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Court or Arbitrator—Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?

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COURT OR ARBITRATOR—WHO DECIDES WHETHER RES JUDICATA BARS SUBSEQUENT ARBITRATION UNDER THE FEDERAL ARBITRATION ACT?

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I. INTRODUCTION

Once upon a time, courts blanched at the idea of arbitration. Perfectly respectable people would opt to settle their disputes by arbitration only to find that the courts would not enforce agreements to arbitrate, never mind arbitral awards.[1] Jealous of their role and function, courts justified their hostility on the ground that arbitration agreements improperly "ousted [the courts] from their jurisdiction."[2] However, the world of arbitration and the way it is perceived by courts have undergone a revolution. Arbitration now rivals, if it has not already displaced, court adjudication as the preferred means of resolving civil disputes.[3] Part of this phenomenon has to do with a general acknowledgment of the inherent advantages of arbitration over litigation, including its ease of procedure, greater speed and privacy, and its drawing on expert knowledge in the

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1. *See generally* STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, ARBITRATION: CASES AND MATERIALS 7-11 (1998) (discussing the historical roots of American arbitration, including traditional resistance to and eventual acceptance of arbitration by courts).

2. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) (citation omitted).

3. G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 626-27 (1988) ("Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes.").

adjudication of the dispute.[4] Another significant part of this phenomenon has been the fostering of legislative and judicial policies favoring arbitration.[5] In particular, the Federal Arbitration Act of 1925[6] renders enforceable any written agreement to arbitrate an existing or future dispute, allowing for the judicial review of any resulting arbitral award only on the most narrow of grounds.[7] In other words, arbitration is today prized for its *differences* from court adjudication—differences that have effectively been endorsed by the legislature and by the parties themselves.

As with so many post-modern stories, however, this one doesn't end happily ever after. Despite Congress's endorsement of arbitration in passing the Federal Arbitration Act, courts still prevent parties from fully realizing the benefits of arbitration by issuing ill-reasoned rulings on the subject of res judicata in the context of arbitration.[8] Specifically, where there has been a prior decision by a court or arbitrator that relates to the matter at issue in a subsequent arbitration, courts are unable to answer in a principled way the fundamental question of who—court or arbitrator—gets to decide whether the prior decision bars the subsequent arbitration by virtue of the doctrine of res judicata. The problem is that legislative policies embodied in the Federal Arbitration Act are frustrated when federal courts improperly determine that they, and not arbitrators, should decide the issue. As a result, the courts impose a judicial resolution process that the parties did not bargain for. This increased and unnecessary judicial intervention effectively denies parties their freedom to contract, as well as

4. *See* John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998) ("[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the 'language and workings of the shop,' may best serve the interest of the parties." (citations omitted)); Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129, 133 (2d Cir. 1996) ("The advantages of arbitration are well-known. Arbitration is 'usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules . . . ." (citation omitted)).

5. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration . . . .").

6. Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-14 (2000).

7. Indeed, the Federal Arbitration Act of 1925 was passed to counter the then-existing judicial bias against arbitration. *See infra* Part III.

8. *See* discussion *infra* Part IV.

the benefits of arbitration to which they are entitled.[9]

Thus, in order to provide parties assurance that the arbitration clauses in their contracts will be respected, and to avoid the associated and unexpected costs of litigation, the issue of who determines the res judicata effect of a prior decision in subsequent arbitration should be resolved definitively. Yet courts have reached divergent conclusions on this issue.[10] Some courts have held that they should decide the issue,[11] while others have maintained that the arbitrators should determine whether res judicata applies.[12] Careful consideration of the cases, however, reveals that these two viewpoints can be reconciled. The key to such reconciliation is determining whether the prior decision is an earlier judgment of the same court now deciding the res judicata question. If the prior decision was issued by the same court, that court should determine whether res judicata applies.[13] On the other hand, if the prior decision was an arbitral award or a judgment issued by a different court, then the arbitrator should decide whether that prior decision precludes subsequent arbitration.[14] In other words, the general rule is that res judicata is an issue for arbitrators.[15] The limited exception to this rule applies when the prior decision is an earlier judgment of the same court asked to decide the res judicata issue.[16] Significantly, this rule is not only supported by the case law, but is also justified by fundamental principles governing arbitration.

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9. *See* Prod. & Maintenance Employees' Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1163 (7th Cir. 1990) (en banc) ("Arbitration clauses are agreements to move cases out of court, to simplify dispute resolution, making it quick and cheap. . . . Arbitration will not work if legal contests are its bookends: a suit to compel or prevent arbitration, the arbitration itself, and a suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once. Reluctance to see the benefits of arbitration smothered by the costs and delay of litigation explains the tendency of courts to order a party feebly opposing arbitration (or its outcome) to pay the winner's legal fees. Anything less makes a mockery of arbitration's promise to expedite and cut the costs of resolving disputes." (citations omitted)).

10. *See* discussion *infra* Part IV.

11. *See* discussion *infra* Part IV.A.

12. *See* discussion *infra* Part IV.B.

13. *See* discussion *infra* Part V.

14. *See* discussion *infra* Part V.

15. *See* discussion *infra* Part V.B.

16. *See* discussion *infra* Part V.C.

Arbitration is, above all, a matter of contract.[17] This means that no party can be forced to arbitrate an issue unless it has entered into an enforceable arbitration agreement. By the same token, where parties have agreed to arbitrate an issue, they should be held to that agreement, and any dispute arising in relation thereto should be resolved by arbitration, not through the courts. As explained below, the defense of res judicata, like any other affirmative defense,[18] is part of the merits of the dispute and should be resolved accordingly.[19] Therefore, when parties agree to arbitrate an issue, they necessarily agree to arbitrate any affirmative defense relating thereto, including that of res judicata, unless they specifically provide otherwise. In the absence of any legal or equitable grounds for revoking these contracts, courts must respect such arbitration agreements by enforcing them under the Federal Arbitration Act, thereby allowing arbitrators to determine the res judicata effect of prior decisions.[20]

However, where the prior decision is a judgment issued by the court that is being asked to compel arbitration, a different result is called for. In this instance, the ability of the court to protect the integrity and the effectiveness of its own judgments is uniquely at stake. Having issued the decision in question, the court is best qualified to assess its scope and effects, including the extent to which it bears on the question of the preclusion of subsequent arbitration. Under these exceptional circumstances, the court rather than the arbitrator should be called upon to consider any preclusion issues arising from the prior judgment.

In sum, the general rule is that arbitrators should determine the res judicata effect of prior decisions on subsequent arbitration, except when the prior decision is the court's own judgment. Where the earlier decision is that of the same court, the court should decide the res judicata issue. This article is structured as follows. Part II briefly reviews the concept of res judicata and its general application in the context of arbitration. Part III examines the Federal Arbitration Act and the context in which preclusion issues

17. *See* 9 U.S.C. § 2 (2000).

18. Examples of affirmative defenses to a claim include laches and the statute of limitations. *See infra* text accompanying note 138.

19. *See infra* text accompanying notes 89-90, 103, 138.

20. *See* 9 U.S.C. § 2.

affecting subsequent arbitration arise before federal courts. Part IV discusses some of the relevant decisions regarding who should determine whether res judicata bars subsequent arbitration, and notes the apparent divergence of authorities. Part V reconciles the cases to disprove the idea that any true divergence exists, and explains the proposed rule. Part VI examines Supreme Court decisions on the more general question of who should decide whether any particular dispute is arbitrable, and analyzes their relevance to the proposed rule. Finally, Part VII, while noting the general applicability of the proposed rule, examines and clarifies particular situations in which its application is more complex.

II. RES JUDICATA

The doctrine of res judicata refers to the binding effect of a judgment in a prior case on the claims or issues in subsequent litigation.[21] Conceptually, the doctrine has two primary applications, sometimes referred to as true res judicata, or claim preclusion, and collateral estoppel, or issue preclusion.[22] True res judicata prevents a party from suing on a claim or cause of action that has or could have been determined by a competent court in a final and binding judgment.[23] Collateral estoppel prevents relitigation of specific issues actually litigated and determined by a final judgment, where the issues were essential to the judgment.[24] This article is primarily concerned with true res judicata, and any reference herein to res judicata is to true res judicata, unless otherwise indicated.[25]

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21. *See* BLACK'S LAW DICTIONARY 1336-37 (8th ed. 2004).

22. *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (explaining that res judicata "consist[s] of two preclusion concepts: 'issue preclusion' and 'claim preclusion'").

23. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.10[1][a] (3d ed. 2000) ("*Claim preclusion* prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action.").

24. *See Migra*, 465 U.S. at 77 n.1; 18 JAMES WM. MOORE ET AL., *supra* note 23, § 131.10[1][a] ("*Issue preclusion* prevents relitigation of issues actually litigated and necessary for the outcome of the prior suit, even if the current action involves different claims.").

25. It is important to keep the two applications separate because, as we shall see, the answer to the question concerning who should determine the

There are several policy considerations underpinning the doctrine of res judicata. First, the nature of courts requires that their judgments be treated as final and authoritative; courts do not sit to render "advisory opinions."[26] Second, the parties are entitled to repose.[27] Third, both the public and the parties should be protected against the costs associated with duplicative litigation.[28] Finally, the integrity of the judicial system is threatened by the prospect of inconsistent and conflicting outcomes.[29] In sum, the doctrine of res judicata serves to secure finality in judicial proceedings and to promote the efficient administration of justice.[30]

It is well-settled that the doctrine of res judicata and its underlying policies apply in equal measure to arbitral awards.[31] The Second Restatement of Judgments provides that "a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."[32] Indeed, as one commentator has noted, "courts have long held that res judicata applies to arbitration awards."[33] This statement is logical, given the strong legislative and judicial policies favoring arbitration. After all, arbitration cannot be a fully effective alternative to litigation if parties who have elected to arbitrate a dispute are permitted to litigate matters determined in a prior arbitration. If anything, the doctrine of res judicata should be applied even more assiduously in the

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preclusive effects of a prior decision may vary depending on whether true res judicata or collateral estoppel is involved. *See infra* Part VII.C.

26. *See* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 14 (2001).

27. *See id.* at 16.

28. *See id.* at 16-17.

29. *See id.* at 18.

30. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

31. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (1982) [hereinafter RESTATEMENT]; *see also* Dial 800 v. Fesbinder, 12 Cal. Rptr. 3d 711, 724 (Cal. Ct. App. 2004) ("As a general matter, an arbitration award is the equivalent of a final judgment which renders all factual and legal matters in the award res judicata." (citation omitted)); Apparel Art Int'l, Inc. v. Amertex Enters., 48 F.3d 576, 585 (1st Cir. 1995) ("An arbitration award generally has res judicata effect as to all claims heard by the arbitrators." (citations omitted)); Simpson v. Westchester, 773 N.Y.S.2d 881, 882 (N.Y. App. Div. 2004) (noting that "the doctrine of res judicata applies to arbitration awards").

32. RESTATEMENT, *supra* note 31, § 84(1).

33. Shell, *supra* note 3, at 641 (citing N.Y. Lumber & Wood-Working v. Schnieder, 119 N.Y. 475 (1890); Brazill v. Isham, 12 N.Y. 9 (1854)).

context of arbitration, since the intent underlying both concepts is to avoid unnecessary litigation.[34] It would be ironic to find that purpose thwarted at precisely the point where the two coincide. Indeed, a failure to apply res judicata to arbitral awards would deviate from the spirit, if not the letter, of the Federal Arbitration Act (the "Act" or "Arbitration Act").[35]

III. THE FEDERAL ARBITRATION ACT

In enacting the Arbitration Act, Congress sought to "reverse[] centuries of judicial hostility to arbitration agreements" by "plac[ing] arbitration agreements 'upon the same footing as other contracts.'"[36] The Act accomplishes this purpose by providing in § 2, the operative core of the Arbitration Act, that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[37]

Thus, all arbitration agreements involving transactions that affect interstate and international commerce are subject to the Arbitration Act,[38] which requires their enforcement except under limited circumstances.[39] In more general terms, the Arbitration Act federalizes arbitration law and "creates a

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34. *Cf.* Miller Brewing Co. v. Fort Worth Distrib. Co. Inc., 781 F.2d 494, 497 n.3 (5th Cir. 1986) ("[A]rbitration is ordinarily preferable to litigation, but to allow arbitration on top of the protracted litigation in this case would be to add insult to injury. The doctrine of res judicata . . . [has] probably done more to prevent useless and wasteful litigation than arbitration ever could.").

35. *See* 9 U.S.C. § 2 (2000).

36. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 68-96 at 2 (1924)).

37. 9 U.S.C. § 2.

38. Section 1 of the Act defines "commerce," in part, as "commerce among the several States or with foreign nations." *Id.* § 1.

39. *Id.* ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate."[40]

The Arbitration Act permits district court involvement in the arbitration process in two primary ways.[41] The first arises prior to arbitration when a party resists arbitration under an existing arbitration clause.[42] In such a case, the Act allows a district court to compel or enjoin arbitration as the circumstances may dictate.[43] The second arises after arbitration when enforcement of an arbitral award is sought.[44] There, the statute authorizes the district court to confirm, vacate, or modify the award under a narrow scope of judicial review.[45]

Beyond these two circumscribed functions, the Act does not authorize court involvement in enforcing arbitration. Indeed, courts are "to exercise the utmost restraint and to tread gingerly before intruding upon the arbitral process."[46] The reason for this restrained approach is that "[a]rbitration is, above all, a matter of contract and courts must respect the parties' bargained-for method of dispute resolution."[47] The idea behind the Act is that arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[48] However, where the parties have agreed to arbitrate a dispute, the Act requires that they be held to their agreement.[49] As the Supreme Court has noted, the "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."[50] The net effect is that the Act

40. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

41. *See* John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 136 (3d Cir. 1998) (citing Local 103 of the Int'l Union of Elec., Radio, & Mach. Workers v. RCA Corp., 516 F.2d 1336, 1339 (3d Cir. 1975)).

42. *Id.*

43. *See* 9 U.S.C. §§ 3, 4 (2000); PaineWebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990).

44. *See Olick*, 151 F.3d at 136.

45. 9 U.S.C. §§ 9-11.

46. Lewis v. Am. Fed'n of State, County, & Mun. Employees, 407 F.2d 1185, 1191 (3d Cir. 1969).

47. *Olick*, 151 F.3d at 136-37 (citing Local 1545, United Mine Workers v. Inland Steel Coal Co., 876 F.2d 1288, 1293 (7th Cir. 1989)).

48. Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

49. *See* 9 U.S.C. § 2.

50. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1984) (footnote

strongly favors a policy of respecting agreements to arbitrate, and courts must avoid intruding upon arbitration proceedings in the absence of explicit statutory authorization.

Accordingly, when a party raises the defense of res judicata in resisting arbitration, the court's task under the Act is limited to determining whether the parties agreed to arbitrate the particular dispute, and ordering the parties to proceed to arbitration "in accordance with the terms of the agreement" when such agreement is found.[51] More specifically, in order to compel arbitration, the district court must first affirmatively answer the following questions: (1) whether the parties seeking or resisting arbitration have a valid arbitration agreement; and (2) whether the particular dispute between those parties—in this case, the question of res judicata—falls within the contours of the arbitration agreement.[52] These two issues determine the "arbitrability" of the dispute.[53] In any event, it is plain that both questions, however defined, must be proved and answered in the affirmative before the court may compel arbitration under the Arbitration Act. Where these questions are answered in the affirmative, the court's duty under the Arbitration Act, absent any "grounds that exist at law or [in] equity for the revocation of any contract,"[54] is to compel arbitration and allow the

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omitted).

51. 9 U.S.C. § 4.

52. *See Olick*, 151 F.3d at 137 (noting that under the Arbitration Act, both questions were "threshold questions [that] a district court must answer before compelling or enjoining arbitration"); *see also* PaineWebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990) (noting that courts need only "engage in a limited review to ensure that the dispute is arbitrable—i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement").

53. *Olick*, 151 F.3d at 137. Some authorities refer to "arbitrability" only in terms of either Question (1) or (2). *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 944-45 (referring only to Question (1) as involving "arbitrability"); JOHN S. MURRAY ET AL., ARBITRATION 107 (1996) (referring only to Question (2) as a matter of "arbitrability"). Arguably, however, the question of "arbitrability" necessarily encompasses both questions since both questions are distinct and must be answered before one can conclude that a dispute is in fact arbitrable. *See also* Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129, 135 (2d Cir. 1996) ("The 'arbitrability' of a dispute comprises the questions of (1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement."). This article therefore employs the term "arbitrability" to include both questions.

54. 9 U.S.C. § 2.

arbitrator to adjudicate the substantive dispute from that point forward. On the other hand, if the court finds that the issue is not arbitrable, then the court gets to decide the res judicata question.

While this two-part process represents the proper framework in which to analyze arbitrability under the Arbitration Act, courts have not always been systematic in approaching this inquiry. Courts do not always explain the statutory context in which the claims arise or ground their reasoning in the structure of the Act.[55] For example, some courts have simply focused on the question of whether the court or the arbitrator is the more appropriate decisionmaker.[56] Although this question has relevance to the broader inquiry, it is only part of that inquiry.[57] The sometimes haphazard manner in which the courts have approached this problem has only contributed to the appearance of an incoherent case law in which the federal courts are stubbornly split on the question of who should determine the issue of res judicata.

IV. THE APPARENT DIVERGENCE OF AUTHORITIES

In addressing the question of whether courts or arbitrators should decide the res judicata issue, the federal courts have reached seemingly disparate and conflicting conclusions. Some courts of appeals have held that the preclusive effect of a prior decision on subsequent arbitration is to be decided by a court,[58] while others have ruled that it should be decided by an arbitrator.[59] Yet other courts of

55. *See, e.g.*, *In re* Y & A Group Sec. Litig., 38 F.3d 380, 382-83 (8th Cir. 1994) (holding that a court should determine the res judicata question by focusing on a court's power to defend its judgment but without specifically relating it to the Arbitration Act).

56. *See, e.g.*, *id.* at 383 (holding that the court should decide the res judicata issue where the prior decision at issue was a judgment of the court because "[t]he district court, and not the arbitration panel, is the best interpreter of its own judgment").

57. *See infra* Part V.

58. *See, e.g.*, *In re Y & A*, 38 F.3d at 383; Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1068 (11th Cir. 1993), *cert. denied*, 510 U.S. 1011 (1993).

59. *See, e.g.*, Consol. Coal Co. v. United Mine Workers of Am., Dist. 12, Local Union 1545, 213 F.3d 404, 407 (7th Cir. 2000) ("[T]he question of the preclusive force of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator to decide."); Chiron Corp. v. Ortho Diagnostic Sys.,

appeals have determined that it should be decided by both courts and arbitrators.[60]

A. Cases Holding that the Court Should Determine the Res Judicata Issue

Two notable cases holding that the court should determine the res judicata issue are *Kelly v. Merrill Lynch*[61] and *In re Y & A Securities Litigation*.[62]

In *Kelly*, plaintiff customers initially brought a suit in federal court against Merrill Lynch alleging violations of federal securities laws. An agreement between the parties provided that "[e]xcept to the extent that controversies involving claims arising under the federal securities laws may be litigated, any controversy between [the parties] . . . shall be settled by arbitration."[63] After the district court granted summary judgment to Merrill Lynch on those claims, plaintiffs initiated arbitration of several state common-law claims. Merrill Lynch considered these state claims to be based on the same conduct underlying the earlier litigation,[64] and responded by filing a motion for a preliminary injunction against the arbitration, which the court granted.[65]

On appeal, the Eleventh Circuit affirmed, holding that res judicata barred arbitration because the plaintiffs could have, but did not, bring their state law claims in the earlier litigation.[66] In doing so, the court determined that the district court, rather than the arbitrator, should determine the res judicata effect of prior litigation.[67] Noting the Act's policy favoring arbitration, the court stated that "the general rule for deciding which questions belong to the courts is that,

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Inc., 207 F.3d 1126 (9th Cir. 2000); Indep. Lift Truck Builders Union v. NACCO Materials Handling Group, Inc., 202 F.3d 965, 968 (7th Cir. 2000) ("[T]he preclusive effect of an arbitrator's decision is an issue for a subsequent arbitrator to decide."); Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129 (2d Cir. 1996).

60. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 138-40 (3d Cir. 1998).

61. Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067 (11th Cir.), *cert. denied*, 510 U.S. 1011 (1993).

62. *In re* Y & A Group Sec. Litig., 38 F.3d 380 (8th Cir. 1994).

63. *Kelly*, 985 F.2d at 1068 n.1.

64. *Id.* at 1068.

65. *Id.*

66. *Id.* at 1070.

67. *Id.* at 1069.

while federal courts can decide if an issue is arbitrable or not, they cannot reach the merits of arbitrable issues."[68] Notwithstanding this rule, however, the court rejected plaintiffs' argument that the issue of res judicata, as an affirmative defense that went to the merits of the claims, should be left to arbitration.[69] The court held instead that courts could decide res judicata, as the issue was "not just one of preventing the piecemeal litigation that occurs when parties simultaneously assert claims in several forums, but of protecting prior judgments."[70]

Similarly, in *In re Y & A Group Securities Litigation*,[71] the Eighth Circuit Court of Appeals affirmed the district court's decision to enjoin arbitration on the grounds that it was precluded by a prior consent judgment.[72] In *In re Y & A*, the arbitration panel had previously considered, but *rejected*, the argument that arbitration was precluded.[73] This means that the court of appeals determined not only that a district court should determine the res judicata issue, but that it could also override an arbitrator's decision on that issue. Rejecting the appellant's argument that the district court was not permitted to reconsider the arbitration panel's decision, the court of appeals noted that the panel's decision was ultimately based on its interpretation of the settlement agreement incorporated in the district court's final judgment.[74] Therefore, it was "[t]he district court, and not the arbitration panel, [who was] the best interpreter of its own judgment," and who had the final say in the matter.[75]

While *Kelly* and *In re Y & A* stand for the proposition that courts should determine the res judicata issue, as set forth in the following section, other cases have concluded that the arbitrator, and not the court, should determine the res judicata effect of a prior decision.

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68. *Id.* (citations omitted).
69. *Kelly*, 985 F.2d at 1069.
70. *Id.*
71. *In re* Y & A Group Sec. Litig., 38 F.3d 380 (8th Cir. 1994).
72. *Id.* at 381.
73. *Id.*
74. *Id.*
75. *Id.* at 383.

B. Cases Holding that the Arbitrator Should Determine the Res Judicata Issue

More recently, some courts have held instead that the arbitrator should decide the res judicata issue. Two notable cases are *National Union Fire Insurance Co. v. Belco Petroleum Corp.*[76] and *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*[77]

National Union was one of the first federal appellate decisions to depart from precedent by determining that the arbitrator should decide the res judicata issue, thereby creating an apparent divergence of authority.[78] In that case, the insured, ("Belco"), had been awarded $144.9 million (ninety percent of its $161 million loss) plus interest in a prior arbitration against the insurers ("National Union") for certain oil exploration and development operations seized by the Peruvian government.[79] These seized interests were covered under a confiscation, expropriation, and deprivation insurance policy issued by National Union.[80] The following year, Belco separately recovered $2.925 million under a maritime insurance policy with an expropriation endorsement issued by a different insurer, Seahawk International Associates, Inc., covering certain vessels that had also been taken by Peru.[81] Subsequently, National Union served Belco with a demand for arbitration under the expropriation policy, seeking to recoup a portion of the $2.925 million proceeds on the ground that National Union's expropriation policy required any recoveries for loss outside the policy to be shared between the insurers.[82] Belco responded by seeking a declaratory judgment in federal court that National Union's claim was barred by res judicata.[83] National Union subsequently filed a petition to compel arbitration.[84] The district court held that the arbitrator should decide the res

76. Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129 (2d Cir. 1996).
77. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126 (9th Cir. 2000).
78. *See Nat'l Union*, 88 F.3d at 136.
79. *Id.* at 131.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 132.
84. *Nat'l Union*, 88 F.3d at 132.

judicata issue, and accordingly granted National Union's petition to compel arbitration.[85]

On appeal, the Second Circuit affirmed the district court's order compelling arbitration.[86] Critical to the decision was the fact that the arbitration clause was broadly rendered to include "[a]ll disputes which may arise under or in connection with [the expropriation] policy"[87] and that under the Arbitration Act, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[88] Belco's claim of preclusion was no more than a legal defense to National Union's claim, and as such, was "itself a component of the dispute on the merits,"[89] being "as much related to the merits as such affirmative defenses as a time limit in the arbitration agreement or laches, which are assigned to an arbitrator under a broad arbitration clause similar to the one in the [expropriation policy]."[90]

Like the Second Circuit Court of Appeals, the Ninth Circuit, in *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*,[91] held that the res judicata effect of a prior arbitral award on a subsequent arbitration should be decided by an arbitrator rather than the court.[92] In *Chiron*, the plaintiff biotechnology company entered into a joint business arrangement with the defendant company.[93] The agreement memorializing the joint undertaking provided for the arbitration of any disputes arising thereunder.[94] When a dispute arose between the parties, the plaintiff filed a declaratory judgment action in federal court seeking an order compelling arbitration of the dispute.[95] In response, the defendant moved for summary judgment on the ground that a prior arbitral award issued in favor of the defendant operated as res judicata to all claims the plaintiff sought to raise in a second arbitration

85. *Id.*
86. *Id.* at 136.
87. *Id.* at 132.
88. *Id.* at 135.
89. *Id.*
90. *Nat'l Union*, 88 F.3d at 136 (citations omitted).
91. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126 (9th Cir. 2000).
92. *See id.* at 1132.
93. *Id.* at 1128.
94. *Id.*
95. *Id.* at 1129.

proceeding.[96] The district court concluded, however, that the res judicata defense was itself an arbitrable issue within the scope of the parties' agreement, and therefore granted the plaintiff's request for an order compelling a second arbitration.[97] On appeal, the Ninth Circuit affirmed the decision of the district court.[98]

Notably, while the defendant acknowledged that the dispute itself was subject to arbitration, it argued that a defense of res judicata should be treated differently from the merits of the dispute.[99] The defendant's argument was premised on the notion that the court would make a better decision than an arbitrator or that it was unfair to leave the issue to an arbitrator.[100] Rejecting these arguments, the court of appeals instead affirmed the contractual nature of arbitration, noting that the defendant had already elected to arbitrate all disputes under the parties' agreement.[101] The court further noted that the detailed procedures for alternate dispute resolution as negotiated by the parties demonstrated that the defendant's election to arbitrate was deliberate.[102] Citing *National Union* with approval, the court observed that the res judicata defense, like any other affirmative defense, was part of the merits of the dispute that was plainly arbitrable under the unambiguously broad arbitration clause in the agreement between the parties.[103] Therefore, the court held that the arbitrator should decide the issue of res judicata.

C. Cases Holding that Both the Court and the Arbitrator Should Determine the Res Judicata Issue

In addition, a third category of cases has held that *both* the court and the arbitrator should decide the res judicata issue. In *John Hancock Mutual Life Insurance Co. v. Olick*,[104]

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96. *Id.*
97. *Chiron*, 207 F.3d at 1129.
98. *Id.* at 1134.
99. *Id.* at 1132.
100. *Id.*
101. *See id.* The parties' agreement provided that the parties were to submit to arbitration "any dispute, controversy or claim arising out of or relating to" the agreement. *Id.* at 1128.
102. *See id.* at 1132.
103. *See Chiron*, 207 F.3d at 1132, 1134.
104. John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132 (3d Cir. 1998).

the Third Circuit addressed the preclusive effects of both a prior court judgment and a prior arbitral award on subsequent arbitration, and held that the court should decide the former, whereas the arbitrator should resolve the latter. In that case, an employee (Olick) had filed a Statement of Claim with the National Association of Securities Dealers ("NASD") against his employer, John Hancock, seeking the arbitration of certain tort claims.[105] In response, the employer sought a declaration in federal court that Olick's claims before the NASD were barred by res judicata as a result of two prior decisions.[106] One of the decisions was an arbitral award issued a year earlier by NASD in favor of Olick in an arbitration between the parties relating to certain limited partnership transactions.[107] The other decision was a district court judgment denying an action brought by third parties against both Olick and the employer and in which Olick had cross-claimed against the employer.[108]

The district court denied the employer's request for the declaration on the grounds that the arbitrator, rather than the court, should determine res judicata issues under the Arbitration Act.[109] The employer then filed a motion for reconsideration, which the court also denied.[110] In so doing, the district court expressly declined to apply case law cited by the employer for the proposition that courts, and not arbitrators, determine res judicata issues stemming from a prior judgment rendered by a federal court.[111] The court noted that the cited case law was distinguishable from the "hybrid" situation before it, which involved "*both* a prior arbitration *and* a prior federal court decision."[112] On appeal, the Third Circuit rejected such a distinction as simplistic and unhelpful.[113] Instead, it proceeded to analyze separately the res judicata effect arising from the prior judgment, and

105. *See id.* at 134.
106. *See id.*
107. *See id.*
108. *See id.*
109. *Id.*
110. *Olick*, 151 F.3d at 134.
111. *See id.* These cases include *In re Y & A Group Securities Litigation*, 38 F.3d 380 (8th Cir. 1994), and *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir. 1993), *cert. denied*, 510 U.S. 1011 (1993), both of which were discussed above. *See supra* Part IV.A.
112. *Olick*, 151 F.3d at 134.
113. *Id.* at 138-39.

arbitral award, respectively.[114]

With respect to the judgment, the Third Circuit observed that "many federal courts have held as a matter of law that claims of res judicata based on a prior federal judgment must be decided by the district court before compelling or enjoining arbitration,"[115] although it also noted that not all courts had reached the same conclusion.[116] Significantly, however, this position was adopted in an earlier Third Circuit decision, *Telephone Workers Union of New Jersey v. New Jersey Bell Telephone Co.*,[117] which the lower court in *Olick* had declined to apply because of the "hybrid" situation.[118] Ultimately, the court of appeals followed its own precedent and resolved the issue in favor of district court jurisdiction to decide the effect of the res judicata defense, and thereby reversed the district court's decision on that issue.[119] Regarding the arbitral award, however, the court of appeals reached the opposite conclusion, holding that the district court had correctly determined that the arbitrator should decide its res judicata effect.[120]

The court explained this difference in result by referring to the terms of the parties' arbitration agreement. Under that agreement, the parties were to submit any dispute arising out of the business of any NASD member to arbitration, and any resulting arbitral awards were to be "final and not subject to review or appeal."[121] The agreement further provided that the arbitrators were empowered to interpret and determine the applicability of all provisions of the relevant arbitration procedure.[122] Since the question of res judicata goes to the nature and extent of the finality of the award, which the parties had agreed was a matter for arbitrators, it was for the arbitrator and not the court to

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114. *Id.* at 139 ("When a party resisting arbitration bases its claim of res judicata not only on a prior judgment but also on the existence of a prior arbitration, the analysis must focus on each aspect of the claim; hybrid facts do not call for a hybrid analysis.").

115. *Id.* at 137 (citations omitted).

116. *See id.* at 137-38.

117. Tel. Workers Union of N.J. v. N.J. Bell Tel. Co., 584 F.2d 31 (3d Cir. 1978).

118. *Olick*, 151 F.3d at 138-39.

119. *See id.* at 139.

120. *Id.* at 140.

121. *Id.*

122. *Id.*

determine the preclusive effect of the prior arbitration award.[123] In sum, the court of appeals held that the district court should determine the res judicata effect of its judgment, whereas the arbitrator should decide the res judicata effect of an arbitral award.

D. Summing Up the Three Categories of Cases

As set forth above, courts are seemingly divided on the question of who decides the merits of a res judicata defense. The answer appears to vary depending on whether the court chooses to emphasize the contractual nature of arbitration, in which case arbitrators will determine the res judicata issue, or to focus instead on the need to protect the integrity of the prior decision, in which case the court gets to decide the issue. As explained below, however, both concerns are valid and have their place within the framework of the Arbitration Act. The key to making sense of this discrepancy is to recognize that a different concern properly predominates depending on the nature of the prior decision. Where the prior decision is a judgment issued by the same court being asked to compel arbitration, the court's need to protect its own judgments overrides any agreement by the parties to submit the res judicta issue to arbitration. Where the prior decision is an arbitral award or a judgment issued by a different court, the court cannot be said to be protecting its own judgments, and the parties' agreement to refer the res judicata issue to arbitration thereby assumes priority.

V. THE GENERAL RULE, ITS LIMITED EXCEPTION, AND THEIR RATIONALES

The following rule reconciles the divergent holdings regarding whether the court or arbitrator determines the res judicata effect of a prior decision: An arbitrator should decide the res judicata effect of prior decisions on subsequent arbitration, except when the prior decision at issue is the court's own judgment. Only when the prior decision is the court's own judgment should the court determine the res judicata issue.

Analysis of the cases discussed in Part IV illustrates and confirms this rule. In cases that determined that an

123. *Id.*

arbitrator should decide the res judicata defense—*National Union* and *Chiron*—the decision-maker considered the preclusive effects of a prior arbitral award. By contrast, in cases that concluded that a court should decide the res judicata issue—*Kelly* and *In re Y & A*—the decision-maker was concerned with the preclusive effects of prior judgments that were issued by the same courts being asked to compel arbitration.[124] *Olick*, however, provides the clearest illustration of this distinction because it held that the district court's prior judgment and the arbitral award should be determined by the district court and the arbitrator respectively.[125] Indeed, many of the federal appellate courts that have dealt with this issue have reached a result that comports with the *Olick* distinction, even if the underlying rationale is not clearly articulated.[126]

The proper analysis in determining whether the court or arbitrator should decide the issue of res judicata begins with two questions: (1) Did the parties enter into a valid agreement to arbitrate?, and (2) Is the res judicata defense within the scope of the agreement to arbitrate?[127] If the answer to both questions is "yes," then the court must enforce the arbitration agreement and permit the arbitrator to determine the res judicata issue. Otherwise, the court decides the issue.[128]

A. The Analytical Framework

1. QUESTION 1: Did the Parties Enter Into a Valid Agreement to Arbitrate?

Question 1 focuses on the validity or enforceability of the agreement to arbitrate. This inquiry must consider whether the parties in fact agreed to arbitrate or whether their consent to arbitration was otherwise valid.[129] The focus of

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124. *See supra* Part IV.
125. *See Olick*, 151 F.3d at 139-40.
126. *See supra* Part IV.
127. *See supra* text accompanying notes 51-54.
128. *See id.*
129. *See, e.g.*, Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129, 135 (2d Cir. 1996) (noting that the subject of Question (1) was whether "there [was] a valid arbitration agreement between the parties at all" and citing the example that "[t]he arbitrability issue in *First Options* was whether certain individuals were bound by an agreement that they did not sign" (citations

this question is whether there is a binding agreement to arbitrate "some" issues, regardless of what those issues might be.[130] In raising the defense of res judicata, the party resisting arbitration does not challenge the fact that the parties agreed to arbitrate their dispute.[131] On the contrary, a party relying on res judicata contends that arbitration based on an otherwise valid arbitration agreement is precluded by the existence of a prior relevant decision. In other words, the reliance on res judicata rests on the assumption that the parties had validly entered into such an agreement.[132] Therefore, the defense of res judicata does not in itself implicate a Question 1 inquiry, and assuming there is no separate dispute that an otherwise valid arbitration agreement exists,[133] Question 1 must be answered in the affirmative.

It is apparent that in each of the cases cited in Part IV, the parties agreed to arbitrate "some" issues, including the subject matter of the underlying dispute. Instead, the parties disagreed as to whether the existence of a prior decision precluded an otherwise valid arbitration agreement. For instance, in *National Union*, although the insured argued that the insurer was barred from seeking a second arbitration under the expropriation policy between the parties, there was no question that the policy contained an otherwise valid arbitration clause.[134] Similarly, in *Kelly*, while Merrill Lynch

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omitted)).

130. *Id.* (finding that Question (1) was resolved since "there [was] no question that the [contract between the parties] contains a valid agreement, binding on [appellant], to arbitrate 'some issues'").

131. *See, e.g.*, *id.* (rejecting appellant's "characterization of the preclusion issue . . . as part of the 'arbitrability' of the dispute" and noting that the "preclusion issue is not, in the words of *First Options*, a disagreement over 'whether [the parties] agreed to arbitrate the merits' of their dispute" (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995))).

132. It would not matter what preclusive effect a prior decision has on subsequent arbitration if such arbitration was never agreed to in the first place.

133. A party who resists arbitration by relying on a defense of res judicata may, of course, in the alternative also dispute that it entered into a valid arbitration agreement (for example, by alleging that it did not sign the agreement), in which case, the court will have to examine the facts relevant to that dispute to determine Question 1. The point here, however, is that the reliance on the defense of res judicata itself does not place in contention the issues that are the subject of Question 1.

134. *See Nat'l Union*, 88 F.3d at 135 ("[T]here [was] no question that the AIG policy contains a valid agreement, binding on [the insured], to arbitrate 'some issues.'").

contended that the plaintiff customers were precluded from seeking arbitration for state law claims as a result of a court judgment arising from prior litigation between the parties, there was no dispute that the parties had agreed to arbitrate any state law claims arising from the contract between them.[135] Thus, Question 1 is answered in the affirmative when posed to the cases in Part IV.

2. QUESTION 2: Is the Res Judicata Defense Within the Scope of the Agreement to Arbitrate?

In asking whether the res judicata defense is within the scope of the arbitration agreement, Question 2 focuses on the particular terms of the agreement. Therefore, Question 2 is a matter of contract interpretation. If the agreement specifically includes (or excludes) the res judicata defense as a matter for arbitration, the court will have little difficulty in resolving this question. However, most arbitration clauses, including those discussed in Part IV, do not expressly refer to res judicata. Instead, they typically provide for the arbitration of all disputes "arising out of"[136] or "relating to"[137] the parties' agreement. The question then becomes whether such broad language should encompass any res judicata defense as a matter of general contract law.

The defense of res judicata, like any other affirmative defense to the substantive claim, is simply part of the *merits* of the underlying substantive dispute.[138] As part of the

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135. *See* Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1068 n.1 (11th Cir. 1993), *cert. denied*, 510 U.S. 1011 (1993) ("Each plaintiff had previously signed a written agreement that . . . any controversy between us arising out of . . . this agreement shall be settled by arbitration . . . ." (internal quotation marks omitted)).

136. *See, e.g.*, *id.*; *see also* John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 140 (3d Cir. 1998) ("The parties' arbitration agreement . . . submits to the NASD 'any dispute, claim or controversy that may arise between [the parties] that is required to be arbitrated under the rules of [NASD].'").

137. *See, e.g.*, Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1128 (9th Cir. 2000) ("[The parties] agreed to arbitrate 'any dispute, controversy or claim arising out of or relating to' the [agreement].").

138. *See Nat'l Union*, 88 F.3d at 135-36 ("[A] claim of preclusion is a legal defense to [the substantive] claim. As such, it is itself a component of the dispute on the merits. . . . It is as much related to the merits as such affirmative defenses as a time limit in the arbitration agreement or laches."). That res judicata is properly characterized as an affirmative defense under federal law is evidenced by Rule 8(c) of the Federal Rules of Civil Procedure, which requires parties affirmatively to plead a res judicata defense, as well as various other

merits, the res judicata issue should be resolved along with, and in the same manner as, the substantive dispute. Therefore, assuming the court finds that the merits of the dispute fall within the scope of the arbitration agreement, it should also conclude that the defense of res judicata falls within the scope of the arbitration agreement. This scenario was present in the cases discussed in Part IV. As noted above with regard to Question 1, while the parties in those cases disagreed over who should determine the preclusive effect of a prior decision, there was no doubt that they had agreed to arbitrate the subject matter of the underlying dispute.[139] It follows, therefore, that the defense of res judicata falls within the scope of the arbitration agreements in those cases as part of the merits of the dispute.

Thus, when parties agree to arbitrate a claim under a broad arbitration clause, they are deemed to have agreed to arbitrate any defenses relating thereto, including that of res judicata. Such an inclusive reading is consistent with general principles of contract interpretation, as evidenced by the fact that other affirmative defenses are similarly considered to be included within the scope of a broad arbitration clause.[140] Such a reading also comports with "the strong federal policy in favor of arbitration,"[141] under which the Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[142] This policy has its roots in the contractual nature of arbitration agreements, and is essentially a reaffirmation of the same general principles of contract law.

As noted above, Question 2 is simply a matter of contract interpretation. Where that contract is silent, the task for the interpreter is to construct "the hypothetical bargain that the parties themselves would have chosen in a completely spelled-out agreement . . . or at least, the bargain that that it

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defenses, including estoppel, laches, and statute of limitations. *See* FED. R. CIV. P. 8(c).

139. *See supra* notes 134-35 and accompanying text.

140. *See Nat'l Union*, 88 F.3d at 135-36 (noting that res judicata is no different from other affirmative defenses, which are "a component of the dispute on the merits" and "are assigned to an arbitrator under a broad arbitration clause [that did not provide specifically for such defenses]").

141. *Olick*, 151 F.3d at 137.

142. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

would be rational for [most similarly-situated] parties to have chosen ex ante."[143] As the Supreme Court has explained, the issue of whether the res judicata defense is within the scope of the arbitration agreement is not an esoteric matter and "parties likely gave at least some thought to [what falls within] the scope of arbitration."[144] This being the case, and given that the law favors arbitration, the more rational interpretation is that parties would assume that the res judicata defense is arbitrable and the onus would be on parties who did not wish to arbitrate the matter to clearly indicate this.[145] As such, "issues will be deemed arbitrable unless 'it is clear that the arbitration clause has not included' them."[146] In other words, Question 2 is to be answered in the affirmative under these circumstances.

B. The General Rule

Once Questions 1 and 2 are answered affirmatively, the court in each case must, barring any "grounds that exist at law and equity for the revocation of any contract,"[147] enforce the respective agreements to arbitrate the dispute, including the res judicata defense.[148] This boils down to the proposition that where a court finds the underlying dispute arbitrable, the res judicata issue is also arbitrable, and in the absence of legal and equitable grounds for revoking a contract, the court must enforce the arbitration agreement. The general rule, therefore, is that the arbitrator gets to decide the res judicata defense in a dispute governed by a broad arbitration clause, provided the underlying dispute falls within the scope of the clause.

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143. Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 34 (2003). For my own possibly contrary purposes, I quote a commentator's description of the purpose of "default rules" employed in contract law to divine the intent of parties in the absence of direct evidence relating thereto. *See id.*

144. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

145. *See id.* (noting that given "the law's permissive policies in respect of arbitration, . . . one can understand why the law would insist on clarity before concluding that the parties did *not* want to arbitrate a related matter" (citations omitted)).

146. *Id.* (quoting 1 G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 12.01, at 156 (rev. ed. Supp. 1993)).

147. 9 U.S.C. § 2 (2000).

148. *See id.*

C. The Limited Exception to the General Rule

The general rule would suggest that the proper result in all of the cases discussed in Part IV is that the arbitrator should determine the res judicata defense. However, the opposite conclusion was reached in those cases where the prior decision was an earlier judgment of the same court.[149] Such cases are distinguishable on the ground that the courts deciding them had also authored the respective prior decisions whose preclusive effects were at issue.[150] Having issued the very decisions that are under consideration, those courts are naturally more qualified than anyone else, including any arbitrator, to determine correctly their substance and scope, and therefore, any preclusive effects they may have on subsequent arbitration.[151] In this situation, it makes sense to assume that the parties would instead have expected the court—the more qualified candidate for the job—to determine the res judicata issue.

In a recent case that involved the application of an arbitration rule to determine a dispute's arbitrability, the Supreme Court observed that arbitrators, being "comparatively more expert about the meaning of *their own rule*, are comparatively better able to interpret and to apply it."[152] As such, the Court concluded that "in the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding."[153] Similarly, following this reasoning, where the prior decision at issue is a judgment issued by the court, it is "reasonable to infer" that the parties intended their agreement to reflect the understanding that

149. *See* discussion *supra* Part IV.A.

150. *See* discussion *supra* Part IV.A.

151. *See In re* Y & A Group Sec. Litig., 38 F.3d 380, 383 (8th Cir. 1994) ("The district court, and not the arbitration panel, is the best interpreter of its own judgment.").

152. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (emphasis added).

153. *Id.* (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995)). *Cf.* Bros. Jurewicz, Inc. v. Atari, Inc., 296 N.W.2d 422, 428 n.7 (Minn. 1980) (holding that the court should rule on a laches defense to a request for arbitration where the defense was based on activity before that very court because it would be "more efficient and practical for the trial judge, who presumably is familiar with what has transpired in the litigation, to decide the issue of laches than for an arbitrator who has had no connection with the litigation").

the court, being "comparatively more expert" about the meaning of its "own" judgment, is comparatively better able to interpret and to apply it.

Thus, the general rule that an arbitrator should decide the res judicata issue does not apply here because it is not reasonable to assume that the parties agreed to arbitrate the res judicata defense under these circumstances. Or, put in terms of Question 2, the res judicata issue would not be deemed within the scope of a broad arbitration clause when the prior decision was a court's own judgment. This is because the parties would not rationally have assigned the dispute's resolution ex ante to an arbitrator instead of the court where the latter was better equipped to do the job. Accordingly, the court should determine the res judicata issue in that situation.

Furthermore, this result holds true even if we disregard the expertise factor and assume that the parties had agreed to arbitrate the res judicata issue. Because such an agreement would circumscribe the court's ability to protect the integrity of its own judgments, it would be unenforceable. It is well established that courts are entitled to protect the integrity of their judgments.[154] Under both common law and statutory law,[155] federal courts are given broad injunctive powers to enforce their judgments and to prevent undue interference therewith.[156] This power includes the authority to prevent repetitive litigation of claims already determined by a court's final judgment since such litigation undermines the judgment.[157] For the same reasons, federal courts are also

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154. *See infra* notes 155-56.

155. *See* All Writs Act, 28 U.S.C. § 1651 (2000).

156. *See* Wesch v. Folsom, 6 F.3d 1465, 1470 (11th Cir. 1993) (noting that the "long recognized power of courts of equity to effectuate their decrees by injunctions or writs of assistance" had been codified in the All Writs Statute, which "empowers courts to issue injunctions to protect or effectuate their judgments" (citations omitted)); Miss. Valley Barge Line Co. v. United States, 273 F. Supp. 1, 6 (E.D. Mich. 1967) ("It is well settled that the courts of the United States have inherent and statutory (28 U.S.C. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with . . . ." (citations omitted)); Gregis v. Edberg, 645 F. Supp. 1153, 1157 (W.D. Pa. 1986), *aff'd*, 826 F.2d 1054 (3d Cir. 1987).

157. *See Wesch*, 6 F.3d at 1470 (noting that courts are empowered under the All Writs Act to issue injunctions in order to "avoid relitigation of questions once settled between the same parties"); Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631, 637 (5th Cir. 1971), *cert. denied*, 404 U.S. 941 (1971) ("Under

empowered to enjoin *arbitration* to prevent relitigating claims that have been, or could have been, resolved by a court's prior final judgment.[158] Accordingly, an agreement to arbitrate the res judicata defense arising from such a judgment is unenforceable as it would deprive the court of its ability to protect its own judgment.[159] In the context of the Arbitration Act, the potential usurpation of the court's power to protect its judgments represents "such grounds as exist at law or in equity for the revocation of any contract," thereby relieving the court of the obligation to enforce such an agreement.[160] Where this is the case, the court should proceed to determine the res judicata issue. Thus, regardless of whether there is an agreement to arbitrate the res judicata defense with respect to a prior decision, a court should rule on that defense, rather than permit its arbitration, when the prior decision at issue is its own judgment.

This result also corresponds to, and therefore draws support from, that reached by courts in resolving the question of who should determine whether a party who has participated in litigation has waived its right to arbitration because of such participation. In the case of *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado*,[161] an employer had filed an action in federal court against certain unions alleging the violation of a no-strike clause in the parties' collective bargaining agreement.[162] The

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the All Writs Statute, 28 U.S.C.A. § 1651, a federal court has the power to enjoin a party before it from attempting to relitigate the same issues in another federal court." (footnote and citations omitted)); Michigan v. City of Allen Park, 573 F. Supp. 1481, 1487 (E.D. Mich. 1983) ("It is well established that a court has the power under the All Writs Act, 28 U.S.C. § 1651, to enjoin the repetitive litigation of the same action." (footnote and citations omitted)).

158. *See* Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1069 (11th Cir. 1993), *cert. denied*, 510 U.S. 1011 (1993) (noting that the federal courts' powers under the All Writs Act "include[] the authority to enjoin arbitration to prevent re-litigation" (citations omitted)); Sheldon Co. Profit Sharing Plan & Trust v. Smith, 858 F. Supp. 663, 667 (W.D. Mich. 1994) ("Under the All-Writs Act, 28 U.S.C. § 1651, . . . a federal court has broad injunctive powers to protect its own judgment, including the power to enjoin arbitration in the interests of preventing relitigation of claims and issues it has already decided." (citation omitted)).

159. *See Kelly*, 985 F.2d at 1069.

160. 9 U.S.C. § 2 (2000). For the text of the full provision, see *supra* text accompanying note 37.

161. Reid Burton Constr., Inc. v. Carpenters Dist. Council of S. Colo., 535 F.2d 598 (10th Cir. 1976).

162. *Id.* at 599-600.

unions argued in response that the court had no jurisdiction over the dispute since the collective bargaining agreement ultimately referred any "dispute . . . involving the application or interpretation of the terms of th[e] agreement" to arbitration.[163] They further stated that one of the defendant unions, Local 1340, was not even a party to the collective bargaining agreement.[164] However, a year after the complaint was filed, the unions admitted that while they did not consider Local 1340 to be a "party" to the collective bargaining agreement, they considered it to be "bound by the substantive terms of the agreement."[165] In its trial memorandum, the employer responded by asserting that such dilatory pleading practices before the court estopped the unions from claiming any right to arbitration.[166]

Confronting this issue at trial, the district court first determined whether a judicial proceeding or arbitration was the proper forum for deciding the waiver issue.[167] The court found that because the arbitration clause was broadly worded, the issue of waiver, like any other equitable defense, was to be determined by the arbitrator.[168]

On appeal, the Tenth Circuit reversed.[169] While the general rule was that equitable defenses were considered to be within the scope of a broadly worded arbitration clause, and thus arbitrable, it did not apply in this case because the waiver defense at issue involved conduct before the district court itself.[170] Further, the court found that allowing an arbitrator to decide the issue would compromise the court's control of its own proceedings.[171]

The court of appeals evaluated the arbitrability of the waiver issue by objectively looking to the collective bargaining agreement to determine the parties' intent.[172] It concluded that while the language of the clause was broad

163. *Id.* at 602 (quoting terms of collective bargaining agreement).
164. *Id.* at 600.
165. *Id.*
166. *Id.* at 602.
167. *Reid Burton*, 535 F.2d at 602.
168. *See id.*
169. *See id.* at 604.
170. *See id.* at 603. The conduct at issue here was the aforementioned dilatory pleading tactics before the court.
171. *See id.*
172. *See id.* at 603-04.

enough to cover the waiver issue, it "d[id] not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions before a district court."[173] In any event,

> even had the parties so intended, [the court] would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function.[174]

After all, "[c]ourts must, of course, maintain judicial control of their own proceedings"[175] and "[s]uch power . . . is broad enough to include a court's determination of the validity of equitable defenses arising out of the action before the court. To hold otherwise would unnecessarily hamper a court's control of its own proceedings."[176]

Other courts have also held that the validity of an equitable defense is to be determined by the court, rather than the arbitrator, where the defense curbs the exercise of the court's "judicial function." In *Brothers Jurewicz, Inc. v. Atari, Inc.*,[177] the Supreme Court of Minnesota affirmed the trial court's determination that it, rather than an arbitrator, was to decide whether the plaintiff manufacturer lost its right to arbitration under an otherwise valid arbitration agreement between the parties because it failed to request arbitration until a year after the initiation of litigation before the trial court.[178] The court held that while the general rule was that arbitrators should determine such equitable defenses under a broad arbitration clause, there were several reasons to carve out a "limited exception which allows courts to rule on a laches defense to a request for arbitration in cases where the defense is not based on the underlying dispute but instead is

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173. *Reid Burton*, 535 F.2d at 604.
174. *Id.*
175. *Id.* at 603.
176. *Id.*
177. Bros. Jurewicz, Inc. v. Atari, Inc., 296 N.W.2d 422 (Minn. 1980).
178. *Id.* at 428. Although this is a state case decided under Minnesota's Uniform Arbitration Act, and not the Federal Arbitration Act, one would approach this issue similarly under both statutes. *See id.* at 427 n.5 (noting that despite certain differences between the statutes, "the issue here considered is presented similarly under both acts").

derived from activity before the very court being urged to compel arbitration."[179] For one, "issues such as laches may be beyond the scope of even a broadly worded arbitration clause since it is unlikely that an arbitration agreement 'ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a [trial] court.'"[180] The court also observed that it would be "more efficient and practical for the trial judge, who presumably is familiar with what has transpired in the litigation, to decide the issue of laches than for an arbitrator who has had no connection with the litigation."[181] Another significant reason lies in the fact that "courts must maintain sufficient judicial control over their own proceedings to determine the validity of equitable defenses that arise out of the actions of parties before the court."[182]

Similarly, the question of whether a prior judgment of the court precludes subsequent arbitration should not be considered within the scope of a broadly worded arbitration clause. This is because it is unlikely that the parties would have agreed to arbitrate an issue arising from earlier proceedings between them before the same court.[183] Since that court would be familiar with the issue, it would also be in the best position to resolve it.[184] Even if the parties had intended this result, such an agreement would "clearly exceed the proper subject matter"[185] of an arbitration agreement and "would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function"[186] insofar as it hampers the ability of the court to protect its own judgments.[187] Thus, to paraphrase the court in *Brothers Jurewicz*, while the general rule is that arbitrators should determine the preclusive effects of prior decisions on subsequent arbitration, there should be a limited exception allowing courts to rule on a res judicata defense to a request

179. *Id.* at 427-28.
180. *Id.* (quoting *Reid Burton*, 535 F.2d at 604).
181. *Id.* at 428 n.7.
182. *Id.* at 427.
183. *See Reid Burton*, 535 F.2d at 604.
184. *See id.* at 603.
185. *Id.* at 604.
186. *Id.*
187. *Id.*

for arbitration in cases where the prior decision is a judgment issued by the very court being urged to compel arbitration.[188]

The adoption of this rule and its exception (the "proposed rule"), explicates and imposes order on the existing case law, including those cases discussed in Part IV. Indeed, certain threads of its supporting rationale, if somewhat tangled, can be discerned in those cases. For example, in *In re Y & A*, where the prior decision at issue was an earlier judgment of the district court, the Eighth Circuit affirmed the lower court's decision to enjoin arbitration rather than allow the arbitrator to determine the defense, on the ground that it was "[t]he district court, and not the arbitration panel, [who was] the best interpreter of its own judgment."[189] The court of appeals pointed to the fact that "[t]he All Writs Act makes plain that each federal court is the sole arbiter of how to protect its judgments."[190] In *Chiron*, where the prior decision in question was an arbitral award, the court held that the arbitrator was to decide the issue, and distinguished *In re Y & A* and *Kelly* on the ground that they both "involved the court determining the res judicata effect of its *own* prior judgment on a subsequent arbitration proceeding."[191] The court also observed that the rationale expressed in those cases "rests on the presumption that the court issuing the original decision is best equipped to determine what was considered and decided in that decision and thus what is or is not precluded by that decision."[192] Although the courts did not proceed to spell out how these issues bore on any arbitration agreement between the parties in the context of the Arbitration Act, they properly relied on them to reach the correct result.

VI. SUPREME COURT DECISIONS ON THE ARBITRABILITY OF ARBITRABILITY

The rule proposed in this article is also consistent with the jurisprudence of the Supreme Court in this area of law.

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188. *See* Bros. Jurewicz, Inc. v. Atari, Inc., 296 N.W.2d 422, 427-28 (Minn. 1980); *supra* text accompanying note 179.

189. *In re* Y & A Group Sec. Litig., 38 F.3d 380, 383 (8th Cir. 1994).

190. *Id.* at 382-83.

191. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1134 (9th Cir. 2000) (citations omitted).

192. *Id.*

While the Court has yet to address the res judicata issue specifically, it has considered arbitrability questions that bear on the issue. In particular, two decisions are relevant to the res judicata question. The first is *First Options of Chicago, Inc. v. Kaplan*,[193] in which the Court laid down principles governing the question of who should determine the arbitrability of a dispute.[194] The second decision is *Howsam v. Dean Witter Reynolds, Inc.*,[195] in which the Court refined those principles, differentiating between substantive and procedural questions of arbitrability.[196]

A. Cases Bearing on the Res Judicata Issue

1. First Options of Chicago, Inc. v. Kaplan

In *First Options*, the question before the Court was whether the district court or the arbitrator should decide whether the respondents were bound to arbitrate a dispute between the parties under an arbitration agreement that the respondents claimed not to have signed.[197] In ruling that the district court should decide the issue, the Court first distinguished between (A) the "arbitrability" of a dispute,[198] or whether the parties have submitted a particular dispute to arbitration and, (B) the separate issue of *who,* court or arbitrator, determines "arbitrability."[199] The Court found that just as the arbitrability of a dispute depends upon whether the parties agreed to arbitrate that dispute, the determination of who decides arbitrability "turns upon what

193. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
194. *See id.* at 942.
195. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
196. *See id.* at 85.
197. *First Options*, 514 U.S. at 942.
198. As discussed above, the "arbitrability" of a dispute comprises the question of whether there exists a valid agreement to arbitrate under the contract in question, and if so, whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement. *See supra* notes 51-53 and accompanying text. Note, however, that *First Options* deals specifically with the first kind of arbitrability question (i.e., Question (1)) and appears for that reason to define "arbitrability" only in that sense. It is plain, however, that "arbitrability" is a broader concept that also includes the second type of arbitrability question (i.e., Question (2)) since a dispute over whether a particular matter falls within the scope of the arbitration clause is ultimately a dispute over whether the parties had agreed to arbitrate that matter (i.e., the "arbitrability" of a dispute). *See supra* note 53.
199. *First Options*, 514 U.S. at 942.

the parties agreed about *that* matter."[200] If the parties had agreed to arbitrate arbitrability, then the arbitrator should get to decide whether the dispute is arbitrable.[201] On the other hand, if the parties had not agreed to submit the arbitrability questions to arbitration, then the court should decide the question independently, just as it would any question not submitted to arbitration.[202] The Court derived these conclusions from "the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[203]

To determine whether the parties agreed to arbitrate arbitrability, the *First Options* Court applied state law principles governing the formation of contracts, just as it would in deciding whether a contract existed.[204] In *First Options*, those principles required the Court to decide whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.[205] Not surprisingly, the agreement did not expressly include the matter of the arbitrability of any dispute within the scope of its arbitration clause.[206] Nor, however, did the agreement specifically exclude it.[207] Thus, the question became one of how "to interpret silence or ambiguity on the 'who should decide arbitrability' point."[208]

Applying standard principles of contractual interpretation, the Court ruled that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[209] Courts, not arbitrators, should determine the arbitrability issue unless, for example, the agreement specifically provides otherwise. Such a presumption applies in that situation because the question of who should

200. *Id.* at 943.
201. *Id.*
202. *Id.*
203. *Id.*
204. *See id.*
205. *See First Options*, 514 U.S. at 944.
206. *See id.* at 946.
207. *See id.*
208. *Id.* at 945.
209. *Id.* at 944 (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)).

determine arbitrability is a higher-level question that is so "arcane" that the parties are unlikely to have considered it when drawing up the arbitration agreement.[210] Therefore, the parties would likely *not* have expected an arbitrator to decide the "who" question.[211]

As the Court also pointed out, the presumption applicable to the "who" question is exactly opposite to the presumption applied when a court is faced with silence or ambiguity on the arbitrability question itself, which is "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement."[212] The presumption in the latter situation is that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,"[213] and courts must thereby allow arbitrators to determine the issue.[214] This is because the latter question arises when it is not reasonably disputed that the parties have agreed to the arbitration of *some* issues; the dispute, rather, is over the *scope* of the arbitration clause.[215] "In such circumstances, the parties likely gave at least some thought to the scope of arbitration."[216] As such, the parties likely would have expected an arbitrator to decide the question.[217]

In sum, under *First Options*, the approach to answering either question is simply to identify the relevant terms of the parties' agreement and then to uphold such agreements where they exist.[218] In the absence of a "completely spelled-out agreement," that task would be to figure out what such a "hypothetical" agreement would likely have provided, and to enforce it accordingly.[219] Thus, because the parties in *First Options* were unlikely to have considered the question of who should determine whether the particular dispute was arbitrable when they concluded the arbitration agreement, the Court applied the presumption that the parties would not have expected the matter to go to arbitration and held that

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210. *See id.* at 945.
211. *See First Options*, 514 U.S. at 945.
212. *Id.* at 944-45.
213. *Id.* at 945 (citation omitted).
214. *See id.*
215. *See id.*
216. *Id.*
217. *First Options*, 514 U.S. at 945.
218. *See id.* at 943.
219. *Cf. supra* text accompanying note 143.

the district court should decide this question.[220] This conclusion appears to suggest that a court should determine the arbitrability of *any* dispute since, as the Court defined it, a "who" question was a higher-level inquiry.[221] However, as discussed below, the Court went on to clarify in *Howsam v. Dean Witter Reynolds, Inc.*[222] that the presumption that a court should determine the "who" question applies only to substantive, and not procedural, questions of arbitrability.[223]

2. Howsam v. Dean Witter Reynolds, Inc.

In *Howsam*, a securities broker brought suit in federal court seeking to enjoin its customer from arbitrating a dispute before the National Association of Securities Dealers ("NASD") on the ground that the customer was time-barred under an arbitration rule of NASD for initiating its request for arbitration more than six years after the dispute.[224] The district court dismissed the action, holding that the question of whether the arbitration was time-barred was one for the arbitrator.[225] On appeal, the Tenth Circuit Court of Appeals reversed.[226] Purporting to follow *First Options*,[227] the court of appeals determined that the issue was one for the district court because, in its view, "application of the NASD rule presented a question of the underlying dispute's 'arbitrability'; and the presumption is that a court, not an arbitrator, will ordinarily decide an 'arbitrability' question."[228]

The Supreme Court, however, disagreed with the court of appeals, concluding that "the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge."[229] The Court explained that not all inquiries into questions of arbitrability—what it termed "potentially

220. *See First Options*, 514 U.S. at 946-47.
221. *See id.* at 944-45.
222. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
223. *See infra* Part VI.A.2.
224. *Howsam*, 537 U.S. 79 (2002). The NASD rule in question provided that no dispute "shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute." *Id.* at 81 (quoting NASD Code of Arbitration § 10304 (1984)).
225. *Id.* at 82.
226. *Id.*
227. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
228. *Howsam*, 537 U.S. at 82 (citation omitted).
229. *Id.* at 85.

dispositive gateway question[s]"[230]—fell under the interpretive rule applied in *First Options*.[231] In this respect, the Court distinguished between "substantive" questions of arbitrability, which fall under the interpretive rule, and "procedural" questions of arbitrability, which do not.[232]

Substantive questions of arbitrability belong to the group of questions that arise

> in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[233]

Examples of such substantive questions of arbitrability include disputes about whether the parties are bound by a given arbitration clause,[234] and disagreements over whether an arbitration clause in a concededly binding controversy applies to a particular type of controversy.[235] The presumption in these cases, in line with the parties' expectations, was that the court should determine the questions of arbitrability.[236]

In contrast, procedural questions of arbitrability come under the group of questions that arise in "other kinds of general circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter" and are presumptively for the arbitrator to decide.[237] Examples of such questions include procedural defenses to arbitrability, such as waiver or delay.[238]

In *Howsam*, the Court also noted that this distinction

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230. *Id.* at 83.
231. *Id.*
232. *Id.* at 85.
233. *Id.* at 83-84.
234. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
235. *See, e.g.*, AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643 (1986) (concerning whether a labor-management layoff controversy fell within the arbitration clause of a collective-bargaining agreement).
236. *Howsam*, 537 U.S. at 83.
237. *Id.* at 84.
238. *See id.*; *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (finding a contract dispute between the parties to be arbitrable even with the addition of claims of waiver and delay).

between "substantive" and "procedural" questions of arbitrability finds support in the Revised Uniform Arbitration Act of 2000 ("RUAA").[239] The RUAA provides that:

> in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.[240]

Applying this dichotomous analysis, the *Howsam* Court determined that the applicability of the NASD time limit rule more closely resembled a "procedural" question of arbitrability and was, therefore, a matter for the arbitrator and not the court.[241] It found support for this conclusion in the fact that

> NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding.[242]

Under a straightforward reading of *Howsam*, one need only ascertain the nature of the arbitrability question to figure out whether a court or an arbitrator should decide it. Thus, a court decides substantive questions of arbitrability, whereas an arbitrator resolves procedural questions of arbitrability.

B. Applying Howsam*'s Procedural/Substantive Divide to the Res Judicata Issue*

While the *Howsam* test is straightforward in concept, its application to the res judicata issue is complicated by the fact that the defense of res judicta is not monolithic in nature. Rather, as explained below, depending on the nature of the prior decision, the defense of res judicta is *either* procedural or substantive, at least within the meaning of these terms as

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239. *Howsam*, 537 U.S. at 84-85.

240. *Id.* at 85 (quoting Revised Uniform Arbitration Act of 2000 § 6 cmt. 2, 7 U.L.A. 13 (Supp. 2002)).

241. *Id.* at 85-86.

242. *Id.* at 85 (citation omitted).

employed in *Howsam*.[243]

The procedural/substantive split is no more than shorthand for determining, in the absence of explicit guidance in the arbitration agreement, who the parties agreed would be the decisionmaker. This correspondence derives from the fact that arbitration is simply "a matter of contract,"[244] and the question of who should decide any arbitrability question ultimately turns on what the parties agreed.[245] Accordingly, the Court spoke of "procedural" questions as those arising in circumstances "where parties would likely expect that an arbitrator would decide the gateway matter,"[246] whereas it described "substantive" questions as those arising in those circumstances "where contracting parties would likely have expected a court to have decided the gateway matter."[247] In other words, this dichotomy is simply a device of contractual interpretation designed to minimize, if not avoid, "the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate," and vice versa.[248]

As noted above, in the ordinary situation where res judicata operates as a defense to arbitration, it is no different from other affirmative defenses, such as waiver or laches.[249] Parties likely expect arbitrators to decide the arbitrability of affirmative defenses, including res judicata. Therefore, under *Howsam*, whether res judicata precludes subsequent arbitration is generally a procedural question of arbitrability.[250] The presumption then is that the arbitrator decides the issue.[251] This conclusion is consistent with the proposed general rule that the res judicata issue is a matter

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243. *See infra* text accompanying notes 244-54.

244. *Howsam*, 537 U.S. at 83 (quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)).

245. *Id. See also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (citations omitted)).

246. *Howsam*, 537 U.S. at 84.

247. *Id.* at 83. Notably, the Court itself does not label the two relevant categories of arbitrability questions as "procedural" and "substantive," although the RUAA, upon which it relies, does. *See supra* notes 239-40.

248. *Howsam*, 537 U.S. at 83.

249. *See supra* text accompanying notes 138-39.

250. *Howsam*, 537 U.S. at 85.

251. *Id.* at 84.

for the arbitrator.

However, as explained above, where the prior decision at issue is a judgment of the court being asked to compel arbitration, it is more reasonable to infer that the parties had *not* agreed to arbitrate the res judicata issue, but rather, had expected the court to decide it.[252] To paraphrase the Court in *Howsam*, this is because the court, being comparatively more expert about the meaning of its own judgment, is better able to interpret the decision and determine its preclusive effects.[253] Further, as the Court also noted, "for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike."[254] As such, where the prior decision is the court's own judgment, the res judicata issue is "substantive" in the narrow sense relied on in *Howsam*, meaning that the court should decide the issue.

Thus, the rule proposed by this article is consistent with Supreme Court decisions because it requires a court to determine the res judicata effect of its own prior judgments, a "substantive" question of arbitrability, and otherwise requires an arbitrator to determine the preclusive effects of prior decisions, a "procedural" question of arbitrability.

VII. APPLICATION AND REFINEMENT OF THE PROPOSED RULE

For the most part, the proposed rule is as simple to apply as it is to state: courts decide the preclusive effects of their own prior judgments on subsequent arbitration, while arbitrators determine the preclusive effects of all other prior decisions on subsequent arbitration. However, there are several situations in which the rule's application is less straightforward and warrants closer examination.

A. Entry of Judgment Upon an Arbitral Award

Section 9 of the Arbitration Act provides that "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the [arbitral] award," the court must confirm and enter judgment upon the award upon a

252. *See supra* text accompanying notes 151-53.
253. *See supra* text accompanying note 242.
254. *Howsam*, 537 U.S. at 85.

timely request from any party to the award.[255] Additionally, under § 13 of the Act, the resultant judgment has "the same force and effect, in all respects, as, and [is] subject to all the provisions of law relating to, a judgment in an action."[256] The question then arises whether such a decision is to be treated, for the purposes of the proposed rule, as an arbitral award or a judgment.

This question was examined in *Chiron*,[257] a case discussed above.[258] Relying on language in the Act,[259] the party opposing arbitration argued that the court should treat a previously confirmed arbitral award as if it were a judgment rendered in a judicial proceeding, and thereby determine its preclusive effect on subsequent arbitration.[260] Rejecting this argument, the court of appeals found instead that a judgment obtained under § 13 of the Arbitration Act should be considered an arbitral award for preclusion purposes.[261] The court observed that the approach advocated by the party opposing arbitration only begged the question since the Arbitration Act "says nothing about which forum or *who* determines the effect of the judgment."[262] In addition, the court noted that while a judgment entered upon a confirmed arbitration award has the same force and effect under the Arbitration Act as a court judgment for enforcement purposes, it was not equivalent to a court judgment for all purposes.[263] For example, while the Arbitration Act requires a court to enter judgment upon a confirmed arbitral award absent very limited grounds, a judgment upon a decision rendered by the court endorses and confirms the merits of that decision.[264] Along the same lines, a judgment under § 13 of the Arbitration Act, unlike one arising from a judicial proceeding, may not be reopened and

255. 9 U.S.C. § 9 (2000).
256. *Id.* § 13.
257. Chiron Corp. v. Ortho Diagnostics Sys., Inc., 207 F.3d 1126 (9th Cir. 2000).
258. *See supra* text accompanying notes 92-103.
259. 9 U.S.C. § 13 ("The judgment so entered shall have the same force and effect, in all respects, as . . . a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.").
260. *Chiron*, 207 F.3d at 1133.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*

challenged under Rules 59 or 60 of the Federal Rules of Civil Procedure or appealed unless the parties' agreement specifically provides otherwise.[265] "In sum, a judgment upon a confirmed arbitration award is qualitatively different from a judgment in a court proceeding, even though the judgment is recognized under the [Arbitration Act] for enforcement purposes."[266]

In support of its case, the party opposing arbitration in *Chiron* cited cases determining that the court should decide the res judicata issue,[267] including *In re Y & A* and *Kelly*.[268] The *Chiron* court, however, distinguished these cases as involving "the court determining the res judicata effect of its *own* prior judgment on a subsequent arbitration proceeding."[269] The court noted that the justification in those cases

> rests on the presumption that the court issuing the original decision is best equipped to determine what was considered and decided in that decision and thus what is or is not precluded by that decision. The policy underlying these decisions is not served in this case, however, when the district court merely confirmed the decision issued by another entity, the arbitrator, and was not uniquely qualified to ascertain its scope and preclusive effect.[270]

Thus, the *Chiron* court found that, for preclusion purposes, a judgment under § 13 of the Arbitration Act is more like an arbitral award than a judgment arising from a judicial proceeding.[271] For the same reasons, this conclusion applies when the issue is analyzed under the proposed rule. Because a judgment under § 13 of the Arbitration Act is not an independent product of the court, there is no reason to assume that the court is comparatively more expert in determining its preclusive effect.[272] As such, it follows that there is no reason to assume that the parties would have expected the court to decide the issue. Furthermore, the All Writs Act arguably has no application in this situation, since

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265. *See id.* at 1133.
266. *Chiron*, 207 F.3d at 1133-34.
267. *Id.* at 1133.
268. See *supra* text accompanying Part IV.A for a discussion of these cases.
269. *Chiron*, 207 F.3d at 1134 (citations omitted).
270. *Id.*
271. *See id.* at 1133-34.
272. *See id.* at 1134.

it only "empowers federal courts to issue injunctions to protect or effectuate *their* judgments."[273] Therefore, a judgment under § 13 of the Arbitration Act should be treated as an arbitral award for the purposes of the proposed rule. Accordingly, an arbitrator should determine its res judicata effect on subsequent arbitration.

B. Judgments of Courts Other Than Those Being Asked to Compel Arbitration

The general rule that arbitrators should determine the res judicata issue extends not only to the case where the prior decision is an arbitral award but also where it is a judgment of a court other than that being asked to compel arbitration.[274] The justification for the latter situation is perhaps harder to discern and warrants closer examination.

As discussed above, the rationale for allowing arbitrators to decide the issue under a broad arbitration agreement is that it is more reasonable to assume that the parties have agreed to arbitrate an affirmative defense such as res judicata and is consistent with legislative policies favoring arbitration.[275] However, when the prior decision is an earlier judgment of the court being asked to compel arbitration, this assumption is not reasonable; instead, the parties would likely have expected the court to decide the res judicata issue given that the court, having issued the original decision, is best equipped to determine what was considered and decided in that decision.[276] Because this exceptional circumstance does not exist when the prior decision is a judgment from a different court and there is as such no reason to regard the court as more expert than the arbitrator, the general rule continues to apply in that situation.

For example, if the question before a federal district court is whether a prior state court decision precludes arbitration because of res judicata, the district court should compel arbitration and permit an arbitrator to decide the res judicata issue.[277] Since the district court was not the author of the

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273. Wesch v. Folsom, 6 F.3d 1465, 1470 (11th Cir. 1993) (emphasis added) (citations omitted). *See also supra* text accompanying notes 154-56.

274. *See supra* text accompanying notes 150, 188.

275. *See supra* Part V.A.

276. *See supra* Part V.C.

277. *But cf.* Miller Brewing Co. v. Fort Worth Distrib. Co. Inc., 781 F.2d 494

prior state court decision, there is no reason to assume that the district court would be any more qualified than the arbitrator to determine the preclusive effects of the state court decision. There is accordingly no exceptional circumstance displacing the prevailing assumption that the parties agreed to arbitrate the issue, and the arbitrator should be permitted to decide the res judicata effects of the state court decision.

In sum, where the prior decision is a judgment of a court other than the court that is asked to compel arbitration, the presumption is that the arbitrator, and not the court, decides its preclusive effect on subsequent arbitration.

C. Collateral Estoppel: The Exception to the Exception

Thus far, this article has focused on true res judicata and has not yet examined issues of collateral estoppel. The reader will recall that the two doctrines are distinct in that the former operates to bar entire *claims* or *causes of action* that were, or could have been, brought in a prior proceeding, whereas the latter precludes only the relitigation of specific *issues* that have been litigated in a prior proceeding.[278] Thus, when a party relies on collateral estoppel to preclude arbitration, it seeks only to preclude the arbitration of certain issues and not the entire claim. As such, "all that a party is seeking is not to bar but merely to *constrain* the arbitrator"[279] so as to "narrow the issues that the arbitrator may consider"[280] without necessarily challenging the arbitration of the dispute generally.

Given these circumstances, it is arguable that the arbitrator, and not the court, should decide the collateral estoppel effects of the prior decision even when that prior decision is a judgment of the court being asked to compel

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(5th Cir. 1986). In *Miller Brewing Co.*, the Fifth Circuit determined that the party seeking arbitration was barred from doing so in federal court as a result of the preclusive effects of a prior state court decision binding both parties. Note, however, that the parties did not raise, and the court did not consider, the specific issue concerning whether arbitrators, rather than the court, should have determined that res judicata issue. *See id.*

277. *Id.* at 501.

278. *See supra* text accompanying notes 22-24.

279. Miler v. Runyon, 77 F.3d 189, 194 (7th Cir. 1996) (emphasis added).

280. *Id.*

arbitration.[281] While the assumption remains that the court is more qualified than the arbitrator to determine the decision's collateral estoppel effects, it is less clear that the parties would have expected the court to decide the collateral estoppel issue. This is because any resolution by the court of the prior decision's collateral estoppel effects would dispose of only part of a claim, potentially leaving the rest for a separate decisionmaker, i.e., the arbitrator. It seems unlikely that the parties would have agreed to isolate a particular issue that constitutes an aspect of the claim for the court to rule on, while preserving the rest of the claim for arbitration. This course of action would be inefficient and is incompatible with the idea that parties seek out arbitration for its ease and speed.[282] Similarly, if it makes sense "for the law to assume an expectation that aligns (1) [a] decisionmaker with (2) comparative expertise"[283] where it helps to secure the "expeditious resolution of the underlying controversy,"[284] then such an assumption is at best questionable when the result is one of greater inefficiency.[285]

Moreover, the court's need to protect its own judgment, which is otherwise an additional justification in favor of the court determining arbitrability,[286] is more limited in the context of collateral estoppel because it affects only issues and not entire claims. As discussed above,[287] federal courts are granted broad injunctive powers under the All Writs Act in order to enforce their judgments and to prevent any undue

281. *See, e.g.*, U.S. Fire Ins. Co. v. Nat'l Gypsum Co., 101 F.3d 813 (2d Cir. 1996) (holding that the arbitrator and not the district court should decide whether the insured was collaterally estopped from seeking arbitration against the insurer for defense costs for bodily-injury claims in asbestos-related litigation when the district court had previously declared that the insurer was not liable for defense costs for property-damage claims in the asbestos-related litigation).

282. *See supra* text accompanying note 4.

283. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).

284. *Id.*

285. Additionally, given that the arbitrator will only have to consider those issues that were in fact decided in determining the prior judgment's collateral estoppel effects (and not make the determination as to what other claims could theoretically have been brought, as it might have had to do to decide its res judicata effects), *see supra* text accompanying notes 23-24, any advantage stemming from the court's greater expertise concerning its own judgment is further reduced when collateral estoppel, and not res judicata, is involved.

286. *See supra* text accompanying note 158.

287. *See supra* text accompanying note 156.

interference therewith.[288] This power includes the authority to prevent repetitive litigation of claims already determined by a court's final judgment since such litigation would undermine that judgment.[289] In the case of collateral estoppel, only particular aspects of a claim decided by the prior judgment, as opposed to entire claims, are subject to reinterpretation. Consequently, the chances that the integrity of the judgment as a whole will be violated are diminished, as is the need to invoke the All Writs Act.

Thus, in the absence of an arbitration agreement providing otherwise, arbitrators rather than courts should determine the collateral estoppel effects of a prior decision on subsequent arbitration, *including* cases where the prior decision is a judgment of the court being asked to compel arbitration. As such, the exception to the proposed rule does not apply in cases involving collateral estoppel. Instead, the singular, unqualified rule in this situation is that the arbitrator, and not the court, should determine the collateral estoppel effects of all prior decisions.

VIII. CONCLUSION

Notwithstanding the accommodations that must be made in the situations discussed in the prior section, the rule proposed by this article is by and large straightforward in its application: arbitrators should determine whether prior decisions preclude subsequent arbitration by virtue of the doctrine of res judicata, except where the prior decision is a judgment issued by the court being asked to compel arbitration, in which case, that court should determine the issue. The proposed rule reconciles the various federal appellate decisions on the question of who should determine whether res judicata precludes subsequent arbitration. More importantly, it provides a coherent framework, derived from the contractual nature of arbitration, for analyzing the question under the Arbitration Act. The hope is that the proposed rule will be employed by both courts and arbitrators, who, in so doing, will give the law in this area what it urgently needs—a reasoned uniformity.

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288. *See supra* text accompanying notes 156-58.
289. *See supra* text accompanying note 158.