

ERIE, BERNHARDT, AND SECTION 2 OF THE UNITED STATES ARBITRATION ACT: A FARRAGO OF RIGHTS, REMEDIES, AND A RIGHT TO A REMEDY*

If the United States Arbitration Act¹ does no more than regulate the manner in which federal courts are to enforce rights rooted outside the act, then, since arbitration is deemed "outcome-determinative,"² *Eric-Tompkins*³ and its progeny would compel courts adjudicating state-granted rights in diversity cases to abandon the federal statute in favor of state law,⁴ which will often deny effect to arbitration provisions;⁵ if, on the other hand, the act itself creates a federal right to recognition of agreements to arbitrate contained in

*Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), cert. granted, 28 U.S.L. WEEK 3259 (U.S. March 7, 1960); American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811 (6th Cir. 1959).

1. 9 U.S.C. §§ 1-14 (1958). The act was first enacted in 1925. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883. It was repealed and substantially reenacted in codified form in 1947. 61 Stat. 669 (1947). The legislative history of the act is traced in Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580 n.1 (1952).

2. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

3. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

4. *Erie* and the cases which follow it, notably Guaranty Trust Co. v. York, 326 U.S. 99 (1945), established the rule that in a diversity case, any conflict between state and federal law and policy which will "significantly affect the result of a litigation" must be resolved in favor of the state law and policy. *Id.* at 109; see 1 MOORE, FEDERAL PRACTICE ¶ 0.304 (2d ed. 1959). Hereinafter this "outcome-determinative" test will normally be referred to as *Erie*, or the *Erie* doctrine.

5. Under the common law, executory agreements to arbitrate—either future-disputes provisions (agreements to arbitrate disputes which may subsequently arise in connection with an underlying contract) or submission agreements (agreements to arbitrate existing controversies), see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS §§ 13-14 (1930) [hereinafter cited as STURGES]—would not be specifically enforced, nor would they furnish the basis for a stay of proceedings in a suit on the original cause of action. In reaching this result the courts used differing terminology, agreements sometimes being referred to as "invalid," or "revocable," or "uninforceable," or sometimes combinations of these terms. See generally Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-84 (2d Cir. 1942); COHEN, COMMERCIAL ARBITRATION AND THE LAW 53-252 (1918); STURGES §§ 15-17.

In approximately 10 states, the common-law doctrine of revocability is still adhered to for both submission and future-disputes provisions. Approximately 25 states have enacted legislation making submission agreements irrevocable, and approximately 15 states have enacted legislation making both submission and future-disputes provisions irrevocable. See 56 COLUM. L. REV. 902, 903-04 nn.6, 8-9 & 11 (1956).

Since *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), has made the Arbitration Act's application to labor arbitration a largely academic question, see Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1282 (1959), this Note is concerned solely with commercial arbitration.

contracts within the statute's coverage, *Erie* would be irrelevant when such a right is asserted, even in a diversity case. Sections 3 and 4, which provide for stays of proceedings pending arbitration and for orders compelling arbitration,⁶ are clearly concerned only with methods of enforcement. But section 2 makes "valid, irrevocable, and enforceable" arbitration agreements in "any maritime transaction or . . . contract evidencing a transaction involving [interstate or foreign] commerce,"⁷ and thus may constitute a rule of federal law from which federal rights would flow.

In *Bernhardt v. Polygraphic Co.*,⁸ a diversity case decided in 1956, the Supreme Court held that specific enforcement of arbitration agreements is outcome-determinative and, therefore, that the district court below correctly applied a local rule of revocability by action to deny defendant's application for a stay pursuant to section 3. Although the majority opinion seems to intimate,⁹ and Mr. Justice Frankfurter's concurrence explicitly states, that to avoid "a serious question of constitutional law," the act should be held inapplicable in all diversity cases,¹⁰ the Court first limited section 3's scope to those

6. 9 U.S.C. §§ 3, 4 (1958). The act's subsequent sections also deal with enforcement. 9 U.S.C. §§ 5 (appointment of arbitrators), 6 (application under act to be heard as motion), 7 (witnesses, fees, and attendance), 8 (proceedings begun by libel in admiralty), 9 (confirmation of award), 10 (vacation of award), 11 (modification or correction of award), 12 (notice of motions to vacate and modify), 13 (proper papers; enforcing award), 14 (title not applicable to contracts made prior to 1926) (1958).

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

9 U.S.C. § 2 (1958).

8. 350 U.S. 198 (1956).

9. The majority noted that in *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935), the Court had applied the act in a diversity case, but indicated that, having antedated *Erie*, the case might be decided differently today. 350 U.S. at 202. It is not clear, however, whether the *Bernhardt* Court was aware that the contract in *Shanferoke*, as the lower court in that case had held, involved interstate commerce. *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934). Assuming the Court was aware of this, the only explanation for their virtually overruling *Shanferoke's* application of § 3 to a diversity case would be an implicit intention to apply the *Bernhardt* rationale equally to all diversity suits, including those where the contract involved interstate commerce. Otherwise, the Court should have limited *Shanferoke* to contracts within the scope of section 2, while *Bernhardt* would control contracts outside that section's coverage.

10. 350 U.S. at 208.

Mr. Justice Frankfurter also acknowledged that the Supreme Court had applied the act to a diversity case in *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, *supra* note 9, but, like the majority, found *Shanferoke* nonauthoritative because it was a pre-*Erie* decision. 350 U.S. at 208 n.2. *Shanferoke* adhered to the interpretation of the act's scope

container contracts mentioned in section 2,¹¹ found that the employment agreement at bar was not such a contract, and noted that the question before it, which thus was one "apart from the Federal Act," concerned "a right to recover that owes its existence to one of the States, not to the United States."¹² Hence the Court did not decide whether section 2 creates a federal right or whether the *Bernhardt* holding extends to diversity cases involving section 2 contracts.¹³

These questions recently confronted two circuits: the Sixth in *American Airlines, Inc. v. Louisville & Jefferson County Air Bd.*,¹⁴ and the Second in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,¹⁵ both diversity suits brought on contracts involving interstate commerce.¹⁶ In *Airlines*, a county

advanced by Judge Learned Hand in *Krauss Bros. Lumber Co. v. Louis Bossert & Sons*, 62 F.2d 1004, 1006 (2d Cir. 1933), and generally accepted prior to *Bernhardt*, that

The remedy is not even coextensive with the jurisdiction; for instance, the controversy may arise between citizens of different states, and the contract not "involve commerce." A citizen of New Jersey may enforce arbitration against a citizen of New York upon a contract of sale which requires him to ship the goods from Newark to Manhattan, but not upon one where they are to go from Manhattan to the Bronx. Conversely, a citizen of New York may not come to the District Court to enforce arbitration against another citizen of the state, though the goods must be shipped across a state line. In the case at bar both conditions were fulfilled; the parties were citizens of different states, and performance involved an interstate shipment.

11. The court of appeals had held that § 3 "stands on its own footing." 350 U.S. at 201; see *Bernhardt v. Polygraphic Co.*, 218 F.2d 948 (2d Cir. 1955). The lower courts had been divided on this point. Compare *In re Cold Metal Process Co.*, 9 F. Supp. 992 (W.D. Pa. 1935) (construing § 3 as so limited), and *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184 (D. Del. 1930) (same), with *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944) (§ 3 not so limited); *Agostini Bros. Bldg. Corp. v. United States*, 142 F.2d 854 (4th Cir. 1944) (same); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943) (same), and *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297 (2d Cir. 1934) (same).

While *Bernhardt* dealt solely with § 3, § 4 is also applicable only to § 2 contracts. See *W. R. Grimshaw Co. v. Nazareth Literary & Benevolent Institution*, 113 F. Supp. 564 (E.D. Ark. 1953); *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825 (S.D.N.Y. 1946), *aff'd*, 163 F.2d 310 (2d Cir. 1947); *Application of Susquehanna Collieries Co.*, 49 F. Supp. 845 (M.D. Pa. 1943); *In re Cold Metal Process Co.*, 9 F. Supp. 992 (W.D. Pa. 1935).

12. 350 U.S. at 202.

13. See *Ross v. Twentieth Century-Fox Film Corp.*, 236 F.2d 632, 634 (9th Cir. 1956); *Reserve Mining Co. v. Mesabi Iron Co.*, 172 F. Supp. 1, 9 (D. Minn. 1959); *Caribbean S.S. Co. v. La Societe Navale Caennaise*, 140 F. Supp. 16, 22 (E.D. Va. 1956).

14. 269 F.2d 811 (6th Cir. 1959).

15. 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 28 U.S.L. WEEK 3259 (U.S. March 7, 1960).

16. In Kentucky (where *Airlines* arose), although a written agreement to submit an existing dispute to arbitration is binding when statutory formalities are complied with, KY. REV. STAT. § 417.010 (1953), an agreement between parties to a contract to arbitrate all future disputes arising thereunder is held invalid and unenforceable as an attempt to oust the courts of their jurisdiction. 269 F.2d at 816; *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 881 (6th Cir. 1944); *Ison v. Wright*, 55 S.W. 202 (Ky. 1900). On the law of New York (where *Lawrence* arose), see notes 26-27 *infra* and accompanying text.

air board sought a state court declaratory judgment that its lease to certain airline companies had terminated upon failure to agree as to renewal terms. After removing to federal district court on grounds of diversity, defendants moved for orders under sections 3 and 4 of the United States act to enforce the lease's provision for arbitration of renewal rentals. The district court denied these motions, ruling that the board had no statutory authority to contract for arbitration.¹⁷ Although the court may have assumed that the act is applicable to diversity suits involving interstate container contracts,¹⁸ it apparently believed that arbitration agreements, even if otherwise contemplated by the act, were beyond the statute's scope if *ultra vires* under state law. On appeal, the Sixth Circuit expressly decided that section 2 of the federal act, "enacted in exercise of Congress' plenary power over interstate commerce," supersedes state laws rendering future-disputes provisions unenforceable as contrary to public policy.¹⁹ But it agreed with the district court that section 2 does not make "valid and enforceable" those arbitration provisions invalid under state *ultra vires* rules. The court of appeals thus ruled that state rather than federal principles of general contract law govern issues such as lack of capacity or fraud that may arise in connection with section 2 arbitration agreements.²⁰ It refused, however, to adopt the lower court's interpretation of the statutory limitations on the air board's powers, choosing instead to remit the parties to a declaratory judgment action on the *ultra vires* issue in state court.²¹ Inconsistently with its earlier assertion that "state

17. *Louisville & Jefferson County Air Bd. v. American Airlines, Inc.*, 160 F. Supp. 771, 775 (W.D. Ky. 1958).

18. Plaintiff's counsel argued that Kentucky law and not the federal act governed the case. Plaintiff's Memorandum in Support of Motion To Remand, p. 2. Defendant's counsel maintained that the federal act applied. Answer and Counterclaim, Appendix to Appellant's [defendant's] Joint Brief, p. 66a; Defendant's Memorandum in Opposition to Motion To Remand, p. 6. Therefore, though the act was not mentioned in the district court opinion, the issue was presented to the court.

19. 269 F.2d at 815; see note 16 *supra*.

20. 269 F.2d at 816.

21. *Id.* at 826; see Note, 69 YALE L.J. 643, 652 n.62, 662 n.111 (1960).

The court placed great emphasis on whether the fixing of the airport rentals was a "justiciable controversy" under Kentucky law, and ruled that that question should be determined in the state declaratory judgment action. 269 F.2d at 826. Apparently the court regarded the justiciability issue as important for two reasons: (1) If the rental dispute were justiciable, and a state court of equity would have the power to fix the renewal rates, then the air board's covenant to submit to arbitration might be only a choice of forum, and therefore probably would not be *ultra vires*. *Id.* at 821. While the covenant to arbitrate might be held *ultra vires* even if the controversy were justiciable, the opinion indicated that if justiciability were certain, the court of appeals might have been willing, as was the district court, to decide the *ultra vires* question itself, since the main deterrent to such a determination—deprivation of the air board's *exclusive* rate-fixing power—would no longer exist; (2) if the contract dispute were nonjusticiable under state law, it might for that reason not come within the scope of the federal act. *Id.* at 826. The court recognized, however, that the federal act might extend to nonjusticiable controversies, *cf.* *Boston Printing Pressmen's Union v. Potter Press*, 141 F. Supp. 553 (D. Mass.

law must give way" to the act within the bounds of section 2,²² the appellate court expressed doubt that the state courts need enforce the arbitration agreement even if they found it *intra vires*,²³ and therefore directed the district court to stay proceedings and retain the case "in order to assure a possible benefit of substance depending on retention of Federal diversity jurisdiction . . ."²⁴

In *Lawrence*, plaintiff buyer sought damages for allegedly fraudulent misrepresentations inducing it to make and perform a contract for a sale of goods. The contract contained an arbitration clause which defendant sought to enforce by a stay pursuant to section 3 of the act. Notwithstanding that the contract involved interstate commerce, plaintiff argued that New York law governed,²⁵ although the New York Arbitration Act makes future disputes provisions specifically enforceable,²⁶ the issue of fraud in the inducement of the container contract is not referred to arbitration.²⁷ The Second Circuit expressly re-

1956), cited 269 F.2d at 826, although it did not consider whether the test of nonjusticiability under the federal act looked to state or federal law. In *Pressmen's Union*, Judge Wyzanski seems to have assumed that the test would be a federal one, but did not discuss the choice-of-law problem, presumably because the contract issue before him was clearly nonjusticiable under state or federal law.

22. 269 F.2d at 815.

23. *Id.* at 826. Counsel for defendant shared the court's apprehension.

If this case is remanded, Defendant will thereby be denied whatever benefits or relief may be afforded to it by this Federal Act. . . . Upon a remand here Defendant must either relinquish its right to assert this Act or institute a new action in this Court

Defendant's Memorandum in Opposition to Motion To Remand, p. 7.

24. 269 F.2d 826.

25. Brief for Plaintiff-Appellee, p.8. But plaintiff's counsel did not invoke the *Erie* rationale in support of his position; and he did not mention *Bernhardt*, although it would have afforded his strongest argument for applying New York law. Defendant's brief likewise ignored the *Erie* issue, and cited *Bernhardt* only for the proposition that grant of a § 3 stay depends on bringing the contract within § 2. Brief for Defendant-Appellant, p. 6. The district court assumed without discussion that § 2 and § 3 were applicable to interstate-commerce contracts in diversity suits, but held for plaintiff on the ground that allegations of fraud in the inducement of the container contract must be tried and rejected by the court before defendant could be granted a stay for arbitration under the federal act. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, No. 475, S.D.N.Y., April 12, 1958 (memorandum opinion of Dimock, J.), appearing in Brief for Defendant-Appellant, Appendix, p. 49a. The *New York Times'* description of the unpublished district court opinion may unfortunately have left an impression that the district court held New York law binding. See *N.Y. Times*, Oct. 29, 1959, p. 1, col. 7, at 25, col. 2.

26. N.Y. CIV. PRAC. ACT § 1448.

27. *Matter of Wrap-Vertiser Corp.*, 3 N.Y.2d 17, 143 N.E.2d 366, 163 N.Y.S.2d 639 (1957); *Application of Cheney Bros.*, 218 App. Div. 652, 219 N.Y. Supp. 96 (1926), *rev'd per curiam on other grounds*, 245 N.Y. 375, 157 N.E. 272 (1927); *cf. Manufacturers Chem. Co. v. Caswell Strauss & Co.*, 259 App. Div. 321, 19 N.Y.S.2d 171, *appeal dismissed*, 283 N.Y. 679, 28 N.E.2d 404 (1940); *Reo Garment, Inc. v. Jason Corp.*, 9 Misc. 2d 521, 170 N.Y.S.2d 412 (Sup. Ct. 1958); *Greenspan v. Greenspan*, 129 N.Y.S.2d 258 (Sup. Ct. 1954).

jected any limitation of the federal act to nondiversity cases and ruled that section 2 declares "national law equally applicable in state or federal courts",²⁸ once it was determined that observance of arbitration agreements was a federal rather than state-created right, *Erie* considerations became irrelevant, since Congress clearly has the power to designate the procedures for enforcing federal rights.²⁹ *Bernhardt* was distinguished as limited to suits on non-interstate-commerce contracts, Judge Medina finding sufficient evidence that Congress, relying on the commerce and maritime powers as the constitutional bases of the act, intended its application to diversity as well as nondiversity cases:

We think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements.³⁰

Unlike the Sixth Circuit,³¹ the Second felt that federal rather than state law should be used in determining the arbitrability of disputes over the "making" of container contracts within section 2,³² and proceeded to interpret section 2 as requiring specific enforcement of an arbitration agreement within its scope so long as that agreement itself, as distinguished from the container contract, was not fraudulently induced.³³

The *Lawrence* and *Airlines* view that Congress intended to create federal law, applicable in appropriate diversity cases, is supported by the construction given the act by contemporary lawyers and legislators, among whom it was generally assumed to include diversity litigation.³⁴ Furthermore, the bill as originally passed by the House of Representatives included a proviso waiving

28. 271 F.2d at 407.

29. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 20-21 (1825).

30. 271 F.2d at 406.

31. See note 20 *supra* and accompanying text.

32. "We hold that the body of [federal] law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability . . ." 271 F.2d at 409. *Contra*, *Ross v. Twentieth Century-Fox Film Corp.*, 236 F.2d 632 (9th Cir. 1956) (holding California law determinative of whether parties' language constituted an agreement to arbitrate; specifically rejected in *Lawrence*, 271 F.2d at 409 n.7).

33. It was on this precise point that the district court was reversed. See note 25 *supra*.

34. See Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 267 (1926); Note, 20 ILL. L. REV. 111 (1925). The *New York Times*, in commenting on the proposed federal legislation, stated:

The purpose of the bill is to require the parties to an arbitration agreement . . . to live up to it. Jurisdiction is given the Federal courts. When the bill becomes law a citizen of Seattle who has a dispute with a citizen of New York . . . will be protected by the arbitration clause of the contract.

N.Y. Times, Jan. 27, 1924, § 2, p. 6, col. 3. According to Walter Gordon Merritt, advisory counsel of the Silk Association of America,

[T]he new Federal Arbitration law contains three essential provisions A shipment in interstate commerce must be involved, at least \$3000 be at issue and

the usual requirement of proving jurisdictional amount when jurisdiction over an arbitration proceeding was founded on diversity of citizenship.³⁵ This clearly presupposed that the act applied to diversity suits. The Senate's omission of this provision, since not intended to effect any major change in the bill,³⁶ must have been only for the purpose of ensuring that petty disputes would be kept out of the federal courts.³⁷ The House Judiciary Committee *Report*, recommending the bill's adoption, also implies that diversity litigation was contemplated by the act.³⁸

Further, the view that section 2 enacts federal "substantive" law may also be supported, in spite of an assertion in the legislative history that whether an arbitration agreement is to be enforced is a "procedural" question,³⁹ by

there must be a difference of state Citizenship between the plaintiff and the defendant.

Id., April 5, 1925, § 2, p. 14, col. 4. Julius Henry Cohen, one of the nation's leading authorities on commercial arbitration, remarking on the federal act in proceedings before an American Bar Association committee considering a Uniform Arbitration Act, stated that the federal act "covers every commercial transaction between the citizens of every state in the country." 50 A.B.A. REP. 150 (1925). Mr. Cohen was primarily responsible for drafting the New York Arbitration Act, on which the federal act was based. See note 41 *infra*. The enormous number of commercial and trade organizations that endorsed the bill, see 48 A.B.A. REP. 286 (1923), probably would have been indifferent to the bill if it was not to include diversity litigation, since the bulk of litigation involving their members would be in federal court solely upon diversity grounds. On the view of Congress, see notes 35-38 *infra* and accompanying text.

35. The original bill introduced into Congress was prepared by the American Bar Association, H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924); 49 A.B.A. REP. 51-52 (1924), and contained the following provision:

§ 8. That if the basis of jurisdiction be diversity of citizenship . . . the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of \$3000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration.

H.R. 646, 68th Cong., 1st Sess. (1924), 65 CONG. REC. 11081-82 (1924).

36. The Senate's deletion of § 8 is not specifically explained in the *Congressional Record*. But upon return of the bill to the House, Representative Chindblom asked Representative Graham, "Are there any substantial differences between this amendment passed by the Senate and the bill as passed by the House?" to which was answered, "There are none." 66 CONG. REC. 3004 (1925).

37. See Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 267 n.* (1926).

38. The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or [*sic*] admiralty, or which may be the subject of litigation in the Federal courts. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924). The most likely jurisdictional basis for interstate-commerce contracts to be litigated in the federal courts was diversity of citizenship. No basis, other than admiralty, is suggested in the legislative history, and the *Congressional Record* is quite explicit that the act is not to be confined to admiralty. See 66 CONG. REC. 2761 (1925).

39. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

analysis of the section's terms and their derivation. Research reveals no congressional attempt precisely to define "valid, irrevocable, and enforceable." But since the federal act follows the pattern of the New York statute passed five years earlier,⁴⁰ and incorporates the work of the same draftsmen,⁴¹ the meaning of the same terms in the earlier statute is significant,⁴² although certainly not controlling. "Valid," in the New York act, apparently was meant to overrule the doctrine that future-disputes provisions are "invalid" as attempts to oust courts of their jurisdiction,⁴³ and, if so, would appear to grant a right where none previously existed, even if a "right" to a "remedy" for breach of contract is a conceptual oddity.⁴⁴ "Irrevocable" should be read in the light of an 1828 New York arbitration statute,⁴⁵ which the 1920 act modified.⁴⁶ Under the old New York act, which dealt only with submission agreements and not with future-disputes provisions, a party could "revoke"

40. N.Y. Sess. Laws 1920, ch. 275 (now N.Y. CIV. PRAC. ACT §§ 1448-1469); see STURGES § 26.

41. In 1918, the Committee on Arbitration of the New York State Bar Association prepared a bill amending the New York Arbitration Act of 1829, which had applied only to submission agreements, see note 47 *infra*, to include future-disputes provisions. 41 N.Y.S.B.A. REP. 151, 153-56 (1918). The bill was not passed by the New York legislature, presumably owing to wartime conditions. 42 N.Y.S.B.A. REP. 92 (1919). In 1920, after conferences with a committee of the New York Chamber of Commerce and its counsel, Julius Henry Cohen, the New York State Bar Association abandoned its 1918 draft and proposed in its place a bill prepared by Mr. Cohen, amended in some respects in accordance with suggestions made by Robert C. Cumming, Legislative Bill Drafting Commissioner of the State of New York. 43 N.Y.S.B.A. REP. 96 (1920). The text of that draft is substantially identical to the act as subsequently passed by the New York legislature. 44 N.Y.S.B.A. REP. 63 (1921). The American Bar Association decided to adopt the New York act as the basis for the proposed federal act, see draft in 46 A.B.A. REP. 359 (1921), revised in 1922, 47 A.B.A. REP. 315 (1922), and a bill conforming to the draft was introduced into Congress in December of 1922, 48 A.B.A. REP. 303 (1923); 46 N.Y.S.B.A. REP. 57 (1923).

42. See *Yates v. United States*, 354 U.S. 298, 309 (1957); *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944).

43. See *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868); *Greason v. Keteltas*, 17 N.Y. 491, 501 (1858).

44. Although *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 269-70, 130 N.E. 288, 289 (1921), upheld the constitutionality of applying the New York act to clauses in existing sales contracts on the ground that arbitration is part of the law of remedies, and as such the validity of the arbitration agreement depends on the public policy existing at the time enforcement is sought, the case should not be read as denying that arbitration agreements, like other contracts, create substantive legal relationships. Judge Cardozo compares the arbitration agreement to a "promise that future controversies shall be submitted to a court." *Id.* at 271, 130 N.E. at 290. Such a promise would be subject to ordinary contract rules. *Cf. Parker, Peebles & Knox v. El Saieh*, 107 Conn. 545, 141 Atl. 657 (1928).

45. N.Y. Rev. Stat. 1828, pt. 3, ch. 8, tit. 14.

46. See note 41 *supra*. Prior to the New York act's passage, the New York Chamber of Commerce President remarked that

our laws do not recognize the validity of an agreement made to arbitrate future disputes and now permit the revocation of such an agreement [W]e . . .

the arbitrators' authority at any time before final hearing, although a revoking party would be liable for "costs, expenses and damages" incurred by his opponent in preparing for arbitration.⁴⁷ By withdrawing a right to revoke, "irrevocable" may be said to have granted the converse right to have an arbitration provision respected. The term "enforceable" seems included in the New York formula only as a prelude to provisions for specific performance remedies—a peculiarly efficacious means of redressing breaches of arbitration provisions⁴⁸—in succeeding sections of the statute.⁴⁹ So analyzed, the words "valid, enforceable and irrevocable" in the New York act both changed the substantive law of arbitration and provided a new remedy.⁵⁰

Similarly, Congress may be said to have created substantive federal rights in section 2 arbitration agreements when it declared such agreements "valid" and "irrevocable," whether federal common law was thereby changed or only codified. The Senate Committee *Report* suggests that Congress thought such agreements were already "valid" as a matter of federal common law,⁵¹ although the draftsmen may have thought that the provision overruled a federal rule to the contrary.⁵² "Irrevocable" was presumably designed, as in New

are now framing a bill which we hope to present to the next Legislature validating arbitration agreements

Bernheimer, *Arbitration in Business*, N.Y. Times, Jan. 4, 1920, § 9, p. 20, col. 1.

47. Whenever any submission to arbitration shall be revoked by a party thereto, before the publication of an award, the party so revoking, shall be liable to an action by the adverse party, to recover all the costs, expenses and damages which he may have incurred in preparing for such arbitration. But neither party shall have the power to revoke the powers of the arbitrators, after the cause shall have been finally submitted to them, upon a hearing of the parties, for their decision.

N.Y. Rev. Stat. 1828, pt. 3, ch. 8, tit. 14, § 23. "No other sum, penalty, forfeiture or damages shall be recovered for any revocation of a submission to arbitration, than such as are prescribed in the last two sections" N.Y. Rev. Stat. 1828, pt. 3, ch. 8, tit. 14, § 25.

48. See *Matter of Aqua Mfg. Co.*, 179 Misc. 949, 950-51, 40 N.Y.S.2d 564, 566 (Sup. Ct.), *aff'd*, 266 App. Div. 718, 41 N.Y.S.2d 935 (1943).

49. N.Y. CIV. PRAC. ACT § 1450.

50. Section 1448 of the New York act is entitled "Validity of arbitration contracts or submissions," and § 1450, the specific enforcement section, is entitled "Remedy in case of default." N.Y. CIV. PRAC. ACT §§ 1448, 1450.

51. See S. REP. NO. 536, 68th Cong., 1st Sess. 2 (1924).

52. The federal act was drafted, see note 41 *supra*, prior to *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123 (1924), where Mr. Justice Brandeis stated that "the substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation" despite its unenforceability. But the case he relied upon in support of this proposition, *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S.D.N.Y. 1915), had held the future-disputes provision involved there as "void" as an ouster of the Court's jurisdiction. *Id.* at 1012. The leading federal case declaring the doctrine that any contract which involves an ouster of jurisdiction is "invalid" was *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 458 (1874), which was reaffirmed in *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876). Apparently the *Red Cross* decision was hailed by proponents of the act as a major change in prior federal law, removing the last stumbling block—an unfriendly federal common law—to adoption of the United States Arbitration

York, to take away the right to revoke, thus changing the federal common law.⁵³ "Enforceable" in section 2 seems anticipatory of the specific performance remedies explicitly provided by a later section of the federal act.⁵⁴ The Senate *Report* assumed that this new remedy would replace or supplement already available nominal damages.⁵⁵ But the cases which might have supported the view that damages would be awarded for the breach of future-disputes provisions state the proposition in dicta; no reported commercial case has been found, federal or state, awarding damages for the breach of an executory agreement to arbitrate.⁵⁶ Therefore it might be argued that Congress was establishing, for the first time, a right to a remedy as well as the remedy itself. The terms "valid," "irrevocable," and "enforceable" in section 2 of the act can thus together be construed to have created a federal right to observance of arbitration agreements within that section's scope.

In addition, several pre-*Bernhardt* cases involving section 2 contracts, not mentioned in *Bernhardt*, classified section 2 as federal substantive law and declared state rules inapposite. In *Kentucky River Mills v. Jackson*,⁵⁷ relied on in both *Airlines* and *Lawrence*,⁵⁸ the Sixth Circuit upheld the validity of an *ex parte* award of arbitrators rendered pursuant to an arbitration clause in an interstate-commerce contract made and to be performed in Kentucky. In a plenary suit on the award, defendant claimed that the arbitration provision was inoperative because future-disputes agreements were "invalid" under Kentucky law, but the district court and court of appeals ruled that the validity of the agreement, as well as its enforceability, was governed by section 2 of the federal act. Section 2 was held to have independent force in these respects, whether or not remedial provisions of the act, section 4 and section 9, were invoked to compel the arbitration or enforce the award by

Act. See Cohen, *Plea for Arbitration Law*, N.Y. Times, Feb. 21, 1924, p. 29, col. 4; N.Y. Times, April 14, 1924, p. 31, col. 1 (citing *Arbitration News*, the organ of the Arbitration Society):

The decision of the United States Supreme Court [in *Red Cross*] is momentous in practical consequences. It demonstrates the falsity of the notion that arbitration agreements are void. On the contrary, it declares them to be valid even without the statute, although the specific remedy can not be invoked unless this remedy has been provided by the statute. . . .

53. *E.g.*, *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398, 402 (6th Cir. 1909); *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. 488 (C.C.M.D. Pa. 1902).

54. The legislative history of the act indicates that its primary purpose was to provide specific enforcement of arbitration provisions. See H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. REP. No. 536, 68th Cong., 1st Sess. 2-3 (1924); *Albatross S.S. Co. v. Manning Bros., Inc.*, 95 F. Supp. 459, 463 (S.D.N.Y. 1951).

55. S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924).

56. See STURGES § 22. The notion apparently stems from a dictum of Lord Coke in the celebrated *Vynior's Case*, 8 Co. Rep. 81b, 82a, 77 Eng. Rep. 597, 598 (K.B. 1609). See COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 84-102 (1918).

57. 206 F.2d 111 (6th Cir.), *cert. denied*, 346 U.S. 887 (1953).

58. 269 F.2d at 815, 817; 271 F.2d at 407, 409.

summary proceedings.⁵⁹ The Sixth Circuit adhered to this interpretation in *Local 19, Warehouse Union v. Buckeye Cotton Oil Co.*:⁶⁰

In seeking to secure the arbitration agreed upon plaintiff here has *rights and remedies* created by the Federal [Arbitration] Act and not by any state. Hence state law does not control [T]he Act . . . creates *federal rights in arbitration* and supplies the procedural remedy.⁶¹

And the Third Circuit has subscribed in dictum to the proposition that section 2 "proceeds to lay down a rule of substantive law regarding the validity of an agreement for arbitration in case of any maritime transaction or a contract evidencing a transaction involving commerce."⁶²

In sum, the act's language, background, and pre-*Bernhardt* construction combine to support the *Lawrence* and *Airlines* holdings that section 2 is the source of a federal right to enforcement of arbitration agreements within that section's scope, and, therefore, that arbitration provisions in maritime and interstate- or foreign-commerce contracts, unlike the agreement in the *Bernhardt* case, are insulated from the thrust of *Eric*. Arguing against this construction of the act is the idea, apparently adopted by Mr. Justice Frankfurter in his *Bernhardt* concurrence, that the act, and the institution of arbitration itself, cannot create rights, but can only provide a means of adjudicating the rights involved in the parties' underlying dispute; under this view, which finds some support in legislative history⁶³ and analogous case law,⁶⁴ section 2 would have no independent force but would be merely defi-

59. 206 F.2d at 118, 120. In this case, plaintiff had not resorted to § 4 proceedings to compel defendant to appoint an arbitrator and proceed with arbitration, since the contract allowed the arbitration to be conducted by a single arbitrator if the other party failed to exercise his right to appoint one. Nor did the plaintiff seek to have judgment entered on the award pursuant to § 9. Instead he sought to have the award confirmed in a New York state court, but when such action was held void for want of personal service, 65 F. Supp. 601, 605 (E.D. Ky. 1946), he brought the instant plenary suit on the arbitrator's award. The court held that the federal act allows *ex parte* proceedings, and that §§ 4 and 9 are permissive, not mandatory.

See also *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455, 457-58 (10th Cir. 1957) ("the common law rule that agreements to arbitrate are revocable" was abrogated by § 2, which "brings into being substantive rights . . . [and is] not purely remedial") (dictum).

60. 236 F.2d 776 (6th Cir. 1956), *cert. denied*, 243 U.S. 910 (1957).

61. 236 F.2d at 781. (Emphasis added.)

62. *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 5 (3d Cir. 1943).

63. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of *procedure* The *remedy* . . . is founded upon the Federal control over interstate commerce and over admiralty."). (Emphasis added.)

64. See *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 279 (1931) ("a remedy is provided to fit the agreement"); *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1011 (S.D.N.Y. 1915) ("the question is one of remedy, and not of right"); *Meacham v. Jamestown, F. & L.R.R.*, 211 N.Y. 346, 352, 105 N.E. 653, 655 (1914) ("an agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies").

ditional of the category of cases to which the act's later sections, establishing a remedy previously disfavored by the federal courts, are meant to apply.⁶⁵ If this "procedural" interpretation is correct, then the act must yield to state law in all diversity cases, since arbitration would be one means of enforcing state-granted rights in the underlying transaction evidenced by the container contract. Admittedly, this theory is conceptually attractive, since the notion of a "right"—with all the significance that word carries—to a particular remedy is a difficult one to grasp. But arbitration's place in our jurisprudence is unique,⁶⁶ and it is more than just another remedy; indeed, *Bernhardt* itself may be cited for that proposition. Further, the "procedural" interpretation would render surplusage the statutory words "valid" and "irrevocable," and, more important, would, when coupled with *Erie*, sharply restrict the applicability of an act presumably designed to foster a practice highly beneficial to businessmen.⁶⁷ Finally, if the act is exclusively remedial, Congress probably would not have restricted it to contracts evidencing transactions in maritime and interstate or foreign commerce. Rather, the act would have applied in all actions arising in federal court. Congress probably limited the scope of section 2 to maritime and interstate or foreign commerce because they felt this necessary to contain the act within constitutional bounds—the House *Report* on the bill stated that federal control over interstate commerce and admiralty was relied upon as well as the power of Congress to regulate the courts.⁶⁸ These limitations would be unnecessary if the act were in its nature exclusively remedial.⁶⁹

Characterizing section 2 as creating a federal right, however, in turn creates several consequent problems. First, are issues surrounding the right to arbitration—such as questions concerning the "making" of the arbitration agreement or of the container contract—to be governed by state rules, or

65. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924).

66. See Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 *LAW & CONTEMP. PROB.* 698 (1952).

67. [The act] is a single step in a movement of growing momentum . . . [which] finds its origin in the unfortunate congestion of the courts and in the delay, expense and technicality of litigation . . . [,] which commands an unusually widespread support in the business world because the reform is directed primarily toward settlement of commercial disputes . . . [, which] deals neither with a novel nor a radical remedy, but with one founded upon the experience of centuries and the dictates of common sense and of necessity . . . [, and which is] the direct outcome of . . . [the] experience of American business and of the necessity for some remedy which will cut the Gordian knot of the law's delay.

Cohen & Dayton, *The New Federal Arbitration Law*, 12 *VA. L. REV.* 265-66 (1926).

68. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

69. *Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 *LAW & CONTEMP. PROB.* 580, 589 (1952); see *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 5 (3d Cir. 1943) ("[Congress] was not seeking to confer validity to arbitration agreements generally, a matter outside the scope of federal powers").

are uniform federal doctrines to emanate from section 2? Second, is the "right" itself to afford a basis for "federal-question" jurisdiction? Third, is the right to be enforced in state courts, and to what extent is it to supersede state law?

One choice-of-law problem under section 2, interpreted to be the source of federal rights, involves the propriety of applying federal rather than state law to decide whether an arbitration agreement is separable from the contract in which it is contained, so that the former is enforceable if valid, even though the latter may be invalid. *Lawrence* adopted a separability construction as a matter of federal law, and rejected any New York rule to the contrary.⁷⁰ Since the right created by section 2 involves arbitration provisions only, and not container contracts (which turn on wholly state-granted rights), separability seems necessary to proper adjudication of a party's section 2 claim. Similarly, issues of whether a provision is an "arbitration" agreement within the meaning of the federal act—rather than "appraisal,"⁷¹ or a "mere agreement for 'settlement' "⁷²—would be a question of interpreting a federal statute and therefore a question of federal law.

But a second, and more difficult, choice-of-law problem arising under section 2 is the propriety of applying federal rather than state law to decide disputes, central in many arbitration cases, over whether given issues, such as the "making" of the container contract, are to be decided by the arbitrator or by the court. *Lawrence* ruled, as a matter of federal law, that a provision providing for arbitration of any "conflict, controversy or question which may arise with respect to this contract that cannot be settled by the parties thereto,"⁷³ is broad enough to include a charge of fraud in the inducement of the container contract within the scope of the arbitrator's authority. The Second Circuit thereby refused to apply New York law, which it regarded as "too narrow" and which, it thought, "would have . . . forced . . . a contrary conclusion."⁷⁴ Thus *Lawrence*, regarding section 2 as creating a "substantive" body of law encompassing "questions of interpretation and construction as well as questions of validity, revocability and enforceability,"⁷⁵ apparently attempted to declare a generally applicable federal common-law rule of arbitration law. Such a construction of the statute may, however, go too far. While an analogy to the duty of the federal courts to make common law under section 301 of the Taft-Hartley Act,⁷⁶ as interpreted in *Lincoln Mills*,⁷⁷ immediately comes to mind, no national policy, like that represented by the national labor acts, here exists, other than that of furnishing the right to observance of section 2

70. 271 F.2d at 409-10.

71. See, e.g., *Gord v. Harmon & Co.*, 188 Wash. 134, 61 P.2d 1294 (1936).

72. See *Scholler Bros. v. Hagen Corp.*, 158 Pa. Super. 170, 44 A.2d 321 (1945).

73. 271 F.2d at 412.

74. *Ibid.*

75. *Id.* at 409.

76. Labor-Management Relations Act § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

77. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

arbitration agreements. That right—to have agreements to settle disputes by arbitration treated no differently from other contracts⁷⁸—would be protected, without obliging federal judges to fashion, without congressional guidance, a federal common law of such matters as fraud, duress, and mistake which would displace well-developed state rules, by a holding that the state law of arbitration will govern section 2 cases so long as it does not interfere with the demonstrable intention of the parties. For example, a hypothetical state rule that whether a container contract was adequately supported by consideration is to be decided only by the court would be followed in section 2 litigation, unless it can be shown that the parties intended that issue to be decided through arbitration. Under such a formulation, assuming the correctness of the Second Circuit's construction of the provision before it and its reading of New York law, the *Lawrence* ruling is proper, not as a substantive federal common-law rule, but as a means of preventing an otherwise applicable state rule from defeating the parties' section 2 rights. Similarly, the suggested solution would support *Airlines'* holding that section 2 overrides state rules that enforcement of arbitration provisions is contrary to public policy—surely those rules contravene the parties' intention—but would not support the Sixth Circuit's belief that only such “public policy” rules are affected by the federal act.⁷⁹

Once it is determined that an issue is one for the court, it should be decided, on the merits, under state law.⁸⁰ First, whenever a question of state-created rights under the container contract and not of federally created rights under the arbitration provision is presented, state law would of necessity apply. Second, although it might be argued that, when Congress provided that arbitration provisions are avoidable “upon such grounds as exist at law or in equity for the revocation of any contract”⁸¹ in a statute designed to alter and codify federal common law, federal rules of law and equity were contemplated, Congress probably meant prevailing rules of law and equity, which today would be those of the states. Thus, issues involving the “making” of the arbitration agreement, which the federal act declares are issues for the court,⁸²

78. See 9 U.S.C. § 2 (1958) (“valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) (“an arbitration agreement is placed upon the same footing as other contracts, where it belongs”).

79. See 269 F.2d at 816.

80. If it is determined that the issue is to be decided by the arbitrator, choice-of-law problems would not arise in that decision, since arbitrators are generally not bound by the law. See, e.g., AMERICAN ARBITRATION ASS'N, STANDARDS FOR COMMERCIAL ARBITRATION I:10, reprinted in STURGES, CASES ON ARBITRATION LAW 529 (1953) (“unless . . . [the relevant arbitration] law or the agreement of the parties so requires, the arbitrator need not apply principles of substantive law in arriving at his decision”).

81. 9 U.S.C. § 2 (1958). The use of the term “revocation” in the saving clause presumably means “avoidance.” See CONN. GEN. STAT. § 52-408 (1958), making future-disputes and submission agreements “valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally.”

82. See 9 U.S.C. §§ 3, 4 (1958).

would be decided under state rules of "law and equity." Among such issues would be fraud in the inducement of the arbitration agreement, waiver of that agreement,⁸³ and, as was held in *Airlines*, lack of legal capacity to agree to arbitrate.⁸⁴

The second major uncertainty spawned by defining section 2 as the source of federal rights is whether the "right" to legal recognition of an arbitration agreement, like other "substantive" federal rights, could be affirmatively enforced, that is, whether an order compelling arbitration could effectively be sought, under the general grant of federal-question jurisdiction contained in section 1331 of the Judicial Code.⁸⁵ (Although an attempt might also be made to invoke section 1337, which gives the federal courts jurisdiction over "any civil action or proceeding arising under any act of Congress regulating commerce" and requires no jurisdictional amount⁸⁶—the Arbitration Act arguably "regulates" commerce⁸⁷—Congress' refusal to remove amount-in-controversy requirements for diversity proceedings under the Arbitration Act⁸⁸ militates against a con-

83. Although *Lawrence* does not mention what law it applied to determine that the arbitration agreement at bar was not waived, the tenor of the opinion and its exclusive reliance on federal precedents on this point indicates that it applied federal law. See 271 F.2d at 412-13.

84. See 269 F.2d at 817.

85. The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. 28 U.S.C. § 1331 (1958).

Whether § 2 furnishes the basis of federal-question jurisdiction is an issue only when the party invoking § 2 seeks affirmative relief, not when he pleads his right as a defense to a state-court action and seeks to remove to federal court. An action "does not arise under federal law, for the purposes of § 1331, if the federal question enters only by way of defense." HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 763 (1953) (collecting cases).

86. 28 U.S.C. § 1337 (1958).

As to current requirements, see *Davenport v. Procter & Gamble Mfg. Co.*, 241 F.2d 511, 514 (2d Cir. 1957) (rejecting defendant's contention that the suit was not removable because "no pecuniary value can be given to [an agreement to arbitrate]"):

In considering the jurisdictional amount requirement that court should look through to the possible award resulting from the desired arbitration, since the petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award.

87. Section 1337 has been applied to many statutes. *E.g.*, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944) (Railway Labor Act); *Mulford v. Smith*, 307 U.S. 38 (1939) (Agriculture Adjustment Act); *Louisville & N.R.R. v. Rice*, 247 U.S. 201 (1918) (Interstate Commerce Act); *Consolidated Timber Co. v. Womack*, 132 F.2d 101 (9th Cir. 1942) (Fair Labor Standards Act); *Grant v. TVA*, 44 F. Supp. 589 (E.D. Tenn. 1941) (Tennessee Valley Authority Act); *Young & Jones v. Hiawatha Gin & Mfg. Co.*, 17 F.2d 193 (S.D. Miss. 1927) (Warehouse Act); *Ingram Day Lumber Co. v. United States Shipping Bd. Emergency Fleet Corp.*, 267 Fed. 283 (S.D. Miss. 1920) (Shipping Board Act); see 1 MOORE, *FEDERAL PRACTICE* ¶ 0.60 [.8-3], at 626 (2d ed. 1959).

88. See notes 35-37 *supra* and accompanying text.

struction of section 1337 that would achieve a similar exemption.) In *Lawrence*, Judge Medina noted in dictum that the rights created by section 2 cannot be the bases for 1331 jurisdiction.⁸⁹ He relied principally on the provision in section 4 that a party seeking an order thereunder compelling arbitration must petition a court "which, save for . . . [the arbitration] agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties,"⁹⁰ and interpreted this language as a requirement that a separate ground of jurisdiction be present before section 2 rights may be enforced in federal court. Admittedly, this reading is supported by a policy designed to "prevent the federal courts from becoming unduly snarled by this far-reaching law."⁹¹ On the other hand, section 4 concerns special statutory proceedings only, not plenary suits in equity;⁹² the act has been held not to compel parties to elect a statutory remedy.⁹³ Although Congress probably expected that plenary suits would be deterred by the judge-made rules limiting damages for breach of an arbitration agreement to a nominal sum at law and denying specific performance in equity,⁹⁴ and such rules, if still adhered to, will continue to make the question of section 1331 jurisdiction over plenary actions academic, in view of congressional and judicial abandonment of these rules in the labor arbitration field,⁹⁵ it seems likely that federal courts might abandon them for commercial arbitration agreements within section 2 as well.⁹⁶ Thus, section 4's limitation would be inapposite, and a party's section 2 rights would give rise to federal-question jurisdiction over a plenary action. Moreover, the provision of section 4 might not be a jurisdictional requirement even when special section 4 relief is sought, but only a venue limitation allowing all courts with jurisdiction over the parties to order arbitration, even though the parties' agreement provides that arbitration will be conducted outside the petitioned court's jurisdictional boundaries.⁹⁷ Finally, a rule that parties may enforce

89. 271 F.2d at 408.

90. 9 U.S.C. § 4 (1958).

91. 271 F.2d at 408.

92. Section 4 relates "to the filing of a petition to compel arbitration." *Ibid.* Ordinary federal suits in equity are of course commenced by a complaint. FED. R. CIV. P. 3. Such a complaint may include a prayer for specific enforcement of an arbitration agreement. *E.g.*, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

93. See *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455 (10th Cir. 1957); *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir.), *cert. denied*, 346 U.S. 887 (1953).

94. See S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924); *Munson v. Straits of Dover S.S. Co.*, 102 Fed. 926 (2d Cir. 1900); STURGES § 22.

95. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (specifically enforcing an arbitration provision); *W. L. Meade, Inc. v. International Bhd. of Teamsters*, 129 F. Supp. 313 (D. Mass. 1955), *aff'd*, 230 F.2d 576, 583 (1st Cir. 1956) (awarding \$359,000 damages for striking in breach of an arbitration clause).

96. *Cf.* *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 467-68 (1957) (dissenting opinion of Frankfurter, J.).

97. See also Note, 39 CORNELL L.Q. 107, 113 (1953), suggesting that the only restriction intended by § 4's language is that the controversy, in order to be arbitrable, must be "litigable."

section 2 rights only when the fortuity of diversity of citizenship (or other grounds of jurisdiction) exists, but not otherwise, could raise a serious constitutional question of denial of equal protection or due process of law. But even if plenary suits in federal court to enforce section 2 rights are not viable, and even if section 4's limitation is of jurisdictional proportion, this equal protection argument could be answered, a rush to the federal courts prevented, and the anomaly of a federal "right" which does not form the basis of federal jurisdiction made more palatable, if section 2 rights are as applicable in state courts of general jurisdiction as in federal courts.

Neither *Lawrence* nor *Airlines* explores section 2's impact on actions brought in state courts, though both allude to its existence:

To be sure much of the [Arbitration] Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 . . . goes beyond this point and must mean that arbitration agreements . . . [affecting commerce], previously held by state law to be invalid, revocable or unenforceable are now made "valid, irrevocable, and enforceable." This is a declaration of national law equally applicable in state or federal courts.⁹⁸

Or more briefly:

Within the scope of the [United States Arbitration] statute circumscribed by the Constitution, federal law is of course paramount under the Supremacy Clause, and state law must give way.⁹⁹

But the opinions failed to acknowledge the complete absence of congressional intent to make the federal act applicable to state court actions,¹⁰⁰ or the views of contemporary commentators that it was not designed to do so,¹⁰¹ although the strongest argument against a construction of section 2 as the source of federal rights is this unanticipated effect in the state courts. Two countervailing considerations, however, minimize the force of that argument. First, even federal statutes which under no possible interpretation could be said to create federal rights have been held to preempt state law despite the absence of

98. *Lawrence*, 271 F.2d at 407.

99. *Airlines*, 269 F.2d at 815.

"[I]f exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction [to enforce federal rights] whenever, by their own constitution, they are competent to take it." *Claffin v. Houseman*, 93 U.S. 130, 136 (1876); *accord*, *McCarrol v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 59, 315 P.2d 322, 329 (1957); see HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 373 (1953).

The only reported attempt to apply § 2 in a state court action seems to be *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950). Defendant's claim that §§ 2, 3, and 4 of the act applied was ignored by the court. In an earlier phase of the litigation, *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364 (D. Neb. 1948), a federal district court found § 2 applicable and granted a stay pursuant to § 3.

100. The possibility is never mentioned in the legislative history.

101. See Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 277 (1926); 20 ILL. L. REV. 111 (1925); 11 A.B.A.J. 153, 155 (1925).

actual legislative intent.¹⁰² Second, construing the act as wholly "procedural" and as thus creating no rights, in order to avoid a holding that the supremacy clause binds state courts to a federal rule,¹⁰³ would necessitate the result advocated by Mr. Justice Frankfurter in *Bernhardt*¹⁰⁴ that the act must yield to *Erie-Tompkins* in all diversity cases, and in this manner may do greater violence to the overall congressional plan. Had the 1925 Congress anticipated *Erie*, it seems likely that it would have preferred making state courts enforce maritime and interstate or foreign commerce arbitration agreements to emasculating the federal act by excluding all diversity suits.

Assuming that state courts are bound to give effect to section 2 rights, they would not be bound to forgo their own procedures in favor of Arbitration Act remedies. But a state may not defeat the substance of a federal claim under the guise of regulating procedure.¹⁰⁵ Thus if a plaintiff sues under section 2 to compel arbitration in a state forum traditionally opposed to specific enforcement of future disputes provisions, that remedy might properly be denied if instead the court were willing to award adequate compensatory damages. To do so it would have to overrule the common-law doctrine that only nominal damages are recoverable,¹⁰⁶ since a remedy limited to nominal

102. In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court held that "the conclusion is inescapable that Congress has intended to occupy the field of sedition" and that "a state sedition statute is superseded regardless of whether it purports to supplement the federal law [the Smith Act, 18 U.S.C. §§ 2385, 2387 (1958)]." The Court reached this conclusion notwithstanding the state's reliance on a letter from the Smith Act's author, Representative Howard W. Smith, that in his opinion, the Congress which adopted the bill never had "the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities." Quoted in Brief for Petitioner, p. 37. Moreover, recent attempts to forbid the judiciary from finding preemption when the act in question contains no express provision to that effect have been unsuccessful. For example, H.R. 3, 85th Cong., 2d Sess. (1958), 104 CONG. REC. 13993 (1958), was supplanted after heated debate, 104 CONG. REC. 13851, 13993, 14138 (1958), by a substitute confined solely to preemption in the field of subversion and sedition, and directed to override *Nelson*.

103. "[T]he Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." U.S. CONSR. art. VI.

104. See note 10 *supra* and accompanying text.

105. "[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Brown v. Western Ry.*, 338 U.S. 294, 299 (1949) (Black, J.). Mr. Justice Frankfurter, dissenting on other grounds, summed up the general principle:

[A] State court cannot defeat the substance of a Federal claim by a denial of it. Nor can a State do so under the guise of professing merely to prescribe how the claim should be formulated. . . . Georgia may adhere to its requirements of pleading, but it may not put "unreasonable obstacles in the way" of a plaintiff who seeks its courts to obtain what the Federal Act [Federal Employers Liability Act] gives him.

Id. at 300-01.

106. See notes 56, 94 *supra* and accompanying text.

damages would effectively nullify the federal right. Further, it is arguable that in the usual commercial context, no measure of compensatory damages would be satisfactory, since a primary purpose of arbitration is to expedite the settlement of disputes and avoid a lawsuit which might take several years to reach trial.¹⁰⁷ On the other hand, when section 2 rights are invoked in defense to a state court action on the underlying contract, a ready alternative to specific enforcement that could hardly be said to slight the federal right would be dismissal of plaintiff's suit.¹⁰⁸ Similarly, state rules on the grounds for vacating an award would be unaffected, unless it could be successfully argued that the rule destroys the right to arbitrate, as would, perhaps, a rule making error of law grounds for vacation.¹⁰⁹ Of course, choice-of-remedy problems are minimized in those states which already enforce arbitration provisions by statute,¹¹⁰ although the terms of such statutes may fail to encompass arbitration agreements not conforming to the state act.¹¹¹ In such a case, the state court might, without unduly prejudicing federal policy, require a litigant seeking to enforce section 2 rights to bring a plenary suit in equity.¹¹²

The *Erie* and *Bernhardt* decisions have cast considerable doubt on the scope of the Arbitration Act, and present a curious problem of statutory construction. If the act is deemed entirely remedial, *Erie* and *Bernhardt* preclude its application to diversity cases arising in states hostile to arbitration. This goes clearly against the intent of the drafters to enforce section 2 arbitration agreements in diversity litigation. On the other hand, the *Lawrence-Airlines* construction of the act as conferring substantive federal rights will bind state courts in a manner not anticipated by Congress. The intermediate solution of applying the act to diversity suits but not to state court litigation would

107. See Dworkin, *Let's Arbitrate*, 25 CLEVELAND B.A.J. 107 (1954); Ellenbogen, *Commercial Arbitration*, 1 BUS. LAW. 247, 264 (1954); Mosk, *Arbitration Versus Litigation*, 7 ARB. J. (n.s.) 218, 224-25 (1952); Sturges, *The Need for Modern Arbitration Laws*, 7 ARB. J. (n.s.) 130, 131 (1952).

108. Such a dismissal might be with or without prejudice. The latter seems more probable since it is doubtful that failure to arbitrate would be such a material breach of the contract as to be a complete defense. Yet provisions for an appraisal of loss or damage to property in insurance contracts are generally held irrevocable, contrary to common-law rules of revocability governing future disputes provisions generally, and failure to submit to appraisal has sometimes been held an effective plea in bar. *North British & Mercantile Ins. Co. v. Robinett & Green*, 112 Va. 754, 72 S.E. 668 (1911); *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10, 97 N.W. 57 (1903); STURGES § 21, at 71-72; see Sturges & Sturges, *Appraisals of Loss and Damage Under Insurance Policies*, 11 MIAMI L.Q. 1, 40 (1956).

109. See PA. STAT. ANN. tit. 5, § 4 (1930).

110. See note 5 *supra*.

111. For example, the enforcement provision of the New York statute applies only to "a contract or submission for arbitration described in section fourteen hundred forty-eight hereof, providing for arbitration in this state . . ." N.Y. CIV. PRAC. ACT § 1450.

112. For the differences between statutory methods of enforcing awards and enforcement by means of a plenary suit, see STURGES § 3; for vacating and correcting awards, see STURGES §§ 4-6.

accord with congressional intent, but would face constitutional problems however phrased: if the act is deemed remedial but nonetheless an exception to the *Erie* doctrine, the act would fall if *Erie* is a proposition of constitutional law, as implied in the *Erie* case itself¹¹³ and in *Bernhardt*;¹¹⁴ if the act is deemed to create federal rights which may be enforced only in federal court

113. *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

114. 350 U.S. at 202 (majority opinion of Douglas, J.). See also *id.* at 208 (concurring opinion of Frankfurter, J.).

Whether the *Erie* doctrine is one of constitutional limitation has been the subject of endless unresolved debate. See, e.g., Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Cowan, *Constitutional Aspects of the Abolition of Federal "Common Law,"* 1 LA. L. REV. 161 (1938); Herricott, *Has Congress the Power To Modify the Effect of Erie Railroad Co. v. Tompkins?*, 26 MARQ. L. REV. 1 (1941); McCormick & Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126 (1938); Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939). Subsequently to *Bernhardt*, in *Byrd v. Blue Ridge Coop.*, 356 U.S. 525 (1958), *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 147-50 (1958), the Supreme Court indicated that it would not be unconstitutional to subordinate *Erie* considerations to those federal procedures rooted in "a strong federal policy against [following] state rules" on the method of trial. 356 U.S. at 538. The case involved whether a federal court in a diversity case had to follow the state practice of referring certain factual questions to a judge rather than a jury. The Court apparently established a two-step inquiry in place of the strict "outcome-determinative" test of *Guaranty Trust*, see note 4 *supra*, as the process for determining whether *Erie* is applicable. It is necessary to inquire first whether the state views the practice as an "integral part" of the right created by state law, 356 U.S. at 536, and second, whether the federal policy should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court, *id.* at 538. *Bernhardt* was held not controlling since the likelihood of a different result being reached by a state judge and a federal jury deciding the same factual question was "not so strong as to require" the federal practice to yield to the state rule in the interest of uniformity of outcome. *Id.* at 540. Thus the Supreme Court seems to have qualified the outcome-determinative test by adopting the interest-weighting test proposed by Mr. Justice Rutledge in his dissenting opinion in *Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541, 557 (1949). Although the *Byrd* case may not be applicable when the federal policy involved is not as strong as the one in that case (which may well have been the constitutional right to trial by jury), it is at least arguable that the congressional decision, perfunctorily reaffirmed by codification after *Erie*, 61 Stat. 669 (1947), to grant specific enforcement of arbitration agreements in interstate transactions, represents such a "strong federal policy." Congress might have reasonably deemed arbitration an important means of expediting settlement of commercial disputes, in order to implement the exercise of its constitutional responsibilities for regulation both of commerce and of the federal courts. The chief difficulty with this argument is the legislative history of the act's adoption in 1925 and re-adoption in 1947, neither of which reveal congressional awareness of any *Erie* problem. Without a deliberate congressional decision to challenge *Erie*, the Court is unlikely to adopt an interpretation of the act requiring a difficult decision as to its constitutionality. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 208 (1956) (concurring opinion of Frankfurter, J.). As a general proposition, when the Court is able to construe an act to avoid questions of constitutionality, it will do so. E.g., *Arkansas La. Gas Co. v. Department of Pub. Util.*, 304 U.S. 61, 64 (1938); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

when an independent ground for federal jurisdiction exists, as suggested at one point in *Airlines*,¹¹⁵ the act could be regarded as a congressional contravention of the supremacy clause and a denial of other constitutional guarantees. The *Lawrence* resolution of this three-pronged predicament has the advantage of effectuating Congress' intent to promote arbitration of disputes involving section 2 commerce, while avoiding the need to modify *Eric* or face constitutional questions. And the resulting restriction on the scope of common-law hostility to such agreements in the state courts hardly constitutes an encroachment on an equally important state policy.

115. 269 F.2d at 826.