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# Commments: Preemption of State Law under the Federal Arbitration Act

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# PREEMPTION OF STATE LAW UNDER THE FEDERAL ARBITRATION ACT

*The Federal Arbitration Act, in contrast to common law, makes arbitration agreements in contracts "evidencing a transaction involving commerce" valid and enforceable. Recent decisions of the United States Supreme Court mandate that the federal Act be applied in both federal and state courts. In this comment, the author traces the history of the federal Act and addresses the threshold question of what activities satisfy the commerce requirement. The author examines the inconsistencies that arise when the federal Act is applied in state courts and urges Congress to revise the Act in light of these inconsistencies. Finally, potential changes in Maryland commercial arbitration law are explored.*

## I. INTRODUCTION

Although most commentaries on the modern day litigation explosion focus on the number of cases resolved in the courts,[1] a large number of disputes now are resolved in the hearing rooms of arbitrators.[2] Consequently, several recent United States Supreme Court decisions have construed the law of commercial arbitration.[3] In *Southland Corp. v.*

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1. *See* Van Dusen, *Comments on the Volume of Litigation in the Federal Courts*, 8 DEL. J. CORP. L. 435 (1983) (discussing the effect of the litigation explosion on the judicial system); Coleman, *The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purposes*, 52 FORDHAM L. REV. 1 (1983) (discussing the effect of the litigation explosion on the Supreme Court).

   During the twelve month period ending June 30, 1984, there were 261,485 civil cases filed in United States district courts. THE LAWYERS ALMANAC 698 (1985) (Law & Business, Inc./Harcourt Brace Jovanovich, Publishers). It is estimated that only two percent of all civil litigation in the United States is in the federal courts. Southland Corp. v. Keating, 465 U.S. 1, 15 n.8 (1984).

2. There were almost 40,000 commercial, labor, accident, and construction cases filed with the American Arbitration Association in 1984. *The Arbitration Alternative*, 71 A.B.A.J. 78, 79 (Feb. 1985). The number of commercial and labor cases arbitrated has more than doubled in the past decade. *Id.* Arbitration has been defined as:

   > [A] contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in place of the tribunals provided by the ordinary processes of law.

   M. DOMKE, COMMERCIAL ARBITRATION § 1.01 (1984) (citing Gates v. Arizona Brewing Co., 54 Ariz. 266, 269, 95 P.2d 49, 50 (1930)).

   For a discussion of court-annexed, as opposed to private arbitration, see Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitation*, 20 CAL. W.L. REV. 43 (1983).

3. During the eleven month period between February, 1983 and January, 1984, two decisions of the Supreme Court of the United States construed the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982) (Act or federal Act). These were Southland Corp. v. Keating, 465 U.S. 1 (1984) and Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983). Prior to these decisions the Court had not

*Keating*,[4] and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[5] the Court explicitly reinforced a judicial policy promoting the enforcement of arbitration agreements. It is clear that both the high cost of litigation and the burden on the courts resulting from the high volume of litigation have played a crucial role in these decisions.[6]

Although state law governs most contract issues,[7] the Supreme Court's recent decisions have summarily mandated that the Federal Arbitration Act[8] (Act or federal Act) is to be applied in state as well as federal court proceedings for the enforcement of arbitration agreements.[9] This comment will explore the development of the Act since its inception as a procedural device in 1925, through its post-*Erie* classification as "substantive," and will address a number of inconsistencies that have arisen when the Act is applied in state courts. This comment encourages Congress to revise the Act in light of these inconsistencies and addresses the threshold question to be met when considering the Act's applicability in state courts — whether interstate commerce is involved. Finally, potential changes in Maryland commercial arbitration law will be examined.

## II. BACKGROUND

### A. *Response to the Unenforceability of Arbitration Agreements — The Federal Arbitration Act*

At common law, a majority of courts found agreements to arbitrate contrary to public policy, void, and unenforceable.[10] This doctrine was based largely upon two characteristics — jealousy and the quest for prestige.[11] These characteristics pervaded the courts and resulted in judicial decisions calculated to dispel the threat that arbitration imposed upon the scope of the courts' jurisdiction.[12]

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been faced with an issue of interpretation of the federal Act since Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

4. 465 U.S. 1 (1984).
5. 460 U.S. 1 (1983).
6. *See The Arbitration Alternative*, 71 A.B.A.J. 78 (1985).
7. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).
8. 9 U.S.C. §§ 1-14 (1982).
9. Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (dicta).
10. *See* W. STURGES, COMMERCIAL ARBITRATION AND AWARDS §§ 22-23 (1930). For a review of the reasons advanced at common law for refusing to enforce arbitration agreements, see United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915).

    Although at common law an agreement to arbitrate a future dispute was voidable, a party who was aggrievied by a breach of this agreement could maintain an action for damages suffered as a result of the breach. These damages, however, were usually nominal. Typically, a court refused to exercise its equity power to enforce an agreement, recognizing the parties freedom to arbitrate if both were agreeable. *See* W. STURGES, COMMERCIAL ARBITRATION AND AWARDS §§ 22-23 (1930).
11. *See* W. STURGES, COMMERCIAL ARBITRATION AND AWARDS § 15 & n.4 (1930).
12. Dicta in a decision by Lord Coke, Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609), is

Although prior to the enactment of the federal Act some state courts displayed a willingness to enforce arbitration agreements,[13] the federal courts remained steadfastly opposed.[14] This dichotomy presented a conflict for the federal courts, which on the one hand sought to follow federal decisional law,[15] and on the other were faced with the Rules of Decision Act which required that the "laws of the several states . . . be regarded as rules of decision . . . ."[16] A number of federal courts held arbitration agreements unenforceable as a matter of general federal law,[17] perhaps relying on the language of the Supreme Court's *Swift v. Tyson*[18] decision, which interpreted the Rules of Decision Act not to require application of state law on issues of "general law."[19]

In 1925, the Federal Arbitration Act was enacted.[20] Section 2 of the

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credited with initiating the idea that arbitration is disfavored because it "ousts" the court of its jurisdiction. *See* W. STURGES, COMMERCIAL ARBITRATION AND AWARDS § 15 n.3 (1930); Comment, *Jurisdiction of the Federal Courts Under the United States Arbitration Act*, 27 TEX. L. REV. 218, 218 n.4 (1948).

13. *See, e.g.*, Berkovitz v. Arbib & Houlsberger, Inc., 230 N.Y. 261, 130 N.E. 288 (1921) (executory agreement to arbitrate valid and enforceable under New York law); Zindorf Constr. Co. v. Western Am. Co., 27 Wash. 31, 67 P.374 (1901) (executory agreement to arbitrate precludes action at law); Monongahela Navigation Co. v. Fenlon, 4 Watts & Serg. 205 (Pa. 1842) (engineer's expertise warrants validity of arbitration agreement in construction contract).
14. *See* Haskell v. McClintic-Marshall Co., 289 F. 405 (9th Cir. 1923); Jefferson Fire Ins. Co. v. Bierce & Sage, Inc., 183 F. 588 (C.C.E.D. Mich. 1910); Mitchell v. Dougherty, 90 F. 639 (3d Cir. 1898); Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065); Lappe v. Wilcox, 14 F.2d 861 (N.D.N.Y. 1926); U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915).
15. *See supra* note 14. The reason for the federal courts' desire to follow federal decisional law is unclear. One commentator has stated that the purpose was to establish nationwide uniformity of decision. *See* Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts:* Erie v. Tompkins, 39 CORNELL L.Q. 74, 80 (1953). Because none of the federal cases actually discuss the choice of law issue at length, it is likely that the federal courts simply saw invalidation of arbitration agreements as the better rule. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW § 110 (rev. ed. 1968) (discussing the "better rule" as a basis for choice of law); R. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS § 6.27 (2d ed. 1980) (same).
16. 28 U.S.C. § 1652 (1982) (corresponds to Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92); *see infra* note 19 (discussing commentary on courts' failure to apply the Rules of Decision Act).
17. *See supra* note 14 and accompanying text.
18. 41 U.S. (16 Pet.) 1 (1842).
19. *Id.* at 18. None of the cases specifically discuss the issue of the applicability of the Rules of Decision Act as interpreted by *Swift v. Tyson*. *See supra* note 14. Several commentators, however, have discussed the issue. *See* Kochery, *supra* note 15, at 78; Note, *Commercial Arbitration in Federal Courts*, 20 VAN. L. REV. 607, 612 (1967). For an early commentary questioning the propriety of the federal courts in ignoring the Rules of Decision Act, see *Federal Courts — Authority of State Law — Refusal to Apply New York Arbitration Law*, 40 HARV. L. REV. 649 (1926-27).
20. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883. Section 14 of the original version named the Act the United States Arbitration act. 9 U.S.C. § 14 (1946). In 1947, however, section 14 was repealed. Act of July 30, 1947, ch. 392, § 2, 61 Stat. 669. The Act has since been referred to as both the United States Arbitration Act and the Federal

Act holds valid and irrevocable those agreements to arbitrate based on a "written provision in . . . a contract evidencing a transaction involving commerce."[21] Section 3 provided for a stay of judicial proceedings pending arbitration,[22] and section 4 provided for specific performance of an agreement to arbitrate.[23]

The Act did little to settle the choice of law issues confronting the federal courts. The focus of attention turned to whether the requirement of interstate commerce set forth in section 2 was similarly required to invoke the other provisions of the Act.[24] Neither section 3 nor section 4 mentioned the commerce requirement. The one Supreme Court decision construing the Act during this period, *Marine Transit Corp. v. Dreyfus*,[25] found its jurisdictional basis in admiralty, thereby shedding no light on the subject.[26] This decision was important, however, because it characterized arbitration as a procedural device under the federal Act.[27]

Absent guidance from the Supreme Court, a majority of the lower federal courts interpreted the language of section 2 to require interstate commerce, in addition to the usual jurisdictional prerequisites of amount in controversy and diversity, before any provisions of the new Act would

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Arbitration Act. The early legislative history of the Act is traced in Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580, 580 n.1 (1952).

21. 9 U.S.C. § 2 (1982) (corresponds to United States Arbitration Act of 1925, ch. 213, § 2, 43 Stat. 883). Section 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

22. 9 U.S.C. § 3 (1982) (corresponds to United States Arbitration Act of 1925, ch. 213, § 3, 43 Stat. 883). Section 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceedings with such arbitration.

9 U.S.C. § 3 (1982).

23. 9 U.S.C. § 4 (1982) (corresponds to United States Arbitration Act of 1925, ch. 213, § 4, 43 Stat. 883). Section 4 provides in pertinent part: "[A] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (1982).

24. *See infra* notes 28-29 and accompanying text.

25. 284 U.S. 263 (1932).

26. *See id.* at 272.

27. *See id.* at 277-78.

apply.[28] Hence, lack of interstate commerce in federal diversity actions often precluded application of the federal Act.[29] Furthermore, state arbitration law was similarly inapplicable on the theory that arbitration was a procedural device,[30] and under accepted conflicts rules, procedural issues were to be governed by the law of the forum.[31]

### *B. The* Erie *Doctrine — Is Arbitration Substance or Procedure?*

The Supreme Court's landmark decision, *Erie Railroad v. Tompkins*,[32] did little to clear up the confusion regarding the jurisdictional scope of the new federal Act. Instead, it created another question — whether the Act would still be considered procedural — and undermined the rationale of those prior federal court decisions that had determined arbitration to be "general federal law" in diversity cases.[33] The *Erie* doctrine mandates the application of state substantive law in federal diversity suits. In light of this, the Supreme Court's characterization of arbitration as procedural for all purposes in *Marine Transit*[34] became the subject of criticism. Commentators argued that some provisions of the Act were procedural, but that other provisions were undoubtedly substantive and should be treated as such for choice of law purposes.[35]

The development of the "outcome determinative" test by the Supreme Court in *Guaranty Trust Co. v. York*[36] redefined the scope of the purely objective substance/procedure test contemplated by *Erie*. In *Guaranty Trust*, the Court declared that "the intent of [*Erie*] was to in-

28. *See, e.g.*, Krauss Bros. Lumber Co. v. Bossert & Sons, 62 F.2d 1004 (2d Cir. 1933); *In re* Woerner, 31 F.2d 283 (2d Cir. 1929); Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184 (D. Del. 1930); *see also* Note, *Arbitration Law of the Last Decade*, 26 VA. L. REV. 327, 340-41 (1940) (discussing jurisdictional prerequisites for application of the federal Act).
29. *See In re* Cold Metal Process Co., 9 F. Supp. 992 (W.D. Pa. 1935); The Volsinio, 32 F.2d 357 (E.D.N.Y. 1929).
30. *See* California Prune & Apricot Growers Ass'n v. Catz Am. Co., 60 F.2d 788, 790 (9th Cir. 1932) (plaintiff's action in federal court to invoke state arbitration statute denied); Lappe v. Wilcox, 14 F.2d 861 (N.D.N.Y. 1926) (state arbitration act is procedural, not substantive and therefore is not binding on the federal courts).
31. *See* Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1857); Union Bank v. Jolly's Adm'rs, 59 U.S. (18 How.) 503, 507 (1855); Suydam v. Broadnax, 39 U.S. (14 Pet.) 67, 75 (1840); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); 2 J. BEALE, CONFLICT OF LAWS 1247-48 (1935).
32. 304 U.S. 64 (1938).
33. *See supra* note 14 and accompanying text. According to *Erie*, "[t]here is no general federal common law." Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
34. Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 277-78 (1932). The Supreme Court had characterized arbitration as procedural as early as 1864 in Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1864), where a judgment entered by a clerk of the court upon the report of an arbitrator was held valid and enforceable. Prior to the enactment of the federal Act, the Court reaffirmed this characterization in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).
35. *See* Kochery, *supra* note 15, at 77-78; Heilman, *Arbitration Agreements and the Conflict of Laws*, 38 YALE L.J. 617, 617-18 (1929).
36. 326 U.S. 99 (1945).

sure that in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court."[37] Thus, the stage was set for a virtual emasculation of the federal Act.

In view of the language in *Guaranty Trust*, one would expect that in a diversity action where state law would not enforce an arbitration agreement, a federal court would be forced to ignore the federal Act. Thus, the federal Act would be precluded in any diversity action where state law considered arbitration unenforceable.[38] The few cases addressing this issue in the wake of *Guaranty Trust*, however, reached the opposite conclusion.[39]

For a clear understanding of these cases, attention must first be directed to the distinction between viewing the Act as "substantive" under *Erie* and viewing the Act as "federal substantive law." The former requires deference to state law in federal courts; the latter relies upon an exercise of Congressional power as justification for the application of federal law in federal courts, regardless of conflicting state laws.[40]

In *Jackson v. Kentucky River Mills*,[41] the federal district court conspicuously avoided *Guaranty Trust* and held that, "legislating within its constitutional domain, Congress has declared, as a matter of substantive law, that an arbitration agreement . . . is valid and enforceable."[42] Similarly, in *Local 19 Warehouse Union v. Buckeye Cotton Oil Co.*,[43] applying the federal Act to a labor contract, the Court of Appeals for the Sixth Circuit recognized that the Act creates federal rights in arbitration and

37. *Id.* at 109.

38. *See* Note, Erie, Bernhardt, *and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and A Right to A Remedy*, 69 YALE L.J. 847, 847-48 (1959-60) [hereinafter cited as Erie, Bernhardt *and Section 2*]; Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404-05 (2d Cir. 1959).

39. *See infra* notes 41-44 and accompanying text. *But see* Tejas Dev. Co. v. McGough Bros., 165 F.2d 276 (5th Cir. 1947).

40. *Compare* Tejas Dev. Co. v. McGough Bros., 165 F.2d 276 (5th Cir. 1947) (arbitration is substantive for *Erie* purposes, therefore state law prevails) *with* Local 19 Warehouse Union v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956) (federal Act creates federal rights in arbitration) *and* Jackson v. Kentucky River Mills, 65 F. Supp. 601 (E.D. Ky. 1946) (arbitration is a matter of federal substantive law).

In *Tejas*, the court intimated that section 2 of the federal Act was inapplicable because the contract was not one of interstate commerce. However, in response to an argument that the enforcement sections of the Act, sections 3 and 4, applied despite the absence of commerce, the court stated that the question was "not as to the method of enforcement of a valid award, but of the validity of the awards and the binding effect of the agreement to arbitrate, both of which are *matters of state substantive law*." Tejas Dev. Co. v. McGough Bros., 165 F.2d 276, 278-79 (5th Cir. 1947) (emphasis added). Citing *Erie*, the court held that because arbitration was state substantive law, the outcome of the suit "can become no better by going into Federal court . . . than . . . in State Courts." *Id.*

41. 65 F. Supp. 601 (E.D. Ky. 1946), *aff'd*, 206 F.2d 111 (6th Cir. 1953).

42. *Id.* at 603.

43. 236 F.2d 776 (6th Cir. 1956).

held that state law does not control.[44] These cases posed the question whether, in light of *Erie*'s prohibition of general federal common law, the federal courts constitutionally could apply the federal Act as a matter of federal substantive law.[45] Although not addressed therein, this constitutional question was also recognized by the Supreme Court in *Bernhardt v. Polygraphic Co. of America*.[46]

### *C. Arbitration as Substantive Federal Law*

In *Bernhardt*, the Supreme Court considered whether section 3 of the federal Act, providing for a stay of judicial proceedings pending arbitration, could be applied in a federal diversity suit absent a transaction involving commerce.[47] The plaintiff brought a breach of contract action in a Vermont state court. Realizing that the contract's arbitration agreement would not be enforced under Vermont law, the defendant sought removal to federal district court and, once therein, a stay of court proceedings pending arbitration in accordance with section 3 of the federal Act.[48]

The district court refused to grant the stay, relying on the *Guaranty Trust* "outcome determinative" test and the treatment of arbitration agreements under Vermont law as unenforceable.[49] The court of appeals reversed, holding that commerce was required to invoke only section 2 of the Act, and that *Erie* warranted application of section 3 in federal courts solely as a matter of procedure.[50] The Supreme Court, however, disagreed. The Court held that because "[s]ections 1, 2, and 3 are integral parts of a whole,"[51] the jurisdictional provisions of section 2 are similarly applicable to section 3. Because the contract in *Bernhardt* was not one involving commerce, section 3 was inapplicable, and Vermont law

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44. *Id.* at 781.
45. *See* Erie, Bernhardt *and Section 2*, *supra* note 38, at 848-49.
46. 350 U.S. 198 (1956).
47. *Id.*
48. Bernhardt v. Polygraphic Co. of Am., 122 F. Supp. 733, 733-34 (D. Vt. 1954), *rev'd*, 218 F.2d 948 (2d Cir. 1955), *rev'd*, 350 U.S. 198 (1956).
49. *Id.* at 734-35.
50. Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948, 951 (2d Cir. 1955), *rev'd*, 350 U.S. 198 (1956). Although, prior to *Erie*, a majority of lower federal courts required interstate commerce before application of *any* of the Act's provisions, *see supra* note 28 and accompanying text, several later decisions found section 3 applicable notwithstanding an absence of commerce. *See, e.g.*, Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854 (4th Cir. 1944); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943); Wilson & Co. v. Freemont Cake & Meal Co., 77 F. Supp. 364 (D.C. Neb. 1948). Most courts, however, continued to require the presence of commerce before application of section 4. *See, e.g.*, W.R. Grimshaw Co. v. Nazareth Literary & Benevolent Inst., 113 F. Supp. 564 (E.D. Ark. 1953); Freemont Cake & Meal Co. v. Wilson & Co., 86 F. Supp. 968 (D. Neb. 1949), *aff'd*, 183 F.2d 57 (8th Cir. 1950); San Carlo Opera Co. v. Conley, 72 F. Supp. 825 (S.D.N.Y. 1946).
51. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201 (1956).

prevailed.[52]

In response to the argument that section 3 was applicable in all federal cases as a matter of federal procedural law, the Court held that the Act was substantive, not procedural, for *Erie* purposes.[53] This, however, gave rise to a serious constitutional question: Was the Act an unconstitutional infringement upon the right of state courts to formulate the law that is followed in federal diversity cases?[54] Although *Bernhardt* raised this question, it was left unanswered.[55]

Soon thereafter, this same question was addressed by the Court of Appeals for the Second Circuit in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*[56] In this diversity action, the plaintiff, Robert Lawrence Co., sought damages for fraudulent misrepresentations made by the defendant, Devonshire Fabrics, Inc., in inducing the purchase of a quantity of wool. Pursuant to an arbitration agreement in the contract, Devonshire Fabrics, Inc. moved for a stay of court proceedings pending arbitration in accordance with section 3 of the federal Act.[57] The contract was one evidencing a transaction involving commerce.[58] The New York fed-

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52. *Id.* at 200-02.
53. *See id.* at 202-03.
54. *Id.* at 202. "If respondent's contention is correct, a constitutional question might be presented." *Id.* Justice Frankfurter offered this answer: "[S]ince the United States Arbitration Act of 1925 does not obviously apply to diversity cases . . . [the majority's] avoidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases." *Id.* at 208 (Frankfurter, J., concurring) (footnote omitted).
55. Although the Court granted certiorari in *Bernhardt* "because of the doubtful application by the Court of Appeals of *Erie*," *Bernhardt*, 350 U.S. at 200, the issue was avoided. The Court stated: "Our view is that § 3, so read, would invade the local law field. We therefore read § 3 narrowly to avoid that issue." *Bernhardt*, 350 U.S. at 202.

    Applying the "checklist theory" of the tenth amendment, Professor Ely has stated that the *Bernhardt* Court's reference to the federal Act's invasion of the "local law field" was misplaced: "But in suggesting that as a matter of constitutional law restrictive of Acts of Congress, a 'local law field' limits the federal government's exercise of powers no one doubts it has . . . the *Bernhardt* court sowed only needless confusion." Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 706 (1974).

    Post-*Erie* federal common law regarding arbitration is also authorized by the Labor-Management Relations Act of 1947, construed in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). In *Lincoln Mills*, the Court concluded that Congress, in furthering a policy of industrial peace, authorizes "federal courts to fashion a body of federal law for . . . specific performance of promises to arbitrate grievances under collective bargaining agreements." *Id.* at 451.

    *See generally*, Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964) (discussing the post-*Erie* growth of federal common law); Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967) (same); Bourne, *Federal Common Law and the* Erie-Byrd *Rule*, 12 U. BALT. L. REV. 426 (1983) (same).
56. 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960).
57. *See id.* at 403-04.
58. *Id.* at 409.

eral district court denied the stay, relying on New York state law which permitted only a court, not an arbitrator, to decide the issue of fraud in the inducement of a container contract,[59] *i.e.*, a contract that contains an arbitration agreement. Devonshire Fabrics, Inc. appealed to the Second Circuit.[60]

The decision whether a court or an arbitrator should decide the validity of the arbitration agreement was potentially outcome determinative, raising a presumption that under *Erie* and its progeny state law must be followed.[61] Judge Medina, however, writing for the Second Circuit, relied largely on legislative history and policy considerations to conclude that the federal Act created a body of federal substantive law affecting the validity and interpretation of arbitration agreements.[62] To hold otherwise, he feared, would emasculate the Act by rendering it inapplicable in diversity cases.[63] He reasoned that in enacting the Act, Congress intended to exercise its commerce and admiralty powers to remove the common law hostility toward arbitration.[64] Because the contract in *Robert Lawrence* involved commerce, the federal Act applied in lieu of New York state law.[65]

The Second Circuit determined that under the federal Act, unlike under New York law, an agreement to arbitrate is separable from the container contract, and therefore an allegation of fraud must be directed to the arbitration agreement itself before the agreement is deemed void.[66] This determination was based not only upon the Act's language, but also upon policy considerations and the common law treatment of arbitration agreements as separable.[67] The court reasoned that the reference in section 2 to a specific "written provision" and the reference in section 3 to an "agreement in writing" for arbitration suggests a distinction between

59. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404, 412 (2d Cir. 1959). The rationale behind refusal to send the fraud issue to arbitration is that a container contract and the agreement to arbitrate within are inseparable; therefore an allegation of fraud in the making of a container contract is similarly an allegation of fraud in the making of the agreement to arbitrate. *See* Wrap Vertiser Corp. v. Plotnick, 3 N.Y.2d 17, 143 N.E.2d 366, 163 N.Y.S.2d 639 (1957) (*overruled in* Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973)); Manufacturers Chemical Co. v. Caswell Strauss & Co., 259 A.D. 321, 19 N.Y.S.2d 171 (1940); *see also*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 412-16 (1967) (Black, J., dissenting) (arbitration of fraud issue raises questions of due process); George Engine Co. v. Southern Shipbuilding Corp., 350 So. 2d 881, 885 (La. 1977), *aff'd* on remand, 376 So. 2d 1041 (La. Ct. App. 1979) (arbitration of fraud issue denies rights to jury trial and appeal); Note, *Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 DUKE L.J. 588 (1968) (discussing rationale of separability).

60. *Robert Lawrence*, 271 F.2d at 402.

61. *Id.* at 404-05.

62. *Id.* at 406.

63. *Id.* at 404.

64. *Id.* at 406-07.

65. *Id.* at 409.

66. *Id.* at 411.

67. *Id.* at 409-10.

the container contract and the arbitration agreement.[68] Recognizing the tenuous nature of relying solely on this reasoning, the court buttressed its argument with the historical separability of arbitration agreements.[69] In addition, the court resorted to the Act's "liberal policy of promoting arbitration"[70] in arriving at its conclusion that the arbitration agreement was separable from the container contract.

Because federal jurisdiction in *Robert Lawrence* was based on diversity, and therefore the parties had access to either state or federal court, the Second Circuit saw fit to reconcile the *Erie* question posed by the potential inconsistency of decisions in the two forums.[71] Relying on the text and legislative history of the Act,[72] the court reconciled the *Erie* question by holding the federal Act applicable in both forums provided the underlying contract was one of admiralty or interstate commerce. If the federal Act is applicable in both federal *and* state courts as a matter of federal substantive law, there is no potential for inconsistent decisions; hence, the *Erie* question is answered.[73]

Eight years after Judge Medina's reconciliation, the Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[74] a case with facts[75] virtually identical to those in *Robert Lawrence*. Although the Supreme Court agreed with *Robert Lawrence* in its conclusions on the issues of separability[76] and the Act's reliance on Congress's

68. *Id.*

69. *Id.* at 410. At common law, however, the primary impetus for viewing an arbitration agreement as separable from its container contract was to guarantee the legitimacy of the container contract while invalidating the arbitration agreement within. *Id.*

70. *Id.* "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." *Id.*

71. *Id.* Robert Lawrence, Inc. was a Massachusetts corporation and Devonshire Fabrics, Inc. was a New York corporation. *Id.* at 404. If the suit had been brought in a New York state court, the arbitration agreement would not have been enforced. *See supra* notes 61-62 and accompanying text. Hence, the constitutional question raised in *Bernhardt* faced the court in *Robert Lawrence*. *Robert Lawrence*, 271 F.2d at 404.

72. *Robert Lawrence*, 271 F.2d at 406-07.

73. *Id.* at 407. Judge Medina wrote: "This is a declaration of national law equally applicable in state or federal courts." *Id.* Hence, there was no question of constitutional law under *Erie*. *Id.* at 404-05.

74. 388 U.S. 395 (1967).

75. Prima Paint Corp., a Maryland corporation, entered into a contract for consulting services with Flood & Conklin Manufacturing Co., a New Jersey corporation. The contract contained an arbitration clause. After breach, Prima Paint Corp. alleged that Flood & Conklin Manufacturing Co. had fraudulently represented its solvency. Flood & Conklin Manufacturing Co. served notice of intention to arbitrate. Prima Paint Corp. responded by filing a diversity action in federal court for rescission of the consulting agreement on the basis of fraudulent inducement, and on the same grounds, petitioned the court for an order enjoining arbitration. *Id.* at 397-99.

76. *Id.* at 402-04.

commerce powers,[77] a comparison of the two decisions reveals several subtle differences in reasoning.[78] The most obvious difference was the absence of consideration by the *Prima Paint* Court of the *Erie* question posed by potential inconsistent decisions in state and federal forums.[79] Whereas the *Robert Lawrence* court recognized and dealt with this question by asserting that the federal Act was applicable in both forums,[80] the *Prima Paint* majority ignored it.[81]

Although Justice Black argued in dissent that the *Prima Paint* majority had construed too broadly the language of the federal Act,[82] a comparison of *Robert Lawrence* and *Prima Paint* reveals a greater reluctance by the Supreme Court to stray from a strict interpretation of the statute.[83] Judge Medina of the Second Circuit relied on policy and historical considerations when fashioning the rule on separability in *Robert Lawrence*;[84] the *Prima Paint* Court found the same rule mandated solely by the language of section 4.[85] The Court held that section 4, which orders a federal court to compel arbitration "once it is satisfied that the 'making of the agreement for arbitration . . . is not in issue,' " requires the party alleging fraud to direct that allegation expressly to the agreement to arbitrate in order to void that agreement.[86]

The method employed by the Supreme Court in dealing with the

77. *Id.* at 400-01.
78. *See* Aksen, Prima Paint v. Flood & Conklin — *What Does It Mean?*, 43 ST. JOHNS L. REV. 1, 19-21 (1968). After reviewing *Robert Lawrence*, the Court stated: "We agree, albeit for somewhat different reasons . . . ." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967).
79. Although the majority did not mention the increased potential for forum shopping, it did answer the constitutional question left open in *Bernhardt* — whether the Arbitration Act could be enforced as a matter of federal substantive law in diversity cases. The Court stated:

> The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases [but rather] whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative.

*Prima Paint*, 388 U.S. at 405.
80. *See supra* notes 71-73 and accompanying text.
81. Based on the Court's avoidance of this critical issue, and the opinion's abundance of directives aimed specifically at the *federal* courts, at least one commentator theorized that *Prima Paint* was calculated to convey that the federal Act was not applicable in state courts. *See* Aksen, *supra* note 78, at 22-23.
82. *Cf. Prima Paint*, 388 U.S. at 409 (Black, J., dissenting) (Court's holding is not supported by the language or legislative history of the federal Act); *id.* at 410 (Black, J., dissenting) (language of section 4, considered alone, does not, as the majority held, provide an explicit answer to the separability question); *id.* at 416 (Black, J., dissenting) (Court's departure from Act's clear statement); *id.* at 425 (Black, J., dissenting) (Congress, not the Court, may revise the federal Act).
83. *See* Aksen, *supra* note 78, at 19-21.
84. *See supra* notes 69-70 and accompanying text.
85. *Prima Paint*, 388 U.S. at 403 (section 4 provides the "explicit answer" to the separability question).
86. *Id.* at 403-04.

constitutional question posed by the application of federal substantive law in diversity cases similarly displayed the Court's eagerness to base its decision on the Act itself.[87] Whereas the rationale in *Robert Lawrence* had been supported by legislative history and policy considerations,[88] the *Prima Paint* Court again based its decision on the language of the statute: "It is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable Federal foundations of 'control over interstate commerce and over admiralty.' "[89] Hence, it appears that the Supreme Court was striving to reach Judge Medina's result in *Robert Lawrence* in a manner less likely to be criticized as judicial revisionism.[90]

## III. RECENT SUPREME COURT DECISIONS: ABSENCE OF STATUTORY GUIDELINES FUELS A POLICY APPROACH

### *A.* Moses H. Cone Memorial Hospital v. Mercury Construction Corp.

The Court was unable to adhere to the narrow statutory approach undertaken in *Prima Paint* when it was faced with less conspicuous arbitration issues sixteen years later in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[91] a case involving a construction contract dispute. Moses H. Cone Memorial Hospital (Hospital) entered into a contract with Mercury Construction Corp. (Mercury) for the construction of additions to its hospital building. The contract provided that all disputes involving interpretation of the contract or performance of the construction work were initially to be referred to the project architect. All matters decided by the architect, or those not decided within a specified time, could then be submitted to binding arbitration.[92]

Construction of the project began in July, 1975, and was to be completed by October, 1979. At a meeting in October, 1977, attended by representatives of Mercury, the Hospital, and the architect, Mercury agreed to comply with the architect's request to withhold its claims for delay and impact costs until the work was substantially completed.[93] Substantial completion occurred in February, 1979, and Mercury submitted its claims to the architect in January, 1980.[94] After ten months of

87. Aksen, *supra* note 78, at 20.
88. *See supra* notes 62-64 and accompanying text.
89. *Prima Paint*, 388 U.S. at 405.
90. *See* Aksen, *supra* note 78, at 21.
91. 460 U.S. 1 (1983).
92. *Id.* at 4-5. The arbitration clause was Article 7.10 of A.I.A. (American Institute of Architects) Document A201, General Conditions of the Contract for Construction (1967 ed.). Ness, Moses Cone Hospital v. Mercury Construction *and the Enforcement of Construction Contract Arbitration Clauses*, CONSTR. LAW., Spring 1983, at 3, 7 n.2.
93. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 6 (1983).
94. *Id.* at 5-6.

deliberation, the Hospital informed Mercury that it would pay nothing on the claims and filed a declaratory judgment action in North Carolina state court naming both Mercury and the architect as defendants. The Hospital alleged that Mercury had lost its right to arbitrate due to waiver, laches, estoppel, and failure to make a timely demand for arbitration.[95]

Mercury responded by filing a diversity suit in federal district court seeking an order to compel arbitration under section 4 of the federal Act. On the Hospital's motion, the district court stayed Mercury's federal suit pending resolution of the state action because both involved the identical issue of the arbitrability of Mercury's claims.[96] Mercury's appeal to the Court of Appeals for the Fourth Circuit resulted in reversal of the district court's stay order and remand to the district court with instructions for entry of an order to arbitrate.[97]

The Supreme Court affirmed the Fourth Circuit's order to arbitrate.[98] The question presented on appeal was not one of arbitration, but rather whether the district court properly stayed the federal action pending resolution of the parallel state court litigation.[99] In resolving this issue, the Court relied on *Colorado River Water Conservation District v. United States*,[100] which held that once federal jurisdiction is properly invoked, deference to parallel state court litigation is proper only in "exceptional circumstances."[101] In determining whether "exceptional circumstances" are present, *Colorado River* set forth a number of factors to be considered, including the avoidance of "piecemeal litigation" and the order in which jurisdiction was obtained by the two forums.[102] Ap-

95. *Id.* at 7.
96. *Id.*
97. Mercury Constr. Corp. v. Moses H. Cone Memorial Hosp., 656 F.2d 933 (4th Cir. 1981), *aff'd*, 460 U.S. 1 (1983).
98. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).
99. *Id.* at 4, 13.
100. 424 U.S. 800 (1976). *Colorado River* involved the exercise of federal court jurisdiction to adjudicate federal water rights. The McCarran Amendment, 43 U.S.C. § 666, waives sovereign immunity to permit joinder of the United States in some state-court suits for the adjudication of water rights. In *Colorado River*, the government brought suit in federal district court against some 1,000 non-federal water users, seeking a declaration of the water rights of several Indian tribes and governmental entities. A defendant in the federal court suit sought to join the United States in a state court proceeding to adjudicate all of the Unites States's claims in state court pursuant to the McCarran Amendment. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
101. *Colorado River*, 424 U.S. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).
102. In *Colorado River*, the Court mentioned four factors: (1) the assumption by either court of jurisdiction over any res or property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums. *Colorado River*, 424 U.S. at 818-19. A decision to dismiss a federal action because of a parallel state-court action is not made on the basis of mechanical application of the *Colorado River* factors, but rather on a careful balancing of the factors as applied to a given

plying these factors in *Moses H. Cone*, the Court found no showing of the requisite exceptional circumstances to justify the district court's stay.[103]

The Court first considered the potential for piecemeal litigation.[104] In its attempt to avoid arbitration, the Hospital argued that, if it were forced to arbitrate, it would be subject to duplicative proceedings — one with Mercury concerning its claim for delay and impact costs, and the other with the architect concerning the Hospital's indemnity claim. Although the former was within the purview of the arbitration agreement, the latter was not.[105] The Hospital's tactic of joining a defendant not subject to an arbitration agreement is commonly used to further complicate a dispute in an attempt to avoid arbitration.[106] A party typically argues that the ensuing complexity has rendered the virtues of arbitration — efficiency and cost effectiveness — unavailing, and therefore the arbitration agreement should be set aside.[107] The Court, however, found this argument unconvincing and held that the federal Act requires "piecemeal litigation" when necessary to give effect to an arbitration agreement.[108]

Second, the Court found that the order in which the two forums, state and federal, obtained and exercised their jurisdiction supported the court of appeals's refusal to defer to state court jurisdiction.[109] After expressing its view that priority is not to be measured in terms of which complaint was filed first, but rather in terms of how much progress has been made in the respective forums, the Court found that greater progress had been made in the federal forum and thus federal jurisdiction was warranted.[110] The Court buttressed its argument with the Congressional intent embodied in the federal Act to "move parties to an arbitrable dispute out of court and into arbitration as quickly and easily as

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case. *Moses H. Cone*, 460 U.S. at 16. The balance is initially heavily weighted in favor of the exercise of federal jurisdiction. *Id.*

103. *Moses H. Cone*, 460 U.S. at 19.

104. *Id.* at 19-21.

105. *Id.*

106. Ness, *supra* note 92, at 5-6.

107. *See, e.g.*, County of Jefferson v. Barton-Douglas Contractors, Inc., 282 N.W.2d 155, 159 (Iowa 1979) (arbitration stayed); Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc., 308 Minn. 20, 24, 240 N.W.2d 551, 553 (1976) (same); J.F. Inc. v. Vicik, 99 Ill. App. 3d 815, 820-21, 426 N.E.2d 257, 262 (1981) (same).

108. *Moses H. Cone*, 460 U.S. at 19-21. The Court relied on several decisions of the federal courts of appeals: C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977); Acevedo Maldonado v. P.P.G. Indus., Inc., 514 F.2d 614 (1st Cir. 1975); Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co., 408 F.2d 606 (2d Cir. 1969). *Moses H. Cone*, 460 U.S. at 20 n.23. This represents the first occasion where the Court was unable to base its holding on a procedural arbitration issue by strictly interpreting the language of the federal Act. *Cf.* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (section 4 provides the "explicit" rule on the separability issue); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956) (section 2 requires a transaction in commerce before the federal Act is applied).

109. *Moses H. Cone*, 460 U.S. at 21.

110. *Id.* at 21-23.

possible."[111] The Court saw the district court's stay of arbitration pending the outcome of the state court litigation as frustrating this intent and, in effect, chastised the lower court for its action.[112]

Third, the Court found another factor — which forum's law, federal or state, provides the rule of decision in a given case — to be instructive in determining which tribunal is proper.[113] The applicability of federal law usually supports the federal court's exercise of jurisdiction, whereas state law applicability usually favors surrender of federal court jurisdiction.[114] In *Moses H. Cone*, however, when considering the impact of the choice of law on the choice of forum, the Court found that "[f]ederal law in terms of the Arbitration Act governs that issue in either state or federal court."[115] The Court's finding that the federal Act applied in both forums actually weighed against the federal court's exercise of its jurisdiction[116] and thus was dicta.[117] This was, however, a telltale indication of the Court's recognition of the applicability of the federal Act as substantive federal law in state courts and confirmed the reconciliation made by Judge Medina twenty-four years earlier in *Robert Lawrence*.[118]

Once the Court was satisfied that the federal Act provided the rule of decision in *Moses H. Cone*, it considered the dispute that had initiated the litigation — whether the issue of timeliness of demand for arbitration is to be decided by the arbitrator or the court. Unlike the issue of separability in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[119] the Court in *Moses H. Cone* found the federal Act silent on the timeliness question.[120] As a result of this silence, the Court was forced to resort to the "liberal federal policy favoring arbitration agreements"[121] as support for its holding that the timeliness issue is arbitrable.[122] The Court found that the "Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in

111. *Id.* at 22.
112. *Id.* It appears that as long as a section 4 petition is filed with a federal court as soon as state-court proceedings are initiated, no federal district court would be justified in refusing to exercise its jurisdiction over the matter, provided the usual prerequisite jurisdictional elements are present. *See* Ness, *supra* note 92, at 6.
113. *Moses H. Cone*, 460 U.S. at 23-26.
114. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 667 (1978) (Blackmun, J., concurring) (case involves issues of federal law); *id.* at 676-77 (Brennan, J., dissenting) (same); *Colorado River*, 424 U.S. at 825-26 (same).
115. *Moses H. Cone*, 460 U.S. at 24.
116. Because the federal Act is applicable in both forums, its status as federal law has less impact on the choice of forum. The Court, however, pointed out that its "task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction . . . ; rather, the task is to ascertain whether there exist 'exceptional' circumstances . . . to justify the *surrender* of that jurisdiction." *Id.* at 25-26 (emphasis in original).
117. *See* Southland Corp. v. Keating, 465 U.S. 1, 24 (1984) (O'Connor, J., dissenting).
118. *See supra* notes 71-73 and accompanying text.
119. *See supra* notes 85-86 and accompanying text.
120. *See Moses H. Cone*, 460 U.S. at 24-25.
121. *Id.*
122. *Id.*

favor of arbitration."[123]

The probable inadequacy of state court proceedings to protect Mercury's rights was cited as another factor supporting surrender of the state court's jurisdiction.[124] After indicating that state courts are obliged to grant stays of litigation pending arbitration under section 3 of the federal Act,[125] the Court expressed its concern as to whether the same is true of an order to arbitrate under section 4.[126] The uncertainty of the applicability of section 4 in state court was used to demonstrate the potential inadequacy of available remedies in that forum.[127] This uncertainty was based upon the language of section 4 which provides that a party aggrieved by another's refusal to arbitrate "may petition any United States District Court"[128] in order to compel arbitration.[129] The Court expressed its concern that a party able to effect a stay of court proceedings pending arbitration in state court via section 3 may be unable to compel arbitration in the same state court via section 4, and therefore may be forced to resort to a separate federal court action. This, it was argued, would be "a pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act."[130] The Court's language in *Moses H. Cone* is clear in its intent to direct state courts to provide the section 4 remedy, regardless of its jurisdictional inapplicability there. In a state court case with diverse parties, one party's resistance to arbitration following a section 3 stay would result in the filing of a separate federal action to compel arbitration under section 4. This would not only be costly and inefficient, but could also be seen as an expression of a lack of good faith on behalf of the resisting party.

### *B.* Southland Corp. v. Keating

Speculation as to the propriety of commanding the state courts to invoke section 4 was further emphasized in a more recent decision of the Supreme Court, *Southland Corp. v. Keating*.[131] In *Southland*, doubt was cast not only upon the use of section 4 in state courts , but also upon the use of section 3, which the Court in *Moses H. Cone* had stated would be applicable in state courts.[132] *Southland* considered the constitutionality

123. *Id.* The Court listed several issues that it viewed as arbitrable: "construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*
124. *Id.* at 26-27.
125. *Id.* at 26-27, 26 n.35.
126. *Id.* at 26-27.
127. *Id.* The court noted that in a factual situation such as the one presented in *Moses H. Cone*, where the party seeking to avoid arbitration is the one from whom performance or payment is due, a section 3 stay is inadequate: "It leaves the recalcitrant party free to sit and do nothing — neither to litigate nor to arbitrate." *Id.*
128. 9 U.S.C. § 4.
129. *Moses H. Cone*, 460 U.S. at 26 & n.35.
130. *Id.* at 27.
131. 465 U.S. 1 (1984).
132. *See supra* note 125 and accompanying text.

of a section of the California Franchise Investment Law (CFIL)[133] which was interpreted to require *judicial* consideration of claims brought under the statute and, therefore, resulted in the state court's refusal to enforce the parties' agreement to arbitrate such claims.[134] Keating filed a class action against Southland Corporation on behalf of approximately 800 California 7-11 franchises alleging, in addition to contract violations, a violation of the disclosure requirements of the CFIL.[135] Southland Corporation's motion to compel arbitration was granted on all claims except those based on the statute.[136] On appeal, California's highest court held that the CFIL did not contravene the federal Act and that the claims asserted under the statute were not arbitrable.[137] The Supreme Court reversed, holding that Congress, in enacting the federal Act, created "a substantive rule applicable in state as well as federal courts [and] intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[138]

The Court relied largely upon legislative history[139] to support its interpretation of the federal Act as a Congressional proclamation that contemplated not only a broad purpose,[140] but also a broad reach.[141] In dissent, Justice O'Connor argued that the Act's legislative history demonstrated an intent "to require federal, not state, courts to respect arbitration agreements."[142] The majority responded by stating that the Act's express limitation to contracts involving commerce could be explained only by Congress's intent to utilize its commerce clause powers to enforce arbitration agreements in state courts.[143]

Justice O'Connor argued further that the majority's application of section 2 in *Southland* as a means for *enforcement* of the arbitration agreement exceeded that section's scope.[144] Section 2 is limited to mak-

133. CAL. CORP. CODE § 31512 (West 1977). The statute provides in pertinent part: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." *Id.*

134. Keating v. Superior Court, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

135. Keating alleged, in part, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the CFIL. *Southland Corp.*, 465 U.S. at 4.

136. *Id.*

137. Keating v. Superior Court, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

138. *Southland Corp.*, 465 U.S. at 16.

139. The Court relied on the House Report on the United States Arbitration Act, H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924), and held that the federal Act is based upon "the incontestable federal foundations of 'control over interstate commerce and over admiralty.' " *Southland Corp.*, 465 U.S. at 11 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967)).

140. *Southland Corp.*, 465 U.S. at 12-13.

141. *Id.* at 13-14.

142. *Id.* at 23 (O'Connor, J., dissenting).

143. *Id.* at 14-15.

144. *See id.* at 31 (O'Connor, J., dissenting).

ing arbitration agreements "valid, irrevocable and enforce*able*,"[145] but does not, in and of itself, provide for specific enforce*ment*.[146] The right of specific enforcement of an arbitration agreement is available under section 4. Justice O'Connor reasoned that if section 2 standing alone creates this right, the enforcement provisions, sections 3 and 4, are rendered largely superfluous.[147] In an attempt to rebut this contention, the majority stated that its holding in *Southland*, preempting a state statute that withdraws power to enforce arbitration agreements, does not mean that sections 3 and 4 of the federal Act apply in proceedings in state courts,[148] hence calling into question the language in *Moses H. Cone* to the effect that section 3 is applicable in state courts.[149]

Although it may be true that sections 3 and 4 are not per se applicable in state courts, the Court has clearly mandated the enforceability of arbitration agreements, and in doing so has created a need for procedures necessary to implement this mandate. It is irrelevant whether the procedures used in state courts are those provided by the federal Act, or those provided by a synonomous state statute.[150] The ultimate outcome — the undisputable enforcement of arbitration agreements — will be the same.

### *C. Silence on Procedural Issues Warrants Legislative Revision*

The vigor with which the Court has approached the enforceability of arbitration agreements is founded within the language of section 2. Those provisions left to carry out the Act's goals — sections 3 and 4 — are, however, jurisdictionally deficient in state courts.[151] Regardless, the court's intent to encourage state court submission to these provisions is clear.

If the Court should seek in a later decision to mandate the application of section 3 in state courts, it could seize upon that section's ambiguous language providing for a stay of court proceedings "in any of the courts of the United States."[152] It may be argued that state courts are courts "of" the United States.[153] The Supreme Court could support its holding with the statement in *Bernhardt v. Polygraphic Co. of America*

145. 9 U.S.C. § 2 (1982) (emphasis added).
146. *Southland Corp.*, 465 U.S. at 31-32.
147. *Id.* at 31 n.20 (O'Connor, J., dissenting).
148. *Id.* at 16 n.10.
149. *See supra* note 125 and accompanying text.
150. A majority of states have enacted their own arbitration acts. Almost all have adopted the Uniform Arbitration Act or some variance thereof. *See* 7 U.L.A. 1 (Supp. 1985). Although the Uniform Arbitration Act is in many respects similar to the federal Act, judicial interpretation in the various states differ. *Id.*
151. *See Southland Corp.*, 465 U.S. at 16 n.10.
152. 9 U.S.C. § 3 (1982).
153. *See Moses H. Cone*, 460 U.S. at 26 n.34. *But see Southland Corp.*, 465 U.S. at 29 n.18 (O'Connor, J., dissenting). Justice O'Connor states that " 'courts of the United States' is a term of art whose meaning is unmistakable. State courts are 'in' but not 'of' the United States." *Id.*

that "Sections 1, 2, and 3 are integral parts of a whole."[154] Thus, it may be argued that the jurisdictional provisions of section 2 apply equally to section 3. Further support may be garnered from state court precedent. Many state courts have recognized that applicability of section 3 is necessary to carry out Congress's intent to mandate the enforcement of arbitration agreements and have liberally applied that section.[155]

Section 4, unlike section 3, is not ambiguous in its terms[156] and is not within the realm of the Court's statement in *Bernhardt*. Still, because section 4 provides the remedy of specific performance of an agreement to arbitrate, the section is necessary to insure the implementation of section 2.[157] Although the scenario described in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, encouraging a party in a state court proceeding to resort to a separate action in federal court to obtain a section 4 order to arbitrate,[158] is available in a diversity situation, a question remains as to that party's options if there is no diversity. Once a party has obtained a section 3 stay order on the basis of a contract evidencing a transaction in commerce, the party conceivably will be unable to force arbitration because of the unavailability of a section 4 type remedy in state court and may also be denied access to a federal forum because there is no diversity. Furthermore, prior federal court decisions indicate conclusively that the federal Act does not create independent federal question jurisdiction.[159]

The need to rewrite the Act is supported by its failure to provide adequate procedural guidelines for the enforcement of arbitration agreements. This failure is best exemplified by the manner in which the Court has addressed the procedural issues that have confronted it. In the 1967 *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* decision, the Court addressed the procedural issue of separability and appeared reluctant to rely on policy and legislative history to support its holding that section 4 requires an allegation of fraud to be directed expressly to an agreement to arbitrate in order to void that agreement.[160] However, in the Court's most recent decisions, *Moses H. Cone* and *Southland Corp. v. Keating*, such was not the case. In *Moses H. Cone*, the Court relied on

154. *See supra* note 51 and accompanying text.

155. *See, e.g.*, DiMambro-Northend Assoc. v. Blanck-Alvarez, 251 Ga. 704, 309 S.E.2d 364 (1983) (relying on *Moses H. Cone*); Allison v. Medicab Int'l, Inc., 92 Wash.2d 199, 597 P.2d 380 (1979) (entire Act applies in state court); United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, *cert. denied*, 484 U.S. 911 (1979) (same).

156. Section 4 is specific in that it permits a party aggrieved by another's refusal to arbitrate to "petition any United States district court." 9 U.S.C. § 4 (1982).

157. *See supra* notes 126-30 and accompanying text.

158. *See supra* notes 124-30 and accompanying text.

159. *See, e.g., Moses H. Cone*, 460 U.S. 1, 25 n.32 (federal Act does not create federal question jurisdiction); Commercial Metals Co. v. Balfour, Guthrie, and Co., 577 F.2d 264, 269 (5th Cir. 1978) (same); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 408 (2d Cir. 1959) (same).

160. *See supra* notes 83-86 and accompanying text.

the liberal federal policy favoring arbitration agreements in determining that the issue of timeliness of demand is one to be decided by the arbitrator.[161] In *Southland*, the Court relied largely upon legislative history to support its finding that section 2 applies in state courts.[162] Thus, it is apparent that the Court has stretched statutory interpretation to its limit in order to resolve procedural issues under the Act.

Another procedural issue, that of the permissibility of superimposing class actions on arbitration proceedings, remains unclear under the Act. In *Southland*, the parties failed to dispute this issue at the state court level, and the Supreme Court therefore refused to pass judgment.[163] The California Supreme Court, however, concluded that such actions were permissible, but was similarly unable to base its decision on the face of the federal Act.[164] This presents an example of a state court confronted by the Act's facial silence on a specific procedure issue.[165]

The Court's sweeping policy of enforcing arbitration agreements has developed as a result of the lack of statutory guidelines in the form of a modern and workable arbitration statute. Implementation of this policy in federal courts arguably is tolerable. Consideration of the problems inherent in the interpretation of the ambiguous federal statute in fifty separate state jurisdictions, however, further underscores the need for legislative revision.

Legislative revision should address the procedural problems arising under the Act. Such revisions should prescribe methods for undertaking class actions in arbitration, rules governing consolidation of arbitrable disputes, and guidelines for establishing when a party has waived its right to enforce an arbitration agreement. Although judicial decisions already have determined that the arbitrator, not the court, decides the issue of timeliness of demand,[166] and that the separability doctrine governs the issue of fraud in the inducement of a container contract,[167] Congressional review of these decisions is appropriate. Finally, provisions must be added indicating Congress's intent to exercise its commerce power not only through section 2, but also through every section of the Act. Only in this

161. *See supra* notes 119-23 and accompanying text.
162. *See supra* notes 139-41 and accompanying text.
163. *Southland Corp.*, 465 U.S. at 8-9.
164. *See* Keating v. Superior Court, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984). Without stating that the federal Act controlled, the court analogized cases permitting consolidation of arbitration proceedings under the Act to the permissibility of class actions in arbitration. *Id.* at 610-11, 645 P.2d at 1208, 183 Cal. Rptr. at 376.
165. A death of cases address the issue of class actions in arbitration. For discussion, see Keating v. Superior Ct., 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984); Keating v. Superior Ct., 109 Cal. App. 3d 858, 167 Cal. Rptr. 481 (1980), *rev'd*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984); Note, *Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787 (1981).
166. *See supra* notes 120-23 and accompanying text.
167. *See supra* notes 85-86 and accompanying text.

manner will it be clear that the entire Act applies in state courts. Further, the scenario described in *Moses H. Cone*, where a party obtains a stay via section 3 in state court but is unable to compel arbitration via section 4,[168] will be avoided.

## IV. THE THRESHOLD QUESTION — WHAT IS A CONTRACT "EVIDENCING A TRANSACTION INVOLVING COMMERCE?"

### *A. Statutory Interpretation*

It is undisputed that, except in admiralty transactions, for an arbitration agreement to come within the ambit of the federal Act it must be contained in a "contract evidencing a transaction involving commerce."[169] Although "commerce" is defined in section 1 of the Act as "commerce among the several states,"[170] the terms "evidencing" and "involving" remain undefined.

These terms have been targeted by those seeking to narrow the scope of the Act. A strict interpretation of the term "contract evidencing a transaction involving commerce" would seem to require the contract, on its face, to reveal that an interstate transaction is to take place.[171] Similarly, the use of the term "involving" commerce, in lieu of the more traditional term "affecting" commerce, has been the basis of an argument that Congress, when conceiving the federal Act, did not intend to exercise the full extent of its commerce clause powers.[172] A restricted exercise of this power is also supported by consideration of Congress's relatively deflated powers under the commerce clause in 1925 when the federal Act was enacted.[173]

### *B. The Lumbard Test*

Notwithstanding these contrary arguments, courts have broadly construed the commerce requirement when applying the federal Act. Although numerous decisions have addressed the issue,[174] few have attempted to develop a test to determine when a contract is one "evidencing a transaction involving commerce." In *Metro Industrial Painting Co. v. Terminal Construction Co.*,[175] Chief Judge Lumbard made what is perhaps the only bona fide attempt.[176] The Chief Judge stated that the sig-

168. *See supra* notes 124-30, 158 and accompanying text.
169. 9 U.S.C. § 2 (1982).
170. 9 U.S.C. § 1 (1982).
171. *See* Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring) (recognizing and rejecting argument that Act requires a contract, on its face, to reveal an interstate transaction).
172. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 409-10 & n.3 (1966) (Black, J., dissenting).
173. *See* Ness, *supra* note 92, at 8 n.32.
174. *See infra* notes 179, 184.
175. 287 F.2d 382 (2d Cir. 1961).
176. *See* Ness, *supra* note 92, at 7-8 n.30.

nificant question "is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity."[177] This interpretation, Chief Judge Lumbard reasoned, is supported by a Congressional intent not to bind to arbitration parties who did not choose to be bound, but rather "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges or . . . by state courts or legislatures."[178]

A significant number of decisions, though not a majority, have relied on this reasoning.[179] In *R.J. Palmer Construction Co. v. Wichita Band Instrument Co.*,[180] the court admitted that the evidence presented came perilously close to failing to meet the interstate commerce requirement.[181] Relying on Chief Judge Lumbard's reasoning,[182] however, the court held that the construction contract was one involving interstate commerce because it "contemplated" the interstate shipment of construction materials and was entered into by parties aware that the completed structure was to be used to house goods moved in interstate commerce.[183]

Numerous arbitration agreements arising out of construction contracts have been found to involve interstate commerce as required by the federal Act. Courts have considered a variety of factors, including the parties' principal places of business, the interstate transport of construction materials and equipment, the interstate travel of construction and design personnel, the location of contract sureties, and the purpose for which a structure was constructed.[184] In view of the broad scope of these

177. Metro Industrial Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring) (emphasis in original).

178. *Id.* Although it did not recognize the test proferred by Chief Judge Lumbard, the Supreme Court has cited this language with approval. *See* Southland Corp. v. Keating, 465 U.S. 1, 13 (1984).

179. *See* Gavlick Constr. Co. v. H.F. Campbell Co., 389 F. Supp. 551 (W.D. Pa. 1975) (dicta); Garfield & Co. v. Wiest, 308 F. Supp. 1107 (S.D.N.Y. 1970); Monte v. Southern Del. County Auth., 212 F. Supp. 604 (E.D. Pa. 1963); Burke County Public Schools v. Shaver Partnership, 303 N.C. 408, 279 S.E.2d 816 (1981); Riverfront Properties Ltd. v. Max Factor III, 460 So.2d 948 (Fla. App. 1984); Cahoon v. Ziman, 60 N.C. App. 226, 298 S.E.2d 729 (1983); R.J. Palmer Constr. Co. v. Wichita Band Instrument Co., 7 Kan. App. 2d 363, 642 P.2d 127 (1982).

180. 7 Kan. App. 2d 363, 642 P.2d 127 (1982).

181. *Id.* at 365, 642 P.2d at 129.

182. *Id.* at 367, 642 P.2d at 130.

183. *Id.*

184. *See, e.g.*, American Home Assurance Co. v. Vecco Concrete Constr. Co., 659 F.2d 961 (4th Cir. 1980) (materials, equipment, personnel, bonding company); Mastmead MAC Drilling Corp. v. Fleck, 549 F. Supp. 854 (S.D.N.Y. 1982) (parties); Fairchild & Co. v. Richmond F. & P.R.R., 516 F. Supp. 1305 (D.C.D.C. 1981) (lease, financial obligations, labor, materials); John Ashe Assoc. & Envirogenics Co., 425 F. Supp. 238 (E.D. Pa. 1977) (parties, materials, personnel); C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnership, 375 F. Supp. 446 (M.D.N.C. 1974) (personnel, suppliers, bonding company); Warren Bros. Co. v. Community Bldg.

factors, it is difficult to imagine any contract arising from a major construction project that would not involve sufficient interstate commerce to fulfill the terms of the federal Act. Thus, because the Supreme Court has held that the Act applies in state courts,[185] existing state arbitration statutes are virtually preempted in construction contract disputes.[186]

## V. APPLICATION OF THE FEDERAL ACT IN STATE COURTS — THE EFFECT ON MARYLAND LAW

### *A. Timeliness of Demand — Is* Bel Pre *Good Law?*

Several state courts, relying on *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* and *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, recognized the broad reach of the federal Act long before the Supreme Court's decision in *Southland Corp. v. Keating*.[187] For example, the Texas Court of Appeals faced this issue over twelve years ago in *Mamlin v. Susan Thomas, Inc.*[188] There, a common law rule invalidated arbitration agreements.[189] This common law rule was disregarded, however, because the contract involved interstate commerce, and thus the federal Act applied.[190]

Although some courts have refused,[191] most have applied the Act in state court proceedings if appropriate and properly pleaded.[192] Although

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Corp., 386 F. Supp. 656 (M.D.N.C. 1974) (personnel, materials, bonding company); Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984) (coal mining leases); R.J. Palmer Constr. Co. v. Wichita Band Instrument Co., 7 Kan. App. 2d 363, 642 P.2d 127 (1982) (materials, use of structure); Northwest Mechanical, Inc. v. Public Util. Comm., 283 N.W.2d 522 (Minn. 1979) (materials).

185. *See supra* notes 9, 114-18, 138 and accompanying text.

186. Maryland has its own arbitration act: Maryland Uniform Arbitration Act, MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 3-234 (1982). The Maryland Uniform Arbitration Act was enacted in recognition of arbitration's primary purpose to "discourage litigation and to foster voluntary resolution of disputes in a forum created, controlled and administered according to the parties' agreement to arbitrate." Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974) (citing Maietta v. Greenfield, 267 Md. 287, 291, 297 A.2d 244, 246 (1972)), *rev'd on other grounds*, 274 Md. 307, 334 A.2d 526 (1975).

187. *See, e.g.*, Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex. 1973) (relying on both *Prima Paint* and *Robert Lawrence*); Pathman Constr. Co. v. Knox County Hosp. Ass'n, 164 Ind. App. 121, 326 N.E.2d 844 (1975) (same); Pinkis v. Network Cinema Corp., 9 Wash. App. 337, 512 P.2d 751 (1973) (same).

188. 490 S.W.2d 634 (Tex. 1973).

189. *Id.* at 636 n.2. The Texas common law rule required parties entering contracts subject to arbitration to do so only "upon the advice of counsel to both parties as evidenced by counsel's signature thereto." *Id.*

190. *Id.* at 636-37.

191. *See* Kress Corp. v. Edward C. Levy Co., 102 Ill. App. 3d 264, 430 N.E.2d 593 (1981); Pullman, Inc. v. Phoenix Steel Corp., 304 A.2d 334 (Del. 1973).

192. *See* Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984); Northwest Mechanical, Inc. v. Public Util. Comm., 283 N.W.2d 522 (Minn. 1979); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex. 1973); Palmer Constr. Co. v. Wichita Band Instrument Co., 7 Kan. App. 2d 363, 642 P.2d 127 (1982); Pathman Constr. Co. v. Knox County Hosp. Ass'n, 164 Ind. App. 121, 326 N.E.2d 844 (1975); Pinkis v. Network Cinema Corp., 9 Wash. App. 337, 512 P.2d 751 (1973).

Maryland courts have yet to apply the Act,[193] it is arguable that had the federal Act as construed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* been applied in the 1975 case of *Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc.*[194] the court of appeals would have reached an opposite conclusion.

In *Bel Pre*, a dispute arose between the parties with regard to payment on a contract for the construction of a nursing home. Bel Pre Medical Center, Inc. moved to compel arbitration pursuant to an arbitration clause in the contract.[195] Frederick Contractors Inc. did not deny that the substantive dispute was arbitrable under the contract terms, but contended that Bel Pre Medical Center, Inc. had waived its right to arbitrate by failing to file a timely demand for arbitration, and that the issue of compliance with such a procedural prerequisite was to be decided by the court, not the arbitrator.[196] Although the Court of Special Appeals of Maryland held that the issue of timeliness was to be decided by the arbitrator,[197] the court of appeals reversed, and without considering the federal Act, held that the procedural issue should be decided by a court.[198]

The court of appeals's position on this issue is contrary to the Supreme Court's 1983 decision in *Moses H. Cone*.[199] Where the subject contract evidences a transaction in commerce, *Bel Pre* is superseded by the holding in *Moses H. Cone* that the timeliness issue is for the arbitrator to decide.[200] Although *Bel Pre* is no longer binding precedent in cases with contracts involving interstate commerce, the *Bel Pre* rule still may apply in those few situations where there is no interstate commerce. Following *Bel Pre* in those cases, however, would only promote confusion and uncertainty. For example, if a party is faced with a dispute under circumstances similar to those in *Bel Pre*, the arbitrability of the procedural issue will turn on the presence of interstate commerce. Sec-

193. The Court of Appeals of Maryland considered application of the federal Act in Litton Bionetics v. Glen Constr. Co., 292 Md. 34, 437 A.2d 208 (1981). *See infra* notes 223-32 and accompanying text.

194. 274 Md. 307, 334 A.2d 526 (1975).

195. *Id.* at 308-09, 334 A.2d at 527-28. The arbitration clause was Article 7.10 of A.I.A. (American Institute of Architects) form A201, General Conditions of the Contract for Construction (1967 ed.). *Id.* at 308, 310-11, 334 A.2d at 528-29.

196. Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md. App. 307, 314, 320 A.2d 558, 562 (1974), *rev'd*, 274 Md. 307, 334 A.2d 526 (1975).

197. *Id.* at 330, 320 A.2d at 572. The opinion was authored by the late Honorable Rita C. Davidson while she was an Associate Judge of the Court of Special Appeals of Maryland. *Id.* at 309, 320 A.2d at 560. The late Judge Davidson, who later became an Associate Judge of the Court of Appeals of Maryland, was considered especially well versed in arbitration law. Although reversed, this opinion was termed in several succeeding court of appeals decisions as a "scholarly opinion." *See* Memorial Services for the Honorable Rita C. Davidson, Associate Judge Court of Appeals of Maryland, April 19, 1985, *reprinted in* 302 Md. LVIII, LX (1985) (Memorial Minute presented by Honorable Richard P. Gilbert).

198. Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc., 274 Md. 307, 314, 334 A.2d 526, 530 (1975).

199. *See supra* notes 121-23 and accompanying text.

200. *Id.*

tion 2 of the federal Act would apply in state court if the contract "evidenc[ed] a transaction involving commerce,"[201] and consequently the timeliness issue would be decided by the arbitrator regardless of a lack of diversity. If interstate commerce was not present, however, *Bel Pre* would require the court to decide the timeliness issue. The potential for inconsistent results is rampant.

Such inconsistent results are suspect, especially when one considers that the Maryland policy with regard to the enforcement of arbitration agreements parallels that prescribed by the federal Act. The Maryland Uniform Arbitration Act,[202] enacted in 1965,[203] embodies a legislative policy favoring executory agreements to arbitrate.[204] Furthermore, arbitration is viewed as a "favored action" in Maryland.[205] In *Moses H. Cone*, the Supreme Court found this same policy embodied in the federal Act to support a holding that the arbitrator, not the court, decides the timeliness issue.[206] Hence, it appears that consistent policies will nevertheless give rise to inconsistent results on this issue. To avoid this inconsistency, and to further a policy of promoting arbitration, the Maryland court should reconsider the rule set forth in *Bel Pre*.

Maryland's highest court had just that opportunity in the 1983 case of *Gold Coast Mall, Inc. v. Lamar Corp.*,[207] decided less than ten months after the Supreme Court's *Moses H. Cone* decision. In *Gold Coast*, the court of appeals was again faced with an issue of whether a party had waived its right to arbitrate by its failure to comply with procedural prerequisites set forth by contract.[208] As in *Bel Pre*, the procedural issue in *Gold Coast* was decided by the court and not the arbitrator.[209] The court applied Maryland's Uniform Arbitration Act;[210] the potential conflict with the federal Act, however, never arose because neither party attempted to demonstrate that the contract was one involving com-

201. 9 U.S.C. § 2 (1982).
202. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 3-234 (1984).
203. Maryland Uniform Arbitration Act, 1965 Md. Laws, ch. 231, § 2.
204. Gold Coast Mall, Inc. v. Lamar Corp., 298 Md. 96, 103, 468 A.2d 91, 95 (1983); Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 448, 450 A.2d 1304, 1306 (1982); C. W. Jackson & Assoc. v. Brooks, 289 Md. 658, 666, 426 A.2d 378, 382 (1981).
205. Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974), *rev'd on other grounds*, 274 Md. 307, 334 A.2d 526 (1975).
206. *See supra* notes 120-23 and accompanying text.
207. 298 Md. 96, 468 A.2d 91 (1983).
208. *Id.* at 99, 468 A.2d at 93. The arbitration agreement required that, in the event of a disagreement, an arbitrator be appointed by each party within fifteen days after a sixty-day negotiation period. Gold Coast Mall failed to abide by this provision. *Id.* at 101-02, 468 A.2d at 94.
209. *Id.* at 108, 468 A.2d at 97-98. In determining whether to decide the procedural issue, the court relied on Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc., 274 Md. 307, 334 A.2d 526 (1975). Gold Coast Mall, Inc. v. Lamar Corp., 298 Md. 96, 108 n.3, 468 A.2d 91, 98 n.3 (1983).
210. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 3-234 (1984).

merce.[211] Notwithstanding the absence of interstate commerce, the *Gold Coast* court could have seized the opportunity to criticize the *Bel Pre* rule and to dispel the inconsistency between that rule and the rule announced in *Moses H. Cone*.

The court in *Gold Coast* refused to decide a second issue—whether the substantive dispute fell within the scope of the arbitration agreement.[212] The court held that questions of substantive arbitrability should in most cases be left for the arbitrator.[213] Hence, under Maryland's Uniform Arbitration Act,[214] an initial determination is made as to whether a disputed issue is substantive or procedural. An issue regarding the former is left to the arbitrator, and an issue regarding the latter is submitted to the court. *Gold Coast* demonstrates the Maryland court's alignment on the issue of substantive arbitrability with the Supreme Court's interpretation of the federal Act.[215]

Although the court thwarted the arbitrator's jurisdiction on the procedural issue in *Gold Coast*, the ultimate outcome was consistent with a policy of promoting arbitration. The court held that Gold Coast Mall's failure to comply with the procedural prerequisites did not amount to a waiver, and therefore arbitration should be compelled.[216] The court's denial of Lamar's attempt to avoid arbitration is indicative of how similar procedural disputes will be viewed in the future. It is unlikely that mere

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211. There was no discussion of the interstate commerce issue. The agreement in dispute was a lease. *Gold Coast Mall*, 298 Md. at 101-02, 468 A.2d at 94-95. Whether the lease agreement was a transaction involving commerce is questionable. *Compare* Fairchild & Co. v. Richmond F. & P. R.R., 516 F. Supp. 1305 (D.C.D.C. 1981) (lease agreement contemplating extensive commercial venture serving Washington, D.C., Maryland, and Virginia is a contract involving commerce) *with* Paramore v. Inter-Regional Financial Group Leasing Co., 68 N.C. App. 659, 316 S.E.2d 90 (1984) (where activity under lease occurred in one state, and only event occurring elsewhere was lessor's receipt of rental payments, contract did not involve commerce).

212. *Gold Coast Mall*, 298 Md. at 108, 468 A.2d at 97.

213. *Id.* at 107-08, 468 A.2d at 97. The issue of substantive arbitrability arises when the parties are in conflict as to the scope of an arbitration agreement. Once such an issue arises, the natural question is who decides — the court or the arbitrator. According to *Gold Coast*, the legislative policy in favor of the enforcement of arbitration agreement dictates that this issue should be left to the arbitrator. *Id.* at 107, 468 A.2d at 97.

214. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 3-234 (1984).

215. In *Moses H. Cone*, the court appeared to disregard the distinction between substantive and procedural issues when considering arbitrability. *See supra* notes 120-23 and accompanying text.

216. *Gold Coast Mall*, 298 Md. at 114, 468 A.2d at 100. The Court of Appeals of Maryland previously addressed the waiver issue in Charles J. Frank, Inc. v. Associated Jewish Charities, 294 Md. 443, 450 A.2d 1304 (1982), where it was held that litigation of one issue subject to arbitration does not constitute a waiver of other unrelated arbitrable issues arising from the same contract. *Id.* at 455, 450 A.2d at 1310. *See* Note, *Contract Law — Waiver of Arbitration Rights by Litigating One Issue is Not a Waiver of the Same Rights as to Unrelated Issues*, Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 450 A.2d 1304 (1982), 12 U. BALT. L. REV. 585 (1983).

disregard of procedural prerequisites will be sufficient to demonstrate a party's intent to waive the right to enforce arbitration.

### *B. The Prospect of Duplicative Proceedings as a Basis for Avoiding Arbitration*

In *Moses H. Cone*, the Supreme Court stated that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."[217] Thus, under the federal Act, an attempt by one party to an arbitration agreement to join a party not similarly bound will not warrant undermining the agreement, regardless of the potential inconsistency of results.[218]

The Maryland position on this issue was expressed in *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.*,[219] and is in accord with *Moses H. Cone*. In *Frank*, a construction project owner entered into two separate contracts: the first was with the general contractor and contained provisions for arbitration; the second was with the project architect and lacked such provisions.[220] When a dispute arose involving all three parties, the owner sought a stay of arbitration and argued that he otherwise would be subject to duplicative arbitration and judicial proceedings.[221] The court of appeals rejected the owner's argument, again relying on the legislative policy favoring enforcement of executory agreements to arbitrate, and held that this policy warranted enforcement of the arbitration agreement, regardless of the prospect of duplicative proceedings and the potential for inconsistent results.[222]

### *C. Consolidation of Arbitration Proceedings*

The issue of the consolidation of arbitration proceedings was addressed by the court of appeals in another construction industry case, *Litton Bionetics, Inc. v. Glen Construction Co.*[223] In *Litton*, the owner entered into arbitration agreements with both the general contractor and the project architect.[224] After arbitrable disputes based on common subject matter arose between the owner and the architect and between the owner and the contractor, the owner filed a demand for arbitration and sought consolidation of both arbitration proceedings.[225] Neither agree-

217. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983). *See supra* notes 104-08 and accompanying text.
218. *See supra* notes 104-08 and accompanying text.
219. 294 Md. 443, 450 A.2d 1304 (1982).
220. *Id.* at 455, 450 A.2d at 1310.
221. *Id.* This is a tactic commonly used to avoid agreements to arbitrate. *See supra* notes 104-08 and accompanying text.
222. Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 459-60, 460 A.2d 1304, 1311-12.
223. 292 Md. 34, 437 A.2d 208 (1981).
224. *Id.* at 36-37, 437 A.2d at 209.
225. *Id.* at 38, 437 A.2d at 210.

ment expressly required or prohibited consolidation.[226] The court found, however, that provisions of the Maryland Uniform Arbitration Act,[227] providing that an arbitration agreement "confers jurisdiction on a court to enforce the agreement,"[228] permitted the exercise of judicial power to order consolidation.[229]

In *Litton*, the owner not only sought to support its consolidation argument with the provisions of the Maryland Uniform Arbitration Act, but also contended in the alternative that the federal Act applied and similarly mandated consolidation.[230] The court of appeals surveyed cases decided under the federal Act and noted that these cases interpreted the federal Act to allow consolidation.[231] Thereafter, the court implied a willingness to apply the federal Act in proper circumstances, but found that no difference would result in the instant case and, therefore, refused to rule on the issue of the federal Act's applicability.[232]

## VI. CONCLUSION

The Supreme Court's recent decisions in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* and *Southland Corp. v. Keating* have displayed an unequivocal judicial policy mandating the enforcement of arbitration agreements in both federal and state courts. *Southland* declares that state statutes impeding arbitratrion will not be tolerated under the auspices of the federal Act. *Moses H. Cone*, on the other hand, raises a presumption that questions of procedural arbitrability will never warrant access to the courts.

Under Maryland law, however, questions of procedural arbitrability

226. *Id.* at 43, 437 A.2d at 213.
227. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 3-234 (1984).
228. *Id.* § 3-202 (1984).
229. Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 52-53, 437 A.2d 208, 217-18 (1981). The court found itself vested with the power to order the consolidation of arbitration agreements because of the statutory jurisdiction conferred upon it by the Maryland Uniform Arbitration Act. *Id.* The Uniform Act provides, in pertinent part, that "[a]n agreement providing for arbitration under the law of the State confers jurisdiction on a court to enforce the agreement and enter judgment on an arbitration award." MD. CTS. & JUD. PROC. CODE ANN. § 3-202 (1984). The court, however, distinguished the *existence* of such power from the *exercise* of such power. In instances where conflicting arbitration provisions require alteration of contract rights in order to effect consolidation, consolidation should not be ordered. The power, however, still exists; the ultimate question is whether it should be exercised. *See Litton*, 292 Md. at 52-53, 437 A.2d at 217-18. The court noted that, in determining whether to exercise the power to consolidate, a court should consider the same types of factors as those considered in determining whether to consolidate equity actions. *Id.* at 55, 437 A.2d at 219.
230. *Litton*, 292 Md. at 39, 437 A.2d at 211.
231. *Id.* at 56, 437 A.2d at 219-20.
232. *Id.* The federal Act has been applied in at least two Maryland trial court decisions. *See* Commissioners of Aberdeen v. Conoc Constr. Corp., No. 30088/37/148 (Cir. Ct. for Harford County, Jan. 4, 1984); Saint Agnes Hosp. v. Charles J. Frank, Inc., No. 84039098/E16458 (Cir. Ct. for Baltimore City, Dec. 19, 1984) (Master's Report).

are proper subjects for judicial resolution. This posture, prescribed in *Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc.* and confirmed in *Gold Coast Mall, Inc. v. Lamar Corp.* stands contrary to the federal rule announced in *Moses H. Cone*. Until Maryland chooses to recant the *Bel Pre* rule in light of *Moses H. Cone* and *Southland*, the determination of who decides procedural issues will be reduced to a determination of whether the arbitration agreement is found in a "contract evidencing a transaction involving commerce."

Remaining unclear, however, is just what degree of commerce is required before the federal Act must be applied. Federal and state courts have construed this requirement liberally, but whether these decisions reflect Congress's true intent in enacting the Act in 1925 is unclear. Also unclear is whether all sections, or only section 2 of the Act, apply in state courts in transactions involving commerce.

These ambiquities burden the summary and speedy resolution of arbitrable disputes and, therefore, point to the need for legislative revision of the Act. Failure by the legislature to address these issues will lead parties who contracted for the settlement of disputes by arbitration into the throes of the courtroom — the precise end arbitration is designed to avoid.

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