EXPLORING THE MURKY BOUNDARIES BETWEEN THE FAA AND STATE LAW IN ARBITRATIONS IN NEW YORK: WHICH LAW APPLIES AND WHEN?

OVERVIEW OF ARBITRATION CHOICE OF LAW

Presented at the ABA Section of Dispute Resolution's
11th Annual Spring Conference, April 16, 2009
Updated 3/25/2013

by

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Scope

The following is a broad overview of choice of law issues with respect to domestic commercial arbitrations held in New York, focusing on the matter from the perspective of both advocates and arbitrators.

The issues arise in two overall contexts:

- What law should arbitrators apply in arbitrations held in New York?
- What law should state and federal courts, respectively, follow when asked to rule on issues relating to arbitrations held or possibly to be held in New York?

Presence of Choice of Law Issues in Every Case

Arbitrations inevitably involve questions as to what law is applicable to matters relating to them.

In my experience, issues as to choice of law largely remain inchoate in arbitrations themselves, only occasionally developing into a bone of contention. Parties' arbitration clauses typically provide for the application of the law of a particular state. The parties generally acknowledge the applicability of that law and rely in their legal arguments, at least in part, on cases from that jurisdiction, although (on the implicit assumption, I take it, that our commercial

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law is fairly uniform) they often end up, with respect to issues of substantive law, citing the best cases they can find from wherever those cases happen to arise. Occasionally, arbitration clauses specify that the FAA applies to the arbitration of any dispute arising under the parties' agreement, although, in my experience, such provisions only occasionally lead to disputes in arbitrations as to the relative applicability of state and federal law to various phases of the proceedings.

There are a number of substantial differences between New York and federal arbitration law, some real distinctions to be made. This is an evolving area presenting opportunities for creative lawyering and challenges to arbitrators to get it right.

The issues are difficult, the boundaries murky, not least because state and federal courts have at times resolved them inconsistently and many issues remain unsettled in the two legal systems.

Types of Law Applicable to Arbitrations

Areas of law potentially involved in any particular arbitration include:

- Substantive law;
- arbitration law, including;
  - substantive arbitration law;
  - procedural arbitration law; and
- procedural law.

"Substantive law," in this context, generally refers to the applicable contract, tort, securities, consumer, or other law establishing or referencing a legal right, duty, or the like upon which a claim or defense in an arbitration is premised.

"Arbitration law" generally refers to law that is specific to arbitration and does not otherwise apply to a dispute. It includes substantive arbitration law--such as the basic rule of the Federal Arbitration Act (FAA) that arbitration agreements are enforceable--and procedural arbitration law relating to actual and prospective arbitrations, both within the arbitrations themselves and within courts presiding over issues relating to such arbitrations.

"Procedural law," in this context, refers at times to general rules of procedure applicable to all kinds of disputes, including those involving arbitration, and to procedural rules specific to arbitration.[2]

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[2] Federal Rule of Civil Procedure 81(a)(6) [previously 81(a)(3)] applies, to the extent the FAA is silent, to matters of procedure applicable to federal court proceedings involving arbitration. *See Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264 (2d Cir. 1999), *abrogated in part, in other respects, at Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008).

Choice of Law and Other Contract Clauses Rarely Resolve All Choice of Law Issues in an Arbitration

Parties in their agreements typically include a generic choice of law clause.

Such clauses are generally understood to designate the substantive law applicable to determining the respective rights of the parties, but not the arbitration law applicable to the administration of any arbitration that ensues under the agreement. In effect, choice of law clauses are generally understood to establish the law applicable to the parties' dispute, whereas arbitration clauses, which are typically parallel independent clauses, are understood as establishing arbitration as the mode of dispute resolution but not as selecting any applicable arbitration law unless that is done with some specificity.[3]

This heightens the importance of the distinction, one that is often overlooked, between the general substantive law and the arbitration law of a particular jurisdiction.

Parties in their arbitration agreements do occasionally specify the arbitration law that will be applicable to disputes between them, but, in my experience, this happens relatively infrequently.

Often in their arbitration agreements parties adopt the rules of an organization such as the American Arbitration Association (AAA), the AAA's International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention & Resolution (CPR), or JAMS. Such rules establish contractually matters that might otherwise have been provided for by arbitration law.

The Law Applicable to an Arbitration May be State or Federal

The substantive, arbitration, and procedural law applicable to an arbitration and to litigation relating to the arbitration may be state or federal or a combination thereof.

Variables in Choice of Law Decisions in Arbitrations

There are many variables relevant to the determination of applicable law in disputed situations, including:

- the intra-state, interstate, or international nature of the dispute;
- characterization of the applicable rule of law in question as:
  - substantive law;
  - arbitration law; and/or
  - procedural law;
- provisions in the parties' agreement as to:
  - choice of law generally;

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[3] *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-64, 115 S. Ct. 1212, 1218-19, 131 L. Ed. 2d 76, 87-88 (1995).

  - arbitration law;
  - arbitration generally;
- provisions of the rules of arbitration providers or the like adopted by the parties in their agreement; and
- the extent to which the counsel, arbitrators, and judges involved in the particular matter are familiar with the choice of law issues discussed herein.

It is worth emphasizing that all of these matters relate to the arbitration law applicable to a particular case, specifically, to questions as to how arbitrations are to be conducted and to what orders courts might enter with respect to actual or prospective arbitrations. It is entirely another question as to what contract, tort, securities, or other substantive law might apply to the dispute being arbitrated.

New York Arbitration Law

New York arbitration law is primarily set forth in New York CPLR Article 75 and case law, although there are rules of law in other statutes that apply to arbitration, typically within limited contexts.[4]

Following is an overview of the scope of coverage of Article 75:

- § 7501: Enforceability of arbitration agreements;
- § 7502: Special proceedings affecting arbitration, including proceedings to stay or bar arbitrations or confirm arbitration awards; statute of limitations; provisional remedies;
- § 7503: Application to compel or stay arbitration; stay of action; notice of intention to arbitrate;
- § 7504: Court appointment of arbitrator in certain circumstances;
- § 7505: Powers of arbitrator to issue subpoenas and administer oaths;
- § 7506: Hearing, including Oath of arbitrator; time and place of arbitration; evidence to be heard of parties' right of cross-examination; parties' right to have counsel represent them; majority decision by arbitrators; waver by parties of rights under this section;
- § 7507: Form, time, and delivery of the Award;
- § 7508: Award by confession;
- § 7509: Modification of award by arbitrator;
- § 7510: Confirmation of award;
- § 7511: Vacating or modifying award;

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[4] *See, e.g.*, N.Y. General Business Law § 399(c), applying to contracts for the purchase of consumer goods or services and prohibiting the inclusion of a mandatory arbitration clause that would commit the consumer to arbitrate any disputes; Gen. Bus. Law § 198-a(k), part of the New Car Lemon Law, permitting a new car purchaser to seek the enforcement of substantive rights under the law through binding arbitration, even if the manufacturer has not consented; and other laws collected and described in 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York".

- § 7512: Death or incompetency of a party;
- § 7513: Fees and expenses; and
- § 7514: Judgment on an Award.

Federal Arbitration Law

Federal arbitration law is generally set forth in the Federal Arbitration Act[5] (FAA) and case law. The FAA was enacted in 1925, five years after New York CPLR Article 75 (as originally enacted). The text of the FAA was largely based on Article 75.

The objective of the originators of New York Arbitration Law and the FAA was first to get a state statute then a federal statute, addressing arbitration to cover interstate and foreign commerce and admiralty, and, ultimately to get a treaty to protect arbitration internationally.

New York arbitration law and the FAA remain quite similar, although there are a number of significant areas where they diverge.

As to domestic arbitrations, the FAA does not establish exclusive subject matter jurisdiction in federal court. Parties must find an independent basis for subject matter jurisdiction so that a federal court can properly exercise jurisdiction of an arbitration issue.

Accordingly, disputes relating to actual or prospective arbitrations affecting interstate commerce and hence subject to the FAA may be litigated in state as well as federal court.

Following is an overview of the scope of coverage of Chapter 1 of the FAA:[6]

- Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title
- Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate involving interstate commerce.
- Section 3. Stay of proceedings where issue therein referable to arbitration.
- Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
- Section 5. Appointment of arbitrators or umpire.
- Section 6. Application heard as motion.
- Section 7. Witnesses before arbitrators; fees; compelling attendance.
- Section 8. Proceedings begun by libel in admiralty and seizure of vessel of property.
- Section 9. Award of arbitrators; confirmation; jurisdiction; procedure.
- Section 10. Same; vacation; grounds; rehearing
- Section 11. Same; modification or correction; grounds; order
- Section 12. Notice of motions to vacate or modify; service; stay of proceedings.

[5] 9 USCS § 1 et seq.

[6] Chapters 2 and 3 of the FAA address international arbitration.

- Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.
- Section 14. Contracts not affected.
- Section 15. Inapplicability of the Act of State doctrine.
- Section 16. Appeals.

Some of the provisions of the FAA--specifically § 2 along with the definitional § 1--on their face seem generally applicable without reference to whether the issues arose in state or federal court.[7] Most of the other sections, particularly §§ 3, 4, 7, 9 (in part), 10, 11, and 12 specifically refer to the federal courts. §§ 5 and 6 make references to "the court" where in neither the text of the section, nor indeed in all of Chapter 1 of the FAA, does there appear to be any reference to any court other than federal court. Section 9, covering confirmation of awards, refers repeatedly to federal courts, although also referencing the possibility of the parties' agreeing as to the court in which any award shall be confirmed.

Preliminary Overview of Federal Arbitration Law[8]

The FAA governs arbitration agreements that involve interstate or maritime commerce, preempting state law as to such matters.

The Supreme Court has interpreted the term "commerce" as used in the FAA very broadly as extending as expansively as the Commerce Clause to any dispute affecting interstate commerce.[9]

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[7] As William J. T. Brown has pointed out, the Supreme Court has stated repeatedly that § 2 is the only section of the FAA that it has applied in state court. *See* William J. T. Brown, "The Dark Before the Dawn: How New York's Venerable but Outdated Arbitration Statute Has Fallen into Desuetude and How Enactment of the Revised Uniform Arbitration Act Can Restore Logic and Reason to New York Arbitration," paper prepared for ABA Section of Dispute Resolution's 11th Annual Spring Conference, April 16, 2009 [hereinafter "Brown Paper"], *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 n.6, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

However, the Supreme Court has stated in *dictum* that state courts, as much as federal courts, are obliged to grant stays of litigation under FAA §3. The Court characterized it as less clear but an open question as to whether the same is true of an order to compel arbitration under FAA §4. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26-27, 103 S. Ct. 927, 942-43, 74 L. Ed. 2d 765, 786-87 (1983). Responding to objections that FAA §2 is the only section of the FAA that the Supreme Court has applied in state court and §§ 3 and 4 do not apply in state court, the Court, focusing on § 4, has also noted that that section "ultimately arises out of § 2". *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038, 1044 (2006).

[8] *See generally*, 13-75 New York Civil Practice: CPLR ¶ 7501.12.

The central thrust of the FAA is § 2, which establishes the enforceability of all arbitration agreements relating to interstate commerce, save upon such grounds as exist at law or in equity for the revocation of any contract. The FAA requires that all such agreements be enforced in accordance with their terms.

The FAA is understood to express a Congressional intent to encourage arbitration, notwithstanding any state substantive or procedural law to the contrary.

The import of this is that any state law that purports to restrict the arbitrability of a dispute affecting interstate commerce is preempted. States may not require a judicial forum for the resolution of claims or issues in interstate commerce that the parties agreed to arbitrate. Rules of state law that preclude arbitration of particular claims or issues are preempted. Any state law that would treat an arbitration agreement less favorably than other agreements is preempted.

Areas of Variance between New York and Federal Arbitration Law: Rules of New York Arbitration Law that Are Preempted by the FAA

New York arbitration law includes a number of rules at variance with federal arbitration law.

Following is a discussion of some such areas of potential variance:[10]

- **Whether the court or the arbitrator should determine challenges to the validity of the parties' overall agreement:** A challenge to the Parties' overall agreement on the ground that it is permeated with illegality is generally, under

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[9] *Citizens Bank v Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003); *Allied-Bruce Terminix Cos. v Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

[10] *See generally*, Brown Paper, *supra* n. 7; 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York"; T. Barry Kingham, *Enforcement of Forum Selection and Arbitration Clauses*, 2 N.Y. Prac., Com. Litig. in New York State Courts, § 11:19 "Enforcement of Forum Selection and Arbitration Clauses" (2d ed. 2008); George K. Foster, *Confusion among Courts over the Interplay of State, Federal, and International Arbitration Law*, Nat. L. J. (Dechert on Choice of Law); 21 Williston on Contracts § 57:5 "Federal Arbitration Act – Preemption of State Law"; 5 N.Y. Jur. 2d Arbitration and Award § 64 ("Effect of Federal Arbitration Act-Where agreement contains provision choosing New York law") (2008).

William J.T. Brown has argued that New York's adoption of the Revised Uniform Arbitration Act (the "RUAA") would "eliminate the idiosyncratic provisions that place New York law in conflict the FAA, while preserving pro-arbitrations features of New York law, such as the party's ability to obtain an early decision as to its right to arbitrate by giving notice of intent to arbitrate." Brown Paper, *supra* n. 7 at 6.

New York arbitration law, to be decided by the court[11] and under the FAA by the arbitrator.[12] In contrast, challenges to the validity of the arbitration clause itself are generally decided by the court under both New York arbitration law and the FAA.[13]

- **The extent to which participation by a party in an arbitration constitutes the party's waiver of jurisdictional objection to arbitration**: CPLR 7503(b) provides that, by participating in an arbitration, a party waives the right to apply to a court to stay the arbitration based on the invalidity of the arbitration agreement or statute of limitations. By participating in the arbitration, the party becomes subject to the decision of the arbitrator on such issues; if the party wants to contest arbitrability, it must make an application in court to stay the arbitration without first contesting the matter before the arbitrator. In contrast, cases in the Second Circuit permit a much higher level of participation in an arbitration before waiver of the right to object to arbitrability will be found.[14]
- **Statute of limitations**:
  - CPLR 7502(b) provides that a party may submit to a court the question of whether an arbitration is barred by a statute of limitations.[15] The U.S.

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[11] *See Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 762 N.Y.S.2d 730 (4th Dep't 2003); *Teleserve Sys. v. MCI Telcoms. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997); *see also,* David Elsberg, *Validity of Pacts with Arbitration Clauses: Courts Split*, N.Y.L.J., Dec. 18, 2006 (reporting that New York courts have been resistant to enforcing the FAA rule that arbitrators, not courts, should decide challenges to the parties' overall agreement). Under New York arbitration law, however, claims of fraud in the inducement are to be decided by arbitrators where there is a broad arbitration clause. *See Weinrott v. Carp.* 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973). The United States Supreme Court recently reiterated in *Rent-A-Center* that, when an agreement delegates the authority to determine the arbitrability of a dispute to the arbitrator, claims that challenge the enforceability and validity of an agreement as a whole will be determined by the arbitrator, while claims that specifically challenge the enforcement of the delegation provision will be considered by the district court. *See Rent-A-Center, W, Inc. v Jackson*, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010); *see generally*, Quincy M. Crawford and Claudia T. Saloman, "*Rent-a-Center, West, Inc, v. Jackson: US Supreme Court Decision Applies to Both Domestic and International Arenas,*" available at http://www.dlapiper.com/rent-a-center-v-jackson-us-supreme-court-decision-applies-to-both-domestic-and-international-arenas/.

[12] *Nitro-Lift Techs., L.L.C. v. Howard.* 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012); *Granite Rock Co. v. Int'l Bhd of Teamsters*, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 1208-09, 163 L. Ed. 2d 1038 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

[13] See *Rent-a-Center*, 130 S.Ct. at 2782; *Buckeye Check Cashing*, 546 U.S. at 445-46; *Utica Mut. Ins.*306 A.D.2d at 762.

[14] *See, e.g., Penrod Mgmt. Group v. Stewart's Mobile Concepts, Ltd.*, 2008 U.S. Dist. LEXIS 11793 (S.D.N.Y. Feb. 16, 2008); *Jones v. Watts Inv. Co. (In re Will of Jones)*, 2000 U.S. Dist. LEXIS 5864 (S.D.N.Y. Apr. 28, 2000).

[15] *See* 13-75 New York Civil Practice: CPLR ¶ 7502.14.

Supreme Court has reached the opposite result under the FAA, finding that such objections are generally to be decided by the arbitrator when the parties have agreed to submit their dispute to arbitration.[16]

- There is a further conflict of state and federal case law as to whether a court or arbitrator should determine limitations issues in cases where (1) the FAA is applicable and (2) the parties' agreement includes a choice of law clause designating New York arbitration law.
  - The New York Court of Appeals has suggested in dictum that, even in cases where the FAA is applicable, limitations defenses should be heard by the court if the parties adopted New York arbitration law (which, in its view, they would do by providing that New York law would apply to the "enforcement" of their agreement).[17] The basis for this conclusion is that, under the FAA, party autonomy in choosing arbitration is paramount: If the parties, through selecting New York arbitration law, chose to have the court determine limitations questions, that choice should be respected.
  - In contrast there are local federal cases providing that, even in such circumstances, limitations questions are for the arbitrators.[18]

- **Punitive damages**: New York arbitration law generally prohibits arbitrators from awarding punitive damages, even if the parties agreed that the arbitrators would have such a power.[19] The Supreme Court in *Mastrobuono* found that the FAA permits arbitrators to award punitive damages.[20] The New York state courts have

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[16] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

[17] *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 826 N.E.2d 802, 793 N.Y.S.2d 831 (2005); *CSAM Capital, Inc v Lauder*, 67 A.D.3d 149, 885 N.Y.S.2d 473 (1st Dep't 2009).

[18] *See, e.g., Bechtel Do Brasil Construções Ltda. v UEG AraucÁria Ltda.*, 638 F.3d 150 (2d Cir. 2011); *Goldman, Sachs & Co. v. Griffin*, 2007 U.S. Dist. LEXIS 36674 (S.D.N.Y.); *see generally,* William J.T. Brown, "Reaffirming Basic Powers of the New York Arbitrator: A Plea for Harmony in State and Federal Arbitration Law," manuscript available with author; Craig P. Miller and Laura Danish "The Enforceability and Applicability of a Statute of Limitations in Arbitration" Franchise Law Journal, (2012), available at http://www.gpmlaw.com/uploadedFiles/Resources/Articles/enforceability_applicability_statute_limitations_arbitration_CMiller(1).pdf

[19] *See Garrity v Lyle Stuart, Inc.* (40 NY2d 354 [1976]). *See also,* Kudler v Truffelman, 2012 NY Slip Op 02155 (1st Dept., 2012).

[20] *Marmet Health Care Ctr., Inc. v Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, N.Y.S.2d 831 (1976); *Matter of Mohawk Val. Community Coll. v. Mohawk Val. Community Coll. Professional Ass'n.*, 28 A.D.3d 1140, 814 N.Y.S.2d 428 (4th Dep't 2006); *Application of Dreyfus Service Corp. v. Kent*, 183 A.D.2d 446, 584 N.Y.S.2d 483 (1st Dep't 1992).

been inconsistent after *Mastrobuono*, with some courts following the decision[21] and at least one not following it and sticking to the strong New York public policy against punitive damages.[22]

- **Attorneys' fees**: CPLR 7513 generally precludes arbitrators from awarding attorneys' fees, unless otherwise provided in the parties' agreement to arbitrate or implied by their choice of arbitration forum.[23] Federal law contains no such prohibition.[24]
- **Consolidation of arbitrations**: New York courts have held that they have the power to consolidate arbitrations based upon the same general bases applicable to the consolidation of actions[25] and have suggested that arbitrators have this same power to consolidate.[26] In contrast, federal courts have generally concluded that, given a broad arbitration clause, consolidation is for arbitrators not courts.[27] Although the Supreme Court's 2010 decision in *Stolt-Nielsen* seemed, by its treatment of class action arbitration, to imply that, absent an explicit delegation of the issue to the arbitrators, consolidation may be for the courts, several recent district court decisions in the Second Circuit have held that joinder and consolidation present different issues than class action arbitration and remain generally for arbitrators not courts to decide. [28]

The Court in *Mastrobuono* held that a general choice of law clause in the parties' contract providing that the contract shall be governed by New York law did not establish the parties' intent to incorporate the New York law allocating power between the courts and arbitrators—that a general choice of law clause adopting New York law does not adopt New York arbitration law.

[21] *212 Inv Corp. v. Kaplan*, 16 Misc. 3d 1125(A), 847 N.Y.S.2d 905 (N.Y. Co. 2007); *Prudential Sec. v. Pesce*, 168 Misc. 2d 699, 642 N.Y.S.2d 466, 1996 N.Y. Misc. LEXIS 141 (Sup. Ct. N.Y. Co. 1996).

[22] *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc. 2d 40, 631 N.Y.S.2d 215 (Sup. Ct. N.Y. Co. 1995); *see* 5 N.Y. Jur.2d Arbitration and Award § 64.

[23] *See, e.g., Grossman v. Laurence Handprints-N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dep't 1982); *CIT Project Fin., L.L.C. v. Credit Suisse First Boston LLC*, 5 Misc. 3d 1030A, 799 N.Y.S.2d 159 (Sup. Ct. N.Y. Co. 2004).

[24] *See Merrill Lynch, Pierce, Fenner & Smith v. Adler*, 234 A.D.2d 139, 651 N.Y.S.2d 38 (1st Dep't 1996).

[25] *See Matter of Cohen v. S.A.C. Capital Advisors LLC*, 11 Misc. 3d 1054A, 815 N.Y.S.2d 493 (2006); 13-75 New York Civil Practice: CPLR 7502.05.

[26] *Avon Products, Inc. v. Solow*, 150 A.D.2d 236, 541 N.Y.S.2d 406 (1st Dep't 1989), later proceeding at 151 A.D.2d 342, 544 N.Y.S.2d 728 (1st Dep't 1989).

[27] *See generally,* Susan Jordan *Stolt-Nielsen's Effect on Consolidation of Arbitrations*, Law 360, (July 7, 2010), available at http://www.lockelord.com/files/News/9424c623-87bd-4514-97a6-9da91766731d/Presentation/NewsAttachment/a4608d66-324a-467c-82dd-9db2056704c4/2010-07_Stolt-NielsensEffect_Jordan.pdf.

[28] *See Safra Nat'l Bank (SNB) v. Penfold Investment Trading, Ltd.*, 10 Civ. 8255, *8-11 (S.D.N.Y. 2011) ("As this Court held in *Amvar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462, 477 (S.D.N.Y. 2010), *Stolt-Nielsen* did not abrogate the rule that federal courts consider consolidation to be a question of procedure to be decided by the arbitrators."); *see also*, *Rice Co. v. Precious Flowers LTD*, 2012 U.S. Dist. LEXIS 78269, 2012 AMC 1947 (S.D.N.Y. 2012).

- **Pre-Award removal of arbitrator**: There is authority to the effect that New York permits the pre-award removal of an arbitrator, whereas the FAA does not.[29]
- **Unenforceability of New York's heightened burden of proof requirement to establish that an arbitration clause had been added to an existing contract**: The Second Circuit, reviewing the New York Court of Appeals' rule that the addition of an arbitration clause to an existing contract had to be proved by "express, unconditional" evidence rather than by the preponderance standard applicable to other amendments, found the rule to be preempted as discriminating against arbitration.[30]
- **Whether arbitrators have authority to issue subpoenas to non-parties for production of documents pre-hearing**: CPLR 7505 provides that an arbitrator and any attorney of record in an arbitration proceeding have the power to issue subpoenas. While the case law is sparse and inconsistent,[31] there is some authority in New York that arbitrators can issue subpoenas to non-parties for discovery purposes.[32] While the issue of whether the FAA permits arbitrators to subpoena non-parties for discovery purposes, as opposed to for purposes of calling the witnesses to the "hearing," has divided the Circuits Courts of Appeal.

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[29] *See IRB-Brasil Resseguros S.A. v. Nat'l Indem. Co.*, 2011 U.S. Dist. LEXIS 136640, *17 (S.D.N.Y. 2011) ("It is well established in this Circuit that parties are precluded from attacking the partiality of an arbitration panel until after an award has been issued."); *AIU Ins. Co. v. Am. Int'l Marine Agency*, 2006 N.Y. Misc. LEXIS 2352, 236 N.Y.L.J. 36 (2006).

[30] *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42 (2d Cir. 1993).

[31] *See generally*, Weinstein, Korn & Miller, 13-75 New York Civil Practice: CPLR § 7505.06; Dennis M. Rothman, Expert Analysis, 13-75 New York Civil Practice: CPLR § 7505.

[32] *See, e.g., ImClone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005); *Schumacher v. Genesco, Inc.*, 82 A.D.2d 739, 440 N.Y.S.2d 4 (1st Dep't 1981); *Motor Vehicle Acci. Indemnification Corp. v McCabe*, 19 A.D.2d 349, 353, 243 N.Y.S.2d 495, 499 (1st Dep't 1963); *Katz v. State Dep't of Corr. Serv's*, 64 A.D.2d 900, 407 N.Y.S.2d 967 (2d Dep't 1978); *ConnecU, Inc., v. Quinn Emanuel*, Slip op., Supreme Court, N.Y. County, Index No. 602082/2008, January 6, 2010; *but see, De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974).

There is authority that arbitrators' subpoena power under CPLR 7505 is restricted to the procuring of evidence for the hearing. *See* Alexander, "N.Y. Practice Commentaries," C 7505 (1998). There is also authority that discovery in aid of arbitration pursuant to CPLR 3102(c) is only available where the requesting party demonstrates that the discovery is necessary and not merely convenient. *See International Components Corp. v. Klaiber*, 54 A.D.2d 550, 387 N.Y.S.2d 253 (1st Dep't 1976).

The Court in *ConnecU* suggested that discovery from out-of-state non-parties can be obtained through CPLR 3108, which authorizes New York courts to seek the assistance of courts of other states to compel discovery by issuing a commission or letter rogatory to such courts. *Id* at 22.

the Second Circuit has found that arbitrators do not have such a power, *i.e.*, that they may only subpoena non-parties' documents to a hearing.[33]

- **Precluding parties from applying in court to stay arbitration**: CPLR 7503(c) provides a procedure whereby a party, by its demand for arbitration or notice of intention to arbitrate, may notify another party that, unless the party applies to stay the arbitration within twenty days after such service, it shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. The FAA contains no such provision. The law is unsettled whether CPLR 7503(c) is applicable to proceedings in state and federal court in New York, respectively, with respect to arbitrations to which the FAA is applicable.[34]
- **Prerequisites to having judgment entered upon an arbitral award**: FAA § 9 requires that, for a party to obtain judgment on an arbitration award, the parties need in their agreement to have agreed that a judgment shall be entered upon the award. CPLR 7510, the analogous New York provision, contains no such requirement. It appears to be questionable but unsettled whether this requirement of FAA § 9 is applicable in New York state courts to cases to which the FAA is applicable or whether federal courts sitting in diversity in New York in such cases could issue judgment on an award under CPLR 7510 where § 9 had not been complied with. [35]
- **Challenges to arbitral award based on arbitrators' refusal to grant adjournment**: Unlike FAA § 10(a), CPLR 7511(b)(1) does not specify an arbitrator's refusing to postpone a hearing upon sufficient cause as misconduct constituting a ground for vacating an award, rather relying on the general language of "misconduct" to address the issue. Interestingly, New York Civil Practice Act (CPA) 1461(3), the predecessor to CPLR 7511(b)(1), contained the same language as FAA§10(a).[36]
- **Time for making an application to vacate an award**: Under CPLR 7511(a), an application by a party to vacate an award must be commenced within 90 days after the delivery of the award to him. Under FAA § 12, notice of motion to

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[33] *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008); *Schnall v. ProShares Trust*, 2010 U.S. Dist. LEXIS 127208 (S.D.N.Y. 2010).

[34] *Matter of Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 893 N.E.2d 807, 863 N.Y.S.2d 391 (2008); *I. K. Bery, Inc. v. Irving R. Boody & Co.*, 2000 U.S. Dist. LEXIS 1872, footnote 10 (S.D.N.Y. 2000); *see also,* Brown Paper, *supra* n. 7.

However, courts have noted an exception to the twenty day rule. *See Matter of Allstate Ins. Co. v. LeGrand*, 91 A.D.3d 502 (2012) (citing *Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264, 266 (1982)). ("However, a motion to stay arbitration may be entertained outside the 20-day period when "its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with").

[35] *Franklin Hamilton, LLC v. Creative Ins. Underwriters, Inc.*, 1:08-cv-7449 (JFK), 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y. November 6, 2008) ; *see also,* Brown Paper, *supra* n. 7.

[36] *See Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006).

vacate an award must be served on the adverse party within three months after the award is filed or delivered.[37]

- **Availability of interim appeals:** Under the CPLR, a party may file an interlocutory appeal to the Appellate Division from any ruling of the Supreme Court. Under FAA § 16 (b), the federal "final judgment rule" applies, *inter alia*, to foreclose an interlocutory appeal from a District Court order compelling arbitration.[38]

Beyond Preemption: Areas where New York Courts Have Applied the FAA Where Ostensibly Not Constitutionally Required To Do So

Discussed above are respects in which New York and FAA arbitration law differ. There are also a number of areas, as William J. T. Brown has identified, where New York state courts, generally without elaboration, have applied FAA arbitration law where ostensibly they were not required to have applied it, specifically with respect to various FAA provisions that appear by their terms to apply only in federal courts. Mr. Brown has identified such areas as the following:[39]

- **Enforcing agreements by their terms without adding new terms, even if said terms are supported by state law and not inconsistent with the parties' agreement**: CPLR 7506(b) empowers the New York courts to direct an arbitrator to proceed promptly with the hearing and determination of the controversy. The New York Court of Appeals has held that, absent a choice of law clause explicitly adopting this provision (or perhaps New York arbitration law generally), this provision of the CPLR does not apply to an arbitration to which the FAA is applicable, since it would involve the court in effectively adding to the parties' agreement something to which they had not agreed.[40]
- **New York state courts' application of FAA § 7 to subpoenas issued by arbitrators in cases involving interstate commerce**:
  - As noted above, CPLR 7505 empowers arbitrators to issue subpoenas in arbitrations over which they preside.
  - Correspondingly, FAA § 7 empowers arbitrators, or a majority of them in a particular case, to issue subpoenas and provides for the enforcement of such subpoenas by the federal district court in which the arbitrators are sitting.

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[37] *See Id*

[38] *See Id.*

[39] Brown Paper, *supra* n. 7; *see also*, Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 Brook. J. Corp. Fin. & Com. L. 1 (2007); Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. Am. Arb. 1 (2004).

[40] *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (1995). The New York Court of Appeals in *Salvano* held that, for parties to adopt New York arbitration law, they must, under the United States Supreme Court's decision in *Volt*, do so with specificity. In the Court of Appeals' view, the key issue is the parties' expressed intent.

- Since FAA § 7 on its face provides only for enforcement in federal court, but disputes relating to arbitrations affecting interstate commerce may be litigated in state court, one might expect CPLR 7505 to apply to such disputes litigated in state court.
- Nonetheless, the First Department in at least one case has reflexively applied FAA § 7 to issues as to subpoenas in arbitrations to which the FAA is applicable.[41]

- **Application by New York state courts of the provisions of FAA §§ 9, 10, and 11 to issues as to the review of awards issued by arbitrators in cases involving interstate commerce:**
  - CPLR 7511 sets forth the standards for vacating or modifying arbitration awards.
  - FAA §§ 9, 10, and 11 set forth standards for confirming, vacating, and modifying arbitration awards. As noted above, § 10 refers specifically to vacating arbitration awards in federal district courts, without reference to state courts. Section 9 refers to confirming awards in federal court, although it also refers to the possibility of the parties' specifying the court in which judgment on an award shall be entered, without specifying what that court might be, or whether it might be a state court. Section 11 refers to modifying awards in federal district court.
  - Accordingly, one might expect that a New York state court hearing a motion to vacate an award in an arbitration to which the FAA is applicable would apply the standards set forth in CPLR 7511, except perhaps, as to confirming awards, if the parties' agreement provided otherwise.
  - Yet the New York courts, including the Court of Appeals, have often proceeded seemingly automatically and reflexively, from the determination that the FAA is applicable to the application of the standards of FAA §§ 10 and 11 for modifying and vacating awards.[42]

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[41] *Imclone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005).

[42] *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 846 N.E.2d 1201, 813 N.Y.S.2d 691 (2006). Indeed, even in *Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Ct. 2007), where Justice Moskowitz applied CPLR 7511 to the review of an arbitration decision to which the FAA applied, she only did so because of her conclusion that the parties, by their agreement, had adopted New York law and CPLR 7511 did not conflict with the FAA. However, the Court in *Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006), noted that the fact that the FAA is applicable to an arbitration does not necessarily mean that all provisions of the FAA are applicable. It focused, for instance, on CPLR 7511 and FAA §10(a), relating to the grounds for vacating an award, but the First Department, in upholding the trial court's confirmation of the award, referred only to the FAA standards for vacatur. *See Uram v. Garfinkel*, 16 A.D.3d 347, 792 N.Y.S.2d 430 (1st Dep't 2005).

SUMMARY OF THE INTERPLAY OF STATE AND FEDERAL ARBITRATION LAW: HOW CHOICE OF LAW ISSUES ARE RESOLVED

Scope of the FAA

- The FAA applies broadly to disputes affecting interstate commerce. Its reach essentially coincides with that of the Commerce Clause.[43] The nature of modern commercial life is such that it would seem that, from the perspective of the Supreme Court's decisions in the area, virtually all --- certainly the vast majority – of commercial disputes that become the subject of arbitration are subject to the FAA.
- However, as discussed hereinafter, the New York state courts at times seem to ignore the scope of FAA and hence impliedly the scope of the Commerce Clause, essentially deciding cases as if the FAA did not exist, or referencing the FAA and essentially ignoring its scope as defined by the Supreme Court.[44]

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[43] *Allied-Bruce Terminix Cos. v Dobson*, 513 U.S. 265, 274, 115 S. Ct. 834, 840, 130 L. Ed. 2d 753, 764 (1995).

[44] *See, e g., Byrnes v. Castaldi*, 72 A.D.3d 718, 898 N.Y.S.2d 640 (2d Dep't 2010); *Ragucci v Professional Constr. Servs.*, 25 A.D.3d 43, 803 N.Y.S.2d 139 (2d Dep't 2005); *Baronoff v. Kean Dev. Co., Inc.*, 12 Misc. 3d 627, 818 N.Y.S.2d 421 (Nas. Co. 2006).

Ragucci was a case involving construction work in a home. The homeowner commenced litigation alleging deficiencies in the work performed; the architect moved to stay the action and compel arbitration, based on an arbitration clause in the parties' agreement. The motion court denied the architect's motion on the ground that arbitration was barred by New York General Business Law § 399(c) nullifying certain consumer agreements to arbitrate. Upholding the motion court, the Second Department ignored what would appear to be the interstate nature of the dispute, never mentioning the FAA.

Baronoff involved similar facts, including construction work in a home. Trial Term granted the homeowners' motion for a stay of the arbitration commenced by the contractor on the ground that the parties' arbitration agreement was barred by General Business Law § 399(c). In *Baronoff*, unlike in *Ragucci*, the Court specifically considered whether the FAA was applicable, finding that it was not. While acknowledging the broad scope of the FAA under state and federal law as applying to all disputes affecting interstate commerce, the court found that the fact that some of the goods used in the construction in question came from out-of-state did not mean that the dispute affected interstate commercing, stating, "If the use of any out-of-state materials triggers the applicability of the Federal Arbitration Act, then General Business Law § 399-c would be eviscerated and preempted in most cases. Taking respondent's reasoning to its logical extreme, any contract for consumer goods, involving any goods from outside of New York, would not receive the intended protection of General Business Law § 399-c." 12 Misc. 3d at 631, 818 N.Y.S.2d at 424-25.

This narrow view of the scope of the FAA, while seemingly questionable, illustrates the narrow view the New York state courts at times take as to the scope of the FAA. William J.T. Brown has noted that the New York courts can be expected to take a dim view as to whether the

Basic Substantive Rule of the FAA

- Under the FAA, arbitration agreements are enforceable, except upon such grounds as exist at law or equity for the revocation of any contract.
- Both elements are important. The central point is the enforceability of arbitration agreements, displacing the earlier state of the law where arbitration was distrusted and arbitration agreements often not enforced by courts.
- But the second part of the rule, that arbitration clauses are challengeable for the same reasons other agreements may be challenged, provides a powerful ground for challenging an arbitration agreement, perhaps even more so now than in the past, as it becomes increasingly clear under the Supreme Court's decisions in the area that it is one of the few ways to avoid an arbitration clause under the FAA.[45] However, the Supreme Court in *AT&T Mobility* held that state law, such as that relating to unconscionability, may not be used to stand as an obstacle to the accomplishment of the FAA's objectives, finding that the FAA preempted a state law that rendered class action waivers unconscionable.[46]
- Examples of such general bases for opposing an arbitration clause include challenges to an arbitration agreement based on duress, adhesion, unconscionability, fraud in the inducement, and the like.

Applicability of the FAA's Pro-Arbitration Rule in State and Federal Court

- The FAA is federal law, applicable in state and federal court, preempting state laws that would limit the enforceability of arbitration agreements.
- It establishes a strong federal public policy in favor of enforcement of arbitration agreements. Arbitration agreements are to be liberally enforced. Where parties have agreed to arbitrate their dispute, the presumption is in favor of arbitrability of the dispute, including all aspects of the dispute. Any doubt regarding the scope of arbitrable issues must be "resolved in favor of arbitration."[47]
- The FAA does not provide an independent basis for federal subject matter jurisdiction. A person seeking to enforce a right under the FAA in federal court

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FAA reaches such areas as arbitration agreements relating to schools, teachers, municipal construction projects, and the like. *See* Brown Paper, *supra* n. 7.

[45] *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging And The evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, Nov. 2008. Bruhl argues that as the Supreme Court has shut off most other means of resisting arbitration, the state law doctrine of unconscionability has in the past several years become an attractive and successful tool for striking down arbitration agreements.

[46] *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743, 179 L. Ed. 2d 742, 748 (2011) ("Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."); *Rent-a-Center West v. Jackson,* 130 S. Ct. 2772 (2010).

[47] *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 475, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488, 497-98 (1989).

must have an independent basis for federal subject matter jurisdiction. However, as noted, a person may assert her right to arbitration under the FAA in state court. The FAA's basic substantive rule of enforceability of arbitration agreements is equally applicable in state and federal courts.

Examples of State Laws Preempted by the FAA

- Accordingly, any state law imposing special conditions to the enforceability of arbitration agreements--conditions not applicable to other agreements--is unenforceable.
- Examples of state laws that have been invalidated on this basis include:
  - New York case law prohibiting arbitrators' awarding of punitive damages;[48]
  - An Alabama statute making written pre-dispute arbitration agreements invalid and unenforceable;[49]
  - A Montana statute declaring an arbitration clause unenforceable unless notice was typed in underlined capital letters on the first page of the contract;[50]
  - A California statute, the Talent Agencies Act (TAA), providing that certain matters covered by the statute were subject to the exclusive original jurisdiction of the California Labor Commissioner;[51] and
  - A California statute applicable only in California State courts that precluded arbitration in franchise investment agreements.[52]
  - A California rule classifying most collective arbitration waivers as unconscionable.[53]

Scope of Arbitrability: How Much of a Dispute is Arbitrable

- Under the FAA, as discussed above, parties who have agreed to arbitrate their dispute are generally understood to have agreed to submit their entire dispute to the arbitrator(s). Of course, if they have only agreed to arbitrate a narrow issue or group of issues to arbitration, that agreement as to the restrictive scope of the arbitration will be honored. The overriding point is that the parties' agreement to arbitrate will be enforced as written.

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[48] *Mastrobuono v Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

[49] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 115 S. Ct. 834, 837, 130 L. Ed. 2d 753, 761 (1995).

[50] *Doctor's Assocs v. Casarotto*, 517 U.S. 681, 683, 116 S. Ct. 1652, 1654, 134 L. Ed. 2d 902, 906 (1996).

[51] *Preston v. Ferrer*, 128 S. Ct. 978, 981, 169 L. Ed. 2d 917, 923 (2008).

[52] *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

[53] *AT&T Mobility LLC, supra* n. 46 and accompanying text.

Reversing the Presumption of Arbitrability for Gateway Issues of Substantive Arbitrablity

- However, this presumption in favor of arbitrability of all questions when the parties have agreed to arbitration is subject to one narrow but important exception—"gateway issues" which the parties are deemed likely to have expected a court to decide, such as:
  - whether the parties have a valid arbitration agreement at all; or
  - whether a concededly binding arbitration clause applies to a certain type of controversy,
  - *i.e.*, questions of the
    - *validity* of the arbitration clause and
    - its *applicability* to the underlying dispute between the parties.[54]
- The Supreme Court in *Howsam* gave the following examples of such "questions of arbitrability" which parties are presumed to have intended that a court decide, notwithstanding their arbitration clause:
  - whether the arbitration contract bound parties who did not sign the agreement;
  - whether an arbitration agreement survived a corporate merger and bound the resulting corporation;
  - whether an arbitration clause in a concededly binding contract applies to a particular type of controversy;
  - whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement; and
  - whether a clause providing for arbitration of various grievances covers claims for damages for breach of a no-strike agreement.[55]
- As to these gateway issues of arbitrability, the general presumption as to arbitrability discussed above is reversed: *As to these gateway issues, the presumption is against arbitrability, such that there would have to be a strong showing of party intent to establish that the parties intended to have such gateway issues decided by the arbitrator(s).* These issues are presumed non-arbitrable unless the parties "*clearly and unmistakably provide[d] otherwise.*"[56]

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[54] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); *see also*, 13-75 New York Civil Practice: CPLR ¶ 7503.38 for a discussion of New York arbitration law in this area.

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

[56] *Howsam*, 537 U.S. at 83, stating:

> Although the Court has also long recognized and enforced a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (emphasis added); First Options, 514 U.S. at 944.

- It must be emphasized that the scope of this exception to the presumption of arbitrability is narrow. The Court in *Howsam* found that it is not applicable in other circumstances where parties would likely have expected that an arbitrator would decide the gateway matter. The Court said that procedural questions that grow out of the dispute and bear on its final disposition are presumptively for an arbitrator, not a judge, to decide. The Court gave the following examples:
  - Whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration;
  - The validity of allegations of waiver, delay, or a like as a defense to arbitrability; and
  - Whether a condition precedent to arbitrabilty has been fulfilled.[57]
- The Supreme Court in *First Options* formulated the rule as to this narrow exception to the presumption of arbitrability somewhat differently. There, the Court defined the exception as applying when the issue is not arbitrability in general, but rather the question of *who* shall determine arbitrability, the court or the arbitrator, stating that, when that is the question, the presumption is reversed and it is assumed that the matter should be decided by the court unless there is "clear and unmistakable evidence" that the parties intended the arbitrator(s) to decide it.[58]

Judicial Determination of Issues of Substantive Arbitrability/Arbitral Determination of Issues of Procedural Arbitrability

- Quoting the Comments to the Revised Uniform Arbitration Act (the "RUAA"), the Court in *Howsam* summed it up that, "[I]n the absence of an agreement to the contrary, issues of substantive arbitrability ... are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice,

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[57] *Id.* at 84-85.

[58] *First Options v. Kaplan*, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 994 (1995), stating:

> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *AT&T Technologies*, *supra*, at 649; *see Warrior & Gulf*, *supra*, at 583, n. 7. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" -- for in respect to this latter question the law reverses the presumption. See Mitsubishi Motors, supra, at 626 ("'Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'") (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)); *Warrior & Gulf*, supra, at 582-583.

laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."[59]

Challenges to the Parties' Underlying Agreement and Arbitration Agreement

- Given the above lay of the land as to who — the arbitrator(s) or the courts — decide issues as to arbitrability, who decides challenges to the validity of the parties' overall agreement and of the arbitration provisions therein?[60]
- The Supreme Court has distinguished the two situations and treats them differently under the FAA. The general rule it has established is that arbitrators decide challenges to the parties' overall agreement but courts decide challenges to the arbitration clause itself. If there is a claim of fraud in the inducement of the arbitration agreement itself, an issue that goes to the making of the agreement to arbitrate it, the court may decide it. But if there is a valid, unchallenged arbitration clause, the challenge to the parties' overall agreement is for the arbitrator(s) to decide.[61]

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514 U.S. at 944-45, 115 S. Ct. at 1924, 131 L. Ed. 2d at 994.

[59] *Howsam*, 537 U.S. at 85.

[60] The issue of the validity of the parties' overall agreement is different from the issue of whether the arbitration agreement was validly entered into by the parties, the latter being one that would be decided by the courts as a matter of substantive arbitrability. *Buckeye Check Cashing, Inc. v Cardegna*, 546 U.S. 440, 444-445, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2006); *see also*, *Nitro-Lift Techs., L.L C. v. Howard*, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012).

[61] *Nitro-Lift Techs., supra*, n. 60; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-445, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2006) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)). *See also,* Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1 (2007).

Barnes argues that *Buckeye*, along with its predecessors *Prima Paint* and *Southland*, undermines the *Erie* doctrine. He argues that the Supreme Court's rule as to the severability of the arbitration agreement from the overall agreement of which it is a part is inconsistent with substantive state law that should govern in federal court in diversity cases. Barnes concludes that, with the Supreme Court's rulings in the area, we are back to a federal common law.

Perhaps an answer to Barnes' observations is that the FAA, as construed by the Supreme Court in *Buckeye* and related cases, represents an overriding federal policy favoring arbitration – and that that policy, to have any chance of being actualized, needs to protect the arbitral process from any but absolutely necessary court intervention. Let the courts start ruling broadly on wide areas of a case and the parties might as well be in court as arbitration; the arbitration objectives, indeed, *raison d'etre*, of simplicity, expedition and economy would be lost.

Concern with letting arbitrators decide questions as to the validity of the parties' overall agreement also would seem, at some level, to be based on a distrust that arbitrators are as competent as judges to decide such matters, a premise that in the view of many is unfounded and unsubstantiated.

- The question arises, how can the arbitration clause be treated differently from the overall agreement in which it appears? Would not its validity be subject to the validity of the overall agreement? If the overall agreement is determined to have been invalid, how can the arbitration clause from the agreement be valid?

The Court has answered this by determining that the arbitration agreement is *severable*. The Court stated in *Buckeye Check Cashing*, "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."[62] The general rule is thus that a broad arbitration clause generally renders challenges to the parties' overall agreement arbitrable, but a challenge specifically to the validity of the arbitration clause can be decided by the court.[63]

General Scope of Applicability of the FAA in New York Courts

- As noted above, the FAA's primary substantive rule of arbitration law – the enforceability of arbitration agreements — is set forth in § 2 of Chapter 1 of the FAA and applies in state as well as federal court.
- The other provisions of Chapter 1 of the FAA generally, on their face, apply to proceedings in federal court.
- Such provisions are certainly applicable in federal court, but are they applicable in state court?
- As noted, the Supreme Court has only explicitly found § 2 to be applicable in state court, and has gone out of its way to note that it has not held the other provisions of the FAA to be applicable in state court, although it has suggested in dictum that § 3 as to staying litigation and possibly § 4 as to compelling arbitration are applicable in state court.
- Accordingly, one might expect that New York state courts, in deciding arbitration issues to which the FAA is applicable, would apply FAA § 2 but otherwise generally apply New York arbitration law.
- However, the New York courts, in what some (including William J.T. Brown) have characterized as over-preemption, have tended to apply other provisions of the FAA in state court without qualification once they determine that the FAA is applicable, including with respect to such areas as the review of awards, the issuance of subpoenas by arbitrators, and the imposition of legal requirements not contained in the FAA or of contract terms not contained in the parties' contract.
- However, there are a limited number of cases addressing these areas of inconsistency between New York and federal arbitration law and some of these

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[62] *Buckeye*, 546 U.S. at 445-446; *see also, Rent-a-Center*, 130 S.Ct. at 2778; *Nitro-Lift Techs., 133 S Ct at 503*

[63] The Supreme Court has continued to strengthen the role of arbitrators in determining questions of arbitrability *vis-à-vis* that of courts. For example, a challenge to an arbitration agreement must specifically target the provision thereof relegating questions of arbitrability to the arbitrator (the "delegation" provision), where there is such a provision, for the issue of the unconscionability of the arbitration agreement to be decided by a court rather than an arbitrator. *See Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

issues have not yet been addressed at all by the courts, so it will be interesting seeing how this plays out.

The Reverse: The Applicability of New York Arbitration Law in State and Federal Courts in FAA Cases

- As discussed above, in the context of New York, state arbitration law often contains limits on arbitrability of certain issues or other distinct arbitration-related rules, such as, in the case of New York, the following:
  - The rule that contesting arbitrability before the arbitrator(s) waives a party's right to contest arbitrability or assert a defense based on statues of limitations in court;
  - The rule that arbitrators may not award punitive damages;
  - The rule that arbitrators may not award attorney's fees absent the parties' having agreed to such authority;
  - The rule that courts and possibly even arbitrators may order consolidations of arbitrations;
  - The rule permitting pre-award removal of arbitrators;
  - The provision for a heightened burden of proof to establish that an arbitration clause has been added to an existing contract;
  - The rule, in the view of some courts, that arbitrators may issue subpoenas to non-parties for discovery of documents;
  - The prohibition of parties' applying to a court to stay arbitration if they do not do so within 20 days of receiving a demand for arbitration or notice of intention to arbitrate containing a demand that they make any such application within 20 days; and
  - The rule that judgment may be entered on an arbitral award even if the parties' agreement did not specify that judgment could be entered on such an award.
- The question becomes, to what extent are these provisions of New York arbitration law applicable to arbitrations that are subject to the FAA?

Applicability of New York Arbitration Law in State and Federal Court to Cases in Which the FAA is Applicable *Where the Parties <u>Have</u> Agreed to State Arbitration Law*

- The easy part of the answer seems to be that state arbitration law is applicable to arbitration-related proceedings in state and federal court to which the FAA is applicable *if the parties have, by their arbitration clause, agreed that it is applicable*, except perhaps if the provision the parties have agreed to adopt is inconsistent with the FAA (though, given the Court's commitment to the idea that parties are entitled to have their arbitration agreements enforced as written, it would seem that parties' agreement to limit arbitrability will generally be enforced—Parties, after all, don't have to agree to arbitration at all and may limit the extent to which they subject themselves to arbitration).
- This is the Supreme Court decision in *Volt*. The California Court of Appeal had upheld the lower court's stay of the arbitration in question on the ground that the

parties, by their contract, had adopted California arbitration law, including a provision that permitted the staying of an arbitration pending related litigation.

- The Supreme Court upheld the California Court of Appeal, based on application of a two-pronged approach:
  - The first prong looks to the parties' arbitration agreement. The fundamental thrust of the FAA is that the parties' agreement to arbitrate is to be enforced as written. The California state court had construed the parties' agreement as incorporating the California state arbitration law, a determination that the Supreme Court took as a given and did not see as within its scope of review. Reaffirming the parties' right to adopt California arbitration law, the Supreme Court emphasized that the FAA does not require arbitration pursuant to a particular set of procedural rules, but rather ensures the enforceability of parties' arbitration agreements, according to their terms.[64]
  - According to the Supreme Court's approach in *Volt,* once this determination is made – once the conclusion is reached that the parties, by their agreement, have adopted some other rule of law — the second issue is reached.
  - The second issue is whether the particular state arbitration rule in question that the parties have adopted is preempted by the FAA, which depends on whether it "*actually conflicts with federal law — that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*'"[65]
  - Somewhat counter-intuitively, the Supreme Court said that it thought that the California statute permitting the staying of arbitrations pending related litigation generally fostered the federal policy favoring arbitration, since California, by that statute, was legislating in an area that the FAA did not cover.[66] The Supreme Court went on to repeat that to prevent the enforcement of the parties' agreement to adopt California arbitration law "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms."[67]
  - Whether this second prong of the Court's analysis in *Volt* will be a significant basis for evaluating this issue going forward is unclear. To the extent that the policies and purposes of the FAA are satisfied by enforcing parties' agreements as written, it is not evident what kinds of state law or outside standards parties might adopt that would be found to undermine the FAA.
- The New York Court of Appeals has reached essentially the same conclusion, finding that, where the parties agreed that New York law would apply to the "enforcement" of their agreement, they thereby adopted New York arbitration

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[64] *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488, 498 (1989).

[65] *Id.* at 477.

[66] *Id.*

[67] *Id.* at 479.

law, including the rule that statute of limitations issues should be determined by the court, not the arbitrator.[68]

- The California arbitration rule that the Supreme Court found that the parties in *Volt*, by their agreement, had adopted was ostensibly a procedural rule, but the principle of *Volt* does not appear to be limited by the nature of the rule involved in that case. The fundamental point, a substantive one — that FAA § 2 requires that parties' arbitration agreements be enforced as written — ostensibly applies to all state arbitration rules, substantive and procedural.
- This was implicit in *Mastrobuono*, where the issue was whether the FAA rule permitting, or the New York rule prohibiting, punitive damages was applicable in the case in light of the parties' choice of law clause providing that their contract was governed by New York law. Reaffirming that parties may agree as they like, to include or exclude punitive damages from their arbitration, the Court saw the issue as a contract issue as to what the parties had agreed.[69] Based on its interpretation of the parties' choice of law and arbitration provisions and their selection of the NASD rules, which the Court found to permit punitive damages, the Court determined that the parties intended that punitive damages be available and hence upheld the award of such damages. The Court emphasized that, in interpreting an arbitration agreement, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself are resolved in favor of arbitration and a court should construe ambiguous contract language against the party that drafted it.[70]
- Accordingly, it would appear to be the rule that state arbitration law, whether of a substantive or procedural nature, will be applicable in cases covered by the FAA when the parties have agreed that such law will be applicable.

Applicability of New York Arbitration Law in State and Federal Court in Cases to Which the FAA is Applicable *Where the Parties Have Not Agreed to Such Arbitration Law*

- There would not appear to be any basis for the application of New York arbitration law in federal court to cases to which the FAA is applicable, where the parties have not stipulated to application of state arbitration law. The FAA has its own procedural provisions and the Federal Rules of Civil Procedure are applicable to fill in procedural gaps not covered by the FAA.
- Ironically, if the above-described trend of over-preemption continues, whereby the New York state courts, once they determine that the FAA is applicable to a case, proceed to apply provisions of the FAA that do not otherwise seem applicable in state court, it would seem that New York arbitration law will

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[68] *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252-53, 826 N.E.2d 802, 805-806, 793 N.Y.S.2d 831 834-35 (2005); *see also, N.J.R. Assoc. v. Tausend.* 19 N.Y.3d 597. 973 N.E.2d 730, 950 N.Y.S.2d 320 (2012); *Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Ct. 2007).

[69] *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76, 84 (1995).

[70] *Id.*

generally not be applied even in New York state courts when the FAA is applicable, absent agreement by the parties to the application of such arbitration law.

- Even with over-preemption, however, there will be circumstances where New York courts may be expected to apply New York arbitration law in cases to which the FAA is applicable, including possibly in circumstances such as the following:
  - **When the FAA is silent**: New York courts may be expected to apply New York arbitration law, at least in some instances, when New York arbitration law covers the point in question and the FAA is silent. The Supreme Court has, after all, specifically noted that the FAA does not occupy the entire field of arbitration, even of arbitration affecting interstate commerce, and that state law is only preempted to the extent that it actually conflicts with federal law -- that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[71]
  - **When New York arbitration law is consistent with the FAA**: New York courts may be expected to apply New York arbitration law when such law is consistent with the corresponding FAA provisions and does not conflict with the enforcement of arbitration agreements. Indeed, where the New York and FAA rules seem consistent, the courts may continue their present practice in many instances of noting the consistency of the two bodies of arbitration law and essentially deciding applicable issues under both sets of rules.
  - **When New York arbitration law is more protective than the FAA of arbitration:** There will also be cases where New York arbitration law is more protective of arbitration than the FAA. State and even federal courts in cases where the FAA is applicable may choose to apply such stricter rules. Examples of such New York arbitration rules discussed above include:
    - That an arbitrator's failure to grant an adjournment is not a specified basis for overturning an award;
    - That a party that has received notice under CPLR 7503(c) has only 20 days to contest arbitrability or statute of limitations in court and is otherwise relegated to arguing such matters before the arbitrator(s);
    - That parties need include no talismanic language in their arbitration agreement allowing for judgment to be entered on an award.
  - **Head in the sand or bold defiance: When the New York courts essentially ignore the applicability of the FAA**: To a surprising extent New York courts--not just lower courts, but the Appellate Divisions and even the Court of Appeals--have decided arbitration related cases that ostensibly affect interstate commerce without so much as a glance in the FAA's direction. These courts have simply ignored the applicability of

[71] *Volt Information Sciences*, 489 U.S. at 477-478.

the FAA and proceeded in their analysis and decisions to apply New York arbitration law. It would be interesting investigating whether counsel simply didn't raise the issue in such cases or the courts chose to ignore it.

- **When the New York courts have a narrower view of the scope of the Commerce Clause**: Another explanation for cases in which the New York courts ignore the applicability of the FAA is that those courts, as discussed above, entertain a narrow view of the reach of the FAA, although this approach seems unrealistic, given the Supreme Court's clear rulings that "commerce" for purposes of the FAA encompasses the full scope of the Commerce Clause.
- **Where the issue is so fundamental that the New York courts feel strongly about the application of New York law as the law of the forum**: There is also a fundamental underlying concept of the law of the forum – that certain fundamental rules, issues — need to be decided pursuant to the law of the jurisdiction in which the arbitration sits, given the heightened interest of the forum jurisdiction in them. While this concept seems to come up more in international arbitration and does not seem to have played much of a role in choice of law issues relating to domestic arbitration in New York, it is perhaps a concept that is always out there and that could play a role in the resolution of choice of law issues that might come up.
- **Reversal or moderation of the New York courts' trend of self-preemption**: As discussed above, the New York courts, in cases before them subject to the FAA, have been applying not only the provisions of the FAA clearly applicable in state court but also provisions that, on their face, seem applicable only in federal court. If this trend is reversed or moderated, New York courts might more often apply New York arbitration law not inconsistent with the basic thrust of the FAA in state court cases subject to the FAA. As William J.T. Brown has suggested, such a situation should not be surprising: After all, for some decades after the enactment first of CPLR Article 75 and then of the FAA, the two bodies of arbitration law existed side by side, with New York arbitration law being applied in New York courts and federal arbitration law being applied in federal court. It was only in 1984 in *Southland* that the Supreme Court found that the FAA was applicable in state court.[72]

- Whether New York's trend of over-preemption will continue will be interesting to watch. Numerous other states, including California, have tended to apply the FAA on a more limited basis in cases before them, generally applying their own arbitration law when it does not conflict with the central rule of the FAA that parties' arbitration agreements are enforceable as written.[73]

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[72] *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

[73] *See* Brown Paper, *supra* n. 7, *citing Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1352, 134882 Cal. Rptr. 3d 229, 240, 244, 190 P.3d 586, 598 (2008), which in turn cited Pennsylvania and Wisconsin decisions to the same effect and a Rhode Island decision to the contrary, *Trombetta v. Raymond James Financial Services, Inc.* (2006) 2006 PA Super 229

Trap for the Unwary: Limited Reach of a Standard Choice of Law Provision

- The above highlights what the courts have found to be the limited thrust of a standard choice of law clause in an agreement, providing generally that the law of a particular state will apply to the parties' agreement. Such clauses are generally

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[907 A.2d 550, 568]; *DeBaker v. Shah* (Ct.App. 1994) 187 Wis. 2d 252 [522 N.W.2d 268, 271], reversed on other grounds in *DeBaker v. Shah* (1995) 194 Wis. 2d 104 [533 N.W.2d 464]; *Flexible Mfg. Systems Pty v. Super Products* (E.D.Wis. 1994) 874 F.Supp. 247, 249; *M&L Power Services v. American Networks Intern.* (D.R.I. 1999) 44 F.Supp.2d 134, 139–142; *see also,* Howard S. Suskin and Stuart D. Polizzi, *A Cautionary Reminder About the Unique Application of the Federal Arbitration Act in State Court Proceedings*, 38 Securities Reg. L. & Rep. 2006 (Dec. 11, 2006), *citing, inter alia, Joseph v. Advest, Inc.*, 906 A.2d 1205 (Pa. Super. Ct. Aug. 8, 2006); *Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (KY 1984); *Manson v. Dain Bosworth Inc.*, 623 N.W.2d 610 (Minn. Ct. App. 1998), and Simmons Co. v. Deutsche Financial Services Corp., 532 S.E.2d 436, 439-40 (Ga. Ct. App. 200).

As pointed out in these various decisions in California, Pennsylvania, Wisconsin, Kentucky, Minnesota, and Georgia, and probably decisions in other jurisdictions (the above list does not purport to be exhaustive), there is an entirely different way than New York has chosen to look at the scope of the FAA in state courts under the Supreme Court's decisions. Specifically, numerous states have found that, under *Volt* and other cases, state arbitration law is only displaced to the extent that it conflicts with the FAA.

Perhaps what this means is that, in state court cases subject to the FAA, the courts should be looking at the individual state arbitration rules in question to evaluate whether they are pro- or anti- arbitration, generally applying them if the former and deeming them preempted if the latter.

The question arises as to how this mode of analysis applies to purely procedural rules of state versus federal arbitration law, given the Supreme Court's conclusion in *Volt* that the FAA does not establish a federal policy favoring arbitration under a certain set of procedural rules, but rather seeks to ensure the enforceability according of their terms of private agreements to arbitrate (*see* Suskin and Polizzi, *supra*, citing *Volt* at 476). Perhaps this means that purely procedural (presumably, non-outcome determinative) provisions of the FAA need not, as a matter of federal law, be applied in state court.

While following this general approach to choice of law issues may provide a consistent standard, such a standard does not promise consistent results, as the cases emerging on the issue throughout the country display significant originality and diversity by the courts in determining whether particular rules of state arbitration law are pro- or anti- arbitration (*see, e.g.*, cases discussed in Suskin and Polizzi, *supra*).

It should be noted that this analysis ostensibly applies regardless of whether the parties have adopted the state's arbitration law. Where the parties have <u>not</u> adopted that law, the question would appear to be simply whether that law is consistent and the like with the FAA. Where parties <u>have</u> adopted the state's arbitration law, that adoption will generally be enforced under *Volt*, subject, at least in theory, to some scrutiny as to whether the law in question is consistent with the FAA. Presumably, however, in the latter instance, the level of scrutiny as to the consistency of the rule with the FAA will be less probing.

understood to provide the substantive law applicable to determination of the parties' underlying dispute, but not to adopt the specified jurisdiction's arbitration law. To do that, parties must be more explicit that that is what they intend.

- In effect, the choice of law and arbitration clauses, respectively, are seen as essentially separate, with the former supplying the substantive law of contract, tort, securities, or the like, and the latter providing for arbitration without specifying what arbitration law applies.[74]
- This is a key distinction that is as integral to understanding this area as it is elusive and counterintuitive. One might have expected, that the standard choice of law clause adopting the law of a particular state, say of New York, would make all of the law of that state applicable, including its arbitration law. But that, as we have seen, is not generally the case; the standard choice of law clause has been interpreted as not reaching the jurisdiction's arbitration law.
- This distinction and the way the Supreme Court has developed it may perhaps best be understood as the Court's effort to intuit what parties presumptively intended by their use of what is typically boilerplate language appearing at the end of documents that may themselves have been largely boilerplate.

CONCLUSION

Perhaps the consummate irony of the complexity and murkiness of this whole area of arbitration choice of law is that it exists as the overlay and foundation for arbitration, a process supposed to be simple, expeditious, and economical.

It is not even that one approach or another to choice of law will necessarily be favorable to one side or the other in any particular situation, but that the ambiguity can fuel litigation causing prolixity, expense, and delay.

Enacting the Revised Uniform Arbitration Act in New York may help resolve some of the ambiguities, but the reality certainly is that we will likely have to wait a long time before the legislatures and courts of the country, state and federal, clear away this morass.

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[74] *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *see also*, 5 N.Y. Jur.2d Arbitration and Award § 64.

The Court in *Mastrobuono* stated:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.

514 U.S. at 62-64.

But the fortunate reality is that we control our destiny in this area. The FAA applies to all domestic arbitrations that affect interstate commerce -- and its central thrust is that parties' arbitration agreements are enforceable as written.

Therein lies a way out of the murk: Parties and their counsel need to use arbitration clauses that specify the arbitration rules of law they want. If this is done, the FAA will generally make such clauses enforceable.

The complexity of the issue highlights the drafting challenges, but the power of § 2 as a norm offers parties the prospect that their drafting efforts will be rewarded. Parties should not have to end up in expensive time-consuming litigation over choice of law when they have chosen arbitration.