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The Pro-Arbitration Policy: Is This What the Parties Really Intended? The Courts' Treatment of Forum Selection Clauses in Arbitration Agreements

*Sterling Financial Inv. Group, Inc. v. Hammer*¹

I. INTRODUCTION

In today's global economy, it is not uncommon for parties from different locations to contract together both in commerce and in employment. Especially in the context of employers, one party will often want any and all disputes it has with its employees to be resolved via arbitration in a certain forum. To accomplish this, employers often include a forum selection clause in the arbitration agreement with the future employee. Thus, if and how courts address forum selection clauses is of paramount importance to employers. In *Sterling Financial Investment Group, Inc. v. Hammer*, the 11th Circuit Court of Appeals were faced with the issue of whether to interpret and enforce a forum selection clause in an arbitration agreement between an employee and an employer.²

II. FACTS AND HOLDING

In 2001, Sterling Financial Investment Group (Sterling) approached Bernard Hammer about a possible employment opportunity at Sterling's headquarters in Boca Raton, Florida.³ At the time, Hammer was working in Beaumont, Texas, as a stockbroker for Morgan Stanley Dean Witter & Co.⁴ The two parties spent several months negotiating before Hammer took a position as nationwide supervisor of recruitment of brokers at Sterling.⁵ In September 2001, Hammer resigned from his position at Morgan Stanley Dean Witter & Co., and moved to Boca Raton, Florida, where he began working for Sterling.⁶ Before beginning work with Sterling, Hammer signed an employment agreement. The employment agreement between Hammer and Sterling contained an arbitration provision.⁷

Shortly after his employment commenced at Sterling, Hammer was fired.⁸ Thereafter, Hammer returned to Texas and, in 2003, began arbitration proceedings

1. 393 F.3d 1223 (11th Cir. 2004).

2. *Id.*

3. *Id.* at 1223.

4. *Id.*

5. *Id.*

6. *Id.* at 1223-24.

7. *Id.* at 1224.

8. *Id.*

against Sterling.⁹ Hammer asserted breach of contract, fraudulent inducement and quasi contract, promissory estoppel, and “other claims under statutory and common law.”¹⁰ Hammer sought to have the arbitration in Houston, Texas, but Sterling objected to Texas venue, demanding that venue be transferred to Florida pursuant to the arbitration agreement.¹¹

At the start of their employment relationship, Hammer and Sterling had entered into two agreements, a Representative Agreement and an Employment Agreement.¹² Pertinent provisions of the Employment Agreement stated that Hammer was an “at will” employee and that the parties were entering into an arbitration agreement.¹³ The arbitration provision contained a forum selection clause which provided that, “[t]he parties agree that any claim or controversy concerning the terms, conditions or application of this Agreement shall be subject to arbitration pursuant to the National Association of Securities Dealers, Inc. in Boca Raton, Florida.”¹⁴ The same agreement also contained a clause stating that the agreement “shall be construed, and the validity, performance and enhancement thereof, shall be governed by the laws of the State of Florida.”¹⁵

A forum selection clause was also included in the Representative Agreement.¹⁶ It provided that, “[a]ny disputes between the parties hereto shall be submitted to binding arbitration before the National Association of Securities Dealers with venue being in the State of Florida.”¹⁷ Similar to the Employment Agreement, the Representative Agreement also contained a provision stating that the Representative Agreement “shall be construed in accordance with and shall be governed by the laws of the State of Florida.”¹⁸

Sterling stated, as one of its reasons for firing Hammer, that his performance was not satisfactory.¹⁹ In his defense, Hammer asserted that Sterling never clarified what exactly Hammer’s position entailed, never related which duties were his, and failed to provide him with adequate administrative support, such as office and telephone arrangements.²⁰

After being fired, Hammer returned to Texas where he filed his claim against Sterling with the National Association of Securities Dealers (NASD).²¹ Pointing to the two agreements between Sterling and Hammer, Sterling asked that the pro-

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* The National Association of Securities Dealers serves as “the primary private-sector regulator of America’s securities industry . . . oversee[ing] the activities of more than 5,100 brokerage firms, approximately 99,000 branch offices and more than 660,000 registered securities representatives.” About NASD, at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=608&ssSourceNodeId=5 (last visited Sept. 25, 2005). Additionally, the NASD “oversee[s] and regulate[s] trading in equities, corporate bonds, securities futures and options . . . [and] operate the largest securities dispute resolution forum in the world, processing over 8,000 arbitrations and 1,000 mediations a year.” *Id.*

ceedings be transferred to Florida, but the NASD denied the request.²² The NASD then referred the arbitration to a panel in Houston, Texas.²³

Seeking to stay arbitration in Texas and have venue transferred to Florida, Sterling filed a motion in the United States District Court for the Southern District of Florida.²⁴ Sterling contended that, under the Federal Arbitration Act (FAA), the district court had authority to transfer venue to Florida based on the employment agreements between Hammer and Sterling.²⁵ Conversely, Hammer argued that the federal courts should not attempt to assert control over every detail of every issue in an arbitration proceeding.²⁶ Hammer stated that, in this case, arbitrators should make all decisions in regards to the arbitration, since both parties had agreed to arbitration.²⁷ To support his position, Hammer relied on NASD's Code of Arbitration Procedure Rule 10315, which states that "[t]he Director shall determine the time and place of the first meeting of the arbitration panel and of the parties."²⁸ Rule 10315 also provides that "[t]he arbitrators shall determine the time and place for all subsequent meetings..."²⁹

Adopting Sterling's argument, the district court granted Sterling's motion to stay arbitration in Texas and to compel arbitration in Florida.³⁰ Hammer subsequently appealed.³¹

The United States Court of Appeals, in the Eleventh Circuit, affirmed the district court's decision.³² The court also adopted Sterling's argument that the FAA grants the district court authority to enforce the terms of both the Employment and Representative agreements.³³ The Eleventh Circuit found that, when one party seeks to have an arbitration commence in a forum inconsistent with a forum selection clause of a valid arbitration agreement and the arbitrator also disregards the forum selection clause, the FAA grants a federal district court jurisdiction to interpret and enforce the forum selection clause contained in the arbitration agreement.³⁴

22. *Hammer*, 393 F.3d at 1224.

23. *Id.*

24. *Id.*

25. *Id.* at 1225.

26. *Id.*

27. *Id.* at 1224.

28. *Id.* at 1225. Rule 10315 states:

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine.

Attendance at a meeting waives notice thereof.

NASD Code of Arbitration Procedure #10315 (2005), at http://nasd.complinet.com/nasd/display/display.html?rbid=1189&record_id=1159005609 (last visited Sept. 25, 2005).

29. NASD Code of Arbitration Procedure #10315 (2005), at http://nasd.complinet.com/nasd/diplay/display.html?rbid=1189&record_id=1159005609 (last visited Sept. 25, 2005).

30. *Hammer*, 393 F.3d at 1224.

31. *Id.*

32. *Id.* at 1226.

33. *Id.* at 1225.

34. *Id.*

III. LEGAL BACKGROUND

The Federal Arbitration Act (FAA) was originally enacted in 1925, and later reenacted and codified as Title IX of the United States Code in 1947.³⁵ Congress enacted the FAA in order to place arbitration agreements on an equal level with ordinary contracts, thereby removing the “longstanding judiciary hostility” towards arbitration agreements at common law.³⁶ Section 2 of the FAA sets forth this mandate by stating that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁷ Section 4 of the FAA provides that district courts shall have the power to issue orders to compel arbitration when one party has failed, neglected, or refused to arbitrate under a valid arbitration agreement.³⁸ Section 4 also requires that if the make of the arbitration agreement or the failure to comply with the agreement is not an issue, the court shall direct the parties to arbitrate. Furthermore, if they are found to be in issue, and the trial court determines there has been a breach of the agreement, the court will order “the parties to proceed to arbitration” per the terms of their agreement.³⁹

The Supreme Court has stated that the FAA manifests a “liberal federal policy favoring arbitration agreements,”⁴⁰ and that its central purpose is to “ensure that private agreements to arbitrate are enforced according to their terms.”⁴¹ Courts are thus required to “rigorously enforce agreements to arbitrate”⁴² so that contractual rights and expectations of the parties are given full effect.⁴³ Any questions as to whether an issue is arbitrable are to be resolved in favor of arbitration.⁴⁴ Arbitration agreements are consensual contracts in which parties are “generally free to structure their arbitration agreements as they see fit,” so that parties may “specify by contract the rules under which that arbitration will be conducted.”⁴⁵

35. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); 9 U.S.C. § 1 et seq. (2000).

36. *Id.*

37. 9 U.S.C. § 2.

38. 9 U.S.C. § 4. Section 4 provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. *Id.*

39. *Id.* Section 4 states:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. *Id.*

40. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

41. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (citation omitted).

42. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted).

43. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

44. *Moses*, 460 U.S. at 24-25.

45. *Volt*, 489 U.S. at 479.

Consequently, parties may limit what issues they will arbitrate⁴⁶ and, by way of a forum selection clause, where they will arbitrate.⁴⁷

In cases where one party has either failed, neglected, or refused to arbitrate a dispute that is subject to an arbitration agreement, section 4 of the FAA grants district courts the power to issue an order “directing that such arbitration proceed in the *manner provided for in such agreement*.”⁴⁸ Section 4 also provides that “[t]he hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.”⁴⁹ This language has been interpreted by various courts to mean that a district court has no power to order arbitration to take place outside of its own district.⁵⁰

At least one other court besides *Hammer* has relied on section 4’s language to enforce a forum selection clause in an arbitration agreement when one party attempted to start arbitration at a place other than that provided in the agreement.⁵¹ In *Bear, Stearns & Co., Inc. v. Bennett*,⁵² a customer signed an agreement with a securities broker-dealer which provided:

[a]ny controversy out of or relating to your account in connection with transactions between us or pursuant to this agreement thereof shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc., the Board of Governors of the New York Stock Exchange, Inc., or the Board of Governors of the American Stock Exchange, Inc. [AMEX] as you may elect.⁵³

Additionally, Article VIII, section 2(c) of the AMEX Constitution states, “if any of the parties to a controversy is a customer, the customer may elect to arbitrate before the American Arbitration Association [AAA] in the City of New York, unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange.”

46. See *Mitsubishi Motors*, 473 U.S. at 628.

47. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (holding forum selection clauses in arbitration agreements are enforceable).

48. 9 U.S.C. § 4 (2000) (emphasis added).

49. *Id.*

50. See *McCullagh v. Dean Witter Reynolds, Inc.*, 177 F.3d 1307, 1308 (11th Cir. 1999) (holding that “the Federal Arbitration Act allows a district court to compel arbitration only in the district in which it sits”); *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327-28 (7th Cir. 1995) (holding that where the arbitration agreement contains a forum selection clause, only the district court in that forum can issue a section 4 order compelling arbitration); *Snyder v. Smith*, 736 F.2d 409, 418 (7th Cir. 1984) (same as *Lauer*’s holding) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Econo-Car Int’l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974) (holding that District Court of the Virgin Islands may not compel arbitration in New York, the site chosen by the parties’ arbitration agreement); *Lawn v. Franklin*, 328 F.Supp. 791, 793 (S.D.N.Y. 1971). *Lawn* stated that “[a]lthough [section 4] appears to imply that the hearing and proceedings follow the District in which the petition for an order directing such arbitration is filed, the converse would seem to follow as well. The proper District within which the petition for such order should be filed is the District where the ‘proceedings’ by virtue of the contract of the parties are to take place.” *Id.*

51. See also *Bear, Stearns & Co. v. Bennett*, 938 F.2d 31 (2d Cir. 1991); *Roe v. Gray*, 165 F. Supp. 2d 1164 (D. Colo. 2001).

52. *Bennett*, 938 F.2d 31 (2d Cir. 1991).

53. *Id.* at 31.

When a dispute arose, the customer filed a demand for arbitration with the AAA in Florida.⁵⁴ The broker then filed a petition in the Southern District of New York to compel arbitration in New York.⁵⁵ The *Bennett* court construed the phrase “in the City of New York” in the AMEX Constitution as a forum selection clause and held that, “[w]here there is a valid agreement for arbitration, Congress has directed the district courts to order that arbitration proceed in accordance with the terms of the agreement.”⁵⁶

Both the *Hammer* and *Bennett* courts held that the court, and not the arbitrator, has the authority to interpret and enforce the forum selection clause.⁵⁷ However, the Supreme Court’s jurisprudence in the area of arbitration may put these holdings on shaky ground.

The Supreme Court has long noted that the courts, and not the arbitrator, are the proper place for determining the “question of arbitrability,” i.e., whether the parties have agreed to arbitrate.⁵⁸ Nevertheless, in *John Wiley & Sons, Inc. v. Livingston*,⁵⁹ the Supreme Court held that after this initial issue of arbitrability has been determined, “procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”⁶⁰

The Supreme Court has provided further guidance as to whether a particular issue of a dispute is a “question of arbitrability.” The Court has refused to define “question of arbitrability” to include “any potentially dispositive gateway question,” whose answer would “determine whether the underlying controversy will proceed to arbitration on the merits.”⁶¹ Instead, a more limited definition has been applied to the phrase “question of arbitrability,”⁶² so that it is only applicable,

[in the] narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.⁶³

Examples of proper “questions of arbitrability” include disputes over whether parties are bound by an arbitration agreement,⁶⁴ and whether a particular controversy is included under the arbitration agreement.⁶⁵ However, as the *Livingston*

54. *Id.*

55. *Id.*

56. *Id.* at 32. (quoting 9 U.S.C. § 4 (2000)) (internal quotations omitted).

57. *Hammer*, 393 F.3d at 1225; *Bennett*, 938 F.2d at 32.

58. See *AT&T Techs., Inc. v. Commc’ns Workers of America*, 475 U.S. 643 (1986) (noting that “[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator”); *Int’l Union of Operating Eng’rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) (holding that it is the responsibility of the court to “determine whether a union and employer have agreed to arbitration”).

59. 376 U.S. 543 (1964).

60. *Id.* at 557.

61. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

62. *Id.* (citing *First Options v. Kaplan*, 514 U.S. 938, 942 (1995)).

63. *Id.* at 83-84.

64. *Kaplan*, 514 U.S. at 943-46.

65. *AT&T Techs, Inc.*, 475 U.S. at 651-52.

court made clear, a “question of arbitrability” would not exist in circumstances involving procedural questions arising out of the dispute.⁶⁶ Likewise, the Supreme Court has stated that a presumption exists that the arbitrator shall decide “allegation[s] of waiver, delay, or a like defense to arbitrability.”⁶⁷ Also, in *Green Tree Financial Corp. v. Bazzle*,⁶⁸ a plurality of the Court found that the phrase “question of arbitrability,” does not include whether, absent specific language to the contrary, an arbitration agreement forbids class arbitration.⁶⁹

The Revised Uniform Arbitration Act (RUAA)⁷⁰ concurs with the Supreme Court regarding what constitutes a “question of arbitrability.” Section 6(c) of the RUAA states that “[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”⁷¹ Specifically, the second comment to section 6 states that section 6(c) is:

intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that, in the absence of an agreement to the contrary, *issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide* and *issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.*⁷²

The Supreme Court has not yet reached the direct issue of whether the interpretation and enforcement of a forum selection clause in an arbitration agreement is a ‘question of arbitrability’ or a procedural matter that should be decided by the arbitrator. *Hammer* and *Bennett* treated a forum selection clause as a ‘question of arbitrability’ and not a procedural matter left for the arbitrator.⁷³ However, at least one court has reached the opposite conclusion.

In *Richard C. Young & Co. v. Leventhal*,⁷⁴ the First Circuit held that, under the Supreme Court jurisprudence of *Green Tree Financial Corp. v. Bazzle* and *Howsam v. Dean Witter Reynolds, Inc.*, forum selection clauses in arbitration agreements are procedural matters that must be left to the arbitrator to interpret

66. *Livingston*, 376 U.S. at 557.

67. *Moses*, 460 U.S. at 24-25.

68. 539 U.S. 444 (2003).

69. *Id.* at 452. The Court held that the issue of whether the arbitration agreement forbids class arbitration should be for the arbitrator to decide. *Id.* at 453, 455 (Stevens’ concurring in judgment and dissenting in part stated, “[a]rguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator, rather than the court.”).

70. The Uniform Arbitration Act was first promulgated in 1955, with the primary purpose of insuring “the enforceability of agreements to arbitrate in the face of oftentimes hostile state law.” Prefatory Note to RUAA, available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm> (last visited Sept. 15, 2005).

71. Uniform Arbitration Act, § 6(c) (2000), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm> (last visited Sept. 15, 2005).

72. *Id.* at § 6 cmt. 2 (emphasis added).

73. See *supra* Part II, III.

74. 389 F.3d 1 (1st Cir. 2004).

and decide.⁷⁵ The pertinent language of the forum selection clause in the arbitration agreement in *Leventhal* stated that, the “disagreement will be submitted for arbitration to the American Arbitration Association in Boston, Massachusetts.”⁷⁶ Although not identical to the language at issue in *Hammer*, the two provisions are substantially similar.⁷⁷ *Leventhal* differs from *Hammer* in that the party seeking arbitration originally filed for arbitration in California, but later submitted the dispute in the proper location, i.e., Boston, Massachusetts.⁷⁸ Before the party resubmitted its request in Boston, the lower court enjoined further proceedings in California and interpreted the language of the agreement to only require that the arbitration request be submitted to the Boston office, and not that arbitration had to occur in Boston.⁷⁹

The *Leventhal* court rejected the lower court’s holding, stating instead that forum selection clauses in arbitration agreements are procedural matters that must be left to the arbitrator to interpret.⁸⁰ Even though the *Leventhal* court reached this conclusion, it noted that since the party had since refiled in Boston, the only question before the court was whether, after the matter was properly refiled, the arbitration group could then interpret the language so as to allow arbitration in an area besides Boston.⁸¹ It expressly refused to address the issue of whether the lower court had authority to intervene in the original arbitration filing in California.⁸²

Additionally, when faced with the issue of whether forum selection clauses are procedural matters for purposes of the Erie doctrine, the majority of federal courts have held that federal common law must govern the interpretation and enforcement of forum selection clauses because venue, - and thus a forum selection clause - is a procedural matter and not a substantive issue.⁸³

IV. INSTANT DECISION

In *Sterling Financial Investment Group, Inc. v. Hammer*,⁸⁴ the Eleventh Circuit was faced with the issue of whether the district court could interpret and enforce a forum selection clause provided in an arbitration agreement by staying arbitration in Houston, Texas, and compelling arbitration in Boca Raton, Florida.⁸⁵ The court affirmed the district court’s order because it found the district court properly exercised jurisdiction under section 4 of the FAA.⁸⁶

75. *Id.* at 4.

76. *Id.* at 2.

77. The agreement in *Hammer* provided that, “[a]ny disputes between the parties hereto shall be submitted to binding arbitration before the National Association of Securities Dealers with venue being in the State of Florida.” 393 F.3d at 1224. See *supra* Part II.

78. *Leventhal*, 389 F.3d at 3.

79. *Id.* at 2-3.

80. *Id.* at 4.

81. *Id.* at 5.

82. *Id.*

83. *Frediani & Delgreco, S.P.A. v. Gina Imports, Ltd.*, 870 F.Supp. 217, 219-20 (1994).

84. 393 F.3d 1223 (2004).

85. *Id.* at 1224-25.

86. *Id.* at 1226

The *Hammer* court assumed the arbitration agreement and the forum selection clause were valid because Hammer never raised that issue before the district court.⁸⁷ Although Hammer argued on appeal that the forum selection clause was invalid due to fraudulent inducement, the court refused to consider this issue because it was not first raised at the district court level.⁸⁸ In its refusal to consider this issue, the court stated that “arguments not presented in the district court will not be considered for the first time on appeal.”⁸⁹

In its discussion regarding whether the district court had jurisdiction to interpret and enforce the arbitration agreement, the court first noted the relevant portion of section 4 of the FAA:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed *in the manner provided for in such agreement*. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.⁹⁰

The court then reasoned that, based on the plain language of section 4 of the FAA, a court may review an arbitration proceeding before it has concluded.⁹¹ Because of the plain language of section 4, the court found that a federal district court “has jurisdiction to enforce a forum selection clause in a valid arbitration agreement that has been disregarded by the arbitrators.”⁹² In so holding, the court implicitly found that the interpretation and enforcement of a forum selection clause is an issue of substantive arbitrability.⁹³

V. COMMENT

The Supreme Court has long recognized that it is within the sole province of the court to determine ‘questions of arbitrability’ (i.e., whether the parties agreed to arbitrate).⁹⁴ However, procedural questions that arise out of the arbitrable issue itself (the underlying dispute) and that have some effect on the final disposition of the dispute should be left to the arbitrator.⁹⁵ In distinguishing the two different

87. *Id.* at 1225.

88. *Id.* at 1226.

89. *Id.* (citing *Mills v. Singletary*, 63 F.3d 999, 1008 n.11 (11th Cir. 1988)).

90. *Id.* at 1225 (citing 9 U.S.C. § 4) (emphasis added by court).

91. *Id.*

92. *Id.*

93. Under the Supreme Court’s jurisprudence, the *Hammer* court’s decision must assume that the interpretation of a forum selection clause is a substantive issue of arbitrability, otherwise it is contrary to the express holdings of the Supreme Court as evidenced in *Howsam v. Dean Witter Reynolds, Inc.* and *Green Tree Fin. Corp. v. Bazzle*. See *supra* part III.

94. See *Livingston, supra* note 59, at 557.

95. *Id.*

circumstances, the Court has stated that a 'question of arbitrability' only exists in the narrow situation where the parties to an arbitration agreement "would likely" have expected a court, and not an arbitrator, to decide the issue.⁹⁶

Additionally, in determining whether an issue is a substantive question for the court or a procedural one for the arbitrator, courts must keep in mind the federal policy in favor of arbitration. The Supreme Court has stated that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁹⁷

The Supreme Court has also held that procedural questions must be left to the arbitrator in order to avoid both duplication of effort by the courts and arbitrator, as well as serious delays caused by the "separation of the procedural and substantive elements of a dispute."⁹⁸ In *John Wiley & Sons, Inc. v. Livingston*, the Court noted that there would be cases "in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed..." and that "in all such cases, [the separation of procedural and substantive elements]... would produce delay attendant upon judicial proceedings preliminary to arbitration."⁹⁹ For these reasons, procedural disputes should not be regarded as "separate disputes," but must be treated as part of the dispute from which the arbitration arose.¹⁰⁰

But the Court's definition only goes so far in demarcating what is and is not a "question of arbitrability." As a result, courts have struggled when faced with the issue of whether a dispute should be left for the arbitrator or the court to decide. When most recently faced with this issue, the Supreme Court itself was unable to reach a majority and instead produced a plurality opinion in *Green Tree Financial Corp. v. Bazzle*.¹⁰¹ The lower courts have split as to the specific issue of whether a forum selection clause in an arbitration agreement is a procedural question for the arbitrator or a 'question of arbitrability' to be determined by the court.¹⁰²

The *Hammer* court relied on *Bear, Stearns & Co., Inc. v. Bennett*¹⁰³ for the proposition that a court may interpret and enforce a forum selection clause.¹⁰⁴ However, the *Bennett* case was decided before the Supreme Court stated its more limited definition of a 'question of arbitrability' in *Howsam v. Dean Witter Reynolds, Inc.*¹⁰⁵ Additionally, the *Bennett* court never specifically addressed whether the interpretation of a forum selection clause was a procedural or substantive issue of arbitrability.¹⁰⁶ Rather, the court in *Bennett* focused on whether forum selection clauses were valid and enforceable in arbitration agreements and assumed

96. See *AT&T*, *supra* note 59, at 651-52.

97. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

98. *Livingston*, 376 U.S. at 543 (1964).

99. *Id.* at 558.

100. *Id.* at 559.

101. 539 U.S. 444 (2003).

102. See *supra* part III.

103. 938 F.2d 31 (2nd Cir. 1991).

104. *Hammer*, 393 F.3d at 1225.

105. The *Bennett* case was decided in 1991, whereas the Supreme Court did not state its limiting definition of when a 'question of arbitrability' existed until 2002 in *Howsam*. (See *Bennett*, 938 F.2d 31. See also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

106. See *Bennett*, 938 F.2d 31.

that the issue of interpretation was properly before it.¹⁰⁷ Similarly, the *Hammer* court also failed to expressly address this issue.¹⁰⁸

The one court that has addressed the issue of whether a court may interpret a forum selection clause in an arbitration agreement, *Richard C. Young & Co., v. Leventhal*,¹⁰⁹ found that a dispute over the interpretation of a forum selection clause was a procedural question for the arbitrator to decide, and not the court.¹¹⁰ In reaching its holding, the *Leventhal* court did take into account the Supreme Court's most recent holdings on the issue.¹¹¹ When taken collectively, the Supreme Court's current jurisprudence concerning 'questions of arbitrability,' the federal policy of solving issues in favor of arbitration, and the fact that the majority of federal courts have found forum selection clauses to be procedural issues for purposes of Erie analysis,¹¹² indicate that the *Leventhal* court was correct in its holding.

However, the *Leventhal* court did not address the issue of whether the court may enforce a forum selection clause.¹¹³ It seems likely that a court following *Leventhal's* analysis would also hold that the court has no power to enforce a forum selection clause in an arbitration agreement, since a precondition to enforcing an agreement is being able to interpret that agreement so that the court knows *what* it is enforcing and *how* to go about that enforcement.

The question then becomes: is such a limitation on a court's interpretation and enforcement powers what Congress intended when it set forth section 4 of the FAA, which states that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court... for an order directing that such arbitration proceed in the manner provided for in such agreement."¹¹⁴ Additionally, the court must issue this order upon a finding that a valid arbitration agreement was entered into and there has been a "default in proceeding thereunder."¹¹⁵ By providing that the court must issue "an order directing that such arbitration proceed in the manner provided for in... [the] agreement," Congress implies that the court shall have at least some limited powers to interpret the agreement. If the court has no power to interpret the agreement, then it has no means of knowing what exactly the "manner provided for" in the agreement is. If this proposition is true, the *Leventhal* holding, by removing the district court's power to hear the issue, serves to eviscerate the FAA's mandate that district courts shall issue an order to the parties requiring arbitration in according to the terms of the agreement. By removing the court's power to hear the issue of whether a forum selection in an arbitration

107. *Id.* at 32.

108. *See Hammer*, 393 F.3d 1223.

109. 389 F.3d 1 (1st Cir. 2004).

110. *Id.* at 4-5.

111. *Id.* at 4 (discussing the holdings of *Howsam v. Dean Witter Reynolds, Inc.* and *Green Tree Financial Corp. v. Bazzle* in reaching its conclusion that the interpretation and enforcement of forum selection clauses is a procedural question left to the arbitrator).

112. *See supra* part III for discussion of these issues.

113. *Leventhal*, 389 F.3d at 5. The court reserved for consideration in a future case whether a District Court has authority to intervene to address whether a party has filed an arbitration proceeding in an incorrect venue.

114. 9 U.S.C. §4 (2000)(emphasis provided).

115. *Id.*

agreement is being properly followed, the court becomes unable to issue an order requiring the parties to arbitrate in accordance with the terms of the agreement

Of course, once a district court is stripped of the power to interpret a forum selection clause, an important issue is raised; namely, what recourse will a party have if an arbitrator decides to ignore the forum selection clause in an arbitration agreement? Because arbitrations are only subject to judicial review in very limited circumstances, the answer is most likely that the party will have no recourse. This means that, in such situations, parties will be denied the forum selection provisions that they bargained for and included in their contracts.¹¹⁶

VI. CONCLUSION

The Supreme Court's jurisprudence seems to indicate that the *Hammer* court wrongly decided the issue before it, and that the correct approach was exemplified by the *Leventhal* court. However, it is doubtful that such a holding is really in accordance with the FAA. Thus, although the *Hammer* court's holding that a district court has power to interpret and enforce a forum selection clause is probably incorrect under the current Supreme Court jurisprudence, it is far more in keeping with the language of section 4 of the FAA and Congress' intent than is the alternative holding exemplified by the *Leventhal* court.

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116. Every federal circuit has determined that in cases where there is no specifically applicable statutory language, the proper standard of judicial review of an arbitrator's decision on the issue of whether the parties agreed to arbitrate is whether the arbitrator manifestly disregarded the law. Marcus Mungoli, Comment, *The Manifest Disregard Of The Law Standard: A Vehicle For Modernization Of The Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1080 (2000). The Supreme Court, in *First Options v. Kaplan*, stated that the "standard of review applied to an arbitrator's decision about arbitrability is a narrow one" and that the court will set aside an arbitrator's decision only in "very narrow circumstances." 514 U.S. 938, 942 (1995). If the court finds that the issue was one the parties had agreed to arbitrate, then the arbitrator's decision is given substantial deference. *Id.* at 943. This of course leads us back to the original inquiry the court faces when asked to enforce an arbitration agreement under § 4 of the FAA, the issue of determining whether a matter is a 'question of arbitrability,' (i.e., whether the parties intended to have it determined by the arbitrator). If the court makes this initial determination when asked to enforce an arbitration agreement, it is hard to see how the court can later find, in its review of an arbitrator's decision, that the parties had not intended to arbitrate that particular issue.