Timeliness and the Non-Existence of Arbitration Agreements
THREE ANALOGIES
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Introduction
This article concerns the timeliness of challenging an arbitrator’s award based on the non-existence of an agreement to arbitrate. Under both federal and state statutory frameworks governing arbitration, parties to arbitration have a limited time to challenge the award issued by an arbitrator. What happens, however, if the challenge is to the very right of the arbitrator to issue an award, rather than to the award itself? If the party challenging the award argues that a governing arbitration agreement never existed, do the statutory timelines still apply? Courts have evolved several responses to these questions. This article will consider those answers and suggest an additional answer largely disparaged or ignored by courts considering the issue.

Section I of this article is a brief introduction of the statutory frameworks governing arbitration proceedings: the Federal Arbitration Act and the Uniform Arbitration Act. The introduction will show that the provisions within the two acts applicable to the timeliness of motions for the non-existence of an agreement to arbitrate are nearly identical, providing justification for considering both federal and state cases under the same analytical framework.

Section II analyzes the case law concerning the timeliness of “no agreement to arbitrate” motions, by defining two models that courts have implicitly adopted: (1) assumed arbitrability; and (2) contract threshold theory. This analysis shows that the model of assumed arbitrability is faulty in its assumption of the main issue of whether an agreement to arbitrate exists. By assuming the existence of such an agreement between parties, assumed arbitrability turns to the application of the statute of limitations, ignoring the discussion of whether the statute actually applies.

The opposite side of the assumed arbitrability coin is the contract threshold theory, through which courts consider whether a contract to arbitrate exists before applying the statute of limitations. While clearly correct as an initial matter, the model leads to other questions regarding what point in the process a party opposing arbitration may, or must, assert the non-existence of a binding arbitration agreement. Here, courts have mostly analogized to two different models of personal jurisdiction. Under the first model, which analogizes to code pleading, a party who wishes to argue the non-existence of an arbitration agreement can only preserve her objection to arbitration by either abstaining from arbitration entirely, or participating in arbitration solely to object to the arbitrator’s jurisdiction. Under the second model, which analogizes to the more forgiving federal notice pleading requirements, a party can preserve her argument regarding the non-existence of an arbitration agreement by making such an argu-

If the party challenging the award argues that a governing arbitration agreement never existed, do the statutory timelines still apply?
ment before the arbitrator, after which the party is free to contest the arbitration on its merits. However, this article will show that both analogies are flawed, not only for failing to account for the significant differences between arbitration and civil actions, but also for straying from statutory dictates.

Finally, Section III argues for the adoption of a subject matter jurisdiction analogy, which would shift the focus during arbitration from the actions of the parties to the actions of the arbitrator and the reviewing court. Such a model is not only more fair to parties, especially given the realities of arbitration proceedings and consumer contracts of adhesion, but is also more faithful to the statutory frameworks that govern arbitration.

I. Arbitration’s Statutory Framework

This section provides a brief overview of the federal and legal statutory provisions governing arbitration. This overview will merely provide the foundation necessary for Section II’s case-by-case analysis. Rather than considering the issues raised by the timeliness of “no agreement to arbitrate” motions in the abstract, this article does so in the context of cases that utilize the federal and state frameworks to reach their conclusions. To state a truism, courts in different jurisdictions interpret statutes differently; it is these different interpretations—not the statutes themselves—that are the basis for this article. This brief overview will also show that the applicable provisions of the federal and state frameworks are nearly mirror images of one another. Thus, the analysis of cases in Section III is able to treat both state law and federal law cases in parallel.

A. The Federal Arbitration Act

The Federal Arbitration Act (“FAA”), enacted in 1925 at 9 U.S.C. §§ 1-16, “seeks to ensure the validity and enforcement of arbitration agreements in any maritime transaction or . . . contract evidencing a transaction involving commerce.” The FAA gives legal effect to a national policy favoring arbitration: “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.”

Through this language, Congress made arbitration a branch of contract law, subject to the same level of enforceability and revocation as contracts under the common law.

In addition to section 2, several other provisions of the FAA bear directly on the timeliness of “no agreement to arbitrate” motions. Section 4 states, “if the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.” Courts retain the power to adjudicate controversies regarding the legitimacy of an agreement to arbitrate. However, once an arbitration award is issued, the role of the courts is severely limited: “[a]ny party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” Section 10, which concerns grounds for vacatur, provides that a court may vacate an arbitration award:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 11 delineates the grounds sufficient for judicial modification or correction of an arbitration award, and is inapposite to the concerns addressed in this article. Motions to vacate an arbitration award “must be served upon the adverse party or his attorney within three months after the award is filed or delivered” pursuant to section 12.

Therefore, Congress established a policy in favor of arbitration in large part by limiting the role of courts to adjudicate arbitration controversies. Under sections 2 and 4, courts properly determine the validity of a contract to arbitrate in the same way the validity of contracts at common law are determined. However, absent such controversies about the formation of a contract, courts are severely limited by sections 9 and 11 in the actions they can take to vacate an arbitrator’s award.

B. State Arbitration Statutes

Most states have adopted the Revised Uniform Arbitration Act (“UAA”), which was drafted in 1956 and last revised in 2000. By 2000, forty-nine states had arbitration statutes; of those, thirty-five had adopted the UAA, and fourteen had adopted “substantially similar legislation.” It is perhaps not surprising that the UAA appears to be closely modeled on the FAA; as such, the statutory provisions that speak directly to the issue of the timeliness of “no agreement to arbitrate” claims are nearly identical to the FAA provisions discussed above.

For example, section 6(a) of the UAA states that agreements to submit to arbitration “are valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract,” echoing section 2 of the FAA, which establishes the “[v]alidity, irrevocability, and enforcement of agreements to arbitrate.” In addition, section 6(b) of the UAA, which states, “the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate,” parallels section 4 of the FAA. Finally, section 22 of the UAA spells out a limited role for judicial review of arbitration awards, specifying:

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 22 or 24 or vacated pursuant to Section 23.

Again, this provision finds its antecedent in section 9 of the FAA.

The significant difference between the applicable provisions of the FAA and UAA occurs in section 23 of the UAA, which covers the grounds for vacating an arbitrator’s award. While section 23 contains the same bases for vacatur as section 12 of the FAA, it lists several additional reasons, including one significant for a party positing the non-existence of an agreement to arbitrate: the court shall vacate an award made in the arbitration proceeding if “there was no agreement to arbitrate, unless the
person participated in the arbitration proceeding without raising the objection . . . not later than the beginning of the arbitration hearing.” This provision foreshadows what I call the personal jurisdiction model of adjudication in “no agreement to arbitrate” controversies, which is discussed in Section III.B. Its significance will be addressed further in that section. However, returning to the parallelism between the UAA and FAA, section 23 of the UAA also provides a ninety-day statute of limitations for motions to vacate an arbitrator’s award.  

While this introduction to the FAA and UAA is brief, it provides a sufficient foundation to begin a consideration of case law concerning the timeliness of “no agreement to arbitrate” motions. Because the provisions overlap so closely, the remainder of this article will—except where noted—treat the two statutory frameworks as identical for purposes of analysis.

II. Models of Timeliness Adjudication under the FAA and State UAA Statutes

The question this article addresses, then, is whether and how courts apply FAA and UAA statutory timelines, as spelled out in sections 12 and 23(b) respectively, to motions positing the non-existence of agreements to arbitrate. That is, when a plaintiff seeks court confirmation of an arbitration award, may a defendant raise the issue of non-existence of an agreement to arbitrate to the court even if the statutory timeline for raising a motion to vacate the award has expired?

There are two dominant models utilized by courts facing this question. The first attempts to answer this question through textual and structural interpretation of the FAA (or state UAA statute). As discussed below, the first model is marked by the often conclusory assumption that a contract to arbitrate exists. It suffers from a fundamental failing in the context of timeliness questions with regard to non-existence of arbitration agreement arguments; namely, that because an arbitration agreement is first and foremost an agreement, an argument that such an agreement does not exist renders the statutory framework that governs arbitration agreements inoperable. In short, the assumption of arbitrability is misplaced, assuming the answer to the question of whether a contract to arbitrate exists between parties in applying statutory timelines. I call this model one of assumed arbitrability.

The second model of timeliness adjudication is what I call the contract threshold theory, whereby courts first determine whether a valid agreement to arbitrate exists between the parties before the FAA or state UAA statutory timelines are triggered. In other words, whereas assumed arbitrability takes proper contract formation for granted and immediately proceeds to the application of statutory guidelines, the contract threshold theory requires a valid contract be found before the FAA or state UAA statutory guidelines are applied. Judicial application of the contract threshold theory is further shaped by analogies to several common law jurisdictional doctrines.

In this section I will look at each of the two models in turn, defining them more precisely and providing illustrations of their respective adoption by different courts. In the course of analysis, I will also attempt to address why the contract threshold theory is clearly the proper interpretive model. Finally, I will discuss the jurisdictional models utilized by courts adopting the contract threshold theory, models that analogize arbitrability to the common law doctrines of personal jurisdiction.

A. Assumed Arbitrability

The model of assumed arbitrability embraced by numerous courts is at once a seemingly simple model to explain, given its straightforward reliance on FAA provisions, and a difficult model to comprehend, given the foundational principle that arbitration agreements are, in fact, agreements. First, I will explain the model, both theoretically and as adopted by courts. Once the model has been fleshed out, I will turn to the question of why its adoption is so difficult to comprehend.

1. Assumed Arbitrability Defined

Courts that embrace a model of assumed arbitrability focus on the primacy of section 9 of the FAA, or, in the State UAA context on the parallel UAA provision. In effect, these courts restrict their analysis of “no agreement to arbitrate” timeliness arguments to the plain language of section 9, and to the other sections of the FAA triggered by a section 9 analysis. Specifically, courts rely on the provision stating they “must grant such an order [confirming an award entered by an arbitrator] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” Sections 10 and 11, implicated in the above-quoted language of section 9, provide grounds for vacating the arbitration award. Section 10 provides the possible grounds for vacatur: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or of refusing to hear pertinent, material evidence, or of any other prejudicial behavior; (4) where the arbitrators exceeded or executed their powers imperfectly; or (5) where, within the court’s discretion and where the time to confirm the award has not expired, the court determines that the arbitrators should rehear the controversy.

While section 10 provides the exclusive federal statutory grounds for vacating an arbitrator’s award, section 12 spells out the timeliness provision for a party who seeks to challenge the award. Section 12 provides that parties have three months after an arbitration award is filed or entered to file a motion to vacate or modify such an award. Section 12 references motions to vacate or modify awards, which are covered in sections 10 and 11, and sections 10 and 11 are incorporated directly into section 9. Section 12, therefore, is also a part of the section 9 analysis.

Because the absence of an agreement to arbitrate is not listed as one of the grounds to vacate the arbitration award, and because section 9 states that courts must confirm arbitration awards absent any of the grounds set out in section 10, courts embracing assumed arbitrability are defined by the proposition that they are required to confirm arbitration awards even in the face of “no agreement to arbitrate” arguments. Further, even if valid grounds for vacatur exist under section 10, section 12 requires that motions to vacate an arbitrator’s award must be filed within three months. Thus, where motions to vacate are not filed within three months of the arbitration award, these courts believe they need not even go so far as to analyze the controversy under section 10.

In essence, the assumed arbitrability model reduces the issue raised by “no agreement to arbitrate” arguments to two simple syllogisms. The first concerns the timeliness of the motion arguing the non-existence of an agreement to arbitrate, and can be stated as follows:

1. Motions arguing the non-existence of a valid agreement to arbitrate between the parties filed after an arbitration award has been entered are motions to vacate the award;
2. Motions to vacate an award must be filed within three months of entry of the award pursuant to section 12 (if motions are filed within the time limit, go to the second syllogism);
3. If a motion arguing the non-existence of a valid agreement to arbitrate is not filed within three months, the court must confirm the award under section 9.
If a party files a motion within the three-month time limit, then the court moves to the second syllogism:

1. Section 9 of the FAA, through reference to section 10, explicitly spells out all the possible grounds for vacating an arbitration award;
2. Those grounds do not include the absence of an agreement to arbitrate;
3. Thus courts do not have the ability to vacate an arbitration award based on the argument that no agreement to arbitrate existed between the parties.

(2) Assumed Arbitrability in Action

Because of the apparently "straightforward" logic of analyzing the enforceability of arbitration agreements under the FAA, opinions embracing assumed arbitrability are often cursory. For example, in Brust v. MBNA, Brust, an alleged debtor, appealed a trial court order confirming an arbitration award in favor of her alleged creditor, MBNA Bank. 32 MBNA submitted a claim against Brust to the National Arbitration Forum ("NAF") in 2002. 33 While Brust apparently received notice from NAF of the arbitration proceeding, she declined to participate, and on January 28, 2003, the arbitrator issued MBNA an award of over $16,000. 34 MBNA moved to confirm the award in a Texas trial court, and Brust subsequently filed a motion to the court on August 22, 2003 denying that an agreement to arbitrate existed—nearly eight months after the award was issued. 35 The trial court confirmed the arbitration award, and Brust appealed. 36

On appeal, the Texas Court of Appeals stated that, "[t]he nonexistence of an arbitration agreement is not one of the grounds upon which an arbitration award may be vacated under the FAA." 37 Further, the court continued, "a party seeking to vacate an arbitration award thereunder must do so within three months after the award is filed or delivered." 38 Thus, the Texas Court of Appeals embraced both of the syllogisms discussed above. According to the court, even if Brust had never agreed to arbitrate disputes with MBNA, that argument does not provide grounds for vacating the arbitration award because it is not one of the grounds for vacating an award under section 10 of the FAA. Additionally, the court held that even if section 10 did provide sufficient grounds to vacate, Brust had waited too long to posit the non-existence of the arbitration agreement.

A number of courts interpreting state UAA statutes have also embraced the twisted logic of assumed arbitrability. For example, several Ohio courts have held that they are restrained by Ohio Revised Code section 2711.09's command that a court "shall grant" an arbitrator's order and enter judgment unless a party has sought to vacate or modify the order within three months. 39 As one Ohio court reasoned, absent a motion to modify, vacate, or correct an arbitration award on the specified statutory grounds—which do not include the non-existence of an agreement to arbitrate—within the specified time limit, "the trial court may only confirm or dismiss the complaint." 40 The implication is that because the non-existence of a valid agreement to arbitrate is not a specified statutory ground, a trial court may not modify, vacate, or correct an arbitration award even if the contract is faulty or nonexistent.

In determining whether a party to an arbitration agreement could challenge an arbitrator’s award after the statutory time limit for challenges had expired where one party argued the particular issue in dispute was not subject to the arbitration agreement, 41 the Massachusetts Supreme Court held "the [Massachusetts] Legislature did not see fit to include jurisdictional challenges as an exception to the § 11(b) filing requirements." 42 "The statutory language is unambiguous." 43 The Massachusetts Supreme Court, like the other courts discussed above, therefore held that any challenges to an arbitration agreement that are untimely under section 11(b) cannot be heard by a Massachusetts court. 44

(3) The Failing of Assumed Arbitrability

Despite the supposed logic of assumed arbitrability's statute-driven syllogistic approach to confirming arbitration awards, there is a fatal flaw in the reasoning—namely, the approach assumes that the FAA governs such disputes even where the existence of a contract is in question. That is, assumed arbitrability assumes the very issue that is before the court.

More specifically, the supposed statutory fealty expressed by assumed arbitrability embraces several sections of the FAA to the exclusion of others; the ignored provisions act as gatekeepers to the section 9 analysis the courts discussed above embrace. There is no room in such an approach for section 2 of the FAA, which provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 45 The validity of arbitration agreements, and therefore the operation of the FAA as a statutory framework, is qualified by the last several words of section 2, which explicitly calls for the recognition of arbitration agreements where a valid contract to arbitrate exists. In other words, section 2 states what should be obvious: arbitration agreements are contracts, and their existence is to be evaluated under the principles of contract law. In order to be bound by an arbitration agreement, a party must assent to the agreement in the first place.

Further, section 4 of the FAA requires "[i]f the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." 46 Where one party argues the non-existence of a contract to arbitrate, the role of the courts under the statute is clear: pursuant to section 4, a court shall determine whether or not such a contract exists; if it does not, pursuant to section 2, the FAA does not govern the controversy. Thus, courts that assume arbitrability and declare themselves limited by the mandatory language of section 9 have abdicated the role assigned to them by statute.

Reconsidering the judicial orders above through the lens of sections 2 and 4 reveals the upside-down nature of the reasoning employed. For example, let us return to Brust. The Brust court held that "[t]he nonexistence of an arbitration agreement is not one of the grounds upon which an arbitration award may be vacated under the FAA . . . [and] a party seeking to vacate an arbitration award thereunder must do so within three months . . ." 47 While formally true, this statement misses the forest for the trees: the non-existence of an arbitration agreement argument calls into question whether the FAA should be applied to the controversy at all. By merely relying on the language of section 9 (and its reference to section 10), the Brust court assumes the answer to the question posed by Brust’s appeal: whether an arbitration agreement was formed between her and MBNA. Section 9 considerations are appropriate only if a controversy is properly subject to the FAA. If—and only if—an agreement to arbitrate exists, courts should

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then look to sections 9 and 10 for grounds to vacate an award, and to section 12 for the time limit on such a motion.

Instead, however, courts that bypass this threshold consideration thrust litigants positing the non-existence of an arbitration agreement into a legal black hole. Though Brust’s argument is that she did not contract to arbitrate with MBNA,46 the court dismissed her argument pursuant to the FAA’s statutory requirements—requirements that are only triggered by a valid agreement to arbitrate. In other words, as the First Circuit explained in MCI Telecommunications Corp. v. Exalon Industries:

> From this review of the FAA, it is apparent that determining whether there is a written agreement to arbitrate the controversy in question is a first and crucial step in any enforcement proceeding before a district court. It is also apparent that in such a quest, as is the situation in any other breach of contract suit, if one of the parties alleges the inexistence of the contract, such a party is entitled to present evidence before the fact finder in support of this position.49

In Exalon, as in Brust, the appellant, Exalon, challenged an arbitration award entered against it on the grounds that it had not entered a valid agreement to arbitrate.50 Also similar to Brust, Exalon did not contest the arbitration or file a motion to vacate within the time limit assigned by section 12.51 The Exalon court, however, rebuked the position advocated by MCI that sections 9, 10, and 12 prevented the court from considering Exalon’s claim. “Although national policy favors the resolution of controversies through arbitration, submission of disputes to this type of forum is totally dependent on the private will of the parties as embodied in whatever contract they may have entered into.”52 In other words, there is no requirement to arbitrate private commercial disputes.53 “The FAA merely provides a tribunal in which, if certain jurisdictional and subject-matter criteria are met, private disputes may be resolved.”54 As the Exalon court concluded:

> The question thus comes down to determining whether [section 12] applies to one who denies the very existence of the condition that triggers the applicability of that statute, i.e., a written agreement to arbitrate such a dispute. Stated in perhaps more familiar arbitral terminology, the issue could be restated as one involving a question of arbitrability. Although normally that handle is reserved for disputes in which the issue is not the existence of an agreement to arbitrate but rather whether specific subjects are within the coverage of the agreement to arbitrate, a claim that nothing is subject to arbitration because there is no agreement to arbitrate must be the mother of arbitrability questions.55

To summarize, assumed arbitrability fundamentally fails as an adjudicatory model with respect to a party’s contention that no agreement to arbitrate exists. While claiming fidelity to the FAA, assumed arbitrability ignores the very foundation upon which the FAA is constructed—the existence of an agreement to arbitrate.

**B. The Contract Threshold Theory**

The contract threshold theory is the flip-side to the assumed arbitrability model. Rather than applying the provisions of the FAA to timeliness considerations regarding the non-existence of arbitration agreements, the contract threshold theory requires a court to find a valid agreement to arbitrate before the arbitration provisions enumerated in the FAA take effect. In simpler terms, the existence of a contract to arbitrate is the threshold requirement that triggers FAA analysis. Exalon lays out the basic rationale of the contract threshold theory, which runs as follows: in controversies where the existence of an arbitration agreement is at issue, section 4 of the FAA requires the court to determine whether a contract to arbitrate exists at law or in equity. In addition, section 2 of the FAA states that a court should follow general principles of contract law to make such a determination.

Thus, the contract threshold theory means only where a court finds a valid contract to arbitrate under sections 2 and 4 should it move on to apply the remainder of the FAA—specifically the statutory grounds and timelines for vacating an arbitration award—to the controversy in question. If, on the other hand, the court finds that a valid agreement to arbitrate does not exist, then the FAA’s limited grounds for vacating an arbitration agreement and its timeliness requirement do not apply. As the United States Supreme Court has noted, “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.”56 The finding of a valid agreement to arbitrate is a threshold issue courts must consider in advance of applying the FAA’s section 9 framework.

Courts that have embraced the contract threshold theory thereby recognize the federal and state presumptions in favor of arbitration as embodied in the FAA and state UAA statutes, while also realizing that such a presumption is not properly applied to the question of contract formation. As the Tenth Circuit explained: “The presumption in favor of arbitration . . . disappears when the parties dispute the existence of a valid arbitration agreement.”57 Therefore, the existence of an arbitration agreement “is a threshold matter which must be established before [the FAA or applicable state UAA statute] can be invoked.”58

As such, the contract threshold theory establishes the first step in a proper judicial analysis of the applicability of the FAA’s timeliness provisions as applied to one party’s contention that no arbitration agreement exists between the parties. Yet this is only the first step, and it raises as many questions as it answers. At what point in the proceedings must a party raise the non-existence of an agreement to arbitrate argument? Does participation in arbitration prevent a party from raising the non-existence of an arbitration agreement argument at a later stage of the proceedings? What if the party who contests the existence of an arbitration agreement does not participate in the arbitration proceeding at all? Can a party raise the absence of an arbitration agreement for the first time in opposing a motion to confirm the arbitration award? Answers to these procedural questions regarding application of the contract threshold theory have been found primarily by making analogies to two models of personal jurisdiction: code pleading and notice pleading.

(1) **The Code Pleading Analogy**

Many courts have sought to answer such questions by analogizing to personal jurisdiction. However, similar to civil litigation, courts analyzing arbitration proceedings, which involve sequential arbitral-judicial proceedings, differ in terms of when
the inexistence of an arbitration contract must be raised, and the extent to which such an argument must be pursued by a party making the argument in order to preserve the jurisdictional challenge.

Code pleading, as previously practiced in federal courts and still practiced in numerous state courts, gives a party seeking to contest the court’s personal jurisdiction two options. The first option is to avoid the proceeding entirely and attack the decision on appeal for the court’s failure to establish personal jurisdiction. When a party avoids the proceeding, it continues in her absence. Thus, if jurisdiction is found to be proper, the merits of the case will be decided in the objecting party’s absence. In simple terms, a party contesting personal jurisdiction by failing to participate in the proceeding thereby contemplates an all-or-nothing risk: either her personal jurisdiction will be upheld by an appellate court or the lower court’s decision on the merits will be upheld without her participation.

The second option is to contest personal jurisdiction at the outset of the proceeding and to follow through on this argument prior to discussion of the merits of the case. If a party makes such a challenge at the outset of the proceeding, then in order to preserve her personal jurisdiction argument she must not make any other arguments or motions before the court. If another argument has been raised, then the party is deemed to have waived her motion that the court lacks personal jurisdiction. In other words, if a party participates in the proceeding for any reason other than contesting the court’s personal jurisdiction, then she grants the court the personal jurisdiction that it may not have had otherwise.

As applied to arbitration, a code pleading analogy gives a party who seeks to contest the existence of an arbitration agreement two choices. Under the first option, the party may not participate in the arbitration proceeding in any manner. In that case, the party will be free to object to confirmation of the award by the trial court on the grounds the arbitrator lacked jurisdiction to enter the award in the first place because no arbitration agreement existed between the parties. Once a party moves for a stay of arbitration, the trial court should determine whether an arbitration agreement exists. If the trial court finds no valid arbitration agreement existed, then the arbitrator will have lacked proper jurisdiction to arbitrate the dispute and the award should be vacated. On the other hand, if an arbitration agreement is found to exist, then the trial court would be bound by the section 9 mandate that it must confirm the arbitrator’s determination.

Under the second option, a party contesting the existence of a contract may appear at the arbitration with the sole purpose of arguing that the arbitrator lacks jurisdiction. If the party’s personal jurisdiction argument is unsuccessful, she must appeal this ruling to the reviewing trial court without pursuing any other arguments she may have. The problem with applying this analogy in the arbitral context becomes apparent when one considers the differences between judicial and arbitral proceedings. Even when a party argues that an arbitrator lacks jurisdiction because no arbitration agreement exists, there is nothing to prohibit arbitrators from proceeding to an evaluation of the controversy on its merits. There is no requirement that the arbitrator “certify” the issue to the trial court. If the party posing the non-existence argument participates in the hearing to any extent greater than to posit that non-existence, then she will have waived the jurisdictional argument. This option ends up being a minor variation of the first option. If the arbitrator rules against the challenge to personal jurisdiction, then arbitration of the issue will likely continue and any argument made by the party opposing jurisdiction regarding the merits will waive the jurisdictional argument.

Focusing on concrete examples of courts that have implicitly analogized to code pleading demonstrates how the analogy is applied. For example, in MBNA v. Credit, Credit did not participate in the arbitration proceeding initiated by MBNA. Her participation “was limited to sending a letter to the arbitrator, objecting to the proceeding because she believed there was no agreement to arbitrate.” The arbitrator entered an award of $21,000 to MBNA on September 7, and MBNA moved the court to confirm the award in late December, more than three months later. When Credit opposed confirmation on the grounds that no valid arbitration agreement existed, MBNA moved to dismiss her opposition for being untimely. The court held that because Credit’s participation was limited to her denial of an agreement to arbitrate, she never submitted to the arbitrator’s jurisdiction and the statutory time limits were not triggered:

We note . . . that MBNA cannot rely on Credit’s tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award. An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, a court must settle the issue before the arbitrator may proceed.

Importantly, once the existence of the arbitration agreement was called into question, the burden rested on MBNA to confirm its existence. Limited to Credit’s assertion that she sent a timely objection to the arbitrator, and thereby in the absence of any argument by MBNA to the contrary, the court held that: Under both federal [the FAA] and state [Kansas’s UAA statutes] law, Credit’s objection to the arbitrator meant the responsibility fell to MBNA to litigate the issue of the agreement’s existence. 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.

Thus, in the absence of MBNA meeting its burden of proving the existence of an arbitration agreement between the parties, the court upheld the district court’s order vacating the arbitration award. The Credit court is echoed by Fischer v. MBNA, which was decided one year later by the Kentucky Court of Appeals.

In Exalon, the First Circuit considered a variation of the code pleading challenge where the party opposing jurisdiction did not participate in any way in the arbitration. Whereas Credit and Fischer responded to the notice of arbitration by sending a letter disputing the existence of an agreement to arbitrate to the arbitrator, Exalon did not respond to the notice of arbitration; rather, Exalon first raised the non-existence of an arbitration agreement argument in response to MCI’s motion to confirm the arbitration award. The court phrased the issue thusly:

[P]ursuant to the FAA, can a person who in fact has not been a party to a written arbitration agreement but who is on notice that an arbitration proceeding has been invoked claiming to have binding effect against his/her interests, be obligated by the outcome unless an affirmative challenge is made against the award?

The court answered its own question simply: “We think not.” Relying on section 4 of the FAA, the court held that “as a general matter, section 12, as well as section 2 and the other enforcement provisions of the FAA do not come into play unless there is a written agreement to arbitrate. Thus, if there is no such agreement, the actions of the arbitrator have no legal validity.”

The latent trap in the code pleading analogy is revealed by MBNA v. Hart, decided by the Supreme Court of North Dakota.
Thus, a party who refuses to engage in arbitration based on the Individual persons involved in such controversies are rarely represented by a lawyer. The nature of most consumer arbitration actions is that a party who opposes arbitration is often not represented by an attorney, and the process of obtaining and representing oneself in the arbitration is time-consuming and complex.

Parties who oppose arbitration are often not represented by an attorney, and the process of obtaining and representing oneself in the arbitration is time-consuming and complex. Nevertheless, the courts have consistently held that consumers have the right to contest the existence of an agreement to arbitrate. A party who states her belief that no agreement to arbitrate exists, but engages in substantive argument at arbitration, risks waiving the opportunity to argue the non-existence of an agreement to arbitrate on the plaintiff's motion to confirm.

(2) The Notice Pleading Analogy

Notice pleading was adopted by the federal courts to simplify the more technical code pleading requirements. As notice pleading pertains to contesting personal jurisdiction, a party could preserve her objection to a court's personal jurisdiction by raising the argument at the beginning of the proceeding. However, in contrast to the process of challenging personal jurisdiction under a code pleading regime, notice pleading the party could then proceed to litigate the case in full. Once the objection is raised in a notice pleading jurisdiction, that objection is preserved for appeal. As applied to arbitration, the notice pleading analogy requires the party contesting the existence of an agreement to arbitrate to raise that argument at the outset of the arbitration proceeding. If such an argument has been properly raised, the party will have preserved the objection to arbitral jurisdiction. She can then proceed to contest the arbitration on its merits, safe in the knowledge that the objection to jurisdiction can be raised in opposition to a motion to confirm the arbitrator's award.

Perhaps the most thorough of the judicial opinions analyzing to notice pleading is Boatta v. MBNA Am. Bank, NA.

Upon Boatta, the Connecticut Supreme Court analyzed the differences between code pleading and notice pleading analogies as applied to the timeliness of a "no agreement to arbitrate" motion. Because the court's analysis is so thorough and because the factual scenario whereby arbitration is invoked by one party and challenged by another is so common, it is a worthwhile exercise to recount the Boatta facts and procedural history in their entirety.

MBNA contended that in 1996 it issued a credit card to Boatta, and enclosed with the card was a cardholder agreement that Boatta ratified by use of the credit card. Though the initial credit card agreement did not contain an arbitration provision, MBNA claimed to have issued a notice of amendment to the cardholder agreement by mail in 1999 containing a mandatory and binding arbitration clause. The notice of amendment included a provision permitting a cardholder to opt out of the arbitration clause by sending written notice within forty-five days. MBNA contended that it never received written notice from Boatta opting out of the amendment and his continued use of the credit card bound him to the amended terms of use. Boatta, on the other hand, contended that he never received the mailed notice of the amendment providing for binding arbitration.

MBNA alleged that Boatta defaulted on his obligation to make credit card payments in April 2003, and at the time of default the outstanding balance on the credit card was $45,000. MBNA initiated arbitration proceedings with the National Arbitration Forum pursuant to the amended cardholder agreement. Boatta, representing himself pro se, sought dismissal on the grounds that he never agreed to arbitrate any disputes with MBNA, and therefore he was not bound by the arbitration agreement presented by MBNA.

On March 4, 2004, the arbitrator issued notice of an award in favor of MBNA for $57,486.66. (A significant and unfortunate omission, the Boatta court does not detail whether Boatta participated in the arbitration proceedings beyond objecting on the grounds that there was no agreement to arbitrate.) On August 17, 2004, MBNA filed an application for confirmation of the arbitrator's award in the Connecticut Superior Court. On August 23, 2004, Boatta filed an objection to the claim on the ground that the arbitrator lacked authority to consider the matter or is-
The court began its analysis with a careful consideration of the term “subject matter jurisdiction” as applied to the authority of an arbitrator to arbitrate claims. Because the parties’ mutual consent conferred power on the arbitrator, the court reasoned, “a claim that an arbitrator lacks the authority to hear a matter can be waived and, once waived, cannot be reclaimed.” The court also rejected Boata’s subject matter jurisdiction analogy:

If an arbitrator’s power is, in fact, subject matter jurisdictional, then the plaintiff’s concern that a defendant could raise the issue of arbitrability, for the first time, at any time prior to the conclusion of all appeals arising from the arbitration would be well founded. Furthermore, because subject matter jurisdiction cannot be waived, characterizing the issue of arbitrability as subject matter jurisdictional would be inconsistent with the well established principle that a party can waive judicial review of arbitrability in the absence of a clear objection before the arbitrator.

Despite rejecting Boata’s subject matter jurisdiction analogy, the court did not adopt MBNA’s code pleading analogy. While a party can waive judicial review of arbitrability in the absence of a clear objection before the arbitrator, the court implied that the absence of such a clear objection was a necessary precondition for a waiver of judicial review of arbitrability. Notably, the rule established by the court does not speak of a party’s behavior once a party makes such a clear objection.

The court continued to explain the two procedural routes by which a party may preserve the issue of the arbitrability of a particular dispute for judicial determination. First, a party may move for a stay of arbitration whereby she refuses to submit to arbitration and seeks to compel a judicial determination of arbitrability. Presumably, a party can raise its objection in the face of the opposition’s motion to confirm the arbitration award. This procedural route aligns with the code pleading analogy. However, the court offers a second procedural means for challenging arbitrability: “Alternatively, the issue of arbitrability may properly be left to an arbitrator or arbitration panel for a determination, along with the merits of a dispute.” The party objecting to jurisdiction can “appeal” the arbitrator’s finding that jurisdiction is proper, and “[s]uch a claim may be raised through a collateral action prior to the arbitration, through an application or motion to vacate the arbitration award or through an objection to the confirmation of the arbitration award.”

Under this procedural route, Boata had three options. He could have: (1) filed a collateral action in the trial court prior to arbitration; (2) affirmatively moved to vacate the arbitration award; or (3) objected to MBNA’s motion to confirm the award. Boata chose the third option, and because he objected to the arbitrator’s jurisdiction during arbitration, Boata preserved his objection through judicial confirmation of the award. In other words,
Boata preserved his jurisdictional argument by stating it at the beginning of arbitration. Thus, the Boata court analogizes to what I have called notice pleading. As the court concludes, “a challenge to the existence of an arbitration agreement is appropriate at any stage before the court renders judgment confirming the award if the issue was not waived during the arbitration proceedings.”  

However, it is important to note that such a challenge was appropriate only because Boata had preserved his personal jurisdiction argument before the arbitrator.

Though the notice pleading analogy therefore appears more fair than the code pleading analogy (at least from the opposing party’s standpoint), there remains one significant impediment to its successful application in the arbitration context. Arbitrators are not required to create a record of the arbitration proceedings. Thus, reviewing judges seeking to apply the notice pleading analogy to “no agreement to arbitrate” arguments face a conundrum, because frequently there is no record recounting whether a jurisdictional objection was made during arbitration. Therefore, while theoretically powerful, the notice pleading analogy depends on the existence of a record that arbitrators are not usually required to maintain. The absence of a recorded objection to jurisdiction during arbitration puts courts in an untenable position, one to which judicial deference to arbitrator’s awards provides an easy, if not necessarily proper, out.

Is there a third way; a way that can overcome both the lack of a record memorializing a party’s objection to jurisdiction, and the fundamental unfairness of code pleading in the arbitration setting?

III. An Argument to Analogize to Subject Matter Jurisdiction

Though dismissed by the Boata court, analogizing to subject matter jurisdiction rather than personal jurisdiction changes the evaluative process in a way that is at least easier to apply. This is especially true given the realities of arbitration from both the participants and the reviewing judge’s perspectives. Personal jurisdiction analogies limit the participation of a party opposing arbitration based on the non-existence of an arbitration agreement to a mere statement of the arbitrator’s lack of jurisdiction. Conversely, the subject matter jurisdiction analogy allows the party opposing arbitration to substantively contest the arbitration and later challenge the existence of an agreement to arbitrate so long as the party objecting to jurisdiction has registered her objection. While this may seem to give parties opposing arbitration two bites at the apple, it is readily explained by a simple shift in focus. Whereas the personal jurisdiction analogy focuses on the actions of the parties, the subject matter jurisdiction analogy focuses on the actions of the arbitrator and the judge before whom confirmation of an award is sought. Thus, no matter the procedural history of the controversy, the subject matter jurisdiction analogy examines whether or not the arbitrator had the power to issue an award, and whether the court had jurisdiction to confirm the award under the provisions of the FAA or applicable state UAA statute.

It is instructive to begin an analysis of a subject matter jurisdiction analogy by focusing on two reasons given in Boata for rejecting such an analytic framework: (1) defendants in arbitration proceedings may raise the issue of arbitrability for the first time at any time prior to the conclusion of all appeals arising from the arbitration; and (2) subject matter jurisdiction would be inconsistent with the well established principle that a party may waive judicial review in the absence of a clear objection before the arbitrator.

A. Why the Subject Matter Jurisdiction Analogy is Fair

The first of the Boata court’s rejections concerns the unfairness of allowing a defendant to raise the issue of arbitrability so late in the proceedings. It is partially true that if a subject matter jurisdiction model of arbitrability were to be adopted, a defendant would have increased ability to raise initial objections to arbitrability at a later juncture of the proceedings. Under either of the personal jurisdiction analogies, a defendant may object in one of two ways. A defendant’s objection may be made at the commencement of the arbitration proceedings unless the defendant abstains from participation in the proceeding entirely, in which case the objection may be stated on the plaintiff’s motion to confirm the arbitration award. However, the personal jurisdiction analogy allows a defendant, who did not appear to contest arbitration, to object on the plaintiff’s motion to confirm the arbitrator’s award before a trial court judge. If a defendant chooses this second route, her objection may be made for the first time at a similarly late stage in the proceedings as a subject matter jurisdiction-based objection. Setting this second manner of objection aside, it is worth examining why it would be fair to allow a defendant to fully participate in arbitration without raising any objection, only to raise a subject matter jurisdiction challenge later.

First, plaintiffs’ concerns for fairness are questionable given the reality of consumer arbitration contracts of adhesion. Creditors and merchants often favor arbitration precisely because arbitration tips the scales of justice in their favor. Arbitration can reduce companies’ exposure to large damage awards, involves the loss of many rights and procedural protections, often involves limitations on class actions, largely takes place in secret, severely limits discovery, and sharply circumscribes a consumer’s ability to appeal the decision-maker’s erroneous interpretations of the law. “[U]nlike a judge, an arbitrator is neither publicly chosen nor publicly accountable.”

In most commercial arbitration cases, arbitrators are not required to give a reasoned explanation of a result. The rules of evidence need not apply in arbitration. One of the leading proponents of binding mandatory consumer arbitration openly concedes that arbitration strips consumers of familiar protections: “[A]rbitration materially changes the dispute resolution rules that consumers and borrowers are accustomed to: there is no right to a jury trial, pre-hearing discovery is limited, class actions are eliminated and appeals are severely circumscribed.”

Thus, if fairness to the parties were the issue, given the take-it-or-leave-it unconscionability of most mandatory consumer arbitration clauses and the significant advantages offered corporations over consumers and lenders by such clauses, it is clear that the scales need to be adjusted to combat the disadvantages faced by consumers and employees subject to binding mandatory arbitration clauses. Further, if arbitration were fair to both parties, corporations would not need to impose it because consumers would freely choose it after a dispute arises. Allowing subject matter jurisdiction based challenges to arbitration, while not fully righting the balance, may do a small part to offset the series of advantages arbitration confers upon corporations.

Second, subject matter jurisdiction should be simple for corporations to establish. Section 2 of the FAA requires courts to recognize “agreement[s] in writing to submit to arbitration.” Therefore, all a plaintiff need show a court to establish subject matter jurisdiction is a written contract in which both parties agree to arbitrate the type of disagreement at issue. The matter could be disposed of quickly, no matter when in the arbitration, confirmation or appeal process it is raised. Of course, the simplicity of providing such proof would require a change in the common practice of corporations utilizing binding mandatory
arbitration clauses. Many corporations, particularly credit card issuers, have attempted to create binding mandatory arbitration agreements with their customers by inserting a notice to that effect in their monthly billing statements.\textsuperscript{120} Many of these “bill stuffers” specify that continued use of the credit card indicates the consumer’s assent to the modified contract terms.\textsuperscript{121} Thus, if a signed contract between the parties exists, it does not explicitly contain the arbitration provision at issue. Section 2 of the FAA is silent about how to prove that a written contract exists, and as a result, the issue is left to state law.\textsuperscript{122} Some courts have enforced arbitration agreements sent out as bill stuffers, while others have not.\textsuperscript{123} There is an easy solution: require corporations to acquire a customer signature to any arbitration agreement that they would then maintain in a physical or computerized file.\textsuperscript{124} Mere presentation of such an agreement signed by the defendant would quickly end the controversy over the court’s subject matter jurisdiction. While this may be a significant change, it is hardly unfair to ask corporations that disproportionately reap the benefits of binding mandatory arbitration clauses to maintain such records.

B. Why the Subject Matter Jurisdiction Analogy Is Not Inconsistent with Waiver

The Boata court’s second concern, that an analogy to subject matter jurisdiction undercuts the principle that a party may waive judicial review in the absence of a clear objection before the arbitrator, initially appears more difficult to answer. As a creature of contract, arbitration may be ratified by performance. Thus, it would seem that the performance of a party who arbitrated a dispute without raising any objection to the proceeding would have ratified an arbitration contract, even if such a contract did not exist between the parties prior to arbitration. However, even this apparently obvious objection begins to unravel upon a closer examination of arbitration proceedings.

Many arbitration proceedings are secret: “[m]ost arbitration clauses and the rules of most arbitration providers requir[e] that all parties to a dispute keep all facts about both the dispute and the arbitrator’s resolution of the dispute ‘confidential.’”\textsuperscript{125} “Arbitrators have no obligation to the court to give their reasons for an award,”\textsuperscript{126} and it is uncommon for arbitrators to provide any written explanation for their decisions.\textsuperscript{127} This secrecy begs the following question: how will a court, faced with a defendant’s opposition on the ground of lack of personal jurisdiction to a plaintiff’s motion to confirm an arbitrator’s award, know whether the defendant has waived judicial review by failing to make a clear objection before the arbitrator? In simpler terms, if an arbitrator does not document proceedings, how will a court know whether a defendant objected to an arbitrator’s exercise of personal jurisdiction?

Finally, there is a strong argument to be made based on the plain language of the FAA, which suggests the subject matter jurisdiction analogy is not only more fair but is also the proper understanding of the statute. Section 2 of the FAA defines the “[v]alidity, irrevocability, and enforcement of agreements to arbitrate,”\textsuperscript{128} and acts as the foundation upon which the rest of the statutory scheme rests. In whole, it states that:

\textit{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 in law or in equity for the revocation of any contract.}\textsuperscript{129}  

At least one court has taken steps toward recognizing a subject matter jurisdiction model.

It is difficult to ignore the demand for a “written provision” or “an agreement in writing” under the FAA though courts have consistently done so. Oral and implied contracts were hardly unknown to the framers of the FAA. The resultant presumption must be that the statute means what it says, and the implications of such a reading are clear: in the absence of a written arbitration provision, a defendant may argue the FAA does not cover the dispute at issue. Because of the specific requirement of a written contract, a defendant may not be deemed to have waived her objection by contesting arbitration. Further, section 4 states that “[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.”\textsuperscript{130} It is the court’s duty to determine whether such a contract exists, and the statute does not release the court of that duty when a defendant raises the non-existence of a contract to arbitrate argument for the first time at a confirmation hearing after fully contesting arbitration.

C. The Subject Matter Jurisdiction Model Applied

At least one court has taken steps toward recognizing a subject matter jurisdiction model. In \textit{MBNA America Bank, NA v. Straub}, the New York City Civil Court defined four requirements a petitioner must meet for the court to confirm an arbitration award entered on its behalf:

(1) [S]ubmission of the written contract containing the provision authorizing arbitration; (2) proof that the cardholder agreed to arbitration in writing or by conduct; and (3) a demonstration of proper service of the notice of the arbitration hearing and of the award. In addition, the court must consider any supplementary information advanced by either party regarding the history of the parties’ actions.\textsuperscript{131}

With regard to the written agreement to arbitrate, the court referred to the “common sense behind this principle”:

[A] written agreement to arbitrate cloaks an arbitrator with a power subject to judicial deference and ‘[a] bsents some grant of authority from the person who is to be bound by the award, the officious intermedi-dlers who gave their opinion on the matter would be no more arbitrators than any of the thousands of men and women who pass through New York’s Grand Central Station each morning.\textsuperscript{132}

Upon a motion to confirm the award, if the defendant brings up the non-existence of an agreement to arbitrate, it is the judge’s responsibility to determine whether such an agreement exists. In the absence of the defendant’s clearly established agreement to the proceeding, it is not admissible under the FAA for the judge to ratify an arbitration award issued by the equivalent to the “morn-ing commuter.”

With regard to its second criterion, the \textit{Straub} court stated that the arbitration clause’s “binding nature . . . must be established by the petition,” and that “the petitioner’s presentation of
proof of the consumer’s subsequent use of the credit line” may constitute objective evidence of such a binding nature. A failure to opt out of a billstuffer arbitration clause and continued use of a credit card also may be sufficient proof of the clause’s binding nature. It is easy to anticipate an argument that this is the very type of performance-based proof that this article argues against. However, the *Straub* court’s guide to establishing proof of an arbitration clause’s binding nature in fact supports the argument I am trying to make. It is *the court* that must confirm the existence of a binding agreement to arbitrate. The strong implication is that the court must undertake an independent review of such an agreement whether or not the statutory timeline for seeking award vacatur has passed.

Therefore, *Straub* suggests a defendant may challenge jurisdiction for the first time on a plaintiff’s order to confirm. At the same time, the *Straub* rule undercuts the *Bootta* court’s concerns that a subject matter jurisdiction-based analogy would be unfair. In many cases, the proof the *Straub* court requires will be easy for a plaintiff to establish. As the *Straub* court explicitly states, contracts are frequently found by courts to be established by performance in the consumer context. The point, however, is courts must consider whether or not the contract is binding, and it must do so even if a defendant raises the non-existence of a contract to arbitrate argument in the first instance during a plaintiff’s motion to confirm an arbitration award.

Thus the subject matter jurisdiction analogy, properly considered, is not a two-bite rule for defendants who dislike the results of arbitration proceedings in which they have participated. Rather, it is a method for returning courts to their rightful place under the FAA. In the context of objections by defendants of the non-existence of an arbitration agreement, courts are merely required to do the job assigned to them by section 4 of the FAA, where the existence of an arbitration clause is at issue, “the court shall immediately proceed to the trial thereof.”

To summarize, it is helpful to return to the big picture: If a plaintiff moves to confirm an arbitration award, and a defendant opposes on the grounds that no agreement to arbitrate exists between the parties, where the court finds the plaintiff has proven the existence of an arbitration clause, the court should merely confirm the arbitration award. If, however, the court finds the plaintiff fails to prove the existence of such a clause, the arbitration award must be dismissed. Proceeding pursuant to the guidelines set out in the FAA and state UAA’s is simply not proper where the existence of an agreement to arbitrate has not been proven.

**Conclusion**

This article has shown that opposition to arbitration awards due to the non-existence of a proper arbitration agreement should not be bound by the statutory timelines for motions to vacate defined in the FAA or state adaptations of the UAA. As discussed in Section II.A, the model of assumed arbitrability fails by applying the statutory timelines to situations where the existence of a valid contract to arbitrate is at issue. That is, assumed arbitrability assumes the existence of a valid contract to arbitrate, thereby enforcing a statute of limitations to a dispute that may not come under the statute. Such evaluations are wrong.

However, the discussion of assumed arbitrability raises the difficult issue of how to properly evaluate a party’s participation in arbitration for purposes of establishing the arbitrator’s jurisdiction over that party. It is not enough to merely embrace a contract threshold theory, for such a theory answers one question only to beg another: when is a contract to arbitrate formed by a party’s participation in arbitration? Courts have implicitly and explicitly analogized to personal jurisdiction, but as Sections II.B.1 and 2 show, analogies to personal jurisdiction are not only instructive but also problematic when applied to participation in arbitration. In particular, the informality of arbitration in comparison to civil actions in terms of both representation and secrecy make direct analogies to personal jurisdiction problematic.

In contrast—as discussed in Section III—analogizing to subject matter jurisdiction not only provides a judicially enforceable method of analysis but also a fair method in light of the widespread promulgation of arbitration clauses in consumer contracts of adhesion. The key insight the subject matter jurisdiction analogy provides is that the focus should be on the actions of the arbitrator and court reviewing the arbitration rather than on the parties. A contract to arbitrate grants the arbitrator and the reviewing court power to preside over private disputes. However, because such power is granted to the arbitrator, and by extension the reviewing court, via contract, the non-existence of an arbitration contract means that power does not exist. Arbitrators who preside over such controversies become “officious intermeddlers,” and under the FAA and the UAA courts have a duty to ensure intermeddlers’ awards are not validated.

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1 Federal arbitration is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. While there are variations of state statutory schemes governing arbitration, most are variants of the Uniform Arbitration Act (“UAA”), available at http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm (last visited Aug. 8, 2008). For a listing of state statutes implementing the UAA, see Richard A. Lord, 21 WILLISTON ON CONTRACTS § 57:7 (4th ed. 1992). When discussing state statutory schemes, this article is primarily concerned with those states that have implemented the UAA.

2 The statutory timelines for challenging an award are shorter than the timelines to move a court for approval of the award. See 9 U.S.C. §§ 9, 12 (motion to confirm must be made within one year; motion to vacate must be made within three months); UAA § 22, Comment 1 and UAA § 23(b), available at http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm (last visited Aug. 8, 2008) (stating that the court need not validate an arbitrator’s award within ninety days, and giving party ninety days to appeal the award).


10 Id.


13 UAA § 6(b), available at http://www.law.upenn.edu/bll/ar-
chives/ulc/uarba/arbitrat1213.htm (last visited Aug. 8, 2008). One of the significant differences between the UAA and FAA is that § 6(d) of the UAA has no parallel in the FAA, and would seem to be important where a party posits there is no agreement to arbitrate: “If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.” However, as one can note in the cases discussed in Section III, infra, state courts have not relied upon this provision in “no agreement to arbitrate” controversies. One explanation is that this provision speaks of someone already a party to a judicial proceeding and the court’s ability to continue arbitration. However, in most “no agreement to arbitrate” cases—especially where timeliness is an issue—arbitration concluded several months prior and the party asserting the nonexistence of the arbitration agreement is only a party to a judicial proceeding after arbitration has ended, where the opposing party seeks to collect the award issued by the arbitrator.

18  Id. at § 23; 9 U.S.C. § 12.
19  Id. at § 23(a)(5).
20  Id. at § 23(b).
22  Because state UAA statutes are modeled after the FAA, and because the provisions of state UAA statutes almost never differ from the FAA in ways that affect the analysis in this section, see Section II, supra, references to the FAA should be understood to apply to state UAA statutes. Where the difference between a state’s UAA statute and the FAA is material, the state provision will be cited.
23  Id. (emphasis added).
26  9 U.S.C. § 10(a)(1)-(5). Surprisingly, in my searches of case law in this area, no court has relied on the fifth criterion. Perhaps this is because courts find the other four criteria provide sufficient grounds for vacating an award, or due to the deference with which courts review arbitration awards.
28  See, e.g., Webb v. MBNA Am. Bank, No. 1:04-cv-107GH, 2005 WL 2648019, at *1 (E.D. Ark. Oct. 13, 2005) (citing section 9 of the FAA and stating that “[f]urthermore, we have held that a failure to file a motion to vacate, modify, or correct within three months of either the initial award or the Clarification of Award waived any defenses to confirmation that might be asserted in a timely motion to vacate.” (internal quotation omitted)).
29  Because motions arguing the nonexistence of an agreement to arbitrate do not seek modification of an arbitration award, assumed arbitrability considers such motions as motions to vacate, and not motions to modify. Therefore, section 11 is inapposite to no agreement to arbitrate arguments.
30  See 9 U.S.C. § 9 (“the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title”).
32  Id.
33  Id.
34  Id.
35  Id.
36  Id.
37  Id.
39  See Cooper, 2006 WL 1519640, at *2 (emphasis added); see also MBNA Am. Bank, N.A. v. Terry, No. L-05-1220, 2006 WL 513952, at *2 (Ohio Ct. App. Mar. 3, 2006) (“R.C. 2711.10 and R.C. 2711.11 provide the exclusive remedy for vacating an arbitration award.”) (emphasis added). See also MBNA Am. Bank, N.A. v. Belleisle, No. DV-04-4, 2005 Mont. Dist. LEXIS 1119, at *9-10 (Mont. Dist. Ct. Apr. 26, 2005) (“Even if Belleisle had made timely application to this Court to vacate, modify, or correct the award, this Court does not have jurisdiction to review the decision of the arbitrator for the reasons Belleisle advances.”); Brown v. Moylan, 509 A.2d 98, 98 (D.C. 1986) (“By failing to urge grounds for vacation of the award within the ninety-day statutory limit, WAB waived any right to challenge the award.”).
40  While it may be possible to distinguish this argument from a strict “no agreement to arbitrate” argument, at the least the point at issue is parallel. Whether the argument is the particular controversy at issue between the parties is not subject to arbitration—as in the instant case—or an argument that no controversies that could possibly be at issue between the parties are subject to arbitration, the same principle is at stake: no arbitration agreement covers the controversy.
41  Mass. Gen. Laws Ann. ch. 150, § 11(b) (West 2008) functions as Massachusetts’s state law version of 9 U.S.C. § 9 and borrows language directly from section 9. The only substantial difference is that, under Massachusetts law, motions to vacate arbitration agreements must be made within thirty days, rather than the ninety days allowed under the FAA.
43  See id.
45  9 U.S.C. § 4 (Section 4 also allows for the demand of a jury trial where the existence of an arbitration agreement is at issue). Brust, 2005 WL 104758, at *1.
46  Id.
47  Id.
49  MCI, 138 F.3d at 427.
50  Id. at 428.
51  Id. (internal citations omitted).
52  Id.
53  Id. at 429.
54  Id. (Further, the court holds absent an agreement to submitting questions of arbitrability to an arbitrator, “the arbitrability of that dispute is subject to independent review by the courts, applying standard contract analysis.”)
56  Dumas v. Am. Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).
57  Avedon Eng’g Inc. v. Seatex, 126 F.3d 1279, 1287 (10th Cir. 1997); see also K.L. House Constr. Co. v. City of Albuquerque,
any deference to an arbitrator’s judgment cannot be constructed. 

Alan Scott Rau, in First Options of Chicago v. Kaplan, 514 U.S. 938 (1995) at length, summarizing the Court’s opinion as holding “The consent that is the predicate for any deference to an arbitrator’s judgment cannot be constructed out of a simple argument before the arbitrator that he lacks jurisdiction—when making this case is just as compatible with the idea that one is in fact unwilling to submit. Merely showing up should be probative of absolutely nothing.” Id. at 302.


See 9 U.S.C. § 9 (stating, “the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title” (emphasis added)).


All of the following facts unless otherwise noted are from Boata, 926 A.2d at 1038-39.

Id. at 1039.

Id.

Id. at 1039-40 (quoting Nussbaum v. Kimberly Timbers, Ltd., 856 A.2d 364, 369 (Conn. 2004) (internal quotations omitted)).

Id. at 1040.

Id. (quoting Nussbaum, 856 A.2d at 369 (emphasis in original) (internal quotations omitted)).

See Section II.A, supra, for a discussion of assumed arbitrability.

Boata, 926 A.2d at 1040.

Id. (brackets in original).

Id. (internal quotations omitted).

Id.

Id. (“[T]he plaintiff claims that, ‘[i]f a defendant submits to arbitration without legitimately raising the issue of arbitrability, that party may be deemed to have waived his right to judicial review of the arbitrability issue.’”).

Id. (“The defendant, on the other hand, claims that, ‘[b]ecause arbitration is a creature of contract, [an] arbitrator’s authority to issue an award depends on the existence of an agreement to arbitrate.’” (emphasis added).

Id. at 1041.

Id.

Id. at 1042-43 (citations omitted).

Id. at 1043.

Id.

Id.

Id.

Id.

100 Id.

101 Id. at 1045.

102 See id. at 1043 (“party can waive judicial review of arbitrability in the absence of a clear objection before the arbitrator” (emphasis added)).


See Boata, 926 A.2d at 1042-43.

As will be explained below, subject matter jurisdiction in the context of arbitration is a slightly more limited notion than in conventional litigation. Because arbitration is the result of a contract between parties, a party can waive his objection on the basis of subject matter jurisdiction if he does not register this objection in front of the arbitrator. In conventional litigation, subject mat-
ter jurisdiction need not be preserved.

107 See Boata, 926 A.2d at 1042-43.
108 See Bland, supra note 104 at 4.
109 Id.; see also Elizabeth G. Thronburg, Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims, 67 Law & Contemp. Probs. 253, 271 (2004) (“A powerful contracting party can impose inadequate arbitration systems on countless potential plaintiffs. By doing so, it can reduce the anticipated cost of its accidents significantly and thereby decrease the deterrent effect of tort law.”).
110 Bland, supra note 104 at 4, 139-52.
111 Id. at 5.
112 Id. at 7; see also Ting v. AT&T, 182 F. Supp. 2d 902, 932 (N.D. Cal. 2002) (“The implications of such secrecy to society are troubling. Among many others, they mean that if consumers obtain determinations that a particular AT&T practice is unlawful, they are prohibited from alerting other consumers. Since the AAA [American Arbitration Association, the arbitrator specified in AT&T’s consumer contracts] does not require the arbitrator to state reasons for the award and does not provide a public record of arbitrator rulings, this confidentiality provision means that a contract that affects seven million Californians will be interpreted largely without public scrutiny. This puts AT&T in a vastly superior legal posture since as a party to every arbitration, it will know every result and be able to guide itself and take legal positions accordingly, while each class member will have to operate in isolation and largely in the dark.”).
114 See Bland, supra note 104, at 153 (“The nature of the judicial review of an arbitration award is governed by state and federal statutes, and these statutes provide a far more limited review than is available to review a court ruling.”).
117 See Davis v. Prudential Sec., 59 F.3d 1186, 1190 (11th Cir. 1995).
120 Bland, supra note 108, at 42.
121 Id.
123 For a list of courts recognizing such agreements, see Bland, supra note 108 at 42 n.102; for a list of courts rejecting such agreements, see id. at 42-45.
129 Id. (emphasis added).
133 Id. at 453.
134 Id.
135 See id. at 453-54.
136 See id. at 453.
138 It is conceivably proper that in many circumstances such dismissals are without prejudice, allowing the plaintiff to re-file the petition to conform with evidence supporting the existence of an arbitration agreement.