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Arbitration and Arbitrability: Toward an Expectation Model

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I. INTRODUCTION

When the parties to a contractual relationship encounter a disagreement, they have the option to invoke dispute resolution procedures that include both public and private aspects. Public involvement is most clearly reflected in the use of court procedures that permit the parties to present evidence at trial and obtain a ruling from a judge or jury on the merits of their dispute. In addition, however, private dispute resolution procedures culminating in arbitration exist alongside this system, offering the parties a generally faster and less expensive method to end their disagreement,[1] as

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[1] FRANK ELKOURI, HOW ARBITRATION WORKS 11 (Alan Miles Ruben ed., 6th ed. 2003) (claiming the advantages of "the saving of time, expense, and trouble" with respect to labor arbitrations between employers and unions). Outside of labor arbitration, there is disagreement

well as the opportunity to have the actual decision on the relative merits of each side's position made by an expert in the subject matter of the dispute.[2] The parties are free to choose private arbitration to resolve their dispute, but generally only public procedures are applicable absent mutual consent to arbitrate.

Even with consent, however, the legal system historically was hostile to the arbitration process. Prior to the enactment of federal and state arbitration legislation, courts felt free to deny enforcement of agreements to arbitrate freely entered into by the parties.[3] Private arbitration was viewed as usurping the jurisdiction of the legal system, and therefore courts permitted the parties to refuse to abide by their prior agreement to arbitrate without fear of any significant legal sanction.[4] Arbitration only worked in

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over whether arbitration truly provides a more expeditious and cost-effective dispute resolution process. *See* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 3.1, at 3:2 (1994) (noting that the achievement of arbitration's objective of providing "quick, inexpensive, and final justice between the parties" is dependent on the interplay of the willingness of the parties to arbitrate, usages and practices of the relevant trade or industry, and the support provided by the legal system); *Id.* §§ 3.2.2.1–3.2.2.2, at 3:10–3:13 (analyzing arbitration's claim of greater speed and lower cost decision making). *See also* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims,* 72 N.Y.U. L. REV. 1344, 1349 (1997); Arthur Eliot Berkeley & E. Patrick McDermott, *The Second Golden Age of Employment Arbitration,* 43 LAB. L.J. 774, 778 (1992); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts,* 76 IOWA L. REV. 889, 957 (1991); Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View,* U. CHI. LEGAL F. 399, 406–15 (1990). Obviously, the referral of cases to arbitration that would otherwise have to be litigated is a way to reduce judicial caseloads. *See generally* Warren E. Burger, *Isn't There A Better Way?,* 68 A.B.A. J. 274 (1982).

[2] The Supreme Court recognized the benefit of expert decision makers in the context of labor arbitrations involving employers and unions in *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). The parties also choose their arbitrators in non-labor cases and have the opportunity to select an expert in the subject matter of the dispute. The American Arbitration Association maintains separate panels of arbitrators for specific types of disputes to assist the parties in selecting subject matter experts.

[3] "The English, and later the American, courts were reluctant to enforce agreements to arbitrate disputes, particularly agreements to arbitrate future disputes." 1 MACNEIL ET AL., *supra* note 1, § 4.1.2, at 4:3.

[4] *See* Ins. Co. v. Morse, 87 U.S. 445, 451 (1874); Wood v. Humphrey, 114 Mass. 185, 186 (1873). *See also* 1 MACNEIL ET AL., *supra* note 1, § 4.2.2.1, at 4:6–4:9 (noting that the "ouster of jurisdiction" rule prevailed in England until it was reversed by statute in 1889, although it had been somewhat limited by earlier action of the House of Lords). While denying specific enforcement, courts could award nominal damages in the event of a breach of an executory agreement to arbitrate. *See* Munson v. Straits of Dover S. S. Co., 102 F. 926, 928 (2d Cir. 1900). Court hostility to arbitration agreements may have been partially the result of judicial concern that

situations where the parties followed through on their agreement to arbitrate by participating in the arbitration proceeding and complying with the arbitrator's award.[5]

That situation changed in the 1920s as a result of the adoption of the Federal Arbitration Act (hereinafter FAA)[6] and parallel state legislation.[7] The primary aim of these statutes was to render agreements to arbitrate legally enforceable. This was achieved in § 2 of the FAA by inserting language describing arbitration agreements as "valid, irrevocable, and enforceable,"[8] and by providing in § 3 and § 4 for the stay of litigation over any arbitrable issue and the issuance of a court order compelling arbitration of the dispute.[9]

Although a dramatic change from prior practice, the FAA was written with some limitations on the enforcement of arbitration agreements. For example, the statute required that any agreement to arbitrate had to be in written form, while also providing that an order to arbitrate could be denied on "such grounds as exist at law or in equity for the revocation of any contract."[10] Even beyond that, however, the enactment of legislation providing for the enforcement of arbitration agreements did not necessarily change the attitude of the courts toward the arbitration process. Many

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resolution of disputes through arbitration meant the loss of judicial fees. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees,* 64 UMKC L. REV. 449, 461–62 (1996).

[5] Compliance is most likely to occur where the parties view the arbitration process as advantageous or where there is commercial pressure to participate in the arbitration and adhere to the resulting decision. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry,* 21 J. LEGAL STUD. 115, 149 (1992).

[6] 9 U.S.C. §§ 1–16 (2000).

[7] New York's arbitration statute was enacted in 1920, preceding the adoption of the FAA. 1920 N.Y. Laws 275.2, codified at N.Y. C.P.L.R. 7501–7514 (Consol. 1988 & Supp. 2004). The American Arbitration Association drafted a model arbitration act which, by 1933, had been adopted by 12 states. *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 985 (1999).

[8] 9 U.S.C. § 2 (2000).

[9] *See id.* §§ 3, 4. The stay of litigation requires that the court satisfy itself that the matter in dispute is subject to arbitration. *Id.* § 3. In a similar fashion, the order compelling arbitration of the dispute requires that the court be satisfied that the parties entered into an agreement to arbitrate and that there has been noncompliance. *Id.* § 4.

[10] *Id.* § 2.

continued to view arbitration as an inferior form of justice, and a number of court decisions specifically excluded certain subject areas from its reach.[11]

In contrast, however, more recent court decisions on arbitration have reflected a continuing evolution toward the acceptance of arbitration as an adequate substitute for the judicial resolution of disputes. According to the Supreme Court, the choice of arbitration is now simply the substitution of one decision making forum for another, without the loss of substantive rights.[12] As such, the process is suitable for the resolution of both private contract and public statutory disputes. Reflecting this view, the Court has upheld the validity of agreements to arbitrate statutory as well as contract claims, including complaints alleging the deprivation of individual civil rights as well as disputes between businesses premised on statutory violations.[13] It now seems apparent that only the clearest expression of a

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[11] The Supreme Court's ruling in *Wilko v. Swan*, barring the enforcement of agreements to arbitrate with respect to claims under the Securities Act of 1933, led to a general understanding that arbitration agreements involving statutory claims were not covered by the FAA. 346 U.S. 427, 438 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989). Beyond that, it has been argued that the FAA was not intended by Congress to apply outside of disputes with respect to commercial contracts. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees,* 64 UMKC L. REV. 449, 466–67 (1996). Even where the FAA was applicable, federal courts were initially "extremely weary of arbitration and, in general, held that they would not, under the FAA, enforce an agreement to arbitrate a particular claim if the claim appeared to be frivolous or without any substantial claim of merit." David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act,* 41 ST. LOUIS U. L.J. 561, 565–66 (1997).

[12] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.").

[13] *See* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406–07 (2003) (discussing RICO); *Gilmer*, 500 U.S. at 27–29 (discussing ADEA); *Rodriguez de Quijas*, 490 U.S. at 481–83 (discussing the Securities Act of 1933); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227–42 (1987) (discussing the Securities Exchange Act of 1934 and RICO); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624–28 (1985) (discussing the Sherman Anti-Trust Act). In *Circuit City Stores v. Adams*, the Supreme Court narrowly interpreted the employment contract exclusion of section 1 of the FAA in the context of a Title VII claim without any suggestion that agreements to arbitrate Title VII claims are unenforceable. 532 U.S. 105, 118–19 (2001). More recently, lower courts have held that agreements to arbitrate employment disputes are enforceable with respect to retaliation claims under the Financial Institutions Reform, Recovery and Enforcement Act and the Sarbanes-Oxley Corporate Reform Act. Oldroyd v. Elmira Sav. Bank, 134 F.3d 72, 77 (2d Cir. 1998); Boss v. Salomon Smith Barney Inc., 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003).

legislative intent to prohibit the arbitration of a specific type of dispute will suffice to justify the exclusion of that issue from arbitral resolution.[14]

While the courts have increasingly embraced arbitration as a dispute resolution mechanism, there has been no change in the foundation principle that the process is premised upon the consent of the parties. Courts have repeatedly reaffirmed that arbitration will not be compelled absent a prior agreement by the parties to refer their dispute to arbitration. This standard is generally not a problem if the dispute arises first and the agreement to arbitrate follows since the parties in such a case will know the nature of their disagreement at the time they consent to refer the matter to an arbitrator.[15] A post-dispute agreement to arbitrate will normally involve a conscious and voluntary choice to forgo the formalities of a court trial in favor of the benefits of a more informal arbitration hearing.

However, parties frequently enter into an agreement to arbitrate well before the emergence of a specific dispute, often incorporating an arbitration clause in the contract establishing their relationship. In that contract the parties may also agree to preconditions that must be satisfied before the arbitration may proceed, including such matters as a requirement that the right to arbitrate be invoked within set time limits or that negotiation and/or mediation precede referral of the dispute to arbitration. In these kinds of cases there is a far greater likelihood that the parties will disagree about whether their dispute should be arbitrated. One side may then refuse to proceed to arbitration, leaving the other party in the position of having to seek a court order compelling arbitration of the dispute.

When faced with a suit to compel arbitration, courts may be presented with a number of legal issues, including whether there exists a binding written agreement to arbitrate, whether the dispute is covered by the agreement, and whether all preconditions to arbitration have been satisfied.

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[14] Congress has considered a number of proposals to preclude mandatory arbitration in the context of specific statutory environments. Illustrative are the proposed Preservation of Civil Rights Protections Act of 2004, S. 2088, 108th Cong. § 513 (2004), barring enforcement of pre-dispute employment arbitration agreements outside of collective bargaining contracts; the Consumer Fairness Act of 2003, H.R. 1887, 108th Cong. § 1003(a) (2003), providing that any binding arbitration provision in a consumer transaction or contract "shall not be enforceable;" and the Predatory Lending Consumer Protection Act of 2003, S. 1928, 108th Cong. § 4(g) (2003), providing that covered mortgages "may not include terms which require arbitration or any other nonjudicial procedure" for the resolution of disputes.

[15] Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1346 (1997) ("Postdispute agreements to arbitrate existing disputes, most would agree, do not raise especially difficult questions.").

Often these are classified as arbitrability issues in the sense that they are gateway questions that must be resolved before arbitration of the merits of the dispute can be ordered. However, before answering these questions a determination must first be made as to whether the suit to compel arbitration itself should be heard by a court or referred to arbitration. Then, once the decision maker has been identified, the contested issues must be resolved. Only if all of the applicable requirements are met will the merits of the parties' dispute be referred to arbitration.

While a variety of approaches are available for handling the arbitrability questions that precede the resolution of the merits of the dispute between the parties, the Supreme Court has been moving toward the adoption of a set of uniform foundation principles for dealing with such challenges. Primarily, the Court has been focusing on an expectation model that attempts to enforce the parties' expressed or presumed intent. However, the appropriateness of the Court's approach and its clarity for lower courts faced with pre-arbitration controversies have not yet been established. The Article which follows is a preliminary attempt to address these questions. Section II is an overview of the general characteristics of the modern law of arbitration. Section III looks at the Court's pro-arbitration policy and its application to questions concerning the scope of the parties' arbitration agreement. Section IV addresses the problem of determining arbitrability in specialized contexts where the subject matter of the dispute is covered by the arbitration agreement. Section V considers the substantive/procedural arbitrability dichotomy. Finally, section VI assesses the developing expectation model as a method for dealing with arbitrability challenges.

II. THE CONTOURS OF CONTEMPORARY ARBITRATION LAW

The FAA, passed by Congress in 1925, is the centerpiece of domestic American arbitration law. It provides the legal framework governing the commercial arbitration process for transactions within the reach of the FAA's commerce clause jurisdictional scope.[16] However, the FAA does not regulate arbitrations conducted pursuant to collective bargaining agreements between unions and employers. These are governed by

[16] State arbitration legislation is available to govern arbitrations not covered by the FAA. *E.g.*, ARK. CODE ANN. §§ 16-108-201 to 16-108-204 (Michie 1987 & Supp. 2003); MO. ANN. STAT. §§ 435.350 to 470 (West 1992 & Supp. 2004).

§ 301(a) of the Labor-Management Relations Act.[17] Nevertheless, despite the different sources of legal support for labor and commercial arbitration, the fundamental principles of both categories have many similarities and judicial decisions frequently cite cases in each area interchangeably.[18]

A central feature of the FAA is its broad jurisdictional sweep which in turn insures its applicability to a wide array of arbitration agreements. Yet, it is not clear that this represents an accurate picture of the FAA in its early years. It has been argued that when the FAA was first enacted in 1925, it was based on congressional authority to define federal law to be applied in federal courts.[19] However, as a result of the Supreme Court's decision in *Erie Railroad Co. v. Tomkins*, Congress and the courts were barred from using this authority in diversity cases as a basis for developing substantive law rules binding on the states.[20] Subsequently the Court's decision in *Bernhardt v. Polygraphic Co.*, restricted the FAA's reach to maritime transactions and those involving commerce defined as "working 'in' commerce . . . producing goods for commerce, or . . . engaging in activity that affected commerce . . . ."[21] This meant that diversity suits to compel arbitration brought in federal court, comparable suits filed in state court, and federal actions not within the narrow scope of what the Court then understood to be the commerce clause reach of the FAA would be subject

[17] 29 U.S.C. § 185(a) (2000). Although the section is written so as to grant federal courts jurisdiction to hear labor contract suits, the Supreme Court concluded that it reflected congressional policy to enforce agreements to arbitrate in both federal and state courts. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962); Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 452–57 (1957). *See generally* 1 MACNEIL ET AL., *supra* note 1, § 11.3.2, at 11:18–11:24.

[18] Commentators caution, however, against treating the two areas identically. *See* 1 MACNEIL ET AL., *supra* note 1, § 11.3.1, at 11:17 ("The differences between commercial and labor arbitration, informed by experience, reinforce this exclusion [of collective bargaining agreements from FAA coverage].") and § 11.3.3, at 11:25 (noting the "perhaps equally troublesome problem of unthinking reliance on LMRA § 301 cases as authority under the FAA").

[19] This was the view expressed by Justice O'Connor, joined by Chief Justice Rehnquist. Southland Corp. v. Keating, 465 U.S. 1, 23 (1984) (O'Connor, J., dissenting). *But see* 1 MACNEIL ET AL., *supra* note 1, § 9.3, at 9:29 ("Although the primary constitutional foundation as advanced by the reformers was the power of Congress to regulate procedures in the federal courts, Congress was also told that it had the power to enact the [FAA] under the commerce clause. Congress apparently believed it was proceeding on both constitutional bases.").

[20] 304 U.S. 64, 78 (1938).

[21] 350 U.S. 198, 201 (1956).

to state law principles governing arbitration, even though many states remained hostile to the arbitration process.[22]

This narrow view of the reach of the FAA was ultimately rejected as a result of the Supreme Court's ruling in *Southland Corp. v. Keating*.[23] There the Court reviewed a decision of the California Supreme Court which interpreted the California Franchise Investment Law to bar enforcement of an agreement to arbitrate claims arising under that statute.[24] The California decision had been based on California law, but it produced a result that was in direct conflict with § 2 of the FAA which requires enforcement of agreements to arbitrate, and was generally inconsistent with federal policy favoring the enforcement of arbitration agreements.[25] The Supreme Court avoided enforcing the state law rule by holding that the FAA was an exercise of Congress's broad authority under the Commerce Clause, and as such its provisions were enforceable in both federal and state courts.[26] Reliance was placed on the language contained in the statute's supporting House Report and the belief that Congress would have been less likely to address the issue of enforcing agreements to arbitrate if the FAA was limited to non-diversity suits filed in federal court.[27]

Section 2 of the FAA extends it reach to any contract "evidencing a transaction involving commerce."[28] The meaning of this language was considered by the Supreme Court in *Allied-Bruce Terminex Cos. v. Dobson*.[29] The setting was a claim filed by a homeowner in Alabama against a franchisee of Terminex under the company's "Termite Protection Plan."[30] The Supreme Court of Alabama rejected the applicability of the

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[22] *Id.* at 202–04. The Court in *Bernhardt* viewed rules governing the enforcement of arbitration agreements as substantive, therefore mandating that state law would govern in cases outside of the jurisdictional scope given to the FAA. *Id.*

[23] 465 U.S. at 13–17.

[24] *Id.* at 5.

[25] *Id.* at 10.

[26] *Id.* at 15–16. This reinforced the result the Court had reached in *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Subsequently, in *Perry v. Thomas*, the FAA's jurisdictional reach was held broad enough to preempt a state law that would have permitted a wage claim to be pursued in court despite the existence of an agreement to arbitrate. 482 U.S. 483, 486, 490–91 (1987).

[27] *Southland*, 465 U.S. at 13, 15.

[28] 9 U.S.C. § 2 (2000).

[29] *See* 513 U.S. 265, 273–77 (1995).

[30] *Id.* at 268–69.

FAA on the grounds that "the connection between the termite contract and interstate commerce was too slight."[31] The Alabama Supreme Court believed that before the FAA would be deemed to govern the arbitration agreement, the parties at the time of contracting must have contemplated substantial interstate activity.[32] The Supreme Court, however, rejected the Alabama interpretation of the FAA, concluding instead that the FAA is an exercise of the full scope of Congress's authority under the commerce clause.[33] Thus, as long as a transaction in fact involves interstate commerce, regardless of what the parties may have contemplated, the FAA governs any arbitration agreement the parties may have reached.[34]

This expansive approach to the jurisdictional scope of the FAA was reaffirmed by the Supreme Court in *Citizens Bank v. Alafabco, Inc.*[35] There the parties had entered into a debt restructuring agreement that included an arbitration clause. The Supreme Court of Alabama found that the FAA was not applicable because the underlying agreement did not have a "substantial effect on interstate commerce."[36] The Supreme Court, however, held that the FAA's broad language, extending its coverage to transactions involving commerce, does not require that the specific transaction be in commerce in the sense of being "within the flow of interstate commerce."[37] Furthermore, the Court did not find the question of whether the transaction, taken alone, had a substantial effect on interstate commerce controlling, as long as "in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'"[38] As phrased, the standard is sufficiently broad that it may well have an effect on decisions that have found intrastate transactions such as single residential real estate sales agreements outside the scope of the FAA § 2 "involving commerce" standard.[39]

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[31] *Id.* at 269.

[32] *See id.* at 270, 275–77.

[33] This was consistent with *Perry v. Thomas*, describing the FAA as "a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." 482 U.S. 483, 490 (1987).

[34] *E.g.*, Reece v. U.S. Bancorp Piper Jaffray, Inc., 80 P.3d 1088, 1091 (Idaho 2003) (holding that securities transactions involve interstate commerce and are subject to the FAA even though the transactions themselves occurred within a single state).

[35] *See* 539 U.S. 52, 56 (2003) (per curiam).

[36] *See id.* at 55.

[37] *Id.* at 56.

[38] *Id.* at 57.

[39] 9 U.S.C. § 2 (2000). Illustrative of decisions holding such intrastate transactions outside of

Substantively, the FAA renders written agreements to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[40] As a result of *Southland* and *Allied-Bruce Terminex*, that right is fully applicable in both federal and state courts.[41] The federal rule making written agreements to arbitrate enforceable applies since "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[42] However, in situations in which enforcement of a written agreement to arbitrate is sought, the recalcitrant party may rely upon general state law defenses that do not single out arbitration agreements for special treatment. This was confirmed by the Supreme Court in *Doctor's Associates, Inc. v. Casarotto*, where the Court ruled that a Montana statute requiring that an arbitration clause be typed in capital letters on the first page of the agreement was in conflict with the FAA.[43] As a contract rule directed to arbitration agreements alone, the Montana statute was inconsistent with the FAA requirement that states not "place arbitration clauses on an unequal 'footing.'"[44]

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the reach of the FAA are *Saneii v. Robards*, 289 F. Supp. 2d 855, 860 (W.D. Ky. 2003); *SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059, 1062 (N.D. Ca. 2002); and *Cecala v. Moore*, 982 F. Supp. 609, 612 (N.D. Ill. 1997). Following *Alafabco*, Alabama took an expansive approach to the commerce clause reach of the FAA. In *Service Corp. International v. Fulmer*, the Alabama Supreme Court held that the FAA applied to a contract for the provision of funeral and cremation services to an in-state purchaser, reasoning that in evaluating statutes regulating economic or commercial activity, courts must look at the aggregate effect of the activity, not just its impact on interstate commerce as a single transaction. No. 1021503, 2003 WL 22872183 at *4–7 (Ala. Dec. 5, 2003).

[40] 9 U.S.C. § 2 (2000).

[41] However, the FAA is not an independent grant of federal court jurisdiction. Enforcement of agreements to arbitrate, therefore, must be secured in state court unless there is an independent basis for federal court jurisdiction such as diversity of citizenship.

[42] Southland Corp. v. Keating, 465 U.S. 1, 16 (1983). Moreover, arbitration agreements must be enforced according to their terms, thus overriding state laws requiring that specific types of disputes be resolved in court despite an agreement to arbitrate, as in *Southland* where the California Supreme Court had interpreted state law to bar the enforcement of agreements to arbitrate franchise law controversies. *Id.* at 5. State law restrictions on the method of enforcing agreements to arbitrate, such as by banning out of state forum selection clauses within concededly valid arbitration contracts, are also preempted. Flint Warm Air Supply Co. v. York Int'l Corp., 115 F. Supp. 2d 820, 827–28 (E.D. Mich. 2000); Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc., 840 F. Supp. 708, 710 (D. Ariz. 1993).

[43] 517 U.S. 681 (1996).

[44] *Id.* at 686.

Although state rules directed specifically to arbitration agreements are preempted by the FAA,[45] there is still room to attack an agreement to arbitrate based on state laws of general applicability. As the Supreme Court recognized in *Doctor's Associates*, "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."[46] This has proven to be a fruitful area for litigation. Numerous court decisions illustrate successful efforts to challenge arbitration agreements based upon both the process by which the agreement was reached as well as the substantive terms embodied within the agreement.[47]

The broad scope of the FAA is not only the result of the commerce clause jurisdiction upon which the Supreme Court has stated it is based. The FAA has also been held applicable to an increasingly broad array of subject areas extending well beyond typical commercial contracts which were its initial concern. In particular, in a series of decisions the Court applied the FAA to agreements to arbitrate federal statutory disputes.[48] In the Court's view, only if the legislation does not allow for claims to be

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[45] The Colorado Supreme Court found a narrow exception to this rule in the context of insurance arbitration. In *Allen v. Pacheco*, the court held that a statute restricting the language and typeface that could be used to impose an arbitration obligation in a medical services agreement was saved from preemption under the FAA on the theory that the legislation regulated the business of insurance under the McCarran-Ferguson Act. 71 P.3d 375, 381–84 (Colo. 2003). The U.S. Supreme Court had previously held that ERISA's broad preemption requirement did not apply to state laws that regulate insurance in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 745–46 (1985), but ERISA's preemption requirement has an explicit exclusion for "any law of any State which regulates insurance, banking, or securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(a) (2000). Unlike ERISA, there is no separate language in the FAA either providing for preemption or establishing an insurance industry exception to any FAA preemption that might exist.

[46] *Doctor's Assocs.*, 517 U.S. at 687.

[47] *See, e.g.*, Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 758–61 (7th Cir. 2001); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–40 (4th Cir. 1999); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000).

[48] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–29 (1991) (discussing the Age Discrimination in Employment Act); Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481–83 (1989) (discussing the Securities Act of 1933); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227–42 (1987) (discussing the Securities Exchange Act of 1934 and RICO); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624–28 (1985) (discussing the Sherman Antitrust Act). *See also* Pacificare Health Sys., Inc. v. Book, 538 U.S. 401, 407 (2003) (concluding that RICO claim is arbitrable where it is not clear that arbitration agreement would bar statutorily authorized punitive damages).

diverted to arbitration,[49] or if specific legislation is passed barring arbitration,[50] would a different result ensue.

Expansion of the scope of the FAA has also been achieved through the narrow interpretation that the Court has given to the employment contract exclusion. In *Circuit City Stores, Inc. v. Adams,* the Supreme Court considered the language of § 1 of the FAA barring its applicability "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[51] The Court rejected the view that this language was a general exclusion applicable to all employment contracts.[52] Instead, the Court limited the reach of the exclusion to those directly engaged in interstate commerce activities such as transportation workers.[53]

Finally, contemporary arbitration law is characterized by a highly deferential standard of review. Once an arbitration award has been issued, only limited grounds for challenge are available. For labor arbitration awards under § 301(a) of the Labor-Management Relations Act, the Court has stated that enforcement is required unless the award does not draw its essence from the labor agreement or violates clearly delineated public

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[49] The Supreme Court has not found any statute to encompass such a limitation, but specific types of actions may be held excluded from the reach of arbitration agreements. *See* McKnight v. Chicago Title Ins. Co., 358 F.3d 854, 857–59 (11th Cir. 2004) (discussing why state law barring arbitration of insurance claims was valid due to McCarran-Ferguson Act authorization of state regulation of the insurance business); Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157, 1162 (Cal. 2003) (holding that claims for injunction under state Business and Professions Code not subject to arbitration); Boughton v. Cigna Healthplans, 988 P.2d 67, 76 (Cal. 1999) (holding that the court would not compel arbitration of claim for injunctive relief pursuant to the state Consumer Legal Remedies Act).

[50] Periodically, legislation has been introduced in Congress which would exempt particular statutory claims from the FAA. Thus far no such proposal has been enacted into law. *E.g.,* Preservation of Civil Rights Protections Act of 2004, S. 2088, 108th Cong. § 513 (2004) (providing that non-collective bargaining agreement pre-dispute employment arbitration agreements are unenforceable); Consumer Fairness Act of 2003, H.R. 1887, 108th Cong. § 1003(a) (2003) (providing that any binding arbitration provision in a consumer transaction or contract "shall not be enforceable"); Predatory Lending Consumer Protection Act of 2003, S. 1928, 108th Cong. § 4(g) (2003) (providing that covered mortgages "may not include terms which require arbitration or any other nonjudicial procedure" for the resolution of disputes).

[51] 500 U.S. 105, 112 (2001).

[52] *See id.* at 114–15.

[53] *Id.* at 119.

policy.[54] The FAA provides that arbitration awards may be vacated where there has been some form of arbitrator misconduct.[55] Beyond that, the case law also identifies manifest disregard of the law as a basis for vacating an arbitration award, but this generally requires a showing that the arbitrator was aware of what the law required but chose to disregard it.[56] Otherwise, mistakes of fact or law are not subject to review.[57] A debate currently exists as to whether the parties to an arbitration agreement may contract for more substantial review of the arbitrator's decision.[58] However, even if this approach were adopted, it would only represent a narrow exception to the policy of award finality that exists under current arbitration law.

III. THE PRO-ARBITRATION POLICY

The fact that parties have entered into an arbitration agreement represents the first step in the arbitration process. The courts have repeatedly reaffirmed that arbitration of a dispute will not be required unless the parties have consented to resolve their disagreement through arbitration.[59] However, when the dispute actually arises, the issue of consent can prove problematic. Questions can be raised about whether the parties actually entered into an arbitration agreement, whether any such agreement was legally effective, whether the current dispute is within the

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[54] *See* E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[55] 9 U.S.C. § 10 (1999). Among the stated basis for vacating an award are corruption, fraud, evident partiality, misconduct, as well as issuance of an award which exceeded the arbitrators's powers.

[56] Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1461–62 (11th Cir. 1997); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986). *See generally* 1 MACNEIL ET AL., *supra* note 1, § 40.7, at 40:80–40:96.

[57] "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco*, 484 U.S. at 36. *See also* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509–10 (2002).

[58] *Compare* Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 996 (5th Cir. 1995) *with* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 933–34 (10th Cir. 2001). *See generally* Victoria L. C. Holstein, *Co-Opting the Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards,* 12 WORLD ARB. & MEDIATION REP. 276 (2001); Alan Scott Rau, *Contracting Out of the Arbitration Act,* 8 AM. REV. INT'L ARB. 225 (1997).

[59] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) ("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.").

scope of the arbitration agreement, and whether any mandatory pre-arbitration requirements have been followed properly.

The actual resolution of such pre-arbitration issues requires a careful assessment of a variety of factors. Initially, it is necessary to determine who the decision maker should be. The existence and enforceability of the agreement to arbitrate, its scope, and the evaluation of compliance with any procedural requirements, are questions that could themselves be decided by an arbitrator or alternatively reserved for judicial resolution. It is also possible to have some issues decided by courts and others by arbitrators depending upon the specific character of the question to be resolved as well as the differing institutional competencies of judicial and arbitration forums.

After the decision maker has been identified, the next step is to develop a format for determining how the dispute over pre-hearing issues should be resolved. Depending upon how arbitration is viewed in the context of the particular issue in dispute, the legal system could reflect a policy of strict neutrality, or it might choose to favor or disfavor resolution of the disagreement through arbitration. It is necessary in this process, however, to distinguish between the separate issues that are involved. The first question is who should decide whether the pre-hearing issue will bar arbitration of the merits of the dispute while the second question concerns the standards that should be applied by the chosen decision maker in determining whether the merits of the dispute will be resolved by an arbitrator or judge. Put another way, either a judge or arbitrator will wind up deciding whether the parties will have to arbitrate to resolve the disagreement that arose between them.

Much of contemporary arbitration law, however, is said to strongly favor use of arbitration as an alternative dispute resolution mechanism.[60] Courts frequently refer to the law's pro-arbitration policy in support of decisions to refer disputes to arbitration on a wide variety of arbitration issues presented to them. Certainly the passage of the FAA and parallel state legislation was designed to insure that arbitration agreements would be enforceable in court, and that parties who changed their minds about arbitrating their disputes after having agreed to do so would face a court

[60] *See, e.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187, 1202–03 (1993) (observing that employment arbitration has been developing a presumption of arbitrability parallel to the one applied in labor arbitration.).

order requiring them to live up to their obligation.[61] However, removing barriers to the enforcement of an arbitration agreement is not the same thing as applying a pro-arbitration policy.[62]

The most direct manifestation of the law's pro-arbitration policy is reflected in the general presumption of arbitrability used by courts in determining whether or not to enforce an arbitration agreement. This is the specific approach used in cases involving claims addressed to the scope of the parties' arbitration agreement in which it is asserted that a dispute which arose during the course of the parties' contractual relationship is not covered by the arbitration agreement. Typically the resisting party argues that the arbitration agreement, whose existence and validity are not challenged, is limited in character and consequently its scope is not broad enough to include the particular contractual dispute at issue. This argument is premised on the foundation principle that arbitration requires the consent of the parties, and therefore any issue not covered by the arbitration agreement is not subject to an order compelling arbitration.

It would be possible to approach such cases by requiring that the party seeking enforcement of the agreement to arbitrate meet the burden of persuading the decision maker that the dispute is within the coverage of the arbitration agreement. Relevant factors in this assessment could include the specific language used in the arbitration agreement, negotiating history, general practices in the industry and prior practices of the parties themselves. Yet, the arbitration clause is often not the central issue in the parties' contractual negotiations. Frequently boilerplate language is used, and there may be no prior relationship between the parties or industry practice to rely upon. These factors could make securing enforcement of an arbitration promise a difficult undertaking. In fact, however, the effort to refer the dispute to arbitration is aided by the presumption that the dispute is within the reach of the parties' agreement to arbitrate. Thus, the party seeking to avoid arbitration must persuade the decision maker that the

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[61] *See* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) ("The problems Congress faced were therefore twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes [at the time of the passage of the FAA in 1925] to mandate enforcement of arbitration agreements.").

[62] 1 MACNEIL ET AL., *supra* note 1, § 8.6, at 8:14 (referring to "the judicial addition to the FAA of a pro-arbitration policy"). Justice O'Connor has stated that "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

dispute is not covered by the arbitration agreement, while facing the risk that any doubt will be resolved in favor of inclusion.

There are certainly advantages to both the legal system and the parties in the use of arbitration as a dispute resolution mechanism. For the courts, the use of arbitration provides a means for dealing with docket congestion.[63] If everything works the way it is supposed to, potential court litigation never materializes. The parties will air their disagreement in an arbitration hearing and comply with the arbitrator's ultimate award. Even if courts do become involved in arbitration-related issues, there is likely to be only a minimum commitment of time and resources. The parties may disagree whether their dispute is arbitrable, and the losing party in the arbitration may later challenge the award, but the presumption of arbitrability and the deference courts give to arbitration awards ensure that such challenges will not be frequent and are likely to be easily resolved when they are made.[64]

For the parties, enforcing their arbitration agreement provides assurance that the law respects contractual choices that have been freely and voluntarily made. The parties agreed to an arbitration clause in their contract, and applying a presumption of arbitrability provides them with the generally speedier and less costly dispute resolution process they sought.[65] The utilization of a presumption of arbitrability also serves to enhance predictability in line with the parties' likely expectations. When they initially agreed to arbitrate, it is reasonable to assume that the parties anticipated that disputes within the general range of their arbitration agreement would wind up before an arbitrator. The fact that one party later objects to arbitration may often be the result of a desire to achieve some tactical objective by taking advantage of the extra cost and delay of litigation in court. It is entirely appropriate to discourage such resistance by weighting the scales in favor of enforcing the parties' earlier agreement to arbitrate.

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[63] "Underlying this pro-arbitration stance appears to be the desire to help clear court dockets, not as a simple consequence of party choice to use arbitration, but as a policy in its own right." 1 MACNEIL ET AL., *supra* note 1, § 8.6, at 8:15 (1994) (citing Warren E. Burger, *Isn't There A Better Way?,* 68 A.B.A. J. 274, 276 (1982)).

[64] *See supra* notes 54–57 and accompanying text.

[65] *See* 1 MACNEIL ET AL., *supra* note 1, §§ 3.2.2.1–3.2.2.2, at 3:11–3:12 (noting that "[d]espite the risk that arbitrations, like litigation, can be prolonged by appeals and other kinds of delays . . . , the sense prevails that arbitration is more expeditious and, thus, provides an advantage to parties wishing to resolve disputes quickly and get on with their business"). However, "[t]here is as much or more uncertainty about the costs of arbitration relative to the costs of litigation as there is respecting their relative speeds." *Id.* at 3:12.

Existing case law amply demonstrates the strength of the legal presumption in favor of holding the parties' dispute to be within the scope of their arbitration agreement. Supreme Court rulings involving collective bargaining disputes subject to arbitration are illustrative. In *United Steelworkers of America v. American Manufacturing Co.*, the labor agreement contained a broad arbitration clause covering disputes as to the "meaning, interpretation and application of the provisions of [the] agreement."[66] The district court found that the employee's acceptance of a permanent partial disability payment estopped him from claiming that he had a right to return to work, while the court of appeals rejected his grievance against the company's refusal to reinstate him as "frivolous, [and] patently baseless."[67] However, since the claim was one based upon the terms of the labor contract, the Court concluded that arbitration was required.[68] It would then be for the arbitrator to determine whether the claim was meritless, barred by estoppel principles, or was valid or invalid for any other reason.

A companion case, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, involved a challenge to the company's practice of contracting out work while existing employees were on layoff status.[69] The parties had a collective bargaining agreement that required arbitration to resolve questions concerning the meaning and application of the contract, but matters "strictly a function of management" were excluded.[70] The court of appeals viewed contracting out as a management function, and thus excluded from the reach of the arbitration clause, but the Supreme Court disagreed.[71] The Court spoke in glowing terms about the role of arbitration in the context of labor disputes, and ruled that an "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[72] Thus, where the grievant could state a claim that was

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[66] 363 U.S. 564, 565 (1960).

[67] *Id.* at 566.

[68] *Id.* at 569.

[69] 363 U.S. 574 (1960).

[70] *Id.* at 576.

[71] *Id.* at 577.

[72] *Id.* at 582–83. The Court gave the management rights clause of the contract a limited interpretation that extended only to matters over which management had complete discretion and control.

arguably covered by the contract, arbitration of the dispute would be required. An exclusion that might or might not apply would not be sufficient to overcome the presumption of arbitrability as long as the dispute was arguably within the arbitration agreement's reach.

In a similar fashion, the Supreme Court in *AT&T Technologies, Inc. v. Communications Workers of America*, rejected a claim that an arbitration agreement which excluded such management functions as hiring, placement, and termination of employees, freed a union from the duty to arbitrate a dispute concerning layoffs, a subject treated elsewhere in the labor contract.[73] The Court reaffirmed the presumption of arbitrability, observing: that "[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator."[74]

Despite the strong presumption of arbitrability in the labor arena, parties may still resist claims to enforce the obligation to arbitrate collective bargaining disputes on the grounds that the agreement to arbitrate does not cover the particular controversy. Sometimes this resistance is part of a larger pattern of resistance to the arbitration process, including both a preliminary refusal to arbitrate the dispute and a later challenge to the arbitrator's award. Judge Easterbrook of the Seventh Circuit Court of Appeals, however, recognized the problems such resistance creates and responded that:

> Arbitration will not work if legal contests are bookends: a suit to compel or prevent arbitration, the arbitration itself, and a suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once.[75]

The use of sanctions against the party resisting arbitration is one method to deal with this problem,[76] but changes in the sanctions provisions of the

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[73] 475 U.S. 643 (1986).

[74] *Id.* at 649–50.

[75] Prod. & Maint. Employees' Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1163 (7th Cir. 1990).

[76] *See generally* Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies, and Sanctions,* 10 HOFSTRA LAB. & EMP. L. J. 245 (1992).

Federal Rules of Civil Procedure have made this a more difficult response.[77] Nevertheless, the available evidence demonstrates that the presumption of arbitrability has had the desired impact of limiting the frequency of challenges to the obligation to arbitrate.[78]

Although courts use different language in dealing with challenges to the enforceability of arbitration agreements in non-labor cases, the FAA incorporates a presumption of arbitrability similar to the one applied to disputes arising under labor contracts. According to the Supreme Court, the FAA encompasses the principle that:

> Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[79]

Reinforcing this idea, the Supreme Court has elsewhere observed that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[80] Thus, the party challenging coverage by a commercial arbitration agreement must meet the burden of establishing that the parties did not agree to the resolution of the dispute by an arbitrator pursuant to their preexisting agreement to arbitrate.[81]

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[77] *See* FED. R. CIV. P. 11(c), *as amended* April 22, 1993. The Advisory Committee Notes, in referring to the 1993 amendment, observe that the amendment "places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court."

[78] *See* Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future,* 18 OHIO ST. J. ON DISP. RESOL. 249, 256 (2003) (observing that "[c]ourts have steered a more intermediate course by enforcing predispute arbitration agreements, while reserving power to void or reform the most objectionable arrangements in these contracts."). *See generally* Peter Feuille & Michael H. LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures,* 45 ARB. J. 35 (1990).

[79] Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24–25 (1983).

[80] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985).

[81] *E.g.* Med. Creative Tech. v. Dexterity Surgical, Inc., No. Civ.A. 03-3773, 2004 WL 350735, at *3 (E.D. Pa. Feb. 25, 2004) (holding that an agreement to exclude actions for

Application of this principle in commercial cases is illustrated by the Second Circuit Court of Appeals ruling in *In re Kinoshita & Co.*, and the legal reaction to it.[82] In this 1961 decision, the court considered an arbitration clause covering disputes that might later "arise under [a maritime] Charter."[83] The appellant sought to avoid arbitration on the grounds of having been fraudulently induced to enter into the contract with Kinoshita & Co., a claim the appellant insisted was not within the scope of the arbitration agreement.[84] The court concurred with this argument, viewing an agreement to arbitrate disputes "arising under" the contract as limited to disagreements over the interpretation of the contract and the performance of contractual obligations, thus excluding the contract formation claim that the objecting party was fraudulently induced to enter into the agreement.[85] In order to achieve wider coverage, the court indicated that a broad arbitration clause covering claims "arising out of or relating to th[e] contract, or the breach thereof" would be required.[86]

The development of the presumption of arbitrability in cases after *Kinoshita*, however, led the Second Circuit to restrict the decision to its facts,[87] while courts in other circuits have declined to follow the ruling's narrow approach.[88] It is true that there is a certain plausibility to the

injunctive relief from contract's mediation and arbitration requirement includes both claims for preliminary and permanent injunctions).

[82] 287 F.2d 951 (2d Cir. 1961).

[83] *Id.* at 952.

[84] *Id.*

[85] *Id.* at 953. The Ninth Circuit Court of Appeals has also limited arbitration clauses to contract performance and interpretation issues where the parties agreed to arbitrate disputes "arising out of" or "arising under" the agreement, in *Tracer Research Corp., v. National Environmental Services Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994), and where the contract states that the arbitration clause covers disputes "arising hereunder," in *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1461 (9th Cir. 1983).

[86] *Kinoshita*, 287 F.2d at 953. (citing the American Arbitration Association standard arbitration clause used at the time).

[87] *E.g.*, ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 26, 31–32 (2d Cir. 2002) (holding that fraudulent inducement is arbitrable under an arbitration agreement covering "any right of action hereunder"); Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218, 225–26 (2d Cir. 2001) (distinguishing arbitration agreement covering disputes arising from the agreement from the *Kinoshita* "arising under" language).

[88] *E.g.*, Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 578 (6th Cir. 2003) (holding that fraudulent inducement is covered by clause requiring arbitration of claims "arising out" of the agreement); Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000) (holding claims relating to the formation of the agreement covered by arbitration

argument that an agreement to arbitrate claims "arising under the contract" assumes that the contract itself is valid, thus excluding challenges to the contract's very existence. However, emphasizing such a fine distinction in language fails to recognize that many contracting parties are unlikely to be aware that what looks like a broad agreement to arbitrate is in fact a limited one. The presumption of arbitrability helps to resolve the problem by providing a default solution unless exclusion of the specific dispute is readily apparent. It is thus more likely today that a broad arbitration clause that is phrased in general terms will be read to cover all claims relating to the parties' contract unless specific exclusionary language is made part of the agreement.

In a somewhat more subtle fashion, the Supreme Court has reflected its pro-arbitration policy in its treatment of claims that raise potential grounds for refusing to order arbitration. Where it is possible to interpret the parties' arbitration system or written arbitration agreement in a fashion that would eliminate the problem, the Court has shown itself willing to proceed with arbitration and leave the disagreement to another day. The Court has resolved two recent cases in this fashion without considering the likelihood that the arbitrator's handling of the arbitration system or interpretation of the parties' agreement would eliminate the problem.

The first of the two cases, *Green Tree Financial Corp.-Alabama v. Randolph*, involved a mobile home purchaser who brought claims against her lender under the Truth in Lending Act and the Equal Credit Opportunity Act.[89] She argued that her written agreement to arbitrate was unenforceable because it did not address the costs of arbitration, raising the possibility that she would not be able to pursue her claim in an arbitral forum because of the risk that she would face prohibitive arbitration costs.[90] The Court viewed Randolph's claim as "too speculative to justify the invalidation of an arbitration agreement."[91] The lack of specific information on the cost of the *Green Tree* arbitration system meant that Randolph could not meet "the

language applying to claims "arising under" and "arising out of" the contract); H.S. Gregory v. Electro-Mech. Corp., 83 F.3d 382, 383 (11th Cir. 1996) (holding that a fraudulent inducement claim must be arbitrated where arbitration clause in the contract stated that it covered disputes "arising hereunder"); Sweet Dreams Unlimited, Inc. v Dial-A-Mattress Int'l, Ltd., 1 F.3d 639, 642–43 (7th Cir. 1993) (holding that an arbitration clause covering claims arising out of the agreement encompassed allegation that agreement was illegal under state franchise disclosure law).

[89] 531 U.S. 79, 83 (2000).

[90] *Id.* at 90.

[91] *Id.* at 91.

burden of proving that the claims at issue [were] unsuitable for arbitration."[92] The Court's disposition left Randolph in the uncertain position of not knowing what financial responsibility she would have for the cost of the arbitration proceeding, but requiring arbitration of the merits of the dispute and leaving the cost issue until later satisfied the Court's overriding pro-arbitration policy.[93]

More recently, in *PacifiCare Health Systems, Inc., v. Book*,[94] the Court addressed a RICO lawsuit brought by physicians against a managed health care organization.[95] Arbitration was resisted by the physicians on the grounds that the agreements they signed prohibited the award of punitive damages, thereby depriving the arbitrator of the authority to award treble damages under RICO's provisions.[96] While the lower courts had refused to enforce the arbitration requirement, the Supreme Court disagreed.[97] It raised the possibility that the arbitrator would not consider the treble damage provision as punitive, thereby making the remedies available in arbitration equivalent to those that would be available in court.[98] The Supreme Court concluded that it "should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved."[99] If all that the objecting party can point to is the possibility, albeit a strong one, that something about the arbitration process or the parties' arbitration agreement was fundamentally flawed, arbitration would be ordered and the problem would be addressed later, a result once again

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[92] *Id.*

[93] In dissent, Justice Ginsburg questioned whether the policy allocating the burden of proof to the party challenging the adequacy of arbitration as the forum for a particular type of dispute should carry over to challenges to the accessibility of the arbitration forum. *Id.* at 94–95 (Ginsburg, J., dissenting). Sensitive to this issue, the Sixth Circuit Court of Appeals held that the enforceability of an arbitration agreement would be based upon whether the "potential costs of arbitration are great enough to deter [the claimant] and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum." Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003) (en banc). Under the Sixth Circuit rule, arbitration would not proceed until the impact of the cost allocation system was assessed. *Id.*

[94] 538 U.S. 401 (2003).

[95] *Id.* at 401.

[96] *Id.* at 403.

[97] *Id.* at 404.

[98] *Id.* at 407.

[99] *Id.* at 406–07.

consistent with the current pro-arbitration environment that the Court's decisions have created.

IV. THE PRESUMPTION OF ARBITRABILITY AND NON-SCOPE ISSUES

A. Post-Contract Disputes

Determining whether a particular dispute arising during the term of the parties' contract is covered by their arbitration agreement is only one of a number of settings in which a party may contest the referral of a dispute to an arbitrator. The Supreme Court may have concluded that when such contests arise, the party objecting to arbitration should have the burden of convincing the decision maker that the agreement to arbitrate is not applicable, but that does not necessarily mean that all pre-arbitration challenges should be treated in the same manner. Whether or not a presumption of arbitrability is appropriate is partly tied to the strength of the national pro-arbitration policy identified by the Court, but the nature of the challenge is also relevant. This is true even though balancing factors in such a process may detract from the clarity and predictability of court responses to arbitration challenges.

Exemplifying the problem of responding to an arbitration challenge where the parties do not contest that their dispute is within the scope of their agreement to arbitrate is the setting of post-contract controversies. The parties may have agreed to various mutual duties and responsibilities, but disputes can arise after their contractual relationship has terminated. One side may seek to litigate the controversy while the other seeks to invoke the arbitration clause of the expired agreement. The Supreme Court addressed the question of how this should be handled in two labor cases: *Nolde Brothers v. Local No. 358, Bakery Workers Union*,[100] and *Litton Financial Printing Division v. NLRB*.[101]

Nolde Bros. involved a claim for severance benefits on behalf of employees who were let go by their employer after the termination of the collective bargaining agreement between the company and the union representing them.[102] The merits of the dispute involved the question of whether the right to severance benefits applied to the laid-off workers or

[100] 430 U.S. 243 (1997).

[101] 501 U.S. 190 (1991).

[102] *Nolde Bros.*, 430 U.S. at 247.

was extinguished when the labor contract expired.[103] However, since the labor contract contained an arbitration clause, a further question was whether the dispute over eligibility for severance benefits would be heard by an arbitrator or judge.[104] The Court concluded that the arbitration agreement prevailed, observing that "in the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract."[105] The point was emphasized in the Court's observation that "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."[106] The *Nolde Bros.* opinion thus suggests an approach to the duty to arbitrate post-labor contract disputes no different from that applied to any other issue involving a challenge to the scope of the arbitration agreement.

Subsequently, however, the Supreme Court substantially narrowed the *Nolde Bros.* standard in *Litton Financial.* In *Litton Financial*, the union claimed that the company violated the layoff procedure contained within the expired collective bargaining agreement, which also contained the arbitration provision.[107] The Court recognized that *Nolde Bros.* had established that an agreement to arbitrate may survive the expiration of the parties' labor contract, but went on to hold that this would only occur with respect to "rights which accrued or vested under the Agreement or rights which carr[y] over after expiration of the Agreement . . . as continuing obligations under the contract."[108]

In a very direct fashion, *Litton Financial* represents a fundamental shift in the Supreme Court's approach to arbitration under labor contracts. The decision discarded the direction the Court had given to lower courts to presume applicability of the arbitration clause for claims arising under the contract even where they came to fruition after the contract expired. Instead, a determination would have to be made as to whether the claim involved a right which accrued, vested or otherwise carried over following the expiration of the contract.[109] Moreover, the treatment of the issue in

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[103] *Id.* at 248–49.

[104] *Id.* at 245.

[105] *Id.* at 253.

[106] *Id.* at 255.

[107] Litton Fin. Printing Div. v. NRLB, 501 U.S. 190, 195 (1991).

[108] *Id.* at 209.

[109] In *Luden's Inc. v. Local Union No. 6 of Bakery*, 28 F.3d 347, 355–56 (3d Cir. 1994), the

Litton Financial indicated that there would be no presumption that the parties intended to create vested or accrued rights for purposes of determining arbitrability.[110] The result was a decision representing a clear exception to the pro-arbitration policy the Court had carefully constructed in other rulings.

In addition, moreover, the test created by *Litton Financial* violated a basic principle applied by courts in ruling on challenges to the arbitration of disputes. Up until *Litton Financial*, court decisions had consistently concerned themselves with the question of whether the claim was based on the contract containing the arbitration obligation. If so, arbitration would be required. Courts were to strictly avoid considering the merits of the dispute when determining whether to refer the matter to arbitration. In contrast, the *Litton Financial* test put the cart before the horse. Before ruling that a dispute was arbitrable, the court would first have to determine whether the contract created rights that survived the expiration of the agreement. As the dissent in *Litton Financial* recognized, however, that issue was encompassed within the merits of the dispute between the parties.[111] The court would therefore have to rule on the merits of the dispute before the

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court found a post-contract duty to arbitrate using the theory that the parties had an implied-in-fact agreement where they continued their relationship as though they were still subject to their otherwise expired labor contract. *But see* Teamsters Local Union No. 122 v. August A. Busch & Co., 932 F. Supp. 374, 381 (D. Mass. 1996) (cautioning that "the mere fact that an employer continues to adhere to the general terms of an expired collective-bargaining agreement is insufficient by itself to demonstrate that it has manifested assent to an obligation to arbitrate postexpiration disputes" absent "conduct supporting an inference that an agreement to arbitrate was reached"). In other settings, courts have found the absence of a vested or carry-over right, and thus no duty to arbitrate the post-contract dispute. *See* Cincinnati Typographical Union No. 3, Local 14519 v. Gannett Satellite Info. Network, Inc., 17 F.3d 906, 910–11 (6th Cir. 1994); Coast Hotels & Casinos, Inc. v. Culinary Workers Union Local 226, 35 F. Supp. 2d 765, 770 (D. Nev. 1999).

[110] The claim for layoff protection in *Litton Financial* was based on a contract provision that called for layoffs to proceed in reverse seniority order, but only if other factors such as aptitude and ability were equal. 501 U.S. at 210. In response, the majority stated: "We cannot *infer* an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration." *Id.* (emphasis added).

[111] The dissents of both Justice Marshall and Justice Stevens, with Justices Blackmun and Scalia joining both opinions, recognized that under *Litton Financial*, courts must address the merits of the dispute in order to determine whether to refer it to an arbitrator. *Id.* at 211 (Marshall, J., dissenting); *Id.* at 218 (Stevens, J., dissenting). For this reason, "the four dissenting justices in *Litton* had much the better of the argument." Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 361 (1999).

dispute could be referred to an arbitrator, leaving arbitrators in some doubt as to what they should do with the case after such a court ruling.[112]

In the labor context, issues related to expired collective bargaining agreements will generally involve claims for financial benefits provided by the labor contract or protection against some form of discipline. In either event, however, the claim will relate to some provision of the agreement. Since labor agreements typically provide for arbitration of all disputes arising under the contract, and the claim relates to a provision of the agreement, the scope of coverage issues would appear to be satisfied. The unique feature, of course, is that the agreement containing the arbitration clause has expired, but this does not alter the fact that the parties agreed to arbitrate claims arising under the contract, a requirement satisfied in a case such as *Litton Financial.* By limiting coverage to vested rights and requiring that these be determined before the dispute is referred to arbitration, the Court placed post-contract demands for arbitration in an inferior category. The Court did not explain why such a claim, arising under the contract, but germinating after its termination, warrants such treatment.

The Supreme Court has not commented on whether its analysis of post-labor contract arbitration requirements would apply to commercial agreements governed by the FAA. However, at the lower court level the problem has been recognized, with the Tenth Circuit Court of Appeals in *Riley Manufacturing Co. v. Anchor Glass Container Corp.*, applying the principle that an arbitration agreement contained in a contract is presumed to survive the contract's expiration unless "the parties express or clearly imply an intent to repudiate post-expiration arbitrability [or] if the dispute cannot be said to arise under the previous contract."[113] Similarly, in *Sweet*

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[112] The arbitrator would have a role to play in determining relevant facts, such as whether the claimant was an employee entitled to severance benefits or a contract worker ineligible for benefits under the agreement. It is not clear whether the arbitrator would be bound by a court finding, made for purposes of determining arbitrability, that the claim involved a vested right.

[113] 157 F.3d 775, 781 (10th Cir. 1998). *See also* Neurosource, Inc., v. Jefferson Univ. Physicians, No. Civ. A. 00-CV-5401, 2001 WL 180264, at *4 (E.D. Pa. Feb. 14, 2001) (explaining that since the Court could not "say with positive assurance" that the plaintiff's claims arose under the termination provisions of the contract, a subject excluded from the arbitration clause, the demand to arbitrate could not be rejected on these grounds); Primex Int'l Corp. v. Wal-Mart Stores, Inc., 679 N.E.2d 624, 626 (N.Y. 1997) (holding that disputes arising under expired contracts arbitrable whether "the termination and discharge resulted from the natural expiration of the term of the agreement . . . , a unilateral termination under a notice of cancellation provision ... , or the breach of the agreement by one of the parties . . . . ").

Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd., the Seventh Circuit Court of Appeals found the reasoning of *Nolde Bros.* "persuasive" in the context of a commercial contract including an arbitration clause, observing that "if the parties had wished to limit the duty to arbitrate to the terms of the Agreement itself they could have said so explicitly."[114]

Many commercial arrangements inevitably involve post-contract claims, such as where a dispute arises over the quality of an item after the contract for its purchase has been fulfilled. If the vested rights analysis were to be followed, a court would first have to determine whether the buyer had a right to assert quality issues before the case could be sent to arbitration. However, if the parties had agreed to a broad arbitration clause, that issue is properly one for the arbitrator to resolve. In commercial contracts involving extended relationships, such as construction and employment agreements, neither the completion of the project nor the resignation of the job holder necessarily means that claims under the expired contract may not exist. The heart of the controversy is likely to be whether the claim survived the contract. Since the parties agreed to arbitrate disputes under the contract, an arbitrator should answer this question, rather than having to wait until the court answers it first. As long as a claim is being made under the contract, the presumption of arbitrability should arise, whether or not the agreement has technically expired. Having agreed to arbitrate contract disputes, the parties should expect that arbitration will be required when a claim is made that the contract has been breached, regardless of when that claim is made.

B. Successorship

Separately, even if the contract containing the arbitration agreement has not expired, arbitrability questions may arise if one of the parties is acquired by another entity. Where a dispute arises between the successor and the remaining contracting party, either may seek to invoke the right to arbitrate based on the contract which the successor may not have signed or otherwise adopted. If arbitration is truly a creature of the written agreement, it is not entirely clear how this should be handled given the fact that the right to arbitrate was contained in the contract signed by the predecessor who is no

[114] 1 F.3d 639, 643 (7th Cir. 1993). However, the court noted that it would face a "more difficult question if the disputes had arisen a significant time after the expiration of the Agreement." *Id.*

longer involved, while the successor, who is a party to the dispute, never formally agreed to the arbitration requirement.

The Supreme Court confronted this problem in the context of a collective bargaining dispute in *John Wiley & Sons v. Livingston*.[115] There Wiley acquired Interscience, a small publishing company.[116] The union that represented Interscience's employees claimed that certain rights under the contract between the union and Interscience survived the acquisition and bound Wiley.[117] Wiley disputed the existence of any contractual duty to the former Interscience employees, and beyond that challenged the claim that it was bound to arbitrate the disagreement.[118]

At its core, the dispute concerned whether Wiley, a non-signatory to the contract, could be held bound by its terms, including a provision requiring the arbitration of contractually-based disputes.[119] For the Court, the answer to the question was that the duty to arbitrate was not extinguished by the acquisition, and that Wiley was required to arbitrate the claim presented by the union.[120] In the Court's view:

> The disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.[121]

Particular factors led the Court to this conclusion, including the existence of a federal policy favoring the arbitration of collective bargaining disputes.[122] In addition, however, the Court noted that Wiley continued to operate the business after it acquired Interscience,[123] and did so against the backdrop of a New York State law which provided that corporate

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[115] 376 U.S. 543 (1964).
[116] *Id.* at 545.
[117] *Id.*
[118] *Id.* at 547.
[119] *Id.*
[120] *Id.* at 548.
[121] *Id.*
[122] *Id.* at 549.
[123] *Id.* at 551.

consolidations do not in and of themselves extinguish preexisting claims or demands.[124]

In the next case to reach the Supreme Court raising the issue of a successor's duty to arbitrate, *Howard Johnson Co. v. Detroit Local Joint Executive Board*,[125] the Court found that the successor had no obligation to comply with the predecessor's arbitration promise.[126] However, *Howard Johnson* involved a sale of assets to the successor and the survival of the predecessor whereas *Wiley* was concerned with the disappearance of the predecessor as a result of the merger.[127] Additionally, there was continuity between the predecessor and successor in *Wiley* as a result of Wiley's hiring of Interscience's employees.[128] In contrast, Howard Johnson did not hire the employees of the predecessor franchisee after the asset purchase.[129] These factors were sufficient to distinguish *Wiley* and supported the conclusion that Howard Johnson was not bound to arbitrate under the predecessor franchisee's arbitration agreement.

Despite *Howard Johnson,* there are many settings in which successors have been held bound by predecessor obligations, particularly where there is a claim of discrimination in violation of federal law.[130] One court explained this as reflective of the desire "to ensure that an employee's statutory rights are not 'vitiated by the mere fact of a sudden change in the employer's business.'"[131] Arguably, a similar principle could be deemed applicable to an arbitration agreement so as to ensure enforcement of the right to compel arbitration under the standards of the FAA, especially if

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[124] *Id.* at 547–48 & n.2.

[125] 417 U.S. 249, 262–65 (1974).

[126] *Id.* at 264.

[127] *Id.* at 257–58.

[128] *Id.* at 258–59.

[129] *Id.* at 259.

[130] *See generally* Musikiwanba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985) (discussing successorship under section 1981); Bates v. Pac. Mar. Ass'n, 744 F.2d 705 (9th Cir. 1984) (discussing successorship for Title VII consent decree); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974) (discussing Title VII successorship); Risteen v. Youth for Understanding, Inc., 245 F. Supp.2d 1 (D.D.C. 2002) (discussing COBRA successorship); Ramirez v. DeCoster, 194 F.R.D. 348 (D. Maine 2000) (discussing Migrant and Seasonal Agricultural Worker Protection Act successorship); Vanderhoof v. Life Extension Inst., 988 F. Supp. 507, (D.N.J. 1997) (discussing Family Medical Leave Act successorship); Brennan v. Nat'l Tel. Directory Corp., 881 F. Supp. 986 (E.D. Pa. 1995) (discussing Title VII successorship). On general principles of corporate successorship, see *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 824–26 (D.C. Cir. 2001).

[131] *Brennan*, 881 F. Supp. at 992 (quoting *Musikiwanba*, 760 F.2d at 750.

there is sufficient continuity between the predecessor and successor following completion of their transaction.[132] However, reflecting a different scale of values, the *Howard Johnson* decision reinforces the importance of a written agreement to arbitrate between the disputing parties by limiting imposed arbitration duties to unique successorship situations. Arguably, this is consistent with the likely expectations of the parties in situations involving corporate mergers and acquisitions on the grounds that an acquiring entity would not normally expect to be bound by dispute resolution procedures agreed to by the acquired entity absent unusual conditions.

C. Separability

Another wrinkle in arbitrability law is represented by the separability doctrine which the Supreme Court approved in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[133] The litigation grew out of Prima Paint's purchase of Flood & Conklin.[134] The parties' contract included a consulting arrangement between the two as well as a broad arbitration clause covering "any controversy or claim arising out of or relating to this Agreement."[135] Prima Paint claimed that Flood & Conklin was in breach of its contractual obligations and that it had fraudulently represented itself as being solvent and able to meet the terms of the contract.[136] Although Flood & Conklin sought arbitration of the dispute, Prima Paint argued for rescission of the agreement on the grounds of fraudulent inducement.[137]

The Supreme Court was confronted with the question of who should decide whether the merits of the parties' dispute was subject to arbitration. Arguably, since the duty to arbitrate is a creature of contract, a claim that the contract containing the arbitration clause was invalid would undercut the legal grounds to compel arbitration. Prima Paint was relying upon this

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[132] *See* Stotter Div. of Graduate Plastics Co. v. Dist. 65, United Auto Workers, 991 F.2d 997, 1000–1002 (2d Cir. 1993). *But see* Rojas v. TK Communications, Inc., 87 F.3d 745, 749–50 (5th Cir. 1996) (holding successor not bound to arbitrate Title VII claim pursuant to the FAA in light of predecessors continuation as a viable entity); Chartier v. 3205 Grand Concourse Corp., 100 F. Supp. 2d 210, 214 (S.D.N.Y. 2000) (holding successor not bound to arbitrate under LMRA in light of lack of continuity).

[133] 388 U.S. 395 (1967).

[134] *Id.* at 397.

[135] *Id.* at 398.

[136] *Id.*

[137] *Id.*

logic by asserting that it was not bound by any provision of the contract since it was fraudulently induced to enter into the agreement.[138] Therefore, if no valid contract existed between the parties, there would be no legal basis to compel arbitration.[139]

In response to this challenge the Court looked to the controlling language of § 4 of the Federal Arbitration Act. It directs the enforcement of an order to arbitrate under an agreement if the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."[140] Under the *Prima Paint* majority view, where the challenge is not specifically addressed as to the arbitration agreement, there is no issue as to the making of an arbitration agreement as called for by § 4. The appropriate step for a court to take in such a case, therefore, is to order arbitration and let the arbitrator decide whether the contract should be rescinded because of fraud in the inducement. In contrast, if a challenge is raised to the arbitration clause itself, there is a dispute as to the "making of the agreement to arbitrate," and a challenge of this sort calls for judicial resolution.[141] Thus, an effort to avoid arbitration by challenging the overall agreement will be heard by an arbitrator, but a challenge specifically addressed to an arbitration clause contained within the agreement is subject to judicial resolution.[142]

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[138] *Id.*

[139] Justice Black, in dissent, expressed this view, commenting that the Court's contrary conclusion was "fantastic" in that "the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties." *Id.* at 407 (Black, J., dissenting). The separability doctrine continues to have its detractors. *See generally* Richard C. Reuben, *First Options, Consent to Arbitration, and The Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions,* 56 S.M.U. L. REV. 819 (2003).

[140] 388 U.S. at 403 n.11 (citing 9 U.S.C. § 4 (1999)).

[141] *E.g.,* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 916–17 (Cal. 1997) (citing Rosenthal v. Great W. Fin. Sec. Corp, 926 P.2d 1061, 1073 (Cal. 1996)); Stewart v. Favors, 590 S.E.2d 186 (Ga. Ct. App. 2003). *But see generally* George Engine Co. v. S. Shipbuilding Corp., 350 So. 2d 881 (La. 1977) (declining to follow *Prima Paint* in cases governed by Louisiana law).

[142] However, where the challenge is that certain features of the arbitration clause are unconscionable and therefore invalid, but the challenge does not include the portion of the agreement which calls upon the arbitrator to rule on issues of the contract's validity or enforceability, the court will order the dispute to be arbitrated. Carbajal v. Household Bank, No. 00 C 0626, 2003 WL 22159473, at *7–8 (N.D. Ill. Sept. 18, 2003). Moreover, because of the strong federal pro-arbitration policy, it will not be enough to allege that the same fraud that induced the signing of the contract also induced the agreement to arbitrate disputes arising from the contract, unless the fraud relating to the agreement to arbitrate stands apart. Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 576 (6th Cir.

Some courts have sought to distinguish *Prima Paint* based upon the nature of the contractual challenge raised by the party seeking to avoid arbitration. This is illustrated by the decision of the Ninth Circuit Court of Appeals in *Three Valleys Municipal Water District v. E.F. Hutton & Co.*[143] The contractual challenge raised in *Three Valleys* was the claim that the official who executed the contract lacked the necessary authority to bind the plaintiff.[144] Although the district court ruled that as a challenge to the contract as a whole, the dispute would have to be referred to arbitration, the court of appeals disagreed.[145] It concluded that *Prima Paint* was "limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to."[146] In the court's view, *Prima Paint* governs claims that the operative contract was voidable, but "a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision."[147]

Much the same approach was applied by the Eleventh Circuit of Appeals in separate cases involving an effort to avoid arbitration based on an allegation of fraud in the factum,[148] and where one of the parties to the agreement containing an arbitration clause claimed never to have executed the document.[149] California,[150] Alabama[151] and the Third Circuit Court of Appeals[152] are among other jurisdictions that refuse to enforce arbitration agreements where the challenge is to the existence of the contract rather than a claim that the contract is voidable. Rulings in other circuits, however, have rejected the void/voidable distinction and hold that *Prima Paint* is applicable in all situations where the challenge is not specifically

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2003). *See also* Fazio v. Lehman Bros., 340 F.3d 386, 394 (6th Cir. 2003); Arnold v. Arnold Corp.–Printed Communications for Bus., 920 F.2d 1269, 1278 (6th Cir. 1990).

[143] 925 F.2d 1136 (9th Cir. 1991).

[144] *Id.* at 1138.

[145] *Id.* at 1139, 1144.

[146] *Id.* at 1140.

[147] *Id.* at 1140–41.

[148] Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986).

[149] Chastain v. Robertson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992).

[150] *See* Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061, 1074 (Cal. 1996).

[151] *See* Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 929 (Ala. 1997).

[152] *See* Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 112 (3d Cir. 2000).

directed to the arbitration agreement contained within the parties' contract.[153]

The separability doctrine remains a controversial principle within the arbitration community. It has its supporters, such as Professor Alan Scott Rau, who has pointed out that "certain putative defects in an agreement need not at all, as a logical matter, impair the validity of the consent to arbitrate."[154] Where this is true, it is appropriate to apply the normal presumption that the arbitrator should resolve questions unrelated to disagreements over whether there is an agreement to arbitrate the particular type of dispute at issue, although the parties are free to provide otherwise.[155] In terms of the FAA, "by alleging that a contract containing an arbitration clause is void, a party in most cases fails to question the authority of an arbitrator and thereby fails to effectively put 'the making of an arbitration agreement' at issue within the meaning of § 4 of the FAA."[156] In addition, from a policy perspective, "[w]ithout separability, dilatory tactics would allow parties to use allegations of contract invalidity to delay arbitration until courts ruled on whether a valid contract of arbitration existed."[157]

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[153] *See* Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir. 1997); C.B.S. Employees Fed. Credit Union v. Donaldson Lufkin & Jenrette Sec. Corp., 912 F.2d 1563, 1566–68 (6th Cir. 1990); Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co., 774 F.2d 524, 529 (1st Cir. 1985). According to the major treatise on arbitration law under the FAA, nothing in the language of the FAA or of *Prima Paint* logically permits distinguishing any of the no-contract-was-made examples from fraud in the inducement or the many other bases which been held to be under the *Prima Paint* rule. *See* 2 MACNEIL ET AL., *supra* note 1, § 15.3.3.1, at 15:28. In *Will-Drill Resources, Inc. v. Samson Research Co.*, 352 F.3d 211, 219 (5th Cir. 2003), the Fifth Circuit Court of Appeals rejected the void/voidable distinction but held that a court must decide whether an agreement to arbitrate actually exists. The setting involved a buyer who claimed that his written offer to purchase all of the sellers' properties, which contained an arbitration agreement, was agreed to by some, but not all of the identified sellers. *Id.* at 213. This resulted in the assertion that no contract existed between the parties as opposed to there being a void or voidable agreement. *Id.*

[154] Alan Scott Rau, *The Arbitrability Question Itself,* 10 AM. REV. INT'L ARB. 287, 337 (1999).

[155] *See id.* at 338.

[156] Andre V. Egle, *Back to* Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement*, 78 WASH. L. REV. 199, 223 (2003).

[157] Natasha Wyss, First Options of Chicago, Inc. v. Kaplan: *A Perilous Approach to* Kompetenz-Kompetenz, 72 TUL. L. REV. 351, 354 (1997). *But see* Williams v. Litton, 865 So. 2d 838, 848 (La. Ct. App. 2003) (observing "that state law, regulating fraud pleadings, provides some limitation on a party's ability to use an allegation of fraud as a dilatory tactic").

However, from another perspective:

> The separability doctrine is a legal fiction pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts. In addition to the contract really alleged to have been formed, the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms.[158]

Courts applying the separability doctrine assume that the parties assented to the arbitration clause even though there is a challenge to the contract as a whole, a process that Professor Stephen J. Ware has called speculative and lacking a basis in the voluntary consent that is essential to contract law.[159] Moreover, the separability doctrine appears to ignore the possibility that the challenge to the contract might be one that "calls into question the validity of the arbitration clause from which [the arbitrators] derive their power."[160] Reasons such as these have led a number of state courts to reject the *Prima Paint* model.[161]

Viewed from the perspective of the expectation model, however, it is not at all clear whether the parties to the agreement would reasonably expect that all disputes about the contract are necessarily excluded from coverage by its arbitration clause. To the contrary, they may very well conclude that their arbitration agreement applies as long as there is a contract, even if the agreement is voidable. In contrast, if there is no contract the parties might reasonably expect that nothing in the agreement, including the promise to arbitrate, is binding. This would suggest that claims that the contract is void should be subject to judicial resolution.

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[158] Stephen J. Ware, *Employment Arbitration and Voluntary Consent,* 25 HOFSTRA L. REV. 83, 131 (1996).

[159] *See id.*

[160] William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection,* 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 53 (1998). Professor Rau called the possibility that an arbitrator would rule a contract invalid in a case of this sort a "conceptual horror." Alan Scott Rau, *The Arbitrability Question Itself,* 10 AM. REV. INT'L ARB. 287, 341 (1999).

[161] *See e.g.,* George Engine Co. v. S. Shipbuilding Corp., 350 So. 2d 881, 886 (La. 1977); Fouquette v. First Am. Nat'l Sec., Inc., 464 N.W.2d 760, 762–63 (Minn. Ct. App. 1991); Shaffer v. Jeffery, 915 P.2d 910, 917 (Okla. 1996); City of Blaine v. John Coleman Hayes & Assoc., Inc., 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991).

V. THE SUBSTANTIVE/PROCEDURAL ARBITRABILITY DISTINCTION

The existence of a presumption that the merits of a dispute arising during the term of the parties' agreement will be resolved by an arbitrator if the parties have entered into an arbitration agreement does not answer the question of who decides whether such an agreement exists and whether it covers the dispute in question. The parties are free to challenge whether a valid arbitration agreement was formed and contest its scope of coverage, and some entity must rule on these claims. This represents the analytically distinct question of who decides whether an arbitration agreement applies to a particular dispute as opposed to whether the dispute is covered by the arbitration agreement. As the case law demonstrates, the second question is governed by a presumption of arbitrability, but the first question is subject to a presumption of judicial resolution.

Why has arbitration law resisted allowing the arbitrator to determine the scope of coverage of the parties' arbitration clause? Although the courts often simply state this result as a rule, there also appears to be an underlying concern that the arbitrator may have a personal interest in finding the matter at issue subject to arbitration. Arbitrators, after all, are paid for arbitrating, and if they find a particular subject outside of the scope of the arbitration agreement, they will have effectively deprived themselves of the opportunity to conduct a proceeding to resolve the merits of the dispute. Viewed from this perspective, the arbitrator may not be sufficiently neutral and therefore should not be allowed to decide how broadly the arbitration agreement reaches.

However, while the argument has its own internal logic, it is not consistently applied. This is illustrated by the fact that arbitrators are permitted under *John Wiley & Sons v. Livingston* to rule on issues related to compliance with the procedural prerequisites to arbitration.[162] Yet, the self interest of the arbitrator should be just as much of a concern where the arbitrator has to decide whether procedural preconditions to arbitration have been satisfied since rulings on such issues will determine whether the arbitration will proceed. It is also true that the argument of arbitrator self-interest does not suggest any exception. It would presumably apply even where the parties have agreed that the arbitrator ruling on whether the merits of the dispute must be arbitrated, the arbitrability question, is not allowed to serve as the arbitrator to decide whether the substance of the parties' contract has been violated, the merits question. Beyond that, the

[162] *See* 376 U.S. 543, 557–59 (1964).

argument assumes that arbitrators will put their own interests ahead of their responsibilities, a point as to which there is no documented support.

The strength of the presumption in favor of judicial resolution of questions concerning the scope of an arbitrator's jurisdiction is demonstrated by the opinion of the Supreme Court in *First Options of Chicago, Inc., v. Kaplan*.[163] There, a company and its owner were involved in a trading dispute with First Options over debts that First Options claimed were owed to it by both.[164] The company had signed an arbitration agreement with First Options and agreed that the dispute was within its coverage.[165] However, the owner, Kaplan, had never signed the agreement and disputed that First Options' claim against him had to be arbitrated.[166]

Consistent with cases dealing with challenges to the existence and scope of an arbitration agreement, the Court ruled that Kaplan's claim that he had never agreed to arbitrate the issue of whether the merits of his dispute with First Options was arbitrable was a question subject to presumptive judicial resolution.[167] Someone would have to decide whether the substantive dispute between Kaplan and First Options would be arbitrated, but the default rule is that the decision maker for this issue would be a court rather than an arbitrator. This conclusion was manifested in the Court's observation that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[168]

First Options pointed to a number of grounds in support of its claim that Kaplan had agreed to arbitrate the initial question of whether the merits of the dispute would be resolved by a court or through arbitration. One factor was that Kaplan had filed a written document claiming that the arbitrators lacked jurisdiction to decide whether the substantive dispute was arbitrable.[169] The Supreme Court, however, disagreed that simply arguing to the arbitrators that the dispute was not subject to arbitration reflected "[a] willingness to be effectively bound by the arbitrators decision on that point."[170] The Court believed that the fact that Kaplan was disputing the

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[163] 514 U.S. 938, 942–47 (1995).

[164] *Id.* at 940.

[165] *Id.* at 941.

[166] *Id.*

[167] *Id.* at 947.

[168] *Id.* at 944.

[169] *Id.* at 946.

[170] *Id.* A further consequence of this conclusion was the Court's ruling that without clear

jurisdiction of the arbitrators established the likelihood that he did not wish to be bound by their decision.[171]

The Supreme Court also rejected First Options' argument that Kaplan should have pursued other methods in lieu of presenting his position on arbitrability to the arbitrators.[172] Specifically, Kaplan could have sought to enjoin the arbitration or simply refuse to appear before the arbitrators to argue against their jurisdiction. For the Court, however, failure to pursue these options did not reflect an intent to submit the question of the arbitrators' jurisdiction to arbitration. Instead, the Court indicated that absent a specific agreement or other clear evidence of an intent to arbitrate arbitrability, the parties are free to insist on judicial resolution of the question of the scope of the arbitrators' jurisdiction.[173]

The fact that the Supreme Court did not create an absolute rule that the determination of the substantive arbitrability of a dispute must be made by a court indicates that under appropriate circumstances the presumption that the question is for judicial resolution can be overcome. This can certainly be achieved by explicit language providing that disputes as to coverage of the parties' arbitration agreement are to be resolved by an arbitrator. Such was found to be the case where the arbitration agreement covered "any dispute relating to the interpretation, applicability, enforceability or formation of" the agreement as well as any "claim that all or in [sic] any part of this Agreement is void."[174] Where the language is explicit, there

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evidence that the parties intended to have the arbitrator rule on the arbitrability of the merits of the dispute, any arbitral ruling on arbitrability would be subject to de novo review rather than the highly deferential review standard normally accorded to arbitration rulings. *See id.* at 948. *See generally* Alan Scott Rau, *The Arbitrability Question Itself,* 10 AM. REV. INT'L ARB. 287 (1999).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Plattner v. Edge Solutions Inc., No. 03 C 2646, 2003 WL 22859532, at *1 (N.D. Ill. Dec. 2, 2003). *See also* Carbajal v. Household Bank, No. 00 C 0626, 2003 WL 22159473, at *2 (N.D. Ill. Sept. 18, 2003) (discussing an agreement to arbitrate claims "including the validity or enforceability of this arbitration provision or any part thereof"). However, both decisions recognized that a court must decide if the parties agreed to have an arbitrator rule on arbitrability and whether that agreement is enforceable. *See Plattner,* at *4; *Carbajal,* at *4–5. While ruling that both arbitration agreements met the *First Options* standard for establishing arbitrator jurisdiction to rule on a challenge to the arbitrability of the dispute, the *Carbajal* court excluded a waiver challenge from the arbitration, while the *Plattner* court found a provision requiring arbitration in New York for a claim filed by an individual contracting for debt consolidation services in Cook County (Chicago) was unconscionable and unenforceable. *See Plattner* at *4–5; *Carbajal* at *5–6, *11.

should be no doubt that the parties considered the issue and agreed to an arbitral resolution of the arbitrability question.[175]

A number of courts have also found that adoption of the American Arbitration Association commercial arbitration rules, which include a provision stating that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"[176] meets the *First Options* standard.[177] However, whether evidence short of an explicit agreement to arbitrate arbitrability, or the adoption of a system of arbitration rules which includes the granting of authority to decide arbitrability challenges to the arbitrator, will suffice is less clear. Existing caselaw indicates that lower courts are not in agreement on how this problem should be handled.

The problem is best illustrated where the parties have used a broad arbitration clause in their agreement, such as requiring that any and all controversies between the parties will be resolved by arbitration. The Second Circuit Court of Appeals[178] and the New York State Court of Appeals[179] found such language sufficient to demonstrate a clear and unmistakable intent to have an arbitrator rule on arbitrability challenges. In essence, both courts took the relevant language at face value, assuming that an agreement to arbitrate all disputes includes arbitrability questions along

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[175] While not calling for the arbitration of all arbitrability questions, the agreement in *Telectronics Pacing Systems, Inc. v. Guidant Corp.*, provided that all disputes under the contract would be arbitrated and further directed that "the arbitrators determine that a third party . . . is a necessary party." 143 F.3d 428, 431 (8th Cir. 1998). The court found this to represent an explicit agreement that the arbitrator must decide if the dispute may proceed to arbitration where a third party is necessary to the proceeding. *Id.*

[176] This provision is currently incorporated in American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) 7(a) (Amended and Effective July 1, 2003).

[177] *See, e.g.,* Johnson v. Polaris Sales, Inc., 257 F. Supp. 2d 300, 308–09 (D. Me. 2003); Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 684 (D. Fla. 2001); Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1085–86 (Ariz. Ct. App. 2003).

[178] *See* PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996) ("The words 'any and all' are elastic enough to encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration.").

[179] *See* Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884, 887–88 (N.Y. 1997) (finding the approach of the Second Circuit Court of Appeals to represent a "balanced and sound view" and noting that the investment houses can protect themselves by drafting appropriate language).

with claims that the substantive provisions of the contract have been violated.

Other courts, however, have placed greater stress on the reluctance of the *First Options* Court to have arbitrators decide the scope of their own jurisdiction. The Illinois Supreme Court, for example, thought that a broad arbitration clause was at best silent on the issue of who should decide arbitrability, and thus insufficient to overcome the presumption that the question was for judicial resolution,[180] while the Tenth Circuit Court of Appeals concluded that such a clause lacked the necessary specific authorization for an arbitral ruling on arbitrability.[181] Courts taking this approach have concluded that the broadness of an arbitration agreement will not substitute for the explicit allocation of the arbitrability question to the arbitrator.

Alongside the principle that questions concerning whether the parties entered into an agreement to arbitrate or whether a particular dispute is within the parties' arbitration agreement are presumptively to be decided by the courts, there exists a parallel principle allocating disputes over procedural matters to arbitrators. Illustrative is the Supreme Court's decision in *John Wiley & Sons v. Livingston*.[182] There, the governing collective bargaining agreement provided that the union was required to follow the steps of a specified grievance procedure before the merits of the

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[180] Roubik v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 692 N.E.2d 1167, 1173 (Ill. 1998). *See also* Williams v. Litton, 865 So. 2d 838, 843 (La. Ct. App. 2003) ("While this language [stating that arbitration is required of 'Any controversy or claim *arising out of or relating* to this Agreement'] is fairly broad, *Kaplan* directs that the arbitration provision must *explicitly* give the arbitrator the power to decide arbitrability.").

[181] *See* Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 780–81 (10th Cir. 1998). Also see *Scott v. Prudential Securities, Inc.* where the court found that section 2 of the arbitration rules of the National Futures Trading Association, requiring that "disputes between and among Members and Associates shall be arbitrated under these Rules," also failed to overcome the presumption of judicial authority over the issue of arbitrability. 141 F.3d 1007, 1013 (11th Cir. 1998) The court stated that:

> [A]lthough we admit that the language of section 2 is susceptible to a reasonable construction in favor of permitting the arbitrators to determine arbitrability, we cannot conclude that section 2 evidences a 'clear and unmistakable' commitment to that position .... Accordingly, we hold that the arbitrators did not have the power to rule on the question of whether Scott had consented to arbitrate.

Id. at 1012–13.

[182] 376 U.S. 543 (1964).

dispute could be referred to arbitration.[183] The company argued that the union had failed to meet this responsibility and therefore arbitration of the merits of the dispute was precluded.[184] As a question of arbitrability, the company insisted that the issue was one for judicial resolution.[185] The Supreme Court, however, viewed the matter differently, concluding that the disagreement raised a procedural issue that was itself a question to be resolved through arbitration.[186]

The Court stressed in *Wiley* that the resolution of procedural matters by a court risked entangling it in the substance of the parties' dispute.[187] In the Court's words, questions such as those about whether the grievance procedure was followed or excused "cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration."[188] In handling problems of this sort, the Court held that "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."[189]

Lower courts have frequently invoked the principle that issues of procedural arbitrability are to be resolved through arbitration. However, the Supreme Court's rationale for the allocation of this issue to the arbitration process is not entirely satisfactory. In many cases, procedural challenges to the arbitration process will not cross over into the merits of the parties' dispute.[190] In *Wiley*, the parties disagreed as to whether the company was obligated to provide severance benefits to workers laid off as a result of a merger. A company claim that the union did not properly invoke the grievance procedure could turn out to be analytically distinct from whether any severance benefits were due under the contract. Asserting that the party seeking arbitration did not pursue the matter in a timely fashion is another

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[183] *Id.* at 555–56.

[184] *Id.* at 556.

[185] *Id.*

[186] *Id.* at 557.

[187] *Id.* at 558.

[188] *Id.* at 557.

[189] *Id.*

[190] *E.g.*, Chicago Sch. Reform Bd. of Trs. v. Diversified Pharm. Servs., Inc., 40 F. Supp. 2d 987, 994 (N.D. Ill. 1999) (finding that a challenge to the timeliness of an arbitration claim was to be resolved by the court, and observing that "[b]ecause the court can resolve the issue of the arbitration's time limit without addressing the merits, the reasoning of *John Wiley* does not apply to this case").

procedural issue that can be raised as part of a challenge to the arbitrability of the dispute. Here again, the procedural question of whether the claim was filed in a timely fashion would not seem to necessarily overlap with the merits of the dispute in most cases. Nevertheless, under the authority of *Wiley,* such issues are typically referred to the arbitrator for resolution.[191]

A conflict is also presented with respect to one of the arguments often made in support of allocating questions concerning substantive arbitrability to the courts, namely that arbitrators should not be given the power to decide their own jurisdiction. However, if there is a legitimate basis for concern about arbitrator self interest when confronted with a claim that a particular dispute is not covered by the parties' arbitration agreement,[192] the same should be true when the effort to avoid arbitration is based on a procedural challenge. In both situations, the argument can be made that the arbitrator's decision could be influenced by his or her financial interest in conducting the hearing. However, this point has not been influential in the debate over procedural arbitrability.

In some circumstances it may be difficult to distinguish questions of procedural arbitrability, which are for the arbitrator to resolve, from issues related to the scope of an arbitrator's jurisdiction, which are allocated to the courts. The rules of the National Association of Securities Dealers (NASD), for example, provided that no dispute "shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute."[193] The Tenth Circuit Court of Appeals found that a claim that the demand for arbitration did not meet this standard raised an arbitrability issue presumptively for judicial resolution,[194] a conclusion similar to that reached by the Seventh Circuit

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[191] *See* County of Durham v. Richards & Assocs., Inc., 742 F.2d 811, 815 (4th Cir. 1984); Contracting N.W., Inc. v. City of Fredericksburg, 713 F.2d 382, 386 (8th Cir. 1983); O'Neel v. NASD, Inc., 667 F.2d 804, 807 (9th Cir. 1982).

[192] *E.g.,* Trafalgar Shipping Co. v. Int'l Milling Co., 401 F.2d 568, 573–74 (2d Cir. 1968) (Lumbard, C.J., dissenting) ("[I]t is not likely that arbitrators can be altogether objective in deciding whether or not they ought to hear the merits. Once they have bitten into the enticing fruit of controversy, they are not apt to stay the satisfying of their appetite after one bite."). In commenting on a dispute over who should decide the timeliness of a demand for arbitration, Professor Park opined that "[p]resumably arbitrators will be more likely than courts to find the claim timely since arbitrators get paid if they hear a dispute." William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators,* 8 AM. REV. INT'L ARB. 133, 138 (1997).

[193] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 82 (2002).

[194] *See* Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 970 (10th Cir. 2001).

Court of Appeals.[195] However, the First and Fifth Circuit Courts of Appeals had reached the opposite result, holding that the question was for arbitral resolution.[196] Given the nature of the issue, the split in the circuits was understandable. From one perspective, the satisfaction of time limitation requirements is a classic procedural issue which, under the *Wiley* analysis, should be referred to arbitration. On the other hand, use of the word 'eligible' in the NASD rules seemingly presents a jurisdictional question of the sort that *First Options* would allocate to a court for resolution.[197]

In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court resolved the split between the circuits, holding that a dispute over compliance with the NASD six-year time limit was a matter for arbitral resolution.[198] The Court recognized, however, that simply labeling an issue as a question of arbitrability can be misleading.[199] In a sense, the phrase could apply to any potentially dispositive "gateway question" since the resolution of such a question can ultimately determine whether the merits of the dispute will be arbitrated.[200] The Court responded with a different view of the arbitrability question, recognizing that it is generally for judicial resolution, but is nevertheless limited to

> the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[201]

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[195] J.E. Liss & Co. v. Levin, 201 F.3d 848, 851 (7th Cir. 2000), *overruled by* Howsam, 537 U.S. at 82–83. *See also* Ohio Co. v. Nemecek, 98 F.3d 234, 237 (6th Cir. 1996) (reaching a similar result for an identical New York Stock Exchange rule).

[196] PaineWebber Inc. v. Elahi, 87 F.3d 589, 601–02 (1st Cir. 1996); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 754 (5th Cir. 1995).

[197] *See* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 319 (1999) (calling the difference between courts viewing the issue as a jurisdictional matter and those classifying it as a procedural question a case of "disparate results - dependent solely on preferences in labeling").

[198] 537 U.S. at 85 (2002).

[199] *Id.* at 83.

[200] *Id.*

[201] *Id.* Professor Park, who had earlier suggested that party expectations should govern the decision as to who should rule on an arbitrability challenge, also recognized that identifying party

The Court indicated that the types of questions falling within the category of issues subject to judicial resolution include disputes as to whether nonsignatories are bound by an arbitration agreement as in *First Options*; a dispute as to whether an agreement to arbitrate survived a corporate merger as in *Wiley*; and challenges to whether an arbitration agreement covers particular subjects, as in *AT&T Technologies v. Communication Workers of America.*[202]

In contrast, the Court concluded that procedural questions, such as whether a preliminary grievance procedure was followed prior to arbitration as in *Wiley*, as well as "allegation[s] of waiver, delay, or a like defense to arbitrability," as stated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[203] are the kinds of situations "where parties would likely expect that an arbitrator would decide the gateway matter."[204] Support for this result was found in the Revised Uniform Arbitration Act of 2000 which, in its comments, followed the pattern of allocating issues of substantive arbitrability to the courts and procedural arbitrability to arbitrators.[205] The Court also noted that such an approach would take advantage of the fact that arbitrators are more likely to be knowledgeable in the procedures applicable to the arbitration process, such as NASD arbitrators with respect to the NASD arbitration rules.[206] It thus makes more sense for questions about such rules to be referred to a decision maker with greater expertise concerning the rules' meaning and application. So understood, the time limit provisions of the NASD rules fit neatly into the procedural arbitrability category and were appropriate for referral to arbitration.

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expectations would not always be simple. *See* William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators,* 8 AM. REV. INT'L ARB. 133, 145 (1997).

[202] 475 U.S. 643, 652 (1986).

[203] 460 U.S. 1, 25 (1983).

[204] *Howsam*, 537 U.S. at 84. *See, e.g.*, Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491–92 (1972) (concluding arbitrator to rule on defense of laches); Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, 288 F.3d 491, 502 (2d Cir. 2002) (stating that defense of repudiation is for arbitrator to decide).

[205] Unif. Arbitration Act § 6, cmt. 2 (amended 2000), 7 U.L.A. 13 (Supp. 2004), *quoted in Howsam*, 537 U.S. at 85.

[206] *Howsam*, 537 U.S. at 84.

The picture is less clear, however, as a result of the Court's most recent arbitrability ruling in *Green Tree Financial Corp. v. Bazzle*.[207] There borrowers who secured loans from Green Tree sued the company for violating South Carolina law.[208] They sought class action status, while the company moved to stay the proceedings and compel arbitration pursuant to the arbitration agreement contained in the relevant documents.[209] The response of the state court was to certify the class and compel arbitration.[210] The arbitrator handled the proceedings as a class action and awarded substantial damages against the company.[211] The award was confirmed by the court and an appeal was taken which claimed that the case could not be pursued in an arbitration proceeding on a class basis.[212] Ultimately the Supreme Court of South Carolina held that the operative arbitration agreements were silent on the issue of possible class arbitrations, and that a class arbitration was permissible in such circumstances.[213]

Justice Breyer, who authored the Court's opinions in both *First Options* and *Howsam*, wrote for four members of the Court in *Bazzle*. His opinion recognized the company's argument that the arbitration agreement at issue barred class arbitrations, not because of an explicit prohibition, but rather because the terms governing the selection of an arbitrator referenced the company and the customer filing the claim, not other customers.[214] However, Justice Breyer also recognized that the contract could be read to permit class arbitrations based on the fact that the arbitrator was selected by the company with the consent of the customer as the arbitration agreement required.[215] But, while there was a theory to support the conclusion of the Supreme Court of South Carolina that the contract did not bar class arbitrations, that was not enough to justify affirming its conclusion.[216]

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[207] 539 U.S. 444 (2003).

[208] *Id.* at 447.

[209] *Id.* at 449.

[210] *Id.*

[211] *Id.* There were, in actuality, two parallel lawsuits. In the second one, the trial court had initially denied class certification, but had been reversed on appeal. The same arbitrator was selected, the proceeding was handled as a class action, and once again the result was a substantial award against the company. *Id.*

[212] *Id.* at 449.

[213] *Id.* at 450.

[214] *Id.*

[215] *Id.*

[216] *Id.*

Rather, Justice Breyer found error in the fact that the decision on whether a class arbitration could proceed was made by the court rather than the arbitrator.[217] What is not entirely clear, however, is the basis of Justice Breyer's conclusion.

Part of the *Bazzle* plurality opinion focused on the distinction identified in *Howsam* between issues that the parties expect an arbitrator to resolve and matters that are more likely subject to an expectation of judicial resolution.[218] Those gateway matters to be decided by a court include such issues as "[w]hether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."[219] Justice Breyer viewed the question of whether the parties' arbitration agreement authorized class arbitrations as outside of the judicial resolution category since it concerned "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties."[220] Instead, the issue was more a question of the "*kind of arbitration proceeding* the parties agreed to,"[221] and as such was more like the type of procedural issue typically assigned to arbitrators.

Justice Breyer, however, did not limit himself to the categorization of the class arbitration question as a procedural matter in justifying his ruling. *First Options* had recognized that even issues parties would normally expect courts to resolve can be referred to arbitration if the parties clearly intend such a disposition. The *First Options* Court found that the Kaplans' appearance at the arbitration after challenging that they were subject to the arbitration agreement was not a sufficient indication that they agreed to be

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[217] *Bazzle*, 539 U.S. at 453–54. Justice Stevens provided the fifth vote which supported the plurality's disposition of the case. In his view, the parties agreed to have South Carolina law govern their arbitration agreement, and nothing in the South Carolina Supreme Court's ruling was barred by the FAA. *Id.* This was conclusive since Green Tree had never objected that the decision on the permissibility of a class arbitration should have been made by the arbitrator. *Id.* Nevertheless, Justice Stevens observed that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court." *Id.* *See also* Pedcor Mgmt. Co. v. Nations Pers. of Tex., Inc., 343 F.3d 355, 359 (5th Cir. 2003) (applying *Bazzle* to claims by insured ERISA plans against a reinsurance company, even assuming they involved a non-traditional class action encompassing one arbitration panel and 408 separate arbitration proceedings).

[218] *Bazzle*, 539 U.S. at 452.

[219] *Id.*

[220] *Id.*

[221] *Id.*

bound by the arbitrator's decision.[222] In contrast, Justice Breyer found sufficient indicia of Green Tree's acceptance of the arbitration of an issue such as the permissibility of a class arbitration in the language of the contract's arbitration clause.[223] There it stated that "*[a]ll* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract"[224] were subject to arbitral resolution. From the plurality's perspective, whether or not the arbitration agreement allowed for class arbitration was an issue relating to the contract and resulting relationships. Nevertheless, Justice Breyer was less than enthusiastic about this conclusion, observing that "the parties *seem* to have agreed that an arbitrator, not a judge, would answer the relevant question."[225] However, this argument still formed part of the basis for his conclusion that the question of whether a class arbitration could proceed under the contract was for the arbitrator to decide.[226]

Although the decisions in *First Options* and *Howsam* were unanimous, the same was not true in *Bazzle.* Chief Justice Rehnquist wrote for three members of the Court that the nature of the issue was one requiring judicial rather than arbitral resolution.[227] In his view, the permissibility of class arbitrations under the parties' contract involved the question of what issue or issues were to be submitted to the arbitrator.[228] This made the case subject to the *First Options* standard that "a party can be forced to arbitrate

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[222] *Id.*

[223] *See id.*

[224] *Id.*

[225] *Id.* In a case decided after *Bazzle,* a California Court of Appeal relied upon the Supreme Court's classification of the challenge to pursuing a class arbitration as a matter subject to arbitration rather than judicial resolution. It concluded that the Supreme Court had "spoken, and the foundational issue—whether a particular arbitration agreement prohibits class arbitrations—must (in FAA cases) henceforth be decided by the arbitrators, not the courts." Garcia v. DIRECTV, Inc., 9 Cal. Rptr. 3d 190, 191 (Cal. App. 2d Dist. 2004). There was no reliance on any specific agreement by the parties to have class arbitration issues referred to arbitration.

[226] *Bazzle*, 539 U.S. at 442. Because it was not clear that the arbitrator decided the class arbitration question, as opposed to merely following the court's interpretation, the judgment was vacated and the case remanded. *Id.*

[227] Chief Justice Rehnquist further concluded that the holding of the Supreme Court of South Carolina violated the terms of the parties' contract and thus was preempted by the FAA. *Id.* at 455 (Rehnquist, C.J., dissenting). Justice Thomas dissented on the grounds that the FAA, in his view, was not applicable to state proceedings. Thus, the state court ruling should have remained undisturbed. *Id.* at 460 (Thomas, J., dissenting).

[228] *Id.*

only those issues it specifically has agreed to submit to arbitration."[229] And as the Court had ruled in *First Options,* silence or ambiguity on the issue of who should decide what matters will be referred to arbitration should mean that the question is for a court to decide.[230] The *Bazzle* contract involved the question of how the arbitrator was to be selected, an issue that Chief Justice Rehnquist believed was "much more akin to the agreement as to what shall be arbitrated"[231] which *First Options* allocated to the courts. *Howsam* was distinguished as involving procedural issues which called for arbitral resolution.[232]

Chief Justice Rehnquist did not directly address the plurality's alternative argument that the contract could be viewed as incorporating the parties' agreement that issues such as the permissibility of class arbitrations were to be resolved by an arbitrator. However, since he quoted the exact same language relied upon by the plurality in support of his argument that the *Bazzle* agreement clearly precluded class arbitrations, his opinion effectively rejected the position suggested by the plurality that the parties agreed in their contract that the arbitrator should decide that question. In effect, Chief Justice Rehnquist's opinion concluded that it would take a specific delegation of authority to the arbitrator rather than a broadly phrased arbitration clause to overcome the presumption of judicial control over substantive arbitrability questions.

IV. AGREEMENTS TO ARBITRATE AND THE EXPECTATION MODEL

When the parties to a contract enter into negotiations, it is most likely that they will concentrate their attention on the substance of the deal. If the arrangement is for the purchase of a product, how much is desired, and of what price and quality? If the parties are negotiating an employment contract, the primary concern is likely to be the nature of the position, terms of compensation, duration of the hiring and grounds, if any, for termination. While dispute resolution procedures may ultimately turn out to be important, they are likely to be much less significant to the parties at the time of contract negotiation than the business opportunities which brought them together in the first place.

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[229] *Id.* (*quoting* First Options, Inc. v. Kaplan, 514 U.S. 938, 945 (1995)).

[230] *See id.*

[231] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 457 (2002).

[232] *See id.*

Nevertheless, if an arbitration system is included in the contract, one of the parties must have considered dispute resolution procedures to be important enough to warrant addressing the issue in the written agreement. However, that does not necessarily mean that substantial thought was given to the details of the arbitration system finally incorporated in the contract. The party proposing arbitration may have had a general preference to avoid time-consuming and costly court litigation without considering how potentially complex pre-arbitration issues should be handled. Proposing an arbitration system, in short, says nothing definitive about preferences for the treatment of arbitrability questions.

Of course, if the parties choose a method for the resolution of pre-arbitration disputes, the contractual foundation underlying the law of arbitration dictates that party preferences be respected. One can certainly hypothesize a negotiation session in which the parties discuss a limitations period that would govern the filing of any complaint alleging that the substantive provisions of the contract have been breached. A discussion of that sort could include consideration of the possibility that whatever limitations period the parties agreed upon might be tolled if the complainant had no way of knowing that the contract breach occurred.[233] The parties might also discuss the possibility that the breach would be considered a continuing violation, thereby justifying what otherwise would appear to be an untimely complaint,[234] or that certain conduct would be considered grounds for waiver, estoppel, or equitable tolling of the limitations period.[235] If the parties recognize that such issues might arise, they are also likely to recognize the possibility that incorporating a limitations period in

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[233] The date the complainant becomes aware of a contract breach may be used as the triggering point for the limitations period rather than the date on which the breach occurred. *See, e.g.*, St. Louis Post-Dispatch v. St. Louis Newspaper Guild, Local 47, 97 Lab. Arb. Rep. (BNA) 694, 698–700 (1991) (Witney, Arb.); Columbus Symphony Orchestra Inc. v. Musicians Local 103, 92 Lab. Arb. Rep. (BNA) 1203, 1209 (1989) (Fullmer, Arb.).

[234] Conduct may be treated by an arbitrator as continuing in character because its impact is repeated each day. Arbitration may then be sought at any time, although the remedy would not apply beyond the limitations period. *E.g.*, Cleveland Pneumatic v. Aerol Aircraft Employees Ass'n, 91 Lab. Arb. Rep. (BNA) 428, 430 (1988) (Oberdank, Arb.); Hillel Day Sch. v. Hillel Teachers Ass'n, Local 1899, 89 Lab. Arb. Rep. (BNA) 905, 907 (1987) (Lipson, Arb.).

[235] Fleming Cos. v. Rich, 978 F. Supp. 1281, 1300 (E.D. Mo. 1997). A failure to object to the untimeliness of the complaint may be deemed a waiver. *E.g.*, Crestline Exempted Vill. Sch. v. Crestline Sch. Employees Ass'n, 111 Lab. Arb. Rep. (BNA) 114, 116 (1998) (Goldberg, Arb.); Camp Lejeune Marine Corps Base v. AFGE Local 2065, 90 Lab. Arb. Rep. (BNA) 1126, 1128 (1988) (Nigro, Arb.).

the contract could lead to a dispute that is separate and apart from their disagreement over whether the substantive terms of the contract have been breached. The parties may then go on to decide whether such issues will be resolved by an arbitrator or judge.

If the parties agree to a process that calls for the arbitration of a dispute over the timeliness of a breach of contract claim the substance of which the parties have agreed to arbitrate, *First Options, Wiley, Howsam* and *Bazzle* are all consistent in calling for the timeliness question to be arbitrated. In such a case the arbitrator would not consider the merits of the dispute until after he or she had found that the breach of contract complaint was made within the time limitations period. In contrast, if the arbitrator found the complaint to be untimely the merits of the dispute would not be considered. In either event, since the parties agreed to arbitrate the timeliness question, the arbitrator's conclusion on this issue should receive the same deference from the courts as the law affords to arbitration rulings on the merits of the parties' dispute.

However, none of the Supreme Court's recent arbitration cases have dealt with the possibility that the parties might choose not to have a dispute over timeliness or other procedural matters dealt with in arbitration. Conceivably, the parties might want the expertise of a particular arbitrator for the substance of their dispute, but at the same time prefer the legal expertise of a judge to evaluate the procedural issues that precede the arbitration. Court decisions that have held that the satisfaction of procedural preconditions to arbitration are for the arbitrator to evaluate have not confronted a situation in which the parties have specifically agreed to exclude such issues from the arbitration process.

From one perspective it might be argued that the resolution of disputes over procedural preconditions to arbitration by an arbitrator is an inherent part of the arbitration process. If the parties choose arbitration as the dispute resolution procedure for the merits of their disagreement, they must accept arbitration for disputes over related procedural matters.[236] Such an

[236] In a related vein, the Tenth Circuit Court of Appeals has concluded that the parties may not contract for more judicial review of the final arbitration award than the law otherwise provides. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 937 (10th Cir. 2001). This makes limited judicial review of the arbitrator's award an invariable component of the arbitration process, trumping freedom of contract principles. A contrary approach was taken by the Ninth Circuit Court of Appeals in *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 890–91 (9th Cir. 1997). An alternative approach is to provide for an "internal" appeal process before a private arbitration panel. *See* COMMERCIAL ARBITRATION AT ITS BEST 298–304 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001)

approach would be responsive to the concern expressed by the Supreme Court that procedural questions related to the arbitration process are often intertwined with the merits of the parties' dispute, and that where the parties have agreed to arbitration, courts should avoid involvement in a manner that would impinge upon arbitral jurisdiction over the substantive issue separating the parties.

However, there is also a sense in which a dispute is a dispute, whether characterized as substantive or procedural. Parties are permitted to choose to arbitrate the merits of their dispute, but they are also free to insist upon using traditional court procedures where contract disagreements arise. Similarly, when the parties have a disagreement over whether procedural preconditions to arbitration have been satisfied, they in effect have a second contract dispute. Under the FAA, they should only be obligated to arbitrate that disagreement if they have agreed to do so in a written contract. But if their written contract to arbitrate calls for judicial resolution of procedural questions, the consent required by the FAA is not present. That should mean that the arbitration of such questions cannot be required.

Given the fact that the FAA requires a written agreement to arbitrate, there is a strong argument supporting the enforcement of the parties' expressed intent with respect to the allocation of arbitrability issues between courts and arbitrators. Whether the issue is the question of whether the arbitration agreement covers the particular dispute or a procedural question concerning compliance with contractual preconditions to arbitration, if the parties have expressly delegated the dispute to arbitration they have satisfied the statutory requirement of a written agreement to arbitrate. On the other hand, a specific direction that such issues are to be resolved by a court constitutes an explicit statement that there is no agreement to arbitrate. Given the absence of an agreement to arbitrate as reflected in the written direction that the dispute be resolved in court, the consensual foundation required for arbitration is absent and therefore arbitration should not be required. Whether the parties have directed that a particular kind of dispute be arbitrated or resolved in court, this approach insures that their expectations will be fulfilled.

More frequently, however, the parties do not express their preference as to what forum their pre-arbitration disputes should be sent. Instead, their arbitration agreement will typically call for arbitral resolution of "any dispute arising under the contract," or perhaps "any dispute arising under or related to the contract." When a pre-arbitration dispute later arises, there is very little on which to base a determination of the parties' expectations.

The courts have attempted to develop default rules to determine where to allocate decision making authority in such cases, but it is not clear that the rules are fully consistent with the expectation model upon which they are supposedly premised.

The rules for disputes over whether a substantive contract claim is covered by the parties' arbitration agreement contains both pro and anti-arbitration components. Arbitration is encouraged as a result of the application of a presumption that the substantive disagreement between the parties is within the scope of coverage of their arbitration agreement. At the same time, however, there is a presumption that this arbitrability determination is to be made by a court. It will only be referred to arbitration if the parties clearly expressed their intent that an arbitrator should determine whether the substantive dispute should be arbitrated. Whether this is what the parties would have expected had they thought about the matter is impossible to know. Nevertheless, the court's arbitrability rules at least provide some guidance in answering the disputed questions, whether or not they are consistent with the expectation model.

The fact that parties often employ general language in their arbitration agreement, however, leaves room for uncertainty. When the contract states that all disputes arising under or related to the contract are to be dealt with in arbitration, the parties are likely to have acted in a manner demonstrating their intent to have the merits of their disagreement resolved in an arbitration proceeding. But arbitration contract language that is both broad in scope and general in its terms can also be read as including the dispute over who should decide whether the merits of the parties' disagreement is within the scope of their arbitration contract. If so, the concepts supporting the expectation model may be inconsistent with the apparent judicial reluctance to permit arbitrators to rule on substantive arbitrability questions.

Yet, when the issue is one of procedural arbitrability, the courts have held that the matter is properly for arbitral resolution. Sometimes this is thought to be the likely expectation of the parties, while at other times the presumption is supported by the concern that procedural questions are often intertwined with the merits of the dispute, and therefore courts should avoid involvement. The courts have not expressly stated that the parties are free to insist on judicial resolution of procedural arbitrability questions, but more importantly no concern has been expressed that allocating procedural questions to arbitration effectively means that the arbitrator is determining that he or she has jurisdiction to resolve the merits of the dispute. To be sure, this is not the same precise question as determining the scope of the

arbitrator's jurisdiction, but the end result is identical. A decision that the dispute is procedurally arbitrable and a decision that the arbitration agreement covers the parties' substantive disagreement means that the arbitration will proceed. There is no apparent reason why arbitrators can be trusted to make one decision but not the other.

While an expectation model may be adequate for the resolution of typical pre-arbitration disputes, some questions may prove difficult to classify. The *Bazzle* case is illustrative. The Court split over the question of whether the relevant arbitration agreement authorized class arbitrations. The majority viewed the question as a procedural issue involving the kind of arbitration the parties agreed to conduct, while the dissent characterized the dispute as a scope of coverage issue involving whether the parties agreed to arbitrate the question of whether class arbitrations are permissible. The differing characterizations produced different end results for the majority and dissent. As a pure expectation issue, it is hard to know what the parties would have wanted had they thought about the matter.

Despite some problems, the expectation model still provides a solid foundation for the resolution of arbitrability disputes. Its advantage lies in the fact that it is built upon party consent where the parties have addressed and resolved an issue, and a sincere attempt at constructing likely intent where there is no explicit resolution of the problem in the parties' agreement. Its application, moreover, could help to solve the one major inconsistency in current arbitration law relating to broad arbitration agreement language covering *all* contract disputes. As suggested by Justice Breyer's plurality opinion in *Bazzle,* the expectation model could be applied to such language to determine the allocation of arbitrability questions between courts and arbitrators rather than relying on the classification of disputed issues as related to the scope of the arbitration agreement or its procedural preconditions.

VII. CONCLUSION

One aspect of the *success* of the arbitration process is the degree to which parties comply with their promise to arbitrate. Unfortunately, however, statistics do not reveal how frequently parties to a dispute try to avoid their earlier arbitration promise. But the numbers are likely to be low due at least in part to the law's pro-arbitration policy. Particularly where the issue involves whether a dispute which arises during the term of the contract is covered by the arbitration agreement, the law presumes coverage. In a similar fashion, the parties will be required to arbitrate

procedural disputes connected with their arbitration agreement unless, perhaps, they have specifically agreed that procedural arbitrability questions are subject to judicial resolution. Challenging arbitrability in such cases is unlikely to be rewarding.

In its most recent consideration of pre-arbitration disputes, the Supreme Court has moved toward the development of an expectation model. Under this theory, questions that arise before the merits of the contract dispute can be heard are allocated to a court or arbitrator largely on the basis of an assessment of the parties' likely expectations. Moreover, this model appears to assume that had they thought about the matter, the parties would have expected that disputes over the existence of an arbitration agreement as well as the scope of its coverage would be heard by a judge, while controversies relating to the satisfaction of procedural preconditions to arbitration would be arbitrated. These appear to be reasonable conclusions absent clearly expressed intent to the contrary.

It must be conceded that application of the expectation model involves some uncertainty. *Bazzle* is just such a case since it is likely that the parties did not think about the possibility of a future class action, let alone who would decide whether the arbitration of a class action could proceed. Nevertheless, attempting to construct what reasonable parties might have expected given the nature of the agreement they signed is at least consistent with the consent principle that serves as the foundation of arbitration law under the FAA. In that respect, it represents an approach that is both superior to the arbitrary substantive/procedural dichotomy as well as more uniform than the inconsistently applied concern over arbitrator self-interest that has periodically filtered into the Supreme Court's arbitrability rulings.