Brooklyn Law Review

Volume 58
Issue 2
The Second Circuit Review - 1990-1991 Term

Article 2

2-1-1992

ARBITRATION: Judge-Made Law and The Presumption of Arbitrability: *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*

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JUDGE-MADE LAW AND THE PRESUMPTION OF ARBITRABILITY: *DAVID L. THRELKELD & CO. v. METALLGESELLSCHAFT LTD.**

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INTRODUCTION

The Second Circuit has provided significant judicial leadership in the interpretation of the United States Arbitration Act (the "Act") since its passage in 1925.[1] Through the innovative use of precedent and the careful weighing of the issues before it, the Second Circuit's decisions have contributed to the strong application of the Act and have, for the most part, conformed with the Act's own terms. In 1959, however, a "presumption of arbitrability" was engrafted onto the Act by a Second Circuit panel perhaps concerned more about easing congested court calendars than about fairly adjudicating private rights. In recent years the United States Supreme Court has adopted the Second Circuit's presumption of arbitrability and has made it the key to the application of the Act. In so doing, the Supreme Court has inflated the Arbitration Act and distorted the doctrines to be followed in applying it.

In 1991 the Second Circuit decided *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*[2] and followed current Supreme Court doctrine in enforcing an ends-oriented view of the Act. In the process, the court created new doctrine that will further imbalance the Second Circuit's consideration of threshold issues of arbitrability. This Article will examine the interplay of Second Circuit and Supreme Court precedent in the development of doctrines of arbitrability under the Act. Next, this Article will explore the reasoning and implications of the *Threlkeld*

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* 923 F.2d 245 (2d Cir. 1991), *cert. dismissed per stipulation*, 112 S. Ct. 17 (1991).

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[1] Act of February 12, 1925, ch. 213, 43 Stat. 883, codified at 9 U.S.C. §§ 1 *et seq.*

[2] 923 F.2d 245 (2d Cir. 1991).

decision.

I. THE UNITED STATES ARBITRATION ACT

In 1923 Congress was asked by the American Bar Association and a variety of commercial organizations to enact legislation for a narrow and specific purpose.[3] These advocates wanted a federal law to make freely negotiated predispute arbitration agreements enforceable in federal courts. The "evil to be corrected"[4] was a common law doctrine that often made it impossible for parties to arbitration agreements to compel other parties to comply with their contractual commitments to arbitrate disputes.[5] The doctrine was so ancient that common law courts felt compelled to obey it even when they found the policy it represented to be anachronistic.[6] A statute was needed to abrogate this principle of the common law.

Proponents of arbitration had already succeeded in enacting statutes in New York[7] and New Jersey[8] to make predispute arbitration agreements enforceable in the courts of those jurisdictions. State legislation could not change the treatment given to arbitration by federal courts, however, because arbitration acts were considered procedural law[9] concerned with remedies rather than rights, and federal courts followed federally prescribed procedures.[10] Only an act of Congress could release federal judges

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[3] The arbitration bill was submitted on January 31, 1923 by Senator Sterling (as S. 4214) and by Representative Mills (as H.R. 13522). 1923 CONG. REC. 732, 797, 67th Cong., 4th Sess. The same afternoon a hearing on the bill was held by the Senate Judiciary Committee. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing before a Subcomm. of the Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) [hereinafter *1923 Hearings*]. Suggestions were made by the Senate subcommittee of areas for improvement in the bill, *id.* at 9-11, and the bill was resubmitted in 1924 (as S. 1005 and H.R. 646). *Arbitration of Interstate Commercial Disputes, Joint Hearings before the Comm. on the Judiciary*, 68th Cong., 1st Sess. (1924) [hereinafter *1924 Joint Hearings*].

[4] *1924 Joint Hearings*, *supra* note 3, at 34-35 (brief of J. Cohen).

[5] *See 1924 Joint Hearings*, *supra* note 3, at 33 (statement of J. Cohen) (citing cases).

[6] *See 1924 Joint Hearings*, *supra* note 3, at 39 (brief of J. Cohen); H. Baum & L. Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. REV. 238-43 (1931).

[7] N.Y. CIV. PRAC. L. & R. 7501 (McKinney 1980).

[8] 1923 N.J. LAWS ch. 134, §1 *et seq.*, *codified as amended, at* N.J. STAT. ANN. ch. 24 (West 1987).

[9] *See 1924 Joint Hearings*, *supra* note 3, at 16 (statement of J. Cohen).

[10] *See id.*, *supra* note 3, at 17 ("The theory on which you do this is that you have

from the dead hand of the common law and make arbitration agreements enforceable in courts of the United States.

A. *Congressional Intent*

Legislators considering the arbitration bill noted the array of organizations supporting the bill and the apparent lack of organized opposition.[11] Yet clearly discernible in the legislative history is their concern that the legislation they were called upon to enact might prove to be unfair in some respect.

The principal witness at the joint congressional hearing on the arbitration bill was Julius Cohen, the main draftsman of the proposed act. Early in his prepared testimony, Cohen briefly mentioned "300 years" of judicial disfavor for arbitration, but his prepared remarks gave no explanation of the reasons for that disfavor.[12] The Chairman interrupted to ask Cohen to explain "the reason for the rule, as you understand it, that a contract for arbitration is not enforceable in equity."[13] Cohen initially discussed the possibility that one of Lord Coke's early decisions may have been misunderstood[14] and the possibility that some courts were jealous of their jurisdiction, powers and emoluments.[15] Then Cohen got to the heart of the concern of equity courts, as he saw it:

> But the fundamental reason for it, when you come to dig into the history of it—the real fundamental cause was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the

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the right to tell the Federal courts how to proceed.").

[11] *Id.* at 11 (statement of W. Piatt); *id.* at 13 (statement of J. Cohen); *id.* at 24 (colloquy between Representative Dyer and the Chairman).

[12] *Id.* at 14 (statement of J. Cohen) ("[T]he difficulty has been that for over 300 years, *for reasons which it would take me too long to undertake too explain at this time*, the courts have said that that kind of an agreement was one that was revocable at any time.") (emphasis added).

[13] *Id.*

[14] "A dictum of Lord Coke in Vynior's Case, established the doctrine of revocability, based, apparently, on the theory of delegation of powers to arbitrators." Baum & Pressman, *supra* note 6, at 240 (referring to Vynior's Case, 8 Co. 302, 77 Eng. Rep. 597 (1609)).

[15] These are the explanations that found their way into the committee reports and into subsequent attempts to reconstruct legislative intent. *See* H.R. REP. No. 96, 68th Cong. 1st Sess. 1-2 (1924); S. REP. No. 536, 68th Cong. 1st Sess. 2 (1924); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974).

> courts said, "If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones." And that still is true to a certain extent.[16]

Although Cohen wished to continue on with his prepared testimony, the Chairman held him back, expressing concern that railroads were using their unequal bargaining power to coerce shippers into signing arbitration agreements. Cohen assured the chairman that federal freight transportation law adequately protected the interests of shippers, but he failed to address squarely the underlying issue of unequal bargaining power and contracts of adhesion.[17]

The Chairman's next interruption came when Cohen was discussing the right to a jury trial. The Chairman wanted to make sure that the jury trial was preserved on "the issue [of] whether there is an agreement to arbitrate or not."[18] This concern for the rights of the party opposing arbitration is also reflected in both the House and Senate Committee Reports.[19] The Senate Report declared that "[t]he constitutional right to a jury trial is adequately safeguarded."[20] The House Report stated that "[i]f one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected."[21]

In short, in enacting the United States Arbitration Act into law, Congress consciously adopted an evenhanded approach. On the one hand, Congress protected the contractual rights of parties entitled to arbitration by making their agreements to arbitrate specifically enforceable in federal courts. Congress also protected their procedural rights in section 4 of the Act; it provided for a joining of issues by the parties within five days after

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[16] *1924 Joint Hearings*, *supra* note 3, at 15 (statement of J. Cohen). To some extent this testimony is reflected in the Senate Report. S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924).

[17] *1924 Joint Hearings*, *supra* note 3, at 15.

[18] *Id.* at 17.

[19] The Chairman's concern for fairness and protection of unwilling parties may also be reflected in the phrasing of a somewhat cryptic question he asked of an earlier witness. Mr. Charles Bernheimer was in the midst of discussing committees that had been set up overseas in various countries by chambers of commerce and other organizations to facilitate the arbitration of commercial disputes, when the Chairman inquired: "[T]he committees are *voluntary* committees?" *Id.* at 8 (statement of C. Bernheimer) (emphasis added).

[20] S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924).

[21] H.R. REP No. 96, 68th Cong. 1st Sess. 2 (1924).

service of process with a speedy determination to follow.[22]

On the other hand, Congress protected the contractual and procedural rights of parties opposed to arbitration by providing a fair hearing on all issues concerning "the making of the agreement for arbitration or the failure to comply therewith."[23] Section 4 of the Act requires that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the courts shall proceed summarily to the trial thereof."[24] Section 4 specifically grants the right of jury trial to the party opposing the motion.[25] If a jury is to be empaneled, it is to have the power to rule on issues of whether a valid agreement for arbitration was made in writing and whether there was a default in proceeding under that agreement.[26] Thus procedural safeguards were built into the Act by Congress to ensure that no one would be deprived of a right to trial unless he or she had already voluntarily agreed to waive it.

B. *Initial Interpretations*

Federal courts interpreted the Arbitration Act on a case-by-case basis in the years following its enactment, applying its provisions to ascertain fairly the contractual intentions of the parties and to enforce valid arbitration agreements when the matter in dispute fell within their parameters. From 1952 to 1962, however, concerns over issues of federalism and the interplay between the policies of the Arbitration Act and other federal statutes led the Supreme Court to decide three cases that gave Arbitration Act jurisprudence a distinct shape.

1. *Wilko v. Swan*

The first such case was *Wilko v. Swan*.[27] In *Wilko* a cus-

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[22] Act of Feb. 12, 1925, ch. 213 § 4, 43 Stat. 883 (codified as amended at 9 U.S.C. § 4 (1947)).

[23] 9 U.S.C. § 4 (1925).

[24] *Id.*

[25] *Id.* It does not appear that the party who is moving for arbitration is granted a statutory right to jury trial upon this issue by section 4. The reason for the omission is undoubtedly that a party seeking to enforce an arbitration agreement must concede that he has waived his right to a jury trial. The right to a jury, therefore, was clearly provided solely for the purpose of protecting parties opposing arbitration.

[26] *Id.*

[27] 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson American Ex-

tomer of a securities brokerage firm brought suit against the brokerage, claiming that he had been induced to buy securities by false representations made to him by a broker. Wilko's contract with the brokerage firm contained an arbitration clause. The Court observed that "two policies, not easily reconcilable, are involved in this case."[28] The first policy, expressed by section 2 of the Arbitration Act, made arbitration clauses "valid, irrevocable, and enforceable."[29] The second policy, expressed by section 12(2) of the Securities Act of 1933,[30] authorized any purchaser of a security who had been damaged by a seller's failure to comply with the Securities Act to sue the seller "either at law or in equity in any court of competent jurisdiction."[31] Section 14 of the Securities Act declared "void" any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act.[32] The case came to the Supreme Court on *certiorari* from the Second Circuit. The Second Circuit had held that the Securities Act did not prohibit predispute agreements to refer securities claims to arbitration and had enforced the arbitration agreement against Wilko.[33]

The Supreme Court reversed. In its parsing of the two statutes involved, the Court found that the Securities Act had been "drafted with an eye to the disadvantages under which buyers labor."[34] The *Wilko* Court noted Congress's concern that buyers of securities often have less access to information about securities than do sellers and that, as a consequence, buyers and sellers were frequently not on an equal footing in negotiating transactions. Although the Court found that the policies of the two acts were "not easily reconcilable," it reasoned that "the intention of Congress concerning the sale of securities is better carried out by holding invalid . . . an agreement for arbitration of

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press, 490 U.S. 477 (1989).

[28] *Id.* at 438.

[29] 9 U.S.C. § 2.

[30] Act of May 27, 1933, ch. 38, tit. I, 48 Stat. 74, *reprinted in* 15 U.S.C. §§ 77a-aa (1981).

[31] Act of May 27, 1933, ch. 38, tit. I, § 12(2), 48 Stat. 84, *reprinted in* 15 U.S.C. § 77l(2) (1981).

[32] 48 Stat. 84, 15 U.S.C. § 77n (1981).

[33] Wilko v. Swan, 201 F. 2d 439 (2d Cir. 1953).

[34] Wilko v. Swan, 346 U.S. 427, 435 (1953).

issues arising under the [Securities] Act."[35] Thus the *Wilko* Court weighed the policies of the Arbitration Act against the policies of the Securities Act of 1933 and found that Congress's concern to preserve contractual arbitration remedies was outweighed and partially contradicted by Congress's concern to protect investors.[36]

2. *Bernhardt v. Polygraphic Company of America, Inc.*

In the second of the three cases, *Bernhardt v. Polygraphic Company of America, Inc.*,[37] the Supreme Court for the first time faced the application of the *Erie* doctrine[38] to the Arbitration Act. The District Court in Vermont, sitting in diversity jurisdiction, had refused to enforce an arbitration clause in an employment contract between a New York corporation and its employee who had performed his employment duties while residing in Vermont.[39] Under Vermont common law an agreement to arbitrate was revocable by either party before the arbitration award was made. Applying *Erie*, the trial court found that state law supplied the rule of decision and ruled in favor of the employee, who preferred to litigate rather than arbitrate the claims against his former employer.

The district court was reversed, however, by the Second Circuit. The Second Circuit reasoned that section 3 of the Arbitration Act[40] made no express reference to the maritime or commerce powers of Congress. Therefore, section 3 of the Act rested on Congress's power to govern the conduct of federal judicial proceedings. Since the Arbitration Act was perceived as essen-

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[35] *Id.* at 438.

[36] Since the Chairman of the congressional panels which held hearings on the arbitration bill expressed concern that arbitration clauses might be unfairly imposed as between parties having unequal power, this decision appears to have been wholly consistent with congressional intent in the Arbitration Act.

[37] 350 U.S. 198 (1956).

[38] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (The *Erie* Doctrine requires federal courts to follow state substantive laws and federal procedural laws.).

[39] Federal courts have the capacity to hear "controversies . . . between citizens of different States." U.S. CONST. art. III, § 2, cl. 1. This capacity is referred to in lawyer's jargon as "diversity" jurisdiction. The scope of diversity jurisdiction is further defined at 28 U.S.C. § 1332 (1987).

[40] Article 3 of the Arbitration Act empowers a federal court in which a dispute is pending to stay the suit if it is satisfied that the dispute is covered by a written arbitration agreement.

tially procedural in nature, federal law governed under the *Erie* doctrine. Applying the federal Arbitration Act, the Second Circuit ruled that the dispute between the parties was arbitrable and should be sent to arbitration.[41]

On writ of *certiorari*, the Supreme Court ruled that in section 2 of the Arbitration Act Congress had expressly limited the Act's scope to contracts within the scope of Congress's commerce and maritime powers. Section 3 of the Act could not be read apart from this limitation.[42] The Court found that Congress's power to pass the Arbitration Act did not derive from its power to define the procedures to be followed by the federal judiciary because the contractual choice of forum for the determination of a controversy was a matter of substantive rather than procedural law. Thus the Court held that the Arbitration Act did not apply. Vermont law controlled Bernhardt's employment contract because his employment in Vermont did not involve interstate or foreign commerce.[43]

3. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*

The Supreme Court's reading of congressional policies concerning federalism and investor protection, and its concern for the Act's constitutionality, led the Court to define the Act's limits. Another case involving Congress's national labor policies led to an expansive application of the Act in the field of labor relations. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[44] was one of a series of cases that dealt with the scope of arbitration agreements under the Labor-Management Relations Act of 1947. In *Warrior & Gulf* the issue was how broadly to construe an arbitration clause in a collective bargaining agreement. The steelworkers sought to compel their employer to arbitrate a dispute that arose when the employer dismissed some of its union employees and then contracted out the work they had performed to nonunion contractors. The lower court dismissed the union's complaint because, according to its interpretation of the collective bargaining agreement, the arbitration clause in

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[41] *Bernhardt*, 218 F.2d 948 (2d Cir. 1955).
[42] *Bernhardt*, 350 U.S. 198, 202 (1956).
[43] *Id.* at 200.
[44] 363 U.S. 574 (1960).

question did not give the arbitrator the right to review the employer's business judgment in contracting out work.[45] The Fifth Circuit affirmed.[46]

In a sweeping decision with broad implications for federal labor law, the Supreme Court reversed the Fifth Circuit and sent the dispute to arbitration.[47] In *Warrior & Gulf* the Court held that arbitration clauses found in collective bargaining agreements were to be construed broadly. Noting the important role arbitration clauses played in labor-management relationships governed by federal labor legislation, the Court held that "[t]he collective bargaining agreement is . . . more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[48] The Court noted that "[t]he present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."[49] Finding that the grievance machinery under a collective bargaining agreement is the engine of industrial self-government and that arbitration was an essential part of that grievance machinery, the Court reasoned that "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."[50] The Court concluded that in suits brought in federal court under section 301 of the Labor-Management Relations Act,[51] "[a]n 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."[52]

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[45] 168 F. Supp. 702 (S.D. Ala. 1958).

[46] 269 F.2d 633 (5th Cir. 1959).

[47] 363 U.S. 574, 585 (1960).

[48] *Id.* at 578.

[49] *Id.* (footnotes and citations omitted).

[50] *Id.* at 581.

[51] 29 U.S.C. § 185 (1947).

[52] 363 U.S. at 582-83 (footnote omitted). The Court was clear about the strength of the presumption of arbitrability it imposed in the labor grievance context:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of purpose to exclude the

The doctrine of *Warrior & Gulf* is particularly notable for the way it distinguished labor arbitration from commercial arbitration. The Court justified its requirement that courts give arbitration clauses under the Labor-Management Relations Act a broad reading by noting that the essential role arbitration played in ensuring the success of the national labor policy had no parallel in the commercial context. "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here."[53] The Court noted that commercial arbitration agreements and those in the labor context arise from very different considerations:

> A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. That is not true of the labor agreement.
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> . . . .
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> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.[54]

In concluding that labor arbitration agreements should be liberally construed, the majority's reasoning relied exclusively upon considerations of national labor policy, which do not apply in the ordinary commercial context. The Court's reliance upon national labor policies to justify its holding in *Warrior & Gulf* compels the conclusion that the policies of the Arbitration Act alone could not justify the broad reading the Court gave to labor

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claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Id. at 584-85.

[53] *Id.* at 578.

[54] *Id.* at 580-81.

arbitration agreements.[55] Thus the reasoning of *Warrior & Gulf* provides no support for the broad interpretation of arbitration clauses in commercial cases. The very reasoning of the Court argues against it.

C. *The Second Circuit's Influence on the Supreme Court*

1. *Robert Lawrence Co. v. Devonshire Fabrics Inc.*

While the Supreme Court was defining the scope of the Act, the Second Circuit was defining its nature. In *Robert Lawrence Co. v. Devonshire Fabrics Inc.*,[56] a diversity case involving a dispute between merchants, the Second Circuit addressed the *Erie*-related issue that the Supreme Court had left open in *Bernhardt v. Polygraphic*.[57] The Second Circuit ruled that by invoking the Commerce Clause and congressional powers over admiralty implied in the Constitution, Congress had intended to create federal substantive law to govern all cases that came within Congress's commerce and admiralty powers.[58] This federal law was to be interpreted by federal courts and encompassed "questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements . . . since these two types of legal questions are inextricably intertwined."[59]

Applying federal common law (which it had just created), the Second Circuit examined the claim that the defendant's fraud in inducing the plaintiff to enter into a contract for the purchase of goods was a "ground . . . for the revocation of any contract"[60] and that therefore, under section 2 of the Act, the

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[55] The Court was evidently unanimous in this opinion. Justice Whittaker, who wrote a dissenting opinion, declared that the majority's rule of liberal construction "is an entirely new and strange doctrine to me. I suggest, with deference, that it departs from both the contract of the parties and the controlling decisions of this Court." 363 U.S. 574, 585-89 (Whittaker, J., dissenting). "Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." *Id.* at 589 (quoting Judge Cardozo in Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 299, 169 N.E. 386, 391 (1929)).

[56] 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed per stipulation*, 364 U.S. 801 (1960). The panel that decided this case included Judge Lumbard, who also participated in the *Threlkeld* decision.

[57] 350 U.S. 198 (1956); *see supra* notes 37-43 and accompanying text.

[58] 271 F.2d at 404-09.

[59] *Id.* at 409.

[60] 9 U.S.C. § 2 (1947).

arbitration provision in the contract was unenforceable against the plaintiff. New York law, which was normally to be applied in a diversity case in New York under the *Erie* doctrine and the Rules of Decision Act,[61] would have made the contract as a whole unenforceable, including the arbitration clause.[62]

The Second Circuit looked to the provisions of the Arbitration Act to determine whether the same results should apply under federal law. Reasoning that "any doubts as to construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars,"[63] the court found that arbitration clauses were severable. The *Robert Lawrence* court decided that fraud in the inducement could be a ground to deny enforcement of an arbitration clause only when the fraud went to the formation of the clause itself, absent contrary expressions of intent by the parties.[64] Since there was no allegation that the arbitration clause in the case before it was separately induced by fraud, the Second Circuit sent the parties' dispute—including the dispute whether the entire contract was voided by fraud—to arbitration.[65]

2. *Prima Paint v. Flood & Conklin Manufacturing Co.*

The Second Circuit's analysis in *Robert Lawrence* began to affect the Supreme Court's interpretation of the Act in commercial cases, such as *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[66] In *Prima Paint* a company that had contracted to receive services under a commercial consulting agreement sued in diversity for rescission of that agreement, claiming that the consulting firm had fraudulently induced it to enter into the contract. According to the complaint, the consulting firm had failed to reveal that it was about to file a bankruptcy petition, which would have rendered it unable to provide the services called for in the consulting agreement. When the consulting firm moved to enforce the arbitration clause contained in the consult-

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[61] Rules of Decision Act, 28 U.S.C. § 1652 (1948).
[62] 271 F.2d at 412.
[63] *Id.* at 410.
[64] *Id.* at 409-410.
[65] *Id.* at 411, 413.
[66] 388 U.S. 395 (1967).

ing agreement, the plaintiff argued that the arbitration clause was unenforceable under the express terms of the Arbitration Act. The plaintiff relied upon section 2 of the Act, which declares arbitration clauses to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[67] The plaintiff argued that the Court was required under the *Erie* doctrine to apply state law in a diversity case to determine what "grounds . . . exist at law or in equity for the revocation of any contract."[68] Under New York law fraud in the inducement entitled the plaintiff to rescind the contract. Accordingly, the plaintiff argued that the arbitration clause was unenforceable under section 2 of the Arbitration Act.[69] Following Second Circuit precedent, the district court granted the defendant's motion to stay the action pending arbitration. The Second Circuit dismissed the plaintiff's appeal.[70]

The Supreme Court assumed for the sake of argument that fraud in the inducement could be a basis for rescission of a contract under state law.[71] As it interpreted the Arbitration Act, however, fraud in the inducement of the contract as a whole would not be a sufficient basis to invalidate an arbitration clause contained in the agreement. Reading section 2 of the Act together with section 4, the Supreme Court noted that section 4 instructs a federal court

> to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue." Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.[72]

Based on this reasoning, the Court affirmed the lower court's order sending the dispute to arbitration, since the plaintiff's claim of fraud in the inducement related to the entire contract as opposed to the specific arbitration clause of the contract.

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[67] 9 U.S.C. § 2 (1947).
[68] 388 U.S. at 400, *quoting* 9 U.S.C. § 2 (1947).
[69] 9 U.S.C. § 2 (1947).
[70] *Prima Paint*, 360 F.2d 315 (2d Cir. 1966).
[71] 388 U.S. at 400 n.3.
[72] *Id.* at 403-04 (footnotes omitted).

Justice Black filed a vigorous dissent in *Prima Paint*. The majority, in finding the arbitration clause to be severable from the rest of the contract for purposes of determining whether fraud in the inducement is a sufficient basis for keeping the contract from arbitration, had achieved precisely the same result as that of the Second Circuit in *Robert Lawrence*. The Supreme Court's decision in *Prima Paint* appeared to be based on the narrow ground of statutory construction, expressing no view on the Second Circuit's doctrine that the Arbitration Act authorized federal courts to create a specific body of federal common law.[73] Nevertheless, Black believed that the majority had, in effect, interpreted the Arbitration Act to give "federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means."[74] Black believed that making the arbitration agreement severable from the rest of the contract made it unequal and superior to other contract clauses. As he understood it, the result of the decision—to permit someone to defraud a second party into entering a contract and then to prevent the second party from suing to rescind that contract because it contained an arbitration clause that had not been induced by any separate fraud—"would flout the intention of the framers of the Act."[75] Black argued that to deny a judicial forum to a party on this basis might be a deprivation of due process of law.[76] He called it "judicial legislation" and added that "Congress might possibly have enacted such a version into law had it been able to foresee subsequent legal events, but I do not think this Court should do so."[77]

D. *Legislative and Judicial Extensions of the Act*

1. The Legislative Extension of the Act

During the 1950s and 1960s, when courts were developing standards for applying the Arbitration Act in interstate commerce, another event occurred that would prove to have signifi-

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[73] *Id.* at 421 (Black, J., dissenting) (noting the Second Circuit's forthright admission that its decision was intended to further a "liberal policy of promoting arbitration").

[74] *Id.* at 422.

[75] *Id.* at 427.

[76] *Id.* at 407.

[77] *Id.* at 425.

cant ramifications for international commercial arbitration. In 1958 a multilateral conference negotiated the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[78] The Convention was the culmination of efforts that had begun years before to make arbitral awards enforceable throughout the world.[79] The United States did not sign the Convention in 1958 after its delegation "recommend[ed] strongly" against doing so.[80] The main reason for the delegates' objections seems to have been a concern that it would "override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures."[81] A change of political party in power and the passage of time brought about a change of policy, however, and in 1968 the Senate ratified the Convention.[82]

Although the Convention had been formally ratified by the Senate, the United States delayed the actual deposit of the instrument of accession to the Convention until Congress enacted enabling legislation to incorporate the treaty into domestic law.[83] The only witness to appear at the only hearing held by Congress on the proposed enabling legislation was Richard Kearney, an attorney for the United States Department of State. In his testimony, Kearney sought to allay any concern on the part of the Senate Committee on Foreign Relations that enactment of the Convention might invalidate state laws or deprive parties unfairly of their rights to judicial determinations of their claims:

> The Chairman: Whether or not this comes into effect all depends upon an agreement entered into voluntarily b[y] the parties. Is that correct?
>
> Mr. Kearney: That is correct, sir.
>
> Mr. Chairman: In other words, you are not imposing this on peo-

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[78] 21 U.S.T. 2517 (1958).

[79] Although earlier multilateral conventions have been negotiated on the same subject, they have not achieved the result of making foreign arbitral awards uniformly and efficiently enforceable. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1054-55 (1961).

[80] Quigley, *supra* note 79, at 1074 n.108.

[81] *Id.* at 1074-75 n.108.

[82] The Senate Act of ratification included a reservation to the United States' accession to the Convention limiting its effectiveness to commercial matters. 114 CONG. REC. 29350-53, 90th Cong., 2d Sess. (1968).

[83] *Id.* at 10.

ple who do not wish any particular procedure; is that correct?

Mr. Kearney: That is absolutely correct.

Mr. Chairman: So that what you are doing is setting up a procedure by which citizens who would normally be of different countries and who wished to resort to this method of settling their differences could do so; is that correct?

Mr. Kearney: That is correct, sir.

Mr. Chairman: So there is no possible opposition based upon the idea we are now reaching out and subjecting citizens to further arbitrary intervention of the Federal authorities or any other authorities in their private affairs. That is not justified; is that correct?

Mr. Kearney: That is correct.[84]

In 1970 Congress passed enabling legislation to incorporate the twelve-year-old Convention into United States law.[85]

Section 201 of the enabling legislation made the Convention directly enforceable in the United States "in accordance with this chapter."[86] Section 202 defined situations in which the Convention would become applicable in disputes involving United States citizens and others.[87] Section 205 of the enabling act authorized the removal of cases from state courts to enforce the Convention.[88] Section 206 authorized courts to compel arbitration and to appoint arbitrators where appropriate.[89] Section 207 authorized any party to the arbitration to apply for an order confirming the award and provided that "the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the awards specified in the set convention."[90] Section 208 made the Federal Arbitration Act

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[84] Foreign Arbitral Awards, S. REP No. 91-702, 91st Cong., 2d Sess. 10 (1970).

[85] Pub. L. No. 91-368, 84 Stat. 692 (July 31, 1970) (adding §§ 201-208 to 9 U.S.C).

[86] "[T]his chapter" refers to chapter 2 of part 9 of the U.S. Code. 9 U.S.C. § 201 (1970).

[87] 9 U.S.C. § 202 (1970).

[88] 9 U.S.C. § 205 (1970).

[89] 9 U.S.C. § 206 (1970).

[90] 9 U.S.C. § 207 (1970). Article 5 of the Convention provides the following grounds for refusal to recognize and enforce an arbitral award:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given

applicable to actions and proceedings brought under the Convention "to the extent that the chapter is not in conflict with the chapter or the Convention as ratified by the United States."[91]

Nowhere in the legislative history is there apparent any belief that the policy represented by the enactment of the Convention into domestic law was one of overriding public concern. As was the case with the original Arbitration Act, Congress seemed to be motivated by a desire to extend to international business transactions a remedy that the Arbitration Act had provided for interstate dealings but which could not be made fully enforceable abroad without a treaty.[92]

Considering the ten-year delay between the negotiation of the Convention and its ratification by the Senate, the two-year delay between ratification of the Convention and its enactment into domestic law, the lack of any evident enthusiasm or expression of strong opinion concerning the matter by legislators and the generally technical nature of the subject matter, it is surprising how much controversy international arbitration has gener-

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proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

21 U.S.T. 2517, 2520 (1958).

[91] 9 U.S.C. § 208 (1970).

[92] *See* Quigley, *supra* note 79, at 1055-59.

ated in case law.[93] That controversy has had less to do with the Convention itself or its enabling act than with the manner in which it served judicial purposes unrelated to promoting the interests of business.

2. Judicial Extensions of the Act

Judges noted early on that the policy of enforcing arbitration agreements also had the salutary effect of lightening their caseloads.[94] It was generally recognized, however, that the principal purpose of Congress in the Arbitration Act was to vindicate private parties' contractual rights.[95] Accordingly, courts generally provided a fairly balanced hearing for claims under the Arbitration Act. Courts added no extra weight to the balance in order to promote interests of judicial economy.

The results achieved in *Robert Lawrence Co.*,[96] where the Second Circuit based its decision partly upon the "liberal policy" of the Act, and in *Prima Paint*,[97] where the majority carefully avoided any reference to policy, perhaps marked a step away from Congress's intent to establish an evenhanded method of resolving Arbitration Act disputes. Yet those decisions concerned the formation of rules for interpreting the Act that were, at least on their face, neutral. The cases established which set of scales would be used to weigh claims of arbitrability and what

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[93] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (Stevens, J., dissenting); Scherk v. Alberto-Culver Co., 417 U.S. 506, 521 (Douglas, J., dissenting), *reh'g denied*, 419 U.S. 885 (1974).

[94] *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402, 410 (2d Cir. 1959). "Finally, any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and *to help ease the current congestion of court calendars.* Such policy has been consistently reiterated by the federal courts and we think it deserves to be heartily endorsed." *Id.* (emphasis added) (citations omitted).

[95] *See, e.g.*, St. Louis Mailers' Union Local No. 3 v. Globe-Democrat Pub. Co., 350 F.2d 879, 885 (8th Cir. 1965); Local Union No. 998 v. The B. & T. Metals Co., 315 F.2d 432 (6th Cir. 1963); Metal Product Workers Union v. The Torrington Co., 242 F. Supp. 813, 824 (D. Conn. 1965); Local No. 30 v. Hyman Brodsky & Son Corp., 243 F. Supp. 728, 730 (E.D. Pa. 1964); U.S. Steel Corp. v. Seafarers' International Union, 237 F. Supp. 529, 532 (E.D. Pa. 1965); *In re* Utility Oil Corp., 10 F. Supp. 678, 680-81 (S.D.N.Y. 1934). *But see* Insurance Agents' International Union v. Prudential Ins. Co., 122 F. Supp. 869, 872 (E.D. Pa. 1954) (ordering arbitration despite language of contract; "where the parties have elected to submit their differences [to arbitration], the courts should not by hair splitting decisions hamstring its operation").

[96] 271 F. 2d 402, 410 (2d Cir. 1959).

[97] 388 U.S. 395 (1967).

parts of a party's claims might be weighed. When it came to the weighing, however, they did not put a thumb on the scales.

This state of affairs began to change in the 1970s. Thanks largely to the advocacy of Chief Justice Warren Burger, the congestion of court dockets became front page news[98] and the subject of significant policy initiatives.[99] In numerous speeches, articles and other communications, the Chief Justice expressed his view that justice would be improved through alternative means of resolving disputes, including mediation, arbitration and conciliation.[100] By his efforts, Burger evidently hoped to stimulate debate and promote legislation to increase the use of alternative dispute resolution mechanisms.

a. The Bremen v. Zapata Off-Shore Co.

The Chief Justice's policy concerns also began to work their way into law through decisions of the Supreme Court. This was first evident in the Court's decision in *The Bremen v. Zapata Off-Shore Co.*[101] In *Bremen* the Court overturned a widely followed doctrine that contract clauses designating a particular judicial forum as the exclusive place for litigation of disputes under the contract were contrary to public policy and therefore unenforceable. Under that doctrine, parties seeking to change venue to a site chosen by a contractual clause had to show that the balance of conveniences was strongly in favor of the contractually-chosen forum.[102]

The *Bremen* Court radically changed United States law concerning choice of forum. In its opinion, authored by the Chief Justice, the Court noted that the country had entered "an era when all courts are overloaded . . . ."[103] In such an era, "[t]he

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[98] *See, e.g.*, Hon. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (March 1983) [hereinafter *Better Way*]; William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1978); Am. Bar Assoc., *Report of the Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976); Hon. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976) [hereinafter *Agenda*].

[99] *See, e.g.*, Raymond J. Broderick, *Yes to Mandatory Court-Annexed ADR*, 18 LITIG. 4 (Summer 1992) ("A court-annexed mandatory arbitration program has been operating in the Eastern District of Pennsylvania for the past 14 years.").

[100] *See e.g., Agenda, supra* note 98, at 83; *Better Way, supra* note 98, at 275.

[101] 407 U.S. 1 (1972).

[102] *Id.* at 6.

[103] *Id.* at 12.

argument that [choice of forum] clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction" because it "appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court."[104] Such a doctrine "reflects something of a provincial attitude regarding the fairness of other tribunals."[105] The Court also voiced its opinion that the continued expansion of American business and industry depended upon a legal regime that would not restrict its development.

> In the opinion of this Court, a doctrine that prohibited the enforcement of forum-choice clauses would be a heavy hand indeed on the future of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[106]

Thus the *Bremen* Court reversed the traditional burden applied to the enforcement of choice of forum clauses. In the future, parties seeking to *oppose* the enforcement of the choice of forum clause would carry a

> heavy burden of showing not only that the balance of convenience is strongly in favor of trial in [the United States] (that is, that it will be far more inconvenient for [the opponent] to litigate [abroad] than it will be for [the proponent of the choice of forum clause] to litigate in [the United States]), but also that a [foreign] trial will be so manifestly and gravely inconvenient to [the opponent] that it will be effectively deprived of a meaningful day in court.[107]

b. Scherk v. Alberto-Culver Co.

Two years later the Burger Court had the opportunity to apply the *Bremen* analysis to enforcement of a predispute arbitration agreement in *Scherk v. Alberto-Culver Co.*[108] In *Scherk* an American manufacturer had negotiated a contract to acquire a European business, along with all rights held by that business

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[104] *Id.* The Supreme Court's unsupported observation that judicial hostility to arbitration rested upon judicial jealousy was considered and rejected in the well-reasoned opinion of the Second Circuit in Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 982-84 (2d Cir. 1942).

[105] *Bremen*, 407 U.S. at 12.

[106] *Id.* at 9.

[107] *Id.* at 19.

[108] 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974).

to trademarks in certain cosmetic goods. The contract contained warranties in which the seller guaranteed that it had sole and unencumbered ownership of the trademarks. The contract also contained an arbitration clause requiring arbitration of "any controversy or claim [that] shall arise out of this agreement or the breach thereof."[109] Approximately a year after the closing of the transaction, the purchaser discovered that the trademarks were substantially encumbered and offered to rescind its purchase of the European business. When the seller refused, the manufacturer sued in federal district court, claiming that the seller's fraudulent representations about its trademark rights had violated section 10(b) of the Securities Exchange Act of 1934[110] and rule 10b-5 promulgated thereunder.[111] The seller filed a motion to stay the action pending arbitration. Relying on *Wilko v. Swan*[112] the court denied the seller's motion to stay, finding that the policies underlying section 10(b) of the Exchange Act were substantially the same as the provisions of the 1933 Act on which *Wilko* was based and therefore the Exchange Act took precedence over the policies of the Arbitration Act. The Seventh Circuit affirmed the lower court's decision.[113]

In reversing the lower courts, the Supreme Court relied heavily on the international context of the dispute. Following its decision in *Bremen*, the Court found that an international contract "involves considerations and policies significantly different from those found controlling in *Wilko*."[114] Potential questions relating to laws and legal policies that would govern international disputes made it imperative for parties to international contracts to seek ways to minimize the uncertainty involved in international contracting.[115] Referring directly to its decision in

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[109] *Id.* at 508.

[110] 15 U.S.C. § 78j (b) (1934).

[111] 17 C.F.R. § 240.-10b-5 (1934).

[112] 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson American Express, 490 U.S. 477 (1989).

[113] 484 F. 2d 611 (7th Cir. 1973).

[114] *Scherk*, 417 U.S. at 515.

[115] A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the prob-

Bremen, the Court declared:

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[116]

The Supreme Court decided that policies of the Arbitration Act would prevail over those of the Securities Exchange Act of 1934 in the international commercial context, notwithstanding the similarity between the policies of the Exchange Act and those of the Securities Act, which had priority in *Wilko*.[117]

In its final footnote of the case, the Court declared that its holding in *Scherk* "is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision," including the signing, ratification and incorporation into United States law of the Convention.[118] The Court went on to state that:

> [W]ithout reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention and the passage of Chapter II of the U.S. Arbitration Act [the enabling act which incorporated the Convention into U.S. law] provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.[119]

It is curious that the Court, presented with new legislation that applied specifically to the enforcement of arbitration clauses in an international context, would decline to rely upon that statute to determine whether an arbitration clause in an in-

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lem area involved.

Id. at 516 (footnote omitted).

[116] *Id.* at 519 (footnotes omitted) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)).

[117] The Court did not reverse the burden of proof for arbitration cases in *Scherk*, as it had done for choice-of-forum clauses in *Bremen*. The issue was not raised by the facts before the Court.

[118] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

[119] *Id.*

ternational contract should be enforced. In *Scherk* the Court specifically relied upon the international character of the dispute to distinguish the case from its apparently contrary holding in the domestic context in *Wilko*. The explanation for this judicial choice may lie in the precedential effect of employing the Act, rather than the Convention. A more narrowly-based decision relying upon the Convention would have had precedential weight in an international, but not domestic, context. However, by taking its urgent concern for enforcing contractual choice of forum "in an era when all courts are overloaded"[120] and by using the contractual choice of forum issue to inflate the importance of the whole Arbitration Act in an international context, the Court created a precedent upon which it could rely to expand the reach and power of the Act in both international and domestic contexts. As in *Bremen*, the Supreme Court had found a means to relieve court congestion through the interpretation of laws, one of the few means available to it under a Constitution that grants the power to define court jurisdiction to another branch of government.[121]

c. Moses H. Cone Memorial Hospital v. Mercury Construction Corp.

In the *Scherk* decision and prior cases, the Supreme Court used relatively restrained language to describe the policies underlying the Arbitration Act. Even though the result in *Scherk* was to give precedence to arbitration policy over investor protection in the international context, it was the international nature of the contractual commitment, rather than its status as an agreement to arbitrate, that provided the basis for its decision.

In 1983 the Supreme Court's rhetoric caught up with—and surpassed—the substance of its arbitration policy in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[122] In this case the issue was whether a district court had improperly stayed a federal lawsuit brought under section 4 of the Arbitration Act for an order compelling arbitration. The district court had held that the Arbitration Act suit should be stayed on fed-

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[120] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

[121] U.S. CONST., art. III, § 2, cl. 2 (giving Congress the power to define the appellate jurisdiction of the Supreme Court).

[122] 460 U.S. 1 (1983).

eralism grounds pending resolution of a previously filed lawsuit in state court between the same parties dealing with the contract that included the arbitration clause. In deciding the stay was improper, the Court examined factors to determine the propriety or impropriety of enjoining federal court actions. One of those factors was whether federal law—in this case the Arbitration Act—provided the rule of decision in the federal case.

Noting that "the presence of federal-law issues must always be a major consideration weighing against surrender" of federal court jurisdiction to state courts,[123] the Court emphasized the importance of the federal-law issues involved in the Arbitration Act.

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act . . . . Although our holding in *Prima Paint* extended only to the specific issue presented, the Court of Appeals has since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. 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.[124]

Of course, since the scope and interpretation of the Arbitration Act were not in question in the case, this language was purely *dicta.* Yet the *dicta* provided the highest judicial sanction for a sweeping new doctrine to be followed by lower federal courts in Arbitration Act cases. In declaring the existence of "a liberal federal policy favoring arbitration agreements,"[125] the Court implicitly adopted the position of the Second Circuit in *Robert Lawrence.*[126] The *Moses H. Cone* majority stated that the effect of the Act was "to create a body of federal substantive law of arbitrability . . . .",[127] notwithstanding the silence of the

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[123] *Id.* at 26.

[124] *Id.* at 24-25 (footnote omitted) (emphasis added).

[125] *Id.* at 24.

[126] 271 F.2d 402 (2d Cir. 1959); *see supra* notes 56-65 and accompanying text.

[127] 460 U.S. at 24.

majority in *Prima Paint* and every other prior Supreme Court decision on that point.

In *Moses H. Cone* the Supreme Court transplanted the presumption in favor of arbitrability from the collective bargaining agreement context to the commercial arbitration context. This transplant reflected the fundamental way in which the Supreme Court's application of the Arbitration Act had changed since *Warrior & Gulf*. Yet the Court offered no rationale for its inflation of the Arbitration Act beyond its naked assertion that "a liberal federal policy" underlay it. Since neither federal labor policy nor international commerce was involved in *Moses H. Cone*, the Court's own prior doctrine did not support an expansive reading of the Act in the domestic commercial context. Nor did the Court look to the Act's legislative history to determine whether legislative intent supported its expansive reading of the Act.[128] Nevertheless, the Court's unexamined *dicta* in *Moses H. Cone* transformed Arbitration Act jurisprudence. After *Moses H. Cone*, federal courts were required to weigh issues of arbitrability with a heavy presumption favoring arbitration.

d. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.

The consequences of the Court's inflation of the Arbitration Act have been easy to see in the decade following *Moses H. Cone*. A series of Supreme Court decisions have taken the Arbitration Act far beyond the limit of what the 1925 Congress could have possibly intended.

A particularly result-oriented, even startling, decision came in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*[129] In this case an automobile dealer in Puerto Rico brought an antitrust suit against three foreign corporations, one of which was owned by an American company. The dealer alleged that the de-

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[128] The Court's subsequent decision in Perry v. Thomas, 482 U.S. 483 (1987), raises the question of whether Justice Marshall, who was the author of the Court's decisions in both *Perry* and *Moses H. Cone*, may have had second thoughts about the breadth of the language he used in the earlier decision to describe the Arbitration Act. The strong language employed in *Moses H. Cone* established that the grounds for a stay in favor of a state court action were not met in that case, due in part to the prevalence of federal law issues in an Arbitration Act section 4 proceeding. In *Perry*, however, the Court felt it necessary to point out that situations remain in which state law, rather than federal, provides the rule of decision in Arbitration Act cases. 482 U.S. at 492-93 n.9.

[129] 473 U.S. 614 (1985).

fendants had conspired to violate antitrust laws by preventing it from reselling automobiles. At issue was whether an arbitration clause contained in the dealer's agreement with two of the defendants should be interpreted to bar litigation of the antitrust claims. The district court and the court of appeals had followed a unanimous line of authority in other circuits to hold that the antitrust questions were not arbitrable because of the central role played by antitrust laws in protecting the economy of the United States.[130] The Supreme Court reversed in part, holding that antitrust claims which have international implications are arbitrable under the Arbitration Act.

In arriving at its decision, the *Mitsubishi Motors* Court first adverted to the concern for international comity and the development of international commerce that was voiced in *Scherk* and *Bremen*:

> *The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the same year by an amendment to the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.[131]

The Court discounted the concern of lower courts about "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion, a concern which militates against automatic forum determination by contract."[132] The *Mitsubishi Motors* Court noted that a party resisting arbitration always has the option to attack the validity of the agreement to arbitrate or to show that one of the factors exists which would warrant setting aside the forum-selection clause at common law. No such showing had been attempted by the plaintiff in this

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[130] *Id.* at 651, 655-57 (Stevens, J., dissenting).

[131] *Id.* at 631 (footnote omitted). Neither the text of the enabling act, Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (1970), nor its legislative history provide any support for the Supreme Court's assertion that the policies of the Arbitration Act are to apply "with special force in the field of international commerce."

[132] *Id.* at 632, *quoting* Mitsubishi Motors v. Soler Chrysler-Plymouth, 723 F. 2d 155, 162 (1st Cir. 1983).

case.[133] The Court conceded that antitrust issues are sometimes complex, but "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators" capable of resolving an antitrust claim.[134]

Finally, the Court came to the nub of the matter, raised by the court of appeals, that "a claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."[135] Although the Court conceded that the treble-damages provision is a "crucial deterrent to potential violators," it saw no reason why the provision could not be enforced in arbitration.[136] The Court reasoned further that considerations of international comity required the reference of antitrust issues to international arbitral tribunals even when the Act would not require reference of identical issues to domestic arbitration.[137] Accordingly, the Court reversed the holding of the court of appeals with respect to the arbitrability of antitrust issues and remanded the case.[138]

The majority in *Mitsubishi Motors* cited the Convention in finding that federal policy favoring arbitration applies with special force in international commerce.[139] However, the Court proceeded almost to the conclusion of its opinion without further reference to the Convention. In the final footnote of the opinion the Court finally addressed the language in the Convention that limits its application to "subject matter capable of settlement by arbitration" and contemplates exceptions to arbitrability grounded in domestic law. Since Congress did not expressly specify any matters it intended to exclude from the scope of the Convention, the Court declined to impose a judicially-implied exception to arbitrability for antitrust decisions.[140]

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[133] *Id.* at 632-33.

[134] *Id.* at 634.

[135] *Id.* at 635, *quoting Mitsubishi Motors*, 723 F.2d at 168, *quoting* American Safety Equip. Corp. v. J.P. Maguire & Co., 392 F.2d 821, 826 (2d Cir. 1988).

[136] *Id.* at 635-36.

[137] *Id.* at 629.

[138] *Id.* at 640.

[139] *Id.* at 631.

[140] *Id.* at 639 n.21.

Justices Marshall and Brennan joined Justice Stevens in a spirited dissent to the *Mitsubishi Motors* decision. In his dissent Justice Stevens expressed surprise that the Court had failed "to determine the specific commitments that the U.S. has made to enforce private commitments to arbitrate disputes arising under public law" before relying on its own vague notions as to what international comity requires.[141] The Convention, as analyzed by Justice Stevens, clearly contemplates that signatory nations will enforce domestic laws that prohibit arbitration with respect to certain subject matters.[142] This understanding had been part of the explanation offered by the President in presenting the Convention to the Senate for its advice and consent.[143] Stevens' dissent noted that it was "clear . . . that the international obligations of the United States permit us to honor Congress' commitment to the exclusive resolution of antitrust disputes in the federal courts."[144] The executive branch, in its brief to the Court as *amicus curiae*, informed it that the "United States' determination that federal antitrust claims are non-arbitrable under the Convention . . . is not likely to result in either surprise or recrimination on the part of other signatories to the Convention."[145] Stevens felt that the majority had been led to "folly" by their internationalist vision.[146]

e. Shearson/American Express Inc. v. McMahon

Two years later in *Shearson/American Express Inc. v. McMahon*[147] the Court partially abandoned the distinction between domestic and international concerns that had seemed so important in the *Scherk* and *Mitsubishi Motors* decisions.[148] In *Shearson/American Express* retail customers of a securities brokerage

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[141] *Id.* at 658 (Stevens, J., dissenting).

[142] *Id.*

[143] *Id.* at 660, *quoting* S. Exec. Doc. E, 90th Cong., 2d Sess. at 19 (1968) ("The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the United States, for example, disputes affecting the title to real property are not arbitrable.").

[144] *Id.*

[145] *Id.* at 661, *quoting* Brief for United States as *Amicus Curiae* at 30.

[146] *Id.* at 665 & n.41.

[147] 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

[148] This development was foreshadowed by the Court's *dicta* concerning the Act in *Moses H. Cone*, 460 U.S. 1, 24-25 (1983); *see supra* notes 122-28 and accompanying text.

firm filed suit in federal district court alleging violations of the anti-fraud provisions of section 10(b) and rule 10b-5 of the Securities Exchange Act of 1934 and RICO violations. The plaintiffs' Exchange Act claims were similar to the ones made by the plaintiff in *Scherk*.[149] They argued that the international complications relied upon in *Scherk* were not present in their case. Accordingly, their Exchange Act remedy should have been as nonarbitrable as the 1933 Act remedy that was held to be nonarbitrable in *Wilko*.

In ruling that the plaintiffs' Exchange Act claims were arbitrable under the Arbitration Act, the *Shearson* Court noted that *Wilko* had been undermined by more recent decisions.[150] The Court also noted that the regulatory structure of the securities laws had changed since the time of *Wilko*.

> In 1953, when *Wilko* was decided, the [Securities and Exchange] Commission had only limited authority over the rules governing self-regulatory organizations (SROs)—the national securities exchanges and registered securities associations—and this authority appears not to have included any authority at all over their arbitration rules. Since the 1975 amendments to § 19 of the Exchange Act, however, the Commission has had expansive power to ensure the adequacy of the arbitration procedures employed by the SROs.[151]

Accordingly, the Supreme Court ruled that claims under section 10(b) and rule 10b-5 of the Exchange Act are arbitrable, whether they occur in the domestic or international context.[152]

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[149] 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); *see supra* notes 103-121 and accompanying text.

[150] Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be non-arbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision . . . . Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights . . . . Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

482 U.S. 220, 232 (1987) (citations omitted).

[151] *Id.* at 233 (citation omitted).

[152] *Id.* at 238. The Court disposed quickly of the plaintiff's argument that RICO claims were nonarbitrable. Applying its reasoning from *Mitsubishi Motors*, the Court found that there was no greater reason to exclude the treble damages claims of private parties under RICO from the ambit of the Arbitration Act than there was to exclude

In dissent Justice Blackmun, joined by Justices Brennan and Marshall, noted that the Court had given an unduly narrow reading to *Wilko*. Blackmun reasoned that "the *Scherk* decision *turned* on the special nature of agreements to arbitrate in the international commercial context"[153] and therefore provided no significant support for the decision in *Shearson/American Express*. Finally, Blackmun observed that "several aspects of arbitration that were seen by the *Wilko* Court to be inimical to the policy of investor protection still remain."[154] For example, judicial review of arbitrators' interpretations of securities laws was still difficult because arbitrators are neither required to give reasons for their decisions nor to record their proceedings. The bases for vacating an arbitration award were limited and the arbitrators' interpretation of the law was subject to review only under the "manifest disregard" standard.[155]

> Furthermore, there remains the danger that, *at worst*, compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry .... The Uniform Code provides some safeguards but despite them, and indeed because of the background of the arbitrators, the investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public. It is generally recognized that the codes do not define who falls into the category "not from the securities industry". Accordingly, it is often possible for the "public" arbitrators to be attorneys or consultants whose clients have been exchange members or SROs. The uniform opposition of investors to compelled arbitration and the overwhelming support of the securities industry for the process suggest that there must be *some* truth to the investors' belief that the securities industry has an advantage in a forum under its own control.[156]

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treble damages under the Clayton Act. *Id.*

[153] *Id.* at 255 (Blackmun, J. dissenting) (emphasis in original) (footnote omitted).

[154] *Id.* at 257.

[155] *Id.* at 258. The Supreme Court noted in Wilko v. Swan, 346 U.S. 427, 436 (1953), that arbitrators "manifest disregard" of the law governing a contract might subject an arbitral award to judicial review for error in interpretation, presumably under 9 U.S.C. § 10. However, this standard "presupposes something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." Saxis v. Steamship Co. v. Mulitifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967).

[156] *Id.* at 260-61. *See* William Glaberson, *When the Investor Has a Gripe*, N.Y. TIMES, Mar. 29, 1987, at 8 (statement of Sheldon H. Elsen, Chairman, ABA Task Force on Securities Arbitration: "The houses basically like the present system because they own the stacked deck.") (emphasis in original) (citations and footnotes omitted).

McMahon showed that a majority of the Court no longer found the *Wilko* rationale persuasive. Not surprisingly the 1988 Court explicitly overruled *Wilko* in *Rodriquez de Quijas v. Shearson-American Express*,[157] holding that predispute arbitration agreements are enforceable for claims arising under the Securities Act of 1933.[158] The resulting state of the law after *Rodriquez de Quijas* was a world apart from the expectations of the 1925 Congress. The congressional Committee Chairman who was assured in 1924 that there could be no problem with contracts of adhesion against small shippers would, in the Supreme Court's new world, witness contracts of adhesion that would be routinely enforced against small investors. Concerned about maintaining the right to a jury trial, he would be faced with antitrust violators against whom there could be no right to any kind of trial. Informed that the Act would not encroach upon the laws of the states,[159] he would see important policies of states struck down because they infringed upon the paramount contractual right to arbitration. In short, he would have seen his expectations betrayed by a Court that decided that the statute's incidental benefit—judicial economy—justified an expanded application of the Act that altered its basic character.

II. THE *THRELKELD* CASE

The doctrines announced by the Supreme Court in its arbitration cases have affected many litigants who come to court to vindicate their rights. A close look at one of those lawsuits, *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*,[160] provides some insight into the effects of the Supreme Court arbitration doctrine.

A. *Facts*

In *Threlkeld* the plaintiff was a closely-held Vermont corpo-

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[157] 490 U.S. 477 (1989).

[158] The Supreme Court has also recently imposed Arbitration Act requirements upon claims made under the Age Discrimination in Employment Act. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).

[159] *1924 Joint Hearings*, *supra* note 3, at 38 ("So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal Courts it does not encroach upon the province of the individual states.").

[160] 923 F.2d 245 (2d Cir.), *cert. dismissed*, 112 S. Ct. 17 (1991).

ration, incorporated in 1985, that traded in forward and futures contracts for metals through the London Metal Exchange ("LME") and the New York COMEX Exchange.[161] In June 1986 Threlkeld & Co. engaged the commodities brokerage services of Metallgesellschaft Limited (London) ("MG").[162] MG brokered or entered into commodities contracts on behalf of Threlkeld & Co. and made margin financing available for Threlkeld & Co.'s contracts.[163]

The contracts traded by Threlkeld & Co. (futures contracts on the COMEX and forward contracts on the LME) involved promises to accept or deliver fixed quantities of metal for a price certain at a fixed date in the future.[164] Threlkeld & Co. was the principal for its trades made on the COMEX, but only "clearing members," such as MG, could enter into contracts as principals on the LME. Accordingly, for LME transactions, MG entered into contracts on behalf of Threlkeld & Co.[165]

As Threlkeld & Co. explained in its pleadings, it is essential for a trader in commodity contracts to have an accurate understanding of the value of its forward positions at all times:

> The market value of futures and forward contracts fluctuates on a daily basis. Certain contracts have no published value. A trader's ability to earn profits depends on his ability to predict market trends and enter into contracts which reflect his predictions, while at the same time limiting risks. Good trading necessarily entails an elaborate system of "hedges," or buying and selling against established positions to limit risk.[166]

A significant portion of Threlkeld & Co.'s contracts were made on "margin." In a margin transaction, the party taking the transaction risk pays at the time of the making of the contract a certain amount of money, which represents a portion of the risk that the party has undertaken in the contract. The remainder of the value of that risk or "margin" may be financed by another

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[161] Complaint at 1-2, ¶¶ 1-7, David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (Orange Cty. Supr. Ct., Vt., 1989) (No. S189-89), *reprinted in Joint Appendix*, at A3, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F. 2d 245 (2d Cir. 1991) (No. 90-7480) [hereinafter *Joint Appendix*].

[162] Plaintiff's memorandum in opposition to motion to dismiss or stay proceedings at 4, *reprinted in Joint Appendix*, *supra* note 161, at A166-69.

[163] *Id.*

[164] *Id.* at 3, *reprinted in Joint Appendix*, *supra* note 161, at A168.

[165] *Id.* at 4, *reprinted in Joint Appendix*, *supra* note 161, at A169 n.3.

[166] *Id.*, *reprinted in Joint Appendix*, *supra* note 161, at A169.

party.[167] In the case of Threlkeld & Co.'s transactions on the LME and COMEX, its margin was financed by MG.

To protect the broker and other parties in transactions, exchanges and brokerage firms have internal rules requiring that margins be secured by collateral or by money paid into a margin account. The margin for each commodity fluctuates as the market price for the commodity changes. From time to time brokers and exchanges are required to make "margin calls," which require the parties to commodities contracts to put up additional collateral to secure the margin on the risks they have taken. When a contract involves a large amount of a commodity, the margin call on that contract can also involve a great deal of money. One of the goals traders hope to achieve by monitoring their accounts is to minimize their vulnerability to large or unexpected margin calls.

MG provided Threlkeld & Co. with frequent statements evaluating Threlkeld & Co.'s trading positions. From MG's point of view, this statement provided it with a means of monitoring whether Threlkeld & Co. had posted an adequate amount of margin or other collateral as security for its contracts with MG. MG's "Terms of Business," a written document signed on behalf of Threlkeld & Co., indicated that all price quotations given to Threlkeld & Co. might be subject to errors and contained an acknowledgement from Threlkeld & Co. that reliance upon such information was at Threlkeld & Co.'s own risk.[168]

Threlkeld & Co.'s trading relations with MG apparently went forward without notable dispute until 1989, when a series of occurrences led to a fiasco. The facts themselves are disputed. According to Threlkeld & Co.'s version of the facts,[169] it became

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[167] *See* Stephens v. Reynolds Securities, 413 F. Supp. 50 (N.D. Ala.), *aff'd*, 523 F.2d 1053 (5th Cir. 1976) ("A margin account is the securities industry's method of extending credit to customers; a customer may purchase a specified amount of stock from a securities firm by advancing only a portion of the purchase price. The firm maintains the stock purchased as collateral for the 'loan' and charges interest on the balance of the purchase price remaining to be paid.").

[168] Terms of Business, Sept. 14, 1988, at 2, *reprinted in Joint Appendix*, *supra* note 161, at A157-58.

[169] Since the Second Circuit ultimately reversed the district court's refusal to issue an order of arbitration against the plaintiff, it is appropriate to focus on the plaintiff's rendition of the facts, since it was those facts that were held to be insufficient to resist arbitration. Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404 (2d Cir. 1959) (court must accept non-moving party's version of facts in motion to compel

aware in early 1989 that its internal systems for evaluating its positions could no longer cope with its trading volume. Threlkeld & Co. claimed to have explained its difficulty to MG and to have received MG's assurance that the valuations Threlkeld & Co. received from MG were accurate and that Threlkeld & Co. should rely upon them.[170]

In February 1989 MG informed Threlkeld & Co. that MG could no longer place Threlkeld & Co.'s trades on COMEX because MG had not registered with the Commodities Futures Trading Commission. At that point, Threlkeld & Co. owned approximately $9 million in copper, which it had acquired through contracts placed by MG on the COMEX. MG's disqualification from trading on COMEX was extremely inconvenient for Threlkeld & Co. because it meant that Threlkeld & Co.'s copper accounts would either have to be liquidated or transferred. To further complicate matters, Threlkeld & Co.'s positions with MG on the COMEX and on the LME had been purchased on margin and were cross-collateralized.[171] The transfer of its COMEX contracts to another broker threatened to reduce the collateral available to MG for Threlkeld & Co.'s contracts on the LME and to deprive Threlkeld & Co. of the collateral (the LME contracts) upon which it had been relying to collateralize its margin financing obligations under the COMEX contracts. To sort out these difficulties, MG agreed to lend Threlkeld & Co. the amounts necessary to satisfy the margin requirements of Threlkeld & Co.'s new COMEX broker, provided Threlkeld & Co. pledged collateral for the margin loans.[172] Although MG transferred Threlkeld & Co.'s COMEX copper contracts to Threlkeld & Co.'s new broker, MG continued to hold warehouse receipts for the copper that it had acquired on COMEX on behalf of Threlkeld & Co.

For its own internal bookkeeping purposes, MG stopped re-

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arbitration under 9 U.S.C. § 3). The author and publisher have relied upon the pleadings submitted by the parties in preparing this account of the litigation. The author and publisher have no independent knowledge of the facts underlying the litigation and the reader is advised that the allegations repeated herein concerning the parties to the litigation may not be true.

[170] MG denied making any such assurances to Threlkeld & Co.

[171] Plaintiff's District Court Memorandum at 7, David L. Threlkeld & Co. v. Metallgesellschaft, No. 90-28 (D. Vt. 1990), *reprinted in Joint Appendix*, *supra* note 161, at A172.

[172] *Id.*

ferring to the copper as "COMEX" copper and began referring to it as "London standard copper." Copper was a commodity that had been traded at one point on the LME, but that had recently been discontinued. According to the LME's rules, the price to be used in valuing a commodity for margin purposes was the "Closing Price most recently quoted."[173] In providing its valuation reports to Threlkeld & Co., MG began to use the last price quoted on the LME before its discontinuation of trading in copper contracts as a basis for its copper quotation. Although the actual market price for copper fluctuated, the price used by MG to reflect that price did not change. As a consequence, MG's evaluation of Threlkeld & Co.'s copper positions became increasingly inaccurate.

The problem was further compounded in May 1989, according to Threlkeld & Co.'s complaint.[174] At that time Threlkeld & Co. informed MG that it had lost its internal accountant and, as a consequence, would need to rely on MG's valuations for trading and for internal accounting purposes if it was to continue trading. MG assured Threlkeld & Co. that MG's valuations were accurate and that it could and should rely on them in continuing to trade through MG.[175]

In July 1989 Threlkeld & Co. informed MG that it intended to dispose of the copper that MG held on its behalf. Stirred to action by this news, MG discovered that it had seriously misvalued Threlkeld & Co.'s copper positions. On August 2, 1989 MG reported a $5 million loss on Threlkeld & Co.'s copper positions and issued a margin call for approximately $1.7 million, even though it had reported a $3.4 million positive margin on the contracts during the final days of July.[176] Perhaps surprised by the sudden large margin call on copper, Threlkeld & Co. conducted an internal investigation with respect to its other metals positions. Shortly thereafter Threlkeld & Co. informed MG that it appeared that MG had also overvalued Threlkeld & Co.'s aluminum contracts by millions of dollars. In September 1989 MG revalued those aluminum contracts and increased its margin call

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[173] London Metal Exchange Rules and Regulations ("LME Rules") at 1-6 (definition of "variation margin"), *reprinted in Joint Appendix, supra* note 161, at A59.

[174] Complaint at 4, ¶ 16, *reprinted in Joint Appendix, supra* note 161, at A6.

[175] *Id.*

[176] Plaintiff's District Court Memorandum at 9-10, *reprinted in Joint Appendix, supra* note 161, at A174-75.

to Threlkeld & Co. by approximately $4.9 million. Threlkeld & Co. and MG negotiated for several months about who should bear any loss resulting from the misvaluation of the metals contracts.[177] Failing to reach agreement, Threlkeld & Co. filed suit against MG in December 1989 in Vermont state court. Threlkeld & Co. alleged that MG's assurances concerning the accuracy of their valuations constituted an oral valuation contract, which MG had breached. Threlkeld & Co. also alleged negligence on the part of MG in preparing valuations for use by Threlkeld & Co.[178] In January 1990 MG sent a notice to Threlkeld & Co. informing them of its commencement of arbitration proceedings under rules of the LME. MG then removed Threlkeld & Co.'s suit to federal court, filed an answer asserting counterclaims for $10 million in margin allegedly due to MG and moved for an order compelling arbitration of the disputes between the parties and dismissal or a stay of the federal court litigation in favor of arbitration.[179]

MG's motion claimed that Threlkeld & Co. had consented to arbitration in two ways. First, MG claimed that Threlkeld & Co. had expressly agreed to arbitration in a written preliminary agreement which Threlkeld & Co. had signed at the start of its relationship with MG.[180] Second, MG alleged that Threlkeld & Co. had agreed to be bound by the rules and regulations of the LME and that those rules required arbitration of the dispute.

The preliminary agreement was dated February 3, 1987, when David L. Threlkeld and a member of MG signed a "Memo to File," which was entitled "outline of basic suggestion made by Mike Hutchinson of M.G. Ltd."[181] The Memo to File contained eleven points. Point ten stated: "This is a memorandum of understanding only upon which a more formalized agreement will be based." Point eleven stated: "The final agreement will be subject to arbitration and subject to the laws of England."[182] The parties subsequently agreed that they had no need to enter

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[177] Statement of John M. Quitmeyer, Hearing Transcript at 5, *reprinted in Joint Appendix*, *supra* note 161, at A204.

[178] Complaint at ¶¶ 30-36, *reprinted in Joint Appendix*, *supra* note 161, at A7-9.

[179] Docket, Civ. No. 90-28, *reprinted in Joint Appendix*, *supra* note 161, at A1; Answer and Counterclaim, *reprinted in Joint Appendix*, *supra* note 161, at A14.

[180] Memorandum to file, *reprinted in Joint Appendix*, *supra* note 161, at A44.

[181] *Id.*

[182] *Id.*

into a more formal written agreement.[183]

The rules of the LME also provided for arbitration of disputes. Regulation 10.1 of the LME Contract Regulations (found in part 4 of the LME Rules) stated that "any dispute as to the existence, completion or validity of or arising out of any Contract shall be referred to arbitration in accordance with the Rules."[184] In addition, section 1.1 of the "Arbitration Rules" of the LME (found in part 8 of the LME Rules) stated that:

> All disputes arising out of or in relation to any contract which contains an agreement to refer disputes to arbitration in accordance with the Rules and Regulations of the London Metal Exchange, or the existence, completion, or validity of such contract, shall be referred to arbitration.[185]

MG argued that Threlkeld & Co. was required to arbitrate its dispute with MG because Threlkeld & Co. had agreed to be bound by the LME rules. MG claimed that Threlkeld & Co. had agreed to abide by the rules in a series of documents that had passed between the parties in the course of their transactions. One of those documents was a standard form MG document entitled "Terms of Business."[186] Section 11 of that document, entitled "Margin," stated, in relevant part, that "[a]ny margin held by us will be held subject to these Terms and to the applicable rules of the relevant Exchange, Exchange Organization or Market."[187] MG argued that this language gave it authorization to arbitrate the margin call and all related issues with Threlkeld & Co. in the forum provided by the LME Rules. MG also put into evidence a written confirmation of some of its metals contracts with Threlkeld & Co. that was signed on behalf of Threlkeld & Co. That confirmation said, in part, that contracts identified in the confirmation "have been made subject to the current rules and regulations of the London Metals Exchange."[188]

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[183] Opinion and Order at 12, *reprinted in Joint Appendix*, *supra* note 161, at A248.

[184] LME Rules, part 4, reg. 10.1, at 4-5, *reprinted in Joint Appendix*, *supra* note 161, at A84. The term "Contract" is defined in the LME Rules as "a contract for metals in a form prescribed by and subject to the Rules of the [LME]." LME Rules, part 1, at 1-2, *reprinted in Joint Appendix*, *supra* note 161, at A55.

[185] LME Rules, part 8, rule 1.1 at 8-1, *reprinted in Joint Appendix*, *supra* note 161, at A101.

[186] *Reprinted in Joint Appendix*, *supra* note 161, at A191.

[187] *Reprinted in Joint Appendix*, *supra* note 161, at A194.

[188] MG Confirmation, *reprinted in Joint Appendix*, *supra* note 161, at A185.

B. *The District Court Opinion*

After briefs were filed, affidavits and exhibits submitted, and oral arguments heard, District Judge Albert W. Coffrin of the United States District Court for Vermont decided the issue of arbitrability against MG and denied MG's motion for dismissal or for stay pending arbitration.[189] At the outset Judge Coffrin exercised his discretion under Federal Rule of Civil Procedure 12(b)(6) to treat MG's motion to dismiss as a motion for summary judgment.[190] Applying the summary judgment standards found in Federal Rule of Civil Procedure 56(c), Judge Coffrin ruled that MG could not prevail on its motion unless the materials before the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[191] According to this standard, the court had to "resolve all ambiguities and draw all reasonable influences in favor of Threlkeld & Co."[192] Thus Judge Coffrin ruled that "for MG to prevail, it must demonstrate that no material issue of fact exists and that the undisputed facts indicate [Threlkeld & Co.'s] claims are subject to arbitration."[193]

Judge Coffrin addressed MG's argument that the Memo to File obligated Threlkeld & Co. to arbitrate its dispute arising out of its alleged oral valuation agreement.[194] Judge Coffrin

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[189] David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd., No. 90-28, slip op. (D. Vt. April 30, 1990), *reprinted in Joint Appendix*, *supra* note 161, at A237.

[190] *Id.* at 6, *reprinted in Joint Appendix*, *supra* note 161, at A242. *See* FED. R. CIV. P. 12(b)(6).

[191] FED. R. CIV. P. 56.

[192] *Threlkeld*, slip op. at 7 (quoting Heyman v. Commerce & Industry Ins. Co., 524 F. 2d 1317, 1320 (2d Cir. 1975)), *reprinted in Joint Appendix*, *supra* note 161, at A243.

[193] *Id.* at 7-8, *reprinted in Joint Appendix*, *supra* note 161, at A243-44.

[194] Judge Coffrin first examined MG's argument that Threlkeld & Co.'s alleged oral agreement was barred, as a matter of law, by the parol evidence rule and the Terms of Business. As stated above, the Terms of Business stated that MG's valuations "may be subject to change or errors" and that "reliance upon such information is at your own risk." The Terms of Business also stated that MG would "provide such additional services as may be agreed from time to time and confirmed in writing." *Threlkeld*, slip op. at 8-9, *reprinted in Joint Appendix*, *supra* note 161, at A244-45. MG argued that the contract's reference to written amendments precluded the possibility of an oral amendment. However, Judge Coffrin ruled that an oral agreement modifying the Terms of Business could have been independently enforceable, regardless of any writing requirements in the Terms of Business, because Threlkeld's agreement to continue doing business with MG could have constituted a new consideration to bind MG to the modification of the alleged oral agreement. *Id.* at 8-10, *reprinted in Joint Appendix*, *supra* note 161, at A244-46.

noted that correspondence between the parties subsequent to the Memo to File had mutually waived the obligation of entering into a more formalized agreement between MG and Threlkeld & Co. The subsequent correspondence did not specifically mention arbitration. The court found that, on its face, it was unclear whether the Memo to File's reference to arbitration was meant to apply after the parties had waived the requirement of a later, more formalized agreement. Construing the ambiguity against MG, Judge Coffrin ruled that "there is a reasonable basis for a difference of opinion as to the scope of the Memo to File's arbitration clause."[195] Accordingly, Judge Coffrin held that the reference to arbitration in the Memo to File did not provide a sufficient basis to compel arbitration.

Next, Judge Coffrin addressed MG's argument that Threlkeld & Co. had obligated itself to obey the LME rules by agreeing to MG's Terms of Business. Observing that the section governing margin made it subject to the rules of the "relevant Exchange" and that similar language appeared on the metals contract confirmations, Judge Coffrin interpreted the arbitration clause in regulation 10.1 narrowly.[196] He noted that regulation 10.1 was limited to "any dispute as to the existence, completion or validity of or arising out of any Contract" and that the term "Contract" was defined elsewhere in the LME Rules as "a contract for metals in a form prescribed by and subject to the Rules of the Exchange . . . ."[197]

Reading regulation 10.1 and the Terms of Business in the manner most favorable to the party opposing the motion, Judge Coffrin interpreted them to require only arbitration of "any dispute arising out of a margin contract for metals traded on the LME entered into by Threlkeld & Co. and MG."[198] The court went on to find that arbitration should not be ordered if Threlkeld & Co.'s claim to have entered into an oral modification of

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[195] *Id.* at 13-14, *reprinted in Joint Appendix, supra* note 161, at A249-50.

[196] The district court did not consider whether section 1.1 of the Arbitration Rules required arbitration of the dispute. *See* Transcript of Hearing before the Honorable Albert W. Coffrin on April 27, 1990, Civ. No. 90-28, at 7, *reprinted in Joint Appendix, supra* note 161, at A200-06. It appears that MG did not rely heavily upon that provision before the court. *See* Brief for Appellee, at 11 n.7, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991).

[197] *Threlkeld*, slip op. at 14-15, *reprinted in Joint Appendix, supra* note 161, at A250-51.

[198] *Id.* at 18, *reprinted in Joint Appendix, supra* note 161, at A254.

the Terms of Business alleged the existence of a "collateral" agreement. Because MG's obligations under its alleged oral agreement could, on Threlkeld & Co.'s view of the facts, have been independent of the obligations contained in the Terms of Business or LME Rules, Judge Coffrin declined to rule that the oral agreement was not a "collateral" agreement. Judge Coffrin found that "a reasonable basis for a difference of opinion as to the applicability of the LME Rules' arbitration clause [to the alleged oral valuation agreement] exists, rendering summary judgment inappropriate."[199] He denied MG's motion to dismiss or to stay the district court action and to compel arbitration.[200]

MG appealed the district court decision to a Second Circuit panel consisting of Circuit Judges Lumbard, Kearse and McLaughlin.[201]

C. *The Second Circuit Decision*

In a unanimous opinion authored by Second Circuit Judge McLaughlin, the court reversed and remanded the case, directing the lower court to order arbitration in accordance with LME Rules.[202]

The Second Circuit began its analysis of the case by laying out the Supreme Court rules for consideration of arbitrability disputes. Citing *Rodriguez De Quijas*,[203] *Moses H. Cone*,[204] *Mitsubishi Motors Corp.*[205] and *Scherk*,[206] the court declared that

> federal policy strongly favors arbitration as an alternative dispute resolution process . . . . [F]ederal arbitration policy requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."
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> . . . .

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[199] *Id.* at 15, *reprinted in Joint Appendix*, *supra* note 161, at A251.

[200] *Id.* at 18, *reprinted in Joint Appendix*, *supra* note 161, at A254.

[201] The Second Circuit Panel found jurisdiction over the interlocutory appeal under 9 U.S.C. § 15 (1988). *See* David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd., 923 F.2d 245, 246 (2d Cir. 1991).

[202] *Id.* at 252-53.

[203] Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989).

[204] Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); *see supra* notes 122-28 and accompanying text.

[205] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); *see supra* notes 129-46 and accompanying text.

[206] Scherk v. Alberto-Culver Co., 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); *see supra* notes 108-21 and accompanying text.

> The policy in favor of arbitration is even stronger in the context of international business transactions . . . . Stability in international trading was the engine behind the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. . . . This treaty—to which the United States is a signatory—makes it clear that the liberal federal arbitration policy "applies with special force in the field of international commerce." [207]

Turning to District Judge Coffrin's opinion, the Second Circuit found that Coffrin had "lost sight of th[e] presumption of arbitrability" and erred by applying summary judgment standards to the case.[208] The Second Circuit found that it was inappropriate for the district court to resolve all ambiguities in favor of Threlkeld & Co. on MG's motion to compel arbitration. In the view of the Second Circuit summary judgment standards were unnecessary because "there was no question that an agreement to arbitrate existed and that arbitration was refused. The district court erred in not deciding the motion simply as one to compel arbitration."[209]

Applying the standards that the panel thought appropriate to arbitrability disputes, the Second Circuit first considered whether the parties had entered into an agreement to arbitrate. Threlkeld & Co. had argued on appeal that no enforceable agreement to arbitrate existed because the arbitration rules of the LME constituted a contract of adhesion and Vermont law voided any obligation it might otherwise have had to arbitrate dispute with MG.[210] The LME Rules contained a provision, regulation 1.3 of the Contract Regulations, which made void any provision of any contract that purported to exclude or was otherwise in conflict with the rules and regulations of the LME.[211] Since the arbitration clause relied upon by MG was one of the rules that was non-negotiable, Threlkeld & Co. argued that it had no power to refuse to enter into an obligation to arbitrate its

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[207] *Threlkeld*, 923 F. 2d. at 248.

[208] *Id.*

[209] *Id.* at 248-49.

[210] Brief for Appellee at 22-25, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991) (No. 90-7480).

[211] LME Rules, part 4, reg. 1.3, at 4-1, *reprinted in Joint Appendix*, *supra* note 161, at A50. Regulation 1.3, part 4 of the LME Rules reads as follows: "[A]ny provision of any contract (other than a provision incorporated by virtue of the General Regulations of the Clearing House or by virtue of the Trading Regulations) which purports to exclude or is otherwise in conflict with these Contract Regulations shall be void." *Id.*

dispute with MG.[212] Thus the LME Rules presented a classic example of a contract of adhesion, which Threlkeld & Co. argued should be unenforceable as a matter of public policy.

The Second Circuit gave little heed to Threlkeld & Co.'s claim to be the victim of an adhesion contract. Threlkeld & Co. was a sophisticated commodities trader with extensive experience in the field and the LME arbitration requirement was typical for commodities contracts. "Threlkeld & Co. cannot now claim that it did not understand its rights and obligations under the contracts."[213] Therefore the Court found the arbitration clauses of the LME Rules were not contracts of adhesion.[214]

Next, the Second Circuit examined the effect of a Vermont statute that required a special written acknowledgement of arbitration to be signed by each of the parties or their representatives before an arbitration agreement could be enforceable.[215]

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[212] Brief for Appellee at 24-25, *Threlkeld*, 923 F.2d 245 (2d Cir. 1991) (No. 90-7480).

[213] 923 F.2d 245, 249 (2d Cir. 1991) (citations omitted).

[214] *Id.* There is an obvious contradiction here. According to the Second Circuit the "fatal flaw" in the district court decision was its failure to see that "there was no question that an agreement to arbitrate existed," and therefore, the district court's use of a summary judgment standard was inappropriate. *Id.* at 248-49. However, the first question that the court of appeals examined was precisely the issue of whether an enforceable agreement to arbitrate existed. Summary judgment standards, including the construction of ambiguities in favor of the opponent of the motion, should have been employed by the Second Circuit in making this determination. *See infra* notes 246-67 and accompanying text. Since the only evidence adduced by Threlkeld on appeal in support of its "contract of adhesion" claim was the existence of regulation 1.3 of part 4 of the LME Rules, the employment of summary judgment standards might not have made a difference in the outcome on this issue, because the burden of coming forward with sufficient evidence to demonstrate the existence of a genuine dispute with respect to a material fact was upon Threlkeld & Co. with respect to this affirmative defense. However, additional factual issues could have been raised by Threlkeld & Co. that, under a summary judgment standard, might have been sufficient to require a trial of the issue under section 4 of the Arbitration Act. 9 U.S.C. § 4 (1947). *See infra* notes 275-99 and accompanying text.

[215] The Vermont statute read as follows:

§5652. Validity of arbitration agreements.

(a) General Rule. Unless otherwise provided in the agreement, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract.

(b) Required provision. No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgement of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgement shall be displayed prominently. The acknowledgement shall pro-

The court held that the statute was preempted by federal law as applied to Threlkeld & Co.'s contracts with MG.[216] As the Supreme Court held in *Prima Paint*, the Arbitration Act applies in federal court to diversity suits that relate to contracts involving interstate or international commerce.[217] Threlkeld's contract with MG, which concerned the purchase and sale of commodities on an exchange in a foreign country, clearly involved international commerce. Noting that the Convention has been incorporated in the United States law by section 202 of the Arbitration Act,[218] it examined the question of whether article II(1) of the Convention preempted the Vermont statute.[219] Both the Vermont statute[220] and the Convention required agreements to arbitrate to be in writing. However, the standard set forth in the Vermont statute was more demanding than that of the Convention. Finding that "state statutes such as the Vermont statute . . . effectively reincarnate the former judicial hostility towards arbitration" and that the Vermont statute clashed directly with the Convention and the Act, the Second Circuit held that the Convention and the Act preempted the Vermont statute, making the LME arbitration provision enforceable as drafted.[221]

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vide substantially as follows:

ACKNOWLEDGEMENT OF ARBITRATION.

I understand that (this agreement/my agreement with_____ of_____) contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator.

VT. STAT. ANN. tit. 12, § 5652 (1989).

[216] *Threlkeld*, 923 F.2d at 249.

[217] 388 U.S. 395 (1967); *see supra* notes 66-77 and accompanying text.

[218] Section 202 reads, in part, as follows: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202 (1988).

[219] Article II(1) of the Convention reads: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." 21 U.S.T. 2517, art. II(1) (1970).

[220] *See supra* note 215.

[221] 923 F.2d 245, 251 (2d Cir. 1991). It is beyond the scope of this Article to comment on whether the Second Circuit decision regarding the preemption of the Vermont statute is correct. However, the Vermont statute applied to arbitration clauses in con-

Having held that Threlkeld & Co.'s agreement to arbitrate was not unenforceable on public policy grounds, the Second Circuit next determined whether Threlkeld & Co.'s litigation violated its duty to arbitrate. Although the Second Circuit referred to the parties' Memo to File, the court did not find an enforceable agreement to arbitrate in the preliminary agreement. Instead the court ruled that Threlkeld & Co. had agreed to abide by the LME Rules when it entered into the metals contracts and the Terms of Business with MG.[222] Threlkeld & Co. had argued that only one of the two arbitration provisions in the LME Rules—regulation 10.1 of the Contract Regulations—had any application to the parties' contracts and that regulation 10.1 did not require arbitration of the disputes before the court.[223] According to this argument, regulation 10.1 did not require arbitration of the claims in this dispute because none of those issues "arose out of" any "Contract" as defined in the LME Rules.[224] Threlkeld & Co. stated that its claims for misvaluation arose out of an oral agreement separate and distinct from the metals contracts. Arguing that the phrase "any dispute . . . arising out of any Contract" should be read narrowly, Threlkeld & Co. contended that regulation 10.1 did not encompass disputes arising under the oral valuation agreement.[225]

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tracts generally and related to no public policy other than the desire of the Vermont legislature to protect persons who might enter into arbitration agreements without full and adequate disclosure and understanding of the implications of their actions. Thus there was no basis for arguing that Vermont's concern for an urgent matter of public policy entitled it to legislate an incidental restriction on arbitration that was not inconsistent with Congress's concerns in enacting the Arbitration Act. *See* Southland Corp. v. Keating, 465 U.S. 1, 17, 18 (1984) (Stevens, J., dissenting); Stewart E. Sterk, *Enforceability Of Agreements To Arbitrate And Examination of The Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981). The result does seem inconsistent, however, with the assurance given by Kearney in his testimony on the Convention before the United States Senate Foreign Relations Committee to the effect that acceptance of the Convention would have no effect whatever on state laws because "[i]t concerns . . . solely the jurisdiction of the Federal district courts." *See* Foreign Arbitral Awards, S. REP. No. 91-702, 91st Cong., 2d Sess. 10 (1970); *see supra* notes 83-84 and accompanying text.

[222] "Threlkeld does not contest the general applicability of the LME rules." 923 F.2d at 247.

[223] LME Rules, part 4, reg. 10.1, *reprinted in Joint Appendix*, *supra* note 161, at A50, A84.

[224] LME Rules, part 1 ("Definitions and General Rules"), *reprinted in Joint Appendix*, *supra* note 161, at A54-59.

[225] Brief for Appellee at 8-17, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991) (No. 90-7480).

On appeal, however, MG changed the thrust of its argument.[226] Rule 1.1 of the LME Arbitration Rules stated that the Arbitration Rules applied to "[a]ll disputes arising out of or in relation to any contract which contains an agreement to refer disputes to arbitration in accordance with the Rules and Regulations of the London Metal Exchange, or the existence, completion or validity of the such contract . . . ."[227] MG argued that the LME Regulations incorporated the Arbitration Rules into Threlkeld & Co.'s contracts. MG argued further that Supreme Court precedent required arbitration clauses to be read broadly whenever possible and that the language of rule 1.1 was broad enough to encompass the oral valuation agreement.

Threlkeld & Co. argued that rule 1.1 was inapplicable on its face. According to Threlkeld & Co., neither the forward contracts, the Terms of Business nor the Memo to File brought the Arbitration Rules into play because none of them contained an "agreement to refer disputes to arbitration in accordance with the Rules and Regulations of the London Exchange."[228] The Memo to File made no reference to the LME Rules. The metals contracts and the Terms of Business referred to the LME Rules, but did not expressly consent to arbitration under those Rules.[229]

The Second Circuit found that the references to the LME Rules in Threlkeld & Co.'s contracts were sufficient to bind Threlkeld & Co. to arbitrate its disputes with MG. The court found that "by incorporating the LME Rules into their contract, the parties agreed to abide by all the Rules."[230] Proceeding to

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[226] Brief for Appellant at 22, *Threlkeld*, 923 F.2d 245 (2d Cir. 1991) (No. 90-7480); Appellant's Reply Brief at 5-8.

[227] LME Rules, part 8, at 8-1, § 1.1, *reprinted in Joint Appendix*, *supra* note 161, at A101.

[228] Brief for Appellee at 10-11.

[229] *Id.*

[230] *Threlkeld*, 923 F.2d 245, 251. Regulation 1.1 of the Contract Regulations provides: "These Contract Regulations shall apply to Contracts made subject to the Rules of the Exchange, whether between Clearing Members or between a Clearing Member and a Member who is not a Clearing Member or between a Member and any other person." LME Rules, part 4, reg. 1.1, at 4-1, *reprinted at Joint Appendix*, *supra* note 161, at A80. Implicit in the court's reasoning is that references in the contracts between Threlkeld & Co. and MG to the LME Rules had a legal effect of incorporating those rules into the contracts between the parties. Although the Second Circuit did not explain or analyze this implicit finding, other cases have come to similar conclusions. *See, e.g.*, Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967); Fleck v. E.F. Hutton Group, 891 F.2d 1047 (2d

analyze the LME Rules, the Second Circuit declared that "it is clear that once the parties agreed to abide by the Rules, part 4, section 10.1 became part of the contract for metals."[231] Thus the contracts did contain an agreement to arbitrate in accordance with the LME Rules, notwithstanding that the agreement did not appear on the face of the contracts. The Second Circuit held that the two arbitration provisions contained in the LME Rules had to be read together and that "the core issue as to arbitrability is whether Threlkeld's claims arise out of *or relate to* these Threlkeld/MG contracts for metals."[232]

Having found that the broader of the two arbitration provisions contained in the LME Rules applied to the contracts at issue, the Second Circuit next construed the provision's language liberally, as required by Supreme Court precedent, and found that the language was "plainly" broad enough to cover the disputes between Threlkeld & Co. and MG.[233] The Second Circuit rejected Threlkeld & Co.'s arguments that its oral valuation agreement was a "collateral" agreement which was not arbitrable because it did not contain a separate arbitration clause. Rather, the Second Circuit held that

> [t]he forward contracts were the genesis of the parties' relationships; the alleged collateral agreement stemmed directly from the forward contracts. The metals contracts between Threlkeld and MG represent the subject matter of the alleged valuation agreements; absent the forward contracts, the valuation agreement "had no starting point, no finishing point and no subject matter."[234]

Having found the arbitration agreements to be enforceable,

Cir. 1989); J.J. Ryan & Sons v. Rhone Poulenc Textile S.A., 863 F.2d 315 (4th Cir. 1988); Coudert v. Paine Webber, 705 F.2d 78 (2d Cir. 1983); Astor Chocolate Corp. v. Mikroverk, Ltd., 704 F. Supp. 30 (E.D.N.Y. 1989); Pervel Industries v. T.M. Wallcovering, 675 F. Supp. 867 (S.D.N.Y.), *aff'd*, 871 F.2d 7 (2d Cir. 1987).

[231] 923 at F. 2d at 251. Regulation 10.1 of the Contract Regulations provides: "Subject as provided in Regulation 10.2, any dispute as to the existence, completion or validity of or arising out of any Contract shall be referred to arbitration in accordance with the Rules." LME Rules, Contract Regulation 10.1, *reprinted in Joint Appendix*, *supra* note 161, at A84.

[232] 923 F.2d at 251 (emphasis added). Regulation 10.1 of the Contract Regulations provided that "any dispute as to the existence, completion or validity of or arising out of any Contract shall be referred to arbitration in accordance with the Rules." LME Rules, part 4, reg. 10.1, *reprinted in Joint Appendix*, *supra* note 161, at A84.

[233] 923 F.2d at 251.

[234] 923 F.2d at 251-52 (quoting Pervel Industries, Inc. v. T.M. Wallcovering, Inc., 871 F.2d 7, 8-9 (2d Cir. 1989)).

however, the Second Circuit declined to instruct the district court as to how to enforce them. MG had argued that the appropriate remedy under the Convention was to dismiss the complaint, instead of staying the action as provided in the Arbitration Act.[235] The court noted that there was a split of opinion within the Second Circuit as to the propriety of dismissing a case as opposed to issuing a stay, but declined to resolve the split because the district court had not yet ruled.

Threlkeld & Co. filed a petition for *certiorari* to the Supreme Court, seeking review of the Second Circuit's decision. However, given the slim chances for any *certiorari* petition and the grim prospect of arbitrating before a tribunal that might be hostile, Threlkeld & Co. negotiated a settlement with MG before *certiorari* could be granted or denied by the Court.[236]

III. ANALYSIS OF *THRELKELD*

The Second Circuit Panel believed that it was faithfully following Supreme Court and Second Circuit precedent in its disposition of the issues in *Threlkeld*. Yet a correct application of the Arbitration Act by the Second Circuit would have differed from the *Threlkeld* decision in at least two significant respects.

A. *The Presumption of Arbitrability and Summary Judgment Standards*

It is abundantly clear that in enacting the Arbitration Act Congress intended all contract parties to receive a fair hearing on the issue of whether they had entered into an agreement to arbitrate issues posed in litigation. This right is impaired by the judicially-imposed presumption of arbitrability.

Section 4 of the Act requires that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to per-

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[235] Brief for Appellant at 17-18, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991) (No. 90-7480). MG downplayed this argument on appeal. *Id.* at 4. This is no doubt because of its wish to minimize the appearance of justification for the summary judgment standard adopted by the district court. *Id.* at 17-18.

[236] Telephone conversation with Robert B. Hemley, Counsel for David L. Threlkeld & Co. (Aug. 17, 1992). On August 2, 1991 the petition for *certiorari* was dismissed by the Supreme Court under the parties' stipulation and rule 46 of the Supreme Court Rules. David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 112 S. Ct. 17 (1991). Threlkeld may have had good reason to believe that the arbitral panel would be unsympathetic or even hostile to its claims. *See infra* notes 287-95 and accompanying text.

form the same be in issue, the court shall proceed summarily to the trial thereof."[237] A party alleged to be in default under an arbitration agreement can demand a jury trial. If a jury is empaneled, it has the power to rule on the questions of whether an agreement for arbitration was made in writing and whether there is a default in proceeding under that agreement. Section 4 provides no preference to a party seeking to compel arbitration over a party resisting arbitration, except in two purely procedural respects. First, a compressed time frame is provided for the joining of issues on arbitrability.[238] This favors the party seeking arbitration by reducing the time and expense needed to move the matter to arbitration. Second, the issues are narrowed to whether a written contract to arbitrate exists and whether the agreement has been breached.[239] This also favors the party seeking arbitration because it restricts the trial court from considering the merits of the controversy except as they relate to the question of arbitrability.

On the other hand, the Act contains two very significant provisions that were intended to protect the party opposing arbitration. The statutory right to trial was intended to be "amply" protected[240] and the right to a jury is given only to the opponent of arbitration.[241] Thus the Act struck a rough balance between the interests of both parties. There is not one word in the Act or in its legislative history suggesting that Congress intended the arbitrability hearing to be weighted in favor of either side.

Nevertheless, the Supreme Court has imposed a weighty "presumption of arbitrability" that changes the balance in Arbitration Act cases. The rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitra-

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[237] 9 U.S.C. § 4 (1947). *See* Local Union No. 998 v. The B. & T. Metals Co., 315 F.2d 432, 436 (6th Cir. 1963) ("[A] factual issue is involved . . . and . . . it would be error if the District Judge resolved that factual issue in a summary judgment proceeding.").

[238] Although the Act does not provide a time frame within which the arbitrability issues raised in the pleadings are to be resolved, the policy of the Act clearly suggests that the arbitrability issue is to be decided in an accelerated fashion, consistent with the rights of the parties. Thus, if there is ground for trial, the court is required to "proceed summarily" to trial. 9 U.S.C. § 4 (1947).

[239] A.T. & T. Technologies v. Communications Workers of America, 475 U.S. 643, 649 (1986).

[240] H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

[241] *See supra* note 25.

tion"[242] certainly sends some cases to arbitration that would not go there under the more traditional balanced standard.[243]

As we have seen, the presumption of arbitrability was first imposed by the Supreme Court in the context of federal labor law.[244] A federal common law presumption was needed in the labor relations field to promote strong congressional policies of concern for public order and national security. The Supreme Court devoted eight pages of its eleven-page opinion in *Warrior & Gulf* to a discussion of those policies and found clearly that it was the special role of arbitration within the collective bargaining context that justified the presumptions imposed by the Court in labor arbitrations in that case.[245]

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[242] *Threlkeld*, 923 F.2d 245, 248 (2d Cir. 1991), *citing* Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983). The presumption of arbitrability appears to have the effect of reversing the burden of proof on arbitrability issues. It has the same effect on arbitration cases, therefore, that the Supreme Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), had on choice of forum clause adjudications. As choice of forum is a common law question, no constitutional impediment existed to the Supreme Court's revision of the law in *Bremen*. As a statute, however, the Arbitration Act is subject to different standards. The judicial revision of the Arbitration Act is judicial legislation and thereby violates article 1, section 1, of the United States Constitution.

[243] The presumption required by currently prevailing Supreme Court doctrine elevates arbitration clauses above other contractual clauses and in so doing undermines the intentions of the legislators and bar association representatives who drafted the legislation. For example, the requirement that all ambiguities be construed in favor of arbitrability causes courts to disregard rules of contract construction that, over the years, have been developed to prevent injustice. A particularly troubling example of this problem can be found in Finkel & Ross v. A.G. Becker Paribas Inc., 622 F. Supp. 1505 (S.D.N.Y. 1985). In that case, the plaintiffs were investors who signed a form agreement drafted by the defendant brokerage house. The agreement contained an arbitration clause stating that "[a]ny controversy between us arising out of, or relating to, any transaction for my account shall be settled by arbitration . . . . " *Id.* at 1507. The same agreement also contained a non-waiver clause, providing that "[b]y this agreement to arbitrate future controversies, I understand that I do not waive any rights I may have under the Federal securities laws for controversies arising under such laws." *Id.* at 1509 n.2. The plaintiffs argued that the non-waiver clause revealed an intention and expectation on their part to reserve the option either to arbitrate or to litigate claims which might arise under the federal securities laws. *Id.* at 1510. Unquestionably, the non-waiver clause created an ambiguity in the document with respect to the obligation to arbitrate securities law claims. The plaintiffs' reading of the non-waiver clause was not unreasonable. Under traditional contract construction rules, ambiguities are to be construed against the drafter of a document. 3 CORBIN ON CONTRACTS 262, § 559 (West 1960). Since the defendant brokerage firm sought and obtained enforcement of an ambiguous arbitration clause that it had drafted, the presumption of arbitrability appears to have been directly responsible for the court's decision to send the matter to arbitration.

[244] *See supra* notes 44-56 and accompanying text.

[245] United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S.

That the presumption may have been specifically justifiable as an aspect of the federal common law of labor-management relations in no way implies that it is generally supportable in the interpretation of the Arbitration Act. The Supreme Court had no clear expression of congressional policy upon which to base its own program of promoting commercial arbitration. As discussed, the 1924 Congress was determined to ensure that "[t]he constitutional right to a jury trial is adequately safeguarded."[246] Subsequent Congresses have also been careful to preserve the parties' right to trial, even when encouraging or mandating arbitration. In 1987, for example, Congress authorized programs of court-annexed compulsory arbitration in ten district courts.[247] This program addressed identical concerns about judicial workload and the burdens of litigation that informed the Supreme Court's deliberations from *Scherk* onward.[248] Yet like the 1924 Congress, the 1987 Congress unambiguously preserved a party's right to a trial.[249]

The right to a trial is significantly impaired when the procedure for deciding whether such a right exists is biased. The procedures set forth in sections 3 and 4 of the Arbitration Act make a party's receipt of any kind of trial dependent upon an assessment of the judge. Section 3 of the Arbitration Act requires a court to stay a suit or proceeding "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under . . . an agreement [in writing for arbitration]."[250] Likewise, part 4 of the Act requires a court to order parties to proceed to arbitration without a trial "upon being satisfied that the making of the agreement for arbitration or the failure to

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574, 581 (1960). If the 1959 Supreme Court had found that the Arbitration Act justified the presumption without the assistance of national labor policy, its reasoning in *Warrior & Gulf* would have been unnecessary. It would have only been necessary for the Court to apply the Arbitration Act. That the Court did not apply the Act shows that it did not believe that the policies underlying the Arbitration Act justified the imposition of a general presumption of arbitrability.

[246] S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924).

[247] Judicial Improvements and Access to Justice Act, tit. IX, *codified at* 28 U.S.C. §§ 651 *et seq.*

[248] 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); *see supra* notes 108-20 and accompanying text.

[249] 28 U.S.C. section 65 gives a dissatisfied party the right to an impartial jury trial *de novo* after the arbitration has concluded. 28 U.S.C. § 65 (1988). *See* Broderick, *supra* note 99, at 3.

[250] 9 U.S.C. § 3 (1947).

comply therewith is not in issue."[251] This initial judicial determination of arbitrability is critical to the process. If the judge is "satisfied" that no issue exists concerning the breach of a written agreement to arbitrate, then the party resisting arbitration cannot insist upon a trial. If the initial judicial determination is affected by a presumption, then the resisting party may be unfairly deprived of a jury trial on the issue of arbitrability—and thus deprived of a trial on the merits of the underlying dispute.

It is in the context of this initial judicial determination that the presumption of arbitrability has its effect. Such a presumption, in addition to being unfair, is also clearly inconsistent with congressional intent. Section 6 of the Arbitration Act provides that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."[252] If section 6 of the Arbitration Act has any meaning at all, it must mean that no distinction is to be made between the hearing of motions under the Arbitration Act and the standard procedures used in other motions, except to the extent that the Arbitration Act expressly provides for such a difference.

If presumptions to be applied in Arbitration Act motions and cases are to be consistent with section 6 of the Act, they must be the same presumptions that are applied in similar circumstances under general motion practice. Under sections 3 and 4 of the Arbitration Act, for example, a judicial determination as to whether a written agreement to arbitrate exists and whether disputes are within the scope of that agreement is likely to require parties to introduce oral or written testimony and documentary evidence, including the written contract.[253] The oppo-

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[251] 9 U.S.C. § 4 (1947).

[252] 9 U.S.C. § 6 (1947).

[253] *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 399 (1967) (matter resolved on affidavits in trial court); Wilko v. Swan, 346 U.S. 427, 429 (1953), *overruled by* Rodriguez de Quilas v. Shearson/American Express, Inc. 490 U.S. 477 (1989) (affidavit submitted with motion to compel arbitration); McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 833 (2d Cir. 1988) (affidavits relied upon to construe arbitration clause); Genesco, Inc. v. T. Kakiuchi & Co. Ltd., 815 F.2d 840, 845 (2d Cir. 1987) (trial court reviewed "voluminous evidentiary submissions"); Banque de Paris et de Pays-Bas v. Amoco Oil Co., 573 F. Supp. 1464, 1471 (S.D.N.Y. 1983) (reciting the "array of evidence" offered in opposition to motion for arbitration).

One circumstance in which evidence of this kind might not be necessary is when the

nent of the motion is also likely to introduce testimony and documentary evidence. When consideration of this kind of evidence is necessary, it is proper for a judge to treat the motion as one for summary judgment and to apply the standards imposed by Rule 56(c) of the Federal Rules of Civil Procedure.[254]

There is nothing in section 3 of the Act that is inconsistent with treating the motion for a stay as if it were a motion for summary judgment. Indeed a stay of litigation pending the arbitration of issues that would otherwise be resolved in litigation has a preclusive effect that is often the substantial equivalent of summary judgment in the matter. The court that stays the action may never hear from the litigants again because their dispute may settle or may be resolved entirely in arbitration and enforced either without further litigation or by an action in another venue.[255] Yet the decision to send a matter to arbitration may cause a result opposite to that which would have occurred in court; it may turn a winner into a loser and leave substantial legal rights unvindicated.[256] If the parties do return to court for enforcement of an arbitral award, the court will not have the power to review the facts *de novo*. The court's review will be limited to the matters referred to in sections 10,[257] 11[258] or 207[259]

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complaint itself attaches a written agreement which contains an arbitration clause. In that case, a motion to dismiss under rule 12(b)(1) might be made without affidavits or other evidence.

[254] FED. R. CIV. P. 56(c). *See also* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404 (2d Cir. 1959) ("[a]ccording to Lawrence, *whose version of the fraud we must accept in the present posture of the case . . . .*") (emphasis added).

[255] Article III of the Convention obligates contracting states to "recognize arbitral awards as binding and enforce them." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. III, 21 U.S.T. 2517, 2519.

[256] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 629 (1985) ("[W]e enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic [read: judicial] context."); Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198, 203 (1956) ("The change from a court of law to an arbitration panel may make a radical difference in ultimate result.").

[257] Section 10 of the Arbitration Act reads as follows:

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

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

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

(c) Where the arbitrators were guilty of misconduct in refusing to

of the Arbitration Act.

The stay procedures of section 3 must be read together with the statutory standards set forth in section 4 for summary pretrial disposition of the arbitrability issue.[260] Those standards forbid the court to order arbitration without trial "[i]f the making of the arbitration agreement or the failure, neglect, or refusal

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postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

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

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1947).

[258] Section 11 of the Arbitration Act reads as follows:

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11 (1947).

[259] Section 207 of the Arbitration Act reads as follows:

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding;

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207 (1970). Article V of the Convention sets forth grounds upon which recognition and enforcement of an arbitral award may be refused. *See supra* note 90.

[260] Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959) (trial required if issues are raised in section 3 motion for stay); Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198, 201 (1956) (section 3 must be read together with sections 1 and 2 of the Act). "Any other reading would give the lie to the belief of the framers of the Act that "[t]he constitutional right to a jury trial is adequately safeguarded." S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924).

to perform the same be in issue."[261] This language cannot be interpreted as being any more permissive as a standard than summary judgment standards, at least from the standpoint of the moving party. After all, Rule 56(c) of the Federal Rules of Civil Procedure requires a party seeking judgments to show only "that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as matter of law."[262]

It is standard procedure in motions for summary judgment that in determining whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and to draw all factual inferences in favor of the party against whom summary judgment is sought.[263] Section 6 of the Arbitration Act requires the observance of all rules normally followed in dispositive motions of this type, including the rule that inferences be drawn in favor of the party opposing the motion to compel arbitration. The rule of favoring the nonmoving party must apply to construction of the arbitration agreement as well as to other disputed facts. Section 4 requires that if "an issue is raised" relating to arbitration, a party alleged to be in default may have a jury trial with respect to the issue.[264] At such a trial it is for the jury to determine whether "an agreement for arbitration was made in writing" and whether "there is a default in proceeding thereunder."[265]

The determination of whether a default exists under a contract necessarily involves the interpretation of the language of the contract. Since the statute clearly assigns the "default" issue to the jury, it appears that the interpretation of ambiguous arbitration contracts is a matter of fact for the jury, rather than a matter of law to be determined by the court.[266] Thus application of the presumption of arbitrability in pretrial motions under sections 3 and 4 of the Arbitration Act appears to conflict squarely with the right to trial granted by section 4 of the Act and the right to fair procedures recognized in section 6 of the Act.

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[261] 9 U.S.C. § 4 (1947).

[262] FED. R. CIV. P. 56(c) (emphasis added).

[263] Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991) (per Kearse, J.); Branum v. Clark, 927 F.2d 698, 704 (2d Cir. 1991) (per Kearse, J., with McLaughlin and Pratt, JJ.).

[264] 9 U.S.C. § 4 (1947).

[265] *Id.*

[266] *See* Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1196 (7th Cir. 1987) (contract not ambiguous).

The presumptions required by currently prevailing Supreme Court doctrine elevate arbitration clauses above other contractual clauses and disregard the express intentions of the legislators who drafted and enacted the Arbitration Act. The legislative history of the Act defies any interpretation that would alter, twist or bend the intentions of the contracting parties to serve judicial notions of public policy:

> *Arbitration agreements are purely matters of contract*, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. *An arbitration agreement is placed upon the same footing as other contracts, where it belongs.*[267]

District Judge Coffrin properly denied MG's motions because he found there was "a reasonable basis for a difference of opinion" regarding MG's claims.[268] In fact, the Second Circuit agreed with much of his analysis: it followed his lead in giving no effect to the Memo to File and relied only indirectly upon section 10.1 of the LME Contract Regulations in finding an enforceable obligation to exist. The issue on which Judge Coffrin was reversed was one that was not vigorously argued before the district court.

Where Judge Coffrin erred was in failing to order a trial, to commence soon thereafter, on the merits of the arbitrability issues in the case.[269] Section 4 of the Act clearly called for a trial to take place in a speedy manner if the judge decided that issues existed with respect to arbitrability. At trial summary judgment standards would not have applied. MG and Threlkeld & Co. would have had to prove their cases by a preponderance of the evidence standard, just as at any other civil trial. Although MG failed to prevail under a summary judgment standard, it might very well have prevailed at trial in the district court under a "reasonable preponderance of the evidence" standard. Moreover, had MG pressed the court to schedule a mini-trial on the arbitration issue, as it was entitled to do, it might have resolved the

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[267] H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) (emphasis added).

[268] David L. Threlkeld & Co. v. Metallgesellschaft Ltd., No. 90-28, slip-op. at 14 (D. Vt. Apr. 30, 1990), *reprinted in Joint Appendix*, *supra* note 161, at A250.

[269] Since Threlkeld & Co. had demanded a jury trial in its complaint, it was entitled to a jury on a mini-trial of the arbitrability issues under section 4 of the Arbitration Act. 9 U.S.C. §§ 3, 4 (1947); FED. R. CIV. P. 38(b).

issue of arbitrability sooner than it ultimately did. Judge Coffrin's order was filed on April 30, 1990. The Second Circuit's opinion in the case was released on January 15, 1991. It should not have taken eight and one half months to schedule and hold a mini-trial on the issue of arbitrability. Any such delay would have constituted a denial of MG's right to a speedy trial under section 4. Thus, even without any further action on the part of MG, Judge Coffrin should have moved immediately to schedule a mini-trial, together with whatever expedited discovery proceedings that the parties may have needed. It was the district court's failure to do so that gave rise to MG's right of appeal.[270]

The court of appeals found that the district court had erred in applying summary judgment standards "since there was no question that an agreement to arbitrate existed and that arbitration was refused."[271] Here, the Second Circuit applied the wrong standard.

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[270] An order denying a stay or an application for an order compelling arbitration is appealable. Noidin v. Nutri/System, Inc., 897 F.2d 339, 342 (8th Cir. 1990); Kansas Gas & Electric Co. v. Westinghouse Elec. Corp., 861 F.2d 420, 422 (4th Cir. 1988). Where the district court's order denying the motion constitutes a judgment on the merits of the arbitrability issue, then such a right of appeal is in order. However, where the district court declines to order a stay or to dismiss the case in favor of arbitration due to the existence of genuine issues of material fact, section 4 of the Arbitration Act requires that "the court . . . proceed summarily to the trial" of such issues. 9 U.S.C. § 4 (1947). Therefore, an order denying summary judgment on the issue of arbitrability is a preliminary order and should not be considered a "final order" for purposes of appeal. Instead, the parties should be required to proceed to trial of the arbitrability issue. The result of the trial would be appealable.

[271] *Threlkeld*, 923 F.2d 245, 248-49 (2d Cir. 1991). One set of facts developed in the affidavits before the district court, but not pursued on appeal, might have created a triable jury issue as to whether an agreement to arbitrate disputes existed with respect to approximately one half of the metals contracts at issue. MG's withdrawal from trading on the COMEX necessitated a complicated series of adjustments between Threlkeld & Co. and MG with respect to Threlkeld & Co.'s copper positions. These positions originally had been in the form of "futures" contracts on the COMEX. Although an affidavit submitted on behalf of MG referred to these as "forward" contracts following MG's withdrawal from COMEX, sufficient ambiguity existed in the record to create an issue as to whether the copper contracts in effect between the parties were "futures" or "forward" contracts. If they were "futures," they could not have been "Contracts" under the LME definitions since the LME did not prescribe a form for "futures" contracts. However, Threlkeld & Co. waived making this argument when it represented to the trial court that "[t]he distinction between 'forward' and 'futures' contracts is . . . not relevant to the issues raised . . . ." Plaintiff's Memorandum of Law, at 3 n.2, David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (D. Vt. 1990) (No. 90-28) (Plaintiff's memorandum in opposition to stay or dismissal motion), *reprinted in Joint Appendix*, *supra* note 161, at A166-68.

Under sections 3 and 4 of the Act the standard is not whether arbitration was refused, but whether there has been "failure, neglect or refusal *to perform*" an arbitration agreement.[272] This means that the facts to be determined—and to be sent to a jury if they are in issue—include the question of whether a refusal to proceed to arbitration constituted a default under the agreement to arbitrate.

The Second Circuit found and resolved at least two triable issues of fact. First, it was not at all clear that the Terms of Business or the metals contracts constituted "contract[s] which contain an agreement to refer disputes to arbitration in accordance with the Rules and Regulations of the London Metal Exchange," as required to apply rule 1.1 of the LME Arbitration Rules.[273] Second, it was unclear as to whether the alleged oral valuation agreement was a "dispute arising out of or in relation to" the metals contracts or the Terms of Business.[274] These issues gave rise to a right of trial by jury under section 4. The district court's decision should have been affirmed, with directions to Judge Coffrin to proceed summarily to trial under 9 U.S.C. section 4.

B. *The Presumption of Conscionability*

Congress did not make all arbitration clauses valid, irrevocable and enforceable in the Arbitration Act of 1925. Section 2 of the Act provides an exception based upon "such grounds as exist at law or in equity for the revocation of any contract."[275] The Supreme Court described these grounds in its *Mitsubishi Motors* decision:

> A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate .... [M]oreover, the party may attempt

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[272] 9 U.S.C. § 4 (1947) (emphasis added). The text of section 3 is to the same effect: "the court ... upon being satisfied that the issue involved ... *is referable to arbitration under such an agreement*, shall ... stay the trial ...." 9 U.S.C. § 3 (1947) (emphasis added).

[273] LME Rules, part 8, rule 1.1, at 8-1, *reprinted in Joint Appendix*, *supra* note 161, at A101.

[274] *Id. See also* LME Rules, part 4, section 1.3, *reprinted in Joint Appendix*, *supra* note 161, at A80. *See* Krell v. Gruntal & Co., 646 F. Supp. 1056, 1057 (E.D. Pa. 1986) (ordering trial because language of contract and application for employment are ambiguous, despite clear language of stock exchange rules).

[275] 9 U.S.C. § 2 (1925).

> to make a showing that would warrant setting aside the forum-selection clause—that the agreement was "(a)ffected by fraud, undue influence, or overweening bargaining power"; that "enforcement would be unreasonable and unjust"; or that proceedings in the "contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court."[276]

The Convention, likewise, provides that a court may refuse to send a matter to arbitration if "it finds that the [agreement to arbitrate] is null and void, inoperative, or incapable of being performed."[277]

Threlkeld & Co. attempted to raise one of the section 2 exceptions to enforceability when it claimed that the obligation to arbitrate claims imposed by the LME Rules was a contract of adhesion. The Second Circuit dismissed this claim, labeling Threlkeld & Co. a "sophisticated commodities trader."[278] Yet such an appellation does not end the inquiry into whether the contract was one of adhesion.

If one considers the partiality of the arbitral tribunal to which the arbitration clause requires claims to be sent, it seems at least a triable jury question whether the agreement to arbitrate was a contract of adhesion. Supreme Court and other precedents justify an inquiry into the composition of an arbitral panel to determine whether the panel is composed of "competent, conscientious and impartial arbitrators."[279] Frequently courts have examined the composition of arbitral panels before sending matters to arbitration to determine whether the panel would in all likelihood be capable of handling the matters before it in a fair and evenhanded fashion.[280] The Court has considered

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[276] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985), *quoting* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 15, 18 (1972).

[277] Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, art. II (3), 21 U.S.T. 2517, 2519 (1958).

[278] *Threlkeld*, 923 F.2d 245, 249 (2d Cir. 1991).

[279] In *Mitsubishi* the Supreme Court stated: "[W]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." 473 U.S. at 634.

[280] *See, e.g.*, A.T.& T. Technologies v. Communications Workers of America, 475 U.S. 643, 645 (1986) (agreement calling for references to "a mutually agreeable arbitrator"); *Mitsubishi*, 473 U.S. at 634 n.18 (describing arbitration panel); Southland Corp. v. Keating 465 U.S. 1, 4 (1984) (arbitration clause calling for arbitration under American Automobile Association Rules); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 5 (1983) (arbitration clause calling for arbitration under rule of American

the composition of the panel even in cases in which the impartiality of that panel has not been significantly controverted.[281]

As Threlkeld & Co.'s brief informed the court, the LME Regulations made void provisions of any metals contract that purported to exclude, or were otherwise in conflict with, the LME's Contract Regulations.[282] The Second Circuit interpreted those Contract Regulations to include an obligation to arbitrate all disputes arising out of or in relation to any contracts for metals or other contracts that contained agreements to refer the disputes to arbitration in accordance with the LME Rules.[283] Therefore Threlkeld & Co. had no power to contract out of an obligation to arbitrate any disputes under LME Rules.[284] Although arbitration clauses may, in some cases, be fully negotiated, they are frequently contained in form agreements where there is little or no negotiation.[285] Especially when it is unclear whether there was negotiation of, or informed consent to, the arbitration contract, courts should examine the composition and

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Automobile Association); Scherk v. Alberto Culver, 417 U.S. 506, 509 n.1 (1974) (reprinting arbitration clause calling for coverage by the rules of the International Chamber of Commerce); Prima Paint v. Flood & Conklin, 388 U.S. 395, 398 (1967) (calling for arbitration under rules of American Automobile Association); Wilko v. Swan, 346 U.S. 427, 432 n.15 (1953) (quoting arbitration clause which provided claimant with choices of three arbitration forums); McDonnell Douglas Finance v. Pennsylvania Power & Light, 858 F.2d 825 (2d Cir. 1988) (examining identity of arbitral panels in deciding that parties do not intend to send certain disputes to panel identified in document).

[281] For example, in *Mitsubishi*, the Court noted that no attempt had been made to establish a showing which would warrant setting aside the forum-selection clause on the basis that enforcement would be unreasonable and unjust or that proceedings in the contractual forum would be so gravely difficult and inconvenient that they would, in effect, deprive the resisting party of his day in court. 473 U.S. at 632-33.

[282] *See* LME Rules, part 4, rule 1.3, at 4-1, *reprinted in Joint Appendix, supra* note 161, at A80.

[283] *See* LME Rules, part 4, rules 1.3, 10.1; LME Rules, part 8, rule 1.1, *reprinted in Joint Appendix, supra* note 161, at A80, A84 & A101.

[284] This brings the Threlkeld/MG contract within the common sense definition of a contract of adhesion voiced by Congressman Edward J. Markey in the course of hearings on arbitration reform: "The first question is whether arbitration clauses are contracts of adhesion, *granting to the customer no choice but to sign if he wishes to participate in our securities markets.*" *Arbitration Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 2 (March 31, 1988) (statement of Hon. Edward J. Markey, Chairman) (emphasis added).

[285] "Most of the firms that required arbitration clauses in account agreements with individual and institutional investors never or almost never waived or negotiated the clauses." U.S. General Accounting Office ("GAO"), **Securities Arbitration: How Investors Fare** 30 (May 1992).

rules of the arbitral forum to be assured of its fairness before referring an unwilling party.[286]

Threlkeld & Co.'s reluctance to go to arbitration before the LME arbitral panel suggests it believed that it would fare better in a judicial proceeding than it would before an arbitral tribunal. Certain matters in the record before the Second Circuit provide support for this fear. Had Threlkeld & Co. dug a little deeper, it might have discovered sufficient evidence to require a trial on the question of whether it was likely to receive a fair and impartial hearing before the LME arbitration panel.

The arbitration rules of the LME require that arbitrators on its arbitration panels be "directors or members of the staff of corporate members of the [London Metals Exchange], or individual, or honorary members of the Exchange."[287] The arbitration rules provide that each party shall appoint an arbitrator to a panel of two arbitrators which shall hear the arbitral proceeding. A third arbitrator may be appointed by the LME in consultation with the existing arbitrators upon application either by a party to the dispute or by one of the arbitrators.[288] This method of choosing an arbitral panel appears, on its face, to be less fair and evenhanded than the standard method of choosing arbitral panels employed in international arbitration.

The method of choosing arbitrators designated by the LME Rules suggests that each party is encouraged to choose a non-neutral arbitrator[289] to represent its interests in the arbitra-

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[286] One ground for rejecting an arbitral award is the partiality of arbitrators. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 258 (1987) (partiality on the part of arbitrators a basis for vacating an arbitration award) (Blackmun, J., dissenting). However, if a showing can be made before the reference to arbitration that there is a significant likelihood that the arbitrators may be partial to one party over another, the court ought not to order arbitration in the first place.

[287] LME Rules, part 8, rule 2.1, at 8-2, *reprinted in Joint Appendix, supra* note 161, at A102.

[288] LME Rules, part 8, rule 1.4, at 8-1, *reprinted in Joint Appendix, supra* note 161, at A101.

[289] Canon VII of the AAA/ABA 1977 Code of Ethics for Arbitrators in Commercial Disputes provides that "[i]n all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start, whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two party-appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral." *Reprinted in* HOUSTON PUTNAM LOWRY, CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED: INTERNATIONAL COMMERCIAL LAW AND ARBITRATION

tion.[290] While the provision that each party may choose an arbitrator gives a superficial appearance of fairness and evenhandedness to the composition of a panel, the appearance of fairness is blemished by the limitation on the pool from which arbitrators may be chosen.[291] MG, as an LME member, might reasonably be presumed to know other members of the Exchange better than Threlkeld & Co.[292] An LME member in MG's position should be capable of finding another member of the Exchange with whom it is on friendly terms and who may be expected to represent its position in the arbitration aggressively. According to one observer of the English arbitration system,

> certain English arbitrators make a (semi-)profession of arbitrating and keep themselves available as arbitrators for certain parties more or less on a retainer basis. Some parties, who are regularly involved in arbitrations thereby reserve those arbitrators for themselves who have

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513, 523 (1991). *See* J. GILLIS WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE 364-68 (1979).

[290] Robert Van Delden, *English Commodity Arbitrations: A Foreigner Looking Around in London*, *in* THE ART OF ARBITRATION, ESSAYS ON INTERNATIONAL ARBITRATION 95, 105-106 (Jan C. Schultz *et. al.* eds., 1982). This situation has been discussed by federal courts in the context of the Arbitration Act. *See, e.g., In re* Utility Oil Corp., 10 F. Supp. 678, 681 (S.D.N.Y. 1934) ("In the conduct of arbitrations it sometimes happens that an arbitrator puts loyalty to his nominator above his duty to be impartial.... With all the arbitrators representing one party only, the party unrepresented would in some cases be at the mercy of his opponent and the result a foregone conclusion.").

[291] Although the Supreme Court has cautioned that American businesses should not expect to be able to conduct all of their international transactions "exclusively on our terms, governed by our laws, and resolved in our courts," The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972), it nevertheless has left the door open for claims that the selection of an arbitral forum may be unfair. Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 633 (1985). American and (in the absence of strong conflicting evidence) presumably international notions of fairness are reflected in the manner in which rules for choosing arbitral panels are regulated by the United States Securities and Exchange Commission ("SEC"). Under SEC rules, the majority of members of a securities arbitration panel are required to be from outside the securities industry. Uniform Code of Arbitration, *Fifth Report of the Securities Industry Conference on Arbitration* Ex. C, 29, 31 § 8(a) (Apr. 1986). This system has been criticized recently as being too lax because the securities exchanges administering the system lack sufficient internal controls to verify the backgrounds of "public" arbitrators. *See* GAO, *supra* note 285, at 55-57. Several dissenting members of the Supreme Court in Shearson/American Express Inc. v. McMahon thought that even the protections offered by SEC oversight might be inadequate to assure investors that an individual arbitral panel was not a "stacked deck." 482 U.S. 220, 260-61 (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.).

[292] Threlkeld & Co. had been formed only the year before it began to do business with MG and it had employed the service of only two other members of the Exchange for trading on the LME.

> a reputation of expertise and a certain fighting spirit. To prevent this from happening would, to my view, already justify a legal provision against appointment of arbitrators by the parties themselves.[293]

As a customer, Threlkeld & Co. could not reasonably be presumed to have any allies or friends on the LME; nor could Threlkeld & Co. reasonably be presumed to be able to locate an *enemy* of MG to serve as its arbitrator (assuming that was desirable).[294] Likewise, Threlkeld could not reasonably be expected to know which members of the LME panel of arbitrators would have a tendency to act more, rather than less, aggressively and vigorously as an advocate for its position. Thus Threlkeld & Co. was at a disadvantage in the choice of an arbitrator to represent its interest in its LME arbitration.[295]

The inequality that is found in the rules governing the composition of LME arbitral panels has no parallel in the rules governing the make-up of arbitral panels under the most fre-

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[293] Van Delden, *supra* note 290, at 105-06. This commentator, referring to "the evil of party appointed arbitrators," said that he had experienced an encounter with "fighting arbitrators" to be "so shocking" that he now believed legislation was appropriate to abolish the system. *Id.* at 105 n.22.

[294] One critic of the arbitration process in the United States securities industry had the following to say:

> The brokerage industry is a closely-knit group and are more likely to protect one another than to punish a fellow firm. After all, the industry representative arbitrator might some day have to look for another job and what will his prospects be if he has determined that a fellow member on the street was a RICO violator or that he has awarded punitive damages or even treble damages. To take this a step further, it is quite possible that the very same fraudulent activities which the claimant is alleging are standard operating procedures at the arbitrator's house. You can see the conflicts that the industry arbitrator will have.

Arbitration Reform Hearing 19 (statement of Theodore G. Eppenstein) (March 31, 1988). If this statement accurately describes arbitrator/brokers in the United States securities arbitration context, it may also fairly describe arbitrator/brokers in the English commodities arbitration context.

[295] The President of the Arbitration Commission of the International Chamber of Commerce was critical of this aspect of arbitration conducted by organizations like the LME:

> An important sector of administered arbitration rests with trade association in arbitration between their members. These are cases where the freedom of choice of an arbitrator may be impeached, where some sort of self-justice may be practiced not at all congenial to the very sense of arbitration, [or] where pressure may be exercised on members to be put on a black list, if they do not comply with the outcome of arbitration proceedings.

Ottoarndt Glossner, *Sociological Aspects of International Commercial Arbitration, in* Schultz, *supra* note 290, at 149.

quently-used procedures governing international commercial arbitration. For example, under the rules imposed by the International Chamber of Commerce ("ICC"), the ICC Court of Arbitration either appoints a sole arbitrator to oversee disputes between parties or appoints a third arbitrator after the parties have chosen their own arbitrators to represent their positions.[296] The ICC Rules contain no provision limiting the parties in their choice of arbitrators. Similarly, under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, each party appoints an arbitrator of its own choosing. The two arbitrators then choose a third to preside over the arbitration or an "appointing authority" may designate the third arbitrator if the other two arbitrators are unable to do so.[297] A somewhat different, but equally neutral, procedure is employed under the rules of the American Arbitration Association ("AAA"). The AAA Commercial Arbitration Rules permit the parties to choose their own arbitrators. If the parties are unable to agree upon the choice of an arbitral panel, then the AAA will choose a panel from a list of arbitrators that has been reviewed by parties to the arbitration. The parties are given an opportunity to reject names from the list that they deem unacceptable and they may rank the others.[298]

An obligation to refer disputes to an unequally chosen panel imposed by a non-negotiable arbitration rule that is incorporated by reference in a non-negotiated form contract that makes no express mention of arbitration should raise enough of a factual issue of fairness to justify a jury trial on the issue of unconscionability. However, the presumption of arbitrability makes it very difficult for a meritorious claim of likely bias to prevail.[299]

The *Threlkeld* case illustrates the need for the various exceptions to arbitrability to be considered jointly and not in isolation from each other. The Second Circuit found that the LME

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[296] ICC Rules of Arbitration, arts. 2 & 3 (1988), *reprinted in* LOWRY, *supra* note 289, at 397-98.

[297] UNCITRAL Arbitration Rules, art. 7(1) & (2), *reprinted in* LOWRY, *supra* note 289, at 372, 375-76.

[298] American Arbitration Association, AAA Commercial Arbitration Rules 4, 13, 14 and 15 (Jan. 1, 1990), *reprinted* in LOWRY, *supra* note 289, at 448, 452-53.

[299] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974): "A contractual provision specifying in advance the forum in which disputes shall be litigated . . . obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."

arbitration clause was not a contract of adhesion because Threlkeld & Co. was a "sophisticated" investor. However, if the Court had considered the evidence that Threlkeld & Co. offered in support of its adhesion contract claim—namely, its complete lack of power to negotiate the arbitration clause—together with the danger of partiality in the rules limiting the choice of arbitrators, the Second Circuit might have found a basis for ruling that it would be unconscionable for Threlkeld & Co. to arbitrate its claims before an LME arbitral tribunal.

C. *Dismissal or Stay in Aid of Arbitration*

MG moved before the district court for dismissal of Threlkeld & Co.'s lawsuit or, in the alternative, for an order staying the district court action and ordering Threlkeld & Co. to proceed to arbitrate its claims against MG.[300] MG argued that dismissal was the proper remedy for international arbitration cases governed by the Convention because the "Convention does not provide for the forum court retaining jurisdiction after it has ordered arbitration."[301] The Second Circuit declined to rule on whether an order dismissing the case or a stay of the case pending arbitration was a more appropriate remedy under the Convention. The district court never ruled on the issue because the parties settled before it had the opportunity to do so.

There are many considerations involved in deciding whether to dismiss the case or stay it in aid of arbitration. Not every case should be decided in the same manner. Some factors might make it appropriate for the trial court to retain jurisdiction over the matter and to stay the action pending arbitration. If, for example, one of the parties is located within the territorial jurisdiction of a court and a possible outcome of the arbitration would be the need to enforce an arbitral award against that party, then a court that already possesses personal jurisdiction over all the parties would be well-placed to aid in the eventual enforcement of an arbitral award. This is certainly in keeping with the spirit of the Convention, which has the enforcement of arbitral awards as its key policy.

Retention of jurisdiction over the dispute also has the ad-

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[300] Brief for Appellant at 5, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991) (No. 90-7480).

[301] *Id.* at 18.

vantage of permitting the court that ordered arbitration to review the results of its order. Should the parties come before it again to enforce the arbitration award, the court will already be apprised of the considerations that led the parties to arbitration. The court that ordered arbitration may be in a better position than most other potential judicial panels to determine whether grounds exist to deny enforcement of the arbitral award.

On the other hand, in some cases the court having jurisdiction in the location where the arbitral panel is to conduct its proceedings will have a stronger connection to the businesses of the parties and to the locations of their assets and their evidence than the sending court will have. In such a case it may make more sense for the sending court to leave the parties to the remedies available elsewhere. The court having jurisdiction in the place of arbitration is likely to be more familiar than the sending court with the manner in which the arbitral panel conducts its proceedings and chooses its members. Such a court is also more likely to be able to compel testimony before the arbitrators, if local arbitral procedures permit such a process, and to determine the merits of a claim that there was a substantial defect in the way the factors linking the arbitration was conducted. In each case it seems appropriate for the sending court to receive evidence regarding both the factors linking the arbitrating parties to the various courts available to oversee the arbitral process and the extent of local judicial oversight given to arbitral proceedings under the arbitral forum's local laws.[302]

CONCLUSION

The Supreme Court has engaged in judicial legislation in its expansion of the United States Arbitration Act. The "emphatic federal policy"[303] to which the Supreme Court has given voice is primarily a judicial policy, as opposed to a congressional policy. Where Congress has spoken on the same topic, it has always been careful to preserve the evenhandedness of its approach to

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[302] Such an inquiry need not delay the commencement of arbitral proceedings. There is no reason why a sending court could not order the parties before it to proceed to arbitrate their claims, reserving the issue of whether to dismiss or stay the proceeding for later decision.

[303] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985).

the rights of litigants. The Supreme Court's arbitration policy has been less careful to protect the contractual and procedural rights of the parties before it.

The Second Circuit's decision in *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.* followed present Supreme Court doctrine and rhetoric too literally. It also paid too little heed to the balance of competing equities reflected in the Arbitration Act. As a result, Threlkeld & Co. was deprived of a right to trial promised in the Arbitration Act, a trial that might have kept it out of a forum it had reason to mistrust. The result for the law is that district courts in the Second Circuit now have misleading instructions about the procedures and standards to observe in motions to compel arbitration.

In *Threlkeld* the Second Circuit lost sight of the basic dilemma that is posed whenever enforcement of an arbitration clause is in question. At stake is nothing less then the parties' fundamental right to due process of law in consideration of their disputes. If a court orders arbitration of issues that parties have not contractually agreed to arbitrate, the parties are deprived of their right to trial—a deprivation that may mean the difference between vindication and defeat, and between justice and financial ruin.[304] Instead they may be sent to a panel of non-lawyers or non-judges who lack the power or experience to give their claims a fully informed hearing. For this reason parties resisting arbitration are entitled to a fair and evenhanded hearing on the issues of whether they entered into an agreement to arbitrate and whether they are in default under that agreement. This is what was intended by Congress in the Arbitration Act.[305] The presumption of arbitrability imposed by Supreme Court precedent renders the judicial hearing given these issues unfair and uneven. It unwisely alters the balance between litigants in order to lighten judicial dockets and to promote a misguided understanding of international comity. In rewriting the Arbitration Act, the Supreme Court has usurped the role of Congress.[306] The

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[304] *See* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956).

[305] 9 U.S.C. § 4 (1947).

[306] THE FEDERALIST No. XLVII at 247 (A. Hamilton, J. Jay & J. Madison) (P. Dutton & Co., ed., 1942) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.*") (quoting the writings of Montesquieu) (emphasis in original).

presumption of arbitrability unfairly deprives litigants of their day in court.