



Jurisdiction of Arbitrators to Decide Their Own Jurisdiction:

Compétence-Compétence in Kansas and *MBNA America Bank N.A. v. Credit*

By Christopher R. Drahozal*

I. Introduction

An arbitration decision by the Kansas Supreme Court is a rare thing — sufficiently rare that when one comes along it is important that it be right. Unfortunately, the Court's recent arbitration opinion, *MBNA America Bank N.A. v. Credit*,¹ while reaching a defensible result, contains an unfortunate dictum that, if followed, would put Kansas out of step with well-accepted principles of American arbitration law.

The issue is one of arbitral authority: do arbitrators have jurisdiction to decide their own jurisdiction, and, if so, to what extent? The Kansas Supreme Court asserted in *Credit* that an arbitration proceeding must stop if a party complains to the arbitrators that it has not agreed to arbitrate — in other words, arbitrators have no authority to address the issue of assent (which is the basis for their jurisdiction), even in the first instance. Such a view is flatly contrary to the usual approach under both the Uniform Arbitration Act (UAA), which Kansas has enacted, and the Federal Arbitration Act (FAA). Practicing attorneys should recognize that the language is dictum and challenge such assertions in future cases.

II. Facts

MBNA initiated an arbitration proceeding under the Code of Procedure of the National Arbitration Forum (NAF)² against Loretta K. Credit, in which it sought to recover an alleged credit card debt of more than \$21,000. Credit did not participate in the arbitration proceeding, other than to write a letter to the arbitrator objecting that she had not agreed to arbitrate.³ Nor did she seek to enjoin the arbitration proceeding. Likewise, MBNA did not petition a court to compel Credit to arbitrate. Instead, it proceeded with the arbitration in Credit's absence — i.e., on an ex parte basis.

On Sept. 7, 2004, the arbitrator ruled in favor of MBNA and awarded it \$21,094.74. In the award, the arbitrator found that "the Parties entered into an agreement providing that this matter shall be resolved through binding arbitration."⁴ The award included a certificate of service, signed by the director of arbitration for the NAF, which provided as follows:

This award was duly entered and the Forum hereby certifies that a copy of this Award was sent by first class mail postage prepaid to the parties at the above referenced addresses on this date.⁵

* I appreciate helpful comments from Rusty Park and Steve Ware. This article previously appeared in 17 WORLD ARBITRATION AND MEDIATION REPORT 296 (2006). Copyright © 2006 by Christopher R. Drahozal.

1. 281 Kan. 655, 132 P.3d 898 (2006).

2. National Arbitration Forum, Code of Procedure (July 2003), available at www.arb-forum.com [hereinafter NAF Code of Procedure]. More

recent versions of the NAF Code of Procedure are available at the same Web site.

3. 281 Kan. at 656, 132 P.3d at 899.

4. *Id.*

5. *Id.*

The record contained no evidence that Credit actually received the award. At oral argument, she stated that the address listed on the award was her correct address but that she did not know if she had ever received the award.

MBNA moved to confirm the award at the end of December 2004. It did not file a copy of the arbitration agreement with its motion. In response, Credit filed a pro se motion to vacate the award, arguing that she had never agreed to arbitrate the dispute. MBNA challenged the motion as untimely because it was filed more than 90 days after the date shown on the certificate of service.⁶ The district court nonetheless vacated the award, finding that "there is no existing agreement between the parties to arbitrate and therefore the award entered against Defendant is null and void."⁷

III. The Kansas Supreme Court Decision

The Kansas Supreme Court affirmed. It identified one controlling question: "Did Credit's effort to thwart confirmation of the award come too late? If so, the district court did not have authority to vacate the award. If not, the district court had the authority it needed to enter its rulings."⁸ In answering that question, the Court indicated that it "evaluated both federal and state law as well as National Arbitration Forum rules when relevant."⁹

The Court's analysis proceeded in four steps. The first two steps addressed the timeliness issue, and the last two steps addressed the correctness of the district court's rulings on MBNA's motion to confirm and Credit's motion to vacate.

First, the Court stated that MBNA could not "rely on Credit's tardiness in challenging the award" because she denied that she had agreed to arbitrate.¹⁰ There is authority supporting that proposition, although the Court does not cite it.¹¹ In *MCI Telecommunications Corp. v. Exalon Industries Inc.*,¹² for example, the 1st Circuit held (under the FAA) that the time limits for challenging an award do not apply when a party challenges the existence of an arbitration agreement. According to the court of appeals:

A party that contends that it is not bound by an agreement to arbitrate can, therefore, simply abstain from participation in the proceedings, and raise the inexistence of a written contractual agreement to arbitrate as

a defense to a proceeding seeking confirmation of the arbitration award, without the [time] limitations contained in section 12, which are only applicable to those bound by a written agreement to arbitrate.¹³

There is contrary authority as well,¹⁴ although professor Alan Scott Rau states that "[t]he correct rule is undoubtedly stated in *MCI Telecommunications*."¹⁵

Second, because the arbitration award was not served on Credit as required by the Kansas Uniform Arbitration Act (KUAA), the Court held that the time for filing a motion to vacate the award never began to run.¹⁶ As a result, Credit's motion to vacate was not untimely. The Court found service flawed in two respects under the KUAA. First, the certificate of service recited that the NAF (rather than the arbitrator) had served the award. Second, the award was served by regular mail rather than by certified mail or personal service.¹⁷ Of course, service of the award appears to comply with the NAF Code of Procedure, which provides that the "Forum shall serve a copy of the Award upon all Parties or their Representatives or as directed by any Party"¹⁸ using "the postal service of the United States or any country, or ... a reliable private service, or ... facsimile, e-mail, electronic, or computer transmission."¹⁹ Because the KUAA requirements for service apply only when the parties have not agreed otherwise,²⁰ service appeared improper to the Court only because of the dispute over the existence of an arbitration agreement (compounded by MBNA's inexplicable failure to attach the arbitration agreement to its motion to confirm the award).

Third, the Court concluded that the district court properly denied MBNA's motion to confirm. According to the Court, MBNA's failure to attach a copy of the arbitration agreement to its motion "violated the Federal Arbitration Act" and "alone would have justified the district court in its decision to deny MBNA's motion to confirm the award."²¹ The Court does not suggest, however, that the KUAA contains such a requirement.

Fourth, the Court held that the district court properly vacated the award. The fact that a party did not agree to arbitrate is a ground for vacating an award under both the KUAA (because "[t]here was no arbitration agreement")²² and the FAA (because "the arbitrators exceeded their powers").²³ The

6. K.S.A. 5-412(b) (motion to vacate the award "shall be made within ninety (90) days after delivery of a copy of the award to the applicant").

7. 281 Kan. at 657, 132 P.3d at 900.

8. *Id.*

9. *Id.*

10. *Id.* at 658, 132 P.3d at 900.

11. Actually, the Court did cite a case that reaches the same result, but only in a string cite at the end of its opinion and not for this proposition. See *id.* at 660, 132 P.3d at 902 (citing *MBNA America Bank N.A. v. Boata*, 893 A.2d 479, 483 (Conn. App.) ("A claim ... that a contract dispute is not subject to arbitration is an attack on the subject matter jurisdiction of the arbitrator and, as such, may be raised at any time prior to a final court judgment," *appeal granted in part*, 899 A.2d 38 (Conn. 2006)).

12. 138 F.3d 426 (1st Cir. 1998).

13. *Id.* at 430. The Court continued, however, that "if a court later determines that an arbitration agreement was in effect, and that the non-appearing party was bound by its conditions, the FAA would then fully come into operation, including the time limitations of section 12." *Id.*

14. See, e.g., *MBNA America Bank N.A. v. Hart*, 710 N.W. 2d 125,

129 (N.D. 2006) (holding that when motion to vacate is untimely, court properly refused to consider party's "assertions that there was no valid arbitration agreement"); *MBNA America Bank N.A. v. Swartz*, 2006 Del. Ch. LEXIS 72, at *3 (Del. Ct. Ch. Apr. 13, 2006) ("Whether Swartz first received a copy of the award in December 2004 or in May 2005, her challenge to the existence or validity of an arbitration agreement is time barred.").

15. Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 296 n.25 (1999).

16. 281 Kan. at 659, 132 P.3d at 901.

17. K.S.A. 5-408(a).

18. NAF Code of Procedure, *supra* note 2, Rule 39(C).

19. *Id.* Rule 39(D), 2(K).

20. K.S.A. 5-408(a) ("The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.").

21. 281 Kan. at 659-60, 132 P.3d at 901 (citing 9 U.S.C. § 13).

22. K.S.A. 5-412(a)(5).

23. 9 U.S.C. § 10(a)(4).

Court emphasized that “MBNA made no legally sufficient response” to Credit’s contention that she had not agreed to arbitrate.²⁴

At the end of its opinion, the Court noted a number of other cases (including one from the Kansas Court of Appeals²⁵) that “appear to reflect a national trend in which consumers are questioning MBNA and whether arbitration agreements exist.”²⁶ Interestingly, of the six non-Kansas cases cited by the Court, two actually upheld lower court decisions confirming awards in favor of MBNA.²⁷ Moreover, the Court did not cite two very recent cases from the U.S. District Court for the District of Kansas, both of which compelled cardholders to arbitrate their disputes with MBNA.²⁸ The Court’s parting shot, however, referring to “MBNA’s casual approach to this litigation,”²⁹ seems hard to dispute.

IV. The Arbitrator’s Jurisdiction to Decide Jurisdiction (aka *Compétence-Compétence*)

On the whole, the Kansas Supreme Court reached a defensible conclusion on (largely) defensible grounds. So why make a fuss? The problem is with a lengthy dictum in the Court’s opinion that is contrary to the usual interpretation of both the UAA and the FAA and that incorrectly limits the power of arbitrators to rule on their own jurisdiction. In the end, the Court’s conclusion is inconsistent with its own analysis, and so is no more than dictum. Practicing attorneys should recognize that it is dictum and challenge attempts to apply it in future cases.

A. An overview of *compétence-compétence* doctrine

The problem discussed by the Kansas Supreme Court is a recurring one in arbitration law: to what extent do arbitrators have the power to rule on their own jurisdiction over a dispute? The issue arises from the contractual nature of arbitration. “Arbitration,” the U.S. Supreme Court has stated, “is a matter of contract and a party cannot be required to submit to arbitration any dispute, which he has not agreed so to submit.”³⁰ If the parties have not agreed to arbitrate, an arbitrator purporting to resolve their dispute is merely an “interloper.”³¹ But that statement merely poses, rather

than resolves, the question of whether arbitrators can rule on whether there is an arbitration agreement in the first place.

At a practical level, the extent of the arbitrators’ authority to rule on their own jurisdiction (their *compétence-compétence* or “jurisdiction concerning jurisdiction”³²) can determine both the extent of, and the timing of, court review of any arbitration award. According to professor William W. Park:

Depending on the context, reference to an arbitrator’s “jurisdiction to decide jurisdiction” has operated with at least three quite distinct meanings: (1) arbitrators need not stop the arbitration when one party objects to their jurisdiction, (2) courts will delay consideration of arbitral jurisdiction until an award is made, and (3) arbitrators may decide on their own jurisdiction free from judicial review.³³

Robert H. Smit explains that “the general rule in the United States has been that while arbitrators have authority under the FAA to consider challenges to their jurisdiction, disputes over arbitration agreements — raised on a motion to stay litigation, to compel or enjoin arbitration or to enforce or nullify an arbitration award — are reserved for

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24. 281 Kan. at 660, 132 P.3d at 901.

25. *MBNA America Bank N.A. v. Barben*, No. 92,085 (Kan. Ct. App. May 20, 2005) (unpublished opinion). The facts of *Barben* were almost identical to those in *Credit* and the court of appeals reached the same result, although its reasoning differed somewhat.

26. 281 Kan. at 660, 132 P.3d at 902.

27. See *MBNA America Bank N.A.*, 710 N.W.2d 125 (N.D. 2006); *MBNA America Bank N.A. v. Terry*, 2006 Ohio App. LEXIS 894 (Ohio App. Mar. 3, 2006). In addition to cases cited by the court, see also *MBNA America Bank N.A. v. Tackleson*, 720 N.W.2d 192 (Iowa Ct. App. 2006); *Karakhanov v. MBNA America Bank N.A.*, 2006 U.S. Dist. LEXIS 237 (E.D. Mo. Jan. 5, 2006).

28. *Feil v. MBNA America Bank N.A.*, 417 F. Supp. 2d 1214 (D. Kan. 2006); *Jaimez v. MBNA American Bank N.A.*, 2006 U.S. Dist. LEXIS 7526 (D. Kan. Feb. 27, 2006).

29. 281 Kan. at 660, 132 P.3d at 902.

30. *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 83 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

31. Rau, *supra* note 15, at 291.

32. William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT’L ARB. 133, 140 (1997).

33. *Id.* Park continues:

In its simplest formulation, *compétence-compétence* means no more than that arbitrators can look into their own jurisdiction without waiting for a court to do so. In other words, when one side says the arbitration clause is invalid, there is no need to halt proceedings and refer the question to a judge. However, under this brand of *compétence-compétence* the arbitrators’ determination about their power would be subject to judicial review at any time, whether after an award is rendered or when a motion is made to stay court proceedings or to compel arbitration.

Id.

independent judicial determination."³⁴ In other words, the accepted approach to *compétence-compétence* in the United States is that arbitrators can decide jurisdictional issues in the first instance, subject to de novo review on a challenge to the award, so long as one of the parties has not yet gone to court.³⁵

B. The Kansas Supreme Court's dictum on *compétence-compétence*

In *Credit*, the Kansas Supreme Court rejected even the "simplest formulation"³⁶ of *compétence-compétence*, albeit only in dicta. In holding that a challenge to the existence of an agreement to arbitrate is not subject to the time limits of state (and federal) arbitration law, the court began by stating its conclusion: "We note first that MBNA cannot rely on Credit's tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award."³⁷ As discussed above,³⁸ the Court's conclusion on this question was consistent with at least some prior law and, in the words of a leading commentator, "undoubtedly" the "correct rule."³⁹

It then continued:

An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, the issue must be settled by a court before the arbitrator may proceed. See 9 U.S.C. § 4; K.S.A. 5-402.

...

Under both federal and state law, Credit's objection to the arbitrator meant the responsibility fell to MBNA to litigate the issue of the agreement's existence. See 9

U.S.C. § 4; K.S.A. 5-402. Neither MBNA, as the party asserting existence of an arbitration agreement, nor the arbitrator was simply free to go forward with the arbitration as though Credit had not challenged the existence of an agreement to do so.⁴⁰

Here, the Court goes well beyond merely excusing Credit's late filing of a motion to vacate the award. It states that Credit's objection that she had not agreed to arbitrate — made to the arbitrator — *required* MBNA to stop the arbitration process and go to court to have that issue adjudicated.

In support of that statement, the Court cites three sources (none of which support its statement, as discussed below).⁴¹ The first two — § 4 of the FAA and K.S.A. 5-402 — both provide that a party may seek to have the court compel a recalcitrant party to arbitrate. The third is the following excerpt from an article in the *Journal of the Kansas Bar Association*:

"If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists and whether the issue in dispute falls within the agreement to arbitrate.

...

"Under either the Federal Act or the Kansas Act, the arbitrator's power to resolve the dispute must find its source in the agreement between the parties. The arbitrator has no independent source of jurisdiction apart from consent of the parties. ... Dreyer, *Arbitration Under the Kansas Arbitration Act*:

34. Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?* 13 AM. REV. INT'L ARB. 19, 27 (2002). By comparison, under French law, "if an arbitration tribunal has already been seized of the matter, the French court will refuse jurisdiction and leave questions respecting the arbitration agreement's existence, validity, and scope to the arbitrators." See John J. Barceló III, *Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1124-25 (2003).

35. And subject to the possibility that the parties have clearly and unmistakably agreed to submit the issue to determination by the arbitrators. See *infra* note 44.

36. Park, *supra* note 32, at 140.

37. 281 Kan. at 658, 132 P.3d at 900.

38. See *supra* text accompanying notes 10-15.

39. Rau, *supra* note 15, at 296 n.25.

40. 281 Kan. at 658, 132 P.3d at 900-01.

41. See *infra* text accompanying notes 57-59.

42. 281 Kan. at 658-59, 132 P.3d at 901 (quoting Leo P. Dreyer, *Arbitration Under the Kansas Arbitration Act: The Role of the Courts*, J. KAN. BAR ASS'N, 5 at 33 (1990)).

The Role of the Courts, 59 J.K.B.A. 33, 35 (May 1990).

"Substantive arbitrability is concerned with the question of whether the parties have contractually agreed to submit a particular dispute to arbitration. The courts decide this question because no one must arbitrate a dispute unless he has so consented." (59 J.K.B.A. at 35 n. 42 quoting *Denhardt v. Trailways Inc.*, 767 F.2d 687, 690 [10th Cir. 1985]).⁴²

In fact, the authority cited by the Kansas Supreme Court does not support its rejection of even the "simplest formulation" of *compétence-compétence*. To understand why, it may be helpful to examine more systematically Credit's right to court review of her contention that she had not agreed to arbitrate.

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C. Court review of challenges to arbitrators' jurisdictional rulings

In the rest of this section, I will put timeliness issues aside and instead focus on when and to what extent Credit might have obtained court review of the issue of assent.

So long as the issue is properly preserved in the arbitration proceeding, a party is entitled to de novo review of its contention that it had not agreed to arbitrate — in an action to vacate the award. In *First Options of Chicago Inc. v. Kaplan*,⁴³ the U.S. Supreme Court held that a court need not defer to the arbitrators' finding that a party had agreed to arbitrate, but instead should determine the issue itself.⁴⁴

Credit's objection that she had not agreed to arbitrate — made to the arbitrator rather than a court — likely was sufficient to preserve the issue of assent for post-award review. Certainly if Credit had participated in the arbitration proceeding without challenging the existence of an arbitration agreement, she would have waived the issue.⁴⁵ Under the KUSA, however, because she "did not participate in the arbitration hearing without raising the objection," she was entitled to seek to vacate the award on the ground that "[t]here was no arbitration agreement."⁴⁶ By comparison, federal courts are divided on whether an objection of the sort made by Credit is sufficient to preserve the assent issue for post-award review.⁴⁷

In addition to seeking post-award review, Credit also had the option to seek pre-award adjudication of the issue by seeking a court injunction against the arbitration proceeding. The KUSA expressly permits parties to enjoin an arbitration proceeding.⁴⁸ The FAA does not expressly permit injunctions against arbitration, but federal courts have entered such injunctions in appropriate circumstances, such as when the court concludes that a party has not agreed to arbitrate.⁴⁹

If Credit had filed a court action seeking to enjoin the arbitration proceeding, the Kansas Supreme Court would have been correct: Credit would have been entitled to a court adjudication of the assent issue before the court could deny her request for an injunction.⁵⁰ Likewise, if MBNA had sought to compel arbitration, the court would have had to resolve the assent issue before ordering arbitration. The U.S. Supreme Court so held in *AT&T Technologies Inc. v. Communications Workers of America*,⁵¹ a labor arbitration case.

But the substantial weight of authority holds that objections like that made by Credit — communicated to the arbitrator and not raised in court — do not preclude the arbitration from proceeding in her absence. Certainly most arbitration rules, including the NAF Code of Procedure, permit arbitrators to make awards on an ex parte basis,⁵² and courts regularly enforce ex parte awards so long

as they otherwise are proper.⁵³ Moreover, the arbitration proceeding need not stop when one party asserts that it did not assent to arbitration. As stated by the Court of Appeals of Arizona in *Brake Masters Systems Inc. v. Gabbay*:⁵⁴

Most other courts that have considered this issue have held that a party is not required to seek a pre-arbitration determination of arbitrability even when the other party objects to the arbitrability of the issue. ... Our arbitration statutes and the weight of authority from other jurisdictions allow either a pre-arbitration or a post-arbitration determination of arbitrability.⁵⁵

These decisions of other courts should be given particular respect here because the KUSA dictates that it "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."⁵⁶

The Kansas Supreme Court misconstrued the authority it cited in support of its view. Both § 4 of the FAA and K.S.A. 5-402 by their terms are permissive: both provide that a party "may" seek to compel arbitration, not that the party must. Nothing in the text of either statute requires a party to obtain a petition to compel if the other party objects to arbitration. The courts likewise have construed the statutes as permissive rather than mandatory.⁵⁷

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

44. *Id.* at 947 (unless the parties have clearly and unmistakably committed the issue to decision by the arbitrators).

45. K.S.A. 5-412(a)(5).

46. *Id.*

47. Compare *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140-41 (7th Cir. 1985) (finding waiver) with *MCI Telecommunications Corp. v. Exalton Industries Inc.*, 138 F.3d 426, 430-431 (1st Cir. 1998) (finding no waiver and distinguishing *Comprehensive Accounting*). Indeed, one federal district court has indicated in dicta that a party opposing arbitration may have an obligation to seek an injunction against the arbitration proceeding in court. See *Mays v. Lanier Worldwide Inc.*, 115 F. Supp. 2d 1330, 1342-43 (M.D. Ala. 2000) (dicta).

48. K.S.A. 5-402(b).

49. Rau, *supra* note 15, at 300 n.34.

50. See *id.*

51. 475 U.S. 643 (1986).

52. See, e.g., NAF Code of Procedure, *supra* note 2, Rule 36(A) ("An Arbitrator may issue an Award or Order when any Party has failed to respond, appear, or proceed at a Hearing, or otherwise defend as provided in this Code."); Rau, *supra* note 15, at 462 n.65 ("Arbitration agreements, and the rules of arbitral institutions, will routinely address the question of the recalcitrant respondent: They will commonly provide for the possibility of ex parte proceedings ...").

53. E.g., *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 578 n.4 (8th Cir. 1998); *Syncor Int'l Corp. v. McLeland*, 1997 U.S. App. LEXIS 21248, at *8 (4th Cir. Aug. 11, 1997) (unpublished opinion), *cert. denied*, 522 U.S. 1110 (1998).

54. 78 P.3d 1081 (Ariz. Ct. App. 2003).

55. *Id.* at 363-64.; see also *National Ass'n of Broadcast Employees & Technicians v. American Broadcasting Co.*, 140 F.3d 459, 462 (2d Cir. 1998):

We see no reason why arbitrability must be decided by a court before an arbitration award can be made. If the party opposing arbitration desires that order of proceedings, it can ask a court to enjoin arbitration on the ground that the underlying dispute is not arbitrable. If it does not seek to enjoin the arbitration, it can raise the arbitrability issue in a judicial confirmation proceeding.

56. 5 K.S.A. 5-420. Moreover, federal law governing the allocation of authority between the arbitrator and the court likely preempts state rules to the contrary under the Supreme Court's recent decision in *Buckeye Check Cashing Inc. v. Cardegna*, 126 S. Ct. 1204 (2006).

57. E.g., *Val-U Constr. Co.*, 146 F.3d at 580 ("Section 4 of the FAA is clearly permissive. As such, Val-U was not required to petition the district court for an order compelling the Tribe to participate in the arbitration proceedings.")

Moreover, the Dreyer article quoted by the Court refers not to cases like *Credit*, in which Credit made her objection to the arbitrator, but rather to cases like *AT&T Technologies*, in which the objection was raised in a court proceeding. The context of the quotes makes this clear: the quotes refer to cases in which the court is "addressing the motion to compel arbitration,"⁵⁸ and Dreyer cites *AT&T Technologies* as authority.⁵⁹ As a result, the authority cited by the Kansas Supreme Court simply does not support its assertion that an objection to the arbitrator's jurisdiction stops the arbitration proceeding in its tracks.

That said, there is some authority — albeit very much in the minority — that the Court might have cited in support of its dictum. In *Smith v. Currency Trading International Inc.*,⁶⁰ the respondents did not participate in the arbitration other than to assert that they had not agreed to arbitrate. Under *First Options*, they certainly were entitled to de novo court review of the assent issue post-award (assuming no waiver). But the district court did not itself determine whether the parties had agreed to arbitrate. Instead, it vacated the award on the ground that "the arbitration panel exceeded its authority by entering an award before judicial determination whether an arbitration agreement exists."⁶¹ The 10th Circuit affirmed in an unpublished opinion.⁶²

But as already noted, the *Smith* case is very much an outlier. As Rau explains in discussing *Smith*: "If this were indeed 'the law,' it would obviously render unworkable any contractual provision for *ex parte* arbitration. It would also compel litigation — this time, on the part of the claimant rather than the respondent — every time that an arbitrator's jurisdiction is challenged."⁶³ Rau concludes: "Fortunately, the law as properly understood is otherwise."⁶⁴

In the end, the Kansas Supreme Court's statement was only dicta. Indeed, the Court itself did not follow through on the implications of its assertion. If the arbitrator had no jurisdiction to go forward once Credit had raised her jurisdictional challenge, the court should have vacated the award without regard to whether MBNA had presented any evidence of an arbitration agreement. Instead, the district court in *Credit* found that there was "no existing agreement between the parties to arbitrate,"⁶⁵ and the Kansas Supreme Court concluded that the district court had not erred.

V. Conclusion

Under both federal and state arbitration law, arbitrators are generally understood to have the authority to rule on their own jurisdiction in the first instance, including ruling on whether the parties have agreed to arbitrate. A party that asserts it has not agreed to arbitrate is entitled to have a court adjudicate that issue (assuming it has not waived the issue), either before an award is made (on a motion to enjoin the arbitration) or after (on a motion to vacate the award). The Kansas Supreme Court's dictum in *Credit* — that the arbitration proceeding should have stopped once Credit asserted to the arbitrator that she had not agreed to arbitrate — departs from the usual approach in American cases and should not be followed. ■

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arbitration may be allowed to proceed." Rau, *supra* note 15, at 352-53.

62. 1999 U.S. App. LEXIS 18182, at *6 (10th Cir. 1999) (unpublished) ("Therefore we agree with the district court that the NASD arbitration panel exceeded its authority by proceeding before a judicial determination of arbitrability").

63. Rau, *supra* note 15, at 352 n.174.

64. *Id.*

65. 281 Kan. at 657, 132 P.3d at 900.

58. Dreyer, *supra* note 42, at 35.

59. *Id.* at 35 n.42.

60. 10 F. Supp. 2d 1189 (D. Colo. 1998), *aff'd*, 1999 U.S. App. LEXIS 18182 (10th Cir. 1999) (unpublished).

61. *Id.* at 1190-91. The district court relied on *First Options* in support of its holding, *id.* at 1190, which Rau describes as a "grotesque misreading" of that case: "It is, perhaps, the zenith of possible misunderstanding to suggest that after Kaplan, a court's ruling on arbitral jurisdiction is a necessary prerequisite before an

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