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Federal Preemption of Arbitration - Southland Corp. v. Keating

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Federal Preemption of Arbitration

Southland Corp. v. Keating[1]

Arbitration agreements have traditionally been viewed with disfavor.[2] Many states have refused to enforce arbitration clauses to the same extent as other agreements, either under the common law or by statute.[3] This hostility towards arbitration agreements was the result of an attempt to preserve the courts' jurisdiction. Any agreement which deprived courts of jurisdiction was frowned upon.[4] The United States Supreme Court recently held that the Federal Arbitration Act[5] (FAA) preempts state law and must be applied in state courts. This decision is in accord with a trend throughout the nation to make arbitration agreements specifically enforceable.[6] The effect of the Court's holding is to make arbitration agreements specifically enforceable nationwide, in state as well as federal courts.[7] This note will examine the preemptive effect of the FAA on state substantive law and the implications for state procedural rules.

In *Southland Corp. v. Keating*, the Supreme Court invalidated a portion of the California Franchise Investment Law[8] which had been interpreted to require judicial consideration of claims brought under it.[9] Although the agreements in question contained an arbitration clause, the franchisees brought judicial actions against Southland for fraud, misrepresentation and violation of the disclosure requirements of the California Franchise Investment Law.[10] The Court held that in enacting the FAA, Congress intended to foreclose attempts

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1. 104 S. Ct. 852 (1984).

2. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *cert. dismissed,* 364 U.S. 801 (1960); Petition of Pahlberg, 43 F.Supp. 761, 762 (S.D.N.Y.), *appeal dismissed,* 131 F.2d 968 (2d Cir. 1942); Lorenzen, *Commercial Arbitration— International and Interstate Aspects,* 43 YALE L.J. 716, 719 (1934).

3. *See* notes 36-60 and accompanying text *infra.*

4. *Robert Lawrence Co.,* 271 F.2d at 406; Lorenzen, *supra* note 2, at 719.

5. 9 U.S.C. §§ 1-14 (1982) (formerly United States Arbitration Act).

6. 26 states have adopted the Uniform Arbitration Act [hereinafter cited as UAA] since it was promulgated in 1955. *See* 7 U.L.A. 1 (Supp. 1984); *Recent Developments: The Uniform Arbitration Act,* 48 MO. L. REV. 137, 139 n.4 (1983) [hereinafter cited as *Recent Developments* 1983]; *Recent Developments 1984: The Uniform Arbitration Act, infra* [hereinafter cited as *Recent Developments* 1984].

7. *See* text accompanying note 104, *infra.*

8. CAL. CORP. CODE §§ 31000-31516 (West 1977 & Supp. 1984).

9. Keating v. Superior Court, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub. nom.* Southland Corp. v. Keating, 104 S. Ct. 852 (1984).

10. 104 S. Ct. at 855.

to limit the enforceability of arbitration agreements by the states.[11] State law contrary to the FAA violates the supremacy clause of the United States Constitution.[12]

Chief Justice Burger, writing for the majority, found that in enacting section 2 of the FAA Congress declared a "national policy" favoring arbitration and "withdrew the power of the states to require a judicial forum for the resolution of claims which the parties agreed to resolve by arbitration."[13] Many states already have legislation in place which provides that arbitration clauses are generally enforceable.[14] As a result of *Southland*, the quirks and idiosyncrasies of state arbitration laws have largely disappeared.

In addition to preemption, *Southland* presented the question of whether arbitration under the FAA is impaired by state procedures allowing for class-wide arbitration.[15] The California Supreme Court had devised this remedy to alleviate any possible "class oppression" caused by the arbitration clauses in question.[16] The *Southland* Court dismissed this issue on jurisdictional grounds.[17]

The *Southland* decision was not completely unexpected.[18] Two Supreme Court cases, *Prima Paint Corp. v. Flood & Conklin Manufacturing. Co.*,[19] and *Moses H. Cone Memorial Hospital v.Mercury Construction Co.*,[20] had hinted at preemption, but neither directly addressed the issue of whether the

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11. Id. *at 858.*

12. Id.

13. 104 S. Ct. at 858. Chief Justice Burger has been an open advocate of alternative methods of dispute resolution, especially arbitration. *See* Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274, 276 (1982); *cf.* Rehnquist, *A Jurist's View of Arbitration,* 32 ARB. J. 1 (1977) (defining proper role of judiciary versus arbitration).

14. *See generally Recent Developments* 1983, *supra* note 6. *Recent Developments* 1984, *supra* note 6.

15. 104 S. Ct. at 857.

16. *See* Note, *Oppressive Arbitration Clauses in Adhesion Contracts,* 71 CALIF. L. REV. 1239, 1242 (1983).

17. 104 S. Ct. at 858.

18. Some state courts had held that the FAA preempts state law. *E.g.*, Sentry Sys., Inc. v. Guy, 98 Nev. 507, 509-10, 654 P.2d 1008, 1008-09 (1982) (per curiam); Tennessee River Pulp & Paper v. Eichleay, 637 S.W.2d 853, 857 (Tenn. 1982); Northwest Mechanical, Inc. v. Public Utils. Comm'n, 283 N.W.2d 522, 523-24 (Minn. 1979); R. J. Palmer Constr. Co. v. Wichita Band Instrument Co., 7 Kan. App. 2d 363, 365, 642 P.2d 127 (1982); State ex rel. *St. Joseph Light & Power Co. v. Donelson, 631 S.W.2d 887, 890-91 (Mo. Ct. App. 1982). Other state courts had held that the FAA does not preempt state law. E.g., Ex parte* Alabama Oxygen Co., 433 So. 2d 1158, 1161-67 (Ala. 1983), *vacated sub nom.*, York Int'l v. Alabamba Oxygen Co., 104 S. Ct. 1260 (1984) (remanded for further consideration in light of *Southland*); Pullman Inc. v. Phoenix Steel Corp., 304 A.2d 334, 338 (Del. 1973); Kress Corp. v. Edw. C. Levy Co., 102 Ill. App. 3d 264, 268-69, 430 N.E.2d 593, 596 (1981).

19. 388 U.S. 395 (1967).

20. 103 S. Ct. 927 (1983).

FAA must be applied by state courts. Both contain dicta demonstrating the Supreme Court's understanding of the FAA.

In *Prima Paint* the Court stated that it is "clear beyond dispute that the federal arbitration statute is based upon . . . the incontestable federal foundations of control over interstate commerce."[21] This language indicates that the FAA is more than merely a matter of federal court procedure. In *Moses* the Court stated "[f]ederal law in the terms of the Arbitration Act governs . . . in either state or federal court."[22] Although the issue in *Moses* concerned the propriety of a stay of judicial proceedings, the language used is a clear indication of the Court's understanding of the FAA.

The *Southland* majority was concerned about forum shopping between state and federal courts. The Court stated that if the action "had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable."[23] The Court felt that forum shopping would be encouraged if the FAA were not applied in state court. This rationale ignores the structure of the FAA which provides that if federal subject matter jurisdiction exists, *either* party can compel arbitration or stay a judicial proceeding in federal court.[24] If federal subject matter jurisdiction does not exist, *neither* party can go to federal court.[25] Southland Corporation originally removed this action to federal district court, but it was remanded back to the state court, presumably due to the lack of complete diversity.[26]

Southland will discourage forum shopping in the situation where an action could be brought in two or more states. Under prior law, some states did not enforce arbitration agreements or limited their scope. The forum chosen by the party seeking a judicial resolution of the dispute could determine the effect of an arbitration clause. After *Southland,* this will no longer be possible. Where the contract involves commerce, an arbitration clause will be equally enforceable in any state. This "national policy" favoring arbitration will homogenize the treatment of arbitration clauses by requiring all states to follow Section 2 of the FAA.

Where both federal and state law purport to regulate the same conduct, the issue arises: To what extent did Congress intend to preempt the field?[27] In *Southland*, Chief Justice Burger indicates that Congress intended to completely displace state law on the enforceability of arbitration clauses.[28] Where

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21. 388 U.S. at 405.
22. 103 S. Ct. at 941.
23. 104 S. Ct. at 860.
24. 104 S. Ct. at 870 (O'Connor, J., dissenting).
25. *Id.*; *see* text accompanying notes 63-64 *infra*.
26. Note, *supra,* note 16, at 1240 n.6.
27. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-24 to 6-25 (1978); Note, *A Framework for Preemption Analysis,* 88 YALE L.J. 363, 369-89 (1978).
28. "Congress declared a national policy favoring arbitration and withdrew the

Congress has decided to "occupy the field" for the federal government, state regulation will be invalidated even though it comports with federal policies,[29] but complete federal preemption should not be found unless congressional intent to do so is clear.[30] It has been argued that Congressional intent is not clear on this issue.[31] Even Chief Justice Burger admits that the "legislative history is not without ambiguities."[32] This finding of preemption in the absence of a clear legislative intent goes beyond, and is inconsistent with, prior case law.[33]

Though the FAA completely preempts state law on the *enforceability* of arbitration clauses, state law may still apply in determining the procedures to be used in enforcing arbitration agreements.[34] Such state procedural rules will be invalidated if they create an obstacle to the accomplishment and execution of the national policy favoring arbitration.[35]

The Court in *Southland* invalidated that part of the California Franchise Investment Law[36] which had been interpreted to require judicial resolution of disputes brought under it.[37] Because this statute hindered the enforcement of arbitration provisions, it violated the supremacy clause.[38] Many other states have, either through legislation or court decision, burdened the enforcement of arbitration clauses to a much greater extent than other contractual provisions. Under the *Southland* decision, states are no longer free to require judicial resolution of specified classes of disputes.[39] States are also prohibited from burdening the enforcement of arbitration clauses in other ways.[40]

The *Southland* Court was unequivocal in its holding that state law is preempted. In enacting the FAA, Congress "withdrew the power of the states to

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power of the states to require a judicial forum . . . ." *Southland,* 104 S. Ct. at 858.

29. Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977); L. TRIBE, *supra* note 27, at § 6-25.

30. L. TRIBE, *supra* note 27, § 6-25, at 384.

31. *See Southland,* 104 S. Ct. at 864-868 (O'Connor, J., dissenting) (FAA not intended to affect state court proceedings); Note, *Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts,* 1968 DUKE L.J. 588, 594.

32. 104 S. Ct. at 859.

33. *See* L. TRIBE, *supra* note 27, § 6-25, at 384.

34. *See* notes 104-127 and accompanying text *infra.*

35. *See* Ray v. Atlantic Richfield Co, 435 U.S. 151, 158 (1978); *Jones,* 430 U.S. at 526; L. TRIBE, *supra* note 27, § 6-24, at 379; *see also* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-152 (1963) (test is whether both regulations can be enforced without impairing the federal superintendence of the field).

36. CAL. CORP. CODE § 31512 (WEST 1977) (INTERPRETED IN *Southland,* 31 Cal. 3d at 598, 645 P.2d at 1200, 183 Cal. Rptr. at 368).

37. 104 S. Ct at 858.

38. *Id.* at 861.

39. *See* notes 44-56 and accompanying text *infra.*

40. *See* notes 57-60 and accompanying text *infra.*

require a judicial forum."[41] Section 2 of the FAA was intended to "foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[42] The enforcement of arbitration agreements is not "subject to *any* . . . limitations under state law."[43]

As an illustration of the extent of preemption, consider the federal Securities Act which provides that an agreement to arbitrate future controversies arising under the Act is void.[44] Many states have followed this lead in enacting and interpreting their securities laws.[45] The California Supreme Court had drawn an analogy to the federal Securities Act in interpreting the California Franchise Investment Law to require judicial resolution of disputes.[46] Under the reasoning of the *Southland* Court, the states are prohibited from making the same exceptions to the enforceability of arbitration clauses as those made by the federal government.[47]

Many other types of state statutes purport to limit the use of arbitration to settle disputes in a given area. For example, Massachusetts law provides that a consumer's remedies for breach of an implied warranty may not be modified and that any attempt to modify or exclude remedies for breach of such warranties is unenforceable.[48] Where the transaction involves commerce, the FAA should supercede this statutory provision and allow a consumer's remedies to be modified by a clause requiring arbitration of disputes.

Some states prohibit the use of an arbitration clause in an adhesion contract.[49] Insofar as these statutes limit the enforceability of arbitration clauses more than other clauses in adhesion contracts, they do not survive the *Southland* decision.

States have also denied the use of arbitration in claims sounding in tort.[50]

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41. *Southland,* 104 S. Ct. at 858.

42. *Id.* at 861.

43. *Id.* at 858 (emphasis added).

44. *See* Wilko v. Swann, 346 U.S. 427, 434-35 (1953).

45. *See, e.g.,* Kiehne v. Purdy, 309 N.W.2d 60, 61 (Minn. 1981); Young v. Oppenheimer & Co., 434 So. 2d 369, 372 (Fla. Dist. Ct. App. 1983); State *ex rel.* Geil v. Corcoran, 623 S.W.2d 557, 559 (Mo. Ct. App. 1981).

46. *Keating,* 31 Cal. 3d at 599, 645 P.2d at 1202-03, 183 Cal. Rptr. at 368.; *see also* Note, *supra* note 16, at 1241 n.12. *But cf.* Allison v. Medicab Int'l Inc., 92 Wash. 2d 199, 597 P.2d 380, 382-83 (1979) (en banc) (FAA preempts Washington Franchise Investment Protection Act which assertedly required a judicial forum for resolution of disputes).

47. *See Southland,* 104 S. Ct. at 861 n.11. ("The question in *Wilko* was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress . . . had in fact created such an exception.").

48. MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1983).

49. *See, e.g.,* IOWA CODE § 679A.1 1983); MO. REV. STAT. § 435.350 (Cum. Supp. 1983).

50. ARK. STAT. ANN. § 34-511 (Cum. Supp. 1982); IOWA CODE § 679A.1 (1983).

Where such disputes arise under a contract involving commerce with an arbitration clause broad enough to cover them, arbitration will be available under the FAA. Several states withhold enforcement of arbitration agreements in insurance contracts.[51] In *United States v. South-Eastern Underwriters Association*,[52] the Supreme Court held that the business of insurance is not beyond the reach of Congress under the Commerce Clause.[53] Congress reacted to this decision[54] by passing the McCarran-Ferguson Act which provides that "[N]o Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . ."[55] Because of this Act, it is not clear whether the FAA will preempt all state law regulating arbitration in insurance contracts. Where state law does not preclude arbitration clauses in insurance contracts, the McCarran-Ferguson Act does not prevent the FAA from giving the clauses effect.[56] The McCarran-Ferguson Act would prevent the FAA from preempting a state statute that prohibited arbitration under an insurance contract.

In addition to state statutes which forbid arbitration of specific subjects, many state laws allow arbitration clauses to be enforced, but burden them to a much greater extent than other contractual provisions. Where the FAA applies, it will preempt these statutes so that the enforcement of arbitration clauses will not be hindered.

For example, three states require prominent notice of the binding effect of arbitration clauses.[57] Under the Missouri statute, a contract containing an arbitration clause must include a notice, in ten point capital letters above or adjacent to the signature line, that the contract contains an arbitration clause.[58] South Carolina and Texas require a notice typed or stamped on the first page of the contract.[59] To the extent that these statutes render arbitration

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51. *E.g.*, ARK. STAT. ANN. § 34-511 (Supp. 1983); KAN. STAT. ANN. § 5-401 (1982); MO. REV. STAT. § 435.350 (Supp. 1983); OKLA. STAT. ANN. tit. 15, § 802 (West Supp. 1982-83).

52. 322 U.S. 533 (1944).

53. *Id.* at 553. This holding was a retreat from Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868), which held that issuing an insurance policy was not commerce.

54. SEC v. National Sec., Inc., 393 U.S. 453, 458 (1969).

55. 15 U.S.C. §§ 1011-1015 (1982). For a good discussion of the interpretation of the McCarran-Ferguson Act, see Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210-30 (1979).

56. *Cf.* Miller v. National Fidelity Life Ins. Co., 588 F.2d 185, 187 (1979) (because state law did not preclude arbitration clauses in insurance contracts, McCarran-Ferguson Act does not prevent application of the FAA).

57. MO. REV. STAT. § 435.460 (Supp. 1983); S. C. CODE ANN. § 15-48-10(a) (Law Co-op. Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 224-1 (Vernon Supp. 1982-83).

58. MO. REV. STAT. § 435.460 (Cum. Supp. 1982).

59. S. C. CODE ANN. § 15-48-10(a) (Law Co-op Supp. 1982); TEX. REV. CIV.

clauses unenforceable in the absence of a special notice, they must yield to the federal policy of enforcing arbitration provisions in contracts involving interstate commerce.[60]

The FAA has been applied by the federal courts whether jurisdiction was based upon diversity[61] or a federal question.[62] The FAA does not itself provide subject matter jurisdiction to a federal court.[63] An independent basis of jurisdiction must exist before a party may utilize the federal court system.[64] This jurisdictional requirement becomes less important now that state general jurisdiction courts are required to apply section 2 of the FAA.

The Court found "only two limitations" to the enforceability of arbitration clauses in state court.[65] First, to be governed by the FAA, an arbitration clause must be part of a written contract "evidencing a transaction involving commerce" or a maritime transaction.[66] Second, even if the contract satisfies the first requirement, it may be revoked upon "grounds as exist at law or in equity for the revocation of *any* contract."[67]

The first limitation is derived from the limitations on Congressional power under the commerce clause. If a contract which contains an arbitration clause does not involve commerce or a maritime transaction, the FAA does not apply in either state or federal court.[68] Section 1 of the FAA defines commerce as "commerce among the several States or with foreign nations."[69]

STAT. ANN. art. 224-1 (Vernon Supp. 1982-83).

60. *Cf.* Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 998-99 (8th Cir. 1972) (refusing to apply a Texas statute requiring that an arbitration clause must be signed by the parties' attorneys before it is valid); Wydel Assocs. v. Thermasol Ltd., 452 F. Supp. 739, 742 (W.D. Tex. 1978) (FAA invalidates provision of Texas partnership law that requires that arbitration agreements will not be binding unless all *partners so contract).*

61. *See, e.g.,* RPJ Energy Fund Management v. Collins, 552 F. Supp 946, 949 (D. Minn. 1982).

62. *See, e.g.,* United States v. Electronic & Missile Facilities, 364 F.2d 705, 709 (2d Cir.), *cert. dismissed* 385 U.S. 924 (1966).

63. *Southland,* 104 S. Ct. at 861 n.9.

64. Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 408 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *cert. dismissed,* 364 U.S. 801 (1960); Dorn v. Dorn's Transp., 562 F. Supp. 822, 824 (S.D.N.Y. 1983).

65. *Southland,* 104 S. Ct. at 858.

66. 9 U.S.C. § 2 (1982). If the contract does not involve commerce or a maritime transaction, state law should be applied. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 200-202 (1956).

67. 9 U.S.C. § 2 (1982) (emphasis added).

68. Bernhardt v. Polygraphic Co., 350 U.S. 198, 200-02 (1956); Downing v. Allstate Ins. Co., 124 Mich. App. 727, 732-33, 335 N.W.2d 139, 141 (1983) (per curiam); Bryant-Durham Elec. Co. v. Durham County Hosp. Corp., 42 N.C. App. 351, 356, 256 S.E.2d 529, 532 (1979).

69. 9 U.S.C. § 1 (1982). Congress specifically exempted contracts for employment of workers in interstate commerce from the application of the FAA. *Id.* Such

Congressional power under the commerce clause has consistently been held to be far reaching.[70] Indeed, in *Wickard v. Filburn*,[71] the Supreme Court held that a farmer who grows 23 acres of wheat intended wholly for consumption on the farm is by virtue of that fact alone subject to regulation under the commerce clause. Subsequent decisions have not restricted the potential reach of the commerce clause.[72]

The argument has been advanced that because Congress said "involving" rather than "affecting" commerce in section 2 of the FAA, it intended a narrower exercise of commerce clause power.[73] The Supreme Court has already rejected a narrow interpretation of "involving commerce" which would have applied the FAA only to contracts between merchants for the interstate shipment of goods.[74] Thus, Congress intended to exercise the full scope of its commerce power in enacting the FAA. The FAA should be broadly construed to enforce arbitration provisions in contracts that touch upon interstate commerce, without drawing a distinction between contracts that "involve" commerce and those that "affect" commerce.

The second limitation is that arbitration clauses may be revoked upon "grounds as exist at law or in equity for the revocation of *any* contract."[75]

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contracts are governed by the Labor Management Relations Act. 29 U.S.C. § 141 (1982).

70. *See* Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 187-89 (1972) (Congress may regulate local conduct which in isolation has only a trivial effect on interstate commerce if the cummulative effect of a class of conduct on interstate commerce is significant). For a good historical discussion of the framer's intent, legislative power and judicial interpretation under the Commerce Clause, see Eule, *Laying the Dormant Commerce Clause to Rest, 91* YALE L.J. 425, 425-37 (1982); O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 395-416 (1982).

71. 317 U.S. 111, 128-29 (1942); *see also* United States v. Darby, 312 U.S. 100, 118 (1941) (congressional power over interstate commerce extends to those activities intrastate which affect interstate commerce).

72. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154 (1971) (construing commerce clause power to reach wholly intrastate "loan sharking" activities); *see also* L. TRIBE, *supra* note 27, § 5-5, at 236-37 (describing congressional power to regulate intrastate activities).

73. Thayer v. American Fin. Advisors, Inc., 322 N.W.2d 599, 603-04 (Minn. 1982); *cf.* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194-97 (1974) (distinguishing between activities which are "in commerce" for purposes of the Robinson-Patman Act and activities which "affect commerce" for purposes of defining commerce clause power).

74. *Prima Paint*, 388 U.S. at 401 n.7.

75. 9 U.S.C. § 1 (1982) (emphasis added). *See generally* Note, *Incorporation of State Law Under the Federal Arbitration Act*, 78 MICH. L. REV. 1391 (1980) (defining grounds which exist at law or in equity for the revocation of any contract and advocating adoption of nondiscriminatory state law as the rule of decision under the FAA).

Special rules making only arbitration agreements unenforceable will no longer be tolerated, but the *Southland* opinion states that a party may assert "general contract defenses" to avoid enforcement of an arbitration clause.[76] In enacting the FAA, Congress intended to place arbitration agreements on an equal footing with other contracts.[77]

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[78] the Supreme Court held that a court may look only to the validity of the arbitration agreement itself, and not to the validity of the underlying contract.[79] Under this "separability doctrine" the court must order arbitration unless the making or performance of the *arbitration agreement* is in issue.[80] Only issues which go to the validity of the underlying contract are for the arbitrators to resolve. Issues surrounding the validity of the arbitration clause are for the courts.

The crucial question in this area is: What are the grounds which exist at law or in equity for the revocation of any contract? One court has suggested that "revocation" under section 2 of the FAA is synonymous with "rescission" which is an appropriate remedy when a contract is induced by fraud, mistake or duress.[81] Another court used the same reasoning but added the defense of undue influence to the list.[82] Still another court has held that the only grounds for revocation which meet the requirement of section 2 of the FAA are conditions which vitiate agreements ab initio.[83]

One avenue of avoiding enforcement of arbitration clauses has met with some success. The addition of an arbitration clause may be a "material alteration" under Uniform Commercial Code § 2-207(2)(b).[84] A written confirmation of an oral agreement will often contain an arbitration clause.[85] If the

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76. 104 S. Ct. at 861 n.11.

77. *Id.*

78. 388 U.S. 395 (1967).

79. *Id.* at 404. The Court refused to consider a claim of fraud in the inducement to the underlying contract.

80. *Id.* at 403. The Court in *Prima Paint* implicitly adopted this separability doctrine from the opinion of Judge Medina in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. granted,* 362 U.S. 909, *cert. dismissed,* 364 U.S. 801 (1960).

81. Halcon Int'l, Inc. v. Monsanto Austl. Ltd., 446 F.2d 156, 159 (7th Cir.), *cert denied,* 404 U.S. 949 (1971).

82. World Brilliance Corp. v. Bethlehem Steel Co., 342 F.2d 362, 364 (2d Cir. 1965).

83. County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53, 56 (1st Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

84. 1 U.L.A. 215 (1976).

85. *See* Comment, *UCC 2-207: Boiler Plates and Arbitration Clauses,* 30 BAYLOR L. REV. 143, 148 (1978); *cf.* Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code,* 67 CALIF. L. REV. 317, 346-47 (1979) (advocating an amendment to UCC § 2-207 to conform it to the separability doctrine and to avoid the problem of arbitration clauses being a material alteration in the battle of the forms).

addition of the clause is a material alteration, the FAA does not apply because the arbitration clause never became part of the contract.[86] While some courts have held that the addition of an arbitration clause *may* be a material alteration,[87] others have stated that the addition of an arbitration clause in a confirmation of an oral agreement constitutes a per se material alteration under UCC § 2-207(2)(b).[88]

Lack of capacity makes a contract voidable.[89] Capacity goes to the "making" of a contract and should, therefore, be an issue for the court to decide.[90] The related question of whether one person has authority to bind another to an arbitration agreement is for the court to consider.[91]

The defense of waiver of the arbitration clause is problematic. One commentator has divided waiver into three categories and suggested that some types be decided by the courts and others by the arbitrators.[92] First, waiver can mean the failure to comply with time restrictions in the agreement. Courts have generally held that this issue is to be decided by the arbitrators.[93] Second, waiver can be in the form of laches.[94] This has also been held to be an issue for the arbitrators.[95] Third, waiver can be found because of participation in a court proceeding.[96] Federal courts have generally decided this issue themselves by determining whether a party is "in default" in proceeding with arbitration under section 3 of the FAA.[97]

The defense of unconscionability of the underlying contract has been held to be an issue for the arbitrators.[98] Similar issues arise with respect to the

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86. *See* Supak & Sons Mfg. v. Pervel Indus., 593 F.2d 135, 137 (4th Cir. 1979).

87. N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 726 (8th Cir. 1977); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1170 (6th Cir. 1972).

88. Supak & Sons Mfg. v. Pervel Indus., 593 F.2d 135, 136 (4th Cir. 1979).

89. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 8-1, at 230 (2d ed. 1977); E. FARNSWORTH, CONTRACTS § 4.4, at 216 (1982).

90. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (court should decide issues which go to the making of the agreement to arbitrate).

91. N & D Fashions, Inc. v. DHJ Ind., Inc., 548 F.2d 722, 729 (8th Cir. 1977).

92. Calkins, *Waiver of the Right to Arbitrate,* 37 ARB. J. 10, 16 (1982).

93. *See* Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222, 1225 (2d Cir. 1980) (time-bar defenses to be decided by arbitrator); *cf.* O'Neel v. National Ass'n of Sec. Dealers, Inc., 667 F.2d 804, 807 (9th Cir. 1984) (statute of limitations is for the arbitrators to decide).

94. Calkins, *supra* note 92, at 11.

95. Halcon Int'l, Inc. v. Monsanto Austl. Ltd., 446 F.2d 156, 163 (7th Cir.), *cert. denied,* 404 U.S. 949 (1971).

96. N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 728 (8th Cir. 1977).

97. *See* Calkins, *supra* note 92, at 13, 16.

98. Janmort Leasing v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1292 (E.D.N.Y. 1979); *see* Goldberg, *Arbitration of Claims of Contract Unconscionability,*

defense of illegality of the underlying contract. If the claim is unconscionability of the arbitration clause itself, the claim should be decided by the courts.[99]

Claims of impossibility of performance, frustration of purpose, or commercial impracticability should never be decided by the court. These defenses merely assert that a *valid* contract should not be enforced, they do not affect the making or performance of the agreement to arbitrate. When faced with these defenses, the court should order arbitration.

Justice Stevens in his separate opinion in the *Southland* decision argues that the arbitration clauses in question were void as a matter of public policy under the Franchise Investment Law.[100] He asserts that an agreement which is void as against public policy is revocable at law or in equity,[101] and should not be enforceable under section 2 of the FAA. Chief Justice Burger responded to this argument by pointing out that the Franchise Investment Law is not a ground at law or equity for the revocation of *any* contract. It is only a ground for the revocation of an agreement to forego the right to a judicial forum.[102] Allowing such state-made exceptions would "wholly eviscerate Congressional intent to place arbitration agreements 'upon the same footing as other contracts.' "[103]

The *Southland* opinion is not entirely clear as to which provisions of the FAA must be applied by state courts. The FAA requires that arbitration clauses be *specifically* enforced by state courts.[104] The difficult issue is whether federal or state procedures control in an action to enforce an arbitration clause under the FAA.[105] The majority opinion expressly stated that it did *not* hold that sections 3 and 4 apply to proceedings in state courts.[106] Section 3 provides for a stay of a judicial proceeding which involves an issue referrable to arbitration.[107] Section 4 sets out the procedures to be used in a proceeding to compel

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56 N.D.L. REV. 7, 7 (1980) (asserting that claims of contract unconscionability should be for arbitrators to decide).

99. *See Prima Paint*, 388 U.S. at 404 (court may consider issues relating to the arbitration clause itself).

100. *Southland*, 104 S. Ct. at 863 (Stevens, J., concurring and dissenting).

101. *Id.*

102. *Id.* at 861 n.11.

103. *Id.* (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)).

104. *Id.* at 859. Justice O'Connor's dissent points out that common law jurisdictions have enforced arbitration agreements in a few different ways, as for example, with an award of damages. *Id.* at 869 (O'Connor, J., dissenting); *see* N. D. CENT. CODE § 32-04-12-(3) (Supp. 1983).

105. For a discussion of procedures under state arbitration acts, see *Recent Developments 1983 supra* note 6 at 169-210; *Recent Developments 1984 supra* note 6.

106. *Southland*, 104 S. Ct. at 861 n.10. Justice O'Connor understood the Court's decision to require state courts to enforce § 2 rights using procedures that mimic FAA §§ 3 and 4. *Id.* at 865 (O'Connor, J., dissenting).

107. 9 U.S.C. § 3 (1982).

arbitration.[108] It is clear that section 2 is binding on state courts.[109] The Court left unresolved the question of whether any of the other procedural sections of the FAA are applicable in state court. Because of this ambiguity, it is uncertain how much federal case law will be binding on the state courts.[110]

Sections 5 through 13 of the FAA contain procedural provisions.[111] Justice O'Connor argues that since the drafters spoke in terms of United States District Courts in enacting the procedural portions of the FAA, the intent of Congress was not to apply these provisions to state courts.[112] Before *Southland*, a state appeals court held that although the substantive provisions of the FAA apply to state courts, the procedural provisions do not.[113] The court held that since FAA § 10, which specifies grounds for vacating an award, was directed at a "United States court in and for the district wherein the award was made," only a federal district court could vacate an award under section 10. Consequently, the court concluded that state courts are without power to vacate awards under the authority of FAA § 10.[114]

A comparison of the FAA and the Uniform Arbitration Act (UAA)[115] is useful because the UAA has served as a model for many state arbitration acts.[116] The FAA is in many ways very similar to the UAA, but certain important differences exist between the two.[117] First, the UAA is not limited to

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108. *Id.* at § 4. For example, service of notice is made in the manner provided by the Federal Rules of Civil Procedure. The *Southland* decision states that the Federal Rules are not applicable in state court. 104 S. Ct. at 861 n.10.

109. *See* 104 S. Ct. at 858.

110. For a discussion of case law under the FAA, see Kreindler, *Arbitration Practice Under Federal Law*, 18 FORUM 348 (1983); *see also* Janmort Leasing v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1286 (E.D.N.Y. 1979) (federal rules of contract construction and interpretation govern under the FAA).

111. 9 U.S.C. § 5 (1982) (appointment of arbitrators); *id.* § 6 (application heard as motion); *id.* § 7 (summons of witnesses, books, records or documents); *id.* § 8 (seizure of vessel in admiralty); *id.* § 9 (confirmation of award); *id.* § 10 (vacation of award); *id.* § 11 (modification or correction of award); *id.* § 12 (notice, service); *id.* § 13 (papers required to be filed).

112. 104 S. Ct. at 864 (O'Connor, J., dissenting)

113. Hilton Constr. Co. v. Martin Mechanical Contractors, Inc., 166 Ga. App. 40, 303 S.E.2d 119, *aff'd on other grounds*,251 Ga. 701, 308 S.E.2d 830 (1983).

114. *Id.* at 41, 303 S.E.2d at 120.

115. 7 U.L.A. 1 (1978).

116. *See Recent Developments 1983, supra* note 6, at 139.

117. The following pairs of sections from the FAA and UAA are essentially the same: (1) UAA § 1, FAA § 2 (validity of an arbitration agreement); (2) UAA § 3, FAA § 5 (appointment of arbitrators); (3) UAA § 11, FAA § 6 (application to court shall be by motion); (4) UAA § 7, FAA § 7 (compelling attendance of witnesses, books, etc.); (5) UAA § 13, FAA § 11 (grounds for modifying or correcting an award); (6) UAA § 14, FAA § 13 (force and effect of judgment confirming, correcting or modifying an award); and (7) UAA § 12, FAA § 10 (grounds for vacating an arbitration award).

transactions which involve commerce or maritime transactions. Second, the two acts contain different provisions concerning their applicability to employment contracts. Section 1 of the FAA states that the FAA does not apply to contracts of employment involving seamen, railroad employees, or workers engaged in interstate commerce.[118] The UAA specifically extends its coverage to contracts of employment, unless the agreement provides otherwise.[119] While both the FAA and the UAA provide for summary proceedings to dispose of issues relating to the making or performance of an arbitration agreement,[120] the FAA provides that a party may demand a jury trial as to these issues,[121] the UAA does not.

Finally, both Acts have sections not found in the other. For example, the UAA provides for stays of arbitration,[122] while the FAA does not. The UAA also establishes requirements for an award[123] and permits arbitrators to change an award,[124] neither of which is provided for under the FAA.

The procedures used to enforce arbitration clauses in state court must not be inimical to the policy underlying section 2 of the FAA of placing arbitration clauses on the same footing as other contracts.[125] It remains to be seen exactly which, if any, procedural provisions of state arbitration statutes, such as the UAA, will be given effect in actions brought in state courts under the FAA. One of the issues in the *Southland* case was whether the policies of the FAA are impaired when a class action procedure is imposed on the process by a state court.[126] Consolidated arbitration has been allowed in federal court under Federal Rule 42.[127]

By requiring state courts to apply section 2 of the FAA, the Supreme Court has taken a significant step towards promotion of the use of alternative methods of dispute resolution. When parties contract to resolve their disputes

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118. FAA § 1.
119. UAA § 1.
120. FAA § 4; UAA § 2(A).
121. FAA § 4.
122. UAA § 2(b).
123. *Id.* at § 8.
124. *Id.* at § 9.
125. 104 S. Ct. at 861 n.11.
126. *Id.* at 857.
127. Robinson v. Warner, 370 F.Supp. 828, 830-31 (D.R.I. 1974). *But see* Weyerhauser Co. v. Wester Seas Shipping Co., 568 F.Supp. 1220, 1221-22 (N.D. Cal. 1983) (Rule 42 is irrelevant, the real issue is whether consolidated arbitration was agreed upon); *cf.* Annot., 64 A.L.R.3d 528 (1975) (*state* court power to consolidate arbitration proceedings).

Federal Rule of Civil Procedure 81(a)(3) makes the Federal Rules generally applicable to the FAA to the extent that the procedures are not provided for. *See* FED. R. CIV. P. 81(a)(3). Section 4 of the FAA also refers to the Federal Rules. *See* FAA § 4. The *Southland* opinion makes it clear that the Federal Rules of Civil Procedure do not apply to state court proceedings under FAA § 2. *Southland,* 104 S. Ct. at 861 n.10.

by arbitration, their agreement will be specifically enforced. Antique state policies promoting the use of the court system will no longer be permitted to undermine such contracts.

The *Southland* decision will not radically change the law in those states already requiring enforcement of arbitration clauses. In states where arbitration clauses were disfavored section 2 of the FAA will require enforcement of the agreement notwithstanding contrary state law. The *Southland* decision may also alter the procedure to be followed in proceedings which relate to the enforcement of arbitration clauses. Procedural rules which deny enforcement of arbitration agreements should fall, just as substantive rules will. It remains to be seen to what extent the procedural aspects of state arbitration statutes will survive the *Southland* decision. Future decisions will further define the role of the FAA in state court. *Southland* has given a strong indication of the Court's understanding of the FAA and its relationship with state law. The federal policy favoring enforcement of arbitration clauses will prevail and require state courts to loosen their jurisdictional grip on this type of dispute resolution.

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