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Casenotes: Arbitration — Court, Not Arbitrator, Must Determine Threshold Issue Whether Valid Contract to Arbitrate Exists. Deferential Standard of Review Rejected; Court Must Undertake De Novo Review. *Stephen L. Messersmith, Inc. v. Barclay Townhouse Associates*, 313 Md. 652, 547 A.2d 1048 (1988)

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ARBITRATION—COURT, NOT ARBITRATOR, MUST DETERMINE THRESHOLD ISSUE WHETHER VALID CONTRACT TO ARBITRATE EXISTS. DEFERENTIAL STANDARD OF REVIEW REJECTED; COURT MUST UNDERTAKE DE NOVO REVIEW. *Stephen L. Messersmith, Inc. v. Barclay Townhouse Associates*, 313 Md. 652, 547 A.2d 1048 (1988).

In a case of first impression, the Court of Appeals of Maryland, in *Stephen L. Messersmith, Inc. v. Barclay Townhouse Associates*,<sup>1</sup> determined: (1) absent an arbitration agreement between the parties, an arbitration panel cannot validly assert jurisdiction to decide a dispute between them<sup>2</sup> and (2) the proper procedure for reviewing a jurisdictional challenge to an arbitration award is to conduct a de novo review to determine whether an agreement to arbitrate existed, giving no deference to views expressed by the arbitration panel.<sup>3</sup>

Arbitration is one of the oldest methods of settling disputes.<sup>4</sup> It is a process which provides a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions.<sup>5</sup> Under common law, parties could voluntarily agree to submit their disputes to arbitration. If an arbitrator's award was issued, it was enforced by the court unless the arbitrator was guilty of fraud or misconduct or had exceeded his authority or had made a mistake in law or fact appearing on the face of the award.<sup>6</sup> At common law, however, an arbitration agreement was revocable at will by either party at any time before an award was rendered.<sup>7</sup> Absent statutory provisions to the contrary, courts often deemed executory agreements to arbitrate future disputes void as against public policy.<sup>8</sup>

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1. 313 Md. 652, 547 A.2d 1048 (1988).

2. *Id.* at 658, 547 A.2d at 1051.

3. *Id.* at 664, 547 A.2d at 1054. The court also held that proceeding by cross-motions for summary judgment in circuit court does not amount to a waiver of de novo review. See *infra* note 78 and accompanying text.

4. M. DOMKE, COMMERCIAL ARBITRATION § 2:02 (Prac. Guide) (1987). Modern arbitration is derived from Roman law, “[w]here the arbitrator acted by virtue of contract between the parties, and his authority to decide the case came from the contract between them and himself.” *Id.* (citing A. ENGELMAN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE § 13, at 259 (1969)).

5. *Bel Pre Med. Ctr., Inc. v. Frederick Contractors, Inc.*, 21 Md. App. 307, 315, 320 A.2d 558, 563 (1974), *rev'd on other grounds*, 274 Md. 307, 334 A.2d 526 (1975).

6. *Id.* at 316, 320 A.2d at 564; see also *NF&M Corp. v. United Steelworkers of Am.*, 524 F.2d 756, 759 (3d Cir. 1975) (“If the arbitrator’s award has deviated from the plain meaning of a labor contract provision, it must find support in the contract itself or in prior practices demonstrating relaxation of the literal language.”).

7. The only remedy a party would have at common law would be a suit for damages for breach of contract. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 116 (1924).

8. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); see also J. MURRAY, MURRAY ON CONTRACTS § 265 at 532 (1974) (“[T]he early courts were very jealous of their prerogative to decide controversies and resisted any attempts to oust them of their jurisdiction.”). *But see* CORBIN, CORBIN ON CONTRACTS § 1433, at 391 (1962) (“It is confidently believed that the origin and survival of this rule as to Arbitration Agreements can

Common law governed arbitration in Maryland until the General Assembly enacted the Maryland Uniform Arbitration Act (the Act) in 1965.<sup>9</sup> The Act is a radical departure from the common law because it grants legal enforceability to arbitration agreements to settle existing as well as future disputes.<sup>10</sup> It empowers courts of general jurisdiction to compel<sup>11</sup> or stay arbitration,<sup>12</sup> and to stay court action pending arbitration.<sup>13</sup> The Act also empowers courts to vacate arbitrator's awards, and sets forth grounds and procedures for such actions.<sup>14</sup> The Act is silent, however, on the standard of review a court should apply to an arbitrator's decision on the jurisdiction of the arbitration panel to hear the dispute at issue.<sup>15</sup>

Prior to 1988, the Court of Appeals of Maryland had not addressed directly the scope of judicial review of arbitration awards under the Act. At common law, however, Maryland courts gave great deference to the arbitrator's award unless it clearly was the result of partiality or corruption.<sup>16</sup> Courts refused to review arbitration awards on the merits because "the purpose of arbitration is 'to compose disputes in a simple and inexpensive manner'" and extensive judicial review would defeat this purpose.<sup>17</sup> As the court of appeals in *Continental Milling & Feed Co. v. Doughnut Corp. of America*<sup>18</sup> stated:

The reason for this doctrine is that an award by arbitrators is the decision of a tribunal which the parties themselves have created, and by whose judgment they have mutually agreed to abide. Very often these tribunals are without legal training, and the purpose of the parties in creating them is to have their disputes settled speedily and inexpensively by a decision which will be final and unalterable. Obviously, if the decision of such a tribunal should be subject to review under the strict rules of the law, the arbitration, instead of promoting economy and fi-

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not be explained by any supposed jealousy of their 'jurisdiction' by the judges. . . .").

9. 1965 Md. Laws 243 (codified as amended at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1984)).
10. *Bel Pre Med. Ctr. v. Frederick Contractors, Inc.*, 21 Md. App. at 319-20, 320 A.2d at 565.
11. MD. CTS. & JUD. PROC. CODE ANN. § 3-207 (1984).
12. *Id.* § 3-208.
13. *Id.* § 3-209; see also *McCormick v. 9690 Deercro Road*, 79 Md. App. 177, 556 A.2d 292 (1989).
14. MD. CTS. & JUD. PROC. CODE ANN. § 3-224; see also *Board of Educ. of Charles County v. Education Ass'n of Charles County*, 286 Md. 358, 366, 408 A.2d 89, 91-93 (1979).
15. See *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 657-60, 547 A.2d 1048, 1051-53 (1988).
16. *Schreiber v. Pacific Coast Fire Ins. Co.*, 195 Md. 639, 647, 75 A.2d 108, 112 (1949).
17. *Board of Educ. of Prince George's County v. Prince George's County Educators' Ass'n*, 309 Md. 85, 98, 522 A.2d 931, 937 (1987) (quoting *Roberts v. Consumers Can Co.*, 102 Md. 362, 368-69, 62 A. 585, 587 (1905)).
18. 186 Md. 669, 48 A.2d 447 (1946).

nality, would generally be but a forerunner to protracted litigation.<sup>19</sup>

Thus, mere errors of law or fact would not constitute grounds for a court to vacate or refuse enforcement of an arbitration award.<sup>20</sup>

Similarly, under the Federal Arbitration Act,<sup>21</sup> courts refuse to vacate arbitration awards unless they reflect a "manifest disregard of the law."<sup>22</sup> In *Ludwig Honold Manufacturing Co. v. Fletcher*,<sup>23</sup> Judge Aldisert stated:

[M]ere error in the law or failure on the part of the arbitrators to understand or apply the law' will not justify judicial intervention, and the courts' function in confirming or vacating a commercial award is 'severely limited.' If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated.<sup>24</sup>

State courts began to uniformly apply this standard, which is commonly referred to as the "completely irrational standard."<sup>25</sup>

Although the Court of Appeals of Maryland has yet to apply the completely irrational standard, the court of special appeals seized the opportunity in *O-S Corp. v. Samuel A. Kroll, Inc.*,<sup>26</sup> where Judge Lowe

19. *Id.* at 674, 48 A.2d at 449.

20. *Board of Educ. of Prince George's County*, 309 Md. at 99, 522 A.2d at 937. Early cases suggest a greater willingness to set aside awards for errors of law. *See, e.g.*, *State v. Williams*, 9 Gill. 172, 175 (1850); *Heutt v. State*, 6 H. & J. 95, 97-98 (1823); *Thompson v. Heap & Allen*, 2 H. & McH. 477 (1790). *But cf.* *Goldsmith v. Tilly*, 1 H. & J. 361, 364 (1802).

21. 9 U.S.C. §§ 1-14 (1988).

22. *Carte Blanche (Singapore) v. Carte Blanche Int'l*, 888 F.2d 260 (2d Cir. 1989): "Manifest disregard of the law" by the arbitrators is a judicially-created ground for vacating their arbitration award. . . . It is not to be found in federal arbitration law. Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

*Id.* at 265 (citations omitted).

23. 405 F.2d 1123 (3rd Cir. 1969).

24. *Id.* at 1127 (quoting *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (1967) (footnotes omitted). Although *Ludwig* was decided under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1947), Judge Aldisert's analysis of the Federal Arbitration Act is persuasive and is often cited by federal and state courts. *See infra* note 25.

25. *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972) (citing *Lentine v. Fundaro*, 29 N.Y.2d 382, 278 N.E.2d 633, 634-35, 328 N.Y.S.2d 418, 419 (1972) as a fair rendition of *Ludwig*); *see also* *Nelson Paving Co. v. Hjelle*, 207 N.W.2d 225, 233 (1973).

26. 29 Md. App. 406, 348 A.2d 870 (1975). *See* *Snyder v. Berliner Constr. Co.*, 79 Md. App. 29, 555 A.2d 523 (1989). The court of special appeals recently held that the completely irrational standard applies when the arbitrator's decision was a substantive rather than a procedural determination. *Id.* at 39, 555 A.2d at 527.

stated:

We hold that when reviewing the fruits of an arbitrator's award, a judge may withhold only such as were tainted by improbity *or* based on a completely irrational interpretation of the contract. We recognize the very limited extension of the reviewing court's scope of review to include authority to vacate an award that is "completely irrational." Statutory support for this is found not only in the fact that arbitrators "exceeded their powers" when they reach a completely irrational result, but also in the connotation of the words "undue means" in Sec. 3-224(b)(1).<sup>27</sup>

Accordingly, a court would be justified in applying the completely irrational standard where the language of a contract subject to arbitration allows for only one interpretation, yet the arbitrator failed to follow the clear contractual mandate. In such a case, a court could properly vacate the award.<sup>28</sup>

On the scope of judicial review of arbitration awards, federal courts remain steadfast in favor of arbitration. Beginning with the *Steelworkers Trilogy* cases of 1960,<sup>29</sup> the Supreme Court established federal guidelines for grievance arbitration by defining the respective provinces of both the court and the arbitrator.<sup>30</sup> Courts, when determining arbitrability, rely on the following criteria established by the *Trilogy*: (1) that an agreement exists,<sup>31</sup> (2) that it provides for arbitration,<sup>32</sup> and (3) that a claim has been made that a provision of the agreement has been violated.<sup>33</sup> In cases where these criteria are met but doubt exists as to whether or not a specific issue should be arbitrated, the Supreme Court has made clear that it favors determination by the arbitrator.<sup>34</sup> The Court, however, has

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27. *O-S Corp.*, 29 Md. App. at 408-09, 348 A.2d at 872 (emphasis in original). The court of appeals has never approved the application of the completely irrational standard. *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. at 652, 659, 547 A.2d 1048, 1051 (1988).

28. *O-S Corp.*, 29 Md. App. at 410, 348 A.2d at 873.

29. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

30. *American Mfg.*, 363 U.S. at 567-68; *Gulf Navigation*, 363 U.S. at 581-83; *Enterprise Wheel*, 363 U.S. at 596-99. Although the cases comprising the *Steelworkers Trilogy* concerned labor arbitration, their principles are generally applied to commercial arbitration as well. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Gold Coast Mall v. Lamar Corp.*, 298 Md. 96, 103, 468 A.2d 91, 95 (1983).

31. *A.T. & T. Technologies v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citing *Gulf Navigation*, 363 U.S. at 582).

32. *Id.* at 649 (citing *Gulf Navigation*, 363 U.S. at 582-83 and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962)).

33. *A.T. & T.*, 475 U.S. at 649-50 (citing *American Mfg.*, 363 U.S. at 582).

34. *Gulf Navigation*, 363 U.S. at 582. Justice Douglas, writing for the majority stated: [T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed

failed to define the scope of the arbitrator's authority to decide the issue of arbitrability itself when the arbitrator's jurisdiction is challenged.<sup>35</sup>

In *Moses H. Cone Hospital v. Mercury Construction Corp.*,<sup>36</sup> the Supreme Court established that if a case is brought within the jurisdiction of the Federal Arbitration Act,<sup>37</sup> the scope of arbitration is broad.<sup>38</sup>

The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.<sup>39</sup>

Moreover, the Court stated that the Federal Act is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."<sup>40</sup> The recent Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>41</sup> supports this position.<sup>42</sup>

to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

*Id.* at 582-83.

35. See McDermott, *Arbitrability: The Courts Versus the Arbitrator*, 23 *ARBITRATION J.* 18, 23 (1968). *But see Gulf Navigation*, 363 U.S. at 588 n.7 (1960) (the question of arbitrability is for the courts to decide).

36. 460 U.S. 1 (1983).

37. 9 U.S.C. §§ 1-15 (1982).

38. *Moses H. Cone*, 460 U.S. at 24-25.

39. *Id.*

40. *Id.* at 24 n.32.

The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. . . . Section 3 likewise limits the federal courts to the extent that a federal court cannot stay a suit pending before it unless there is such a suit in existence. Nevertheless, although enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.

41. 473 U.S. 614 (1985).

42. *Id.* at 625-26. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, Mitsubishi and Soler entered into a sales agreement which provided for arbitration in the event of a breach. When Mitsubishi sought to enforce the arbitration agreement, Soler claimed that the dispute included antitrust causes of action under the Sherman Act, which Soler had not intended to arbitrate. Moreover, Soler argued that rights conferred by the antitrust laws were of a character inappropriate for enforcement by arbitration. *Id.* at 621. The Court held that the United States Court of Appeals for the First Circuit correctly determined that the parties' agreement to arbitrate reached the antitrust issues and that no legal constraints external

Maryland courts have yet to apply the Federal Arbitration Act,<sup>43</sup> and, in cases involving issues similar to those decided by the Supreme Court, Maryland courts have produced contrary results. In *Frederick Contractors, Inc. v. Bel Pre Medical Center*,<sup>44</sup> for example, the court of appeals held that threshold procedural issues, such as the timeliness of a demand for arbitration, are to be decided by the court, not by the arbitrator.<sup>45</sup> A similar finding relative to procedural issues was made in *Litton Bionetics v. Glen Construction Co.*<sup>46</sup>

The issue of whether or not a party waives its rights to judicial review of arbitrability by participating in arbitration is generally approached by courts in two ways.<sup>47</sup> The first approach is exemplified in the court of appeals decision in *Messersmith*. When a party submits the

to the parties' agreement foreclosed the arbitration of those claims. *Id.* at 628. Writing for the Court, Justice Blackmun noted the liberal federal policy favoring arbitration:

There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for the Act's usefulness both in controversies based on statutes or on standards otherwise created," and we are well passed the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibit the development of arbitration as an alternative means of dispute resolution.

*Id.* at 626-27 (citation omitted).

43. The Maryland Uniform Arbitration Act is the state analogue to the Federal Arbitration Act. *Regina v. Envirmech*, 80 Md. App. 662, 667, 565 A.2d 693, 696 (1989). In *Litton Bionetics v. Glen Constr. Co.*, 292 Md. 34, 437 A.2d 208 (1981), the court of appeals considered the Federal Arbitration Act in its analysis but did not apply the Act.
44. 274 Md. 307, 334 A.2d 526 (1975).
45. *Id.* at 314-15, 334 A.2d at 530-31. The court of special appeals, however, held that the issue of timeliness was to be decided by the arbitrator. *Bel Pre Med. Ctr. v. Frederick Contractors, Inc.*, 21 Md. App. 307, 302 A.2d 558 (1974). *But see* *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("[T]he timeliness issue is for the arbitrator to decide").
46. 292 Md. 34, 437 A.2d 208 (1981). In *Litton*, the court of appeals addressed the issue of whether a circuit court has the power to order that the arbitration of a dispute between a building owner and the building's architect be consolidated with the arbitration of disputes between the owner and the general contractor. Neither agreement required or prohibited consolidation. Nevertheless, the court invested itself with the power to order the consolidation of arbitration agreements pursuant to § 3-202 of the Courts and Judicial Proceedings Article, which states: "An 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." *Id.* at 53, 437 A.2d at 218.  
The late Honorable Rita Davidson, joined by Judges Smith and Digges dissented, stating: "I am unwilling to construe the words 'enforce the agreement,' appearing in § 3-202 as expanding judicial jurisdiction to include authorization to consolidate arbitration proceedings. I, therefore, find nothing in the language of § 3-202 that authorizes judicial interference with arbitration procedures established by the agreement of the parties." *Id.* at 58-59, 437 A.2d at 221; *see also* *Stauffer Constr. Co. v. Board of Educ. of Montgomery County*, 54 Md. App. 658, 666, 460 A.2d 609, 613 (1983) ("threshold issue is for the court to decide").
47. *See* Annotation, *Participation in Arbitration as Waiver of Objections to Arbitrability*, 33 A.L.R.3d 1242 (1970); 5 AM. JUR. 2d *Arbitration and Award* § 48, 50, 83 (1962).

controversy to the arbitrators, but at the same time challenges arbitrability by reserving the right to challenge in court an adverse ruling on arbitrability, the court decides the arbitrability issue de novo. If the arbitrators decide they have jurisdiction, the parties proceed to arbitrate the dispute, maintaining the right to appeal on the grounds that the arbitrators lacked jurisdiction.<sup>48</sup> In this instance, the objecting party is not required to seek an injunction of the arbitration or to withdrawal from the proceeding; the party simply is required to object on the record.<sup>49</sup>

The second approach requires the objecting party to either not participate in the arbitration proceeding, or in the alternative, to seek a stay of the proceeding.<sup>50</sup> Either method allows the court to first determine the threshold issue of arbitrability before proceeding through arbitration on the merits. If the objecting party proceeds with arbitration, the court's review is limited strictly to questions of fraud, mistake, or misconduct.<sup>51</sup>

In *Messersmith, Inc. v. Barclay Townhouse Associates*,<sup>52</sup> Barclay Townhouse Associates (Barclay) contracted with Henry A. Knott Remodeling Company, Inc. (Knott) for Knott to manage a construction project.<sup>53</sup> Knott subcontracted with Stephen L. Messersmith, Inc. (Messersmith) to perform specific construction work on the project. Messersmith commenced work without a signed contract.<sup>54</sup> Subsequently, at Messersmith's request, the parties held a meeting to finalize the contract at which a Knott representative added a handwritten provision requiring binding arbitration of disputes between the parties.<sup>55</sup> This provision was initialled by Knott and Messersmith; the contract was signed by Messersmith but not by Knott or Barclay.<sup>56</sup>

Thereafter, disputes arose between Messersmith and Knott regarding the quality of Messersmith's work and his failure to receive payment for work already completed.<sup>57</sup> Messersmith filed a demand for arbitra-

48. Local 719, American Bakery & Confectionary Workers v. National Biscuit Co., 378 F.2d 918, 921 (3d Cir. 1967); R.W. Granger & Sons, Inc. v. Local 275 of the United Bhd. of Carpenter's, 686 F. Supp. 22 (D. Mass. 1988); Falstaff Brewing Corp. v. Local 153, International Bhd. of Teamsters, 479 F. Supp. 850, 857 (D. N.J. 1978), *aff'd*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980); Arrow Overall Supply Co. v. Peloquin Enters., 414 Mich. 95, 100, 323 N.W.2d 1, 3 (1982).

49. 313 Md. 652, 547 A.2d 1048 (1988).

50. Caltagirone v. School Bd. of Hernando County, 355 So. 2d 873 (Fla. Dist. Ct. App. 1978); L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 352-53 (Tex. 1977); National Cash Register Co. v. Wilson, 8 N.Y.2d 377, 382, 171 N.E.2d 302, 305, 208 N.Y.S.2d 951, 955 (1960); Rosser v. Hochwalt, 12 Ohio App. 2d 129, 231 N.E.2d 334, 337 (1967).

51. See *supra* notes 6, 20, 24 and accompanying text.

52. 313 Md. 652, 547 A.2d 1048 (1988).

53. *Id.* at 654, 547 A.2d at 1049.

54. *Id.* at 655, 547 A.2d at 1049.

55. *Id.*

56. *Id.* at 655-56, 547 A.2d at 1049.

57. *Id.* at 656, 547 A.2d at 1050.

tion seeking an award against Knott and Barclay.<sup>58</sup> Knott and Barclay challenged the arbitration panel's jurisdiction on the basis that no written agreement to arbitrate existed.<sup>59</sup> The arbitration panel overruled the objections and a full hearing followed.<sup>60</sup> The arbitrators found for Messersmith.<sup>61</sup>

Barclay petitioned the circuit court to vacate the arbitration award on the grounds that it had never agreed to submit to arbitration.<sup>62</sup> The parties agreed to proceed by cross-motions for summary judgment.<sup>63</sup> The circuit court denied Barclay's motion for summary judgment and petition to vacate and granted Messersmith's motion.<sup>64</sup> The court of special appeals remanded the case with instructions that the circuit court undertake a de novo review to determine whether an agreement to arbitrate existed.<sup>65</sup> The Court of Appeals of Maryland granted Messersmith's petition for a writ of certiorari and affirmed the judgment of the court of special appeals.<sup>66</sup>

In *Messersmith*, the court of appeals reaffirmed the principle first enunciated in the *Steelworkers Trilogy*,<sup>67</sup> that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."<sup>68</sup> The court construed the Maryland Uniform Arbitration Act, particularly sections 3-208 and 3-224(b), to support its views and concluded that Barclay's participation in the arbitration subsequent to its objection was inconsequential.<sup>69</sup>

Messersmith argued that a judicial proceeding pursuant to section 3-208 is by necessity a de novo proceeding while 3-224(b) requires a record review and is not a de novo proceeding.<sup>70</sup> Rejecting Messersmith's argument, the court found that by including the permissive "may" in section 3-208, the General Assembly's intention was to permit a party to raise the issue of jurisdiction after arbitration, as did Barclay.<sup>71</sup> Moreover, the court noted that neither section 3-208 nor 3-224(b) provides specifically for either type of review; rather, both are simply mechanisms which au-

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The arbitrators awarded Messersmith \$63,395.13 plus costs and interest against Barclay. *Barclay Townhouse Associates v. Stephen L. Messersmith, Inc.*, 67 Md. App. 493, 495, 508 A.2d 507, 508 (1986).

62. *Messersmith*, 313 Md. at 656, 547 A.2d at 1050.

63. *Id.*

64. *Id.*

65. *Barclay Townhouse*, 67 Md. App. at 498, 508 A.2d at 510.

66. *Messersmith*, 313 Md. at 652, 547 A.2d at 1048.

67. *See supra* note 29.

68. *Messersmith*, 313 Md. at 662, 547 A.2d at 1052 (quoting *A.T. & T. Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986)); *see also supra* notes 29-35 and accompanying text.

69. *Messersmith*, 313 Md. at 663, 547 A.2d at 1053.

70. *Id.*; *see also* Brief for Appellant at 12, *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 547 A.2d 1048 (1988) (No. 86-83).

71. *Messersmith*, 313 Md. at 663, 547 A.2d at 1053.

thorize a court either to stay or invalidate an arbitration proceeding.<sup>72</sup>

The court concluded that application of a deferential standard of review is appropriate only where the parties indisputably agree to submit to arbitration.<sup>73</sup> When an arbitration award is attacked for lack of jurisdiction, however, "the proper procedure for reviewing cases arising under Section 3-224(b)(5) is to conduct a de novo review."<sup>74</sup>

Finally, the court rejected Messersmith's contention that Barclay waived its right to a de novo review when it consented to proceed by cross-motions for summary judgment.<sup>75</sup> The court reasoned that submission of a motion for summary judgment suggests a preference for an expedited procedure, not a waiver of a party's substantive right to a de novo review.<sup>76</sup>

The court of appeals was warranted in holding that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" because it is consistent with the traditional approach established by the *Steelworkers Trilogy*.<sup>77</sup> The court, however, relies on no direct authority to support its finding that Barclay was entitled to a de novo review.<sup>78</sup> The court's reliance on *Frederick Contractors*<sup>79</sup> is suspect because it is in direct contradiction of the Supreme Court's ruling in *Moses Cone Hospital*.<sup>80</sup>

Arguably, a deferential standard of review may result in a fundamental denial of due process to the objecting party.<sup>81</sup> Whether an agreement exists, however, is a threshold issue that should be determined at the outset, not at a subsequent de novo trial. No purpose is served by permitting a party to object on the grounds that no arbitration agreement exists, and then to continue with arbitration, only to have the threshold issue subsequently determined by the circuit court in a trial de novo. As Messersmith argued,<sup>82</sup> this allows the objecting party to attempt to win on the merits, and, if unsuccessful, to secure a second chance of obtaining a favorable result by challenging the panel's jurisdiction. Considerations

72. *Id.*

73. *Id.* at 659, 547 A.2d at 1051.

74. *Id.* at 664, 547 A.2d at 1054.

75. *Id.* at 665, 547 A.2d at 1054.

76. *Id.*

77. See *supra* notes 29-34 and accompanying text.

78. *Messersmith*, 313 Md. 652, 547 A.2d 1048 (1988). Every case the court relies on to support *Barclay's* de novo review is actually a reaffirmation that the threshold question of whether the parties agreed to arbitrate is for the courts, not the arbitrator, to decide. One exception is *Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co.* 253 N.Y. 382, 171 N.E. 579 (1930). But see *infra* notes 84-85 and accompanying text.

79. 274 Md. 307, 334 A.2d 526 (1975).

80. 460 U.S. 1 (1983); see also *supra* notes 38-39, 44-45 and accompanying text.

81. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV, § 1; see also MD. CONST., DECL. OF RIGHTS, art. 24.

82. See Brief of Appellant at 9, *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 547 A.2d 1048 (1988) (No. 86-83).

of equity and fairness dictate that the objecting party should be required to stay the arbitration proceeding while a determination of the existence of an agreement is made by a court.<sup>83</sup>

Although the court of appeals relies on the 1930 New York case, *Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co.*,<sup>84</sup> to support its statutory interpretation of the Maryland Arbitration Act, it fails to recognize that the modern New York statute provides for a mandatory stay when it is asserted that there is no valid arbitration agreement.<sup>85</sup> The *Messersmith* court also relies on *Arrow Overall Supply v. Peloquin Enterprises*;<sup>86</sup> in *Arrow*, however, the court, while acknowledging that the Michigan statute provides for, but does not mandate a stay, asserted its preference for a stay and presented policy reasons to support this preference.<sup>87</sup> The *Messersmith* court indicated no preference.

When the Maryland General Assembly initially adopted the Uniform Arbitration Act, section 2(a) of the Act stated:

On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, *but* if the opposing party denies the existence of the agreement to arbitrate, the *court shall proceed expeditiously* to the determination of the issues so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.<sup>88</sup>

In 1973, the Commission to Revise the Annotated Code of Maryland reorganized the Maryland Uniform Arbitration Act so that former section 2(a) of the Act became section 3-207.<sup>89</sup> Section 3-207 presently reads:

- (a) *Refusal to arbitrate.* — If a party to an arbitration agreement described in § 3-202 refuses to arbitrate, the other party may *file a petition* with a court to order arbitration.
- (b) *Denial of existence of arbitration agreement.* — If the opposing party denies existence of an arbitration agreement, the court shall proceed expeditiously to determine if the agreement exists.
- (c) *Determination by court.* — If the court determines that the agreement exists, it shall order arbitration. Otherwise it

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83. New York's arbitration statute, for example, provides that "a party must stay the arbitration proceeding or he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with." N.Y. CIV. PRAC. L. & R. 7503 (McKINNEY 1985).

84. 253 N.Y. 382, 171 N.E. 579 (1930).

85. See *supra* note 83.

86. 414 Mich. 95, 323 N.W.2d 1 (1982).

87. *Id.* at 100, 323 N.W.2d at 3.

88. 1965 Md. Laws 243, 244 (codified at MD. ANN. CODE art. 7, § 2 (1968)).

89. MD. CTS. & JUD. PROC. CODE ANN. § 3-207 (1984).

shall deny the petition.<sup>90</sup>

Although the language is similar to that of the Act originally adopted by the General Assembly, the revised section requires a party to file a petition with a court to order arbitration if the opposing party denies the existence of the agreement. This presupposes that the opposing party will refuse to attend the arbitration or, in the alternative, will seek a stay of the proceeding as provided by section 3-208. Nothing in the original or revised statute indicates that the legislature would approve of the court's determining a threshold issue of jurisdiction after the arbitration proceeding. In fact, the only support for this method is found in section 3-224(b)(5) which states:

(b) *Grounds.* — The court shall vacate an award if:

- (5) There was no arbitration agreement as described in § 3-206, the issue was not adversely determined in proceedings under § 3-208, and the party did not participate in the arbitration hearing without raising the objection.<sup>91</sup>

Yet the inclusion of the clause "the issue was not adversely determined in proceedings under § 3-208" in section 3-224(b)(5), which provides for a stay of arbitration, suggests that section 3-208 would be implemented prior to section 3-224(b)(5). At the least, the language is ambiguous.

The plain language of section 2(a) of the original statute indicates the legislature's strong preference to have the threshold issue of jurisdiction decided by the courts prior to arbitration. The word "expeditiously" emphasizes that the court should decide the issue with speed and efficiency, not after the arbitration panel proceeding.

By increasingly circumscribing the authority of arbitrators, the Maryland courts are effectively discouraging reliance on arbitration as a more efficient, less expensive alternative to litigation.<sup>92</sup> If Maryland maintains this posture, arbitration could become so cumbersome that it would no longer serve its original purpose. Additionally, the court's failure to suggest that the arbitrators should stay the proceedings while the threshold issue of arbitrability is decided allows the objecting party an opportunity to better his position and further complicate a dispute in an

90. *Id.* (emphasis added).

91. MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(5) (1984).

92. *See, e.g.*, Comment, *The Scope of Modern Arbitration Awards*, 62 TUL. L. REV. 1113-14 (1988) (quoting the State of the Judiciary Address by Chief Justice Burger, reprinted in 109 N.J.L.J., Feb. 4, 1982 at 1, col. 4). Chief Justice Burger, in his State of the Judiciary Address, called for an increased reliance on arbitration as an alternative to litigation. The Chief Justice made specific reference to the "litigation explosion" and the need to find viable alternatives:

We must now use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community, to shape new tools. . . . Against this background I focus today on arbitration, not as the answer or cure-all for the mushrooming case loads of the courts, but as one example of "a better way to do it."

attempt to avoid arbitration. Likewise, under the procedure adopted in *Messersmith*, the party that prevails in arbitration loses its contractual right to the finality of the award as well as the savings of time and expense that arbitration provides.

In order to maintain efficient arbitration, the Maryland General Assembly should amend the Maryland Uniform Arbitration Act to expressly require that the objecting party seek a stay of the arbitration proceeding so that participation in the proceeding after objecting to jurisdiction would constitute an effective waiver of a right to full judicial review. In the event of legislative inaction, the courts should not condone such practice, but should affirmatively assert a preference for determination of arbitrability prior to the proceeding. This posture would well reflect the legislative intent first manifested in the enactment of the Maryland Uniform Arbitration Act, and would further the purpose of the arbitration process — to provide a speedy and inexpensive alternative to litigation.

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