

# LEGAL DEVELOPMENTS

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## Recent Supreme Court Decision Reinforces the Increasingly Important Role Arbitrators Play in Resolving Disputes

Over the years, the courts have demonstrated an increasingly positive view of arbitration, repeatedly articulating a liberal federal policy favoring arbitration as a method of dispute resolution. One exception is that courts must decide “questions of arbitrability” - - that is whether the parties agreed that the dispute would be arbitrated. Earlier this month, the Supreme Court handed down an important decision explaining that not all gateway questions are “questions of arbitrability.” Rather, the test is whether the question is one the parties would expect a court, rather than an arbitrator, to decide.

### The Supreme Court’s Decision

The case, Howsam v. Dean Witter Reynolds, Inc., 2002 U.S. LEXIS 9235 (Dec. 10, 2002), revolved around an arbitration rule of the National Association of Securities Dealers (“NASD”), which stated 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.” After Howsam executed the NASD’s Uniform Submission Agreement, Dean Witter filed a lawsuit in federal court asking the court to declare that this dispute was ineligible for arbitration because it was more than six years

old. The Tenth Circuit viewed the NASD rule as presenting a question of the underlying dispute’s arbitrability, and therefore must be decided by the court, rather than an arbitrator. The Supreme Court reversed, concluding that the NASD rule was procedural in nature, and therefore, although it presented a gateway issue, it was not a “question of arbitrability.”

The Court began its discussion by noting that despite the liberal federal policy favoring arbitration, the “question of arbitrability” is ordinarily an issue for judicial determination. The Court went on to explain, however, that not all dispositive gateway questions are “questions of arbitrability.” Rather, the Court must assess whether the gateway matter is one that the contracting parties would likely have expected a court, rather than an arbitrator, to decide. By engaging in this analysis, the courts can avoid the risk of forcing parties to arbitrate matters they may not have agreed to arbitrate.

The Court then attempted to define what specifically constitutes a “question of arbitrability” such that judicial resolution is expected. According to the Court, judicial resolution is appropriate where the gateway issue concerns substantive arbitrability, for example, a dispute over whether the parties are

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bound by a given arbitration clause. Similarly, a disagreement about whether an arbitration clause in a contract applies to a particular controversy is ordinarily an issue for the court to decide. Conversely, procedural issues that grow out of the underlying dispute, such as waiver, delay and like defenses, are for the arbitrator to decide.

The Court concluded that because the NASD time limit rule falls within the class of gateway procedural disputes that do not present “questions of arbitrability,” the arbitrator was to interpret this rule. The Court also noted that this outcome was appropriate because an NASD arbitrator would have comparatively more expertise about the meaning of NASD rules. Therefore, absent a contrary statement in

the arbitration agreement, it made sense for the court to assume that the parties expected the arbitrator to resolve this particular dispute.

### Conclusion

There are many benefits to arbitration and therefore, to the extent arbitration clauses are not already included in your contracts, it is worthwhile to consider adding them. However, there are risks to arbitration as well, including the lack of meaningful judicial review of an arbitrator’s decision. As the courts increase the scope of arbitrator authority, it is important to carefully weigh the risks and benefits of arbitration in light of the increasing variety of questions being submitted to the arbitrator.