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JUSTICIABILITY OF A NON-MERIT CONDITION PRECEDENT TO ARBITRATION

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INTRODUCTION

On January 17, 2012, the United States Court of Appeals for the District of Columbia Circuit vacated an arbitration tribunal's award of damages to BG Group in the amount of $185,285,485.85.[2] BG Group responded by filing a petition for a writ of certiorari (Petition) and claimed, among other things, that the D.C. Circuit violated Supreme Court precedent and joined the Eleventh Circuit in a troubling split with the First, Sixth, Seventh, and Eighth Circuits.[3] There is an underlying dispute between BG Group and Argentina that is based upon preconditions to

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2 Republic of Argentina v. BG Grp. PLC, 665 F.3d 1363, 1368 (D.C. Cir. 2012).

3 *Id.*; Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 383 (1st Cir. 2011); Lumbermens Mut. Cas. Co. v. Broadspire Mgmt Servs., Inc., 623 F.3d 476, 481 (7th Cir. 2010); JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 392-93 (6th Cir. 2008); Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1099 (8th Cir. 2004); Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1290 (11th Cir. 2002); *see also* Petition for a Writ of Certiorari, *BG Grp.*, 665 F.3d 1363, *petition for cert. filed*, 2012 WL 3091067 (U.S. July 27, 2012) (No. 12-138).

arbitration in a bilateral investment treaty between the United Kingdom and Argentina (Treaty).[4] The D.C. Circuit held that it was for a court—not an arbitrator—to decide whether BG Group violated the Treaty's condition that an investor file suit in an Argentine court and wait eighteen months prior to arbitration.[5] The Petition asks the Supreme Court to consider its argument that an arbitrator—not a court—has the authority to decide whether BG Group satisfied the eighteen-month condition precedent to arbitration.

This Article argues that the D.C. Circuit was correct to hold that it is for the court to decide whether BG Group satisfied the eighteen-month precondition. Part I explains the facts underlying the dispute between BG Group and Argentina. The first section also articulates the importance of international arbitration for foreign investments and the potential impact on international arbitration if the Supreme Court either denies the Petition or upholds the D.C. Circuit's opinion. Part II discusses the history of the Federal Arbitration Act in Supreme Court opinions related to the D.C. Circuit decision. Part III addresses the Petition's claim that there is a circuit split and finds that no such split exists through an assessment of those appellate decisions.

Ultimately, the Article concludes that the common theme running throughout the circuit decisions is that courts may retain the right to decide questions of arbitrability when that finding does not involve the merits of the dispute. Because neither Argentina's Brief in Opposition (Opposition Brief) nor any of the four *amicus curiae* briefs directly refute the central claims in the Petition, this Article will contest the Petition's central argument by demonstrating that there is no

4 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments Article 8(2), U.K.-Arg., Dec. 11, 1990 [hereinafter *Treaty*], *available at* http://unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf. Although this case involves a foreign nation and a foreign corporation, the United States has jurisdiction because Congress granted federal district courts with original jurisdiction over disputes, including the present case, which arose under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C §§ 201, 203 (2006); Republic of Argentina v. BG Grp. PLC, 715 F. Supp. 2d 108, 116 (D.D.C. 2010) (reversed on other grounds); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

5 *BG Grp.*, 665 F.3d at 1370-73.

circuit split because all of the relevant appellate decisions follow Supreme Court precedent by permitting the judiciary to decide questions of arbitrability when (1) the condition precedent to arbitration does not relate to the merits of a dispute, (2) the precondition occurs before the arbitration clause is triggered, and (3) the contract does not explicitly confer the arbitrator with the authority to decide questions of arbitrability.

I. BG GROUP'S DISPUTE AND ARBITRATION POLICY CONSIDERATIONS

The current dispute arose after BG Group PLC, a United Kingdom corporation, invested in Argentine gas companies.[6] The United Kingdom and Argentina have a Treaty that includes an arbitration clause stating that both parties may voluntarily agree to arbitration or one party may compel arbitration if eighteen months have passed since the dispute was submitted to a court in Argentina.[7] The D.C. Circuit found that the Treaty's arbitration, provision in Article 8(3) was not triggered until one party satisfied the Article 8(2) condition to file its dispute with an Argentine court and wait eighteen months.[8] The D.C. Circuit elaborated, "[b]ecause the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide."[9] This conclusion is based on the Supreme Court-adopted principle that arbitration is a matter of contract and it is for the court to determine whether a contract exists and confers authority on an arbitrator.[10]

6 *Id*. at 1365.
7 *Treaty*, *supra* note 4, at art. 8(2); *see also BG Grp*., 665 F.3d at 1365-66.
8 Republic of Argentina v. BG Group PLC, 665 F.3d 1363, 1371 (D.C. Cir. 2012); *see also Treaty*, *supra* note 4, at art. 8(2)-(3).
9 *BG Grp*., 665 F.3d at 1372.
10 AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *see also* United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("For arbitration 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.").

BG Group argues that the D.C. Circuit's finding that preconditions to arbitrate are within the courts'—not arbitrators'—authority is one additional example of the judiciary's long-standing reluctance to embrace arbitration.[11] BG Group claims that a precondition to arbitrate in a multi-stage arbitration agreement is a matter of "procedural arbitrability,"[12] and the Court has already ruled that whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."[13] The Petitioner goes on to assert that the multi-stage fact pattern in the present BG Group dispute was already addressed in *John Wiley & Sons, Inc. v. Livingston*, which held that an arbitrator, not a court, should decide whether a pre-arbitral requirement was satisfied in a multi-stage grievance process.[14]

The Petition and the four motions for leave to file *amicus curiae* briefs raise weighty policy considerations to support their claim.[15] Congress adopted the Federal Arbitration Act to overcome the judiciary's reluctance to permit arbitrators to decide issues traditionally within the purview of the courts.[16] The United States adopted this policy because domestic and international arbitration agreements can have the benefit of expediting the typically time-consuming process of going to court.[17] The D.C. Circuit's decision, so the Petition's argument goes, "upsets the settled expectations"[18] of private parties that may have assumed arbitrators will decide the arbitrability of preconditions to arbitration.

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11 *Petition for a Writ of Certiorari*, *supra* note 3, at *3.
12 *Id.*
13 *Id.* (citing Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79, 85 (2002) (citations omitted)).
14 *See* 376 U.S. 543, 555-59 (1964); *Petition for a Writ of Certiorari*, *supra* note 3, at *3.
15 Brief of Amicus Curiae of the United States Council for International Business in Support of Petitioner, 2012 WL 3766959 (Aug. 30, 2012) (No. 12-138); Brief of AWG Group Limited as Amicus Curiae in Support of Petitioner, 2012 WL 3875287 (Aug. 30, 2012) (No. 12-138); Brief of Professors and Practitioners of Arbitration Law as Amici Curiae in Support of Petition for a Write of Certiorari, 2012 WL 3805768 (Aug. 29, 2012) (No. 12-138); Motion for Leave to File Brief of Amicus Curiae of the American Arbitration Association as Amicus Curiae in Support of Petitioner, 2012 WL 3724702 (Aug. 27, 2012) (No. 12-138).
16 9 U.S.C §§ 1-16 (2006); Vaden v. Discover Bank, 556 U.S. 49, 58 (2009).
17 *Petition for a Writ of Certiorari*, *supra* note 3, at *34.
18 Reply Brief for the Petitioner, 2012 WL 4960360, at *12 (Oct. 17, 2012) (No. 12-138).

Sovereign states like Argentina, have an interest in receiving foreign investment, and those future investments may be put in jeopardy by increased uncertainty about the extent to which the parties' may rely upon arbitration as a mechanism to enforce an agreement.[19] Cross-border transactions that include an arbitration clause are likely do so for the arbitration process' "neutrality, both political and procedural."[20] The Professors and Practitioners' motion explains, "[t]he right to resort to arbitration relieves investors of the need to persuade their own governments to espouse their claims through diplomatic channels, and relieves states of the complications to diplomatic relations that arise from the espousal of private claims."[21] If the courts increase parties' incentive to litigate preconditions to arbitration, then arbitration's utility may decrease significantly.

BG Group argues that its dispute is particularly important for the United States and other nations because a finding in favor of Argentina could cause many international investment agreements to be ripe for disputes about their own preconditions to arbitrate due to the high frequency of such clauses; in one study, 108 of 377 cases with multiple disputes involved the "duty to mediate" as a precondition.[22] The American Arbitration Association *Amicus Curiae* Motion (AAA *Amicus* Motion) warns that the D.C. Circuit's decision could be disruptive by facilitating increased judicial intervention.[23] The AAA *Amicus* Motion goes on to assert that countries compete to have their nation selected as a seat of arbitration and many companies would not want to select the United States if there is an increased likelihood of judicial intrusion.[24] The private sector has also

19 *See id.* at *4.
20 Detlev Vagts & William W. Park, Book Review, *National Legal Systems and Private Dispute Resolution*, 82 AM. J. INT'L L. 616, 628 (1988).
21 Professors and Practitioners *Amici* Brief, *supra* note 15, at *12; *see also* Julian Davis Mortenson, *The Meaning of "Investment": ICSID's* Travaux *and the Domain of International Investment Law*, 51 HARV INT'L L.J. 257, 282-83 (2010).
22 James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 56 n.34 (2006); *see also* Petition for a Writ of Certiorari, *supra* note 3, at *34.
23American Arbitration Association *Amicus* Motion, *supra* note 15, at *4-*5.
24 *Id.* at *19.

referred to the D.C. Circuit's decision as a "cautionary tale" for investors who may fear their contracts will not be enforced.[25]

Argentina's Opposition Brief reframes the grave concerns of BG Group and characterizes the legal issue as a matter of contract formation. The Opposition Brief claims that the Treaty presents an offer for arbitration to companies that invest in Argentina and such an offer is accepted when the company "accepts the offer to arbitrate *according to the express terms of that offer*, [otherwise,] no arbitration agreement can come into existence."[26] Therefore, because the Treaty required BG Group to file litigation in Argentine courts and wait eighteen months—an action BG Group did not take—BG Group never accepted the offer to arbitrate and an agreement does not exist between the parties.[27] It is understandable why the Opposition Brief characterizes this Treaty as an offer that is not accepted.[28] Supreme Court precedent is clear that it is for the courts to determine whether a contract exists.[29] Consequently, by characterizing the Treaty as Argentina's offer for BG Group to accept through certain actions, the Opposition Brief attempts to provide the court with clear grounds to rule that violations of the Treaty's requirements prior to arbitration are for a court to decide.

Interestingly, while Argentina and BG Group appear to be speaking past one another—each discounts the other's primary claim as absurd and not worthy of addressing beyond a cursory statement—Argentina does not need to take such an extreme position as saying no agreement exists in order to succeed.[30] Argentina's claim that there is no contract is rooted in the more moderate

25 *See* Republic of Argentina v. BG Group, *: "arbitrability" as a threat to the finality of international arbitration awards*, DLA PIPER (Mar. 27, 2012), http://www.dlapiper.com/republic-of-argentina-v-bg-group-arbitrability-as-a-threat-to-the-finality-of-international-arbiration-awards/.
26 Brief in Opposition, 2012 WL 4713129, at *1 (Oct. 1, 2012) (No. 12-138) (emphasis is original).
27 *Id.* at *9-*10.
28 *See id.* at *9.
29 *See id.* at *19-*20.
30 The Reply Brief accuses the Opposition Brief of an "existential dispute" with regard to whether a contract exists. *See* Reply Brief for the Petitioner, *supra* note 18, at *9. Yet the Reply Brief has an existential crisis of its own: how can an arbitrator have existing authority to decide an issue of arbitrability if the source of that authority may not exist?

principle underlying this Article's assertion in Parts II and III below that the court may decide that the arbitration clause was not triggered even if a contract exists. After all, an arbitrator cannot have authority if the parties' intent did not trigger the agreed upon mechanism to confer arbitral authority.[31] This Article and the Opposition Brief share the epistemological contention that an effective arbitration clause does not exist given this fact pattern. The Opposition Brief achieves that result by arguing that only the parties' intent can form a contract and that intent never manifested, so the contract does not exist.[32] This Article explains that even assuming there is a contract, United States Supreme Court precedent still contends that the courts have the authority in this circumstance to determine that the arbitration clause was not triggered due to the conditions precedent in the prior provision of the Treaty.[33]

Other policy considerations favor Argentina's position because the Supreme Court should disambiguate all potential benefits of arbitration from the benefits of arbitration in this case's bilateral investment treaty. In the Treaty, Argentine courts were granted the right to decide the dispute within eighteen months before arbitration may begin.[34] While this process may not seem efficient—with efficiency a typical benefit of arbitration—this inefficient grievance system was established by the United Kingdom and Argentina in their Treaty, which should be honored. Perhaps Argentina included such inefficiency because it wanted to retain symbolic sovereignty over such important disputes. Or, Argentina may have wanted to provide the arbitrator with a lodestar from which to base its own judgment. Either way, the United States Supreme Court is obliged to honor the dispute resolution system crafted by the parties to the Treaty.

31 Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79, 83 (2002).
32 Brief in Opposition, 2012 WL 4713129, at *9-*10 (Oct. 1, 2012) (No. 12-138).
33 *See Howsam*, 537 U.S. at 83.
34 Reply Brief for the Petitioner, *supra* note 18, at *4.

As the Opposition Brief highlights, though the courts favor arbitration, that favoritism presumes the parties agreed to have the arbitrator solve their dispute. Although arbitration is often a very efficient process with time and cost savings,[35] the basic goal "is not to resolve disputes in the quickest manner possible. . . but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'"[36] In the Treaty, Article 8(2) may require eighteen months to pass before Article 8(3) arbitral authority can commence. The Professors and Practitioners *amici* motion says that the D.C. Circuit's decision to look at the terms of the contract has "set United States courts on a collision course with the international regime embodied in thousands of [bilateral investment treaties]."[37] This conclusion disregards the fact that other countries consider a contract's conditions precedent as well.

China and Switzerland, for example, will consider a condition precedent to arbitration that is similar to the facts in the BG Group dispute because both countries' courts will consider the period of time that occurred prior to an arbitrator gaining authority.[38] In 2009, an intermediate court in China set aside an arbitral award because the parties had not engaged in a "45-day consultation period" prior to arbitration.[39] A Swiss court also vacated an arbitral decision for "excess of jurisdiction" due to a party's failure to submit a dispute to arbitration within 30 days.[40] While this Article does not purport to claim that the D.C. Circuit's opinion is consistent with all foreign courts, the Chinese and Swiss decisions are instructive. Most importantly, as the following section will demonstrate, the D.C. Circuit's decision regarding conditions precedent to arbitration is consistent

35 *See* Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753, 768 (2004)(quoting Volt Info. Scis., Inc. v. Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).
36 First Options of Chicago., Inc. v. Kaplan, 514 U.S. 938, 947 (1995).
37 Professors and Practitioners *Amici* Brief, *supra* note 15, at *15.
38 Brief for Professors and Practitioners as *Amici Curiae*, supra note 15, at *15.
39 Lanming Zhao, *Chinese Court Refused to Enforce Award for Failure to Satisfy Pre-Arbitration Consultation Provision*, 14 INT'L BAR ASS'N ARB. NEWSL. 43 (2009).
40 William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 134-35 (1997).

with Supreme Court precedent as well as other circuits' decisions, and the Petition does not accurately claim that a circuit split exists.

II. THE SUPREME COURT AND CONDITIONS PRECEDENT TO ARBITRATION

Congress enacted the Federal Arbitration Act (FAA) to "ensure judicial enforcement of privately made agreements to arbitrate."[41] Prior to the FAA, the judiciary treated arbitration agreements aversely and Congress wanted to place such clauses on "the same footing as other contracts."[42] It is important to note, however, that while the common law precedent was averse to arbitration agreements, the aversion did not stem from then-contemporary United States judges but originated with the English courts' jealousy of arbitrators' encroachment on court jurisdiction.[43] Those who believe that United States judges personally opposed arbitration may be surprised to learn that judges in the United States "frequently criticized" the common law's opposition to arbitration and "recognized its illogical nature and the injustice which results from it."[44] United States judges were not personally hostile to arbitration but felt duty bound to uphold the common law's dictates that discriminated against arbitration provisions.[45] Congress therefore enacted the FAA to overcome the common law opposition and effectuate arbitration's benefit of providing a comparatively more informal process than courts may provide, including informality that may decrease the adversarial nature of a dispute.[46] Parties may also benefit from arbitration because they prefer a neutral authority who is familiar with their industry to decide a dispute, as opposed to a judge who may not understand an industry's practices.[47]

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41 Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985); *see, e.g.*, 9 U.S.C. §§1-16 (2006).
42 H.R. REP. NO. 68-96, at 1-2 (1924).
43 *See id.*
44 *See id*. at 2.
45 *See id.* at 1-2.
46 *See* Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1501-02 (1995); *see also* H.R. REP. NO. 68-96, at 1-2.
47 *See* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1488-89 (1959).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, theSupreme Court articulated that a court must first determine whether contracting parties agreed to arbitrate a specific issue when evaluating an arbitration case.[48] The Court acknowledged its own precedent highlighting that "the scope of arbitrable issues should be resolved in favor of arbitration,"[49] because the contractual provision to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[50]

In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court advanced its jurisprudence on the "arbitrability question."[51] The arbitrability question asks whether a court or an arbitrator should decide whether a dispute is within the purview of an arbitration agreement.[52] The Supreme Court answered that arbitrability questions should be decided by a court.[53] The justices reasoned that a party retains the right to go to court unless that party agreed to arbitrate.[54] While many arbitration issues are unclear, the Court expressly stated that "[w]e believe the answer to the 'who' question. . . is fairly simple" because "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter."[55] While the Court acknowledges that parties may agree to arbitrate questions of whether or not a matter is within an arbitrator's jurisdiction,[56] a court should determine whether the parties wanted a court or an arbitrator to answer that question. The answer to the question about "who" should decide an arbitration question ultimately rests on the parties'

48 473 U.S. 614, 626 (1985).
49 *Id.* at 626 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
50 *Id.* at 628.
51 *See* 514 U.S. 938, 943(1995); Park, *supra* note 39, at 136.
52 First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).
53 *Id.* at 942-43.
54 *Id*.
55 *Id.* at 943 (emphasis in original).
56 *Id.* at 943 (citing AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability)).

intent in the underlying contract about "who" decides whether a given dispute falls within the scope of the arbitration clause.[57]

The Supreme Court then clarified that when a contract is either silent or ambiguous about who decides the arbitrability question, courts should err on the side of the court retaining its jurisdiction over at least the arbitrability question.[58] Specifically, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e] evidence that they did so."[59] If a court forced a party to have an arbitrator decide arbitrability, then the courts may "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[60]

While the courts often interpret the FAA to express a national policy in favor of arbitration, time and again the Supreme Court has drawn a line in the sand that it is for the courts to determine whether a given dispute should go to a judge or an arbitrator.[61] As recently as 2010, the Supreme Court held in *Granite Rock Company v. International Brotherhood of Teamsters* that a court, not an arbitrator, should determine whether the contracting parties agreed to arbitration for the dispute brought to the court's attention.[62] Additionally, in 2010, after the majority in *Rent-A-Center, West, Inc. v. Jackson* did not rule on the question of arbitrability because that provision was severable, there was no unconscionability claim regarding the arbitrability clause, and that claim was raised too late;[63] the dissent added "[i]t would be bizarre to send these types of gateway matters to the arbitrator as a matter of course because they raise a 'question of arbitrability.'"[64] The dissent pointedly explained that even though the court favors arbitration it would be illogical to allow an arbitrator to decide a

57 *Id.*
58 *See id.* at 944-45.
59 *Id.* at 944 (quoting *AT&T Techs.*, 475 U.S. at 649).
60 *Id.* at 945.
61 9 U.S.C. § 3 (1947); *see, e.g.*, Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2855-56, 2859 (2010).
62 130 S. Ct. at 2858-59.
63 130 S. Ct. 2772, 2780-81 (2010) (5-4 decision).
64 *Id.* at 2782 (Stevens, J., dissenting).

question of arbitrability if the parties' intent did not confer the arbitrator with such power because arbitration is a creature of contract that is the source of the arbitrator's authority.

In *Rent-A-Center*, the majority and dissent understood that the Court would not permit arbitration if a party did not delegate to the arbitrator the authority to decide a dispute.[65] Although the majority did not rule on the arbitrability question because the claim was not timely raised,[66] the Court explained that if it were permitted to look at the issue it should find that the Court should look to the contracting parties' intent to determine whether an issue may be "delegated to the arbitrator, so long as the delegation is clear and unmistakable"[67], though the parties may contract to extend an arbitrator's authority to issues of arbitrability.[68]

When evaluating whether an arbitrator's authority was triggered, the D.C. Circuit rightly acknowledged the distinction between "substantive" and "procedural" arbitrability questions.[69] The purpose of the "substantive" and "procedural" analysis is to determine whether the arbitrator has jurisdiction over the question at hand. That is why substantive arbitrability concerns "issues relate[d] to whether a valid enforceable agreement to arbitrate existed between the parties and whether the dispute in question falls within the scope of the arbitration agreement" and procedural arbitrability involves disputes about "whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been complied with or waived, or whether the unexcused failure to follow them precludes the duty to arbitrate."[70] Arbitration is a creature of contract and judicial precedent attempted to use "substance" versus "procedure" to delineate the different between when certain facts give rise to an arbitrator's authority and when certain facts do not confer jurisdiction on an arbitrator.

65 *See id.* at 2779 (Scalia, J.) (majority opinion) ; *see also* 130 S. Ct. at 2782 (Stevens, J., dissenting).
66 130 S. Ct. at 2781 n.5 (Scalia, J.).
67 *Id*. at 2783 (Stevens, J., dissenting).
68 *Id.*
69 Republic of Arg.entina v. BG Grp. PLC, 665 F.3d 1363, 1372 (D.C. Cir. 2012).
70 Rachel Jacobs, *Should Mediation Trigger Arbitration in Multi-Step Alternative Dispute Resolution Clauses?*, 15 AM. REV. INT'L ARB. 161, 164 (2004).

In *John Wiley & Sons, Inc. v. Livingston*, the Supreme Court acknowledged that arbitration disputes involve both substantive and procedural grievances, but realized that these matters were often inextricably linked.[71] While the Court recognized that many procedural issues should be delegated to an arbitrator, it also established an essential caveat: "strictly procedural" claims should remain with the courts.[72] Moreover, the Court clarified that procedural issues are delegated to an arbitrator only after it is determined that a party must present its dispute to an arbitrator.[73] Consequently, *John Wiley* is not dispositive with regard to the Petition and indicates that BG Group's dispute over a time-related precondition may be the precise caveat that *John Wiley* decided to leave for the courts.

This aforementioned caveat demonstrates that the term "procedural" is too generalized to capture the entirety of Supreme Court precedent. Instead, it is more appropriate to ask—for procedural arbitrability issues—whether the procedural dispute is "merit" or "non-merit," where the term "non-merit" refers to those decisions that do not require the authority to decide a party's merit-based claim and the procedural issue arises before an arbitrator must even be contacted.[74] Appeals courts may sometimes incorrectly bifurcate the two issues into substantive arbitrability as a judge-related matter and procedural arbitrability as an arbitrator-related matter when they generalize, but the holdings do not follow such generalizations.[75]

Much of the confusion over the distinction between "substantive" and "procedural" arbitrability is derived from the labels that attempt to distinguish substance from procedure. This

71 376 U.S. 543, 557-58 (1964) ("It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.").
72 *Id.* at 558 (internal quotations omitted).
73 *Id.* at 557.
74 The importance of the timing for contacting an arbitrator is to avoid the situation where a court would be asked to decide a procedural issue related to the procedures established by a specific arbitration or arbitration organization.
75 *See, e.g.*, Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc., 623 F.3d 476, 480 (7th Cir. 2010) (generalizing beyond the facts of the case).

confusion causes courts to recognize that there are also mixed questions with both substantive and procedural components. As in Civil Procedure, the line between substantive and procedural matters, including due process, is difficult to draw because procedures impact substantive rights and substantive rights impact procedures.[76] Likewise, the lines between substantive and procedural arbitrability are often not intuitively based on the words "substance" and "procedure" due to the grey area between the two. For example, "substantive arbitrability" does not necessarily relate to the substance of merit-based arbitration issues and "procedural arbitrability" may relate to a claim regarding legally substantive conclusions, such as whether a party has a duty to provide information that comports with a specific standard.[77] Ultimately, as demonstrated below through the various federal appellate decisions to address the proper delineation between substantive and procedural arbitrability, the underlying reasoning consistent among the appellate courts is that a judge—not an arbitrator—may decide preconditions to arbitration that do not involve decisions related to the merits of a dispute.

III. UNIFORM REASONING AMONG THE CIRCUITS

BG Group's Petition formulates a circuit split by generalizing federal appellate decisions so that they extend until they overlap at a point of contradiction that did not previously exist. Although the Petition claims that the First, Sixth, Seventh, and Eighth Circuits have split with the Eleventh and D.C. Circuits on the issue of court jurisdiction over preconditions to arbitrate, no such split exists.[78] This section goes through each of these circuits to disambiguate the Petition's generalization of each court's reasoning. This Article demonstrates that the circuits issued far more narrow opinions than the Petition portrays. Moreover, these narrow opinions are consistent with one

76 *See* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 848 (2003) ("What we would ordinarily call procedural rights can be characterized as substantive, and substantive rights can often be defined in terms of procedure."); *see also* Christyne E. Ferris, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 VAND. L. REV. 959, 975-76 (2008).

77 *See, e.g.*, JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 392-93 (6th Cir. 2008)

78 *Supra* note 3 (collecting cases).

another on the issue of court jurisdiction regarding conditions precedent to arbitration. Consequently, the D.C. Circuit's decision stands as a rightly decided case compelled by precedent and is consistent with its sister circuits.

Summarizing the First Circuit decision in *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*,[79] the Petition states that "the effect of a party's failure to satisfy the [good-faith negotiation] precondition to arbitration was a question for the arbitrator, not the court."[80] The Petition correctly summarizes the First Circuit's reasoning as applied to the facts in that case, though the First Circuit relies on reasoning in an explanatory parenthetical that generalized the Supreme Court's decision in *John Wiley*, stating that "an arbitrator should decide whether the first steps of a grievance procedure were completed, where these steps are pre-requisites to arbitration."[81] This generalization, without further clarification, may have been appropriate for the First Circuit because in both the First Circuit case *Dialysis Access Center* and the Supreme Court decision in *John Wiley*, the arbitration precondition in question was dependent upon a neutral authority's assessment of a specific party's actions in the context of a deal and the precondition related to the merits of a case.[82] Consequently, both cases involved mixed questions of "substantive" and "procedural" conditions to arbitrate, which *John Wiley* delegates to an arbitrator.[83] The First Circuit therefore was not required to distinguish mixed questions of substantive and procedural preconditions to arbitrate from purely procedural preconditions to arbitrate that are unrelated to the merits of a case. In contrast, the D.C. Circuit was confronted with a non-merit precondition to arbitrate—the eighteen-month requirement to litigate—in the Petition's existing case.

79 638 F.3d 367, 383 (1st Cir. 2011).
80 *Petition for a Writ of Certiorari*, *supra* note 3, at *29.
81 *Dialysis Access Ctr.*, 638 F.3d at 383.
82 John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 556-58 (1964) (discussing an organization's refusal to recognize a union representative as an impediment to the pre-arbitration grievance procedure); *Dialysis Access Center*, 638 F.3d at 371, 383 (determining that an arbitrator must decide whether the facts establish that a party did not negotiate in good faith).
83 *John Wiley*, 376 U.S. at 556-58.

In fact, in a different First Circuit opinion authored by the same judge, the First Circuit held that a court has the authority to decide that arbitration is not compelled because a precondition was not satisfied.[84] In that case, *HIM Portland, LLC v. DeVito Builders, Inc.*, there was a precondition to mediate before the arbitration clause was triggered.[85] Unlike the Petition's characterization of First Circuit jurisprudence, the court affirmed the same principle established by the Supreme Court and relied on by the D.C. Circuit.[86] Because circuit courts may not contravene the intentions of the parties as stated in the contract, when the parties intend mediation to occur prior to arbitration, the court itself has the authority to state that the arbitration clause was not triggered.[87] Whether mediation occurs is not inherently related to the merits of a case. Strikingly, the First Circuit cited to the very Eleventh Circuit case that the Petition claims contradicted the First Circuit's reasoning and caused a circuit split.[88] However, the First Circuit cited to the Eleventh Circuit as support for the reasoning of its holding on conditions precedent to arbitration. It is therefore unlikely that the Petition is correct about the existence of a circuit split between the First, D.C., and Eleventh Circuits within the context of the Petition's appeal.[89]

The Sixth Circuit's holding in *JPD, Inc. v. Chronimed Holdings, Inc.*, when summarized by the Petition, correctly stated that the court found a contractual precondition to arbitrate as a matter for an arbitrator.[90] Once again, however, the Petition omitted that the procedural issue in the case required the Sixth Circuit to make a determination about the nature of the case and thus was more

84 HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41 (1st Cir. 2010).
85 *Id.* at 42.
86 *See id.* at 44.
87 *See id.* ("Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation.").
88 *See id.* (citing Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1291 (11th Cir. 2002); *see also* Petition for a Writ of Certiorari, *supra* note 3.
89 *See* HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 44 (1st Cir. 2010). (citing Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1291 (11th Cir. 2002).
90 539 F.3d 388, 392-93 (6th Cir. 2008); Petition for a Writ of Certiorari, *supra* note 3, at *29.

appropriate for an arbitrator.[91] The precondition dispute before the Sixth Circuit was not nearly as simple and straightforward as whether a period of time passed before an arbitrator may consider a dispute, like BG Group's case.[92] Instead, the *JPD* precondition at issue required a party to document and disclose earnings before interest, taxes, depreciation, and amortization.[93] Whether there was sufficient documentation is an issue left to an arbitrator's judgment because the procedural issue of whether a precondition was met required a substantive decision related to factual determinations in the dispute.[94] Consequently, the facts in the Sixth Circuit case are easily distinguishable from the facts raised in the Petition's D.C. Circuit opinion and the courts' reasoning should be categorized differently because one required a determination related to the merit of the dispute and the other was non-merit-related. The Petition is correct that the Sixth Circuit said the arbitrators should have "comparatively more expertise than a court to resolve the challenge,"[95] but no expertise is needed for the basic question presented in Petitioner's case about whether a certain period of time had elapsed after a party filed litigation in an Argentine court before an arbitrator may evaluate the merits.

When BG Group cites the Seventh Circuit, the Petition continues its theme of citing cases with disputes about conditions precedent to arbitration that require a judgment related to the merits of the case. The Seventh Circuit's decision in *Lumbermens Mutual Casualty Company v. Broadspire Management Services, Inc.* explains that a condition precedent to arbitration would require the "fact-intensive, specialized inquiry very similar to the inquiry it would undertake in order to actually determine what the proper purchase price should be."[96] While this case can be distinguished from the D.C. Circuit case because the "procedural" issue was fact-intensive and related to the merits of

91 539 F.3d 388, 392-93 (2008); Petition for a Writ of Certiorari, *supra* note 4, at *29.
92 *See JPD*, 539 F.3d at 393.
93 *See id.* at 390, 392-93.
94 *See id.* at 393.
95 Petition for a Writ of Certiorari, *supra* note 3, at *29.
96 623 F.3d 476, 481 (7th Cir. 2010).

the case similar to the aforementioned First and Sixth Circuit cases, the court in this matter went out of its way to explain the Supreme Court's framework for determining questions of arbitrability, as established in *Howsam*.[97]

The explanation, however, extends the *Howsam* reasoning to the point where it is broad enough to condone actions the Supreme Court unequivocally prohibited. For example, the Seventh Circuit states without qualification, "[u]nder *Howsam*, questions such as whether prerequisites to arbitration have been met . . . should be determined by [an] arbitrator."[98] Because the opinion lacks any limitation on this blanket statement, the assertion inherently contends that arbitrators should determine all preconditions to arbitrate. The Supreme Court went to great lengths in *Howsam* to outline how such a general statement is not correct. Specifically, the Supreme Court stated "[a]lthough the Court has also long [favored arbitration agreements] it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "*question of arbitrability*," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."[99] Consequently, while the Seventh Circuit's reasoning was correct as applied to the facts in that case, its generalizations of Supreme Court precedent are unequivocally broader than the Supreme Court's decision in *Howsam* permits with regard to clear and unmistakable evidence of intent.

The Petition's reading of the Eighth Circuit's decision in *International Brotherhood of Electrical Workers, Local Union No. 545 v. Hope Electrical Corporation* does not incorporate the court's full reasoning.[100] The failure to reference the entirety of all relevant sections in the decision may have occurred due to the conflation of terminology used by numerous courts. The Petition claims that

97 *See* 537 U.S. 79, 84 (2002); Lumbermens Mut. Cas. Co. v. Broadspire Mgmt Servs., Inc., 623 F.3d 476, 480-81 (7th Cir. 2010).
98 *Lumbermens Mut.ual Cas.ualty*, 623 F.3d at 480.
99 *Howsam*, 537 U.S. at 83 (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)) (emphasis in original).
100 380 F.3d 1084, 1098 (8th Cir. 2004).

the Eighth Circuit "refused to address the jurisdictional challenge, and instead referred it to arbitration. . . ."[101] This casual reading of the Eighth Circuit's in-depth analysis and application of jurisdictional issues belies the support the Eighth Circuit may have for the D.C. Circuit's reasoning in the present case. The Eighth Circuit began its discussion of justiciability by clarifying that a court must place a dispute within one of three categories: "jurisdictional challenges of a procedural nature, jurisdictional challenges of a substantive nature, and challenges that relate to the merits of the arbitrator's decision."[102] Even this thoughtful reformulation of the more traditional substantive and procedural arbitration distinction includes a third category that unfortunately retains the source of confusion: the ambiguous use of the terms procedural and substantive.

The Eighth Circuit's definitions for the two terms overlap. The court defines procedural as relating to the rules of and conditions for arbitration in an agreement.[103] The court defines substantive as relating to gateway determinations that decide whether arbitration is triggered.[104] One could imagine a contract that drafts a precondition that is both procedural and substantive. For example, the dispute in the above Sixth Circuit case required one party to provide a certain level of economic documentation to the other party to trigger arbitration.[105] However, in the present case , the precondition was whether a certain period of time had passed—a determination for which no arbitrator's expertise is needed. Consequently, it would appear that while one may want to minimize the significance of the passage of time as a mere "procedural" matter it could also be categorized as a "substantive" determination according to the Eighth Circuit's definition because it goes to the heart of a gateway issue and the question regarding whether an arbitrator's authority was triggered.

101 Petition for a Writ of Certiorari, *supra* note 3, at *30.
102 *Hope Elec. Corp.*, 380 F.3d at 1098.
103 *Id.*
104 *See id.*
105 *See* JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 392-93 (6th Cir. 2008).

Despite the Petition's claim that the Eighth Circuit did not address jurisdictional challenges, the court decided some issues in favor of jurisdiction over arbitral jurisdiction. For example, the court states, "[h]ere, the Second Inside Agreement does not unambiguously grant the arbitrators the authority to decide such substantive jurisdictional issues. Accordingly, the court rather than the [outside organization] is the proper authority to hear Hope Electrical's substantive jurisdictional challenges."[106] According to the Petition, when the court refused to address jurisdictional issues, the authors of the Petition were likely referring to the Eighth Circuit statement that the court will not address matters of procedural arbitrability, though jurisdictional issues are included in the Eighth Circuit's discussion of substantive arbitrability.[107]

Although the Petition-cited Eighth Circuit case is not an ideal candidate for the source of a circuit split, another Eighth Circuit case may be. In *International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Shopman's Local 493 v. EFCO Corporation and Construction Products, Inc.*, the two alleged preconditions that were violated were matters of timeliness and written communication, neither of which require an arbitrator to assess the merits of the case nor engage in a matter of expertise.[108] In *EFCO*, the court adeptly summarizes the current Supreme Court precedent but applies such reasoning in a tautological fashion when the appeals court explains, "[b]ecause a party's failure to comply with the procedural prerequisites for arbitration is a matter of procedural, and not substantive, arbitrability, we reverse the judgment of the District Court."[109] The court further asserts, without explanation, that timeliness and writing requirements are not of substantive arbitrability because they are "procedural steps" not limited to "subject matter."[110] The court does not provide any analysis as to why timeliness and writing are inherently procedural and

106 Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1099 (8th Cir. 2004).
107 *Hope Elec. Corp.*, 380 F.3d at 1099.
108 359 F.3d 954, 955 (8th Cir. 2004).
109 *See id.* at 955.
110 *See id.* at 956.

therefore assumes the very answer to the question presented by the case. Fortunately, the Eleventh Circuit and D.C. Circuit do not use the connotations of procedure as a heuristic to replace the Supreme Court's precedent on the meaning of substantive arbitrability.

In the Eleventh Circuit's *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, the court, similar to the D.C. Circuit, returns to the foundation of federal arbitration law, expressing that "arbitration 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."[111] *Kemiron* reminds those who read its opinion that the parties intent is "paramount" and does "trump" the Federal Arbitration Act's pro-arbitration policy.[112] The Eighth and D.C. Circuits derived this assertion of a court's authority from the Supreme Court's own reminder that the court must look to the contract and intent of the parties before dismissing outright a petitioner or respondent's claims.[113] In *Kemiron*, the contract explicitly stated that a fifteen-day period for mediation must occur prior to arbitration.[114] The parties therefore intended for a mediation to occur prior to arbitration and the court rightly enforced the contract, including its precondition to arbitrate.[115]

CONCLUSION

Not all preconditions to arbitrate are created equal. Some parties explicitly allow the arbitrator to decide questions of arbitrability and some do not. Certain preconditions require a neutral authority to make a determination related to the merits of the case—an area of authority reserved for the arbitrator—while other conditions precedent are non-merit issues that the courts are competent to determine. While the courts may favor arbitration in order to "reverse the

111 290 F.3d 1287, 1290 (11th Cir. 2002) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986)).
112 *Kemiron*, 290 F.3d at 1290.
113 *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 57 (1995).
114 *Kemiron*, 290 F.3d at 1291.
115 *See id.*

longstanding judicial hostility to arbitration agreements,"[116] judges need not supplant their previous hostility for arbitrators with hostility to themselves. The Petition claims that evaluations by courts on a "case-by-case basis" would be "a recipe for collateral court proceedings and the evisceration of the efficiencies of arbitration."[117] Unfortunately for BG Group, courts may not eviscerate the parties' contractual intent and Supreme Court precedent that provides courts with jurisdiction over non-merit preconditions to arbitrate.

116 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).
117 Petition for a Writ of Certiorari, *supra* note 3, at *26.