

# ARBITRATION IN ADMIRALTY

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## INTRODUCTION

Forty years is a relatively short time in judging the maturity of a legal concept. Prior to the passage of the New York Arbitration Act<sup>1</sup> in 1920, and the United States Arbitration Act<sup>2</sup> in 1925, the idea of settling disputes by arbitration was deemed contrary to our public policy with the result that courts refused to compel parties to perform their promises to arbitrate. Jurists applied the axiom that such agreements were unenforceable because they ousted the jurisdiction of the courts, but historians have analyzed the real public policy to have been the fear in the judicial ranks of losing the sine qua non of their existence, that is, the settling of disputes between men. In maritime jurisprudence, arbitration has swung the full pendulum, there being evidence that as early as 1320 in England, maritime controversies were settled by arbitration.<sup>3</sup>

The basis of jurisdiction for a court in arbitration controversies is not the physical presence of the parties or res within the court's geographic limits of power, but rather the expressed "consent" of the parties by language in their arbitration agreement. Typical of the agreements in the maritime area is the printed New York Produce Exchange form charter-party, wherein the charterer and the vessel owner agree:

Should any dispute arise between Owners and the charterers, the matter in dispute shall be referred to three persons at New York. The arbitrators shall be commercial men.

The objective of this article is to analyze the connotations in the phrase "at New York." Since the subject matter of the New York Arbitration Act is generally unlimited, and the federal act, though limited in its scope, applies to "maritime transactions," both acts govern charter-parties and other maritime matters although the rights, remedies, and results may be different under each act.

The problems in any federal-state question are further complicated by constitutional considerations as well as conflict of laws questions vis-à-vis procedural rights. This article will attempt to sketch a few of these problems, namely:

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<sup>1</sup> N.Y. Civ. Prac. Law §§ 7501-7514.

<sup>2</sup> 9 U.S.C. §§ 1-14 (1958).

<sup>3</sup> *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 122, n.3 (1924). See also *Kulukundis Shipping Co. S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 1942 Am. Mar. Cas. 364 (2d Cir. 1942) for an interesting history of arbitration in admiralty.

- (1) Whether the historical concept of federal-state concurrent jurisdiction extends to arbitration of maritime affairs;
- (2) which system prevails when the state court is invoked, but the controversy is removed to the federal courts, where remand to the state court is attempted, and;
- (3) whether the characterization of substantive or remedial to the Federal Arbitration Act is the panacea to the problem.

#### FEDERAL-STATE CONCURRENT JURISDICTION

Shortly after the passage of the New York Arbitration Act in 1920, the familiar problem of a state court's concurrent jurisdiction over in personam admiralty matters reared its head. In 1924, the landmark *Red Cross Line*<sup>4</sup> controversy was brought to the Supreme Court. The charter-party between the owners and charterers of the vessel provided for arbitration "in New York." The New York Court of Appeals held that the state court had no jurisdiction believing a charter-party was exclusively within federal admiralty jurisdiction, on the rationale of the Supreme Court's 1917 decision in *Southern Pacific v. Jensen*,<sup>5</sup> that the need for maritime uniformity overrode a state's interests in maritime matters. Justice Brandeis, writing for the Supreme Court majority, reversed the New York Court of Appeals, holding that by reason of the "saving to suitors" clause and the "right to a common law remedy" contained therein,<sup>6</sup> a state had concurrent in personam jurisdiction over maritime causes of action including charter-parties containing arbitration clauses. So long as a state does not attempt to enforce the in rem remedy exclusively reserved to the admiralty court,<sup>7</sup> or to change the "substantive admiralty law," the state is free to adopt such remedies as it sees fit.<sup>8</sup>

The opinion of the Court is not weakened by the argument that the case was decided prior to the effective date of the Federal Arbitration Act. The federal act had been introduced in Congress in December of 1922,<sup>9</sup> a fact presumptively known by the Court and counsel. Admittedly, as late as 1939, the respected admiralty treatises<sup>10</sup> inferred that the maritime doctrine of uniformity and federal pre-emption by Congressional act demanded the ousting of the state

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<sup>4</sup> *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 1924 Am. Mar. Cas. 418 (1924).

<sup>5</sup> 244 U.S. 205 (1917). The Court held that New York Workmen's Compensation Act when applied to maritime harbor workers, violated the policy of maritime uniformity.

<sup>6</sup> 28 U.S.C. § 1333(1).

<sup>7</sup> See the *Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867).

<sup>8</sup> 264 U.S. 109, 123 (1924).

<sup>9</sup> Comment, 69 Yale L.J. 847, 854, n. 41 (1960).

<sup>10</sup> See, e.g., Gustavus Robinson, *Admiralty Law*, 231-232 (1939).

arbitration acts of maritime subject matters including arbitration clauses in charter-parties.

More than a decade later, in 1953, a New York court, in granting a motion to compel arbitration, rejected the argument that a charter-party arbitration clause was a maritime contract exclusively within the admiralty jurisdiction of the federal courts, on the theory that the basis of jurisdiction was the "consent" of the parties contained in the agreement to arbitrate "in the City of New York."<sup>11</sup>

The state court's power of concurrent in personam jurisdiction was affirmed by the Supreme Court in 1954,<sup>12</sup> on the authority of *Red Cross Line*, by a 7-2 decision holding that a California state court could adjudge vessel partition proceedings since such an action was not within that prohibited historical in rem sphere of exclusive admiralty jurisdiction.

In the late fifties, the state courts continued to apply the "saving to suitors" clause to justify their jurisdiction over maritime arbitrations and refused to be ousted of their power.<sup>13</sup> Again, apparent approval came in 1959 from the United States Supreme Court when, in *Romero v. International Terminal Operating Company*,<sup>14</sup> it reviewed the jurisdictional problems of federal admiralty vis-à-vis federal civil vis-à-vis state courts, and reaffirmed the traditional maritime powers of the original colonial state courts:

Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers, as they have played joint roles in the development of maritime law throughout our history.<sup>15</sup>

Adherents of federalism can find rejuvenation in the 1959 decision of the Second Circuit in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*<sup>16</sup> Admittedly, the case does not involve maritime law, but rather an interstate commerce inland shipment wherein Judge Medina held that section 2 of the Federal Arbitration Act, which makes arbitration

<sup>11</sup> *T. J. Stevenson & Co. v. International Coal Corp.*, 15 Misc. 2d 904, 185 N.Y.S.2d 599, 1953 Am. Mar. Cas. 1056 (Sup. Ct. 1953).

<sup>12</sup> *Madruza v. California*, 346 U.S. 556, 1954 Am. Mar. Cas. 405 (1954).

<sup>13</sup> See, e.g., *First National Oil Corp. v. Arrieta*, 2 Misc. 2d 225, 151 N.Y.S.2d 309 (Sup. Ct. 1956), *aff'd*, 2 App. Div. 590, 157 N.Y.S.2d 313 (1957), *appeal dismissed*, 2 N.Y.2d 992, 143 N.E.2d 341, 163 N.Y.S.2d 604 (1957); *H. V. B. Smith v. Polar Cia De Navigacion Ltda.*, 15 Misc. 2d 301, 181 N.Y.S.2d 368, 1959 Am. Mar. Cas. 2123 (Sup. Ct. 1958).

<sup>14</sup> 358 U.S. 354, 1959 Am. Mar. Cas. 832 (1959).

<sup>15</sup> 358 U.S. at 374, 1959 Am. Mar. Cas. at 847.

<sup>16</sup> 271 F.2d 402, 1960 Am. Mar. Cas. 287 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *appeal dismissed per stipulation*, 364 U.S. 801 (1960).

agreements enforceable, was "a declaration of *national law* equally applicable in state or federal courts," that the section "created *national substantive law* clearly constitutional under the *maritime* and commerce powers of the Congress," and that "the body of law thus created is *substantive*, not procedural in character."<sup>17</sup> (Emphasis added.) The case is famous, or infamous depending on the advocate's viewpoint, and will remain so for some time, since it never reached the Supreme Court due to settlement by the parties.

The *Red Cross* line of authority has not been buried by the *Lawrence* case, at least in admiralty. In April 1961, *Red Cross* again was revisited by the United States Supreme Court in *Kossick v. United Fruit Co.*,<sup>18</sup> where it was held that the New York statute of frauds was inapplicable to a seaman's oral contract against a shipowner. It is noteworthy that the Court returned to the basic federal-state problem raised in its 1917 *Jensen* decision upon which the New York Court of Appeals erroneously relied in *Red Cross Line*. The Court reaffirmed its decision in *Romero* without discussing the Second Circuit's decision in *Lawrence*. In commenting on the federal-state overlapping in maritime matters, the Court said:

But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern.<sup>19</sup>

Where are we today, regarding a state's "concurrent in personam jurisdiction" as to maritime matters including arbitration clauses in charter-parties? The writer would suggest that the principles of concurrent jurisdiction will be sustained and reconciled, case by case, until the Supreme Court meets head-on the absolute federalism jurisprudence found in the recent Second Circuit cases.

A recent *unanimous* decision by the United States Supreme Court in a labor case involving federal court pre-emption of labor litigation under section 301(a) of the Labor-Management Relations Act of 1947 concluded in favor of the principle of concurrent jurisdiction stating that "in our judicial history . . . exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."<sup>20</sup> For authority, the Court cited an admiralty case, *Garrett v.*

<sup>17</sup> *Id.* at 407, 409, 1960 Am. Mar. Cas. at 293, 296.

<sup>18</sup> 365 U.S. 731, 1961 Am. Mar. Cas. 833 (1961).

<sup>19</sup> *Id.* at 738, 1961 Am. Mar. Cas. at 840.

<sup>20</sup> *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). See also *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

*Moore-McCormack Co.*,<sup>21</sup> and rejected the argument that the dual jurisdictional system would lead to disharmony in formulating federal common law.

In summary, so long as a state does not violate a party's rights rooted in the substantive maritime law, the principle of concurrent in personam jurisdiction by state courts will be and should be preserved. Uniformity, including uniformity in maritime law as a goal for its own sake, does not seem to be the end of our present Supreme Court; the preservation of a state's rights appears to be the superior interest.

RIGHT TO REMOVE AGAINST RIGHT TO REMAND IN RELATION TO  
"CONSENT" AS THE BASIS OF JURISDICTION

When parties subscribing to a printed form charter-party arbitration agreement "in New York," or "at New York," or "in the City of New York" are they consenting to arbitration in the United States district courts under the Federal Arbitration Act, or the New York state courts under the New York Arbitration Act?

When the problem has arisen in the New York courts, they have held that the making of an arbitration agreement is deemed a consent or implied submission of the parties to the jurisdiction of that state's courts.<sup>22</sup> When the identical problem has been presented to the federal courts, the same rationale of "consent" is used to justify the conclusion that the United States district courts have jurisdiction and the federal act is then applied.<sup>23</sup> It is true the federal act was modeled after the state act, but case law, statutory amendments, and procedure between the two is markedly different.<sup>24</sup>

The problem, to which of the two court systems do the parties

<sup>21</sup> 317 U.S. 239 (1945), where the court held a seaman could sue in the state court for damages under the Jones Act, as well as for maintenance and cure.

<sup>22</sup> *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931) (non-maritime); *Matter of Gantt*, 297 N.Y. 433, 79 N.E.2d 815 (1948), *cert. denied*, 335 U.S. 843 (1948) (non-maritime); *T. J. Stevenson v. International Coal Corp.*, 15 Misc. 2d 904, 185 N.Y.S.2d 599, 1953 Am. Mar. Cas. 1056 (Sup. Ct. 1953); *Terminal Auxiliar Maritima S.A. v. Cocotos Steamship Co.*, 11 Misc. 2d 697, 178 N.Y.S.2d 298, 1959 Am. Mar. Cas. 2122 (Sup. Ct. 1957); *H. V. B. Smith v. Polar Cia De Navigacion Ltda.*, 15 Misc. 2d 301, 181 N.Y.S.2d 368, 1959 Am. Mar. Cas. 2123 (Sup. Ct. 1958).

<sup>23</sup> *Farr & Co. v. Cia Intercontinental De Navigacion De Cuba, S.A.*, 144 F. Supp. 839, 1956 Am. Mar. Cas. 1701 (S.D.N.Y. 1956), *aff'd*, 243 F.2d 342, 1957 Am. Mar. Cas. 450 (2d Cir. 1957). Note that in affirming the Second Circuit refers to the second landmark New York case of *Gilbert v. Burnstine*, *supra* note 22, but adds it is "not controlling on us." 243 F.2d at 346, 1957 Am. Mar. Cas. at 455, *accord*, *Orion Shipping Co. v. Eastern States Petroleum*, 284 F.2d 419 (2d Cir. 1960).

<sup>24</sup> *E.g.*, compare the time limitations in demanding arbitration contained in the New York Act, N.Y. Civ. Prac. Law § 7502(b), with the lack of any time bar section in the federal Act.

“consent,” must be faced in a removal-remand situation, that is, where *A* invokes the aid of the state court in the arbitration, but *B* removes the action to the federal court. The removal takes effect immediately upon filing the petition of removal, which is usually prior to the hearing in the state court. Finally *A* requests the federal court to remand to the state court. Sometimes the problem is judicially sidestepped by a valid technique, other times, the judicial “tool” employed is questionable.

Compare the results of the concurrent jurisdiction controversy arising from varying interpretations of maritime arbitration clauses in *Omnium Freighting Corp. v. United Steamship Corp.*,<sup>25</sup> where the federal district judge consented to the state court’s hearing of the motion to vacate, with *Amicizia Societana v. Chilean Nitrate Corp.*<sup>26</sup> where the respondent acquiesced in the jurisdiction of the federal court, ending the concurrent jurisdiction controversy before it started.

In contrast is a recent case where the federal trial judge decided the issue “since it may be assumed that the state court will recognize the *priority* of this application” to the federal court.<sup>27</sup> (Emphasis added.) Since in all three cases, the state court was the first court to be invoked by a party, and since the parties arguably “consented” to the jurisdiction of either court, is it not questionable logic to reach a decision by the characterization of “assuming” recognition of federal “priority”?<sup>28</sup> A subsequent Southern District of New York decision questions the conclusion that federal priority is proper in this context, and concludes by stating that any priority “should be accorded to the court whose jurisdiction was so initially invoked.”<sup>29</sup> Are arbitration clauses in maritime contracts returning us to the “forum-shopping” intended to be stopped by the United States Supreme Court in *Erie R. Co. v. Tompkins*?<sup>30</sup> Perhaps the future may be worse. In the same

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<sup>25</sup> 15 Misc. 2d 800, 185 N.Y.S.2d 857 (Sup. Ct. 1958).

<sup>26</sup> 184 F. Supp. 116, 1960 Am. Mar. Cas., 624 (S.D.N.Y. 1959), *aff’d*, 274 F.2d 805 (2d Cir. 1960).

<sup>27</sup> *Ilios Shipping & Trading Corporation v. American Anthracite & Bituminous Coal Corporation*, 148 F. Supp. 698, 699, 1957 Am. Mar. Cas. 1294, 1295 (S.D.N.Y. 1957), *aff’d per curiam*, 245 F.2d 873 (2d Cir. 1957).

<sup>28</sup> Healy refers to the situation as a jurisdictional “race” between the parties. Healy, “Admiralty and Shipping,” 35 N.Y.U.L. Rev. 587, 592 (1960).

<sup>29</sup> *Cocotos Steamship v. Hugo Neu Corp.*, 178 F. Supp. 491, 493, 1959 Am. Mar. Cas. 1941, 1943 (S.D.N.Y. 1959); *accord*, *Petroleum Cargo Carriers, Ltd. v. Unitas, Inc.*, 31 Misc. 2d 222, 220 N.Y.S.2d 724 (Sup. Ct. 1961), *aff’d mem.*, 15 App. Div. 2d 735, 224 N.Y.S.2d 654 (1962).

<sup>30</sup> 304 U.S. 64 (1938).

federal court, counsel may be "shopping" for the right judge to hear his case.

The confusion in federal-state overlapping jurisdiction and removal-remand problems has swelled since the 1948 revision of the Federal Judicial Code, including the removal statute. Section 1333(1)<sup>31</sup> saves to maritime suitors their right to a common-law remedy in a state court; sections 1441(b)<sup>32</sup> and 1332<sup>33</sup> declare that, generally, actions are not removable to a federal court unless there is diversity of citizenship. These sections form the basis for state court jurisdiction and the granting in federal courts of motions to remand to the state court. On the opposite side, section 1441(a)<sup>34</sup> gives to litigants the power of removal to the federal courts in cases where the district courts have original jurisdiction, pursuant to the United States Constitution.<sup>35</sup> Other sections give removal power and federal jurisdiction without diversity to claims "arising under the Constitution, treaties, or laws of the United States."<sup>36</sup> Section 1331(a)<sup>37</sup> does the same where the matter exceeds \$10,000. These are the sections forming the basis for exclusive federal court jurisdiction and refusal to remand actions to the state court.

The language of statutory jurisdictional sections of such obvious complexity can be, and has been, stretched or contracted, depending upon the jurisprudential feelings of the deciding court. Which of the three, diversity, amount, or subject matter, must a maritime arbitration dispute have in order to confine it to either the federal or state judiciary system?

The adherents of broad federal jurisdiction over maritime matters received a boost by the eminent Judge Magruder's opinion in *Doucette v. Vinson*,<sup>38</sup> where he refused to remand, and held that a general maritime law claim (fisherman's injury) could be maintained in the federal courts, on the theory that it arises under the Constitution and laws of the United States, even where there was no diversity of citizenship.

Thereafter, sympathetic jurists had little hesitation in denying maritime suitors their alleged state court rights, holding that the right

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<sup>31</sup> 28 U.S.C. § 1333(1).

<sup>32</sup> 28 U.S.C. § 1441(b).

<sup>33</sup> 28 U.S.C. § 1332.

<sup>34</sup> 28 U.S.C. § 1441(a).

<sup>35</sup> U.S. Const. art. III, § 2: "The judicial power [of United States Courts] shall extend to all cases . . . of admiralty and maritime jurisdiction."

<sup>36</sup> 28 U.S.C. § 1337.

<sup>37</sup> 28 U.S.C. § 1331(a).

<sup>38</sup> 194 F.2d 834, 1952 Am. Mar. Cas. 458 (1st Cir. 1952).

to remove was superior to the "saving to suitors" right, which could be constitutionally satisfied in the federal court on the civil side, since the clause merely gave a choice of remedies, not of forums.<sup>39</sup>

Further support in favor of broad federal jurisdictional maritime powers was found in the United States Supreme Court's language in *Pope & Talbot, Inc. v. Hawn*, to the effect that "while states may sometimes supplement federal maritime policies, a state may not deprive a person of any *substantial admiralty rights* as defined in controlling acts of Congress or by interpretative decisions of this Court."<sup>40</sup> (Emphasis added.)

The proponents of narrow federal jurisdiction over maritime matters, who are in favor of preservation of state court rights by virtue of the "saving to suitors" clause, received a similar boost by Justice Medina's opinion in *Paduano v. Yamashita Kisen Kabushiki Kaisha*.<sup>41</sup> It was held that general maritime law causes of action could not be brought on the federal law or civil side unless there was diversity and the requisite jurisdictional amount. This school of thought could not be deemed a minority as it had many followers, so that it is most difficult to reconcile decisions in the same district court.<sup>42</sup> Can the cases be reconciled, or is there actually a different jurisprudential approach underlying each jurist's decision? The state court adherents demand diversity and over \$10,000, and maybe more, to oust them of jurisdiction. They urge that every doubt should be resolved in favor of

<sup>39</sup> See, e.g., *Reynolds v. Bryant*, 107 F. Supp. 704, 1953 Am. Mar. Cas. 348 (S.D. N.Y. 1952); *Wunderlich v. Netherlands Ins. Co.*, 125 F. Supp. 877, 1955 Am. Mar. Cas. 1659 (S.D.N.Y. 1954) (marine insurance); *Bakhshandeh v. Continental Ins. Co.*, 129 F. Supp. 122, 1955 Am. Mar. Cas. 65 (S.D.N.Y. 1954) (marine insurance); *Ilios v. American Anthracite and Bituminous Coal Corp.*, 148 F. Supp. 698, 1957 Am. Mar. Cas. 1294 (S.D.N.Y. 1957) (arbitration); *Compania Maritima Ador v. New Hampshire Fire Ins. Co.*, 120 F. Supp. 577, 1954 Am. Mar. Cas. 1149 (S.D.N.Y. 1954) (marine insurance); *Crispin Co. v. Lykes Steamship Co.*, 134 F. Supp. 704, 1955 Am. Mar. Cas. 2050 (S.D. Tex. 1955) (cargo suit); *Davis v. Matson*, 143 F. Supp. 537, 1956 Am. Mar. Cas. 2146 (N.D. Cal. 1956) (longshoreman's injury).

<sup>40</sup> 346 U.S. 406, 409, 1954 Am. Mar. Cas. 1, 7 (1953).

<sup>41</sup> 221 F.2d 615, 1955 Am. Mar. Cas. 1483 (2d Cir. 1955); *accord*, *Jordine v. Walling*, 185 F.2d 662, 1951 Am. Mar. Cas. 43 (3d Cir. 1951); *Jenkins v. Roderick*, 156 F. Supp. 299, 1957 Am. Mar. Cas. 2325 (D. Mass. 1957).

<sup>42</sup> Compare the previous S.D.N.Y. decisions, *supra* note 39, with Judge Cashin's opinions in *Cocotos v. Hugo Neu Corp.*, 178 F. Supp. 491, 1959 Am. Mar. Cas. 1941 (S.D.N.Y. 1959) (arbitration), and *Amicizia Societanave Gazione v. Chilean Nitrate Corp.*, 184 F. Supp. 116, 1960 Am. Mar. Cas. 624 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 805 (2d Cir. 1960) (arbitration); see *Vistorias Milling Co. v. Hugo Neu Corp.*, 196 F. Supp. 64, 1961 Am. Mar. Cas. 2369 (S.D.N.Y. 1961) (arbitration); *Rosenthal & Block China Corp. v. Porzellanfabrik*, 183 F. Supp. 659 (S.D.N.Y. 1960) (arbitration); *Harrisville v. Home Ins. Co.*, 129 F. Supp. 300, 1955 Am. Mar. Cas. 66 (S.D.N.Y. 1954) (marine insurance).



remand, that the purpose of the amendment to section 1441(a)<sup>43</sup> was to limit removal from the state courts, and that to hold in favor of federal civil courts is tantamount to reading out of the statute books the "saving to suitors" clause.<sup>44</sup>

The conservative jurists who advocate the preservation of a state's power and jurisdiction under the "saving to suitors" clause won the first round when the United States Supreme Court, in *Romero v. International Terminal Operating Co.*,<sup>45</sup> resurrected and favorably reviewed the maritime "suitors" clause, criticizing Justice Magruder's 1952 *Doucette*<sup>46</sup> opinion as upsetting the century-old "lucid principle of constitutional construction" that a maritime controversy was not a "claim arising under the Constitution . . . or laws of the United States" under § 1441(b).<sup>47</sup>

In view of the axiom that all cases are distinguishable on their facts, plus the unpredictability of tomorrow's law when its basis is today's 5-4 decision by the United States Supreme Court, it is not surprising that lower federal courts do not always follow the principles laid down by the highest Court's most recent opinion.<sup>48</sup>

Returning to the basic question, are all the cases on maritime jurisdiction in the removal-remand area sufficiently reconcilable to conclude what the rule is regarding maritime arbitration? It is suggested the cases can be successfully synthesized, at least to the extent that where there is diversity of citizenship and over \$10,000 in controversy under a charter-party arbitration clause, the federal court may refuse to remand to the state court, depending on the judicial philosophy of the judge deciding. When one of the three elements (diversity, amount or subject matter) is missing, the federal court's refusal to remand may be appealable on the grounds that it is violative of the constitutional right under the "saving to suitors" clause.

But it is also suggested that the analytical method presently

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<sup>43</sup> 28 U.S.C. § 1441(a).

<sup>44</sup> See *Hill v. United Fruit Co.*, 149 F. Supp. 470 (S.D. Cal. 1957).

<sup>45</sup> 358 U.S. 354, 1959 Am. Mar. Cas. 832 (1959) was a 5-4 decision where a Spanish seaman injured aboard a Spanish registered vessel filed his combination Jones act, unseaworthiness, maintenance and cure cause of action on the federal law side to get a jury hearing on his general maritime law cause of action. His unsuccessful theory was that 28 U.S.C. § 1331 ("arises under the Constitution") did not require diversity of citizenship (both parties were foreigners).

<sup>46</sup> *Doucette v. Vinson*, 194 F.2d 834, 1952 Am. Mar. Cas. 458 (1st Cir. 1952).

<sup>47</sup> 358 U.S. at 365, 1959 Am. Mar. Cas. at 840.

<sup>48</sup> See, e.g., *Di Benedetto v. Moller Steamship Co.*, 186 F. Supp. 228, 1960 Am. Mar. Cas. 741 (E.D.N.Y. 1959), where the court refused to remand to the state court and narrowly distinguished *Romero*, on the ground that there was no question of remand in that case.

employed is inappropriate in view of the context, that is, that the basis of jurisdiction here is "consent," and cases should be decided on that rationale rather than the technical language of the Federal Judicial Code. By consensual agreement, the parties have implicitly submitted to both the federal and state court systems and both arbitration acts, therefore, the first court invoked by either party should be deferred to by all subsequent state and federal courts, regardless of diversity or jurisdictional amount. Deciding the situs and forum of these cases on characterizations of diversity and federal "priority" appears to be contra to the jurisdictional basis of "consent."

IS THE FEDERAL ARBITRATION ACT IN MARITIME ARBITRATIONS  
SUBSTANTIVE OR PROCEDURAL AND REMEDIAL?

There is little doubt that the Second Circuit could not have used stronger language in *Lawrence*, when it stated that section 2<sup>49</sup> of the Federal Arbitration Act was "national" law, was "national substantive law, clearly constitutional under the maritime and commerce powers of the Congress," and was "substantive, not procedural, in character."<sup>50</sup> But, whether the same label of "substantive" would or should be applied by the Second Circuit or the United States Supreme Court to a maritime arbitration clause, it is not conclusively decided by *Lawrence*, as there, the Second Circuit was interpreting a commerce contract involving an inland interstate shipment of goods and did not have all the maritime law considerations and precedents before it.

The characterization of "substantive" to section 2 of the federal act might not apply in maritime arbitrations for the following reasons. First, it must be noted that the *Lawrence* case was not decided by the Supreme Court, since the controversy was settled by the parties after certiorari had been granted. Therefore, it is not yet known whether the highest Court will concur in Judge Medina's reconciling and distinguishing of the Supreme Court's prior decision in *Bernhardt v. Polygraphic Co. of America*,<sup>51</sup> especially in view of the express admission

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<sup>49</sup> 9 U.S.C. § 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable . . ."

<sup>50</sup> *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407, 409, 1960 Am. Mar. Cas. 287, 293, 296 (2d Cir. 1959), cert. granted, 362 U.S. 909, appeal dismissed per stipulation, 364 U.S. 801 (1960).

<sup>51</sup> 350 U.S. 198 (1956), was a non-maritime (employment contract) arbitration controversy, the enforceability of which the Court held was to be interpreted not by the Federal Arbitration Act case law, nor by Vermont local law (which held arbitration unenforceable), but, rather, by the United States district court determining the Vermont conflicts of law rule which might apply New York law and enforce the arbitration agreement.

that the Second Circuit was "reluctant to disagree"<sup>52</sup> with Justice Frankfurter's concurring opinion in *Bernhardt*.

In *Bernhardt*, Justice Frankfurter characterized the federal act as "remedial and procedural" when he stated it was "not applicable to diversity cases."<sup>53</sup> By holding that state law governs in arbitration enforceability cases where there is diversity of citizenship, Justice Frankfurter relied on the constitutional analysis of the Court in *Erie*, that in federal-state conflict of law cases, if the conflict can be characterized as significantly affecting the result of the litigation, then state law determines the outcome of the controversy, and the application of state law is a constitutional right. Such analysis clearly is founded on the premise that the federal arbitration act is remedial and procedural, since, as *Lawrence* contends, if there were a *federal substantive right* to arbitration, the doctrine of *Erie* would be irrelevant even in diversity cases.<sup>54</sup>

The combination of *Bernhardt* and *Erie*, plus some legislative history,<sup>55</sup> makes it uncertain whether the *Lawrence* opinion would have been affirmed by the highest Court.

The second argument against characterizing the Federal Arbitration Act as "substantive" law in maritime arbitrations is the historical maritime precedents which were not before the *Lawrence* court. The constitutionality of the arbitration act was upheld in *Marine Transit Corp. v. Dreyfus*,<sup>56</sup> over the strenuous argument that admiralty courts did not have the power to order specific performance in any situation, including an agreement to arbitrate. Chief Justice Hughes upheld the constitutionality of the 1925 act on the ground that this was merely an equity power, purely remedial in nature. The Court's emphasis on "remedy" cannot be overlooked:

The question, then, is one merely as to the power of Congress to afford a *remedy* in admiralty to enforce such an obligation. . . . The general power of the Congress to provide *remedies* in matters falling within the admiralty jurisdiction of the Federal courts, and and to regulate their *procedure*, is indisputable.<sup>57</sup> (Emphasis added.)

<sup>52</sup> 271 F.2d at 404, 1960 Am. Mar. Cas. at 289.

<sup>53</sup> 350 U.S. at 208.

<sup>54</sup> See Comment, 69 Yale L.J. 847 (1960) and Note, 45 Cornell L.Q. 795 (1960) for two noteworthy articles on arbitration and *Lawrence* vis-à-vis *Bernhardt* and *Erie*. The Yale article suggests a unique characterization, that is, that the federal Act created "a right to a remedy as well as the remedy itself." *Supra* at 856.

<sup>55</sup> See H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924), wherein it is stated: "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."

<sup>56</sup> 284 U.S. 263, 1932 Am. Mar. Cas. 161 (1932).

<sup>57</sup> *Id.* at 277, 1932 Am. Mar. Cas. at 167.

If the unanimous 1932 decision in *Dreyfus* is still the maritime law today, it is difficult to see how the federal arbitration act can be labelled as "substantive" without shaking its constitutional maritime foundation that it is merely a remedy. No matter what new law *Lawrence* might have made in non-maritime arbitration, there appears to be another bridge yet to be crossed before the same characterization can be applied regarding maritime arbitrations.

The third argument to be considered in whether the federal act creates a federal right in maritime arbitrations is the maritime case law of the United States Supreme Court, prior to and subsequent to *Dreyfus*. The basic case, *Red Cross Line*,<sup>58</sup> decided after the federal act was brought before Congress (1922), but before its passage (1925), held that arbitration is a "remedy"; it has been recited with approval in *Madruga*,<sup>59</sup> in *Romero*,<sup>60</sup> and in *Kossick*,<sup>61</sup> which was subsequent to the *Lawrence* opinion. These Supreme Court decisions make it even more difficult to conclude that the *Lawrence* characterization of "substantive" applies to maritime as well as non-maritime arbitrations.

Finally, the non-maritime arbitration cases, subsequent to *Lawrence*, disclose that the label "substantive" is not the panacea for the federal-state conflicts problem in this area. Chief Judge Lumbard's concurring opinion in *Metro Industrial Painting Corp. v. Terminal Const. Co.*<sup>62</sup> stated that if the federal act is inapplicable, the federal court will look sometimes at the New York conflicts of law rule, to find the applicable law governing an arbitration clause in a contract, and other times at the New York local law, since the New York Arbitration Act is substantive in part and remedial in other parts.<sup>63</sup> How many lawyers and businessmen can follow the "leapfrog" process apparently required in this area, and how does such an analysis aid predictability of tomorrow's law are two of the questions that must be considered in judging the merits of the "substantive-procedural" analysis.

The recent Second Circuit case of *Lummus Co. v. Commonwealth Oil Refining Co.*,<sup>64</sup> demonstrates almost three years of "forum shopping" by opposing counsel in controverting an arbitration clause which provided that arbitration was to be held in New York in accordance with the rules of the American Arbitration Association. The parties

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<sup>58</sup> 264 U.S. 109 (1924).

<sup>59</sup> 346 U.S. 556, 561 (1954).

<sup>60</sup> 358 U.S. 354, 372 (1959).

<sup>61</sup> 365 U.S. 731, 740 (1961).

<sup>62</sup> 287 F.2d 382 (2d Cir. 1961), where a motion to compel arbitration under the federal Act was granted against the defense of no jurisdiction due to lack of diversity.

<sup>63</sup> *Id.* at 388, n.3.

<sup>64</sup> 297 F.2d 80 (2d Cir. 1961); see n.5 at 87 where the court reserves for the future the fixing of the borderline in arbitration between substantive and procedural.

jumped from the district court in Puerto Rico to the New York state supreme court to the Southern District of New York, back to Puerto Rico, up to the First Circuit, which applied New York law, down to the Southern District, for two decisions by different judges, and, finally, to the Second Circuit, which granted a petition for mandamus against one of the district judges. It must be noted that over thirty months expired in motion practice before the parties were finally ordered to arbitrate the merits of the controversy. This extensive litigation resulted from an attempt to determine whether maritime arbitration is substantive, or remedial and procedural, along with the problem of reconciling *Bernhardt* and *Lawrence*.

It appears that the "substantive-procedural" characterization laid down by the Second Circuit in *Lummus* will require frequent revisiting by appellate courts until the line of demarcation is clearly established, if it ever can be clearly established. Whether or not the substantive characterization can constitutionally be applied in maritime arbitrations has not been faced to date by the Second Circuit, or any other court.

#### CONCLUSION

The inconsistency and inconclusiveness of the case law prevents a clear conclusion of what the law is today in this area of federal-state concurrent jurisdiction over maritime and non-maritime arbitrations. What the law ought to be is easier to conclude than what the law is. The law, at least, should be clear and somewhat predictable. If the Federal Arbitration Act was, and is, intended to pre-empt the field of maritime arbitrations, and maybe it should pre-empt the field for purposes of uniformity, then Congress or the United States Supreme Court should decree such pre-exemption. If state's rights, by virtue of the "saving to suitors" clause, is deemed by Congress or the highest Court to be the superior consideration, then this should also be clearly decreed and thereafter followed by the lower federal tribunals and state courts. Under the present system, diversity of citizenship and other technicalities result in diverse decisions based on diversity of jurisprudence of the deciding courts. It would seem the primary rationale should be the "consent" to arbitration by the parties, as found in the contractual clause.

It is suggested that the following approach, by Justice Coleman of the City Court in New York County, reaches the desired result from an easily comprehensible analysis. The language in the maritime arbitration clause provided for arbitration "in New York." One party argued the federal act should apply, and his opponent argued the state act should govern. Deciding in favor of the federal act, Justice Coleman said:

Whether the parties, in agreeing to arbitrate, subjected themselves to the provisions of the federal statute, or to those of the New York statute, is a question of intention, to be determined in the light of context and occasion.

...

By the test of intention we must say the federal statute applies. . . . Normally he would think of a federal court, and more specifically, of a court of admiralty as the one in which his matters in litigation would be disposed of; to him, a federal court would be "forum conveniens." The cause of action itself is normally one that, in the Port of New York at least, finds its way into a federal court. . . . The environment in which the parties to the arbitration, their attorneys, and the arbitrator moved was "federal."<sup>65</sup>

A conclusion in the area of suggested re-drafting techniques to avoid these problems might also be helpful. Parties desiring to arbitrate their future disputes should scrutinize the language used in printed forms. If the ambiguous phrase, "in New York," is used by the form, amendments should be added to clarify the parties' intentions. Such amendments should spell out whether the federal or state arbitration act should govern the relationship; whether the federal court or the state court should be the forum for resolving any dispute before or after the arbitration award is rendered; and whether federal maritime law or state law should be determinative of the dispute.

Rather than hinder the business contract of the parties by forcing them to discuss the alternatives of handling future disputes, which is undoubtedly an unpleasant topic, it is suggested the amendments should be incorporated by the drafters of the printed forms.

As a final note, until legislative, judicial, or drafting clarifications are effected, it is recommended that counsel preparing their client's case for the arbitrators' hearing should stipulate prior to the hearing the governing arbitration act, the forum, and the law, thereby minimizing the time and expense often incurred subsequently in attempting to upset the award made by the arbitrators.

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<sup>65</sup> French v. Petrinovic, 183 Misc. 27, 29, 30, 46 N.Y.S.2d 846, 848, 849 (N.Y. City Ct. 1946), *aff'd*, 184 Misc. 406, 54 N.Y.S.2d 179 (Sup. Ct. 1946) where the arbitrator, as plaintiff, sued a shipowner for his unpaid services rendered as an arbitrator.