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NOTES

Incorporation of State Law Under the Federal Arbitration Act

Commercial arbitration agreements, unlike most other contracts, are not entirely creatures of state law. Although state law determines whether most contracts are binding or enforceable,1 the Federal Arbitration Act2 (the "Act") governs the enforcement of arbitration agreements in maritime transactions and in transactions involving interstate commerce.3 Congress passed the Act in 1925 to check judicial and legislative hostility to executory arbitration agreements.4 By creating a federal right to specific enforcement5 of arbitration agreements, the Act displaced many federal and state court decisions that refused specific enforcement.6

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1. A contract may be binding and enforceable under state law, but if it violates a federal statute the courts will not enforce it. See, e.g., Lear, Inc. v. Adkins, 395 U.S. 653 (1969) (federal antitrust law preempts state contract law).


4. See note 67 infra and accompanying text.

5. Section 4 provides for orders compelling arbitration:

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.


Section 3 provides for stays of litigation pending arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall . . . stay the trial of the action until such arbitration has been had.


The Act is binding not only on federal courts but also on state courts under the supremacy clause, U.S. CONST. art. VI, cl. 2. Where there is no independent federal subject matter jurisdiction and the arbitration clause satisfies 9 U.S.C. §§ 1 & 2, the parties will be relegated to the state courts, but their rights will be determined under the Act. Several state courts have ac-
But the principles governing the Act’s displacement of state law have remained unclear ever since 1925. Although the Act makes arbitration agreements enforceable and irrevocable in most circumstances, its second section permits revocation upon “such grounds as exist at law or in equity for the revocation of any contract.” The Act fails to specify whether these grounds for revocation are to be found in existing state law or in a new body of federal common law. If the Act requires courts to find these grounds in existing state law, the federal law of arbitration should be a patchwork, varying with each state’s contract law. If, however, the Act requires courts to create independent federal grounds for revocation, the law of arbitration should be nationally uniform. Congress failed to provide choice-of-law rules under the Act; the courts, lacking clear congressional guidance, have gone down different paths. Some courts have concluded that the Act replaces all state law governing arbitration agreements with federal common law; others have applied state laws to some arbitration issues; yet others have failed to specify what law they were applying.

This Note proposes a solution to this choice-of-law problem. Section I surveys the courts’ response to Congress’s silence and finds confusion and disarray. Section II argues that courts should apply the state law pertinent to arbitration unless that law places heavier burdens on arbitration contracts than on other contracts; where state law does discriminatorily burden arbitration, the courts should apply the pertinent state rules applicable to “any contract.” It concludes

7. 9 u.s.c. § 2 (1976).
8. This way of formulating the question may offend those who contend that a court’s construction of a federal statute and its formulation of federal common law pursuant to statutory authorization are at bottom the same thing. See Westen & Lehman, Is There Life for Erie After the Death of Diversity?, 78 MICH. L. REV. 311, 331-36 (1980). Hence, even if it construes the Act to require the application of state law, a court makes federal common law. This is true, but irrelevant to the subject of this Note. This Note asks whether the Act should be interpreted: (a) to allow courts the freedom to define as an independent federal matter the proper grounds for the revocation of arbitration agreements; or (b) to restrict that freedom and require courts to refer to state contract law for these grounds.
9. See text at note 18 infra.
10. See, e.g., cases cited in note 20 infra.
11. See, e.g., cases cited in note 30 infra.
13. A court must, of course, decide which state’s contract law to apply to arbitration agreements. This question can be answered with a routine choice of law analysis: a court should apply the same state law that it would apply in an ordinary contract case.
that the "grounds . . . for the revocation of any contract," although determined as a matter of federal policy, are to be found in state law rather than in an independent federal law. Section III applies this general principle of choice to a series of illustrative state rules.

I. THE JUDICIAL RESPONSE TO CONGRESSIONAL SILENCE

The typical choice-of-law question under the Act arises when a court must decide whether the parties to a lawsuit must arbitrate their contractual disputes. Before ordering arbitration or staying judicial proceedings pending arbitration, the court must find that the parties have made an enforceable agreement to arbitrate. Whether the agreement is enforceable may depend on whether state contract law or federal common law applies. But neither the text of the Act nor its legislative history clearly define the extent of the Act's ouster or modification of state contract law. In view of this ambi-

14. See note 5 supra.
15. The wording of the Act implies that different standards govern the issuance of orders to arbitrate and orders staying litigation. Section 3, the stay provision, requires a preliminary finding that the issue "is referable to arbitration," while Section 4, governing affirmative orders to arbitrate, requires such an order if the court is satisfied that the "making" and performance of the arbitration agreement are not "in issue." See note 5 supra. However, the Supreme Court in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967), held it "inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court," and therefore held that "in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."
17. Section 2 does not state whether courts are to refer to state or federal rules of law and equity in deciding whether there are "grounds . . . for the revocation" of the contract. 9 U.S.C. § 2 (1976). Section 4 instructs courts to determine whether the "making of the agreement for arbitration" is "in issue," 9 U.S.C. § 4 (1976); the law governing this determination logically should be the same as that which furnishes the grounds for revocation in Section 2, but Section 4 does not help decide what law that should be. See Note, Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts, 1968 DUKE L.J. 588, 603-04 n.68.
18. Under the commerce and admiralty powers, U.S. Const. art. I, § 8, cl. 3 and art. III, § 2, and under the supremacy clause, U.S. Const. art. VI, cl. 2, Congress could have enacted legislation governing all issues surrounding the formation and enforcement of arbitration clauses in contracts involving maritime transactions or interstate or foreign commerce. But the legislative history reveals little awareness on the part of Congress that state law might be affected. Apparently, Congress was preoccupied with the right to specific enforcement of arbitration agreements, and so never considered that the Act might affect other legal issues relating to arbitration clauses. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 419 (1967) (Black, J., dissenting); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924); Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A.B.A.J. 153, 154-55 (1925) [hereinafter cited as Committee on Commerce]. However, in Prima Paint the Supreme Court implied that the Act applies to other arbitration issues in addition to specific enforcement. See text at notes 40-49 infra. For a more detailed explanation of the history of the Act, in Congress and in the courts, see generally Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. at 409-23 (Black, J., dissenting); Cohen & Dayton, The New Federal Arbi-
guity, it is perhaps unsurprising that courts have differed in the extent to which they incorporate state laws as federal rules of decision. 19

One group of cases interprets the Act as commanding courts to create a federal common law of commercial arbitration without any reference to state law. 20 In the leading case of Robert Lawrence Co. v. Devonshire Fabrics, Inc., 21 the Court of Appeals for the Second Circuit created a federal rule to interpret the scope of an arbitration clause more broadly than the state rule would have permitted. 22 The plaintiff had agreed to arbitrate "[a]ny complaint, controversy or question which [might] arise with respect to [the] contract." 23 The

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19. Some courts have avoided the choice-of-law issue by noting that the relevant rule of decision would be the same under either federal or state law. E.g., Farkar Co. v. R.A. Hanson Disc., Ltd., 583 F.2d 68, 71 (2d Cir. 1978) ("We find it unnecessary to comment except briefly on ... 'federal contract common law,' 'federal common law,' 'federal substantive law' and 'national [federal] substantive law.' ... [U]nder any applicable law the result would be the same") (emphasis in original), modified, 604 F.2d 1 (2d Cir. 1979) (per curiam); Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 756 (2d Cir. 1967) ("[W]hether state or federal law [of duress] be deemed controlling makes no practical difference in this case; we have found no distinction between them ... ") (footnote omitted).


This Note argues that the Act incorporates non-discriminatory state law. Because the U.C.C. generally applies equally to arbitration clauses and other provisions in sales contracts, the courts should ordinarily adopt it as controlling law under the Act. However, the courts should not adopt discriminatory state court interpretations of the U.C.C. See notes 109-19 infra and accompanying text.


22. See 271 F.2d at 412.

23. 271 F.2d at 404.
plaintiff claimed that the purchase agreement had been procured by defendant's fraudulent misrepresentations, and sued in federal court for damages. The defendant claimed that the agreement to arbitrate was valid, and that the court should stay court proceedings pending an arbitrator's resolution of the issue of fraud. New York's contract law would have taken the issue of fraud out of the hands of the arbitrator, and would instead have required the court to decide the matter. The Robert Lawrence court held, however, that the Act creates a body of substantive federal law that encompasses all the legal issues surrounding arbitration clauses: it does not require any reference to state rules of decision. The Act's "liberal policy of promoting arbitration" made the arbitration clause a separable and enforceable contract apart from the purchase contract. Although the arbitration provision was contained in and part of the purchase contract, the issue of fraud in the purchase agreement was nonetheless arbitrable.

A second group of cases shows a greater readiness to look to state law. These courts differ, however, in their reasons for applying state rather than federal law. In Wydel Associates v. Thermasol, Ltd., for example, a federal district court said that it would generally apply state contract law, except for "those state statutes [and decisions] which limit arbitration agreements with rules not applicable to other contracts." In Wydel, the plaintiffs claimed that a Texas partnership statute invalidated an arbitration agreement executed by their partner because the statute required all the partners of a partnership to authorize arbitration agreements. The statute only required such unanimity in the case of arbitration agreements and a

24. 271 F.2d at 404.
25. 271 F.2d at 404.
26. See 271 F.2d at 412.
27. 271 F.2d at 409.
28. 271 F.2d at 410. For this Note's different reading of the Act's policies, see notes 71-83 infra and accompanying text.
29. 271 F.2d at 409-10.
32. 452 F. Supp. at 742.
unless authorized by the other partners . . . one or more but less [sic] than all the partners have no authority to:

(e) Submit a partnership claim or liability to arbitration or reference.
few other types of contracts; a single partner could bind the partnership to other contracts. The court held that the Act overrode the statute's unanimity provisions because the provisions placed greater limits on the authority of partners to enter arbitration agreements than on their authority to enter other kinds of contracts. The court rejected the discriminatory unanimity requirement, and turned instead to the state law governing other contracts as the appropriate rule under the Act.

Another federal district court saw a different place for state law in Duplan Corp. (Duplan Yarn Division) v. W.B. Davis Hosiery Mills, Inc. In Duplan, the court said that federal law governs issues of arbitrability or interpretation, while state law controls issues of formation or validity:

It is the "scope" rather than the existence of an agreement to arbitrate which is determined by reference to federal law. The question whether a valid arbitration clause exists involves general contract principles; state law governs the disposition of that question.

Despite basic differences between Wydel and Duplan, both cases contrast sharply with the view of courts following Robert Lawrence that it is "unnecessary to decide where the contract was made, what state law governs, or what that state law is."

The Supreme Court has done little to resolve the conflict between courts that hold that the Act creates a completely independent federal arbitration law and those that choose to incorporate state contract law. In Prima Paint Corp. v. Flood & Conklin Manufacturing Co., the Court faced a set of facts almost identical to the facts in Robert Lawrence, and reached the same result: it held that an arbitrator and not a court should determine whether a purchase agreement containing an arbitration agreement had been induced by fraud. The Court, however, declined to follow the theory of the Robert Lawrence court; it relied instead on a questionable interpre-

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34. Under the Texas statute, one partner may bind others to contracts executed in the usual course of partnership business. TEX. REV. CIV. STAT. ANN. art. 6132b, § 9(1) (Vernon).
35. 452 F. Supp. at 742.
36. 452 F. Supp. at 742.
38. 442 F. Supp. at 88 (citations omitted). The Duplan court applied North Carolina's reading of U.C.C. § 2-207(2)(b), which held that an arbitration clause on a confirmation form was a "material alteration," and hence did not become part of the contract. 442 F. Supp. at 89. The "federal substantive law" rule used by the petitioner would have defined "materiality" so as to create a binding contract to arbitrate. 442 F. Supp. at 88. See text at note 109 infra.
41. Compare 388 U.S. at 396-404 with 271 F.2d at 404-06, 409-12.
42. The majority said that it agreed with the Robert Lawrence court, "albeit for somewhat different reasons . . . ." 388 U.S. at 400. Justice Harlan, in a brief concurrence, stated that he would also "affirm the judgment below on the basis of Robert Lawrence Co. v. Devonshire Fabrics, Inc. . . . ." 388 U.S. at 407.
tation of section 4 of the Act, which states that a court shall order arbitration if “the making of the agreement for arbitration or the failure to comply therewith is not in issue.”43 The Court read this language to say that the making of an arbitration agreement is put into issue by allegation of defects in the arbitration agreement itself, but not by allegation of defects in the underlying purchase agreement.44 Thus, the Court agreed with the Robert Lawrence court that an arbitration agreement is separable from the contract within which it is contained.45 But since the majority purported to find this rule of separability in the text of the Act itself, Prima Paint avoided the troubling issue of whether to incorporate state law or create independent federal law where the Act provides no explicit textual answer.

Justice Black, in a vigorous dissent joined by Justices Douglas and Stewart, argued that the majority had not really avoided the choice-of-law issue: they had resolved it in the same manner as Robert Lawrence.46 Section 4's command to order arbitration if “the making of the agreement for arbitration . . . is not in issue,” he noted, “far from providing an ‘explicit answer,’ merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue.”47 The Act nowhere provides an answer to this “further question.” Under New York law, an allegation of fraud in the inducement of the entire contract would have put the making of the arbitration agreement in issue, and no stay could have been ordered.48 Because the majority stayed litigation pending arbitration, Justice Black thought that they had necessarily applied an independent federal common-law rule, and not, as they claimed, a rule explicit in the text of the Act.49

Justice Black's broad reading of Prima Paint seems overly pessimistic. While his disbelief that the majority found an express rule of separability in the text of the Act is understandable, the majority purported to do no more than discover that express rule.50 Prima

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44. See 388 U.S. at 403-04.
45. See 388 U.S. at 403-04, 410; Furnish, supra note 20, at 321-22.
46. See 388 U.S. at 408-11 (Black, J., dissenting).
47. 388 U.S. at 410 (Black, J., dissenting).
48. The Court, at least, assumed that New York law would have such an effect. See 388 U.S. at 411 n.4 (Black, J., dissenting).
49. 388 U.S. at 411 (Black, J., dissenting). The majority, however, clearly did not think that they were creating federal common law. See 388 U.S. at 403.
50. Prima Paint's rule of separability is really two rules. First, an arbitration agreement is an agreement separate from the purchase agreement that it accompanies. Second, allegations of fraud in the commercial contract can never place the making of the arbitration agreement in issue. The second rule follows from the first because of section 2 of the Act. Since the rule of separability requires that we consider the underlying commercial agreement and the accompanying arbitration agreement to be separate contracts, section 2 forbids a state to allow allega-
Paint does not require federal courts to apply federal law to decide whether defects in the separable arbitration agreement place its making at issue under section 4, nor does it tell courts what law to turn to in deciding what grounds exist for the revocation of any contract under section 2. These further questions have continued to divide courts in the thirteen years since Prima Paint was decided. Some continue to embrace Robert Lawrence; others have turned to state law to determine grounds for revocation under section 2. Prima Paint has apparently only compounded the confusion surrounding the Act’s choice-of-law question. A satisfying answer can only come from an analysis of the purposes that Congress sought to further in the Act, and from a choice among those purposes where they are inconsistent.

II. CHOICE-OF-LAW PRINCIPLES UNDER THE ACT

In 1924, Congress apparently believed that the Arbitration Act merely settled “a question of procedure” in making arbitration agreements enforceable in federal courts, and that it did not create “substantive law.” The courts, however, have since recognized that the Act does create a valid body of substantive federal law that controls decisions both in federal courts and in state courts. But even though the right to enforce an arbitration agreement is a federal right, the content of that right should be determined by reference to state law.

Courts often determine the content of federal statutory rights by reference to state law. As the Supreme Court said in another context, “the scope of a federal right is, of course, a federal question, but...
that does not mean that its content is not to be determined by state, rather than federal law.”

Deciding whether a given federal statute should be interpreted to incorporate state law requires a two-stage analysis. First, a court should inquire whether the federal statute forbids the incorporation of state laws either explicitly or implicitly. If Congress has declared that federal rules independent of state laws will apply, or if adoption of state laws would conflict with the language of the statute, then the inquiry ceases: adoption of state law is forbidden. Second, even if adoption of state law does not directly conflict with the statute, a court should inquire whether the

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Federal courts commonly adopt state law as the appropriate measure of federal law. E.g., United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (state law adopted as the appropriate federal rule for establishing the relative priority of competing federal and private liens); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (state law borrowed in action under 25 U.S.C. § 194 to determine whether changes in river were avulsive or accretive); De Sylva v. Ballentine, 351 U.S. 570 (1956) (state law adopted to decide if an illegitimate offspring was a “child” within the meaning of the Copyright Act); Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128, 132 (1956) (although state law generally determines liability under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1976), Massachusetts wrongful death statute held “at war with” the standard of a liability provided by Congress, and hence not applied under the Act); United States v. Rogers & Rogers, 161 F. Supp. 132, 135 (S.D. Cal. 1958) (local law incorporated in action brought under the Miller Act: “[t]here is no supervening federal interest here which dictates the fashioning of uniform federal law to displace the law of the State where all parties concerned reside and all material facts occurred”). See generally Note, The Role of State Law in Federal Tax Determinations, 72 HARV. L. REV. 1350 (1959); Note, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U. CHI. L. REV. 823 (1976) (hereinafter cited as “Chicago Note”).


In Erie R.R. v. Tompkins, the Supreme Court removed the power of the federal courts to declare independent federal common law in deciding issues which would be governed by state law in state courts. Later cases have held, however, that where the matter before the court is closely related to a federal function, state law does not govern of its own force and the federal courts have the responsibility to fashion a federal rule to decide the issue. In Clearfield Trust Co. v. United States [318 U.S. 363 (1943)], the Court indicated that, unless Congress has specified otherwise, a federal court in this situation has the option either to “adopt” state law as the content of the federal rule or to develop uniform federal law to resolve the question (footnotes omitted).

58. The model for this analysis derives from Chicago Note, supra note 56. The second stage of that note’s analysis is modified here so as to weigh federal interests in uniformity against federal interests in applying state law, instead of weighing federal interests against state interests. See Chicago Note, supra note 56, at 829-30, 842-44. This modification better accounts for the supremacy of valid federal law over state law. See Westen & Lehman, supra note 8, at 357. But see Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 386 (2d Cir. 1961) (Lumbard, C.J., concurring) (“Having no clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the [arbitration] act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states”); Mishkin, Some Further Last Words on Erie — The Thread, 87 HARV. L. REV. 1682, 1683 (1974) (“[t]hat Congress may have constitutional power to make federal law displacing state substantive policy does not imply an equal range of power for federal judges”). See generally Westen & Lehman, supra note 8.


60. See Chicago Note, supra note 56, at 835; cases cited in id. at n.73.
federal interests in applying state law outweigh the federal interests in applying independent federal rules.61

A. Adoption of Nondiscriminatory State Law

The Federal Arbitration Act contains no clear mandate that independent federal rules should oust all state laws governing the enforcement of arbitration agreements.62 But some state laws clearly conflict with the Act, and must be ousted. For example, section 4 of the Act, as interpreted in Prima Paint, expressly rejects state rules that place the making of an arbitration agreement at issue because of a defect in the making of the separable underlying contract. After Prima Paint, a federal court, despite conflicting state law, must order arbitration under section 4 of the Act or stay judicial proceedings under section 3 if it determines that the “making” or “performance” of the arbitration agreement are not “in issue.”63

Even after a state law passes the Prima Paint test of separability, it may still conflict with section 2 of the Act. Section 2 makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”64 Since all allegations that place the “making” or “performance” of the agreement at issue under section 4 are also grounds for revocation,65 a court must ascertain that a state law does not con-

61. See note 58 supra; cases cited in note 56 supra.
62. See notes 17 & 18 supra and accompanying text.
63. 388 U.S. at 403-04. See note 15 supra.
65. All claims that put the making or performance of an arbitration agreement in issue — section 4 claims — must rest upon section 2 grounds for revocation, if “revocation” is understood to mean the prevention of arbitration despite one party’s opposition. Because all section 4 claims must rest upon section 2 grounds, an allegation must satisfy the requirements of both section 2 and section 4 before it can prevent arbitration by putting the making of the arbitration agreement in issue.

Although all section 4 claims must rest upon section 2 grounds for revocation, not all grounds for revocation necessarily give rise to claims that put the making or performance at issue under section 4. Some courts have held, for instance, that claims of waiver or laches do not put the making at issue, and that such claims must therefore be heard by the arbitrator; waiver or laches, however, might still be grounds for revocation under section 2. See e.g., Conticommodity Servs., Inc. v. Phillip & Lion, 613 F.2d 1222 (2d Cir. 1980) (interpreting section 4 to require arbitrator to decide timeliness of demand for arbitration); World Brilliance Corp. v. Bethlehem Steel Co., 342 F.2d 362 (2d Cir. 1965) (laches and waiver held questions for arbitrator). This Note is concerned only with the choice of state versus federal grounds of revocation, and not with the question of which tribunal should apply these grounds (the court versus the arbitrator); hence this Note need not decide which valid section 2 grounds do not place the making or performance in issue under section 4. The extent to which courts should remit the consideration of grounds for revocation to an arbitrator’s decision should probably be viewed as a matter of federal statutory interpretation independent of state law. See B. Calkins, The “Making” of an Agreement to Arbitrate: A Question for the Court or the Arbitrator? (Nov. 4, 1980) (unpublished paper on file with the Michigan Law Review). Courts might take either of two approaches to this job of interpretation. First, if a court found the making not in issue despite allegations based upon valid section 2 grounds, it would order arbitration. Then the arbitrator would presumably apply the legal rules that section 2 makes
conflict with section 2 of the Act before applying the law pursuant to section 4. 66

State laws conflict with section 2 of the Act if they discriminate against arbitration agreements, if, that is, they provide "grounds . . . for the revocation" of arbitration agreements that are not applicable to "any contract." Congress's primary purpose in section 2 was to undo judicial and legislative hostility to executory arbitration agreements; before passage of the Act, many states had held such agreements revocable and unenforceable. 67 An example of a hostile state law that conflicts with section 2 is the Texas statute at issue in Collins Radio v. Ex-Cell-O-Corp. 68 The statute required acknowledgment by a state-licensed lawyer that the client had been advised of the consequences of agreeing to arbitrate. 69 Since state law placed no such limitation on other types of contracts, the court properly refused to adopt the acknowledgment requirement as the federal rule of decision. 70 To put the matter in terms of the two-stage analysis set forth above, discriminatory state rules fail to qualify for adoption at the first stage: they conflict with language of section 2 of the Act.

The second stage of the adoption analysis concerns only state rules that do not conflict with the Act. If a state law allows the same "grounds . . . for the revocation" of arbitration agreements that it allows for the revocation of "any contract," it does not conflict with either sections 2 or 4 of the Act. The question remains, however, applicable. Second, a court might interpret the term "making" so that any valid section 2 ground for revocation would place the making in issue, and thus no ground for revocation would be a matter for the arbitrator. The first of these alternatives seems likely to prevail, given cases like Commodity Services and World Brillance.

66. Courts should be little troubled by application of Section 2 to claims under Section 4 of the Act. In Prima Paint, the Supreme Court deftly extended the Section 4 requirement that a claim put the "making at issue" to an appeal for stay of judicial proceedings pending arbitration under Section 3. See 388 U.S. at 404. Just as "it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court," 388 U.S. at 404, it is inconceivable that Congress intended the non-discriminatory command of Section 2 to go unheeded simply because it was not repeated in the enforcement provisions of Section 3 and Section 4.

There may be reasons to read the Act less than literally and allow courts a limited freedom to find the making placed in issue by a state's discriminatory but reasonable grounds for the revocation of arbitration agreements. Congress sought to undo legislative and judicial hostility to arbitration, not to preclude completely any reasonable regulation of it. Section 2's formula was an attempt to express congressional disapproval of discriminatory hostility succinctly, but that formula, if read literally, is too broad for its purposes. Under some circumstances, therefore, the policies of the Act may tolerate a court's decision that unique but not hostile grounds for revocation may put the making in issue.


68. 467 F.2d 995 (8th Cir. 1972).

69. 467 F.2d at 997.

70. 467 F.2d at 997-98. The court's reasoning, however, suggested a principle that this Note's analysis would find overbroad: "the Federal Act bars resort to state arbitration rules to determine the validity of arbitration clauses . . . ." 467 F.2d at 997.
whether the federal interests in adopting an independent body of federal arbitration law outweigh the federal interests in applying nondiscriminatory state law.

Federal courts might desire to apply independent federal law to arbitration agreements because of a belief that the resultant uniformity among jurisdictions will ease administration of the Act\textsuperscript{71} and promote its purposes. A similar belief led the Supreme Court to create a nationally uniform body of labor arbitration law.\textsuperscript{72} This uniformity furthers and is made necessary by the strong federal policy of promoting the arbitration of labor disputes.\textsuperscript{73} Because labor arbitration is greatly preferable to its likely alternative — industrial strife — the courts have created a specialized and uniform body of law that differs in many particulars from ordinary principles of contract law.\textsuperscript{74}

By comparison, the federal interest in applying a uniform federal law to commercial arbitration agreements is relatively weak. The legislative history of the Act indicates that Congress was content to place arbitration on an equal footing with other contracts;\textsuperscript{75} uniformity is not necessary to achieve such equality. In fact, as is discussed below,\textsuperscript{76} the two goals are inconsistent. The Act can as easily prevent the frustration of contracting parties' intent if courts apply nondiscriminatory state law as it can if they apply uniform nationwide rules.\textsuperscript{77}

\textsuperscript{71} Cf. Chicago Note, \textit{supra} note 56, at 839 ("Uniformity is often sought to ease the burden of federal administration").

\textsuperscript{72} The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements . . . The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling." Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

\textsuperscript{73} See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

\textsuperscript{74} Federal policy prefers arbitration of labor grievances because it promotes "stabilization through the collective bargaining agreement . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (footnotes and citation omitted). In other words, arbitration of labor disputes is the "substitute for industrial strife." 363 U.S. at 578. Litigation is not a realistic alternative, and hence the federal interest is in channeling labor disputes into arbitration. In contrast, "[i]n the commercial case, arbitration is the substitute for litigation." 363 U.S. at 578. There is less harm to the economy when commercial parties choose to litigate rather than arbitrate their disputes than when unions strike over contract disputes. Thus, there is not the same compelling public interest in encouraging commercial parties to resolve their disputes through arbitration. \textit{See Consequences, supra} note 18, at 592. \textit{But cf.} Furnish, \textit{supra} note 20, at 334 ("[T]he objectives of contractual exchange in our society . . . frequently are served best today by arbitration rather than litigation").


\textsuperscript{76} See notes 84-89 \textit{infra} and accompanying text.

\textsuperscript{77} This assumes that as long as the applicable law makes it possible for parties to achieve their contractual intent, the parties will know equally well in either case what the applicable law is, and tailor their agreement accordingly.

If the parties do not take the time to discover the applicable law, it may be more likely that they will assume that nondiscriminatory state contract law applies to their arbitration clause.
Some courts, to be sure, have discerned "a strong federal policy in favor of [commercial] arbitration" over litigation.\textsuperscript{78} This policy, they say, arises "to help ease the current congestion of court calendars."\textsuperscript{79} But the authorities relied upon by these courts reveal no such policy.\textsuperscript{80} Although Congress recognized that some parties choose arbitration to eliminate the "delay and cost of litigation,"\textsuperscript{81} it does not follow that an independent public policy favors the arbitration rather than litigation of commercial disputes.\textsuperscript{82} The Act favors arbitration only to the extent that it puts arbitration agreements on

Typically only a fraction of the total time spent negotiating the document will go into the arbitration provision. Often, it will be included at the last minute without serious consideration. These circumstances would tend to aggravate the uncertainty caused by applying independent federal rules to the arbitration clause, because the parties are likely to assume that the same rules govern formation and interpretation of the arbitration clause as the bulk of the contract.

The requirement of independent subject matter jurisdiction under the Act also increases the likelihood that the parties will rely on state law. The Act governs all contracts involving interstate commerce. 9 U.S.C. §§ 1 & 2. Thus, whenever there is no diversity (or other federal) jurisdiction, arbitration cases covered by the Act will be brought in state courts, where they will be governed by federal law. To what body of contract law are state court judges to look? There is no comprehensive body of federal contract common law. How are they to guess what independent rule a federal court would apply in questions that have not yet been decided by the federal courts (and where it is not clear that the Act's policies require a particular rule)? See \textit{Friendly, In Praise of Erie and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 406 (1964)}.


\textsuperscript{80} The court in \textit{Robert Lawrence} was apparently the first to announce such a policy. \textit{Consequences, supra note 18, at 592.} The court cited two commercial arbitration cases, neither of which supports the proposition that a federal policy favors arbitration over litigation to ease the congestion of the courts. The citation to Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 453 (1935), was apparently to the Court's reference to "conges­tional approval of arbitration." It is difficult to see how the \textit{Robert Lawrence} court stretched this to support the proposition that Congress favors arbitration independently of the intent of the parties. The citation to Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942), was apparently to that court's quotation from the report of the House Committee that referred to the "agitation against the costliness and delays of litigation." H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924), \textit{cited in} 126 F.2d at 985. However, this "agitation" came from businessmen whose expectations about arbitration agreements were being undermined by the courts. Congress never mentioned any need to reduce the case loads of the federal courts. Courts following \textit{Robert Lawrence} have cited \textit{Robert Lawrence} itself as the source of this policy. \textit{See, e.g., Southwest Indus. Import & Export, Inc. v. Wilmod Co.}, 524 F.2d 468, 470 (5th Cir. 1975). For an argument that there is a pro-arbitration policy, see Note, \textit{supra note 17, at 603-04 n.68.}

\textsuperscript{81} H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924).

\textsuperscript{82} One author suggests that these courts may have erroneously borrowed the policy favoring arbitration from the field of labor arbitration. \textit{See Consequences, supra note 18, at 592.}
equal footing with other contracts in the face of state hostility to arbitration. Nothing in the Act suggests that arbitration agreements should be more irrevocable or enforceable than other contracts. Thus, no federal policy favors an independent, pro-arbitration federal common law.

Even if favoritism to arbitration provides no justification for independent federal rules, courts might apply federal rules if they believed that Congress assumed that uniform federal law would apply to all federal arbitration cases. Since Congress passed the Act in the days before *Erie R.R. v. Tompkins*, it may have assumed that federal courts would look to a uniform federal contract law in deciding what were valid grounds for the revocation of arbitration agreements. And since Congress passed the Act pursuant to the commerce clause, this assumption would still be effective today despite *Erie*. According to this reasoning, courts should still read the Act today as commanding the creation of uniform federal rules.

Such a reading of the Act, however, would elevate an incorrect congressional assumption above the more important congressional goal of making the law governing arbitration agreements congruent with the law governing commercial contracts. Through the Act, Congress sought to place arbitration agreements "upon the same footing as other contracts" and to help contracting parties achieve their intent to make valid arbitration agreements. At the time of the Act's passage, Congress could have assumed that, because federal common law would govern not only arbitration agreements but also their underlying commercial contracts, there would be both na-

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84. 304 U.S. 64 (1938) (holding that federal courts do not have the power to declare independent federal common law in deciding issues that would be governed by state law in state courts).

85. [Before *Erie*] the federal courts had interpreted *Swift* [41 U.S. 6 Pet. 1 (1842)] (or more likely, misinterpreted it to mean) that they could adopt a federal common law in diversity cases that differed from the state common law of the forum, and that they could fashion such a federal law in all areas of regulation, without a reference to subject matter.

86. Congress rested the Act not only upon Congressional power to regulate procedure in the federal courts, but also "upon the Federal control over interstate commerce and over admiralty." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).


88. See Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2d Cir. 1959) (Lumbard, C.J., concurring) (Congress sought "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges").
tationwide uniformity of arbitration law and congruence between the
law governing commercial agreements and arbitration clauses. After
Erie, however, state law governs ordinary commercial agreements.
Consequently, uniformity and congruence have become inconsistent
goals. Since Congress never expressly commanded uniformity
among jurisdictions, but only (perhaps) assumed it as a consequence
of a now-obsolete notion of the scope of federal common law, courts
should today give effect to Congress's desire to achieve congruence:
they should incorporate the same law that governs commercial con­
tracts — nondiscriminatory state law. 89

While the federal interests in applying independent federal law
are weak and inconsistent with the goal of congruence, the federal
interests in applying nondiscriminatory state law are strong. The
first such interest is the convenience of drawing upon a "ready-made
body of state law" 90 as "an appropriate and convenient measure of
the content of the federal law." 91 No unified body of federal law
governing arbitration exists. 92 Nor would such a body of law result
soon from incremental judicial decisions in federal arbitration cases.
Each state, however, has developed a body of contract law to which
the courts can conveniently look in deciding what "grounds . . . ex­
ist . . . for the revocation of any contract."

A second and related reason to adopt nondiscriminatory state
law is that application of independent federal rules may disrupt
commercial relationships. If independent federal law applied to.ar­
bbitration agreements, there would be unsettled areas of law control­
ing their "making" until federal courts had issued decisions in those
areas. These unsettled areas would be a source of uncertainty for
parties wishing to make an arbitration contract. If parties could as­
sume that nondiscriminatory state laws would apply, this uncertainty
would be removed. 93

89. This Note defines non-discriminatory state law as the law applicable to "any contract"
68 (1966); H. Hart & H. Weschler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 768
(2d ed. 1973); Note, supra note 53, at 1098 ("Incorporation of state rules also may be conve­
nient where the federal judiciary has not formulated a comprehensive body of law"); Chicago
Note, supra note 56, at 842-43.
91. H. Hart & H. Weschler, supra note 90, at 768.
92. See text at notes 14-24 supra.
("we should consider . . . the impact a federal rule might have on existing relationships under
federal rule would disrupt commercial relationships predicated on state law"); United States v.
Little Lake Misere Land Co., 412 U.S. 580, 595 (1973) ("the established body of state property
law should generally govern federal land acquisitions"); Reconstruction Fin. Corp. v. Beaver
County, 328 U.S. 204, 210 (1946) ("the congressional purpose can best be accomplished by
application of settled state rules as to what constitutes 'real property'"); Chicago Note, supra
note 56, at 843.
The federal interests in adopting state laws that do not discriminate against arbitration thus outweigh the federal interests in creating a uniform federal law of arbitration independent of state law. Courts should therefore adopt nondiscriminatory state law as the Act's rule of decision.

B. Corollaries of Adopting Nondiscriminatory State Law

The fundamental adoption analysis is thus established. Nondiscriminatory state law should be adopted and discriminatory state law should not. But three corollary questions remain. First, what law should courts apply in place of ousted discriminatory state rules? Second, may a court ever decide not to apply a state rule that, although it does not discriminate against arbitration, nonetheless makes arbitration agreements more difficult to enforce than another state would? Finally, should courts adopt state rules that discriminate in favor of arbitration agreements? The answers to these three questions flow logically from the preceding analysis.

Once a court determines that a state law discriminates against arbitration, that law is ousted by the Act. Next the court must decide what rule should replace the ousted rule. The court might apply either the general — and by definition, nondiscriminatory — state law of contract, or an independent federal rule. This latter choice matches the one a court would have to make if there had never been a discriminatory state rule in the first place. As shown above, the court should apply nondiscriminatory state law in such cases.

State contract law that does not discriminate against arbitration agreements, but makes the formation of all contracts, including arbitration agreements, more difficult than does the law of other states, should be applied under the Act. This conclusion also follows from the preceding adoption analysis. The congressional purpose to make the law governing arbitration conform to the law governing commercial contracts controls, given the absence of any purpose to favor arbitration. As long as arbitration stands on the "same footing" as "any contract," there is no conflict with Section 2 of the Act,

94. See text at notes 64-70 supra.
95. See notes 75-93 supra and accompanying text.
96. For example, in Collins Radio v. Ex-Cell-O Corp., 467 F.2d 995 (8th Cir. 1972), discussed supra at notes 68-70 and accompanying text, a court refused to apply a Texas state law that imposed a higher standard of validity on arbitration agreements than on other contracts. The Collins court held that the arbitration agreement was valid under "general contract law," 467 F.2d at 999; had the court applied this Note's analysis, it would presumably have reached the same result under general Texas contract law.
97. See text at notes 85-89 supra.
98. See text at notes 75-83 supra.
and no need to modify state law.

Finally, if state law favors the formation or enforcement of arbitration agreements above other contracts, courts should nevertheless adopt such rules under the Act. A state might desire to promote the formation and enforcement of arbitration agreements in order to reduce court backlogs or speed the resolution of commercial disputes, and might therefore make arbitration agreements easier to form or enforce than ordinary contracts.101 Congress, of course, declared that it sought in the Act to place arbitration agreements “upon the same footing as other contracts.”102 State pro-arbitration laws seem inconsistent with this purpose. But the conflict with the Act is semantic, not substantive. Congress wanted to establish a congruence between the law governing arbitration and the law governing other contracts, but such congruence is only necessary to help parties achieve their contractual intent.103 Even if the Act allows parties to ignore the effect of state rules that discriminate against arbitration, it does not necessarily require them to ignore pro-arbitration rules. Congress's primary purpose was to overcome state hostility to arbitration;104 it did not contemplate the problem of discriminatory favoritism. Only if the Act required uniform federal rules governing arbitration would state rules favoring arbitration be displaced. Since the Act does not require independent federal rules,105 state rules favoring arbitration agreements are not inconsistent with the purposes of the Act and should be incorporated as rules of decision.106

These three corollaries to the decision to apply nondiscriminatory state law complete the list of principles that should govern incorporation of state law under the Act. First, when a party seeks to stay court proceedings pending arbitration under Section 3 or order arbitration under Section 4, a court should decide whether the party's allegation puts the making of the separable arbitration agreement, as distinct from the underlying contract, in issue. A court should not order arbitration or stay proceedings pending arbitration

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101. A hypothetical example of a rule that discriminates in favor of arbitration would be a rule providing that arbitration provisions are never material alterations under U.C.C. § 2-207 and so always become part of the contract if contained in either the order or confirmation form. See text at notes 109-19 infra. Cf. Mass. Ann. Laws ch. 251, § 2A (Michie/Law Co-op) (court may order consolidation of arbitration proceedings notwithstanding the parties' agreement to the contrary).


103. See note 88 supra and accompanying text.

104. See notes 4-6 supra and accompanying text.

105. See text and notes 71-89 supra.

106. Of course, there might come a point at which a state's pro-arbitration law would become so inimical to the parties' intent as to actually discourage the formation of any arbitration agreements. At that point, the policies of the Act might well be sufficiently offended to require the courts to replace pro-arbitration laws with the law governing the formation of ordinary contracts in the state.
if the party alleges facts that, under a state law that does not discriminate against arbitration agreements, would put the making of the separable arbitration agreement in issue. Second, a court should not apply state laws that discriminate against arbitration, nor allow them to place the making in issue. State laws discriminate if they create grounds for the nonenforcement of arbitration agreements and those grounds do not apply to other contracts. Third, a court should replace discriminatory state rules with the rules generally applicable to all contracts in the state. Fourth, a court should not oust nondiscriminatory state rules even though they make the enforcement of arbitration agreements more difficult in that state than in other states. Finally, a court should adopt state rules that favor arbitration over other contracts. The following Section will apply these principles to several illustrative state laws.

III. IDENTIFYING DISCRIMINATORY STATE LAWS

In most circumstances, courts should have little difficulty in applying a rule that directs them to adopt nondiscriminatory state law. A party seeking to prevent arbitration will claim that the making of the arbitration agreement is in issue, and the court will easily discover whether the state rule underlying the claim discriminates against arbitration agreements. Most state rules of contract formation and construction do not discriminate against arbitration, and can be confidently applied. Some state rules apply unique standards to arbitration agreements, and can be just as easily rejected. For example, a state rule might interpret arbitration agreements so narrowly as to submit only matters listed in the agreement to arbitration. 107 Unless such a rule of “express enumeration” applied to other contracts in the state, it could not place the making of an arbitration agreement in issue.

In a few cases it will be more difficult to decide whether a state rule discriminates against arbitration. Occasionally a rule that appears innocuous on its face turns out to be discriminatory as applied in state courts. Similarly, a rule that appears to discriminate against


arbitration sometimes may merely state explicitly the rule already applied to all other contracts.\textsuperscript{108} The varying ways in which courts have applied the "material alteration" clause of section 2-207 of the Uniform Commercial Code best illustrates the need to look at the application of a state rule as well as its language in deciding whether it is discriminatory.

Section 2-207 governs the "battle of the forms" that ensues when merchants exchange sales and purchase forms that contain different provisions. Provisions that are "material alterations" will not become part of the contract without the specific consent of the other party.\textsuperscript{109} A state law might provide that an arbitration clause contained in a sales contract confirmation form always constitutes a "material alteration" under section 2-207, and thus never becomes part of the contract unless both parties explicitly agree to the arbitration clause. A New York case, \textit{In re Marlene Industries Corp. (Carnac Textiles, Inc.)},\textsuperscript{110} held that an arbitration clause is always a "material alteration," even in the textile industry where arbitration is routine.\textsuperscript{111} The court said it would require "unequivocal agreement" and a "clear indication of intent" to arbitrate before it would compel arbitration.\textsuperscript{112} In so holding, the court ignored the standards set

\textsuperscript{108} The reader might profitably compare the distinction drawn in equal protection cases between laws that explicitly discriminate against racial or ethnic minorities, see, e.g., \textit{Loving v. Virginia}, 388 U.S. 1 (1967) (statute prohibiting marriages on basis of race), and those that are racially "neutral" on their face but are administered in a discriminatory way, see, e.g., \textit{Louisiana v. United States}, 380 U.S. 145 (1965) (statute requiring that all voter applicants understand the Constitution, but applied only against blacks); \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886) (statute requiring certificate to operate a laundry in a wood building enforced only against Chinese). Moreover, a statute that disadvantages one group may so disadvantage other groups as to negate an inference of discriminatory purpose. See, e.g., \textit{Personnel Adm'r v. Feeney}, 442 U.S. 256, 281 (1979) (Stevens, J., concurring) (absolute veterans preference in civil service hiring disadvantages many men as well as women). \textit{See generally}, \textit{W. Lockhart, Y. Kamisar & J. Cooper, Constitutional Law} 1258-97 (5th ed. 1980).

\textsuperscript{109} The section provides, in pertinent part:

\textit{§ 2-207. Additional Terms in Acceptance or Confirmation}

\begin{enumerate}
\item [(1)] A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
\item [(2)] The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
\begin{enumerate}
\item [(a)] the offer expressly limits acceptance to the terms of the offer;
\item [(b)] they materially alter it; or
\item [(c)] notification of objection to them has already been given or is given within a reasonable time after notice of them is received. [emphasis added.]
\end{enumerate}
\end{enumerate}


\textsuperscript{112} 45 N.Y.2d at 333-34, 380 N.E.2d at 242, 408 N.Y.S.2d at 413.
forth in New York's official comments to section 2-207. Those standards define materiality in terms of whether the term "would result in surprise or hardship if incorporated without express awareness by the other party."113 Because it does not apply the same legal standards to arbitration agreements as to other contracts, the Marlene rule should not be adopted as the appropriate rule of decision under the Act.114

A state court might, however, explicitly apply the unfair surprise standard and nonetheless find an arbitration clause to be a "material alteration." The court would reach the same result as Marlene, but would purport to apply state law in a nondiscriminatory fashion. Courts interpreting the Act would have to decide whether this result was permissible. Section 2 of the Act is apparently satisfied by the application of the unfair surprise standard to both arbitration agreements and other contracts. But the term "unfair surprise" admits of such a wide variation in interpretation115 that a state might selectively disfavor arbitration, despite the ostensibly uniform application of its law. A court applying the Act should ensure that a state law is nondiscriminatory in practice as well as in verbal formula. Suppose, for example, that state law normally does not consider a confirmation-form term a material alteration if the term conforms to the "usage of the trade."116 The Act would then require a rule that arbitration clauses are not material alterations where arbitration conforms to trade usage.

However, a state might have a per se material alteration rule and yet not discriminate against arbitration agreements. If the state did not employ the unfair surprise standard for U.C.C. § 2-207, and if it defined "material alteration" broadly, almost no term contained in a confirmation form could become part of the contract under section 2-207. In effect, such a state would require acceptance forms to "mirror" the offer. In non-sales transactions, this mirror-image

114. See text at notes 67-70 supra.
Some courts have adopted the Marlene rule as the measure of federal law under the Act, and others have not. Compare Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135 (4th Cir. 1979) (holding that there is no conflict between Marlene and the Act, and applying a per se material-alteration rule for arbitration provisions), Duplan Corp. (Duplan Yarn Div.) v. W.B. Davis Hosiery Mills, Inc., 442 F. Supp. 86 (S.D.N.Y. 1977), and John Thallon & Co. v. M&N Meat Co., 396 F. Supp. 1239 (E.D.N.Y. 1975) (holding arbitration clause is material per se; resting on New York law), with Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973) ("The question of a material alteration rests upon the facts of each case"), and Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972) (declining to follow New York law, holding material alterations are questions of fact).
115. Cf. cases cited in note 114 supra.
rule still governs the “battle of the forms” in several states. A mirror-image rule does not conflict with the Act so long as the state applies it evenly to all contract provisions. Thus, courts must occasionally examine how U.C.C. § 2-207 and other state rules are applied, as well as how they are phrased, to determine whether they discriminate against agreements to arbitrate.

State unconscionability rules pose a unique and difficult problem for courts applying a nondiscrimination test. A state rule that held all arbitration agreements unconscionable per se would be essentially a disguised version of the common-law rule that arbitration agreements are unenforceable and would clearly conflict with section 2 of the Act. Assuming that a state applies its unconscionability rules both to arbitration agreements and to other contract terms, the difficult question becomes whether the Act ever permits a state to hold an arbitration agreement unconscionable. On the one hand, the Act contemplates that the full range of legal and equitable defenses to the enforcement of any contract will be available to parties opposing arbitration, and many states recognize an unconscionability defense to contract enforcement. On the other hand, a finding of unconscionability seems to reflect a judicial determination that arbitration is unfair, a view that implies judicial hostility toward arbitration.

By looking to the source of the unconscionability, courts in many cases should be able to find arbitration agreements unconscionable without discriminating against arbitration. A state court does not discriminate against arbitration if it holds an arbitration agreement unconscionable for reasons that do not arise solely because an arbi-

117. The “rule of exact acceptance,” as it is sometimes called, see U.C.C. § 2-207, N.Y. Annot. § 1 (McKinney), holds that “an acceptance, to be effectual, must be identical with the offer and unconditional.” 17 C.J.S. Contracts § 43 (1963).


119. See text at notes 97-100 supra.

120. See note 6 supra.

121. Section 2 preserves as valid such grounds for revocation as exist for “any contract.” 9 U.S.C. § 2 (1976). See H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924): “The [Act’s enforcement] procedure is very simple, following the lines of ordinary motion procedure . . . and at the same time safeguarding the rights of the parties. . . . If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected” (emphasis added).

trator rather than a judge or jury decides the dispute. For example, a court might reasonably refuse to enforce a provision requiring the weaker party to travel great distances in order to arbitrate any claims. A court might also refuse to enforce an arbitration agreement where excessive filing fees for arbitration would preclude the weaker party from any action on the contract. Both such contracts would impose oppressive expenses on the weaker party as prerequisites to arbitration; a court should be as free to find a gross inadequacy of consideration for these terms as it would to find inadequate consideration for any other oppressive contract term. Since a finding of unconscionability would require no determination that arbitration itself — the change in tribunal — is unfair, such a finding would not conflict with the Act.

Even a finding that the change in tribunal itself is so grossly onerous or advantageous to one party as to be unconscionable is permitted under the Act. In most cases, arbitration benefits both parties equally, as for instance where commercial parties bargain at arms' length. But some parties may agree to arbitrate because the contract as a whole is beneficial to them, even though arbitration may be to their disadvantage. Potential personal injury plaintiffs are such

123. Cf. Player v. Geo. M. Brewster & Son, Inc., 18 Cal. App. 3d 526, 536, 96 Cal. Rptr. 149, 156 (1971) ("We think the courts . . . should scan closely contracts which bear facial resemblance to contracts of adhesion and which contain cross-country arbitration clauses").

124. Cf. Spence v. Omnibus Indus., 44 Cal. App. 3d 970, 977, 119 Cal. Rptr. 171, 174 (1975) (requiring defendant to bear cost of filing fee for arbitration: "a contractor may not use an arbitration provision in a contract such as this to effectively deny such home owner an opportunity to press a damage claim against him").


126. Contractual terms such as those discussed here do not concern the validity and enforceability of arbitration agreements within the meaning of the Act. Such terms are accessory obstacles to arbitration, obstacles which can be separately scrutinized under state law without even invoking the Act.


129. See 63 Cal. App. 3d at 360-61, 133 Cal. Rptr. at 786:

"Unless advised by his doctor to the contrary, the patient normally feels he has no choice..."
a class. By agreeing to arbitrate, the potential plaintiff gives up a potential jury-verdict windfall; the potential defendant gains a corresponding reduction in potential liability. After considering the magnitude of the advantage flowing to the potential defendant, a court may conclude that that advantage was unfairly procured, without necessarily implying that arbitration is unfair. The court simply asks whether there has been adequate consideration or fair bargaining for a substantial exchange. Since a court asks the same question in any unconscionability case, it does not discriminate against arbitration agreements by holding that some of them confer unconscionable advantages on one party. Therefore, courts should adopt in arbitration cases those state rules of unconscionability that rest on a finding of unbargained-for advantage.

CONCLUSION

Congress failed to specify how the Federal Arbitration Act alters the applicability of state contract law to commercial arbitration agreements. Courts, usually basing their choice between state and federal law on vague appeals to the Act's underlying policies, have differed in the extent to which they incorporate state laws as federal rules of decision. The Supreme Court in Prima Paint gave this issue only "summary treatment," ingeniously discovering an express rule of separability in section 4 rather than providing a general principle for determining which state rules, if any, survive the Act. Courts can disentangle the muddle by looking beyond Prima Paint and section 4 of the Act to the language and purpose of section 2. In order for a rule to place the making of a separable arbitration agreement in issue under section 4, the rule must first comply with the requirements of section 2. State laws that treat arbitration agreements like other contracts satisfy these requirements. Courts should apply these nondiscriminatory state laws because they are accessible and because they promote the Act's objective: they put arbitration agreements on an equal footing with other contracts.

but to seek admission to the designated hospital and to accede to all of the terms and conditions for admission, including the signing of all forms presented to him."

130. See 63 Cal. App. 3d at 361, 133 Cal. Rptr. at 786: The manifest objective of a medical entity in including an arbitration clause is to avoid a jury trial and thereby hopefully minimize losses for any medical malpractice and correspondingly to hold down the amount of any recovery by the patient.