jurisdiction to arbitrators.⁷⁷ Thus, while U.S. law acknowledges the competence-competence principle on a contractual basis,⁷⁸ when the delegation clause is agreed on by the parties, a wholly groundless arbitration agreement will not avoid the arbitrators' competence on all arbitrability threshold issues.⁷⁹ In theory, this Article may present a favorable view of this approach. It is inspired by a coherent vision of arbitration as a matter of consent.

This consideration is relevant in approaching a comparative view on the allocation of jurisdictional competence between courts and arbitral tribunals to stimulate a more uniform global regulation. In the following paragraphs, this Article will analyze how each system, given a statutory law provision of the competence-competence principle, can favor arbitration while balancing rapidity with efficiency. Additionally, this Article will consider how the increasing frequency of parties' consent in the U.S. legal system might offer different perspectives.

D. The Influence of the Model Law and Country-Specific Provisions

This section will offer a comparative view of the implications of arbitral jurisdiction according to the key issues discussed above. Disregarding U.S. arbitration law, each country-specific rule more or less affirms the competence-competence principle and regulates this matter in an arbitration act. These rules are inspired by the UNCITRAL

76. *Park*, *supra* note 46, at 39.

77. *Id.* at 41.

78. *Henry Schein*, 139 S. Ct. at 527 (2019).

79. *Id.* at 529.

Model Law.⁸⁰ In particular, Article 16(1) of the Model Law allows the arbitral tribunal to challenge its own jurisdiction and determine the validity and scope of the arbitration agreement.⁸¹

This conclusion, known as a positive effect of the competence-competence principle, seems to be applied irrespective of the intentions of the parties to the arbitral agreement. However, this general rule should not mislead. Article 16 of the Model Law does not resolve many relevant issues related to the allocation of jurisdiction between the arbitral tribunal and the court. According to Articles 8(1) and (2), the court can decide on such issues before any determination by the arbitrators. These provisions allow the arbitral tribunal to take make decisions even if the action was already brought in a court, so it grants and legitimates the parallel proceeding as an unavoidable event that characterizes litigation in arbitration. Moreover, the text of Article 8(1) suggests that, when courts are asked to decide whether or not the arbitral agreement is null, void or incapable of being performed, the courts provide a full interlocutory determination instead of a prima facie basis of evaluation.⁸² This has been the traditional interpretation of Article 8(1) based on the drafting history and rejection of the proposal to amend Article 8(1) in terms of requiring prima facie review rather than a full interlocutory judicial review on the arbitrators' jurisdiction.⁸³

Article 8(2) of the Model Law generally regulates the conduct of the parallel proceedings on jurisdictional issues. It authorizes the arbitrators to continue the arbitral proceedings even though it is pending a court's challenge to jurisdiction. On the other hand, Article 8(2) provides a similar power to the court in a differing situation. The Model Law produces more questions than answers and more doubts than

80. See U.N. Commission on International Trade Law [UNCITRAL], *Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006* (Vienna: United Nations, 2008) U.N. Doc. A/40/17, annex I.

81. *Id.* art. 16(1).

82. Frédéric Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdictions*, 22 *ARB. INT'L*, 463-73 (2006) (suggesting how permitting a full judicial review on the arbitral jurisdiction could "seriously imperil the internal coherence" of the Model Law).

83. *Report on the Working Group on International Contract Practices on the Work of Its Fifth Session*, XIV *UNCITRAL Y.B.* 60, 67, U.N. Doc. A/CN.9/233 (1983).

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certainties. In particular, a court may decide jurisdictional issues before the arbitrators.

Not surprisingly, some national arbitration laws decide the issues on arbitral jurisdiction by interpreting the parallel proceeding between the court and the arbitral tribunal as a common framework. Some courts “[restrict] the function of the court so as to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration agreement.”⁸⁴ This is primarily referred to as the so-called negative effect.⁸⁵ The negative effect principle “evidences more variation in approach between jurisdictions and has generated more debate internationally.”⁸⁶

1. German Law

While it is arguable that the German legal system is considered the original source of the competence-competence principle, some amendments are codified in Section 1032 of the German Code of Civil Procedure.⁸⁷ In fact, the Model Law rules established in Articles 8 and 16, following the enactment of the 1998 German Arbitration Act, resemble Sections 1032 and 1040 of the German Code of Civil Procedure. Additionally, Section 1032(2) is in favor of the immediate issue by the arbitrators of a partial interlocutory award concerning jurisdiction which may be challenged immediately before the courts.⁸⁸ The German law provides that any proceedings brought before the court on arbitral jurisdiction may only be brought if the arbitral tribunal has not been constituted and arbitral proceedings are not yet pending. In this case, the court’s decision is on the jurisdictional issue’s merits as such with a typical full judicial review.

84. Ozlem Susler, *The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence*, 6 MACQUARIE J. BUS. L. 119, 125 (2009).

85. *Id.* at 127.

86. *Id.*

87. See ZIVILPROZESSORDNUNG [CODE OF CIV. PROC.], § 1032, translation at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3558; See also Peter Schlosser, *La nouvelle législation allemande sur l'arbitrage*, REV. ARB. 291, 298 (1998).

88. *Id.* § 1032(2).

Since Section 1032(3) tolerates the constitution of an arbitral tribunal notwithstanding an action on arbitral jurisdiction brought before the court, the parallel proceedings determine a complicated situation. The final award, set forth by the arbitral tribunal that decided to continue its proceeding, can be annulled by the court of appeal, whenever the parallel court has decided on the lack of the arbitral jurisdiction. This rule seems to indicate that German law only partially shares the competence-competence principle. The essence of the German arbitration law is that, once the parallel proceeding on the jurisdictional issue is pending, the decision set by the court is binding for all parties and arbitrators as it represents a full review.

The decisive influence of the Model Law has favoured a significant change in previously posed arguments under the German law. Conclusively, the power of arbitrators over their own jurisdiction does not result from a subclause, similar to the U.S. delegation clause, of the arbitral agreement. Rather it arises directly by the operation of law, although it is not entirely exclusive due to the possibility of an immediate challenge before the courts. Unlike the 1998 German Arbitration Act's approach to previous legislation, which was more clearly aligned with the U.S. model as set forth by *First Options*, current German Law seeks to set aside the rule providing for the application of a genuine competence-competence clause.⁸⁹ Thus, while German law allows for the immediate challenge of the interlocutory award on jurisdiction, the parallel possibility for the arbitral tribunal to guide the proceedings, and does not permit a separate agreement of the parties and delegates jurisdictional issues to arbitrators, it leaves the last word to the court.⁹⁰

Although there are contrary opinions in the literature, by which the "parties are able to waive judicial review of issues affecting private interest,"⁹¹ the leading interpretation is that courts must have a crucial role in giving effect to arbitral agreements. As we shall see in the following sections, European systems allow the courts to determine the issue of jurisdiction before the arbitral proceedings have been formally

89. Barceló III, *supra* note 59, at 1131.

90. Walter Habscheid, *Zur Kompetenz-Kompetenz nach der Neuen Schiedsrecht*, FESTSCHRIFT PETER SCHLOSSER 247 (2005).

91. REINHOLD GEIMER ET AL., ZIVILPROZESSORDNUNG, §1059, Par. 8 (30th ed. 2013).

initiated. Moreover, the Model Law legitimizes the parallel proceedings as a normal framework to solve arbitral jurisdictional issues, remaining silent on a specific provision such as a delegation clause by parties who decided on the arbitral agreement.⁹²

2. *The United Kingdom and Italian Law*

The Model Law has undoubtedly influenced the 1996 United Kingdom (“U.K.”) Arbitration Act. Thus, it makes detailed provisions concerning the relationship between arbitral tribunals and courts, mainly inspired by the provisions of Article 8(1) of the Model Law.⁹³ Nevertheless, viewed as a whole, Sections 9, 30-32, and 67 of the 1996 U.K. Arbitration Act provide a set of rules that shape an approach to competence-competence issues different than the Model Law and similar to the U.S. rule in light of *Henry Schein*.

Section 30(1) of the Model Law recognizes the competence-competence principle in which both the validity of the arbitral agreement and the arbitrability issue are generally submitted to the arbitrators’ decision “unless otherwise agreed by the parties.”⁹⁴ Several English decisions recognize the competence-competence principle even if they specify that arbitral tribunals are merely the first tribunal in its own jurisdiction. For example, there is the possibility of a subsequent de novo judicial review by the court of appeal that addresses both the jurisdictional issues and the merits of the case.⁹⁵

Although the U.K Arbitration Act recognizes the parties’ right to have an interlocutory decision by the court on arbitral jurisdiction absent a contrary clause, Section 9 applies for a stay of legal proceedings in order to give to the written arbitration agreement the

92. See Alan Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT’L ARB. 287, 349 (1999).

93. Thomas E. Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. L. J. 131, 143 (1998); see also John J. Barcelo III, *Kompetenz-Kompetenz and Its Negative Effects—A Comparative View* (Sep. 11, 2017), Cornell Legal Studies Research Paper No. 16-40.

94. Peter Aeberli, *Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map*, 21 ARB. INT. 253, 253 (1996).

95. *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40; see also *Dallah Real estate & Tourism Holding Co. v. Pakistan* [2010] UKSC 46.

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prior effect.⁹⁶ Section 9 explains a matter covered by the arbitration agreement is brought before the court.⁹⁷ These legal provisions highlight the court's discretionary power when it decides on the jurisdiction in order to consider the validity of the arbitration agreement itself.

These rules have been adopted to grant a decision by the arbitrators concerning their jurisdiction as quickly as possible, which may be subject to appeal. The parties may also ask the arbitrators to give an immediate partial award concerning the jurisdiction of the tribunal, thereby avoiding any delay in the review of that decision by the courts.

Furthermore, in *Fiona Trust & Holding Corp v. Privalov* the House of Lords notably stated:

The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. The clause should be construed under this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.⁹⁸

It is consistent with the broader systematic framework of other legal provisions in the U.K. Arbitration Act, including Section 30(2) and Section 67. The court may stay the proceedings brought before it and refer the decision to the arbitral tribunal under two circumstances. First, this can be done when the latter has already been established and arbitral proceedings are pending. Second, it may also occur when U.K. law provides for an early judicial review of any partial award on jurisdiction issued by the arbitral tribunal. Sections 9(1) and (4) properly balance the legitimacy and the efficiency of the arbitral proceedings since "if such early review is available, then the potential unfairness and inefficiency of sending a non-contenting party to the arbitration is significantly reduced."⁹⁹

To the contrary, Section 32 provides that a party may request the court to determine the jurisdiction of the arbitral tribunal. Under this

96. Carbonneau, *supra* note 96, at 137; Aeberli, *supra* note 97, at 278.

97. Carbonneau, *supra* note 96, at 137.

98. *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40.

99. Barcelo III, *supra* note 96, at 29.

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section, the courts may give its decisions on jurisdiction either with the permission of the arbitrators or if all parties agree.¹⁰⁰ The arbitrators will only grant such jurisdiction to the courts if the application submitted to the court does not constitute a strategic delay. In any case, the court must determine there are good reasons to decide on the jurisdiction in the place of the arbitral tribunal.¹⁰¹

The viewpoint of the proceedings' economic efficiency inspired the 1996 U.K. Arbitration Act. Whenever a party brings a lawsuit, the court has the discretionary power to refer the jurisdictional issue to arbitration.¹⁰² "The court looks for the most economical way to decide where the real dispute should be resolved: ...that is a matter of discretion, not jurisdiction."¹⁰³ Moreover, it is worth noting that, when the parties challenge the arbitration agreement's scope, the U.K. courts usually refer the decision to arbitrators.¹⁰⁴

Finally, a brief survey on the Italian arbitration law suggests the same conclusion about the potentially misleading parallel proceeding as a compromise solution. According to Articles 817 and 819 of the Italian Code of Civil Procedure, the Italian law establishes a preference for arbitration. The law enhances the arbitrators' power to determine their own jurisdiction when the arbitral tribunal is constituted, irrespective of the fact that the same issue is already pending in court.¹⁰⁵ Nevertheless, the recognized application of the competence-competence principle is only partial. It newly fights against the legitimation of the parallel proceeding and the court's power to decide the jurisdictional issue whenever the arbitral tribunal has not yet constituted.¹⁰⁶

100. *Id.*

101. *See* *Vale do Rio Doce Navegacao v. Shangai Bao Steel Ocean Shipping Co.* [2000] EWHC 205 (holding that Section 32 sets out the exceptional grounds on which the court may become involved in the decision concerning the jurisdiction of the arbitrators).

102. *See* *Excalibur Ventures LLC v. Texas Keystone Inc.* [2011] EWHC 1624; *see also* 1998 English Civil Procedure Rules 1998 62.8, § 3 (UK).

103. *Id.*

104. *Id.*

105. *See* CODE OF CIVIL PROCEDURE (It.), *translated in* COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE, (2006).

106. *Id.*

3. French Law

French law enforces the arbitral agreement when it has been decided by the parties.¹⁰⁷ In particular, the French Court of Cassation interprets the manifest nullity exception narrowly.¹⁰⁸ There are several instances where French law contradicts the U.S. legal rules. Under French law, the relation between arbitral tribunal and the court is inverted. The courts are authorized to decide, *prima facie*, jurisdictional issues when it is clear the parties did not intend to address arbitration, or they accidentally enforced an invalid arbitral agreement.¹⁰⁹ If arbitral proceedings have been commenced, the arbitrators are exclusively empowered to decide the jurisdictional issue, even if the award may be challenged before the courts.

CONCLUSION

The comparative evaluation shown through the recent trend of the U.S. Supreme Court on the delegation clause and the arbitrability issue highlight new considerations of the Model Law suggestions. While there is a dependence on the judiciary in implementing the arbitration effectively, *Henry Schein* can contribute to overcoming the impasse between the competence-competence declamation and the court's active role in resolving threshold issues of arbitration proceedings.

First, there must be a change in approach to avoid a predominant role of the court when the parallel proceeding is brought, particularly if the arbitral tribunal is not yet constituted. How long does the conflict between jurisdictions need to continue in order to resolve the jurisdictional issue? It is too soon to know whether *Henry Schein* will be a turning point on this transnational matter of arbitration proceedings. However, using a comparative approach, this article attempts to evaluate whether *Henry Schein* and its rationale in the U.S. could offer a renewed perspective to the European legal context.

According to the U.S. legal system, when a specific rule establishing the competence-competence principle as a cornerstone does not exist, the Supreme Court enhances the parties' consent to

107. Susler, *supra* note 85, at 122.

108. *Id.* at 13.

109. William Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules*, No. 15-40 Boston University School of Law, Public Research Paper (2015).

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arbitrators deciding jurisdictional issues. The matter is traditionally approached irrespective of the possibility of parallel proceedings because arbitral proceedings in accordance with the parties' choice has been favored. However, the question remains whether this choice can be considered as clear and unmistakable. This question is not crucial and, ultimately, returns to correctly drafting the arbitral agreement and delegation clause.¹¹⁰

Nevertheless, the potential impact from *Henry Schein*, beyond the United States, stems from the absence of a specific rule focusing on the competence-competence principle. The relevant points of *Henry Schein* are undoubted when viewed through the lens of a European legal scholar. *Henry Schein* offers food for thought regarding innovative considerations, mainly for all legal systems that have a specific provision on that principle. In other words, in accordance with arbitration's purpose, arbitrators must have exclusive power in deciding gateway issues whenever parties request it. The willingness of the parties to choose arbitration in lieu of judicial litigation dominates in determining whether arbitrators or the court must take the lead in deciding jurisdictional issues.

Additionally, *Henry Schein* introduces an argument which properly highlights the bias related to the parallel proceeding brought to the court. It "inevitably spark[s] collateral litigation" and creates "such a time-consuming sideshow."¹¹¹ Honoring an explicit agreement by parties for an arbitrator to decide jurisdictional threshold issues includes a twofold policy. First, it enhances the crucial standpoint of arbitration proceedings, as the parties agree to resolve their disputes out of the court. Second, in doing so, it makes the competence-competence principle effective, even though it does not directly apply to statutory law. Therefore, it is reasonable to consider parties' consent to arbitration where the governing law does not acknowledge the competence-competence principle.

There is a partial similarity between the Court's solution in *Henry Schein*, enhancing the parties' willingness through the effectiveness of the delegation clause, and the so-called negative effect of the

110. Charles B. Rosenberg, *Henry Schein v. Archer & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause*, 8 AM. U. BUS. L. REV. 381, 393 (2020).

111. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

competence-competence principle set directly by the law. There is a difference between a system that recognizes the arbitrator's exclusive power to determine its jurisdiction, if parties want it, and the system that tries to achieve this result by statutory law. If the attribution of this power is a natural corollary of the establishment of equal status for the arbitrators and the ordinary courts when exercising judicial powers, then it is necessary to understand how to guarantee the autonomy of arbitration whenever the law, and not the delegation clause, provides.

The possibility of disputing arbitrability before the courts (and generally the allocation of jurisdiction on the merits) whenever the arbitral tribunal has constituted, undermines arbitration autonomy. It provides guarantees to the parties only if the court subsequently finds that it has exclusive jurisdiction. On the other hand, if the court upholds the jurisdiction of the arbitrators, and if arbitral proceedings are not yet pending, there will be the twofold defect of not defending arbitration autonomy, causing it to be inefficient, deferring its launch, and undermining one of the reasons why the parties committed to the arbitration agreement. Moreover, if the arbitration has launched and pursued pending a decision by the courts, the arbitrators will have exposed the parties to a potential inefficiency whenever the court subsequently denied the arbitral jurisdiction.

The French model notably offers an interesting solution, so that it is no surprise that this model is typical of the international conventions adopted in the area of arbitration and international trade. This model is sensitive to the parties' intention to adopt the arbitration mechanism for resolving disputes as an alternative to the jurisdiction of the courts. The French model is centred on the so-called negative effect of the competence-competence principle, which requires the court to defer to the arbitrators regarding questions of jurisdiction. This has the effect of rendering the court's role in that decision minimal. The court intervenes only to consider whether the arbitration agreement is *prima facie* manifestly incapable of establishing the arbitral jurisdiction on the merits. After a full review the court establishes jurisdiction by a binding decision, deciding either on the merits of the dispute (if the party filed such a request) or deciding only on the issue of jurisdiction, if the party apprised the courts of the matter exclusively for that purpose. In any case, pending a decision by the courts, it will not be possible to either launch or pursue arbitral proceedings.

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This solution suggests a complementary role for the court which is capable of using parallel proceedings as an instrument for arriving at a preliminary and effective solution to the “gateway issue” and not as a potential delaying tactic by one of the parties. There are two aspects to this solution: first, the *prima facie* prognosis that the arbitration agreement is null and void, and second, the automatic staying of the arbitration whenever the court arrives at a due assessment following a full review that the arbitral tribunal lacks jurisdiction. This is the best solution because it tries to avoid the parallel proceedings regarding arbitral jurisdiction.

Thus, *Henry Schein* introduces renewed considerations and provides a different perspective on this issue, aiming for a more uniform and harmonized provision. This solution addresses the crucial role of the parties’ consent to arbitration and the outstanding American doctrine on “contracting for procedure,” as noted in the Introduction of this article.

The turning point between the U.S. system and the Europeans system is undoubtedly the provision of the competence-competence principle. This kind of provision makes it difficult to strike an appropriate balance between legitimacy and efficiency of the arbitral proceedings. The parallel proceedings appear to naturally follow that principle.

On the contrary, the U.S. delegation clause and the recent interpretation offered by *Henry Schein* centres on the parties’ full-size role. It also demonstrates the risk of inefficient arbitration stemming from concerns over wasting time and money, while fully and effectively safeguarding the original agreement, thereby disallowing arbitral jurisdiction decision from the organs of public justice. While the U.S. arbitration system does not expressly provide guidance on the competence-competence principle, it does grant the parties, who have agreed to arbitration, a more consistent application of the arbitrators’ powers and duties.

The milestone that emerges from *Henry Schein* is, in sum, the crucial role assumed by the parties’ intent, a precise statutory provision, and delegating the decision on threshold jurisdictional issues to the arbitral tribunal. Accordingly, within the systems expressly providing the prior arbitrators’ power in so deciding, the parties should expect a twofold chance to preserve their will for having chosen arbitration proceeding.

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With unchanged regulatory provisions, parties could contract domestic and country-specific arbitration procedures, introducing a delegation clause to enhance the declamation of the competence-competence principle. Alternatively, the U.S. system should change regulatory provisions, requiring declamation to be more effective. It should also directly provide the so-called negative effect of this principle. The parties should play a central role, precisely avoiding these negative effects and requiring the concurrent jurisdiction of courts in deciding all gateway issues.