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The Unclear "Clear and Unmistakable" Standard: Why Arbitrators, Not Courts, Should Determine Whether a Securities Investor's Claim is Arbitrable

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I. INTRODUCTION

When an individual investor opens an account with a securities broker, the customer often must sign a standard-form contract as a precondition of conducting business with the broker.[1] This nonnegotiable contract, referred to as a Customer Agreement, generally contains an arbitration clause under which the parties agree to submit any future disputes to arbitration conducted by one of the securities industry's self-regulatory organizations ("SROs").[2] Proceedings initiated under the broad and inclusive arbitration clause are subject to the arbitration guidelines established by the SROs, a group which includes all the major stock exchanges.[3] Virtually all

1. *See* J. KIRKLAND GRANT, SECURITIES ARBITRATION FOR BROKERS, ATTORNEYS, AND INVESTORS 75-76 (1994); Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power*, 46 DEPAUL L. REV. 109, 117 (1996) (recognizing that investor-broker agreements are preconditions to opening accounts); Deborah Masucci, *Securities Arbitration—A Success Story: What Does the Future Hold?*, 31 WAKE FOREST L. REV. 183, 185 (1996) (observing that the securities industry began to require predispute arbitration agreements as a means of curtailing mounting litigation costs); Margo E. K. Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements*, 1990 COLUM. BUS. L. REV. 91, 92 (noting that most brokerage firms require customers to sign a standardized agreement as a precondition to trading securities).

2. A common arbitration clause provides for arbitration of "any and all controversies which may arise" between the broker and customer concerning the account. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1196 (2d Cir. 1996). Further, it typically states that all claims are to be arbitrated in accordance with the "rules of the organization [SRO] convening the panel." *Id.*; *see also* GRANT, *supra* note 1, at 77 (providing an example of a standard arbitration provision that Shearson/American Express had its customers sign).

3. The Securities Exchange Act of 1934 defines an SRO as "any national securities exchange, registered securities association, or registered clearing agent, or . . . the Municipal Securities Rulemaking Board." 15 U.S.C. § 78c(26) (1994). The SROs include: "The American Stock

brokers are members of an SRO.[4] The National Association of Securities Dealers ("NASD"), the leading SRO, conducts between eighty-five and ninety percent of all customer-broker arbitrations.[5]

Although the parties to a securities dispute usually submit to SRO arbitration in accordance with the terms of the agreement,[6] some parties resist arbitration.[7] The resisting party (usually the securities broker)[8] typically turns to the courts for an initial ruling on whether the arbitration must proceed.[9] Meanwhile, the party that initially submitted its claim to arbitration (usually the customer) tends to resist resolution of the issue by the courts, arguing that the arbitrators themselves should decide whether arbitration is the appropriate means of resolving the dispute.[10] The question in these cases thus becomes whether courts or arbitrators should decide if a particular dispute is arbitrable. This is referred to as the arbitrability question.[11] In response to this threshold inquiry, the

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Exchange; The Boston Stock Exchange; The Chicago Board Options Exchange, Inc.; Cincinnati Stock Exchange; Midwest Stock Exchange; Municipal Securities Rulemaking Board; National Association of Securities Dealers, Inc.; The New York Stock Exchange, Inc.; New York Mercantile Exchange; National Futures Association; Pacific Stock Exchange; and Philadelphia Stock Exchange." GRANT, *supra* note 1, at 135. *See infra* notes 122-40 and accompanying text for a discussion of SROs, their self-enforcement of securities laws, and SEC oversight.

4. *See* GRANT, *supra* note 1, at 135-37.

5. Masucci, *supra* note 1, at 188 (stating that the NASD receives eighty-five percent of all arbitration claims filed pursuant to SRO arbitration rules); NASD Regulation, Inc., Press Release, Aug. 5, 1999 (noting that "NASD Regulation's arbitration forum is the largest securities arbitration forum in the country, handling over 5,000 cases per year, which is approximately 90 percent of all securities arbitration cases in the United States").

6. That most parties to a dispute submit to arbitration can be seen in the number of arbitration cases filed annually and those cases closed annually by the NASD arbitration forum. In 1998, for example, 4,938 cases were filed. These numbers certainly surpass the number of litigated disputes. *See* NASD Regulation, Inc., *The Neutral Corner*, 11 (Nov. 1999); *see also* Masucci, *supra* note 1, at 188-90.

7. *See, e.g.*, Miller v. Flume, 139 F.3d 1130, 1131 (7th Cir. 1998) (noting that, while the investor agreed to arbitration, the broker sought to enjoin the arbitral proceeding); *Bybyk*, 81 F.3d at 1196 (same). For a discussion of this issue, see *infra* notes 265-72 and accompanying text.

8. In virtually all of the cases examined in this Note, the securities brokerage firms, not the customers, sought to avoid arbitration in favor of taking the dispute to court. *See infra* notes 266-72 and accompanying text.

9. *See Miller*, 139 F.3d at 1132; Smith Barney, Inc. v. Sarver, 108 F.3d 92, 94-95 (6th Cir. 1997); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 382 (11th Cir. 1995).

10. *See, e.g., Bybyk*, 81 F.3d at 1196-97; FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1311 (8th Cir. 1994).

11. Definitional problems arise, however, because courts construe "arbitrability" in one of two ways. *See* PaineWebber Inc. v. Elahi, 87 F.3d 589, 595 (1st Cir. 1996) (noting that determining whether an issue is arbitrable leads one into "a definitional maze"). The first definition of "arbitrability" refers to whether the parties intended to have an agreement to arbitrate in the first place. *Id.*; *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995) (explaining that the initial determination must be whether the parties agreed to arbitration, since if a party did not so agree it will normally have the right to a judicial decision on the merits). The second definition of "arbitrability" concerns whether the particular dispute falls within

Supreme Court has adopted a "clear and unmistakable" standard.[12] In two separate opinions, the Court has held that unless the parties clearly and unmistakably agree to arbitrate the issue of arbitrability, the question is one for courts, not arbitrators, to decide.[13] In other words, when a question of arbitrability arises, the parties will not be required to submit to arbitration unless there is clear and unmistakable evidence in the arbitration agreement itself that the parties intended to have arbitrators decide arbitrability issues.[14]

This "clear and unmistakable" standard, however, is not very clear at all. Indeed, the Supreme Court's articulation of the clear and unmistakable standard has been extremely unclear. Because the Court has failed to specify what contractual language satisfies the "clear and unmistakable" requirement, lower courts have been left to their own devices in defining the parameters of the standard.[15] Although the lower courts almost uniformly recognize that application of the "clear and unmistakable" standard to arbitrability questions is a matter of contract interpretation, they have not reached a consensus as to which particular contract principles should be applied in the interpretation.[16]

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the scope of an otherwise valid arbitration agreement to which the parties intended to be bound. *Elahi*, 87 F.3d at 596; *see also* AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649 (1986). For purposes of this Note, the "arbitrability question" will refer merely to whether a dispute is arbitrable under the agreement executed by the parties. *See* Norman S. Poser, *Making Securities Arbitration Work*, 50 SMU L. REV. 277, 280 (1996) (arguing "that a narrow definition of arbitrability will best accomplish the goals of arbitration, by limiting the role of the courts so that the primary goal of arbitration—resolving disputes with the maximum degree of speed and economy—can be accomplished"). This is essentially an umbrella definition which encompasses both of the above definitions. Defining "arbitrability" in this manner allows the analysis to focus on the primary concern of this Note, namely that Rule 10324 of the NASD Code provides clear and unmistakable evidence that the parties to a securities dispute intended to arbitrate arbitrability questions.

12. *First Options*, 514 U.S. at 944 (holding that unless parties "clearly and unmistakably" agree to have an arbitrator decide arbitrability issues, a court will resolve them); *AT&T Techs.*, 475 U.S. at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

13. *First Options*, 514 U.S. at 944-45; *AT&T Techs.*, 475 U.S. at 649.

14. *First Options*, 514 U.S. at 944-45; *AT&T Techs.*, 475 U.S. at 649.

15. One court, for example, explained that the Supreme Court's standard as laid down in *First Options of Chicago, Inc. v. Kaplan* and *AT&T Technologies, Inc. v. Communications Workers of America* left some ambiguity. *Elahi*, 87 F.3d at 592. The court noted that these "Supreme Court cases provide guidance, but do not point clearly to the correct result in this case. Consequently, we embark on our own analysis." *Id.*

16. *See* Carroll E. Neesemann & Maren E. Nelson, *The Law of Securities Arbitration*, in PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 854 (1999) ("The 'clear and unmistakable' standard laid down in [*First Options*] has not ended all confusion and disagreement among the Circuits regarding what contractual language suffices.").

Much of the controversy surrounding the "clear and unmistakable" standard has focused upon the proper interpretation of the relationship between Customer Agreements and the *NASD Code of Arbitration Procedure* ("*NASD Code*" or "*Code*"), particularly Rule 10324.[17] Briefly stated, the disagreement over Rule 10324 is whether its language, when adopted by the parties to a Customer Agreement, provides clear and unmistakable evidence of an agreement to submit the arbitrability question to arbitration.[18] The relevant language in the Rule provides that "[a]rbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties."

Unfortunately, due to the Supreme Court's ambiguous articulation of the clear and unmistakable standard and the arguably broad language of Rule 10324, a circuit split developed, further muddling the issue.[19] Under the majority view, Rule 10324 does not provide clear and unmistakable evidence of the parties' intent to arbitrate arbitrability. Therefore, most courts hold that courts should resolve this threshold issue.[20] On the other side, a minority of circuits holds that Rule 10324, when incorporated into the arbi-

17. NATIONAL ASS'N OF SEC. DEALERS, INC., CODE OF ARBITRATION PROCEDURE, NASD Manual, Rule 10324 (May 1999) [hereinafter NASD CODE]. Rule 10324 is the former Section 35. In January 1996, the SEC gave the NASD permission to renumber its *Code of Arbitration Procedure*. The renumbering itself did not substantively change the content of the various provisions. For purposes of this Note, all *NASD Code* sections will be referred to by their new form for purposes of clarity and simplicity. It should be noted, however, that in many of the cases discussed in this Note the courts reference the old numbers, since those cases predate the 1996 renumbering. *See* Sean M. Costello, Comment, *Time Limits Under Rule 10304 of the NASD Code of Arbitration Procedure: Making Arbitrators More Like Judges or Judges More Like Arbitrators?*, 52 BUS. LAW. 283, 283 n.1 (1996) (discussing the renumbering of the *NASD Code*).

18. *See* FSC Sec., Inc. v. Freel, 14 F.3d 1310, 1312-13 (8th Cir. 1994) (holding that "the parties' adoption of [Rule 10324] is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators"). *But see* Smith Barney, Inc. v. Sarver 108 F.3d 92, 97 (6th Cir. 1997) (holding that Rule 10324 is ambiguous as to who should resolve arbitrability questions, and therefore it is not clear and unmistakable).

19. *See Symposium on the Structure of Court-Connected Mediation Programs*: Miller v. Flume, 14 OHIO ST. J. ON DISP. RESOL. 957, 960 (1999) (recognizing the circuit split over whether Rule 10324 satisfies the "clear and unmistakable" standard). For a complete discussion of the circuit split, see *infra* Parts III.B.1 and III.B.2.

20. The Sixth, Seventh, Tenth, and Eleventh Circuits have interpreted Rule 10324 as not meeting the clear and unmistakable standard, thus ruling that courts should determine questions of arbitrability. *See* Miller v. Flume, 139 F.3d 1130, 1134 (7th Cir. 1998); *Sarver*, 108 F.3d at 97; Cogswell v. Merrill Lynch, Inc., 78 F.3d 474, 477 (10th Cir. 1996); Merrill Lynch, Inc. v. Cohen, 62 F.3d 381, 384 (11th Cir. 1995).

tration agreement, satisfies the "clear and unmistakable" standard, thus leaving resolution of the arbitrability question to arbitrators.[21]

The circuit split over whether Rule 10324 provides clear and unmistakable evidence of the parties' intent to arbitrate arbitrability has resulted in a great deal of confusion and inconsistency regarding the meaning of predispute arbitration agreements in the securities industry. The lack of uniformity leaves customers more vulnerable to costly and prolonged court battles when their claims could be resolved more efficiently in an arbitral forum. Therefore, the Supreme Court should review the issue and resolve the ambiguity surrounding the meaning of Rule 10324 by requiring parties to arbitrate securities disputes according to the terms of their agreement.

This Note argues that Rule 10324, interpreted under common law contract principles and in light of the federal policy favoring arbitration, satisfies the "clear and unmistakable" standard. As a matter of contract interpretation, the entire *NASD Code* and the Customer Agreements should be read as a whole contract.[22] Similarly, the provisions of the Customer Agreements and the *NASD Code* should be read as consistent with each other.[23] Even if these two contract principles do not resolve the question, the principle that ambiguous contract language should be interpreted against the drafter is dispositive of the question whether courts or arbitrators should determine arbitrability issues.[24] This conclusion is bolstered by the fact that in the vast majority of federal cases, it is the brokers, not the investors, who attempt to avoid arbitration by initially seeking judicial review of the arbitrability question.[25] As the more sophisticated and powerful parties in most securities agreements, brokers should not be permitted to avoid the very contracts they drafted by arguing that the contracts are ambiguous on the arbitrability question. Finally, the current federal policy favoring arbitration would be eviscerated if brokers could avoid the terms of their own contracts by tying up disputes in court.[26]

Part II of this Note provides a brief history of arbitration in both general and securities arbitration cases, emphasizing the de-

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21. The Second and Eighth Circuits have held that Rule 10324 proclaims that arbitrators should decide arbitrability issues. *See* PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996); *Freel*, 14 F.3d at 1312-13.

22. *See infra* Part IV.A.1.

23. *See infra* Part IV.A.2.

24. *See infra* Part IV.A.3.

25. *See infra* notes 265-72 and accompanying text.

26. *See infra* Part IV.B.

velopment of a federal policy in favor of arbitration as evidenced in the Federal Arbitration Act. In addition, Part II traces the course of the Supreme Court's gradual acceptance of the enforceability of predispute arbitration agreements in the securities setting. This history demonstrates the Court's fervent support for upholding parties' intent as to such agreements. Part II also examines the two Supreme Court cases that developed the "clear and unmistakable" standard and concludes that the Court's ambiguous articulation of this standard provided insufficient guidance to lower courts charged with interpreting arbitration agreements. Part III explores the nature and characteristics of securities arbitration, with particular emphasis on NASD arbitration procedures and Rule 10324 of the *Code*. Additionally, Part III discusses the circuit split that developed over the interpretation of *NASD Code* Rule 10324 as a result of the Supreme Court's incomplete articulation of the "clear and unmistakable" standard. Finally, Part IV offers several reasons why courts should side with the circuits that hold that Rule 10324 provides clear and unmistakable evidence of the parties' intent to arbitrate the arbitrability question when those parties incorporate the *NASD Code* into their agreements.

II. FEDERAL POLICY IN FAVOR OF ARBITRATION AND SUPREME COURT JURISPRUDENCE CONCERNING SECURITIES ARBITRATION

A. A Brief History of Arbitration and the Federal Arbitration Act

Arbitration has existed as a means of resolving disputes since ancient Greece, Rome, and Israel.[27] Commercial arbitration, with roots extending back to seventh-century England, became permanently entrenched in the English common law system by the fourteenth century.[28] During the seventeenth century, however, judicial antipathy toward arbitration arose when judges began to fear that arbitral bodies might usurp their jurisdiction and threaten

27. *See* C. EDWARD FLETCHER, ARBITRATING SECURITIES DISPUTES 12 (1990) (providing a brief history of arbitration in the Anglo-American legal world); GRANT, *supra* note 1, at 13 (same); Anthony G. Buzbee, *When Arbitrable Claims are Mixed with Nonarbitrable Ones: What's a Court to Do?*, 39 S. TEX. L. REV. 663, 664 n.1 (1998) (discussing the history of dispute resolution in the United States).

28. *See* FLETCHER, *supra* note 27, at 12-13; GRANT, *supra* note 1, at 13.

their salaries.[29] This judicial opposition to arbitration continued virtually unabated in England through the nineteenth century.[30]

Early American courts adopted English jurists' general hostility toward arbitration.[31] While arbitration found its champions in the American commercial setting, with many colonies and, subsequently, states passing statutes enforcing agreements to arbitrate existing disputes, judicial opposition to arbitration nonetheless persisted.[32] Consequently, American courts ruled predispute arbitration agreements invalid well into the twentieth century.[33] Eventually, though, lower courts began to chip away at this restrictive approach, and state legislatures soon followed suit. In 1920, for example, the New York legislature became the first body to pass a law validating predispute arbitration agreements.[34] The New York statute laid the groundwork for passage of the Federal Arbitration Act ("FAA") in 1925.[35]

Enacted as a congressional response to the long-standing judicial distaste for arbitration,[36] the FAA promotes arbitration by making arbitration agreements enforceable in federal courts.[37] Congress's clear purpose in enacting the FAA was to put arbitration agreements on the "same footing as other contracts" in order to promote fast and efficient resolution of disputes.[38] The FAA empow-

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29. *See* FLETCHER, *supra* note 27, at 15-18.

30. *See id.* at 18-20.

31. *See* FLETCHER, *supra* note 27, at 20; GRANT, *supra* note 1, at 14.

32. *See* FLETCHER, *supra* note 27, at 23-25.

33. *See id.* at 23-24.

34. *See id.* at 24-25.

35. *See id.* at 25. The Federal Arbitration Act is codified in 9 U.S.C. §§ 1-15 (1994 & Supp. 1997).

36. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) (noting that Congress intended the FAA to "revers[e] centuries of judicial hostility to arbitration agreements"); Harding, *supra* note 1, at 124.

37. 9 U.S.C. §§ 1-15; *see also* FLETCHER, *supra* note 27, at 38-39; Costello, *supra* note 17, at 291-92; Harding, *supra* note 1, at 124-25. The centerpiece of the FAA is § 2, which provides:

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

9 U.S.C. § 2.

The Supreme Court has subsequently described Section 2 as "a congressional declaration of a liberal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

38. H.R. REP. NO. 96, at 1 (1924). The House Report on the bill discussed Congress's intended revocation of judicial hostility toward arbitration, emphasized that arbitration provided a

ers federal district courts to stay court proceedings in cases where the relevant issue(s) may be resolved by arbitration.[39] In addition (and with direct significance for courts charged with interpreting *NASD Code* Rule 10324), the FAA allows federal courts to compel arbitration if a party to an arbitration agreement refuses to submit to arbitration.[40] Since its passage, the Supreme Court has consistently acknowledged the importance of the FAA, reiterating that the federal policy favoring arbitration requires "ambiguities as to the scope of . . . arbitration [agreements to be] resolved in favor of arbitration."[41] Unfortunately, despite the relative clarity of the FAA and the Supreme Court's recognition of the policies behind it, lower courts have been left to grapple with some troubling residual issues, such as interpretation of the scope of Rule 10324.[42]

B. The Supreme Court's Recognition of the Enforceability of Predispute Arbitration Agreements

Before examining the circuit split regarding whether, in light of Rule 10324, arbitrators or courts should determine the arbitrability question, it is necessary to understand the development of the Supreme Court's recognition of predispute arbitration agreements as enforceable instruments. For almost half a century, the Supreme Court has reviewed the interaction of the FAA and securities regulation. Decided in 1953, *Wilko v. Swan* announced the general policy of protecting investors from securities brokers.[43] In *Wilko*, after an investor brought a claim under Section 12(2) of the

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speedier and less costly form of dispute resolution than litigation, and solidified Congress's intention to enforce arbitration agreements. *Id.* at 1-2.

39. *See* 9 U.S.C. § 3; *see also Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

40. 9 U.S.C. § 4; *see also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation.").

41. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Univ., 489 U.S. 468, 476 (1989)).

42. *See* Neesemann & Nelson, *supra* note 16, at 778 (observing that "two fundamental issues plagued the courts" following the enactment of the FAA: "first is whether Congress, in 1925, intended the FAA to function merely as a procedural rule, which would apply only in federal courts, or whether Congress intended to create a new body of substantive federal law, which would apply in both state and federal courts. The second in whether Congress intended the FAA to include within its scope the arbitration of statutory claims").

43. Wilko v. Swan, 346 U.S. 427 (1953).

Securities Act of 1933 ("Securities Act"),[44] the broker moved for arbitration of the dispute as provided in the preexisting arbitration agreement between the parties.[45] The Court held that protection of the investor's substantive rights under the Securities Act required judicial review, despite any arbitration agreement to the contrary.[46] Briefly stated, the *Wilko* doctrine declared invalid all predispute arbitration agreements in the securities setting.[47] This restrictive interpretation of predispute arbitration agreements continued unblemished for the next twenty years.

In 1974, the Supreme Court tentatively began to dismantle the *Wilko* doctrine.[48] In *Scherk v. Alberto-Culver Co.*, the Court considered whether a dispute arising under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") should be arbitrated according to the terms of a predispute arbitration agreement between two international parties.[49] The Court upheld the parties' agreement "to arbitrate any dispute arising out of their international commercial transaction," indicating that the provisions of the FAA required such a finding.[50]

The Court continued to whittle away at the *Wilko* doctrine in two 1985 cases.[51] In *Dean Witter Reynolds, Inc. v. Byrd*, the customer-plaintiff alleged both state law and federal securities law claims.[52] Although the Court denied arbitration as to the federal claims, it permitted arbitration for the pendent state claims in order to uphold Congress's policy of enforcing parties' contractual agreements to arbitrate.[53] The Court held that Congress intended

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44. 15 U.S.C. § 77(*l*) (1994 & Supp. 1998). This section of the Securities Act proscribes the offer or sale of a security that "includes an untrue statement of a material fact or omits" a necessary material fact. *Id.*

45. *Wilko*, 346 U.S. at 428-29.

46. *Id.* at 437-38.

47. *Id.*

48. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

49. *Id.* at 508-09.

50. *Id.* at 519-20. Commentators disagree as to the import of *Scherk* in the eventual overturning of the *Wilko* doctrine. One commentator, for example, observes that *Scherk* "set the stage for enlarging the scope of issues eligible for arbitration." Costello, *supra* note 17, at 295. Conversely, a pair of authors noted that "[m]any commentators explained *Scherk* as an aberration that carved out an exception because the dispute was international in nature." Neesemann & Nelson, *supra* note 16, at 785.

51. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

52. *Byrd*, 470 U.S. at 214-15. The claims brought by the investor against the securities brokerage firm are fairly typical. They included claims that a broker traded on the investor's account without consent, that the transactions were excessive, and that the firm misrepresented the status of the customers. *Id.* at 214.

53. *Id.* at 219-21.

the pro-arbitration FAA to apply to bifurcated proceedings (i.e., proceedings where part of the claims are resolved in court and the other part by arbitrators) even if its application would cause prolonged resolution of a securities customer's claims.[54] In the same term, the Court upheld, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, an agreement in an international contract to arbitrate antitrust claims, emphasizing that commercial arbitration agreements must be enforced according to their terms.[55] Relying on Section 2 of the FAA, the Court highlighted the mutually reinforcing federal policies favoring arbitral dispute resolution on the one hand and "enforcement of private contractual arrangements" on the other.[56]

Only two years later, in *Shearson/American Express, Inc. v. McMahon*, the Supreme Court struck another, almost fatal, blow to *Wilko*.[57] The Court found nothing in the language of the Exchange Act that precluded the use of arbitral forums for the resolution of disputes arising under Section 10(b).[58] The *McMahon* Court directly addressed *Wilko*, stating that in subsequent decisions the Court found nothing in the use of arbitration that inherently impinged on a customer's substantive rights.[59] *McMahon* thus placed arbitration on equal footing with judicial review as a means of resolving securities disputes.[60] In addition, *McMahon* found that arbitration supervised by the Securities and Exchange Commission ("SEC"), and by the securities industry itself through SROs, provided adequate protection to investors under the Exchange Act.[61] By so ruling, as one commentator observed, the Court "tacitly consent[ed] to the use of predispute arbitration clauses that incorporated by reference SRO arbitration rules."[62]

The *Wilko* wall finally crumbled in 1989 with the Supreme Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[63] *Rodriguez* explicitly overruled *Wilko*, holding that Se-

54. *Id.* at 218-21. Justice White even more clearly pointed toward the eventual overruling of the *Wilko* doctrine. In his concurring opinion, White noted that whether claims under the Securities Exchange Act of 1934 are not arbitrable is an issue of serious doubt. *Id.* at 224 (White, J., concurring).

55. *Mitsubishi*, 473 U.S. at 628.

56. *Id.* at 625.

57. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

58. *Id.* at 230-32.

59. *Id.* at 231-32.

60. *Id.* at 232.

61. *Id.* at 233-34.

62. Costello, *supra* note 17, at 295; *see also McMahon*, 482 U.S. at 233-37.

63. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

curities Act Section 12(2) claims could be subject to arbitration.[64] The Court read the Securities Act and the Exchange Act "harmoniously," as part of an integrated system of federal securities regulation.[65] The Court finally had abandoned the retrogressive approach of disfavoring the enforcement of predispute arbitration agreements.[66] *Rodriguez* mandated that courts enforce predispute arbitration agreements for all claims arising under federal securities laws.[67]

The line of cases culminating in *Rodriguez* reveals a steady trend in Supreme Court jurisprudence toward favoring arbitration in the securities setting.[68] By 1990, the Supreme Court had finally aligned itself with the congressionally mandated policy favoring arbitration, as embodied in the FAA.[69] This trend in jurisprudence bolsters the argument that arbitrators should determine questions of arbitrability. Taking such issues out of the hands of arbitrators would supplant current legislative and judicial policy, rendering arbitration weaker and making predispute arbitration agreements less certain. As one commentator has observed, "[t]he fact that parties who signed an agreement to arbitrate future disputes find themselves forced to litigate collateral issues [such as arbitrability] tends to defeat the unique advantages of arbitration."[70]

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64. *Id.* at 484.

65. *Id.* at 484-85.

66. *Id.* at 484.

67. *Id.* at 484-85; *see also* GRANT, *supra* note 1, at 122; Costello, *supra* note 17, at 296.

68. The Supreme Court also has advocated the policy that favors arbitration in cases involving labor arbitration. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that the Age Discrimination in Employment Act does not preclude arbitration under the FAA, especially if the parties agree to arbitration). In fact, the federal policy in favor of arbitration pervades all fields of arbitration. *See generally*, Special Project, *Current Issues in Arbitration*, 51 VAND. L. REV. 681 (1998) (offering scintillating and illuminating Notes on various aspects of arbitration in the Nation's leading law review).

69. In addition the Supreme Court has reiterated its support for the pro-arbitration policy. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

70. Poser, *supra* note 11, at 279. For a discussion on how and why dealers seek to avoid arbitration, see *infra* Part IV.A.3.

C. Developing a Standard for Determining Arbitrability

1. AT&T Technologies v. Communications Workers of America

In *AT&T Technologies, Inc. v. Communications Workers of America*, the Supreme Court established the standard currently used to determine whether courts or arbitrators should decide if disputes are arbitrable under the terms of predispute arbitration agreements between investors and securities brokers.[71] In this case, AT&T and the union had entered into a collective bargaining agreement. Article 8 of the agreement provided that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be arbitrated.[72] Meanwhile, Article 9 excluded from arbitration AT&T's decisions concerning management functions, including the hiring and termination of employees.[73] Article 20 prescribed the order in which workers were to be laid off, if necessary, due to a lack of work.[74] A dispute arose when AT&T laid off 79 workers, allegedly in contravention of other articles of the collective bargaining agreement.[75] AT&T refused to submit the union's claim to arbitration, arguing that, because the dismissal of workers fell under Article 9, the dispute was not subject to arbitration.[76] In opposition, the union claimed, pursuant to Article 20, that a layoff required a work shortage.[77] In its suit to compel arbitration, the union argued that whether the layoffs were justified by a lack of work was a question for the arbitrator to decide, not the court.[78]

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71. AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643 (1986). *AT&T Technologies* concerns the issue of arbitrability in the labor context. Some commentators suggest that labor arbitration cases should be distinguished from commercial arbitration cases because of the different jurisprudence and due to the fact that labor arbitration is not governed by the FAA. *See* Natasha Wyss, Comment, First Options of Chicago, Inc. v. Kaplan: *A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 362 (1997). At least one court, however, has noted that "there is little question" that court decisions regarding labor arbitration apply to commercial arbitration. PaineWebber Inc. v. Elahi, 87 F.3d 589, 594 n.6 (1st Cir. 1996). The court observed that the fact that *First Options*, a commercial arbitration case, relied on *AT&T Technologies*, a labor arbitration case, should put all doubt to rest. *Id.*

72. *AT&T Techs.*, 475 U.S. at 645.

73. *Id.*

74. *Id.*

75. *Id.* at 645-46.

76. *Id.* at 646.

77. *Id.*

78. *Id.*

The federal district court found that since the union's interpretation was at least plausible, it was "for the arbitrator, not the court[,] to decide whether the union's interpretation has merit."[79] On appeal, the Seventh Circuit acknowledged that courts generally decide the issue of arbitrability.[80] Nonetheless, the Seventh Circuit found an exception to the general rule, explaining that arbitrators should resolve the issue of arbitrability if the parties clearly have not excluded arbitrability from the arbitration agreement, if the agreement contains a standard arbitration clause, and if, in deciding the arbitrability question themselves, the courts would become embroiled in interpreting the substantive provisions of the agreement.[81]

The Supreme Court rejected the Seventh Circuit's exception to the general rule.[82] The Court held that interpretation of the arbitrability provisions of collective bargaining agreements is a function of the courts.[83] The Court based its decision on four main principles.[84] First, arbitration is a matter of contract, and a party who did not agree to arbitration cannot be bound to arbitrate.[85] Second (and most importantly for purposes of this Note), the Court held that "the question of arbitrability . . . is undeniably an issue for judicial determination."[86] The Court stated that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[87] The Court did not elaborate on what language would suffice to satisfy the "clear and unmistakable" standard.[88] It can be inferred from the facts of *AT&T Technologies*, however, that Articles 8, 9, and 20 of the collective bargaining agreement, read together, did not constitute the requisite clear and unmistakable language. The third principle announced by the Court was that a court cannot rule on the potential merits of the

79. *Id.*
80. Communications Workers v. Western Elec. Co., 751 F.2d 203, 206 (7th Cir. 1984).
81. *Id.*
82. *AT&T Techs.*, 475 U.S. at 651.
83. *Id.* at 649.
84. *Id.* at 648-50. The Court based its presentation of the four principles on the Steelworkers trilogy of cases. *See* United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
85. *AT&T Techs.*, 475 U.S. at 648-49.
86. *Id.* at 649.
87. *Id.*
88. *Id.* at 649-52.

underlying claim when it reviews the arbitrability issue.[89] Fourth, "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[90]

Under *AT&T Technologies*, then, an arbitrator will decide whether an issue is arbitrable only if the agreement reveals the parties' clear and unmistakable intent to submit the issue to arbitration.[91] Otherwise the court will decide the arbitrability issue.[92] The problem with the *AT&T Technologies* decision is that it fails to specify what language will satisfy the "clear and unmistakable" standard.[93] This ambiguity ultimately led to the Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan* and resulted in the circuit split over Rule 10324 of the *NASD Code*.[94]

2. *First Options of Chicago, Inc. v. Kaplan*

In *First Options*, the Supreme Court confirmed the standard for determining the arbitrability question in the context of predispute securities arbitration agreements.[95] Adhering to the precedent established in *AT&T Technologies*, the Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear[ ] and unmistakabl[e]' evidence that they did so."[96]

In *First Options*, the defendant First Options of Chicago, Inc., a securities firm, sought arbitration to resolve a dispute with MK Investments, Inc. ("MKI"), Mr. Kaplan, who owned MKI, and Mrs. Kaplan.[97] MKI submitted to arbitration, as required under the

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89. *Id.* at 649.

90. *Id.* at 650 (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

91. *Id.* at 649.

92. *Id.*

93. It must be noted, however, that *AT&T Technologies* stands for the proposition that parties may agree to arbitrate arbitrability. *Id.* at 649.

94. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

95. *Id.* at 944 (establishing the "clear and unmistakable" standard for use in interpreting arbitration agreements in the securities setting).

96. *Id.*

97. *Id.* at 940. It is important to observe here that it was the securities firm that sought to compel arbitration. This is in contrast to most of the other cases explored in this Note, in which the customers/investors seek arbitration and the securities firms attempt to avoid arbitration. This distinction and its importance in evaluating *First Options* vis-à-vis the NASD Rule 10324 cases is explored below. *See infra* notes 265-72 and accompanying text.

terms of a Loan Agreement, which contained an arbitration clause.[98] The Kaplans, however, had not signed the Loan Agreement; instead, they had signed a Letter Agreement that did not contain an arbitration clause.[99] The Kaplans contended, therefore, that their dispute with First Options was not subject to mandatory arbitration.[100]

The arbitration panel rejected the Kaplan's argument and imposed its jurisdiction.[101] Upon reviewing the merits of the claims, the arbitral panel ruled against the Kaplans, compelling them to appeal the decision to the federal district court.[102] The district court upheld the arbitral panel's decision, explaining that it was plausible for the arbitrator to have concluded that the Letter Agreement was intended to incorporate by reference the Loan Agreement.[103] Under this reasoning, the Kaplans had in fact expressly submitted the dispute to arbitration.

The Court of Appeals for the Third Circuit reversed, holding that the dispute between First Options and the Kaplans was not arbitrable.[104] The court explained laconically that questions of arbitrability are for courts to decide.[105]

The Supreme Court affirmed the appellate court's ruling.[106] The Court narrowed the relevant question to this: Who has the power to decide whether the parties agreed to arbitrate, the court or the arbitrator?[107] In response to this question, the Court first recognized that "arbitration is simply a matter of contract between the parties."[108] If the parties agreed to submit the question of arbitrability to arbitration itself, then courts should "give considerable leeway to the arbitrator," setting aside the arbitrator's decision on the merits only in the narrowest circumstances.[109] If, however, it is unclear whether the parties agreed to submit the question of arbi-

98. *Id.* at 940-41. The arbitration clause in the loan agreement stated: "Any controversy between First Options and MKI arising out of MKI's business or . . . this . . . Agreement . . . shall be submitted to and settled by arbitration . . . ." Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1507 n.5 (3d Cir. 1994).

99. *First Options*, 514 U.S. at 940-41.

100. *Id.* at 941.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (citing *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994)).

105. *Id.* (citing *Kaplan*, 19 F.3d at 1509).

106. *Id.* at 947.

107. *Id.* at 943.

108. *Id.*

109. *Id.* (citing Section 10 of the FAA, 9 U.S.C. § 10 (1994)).

trability to arbitration itself, then the courts should independently decide this issue.[110] In reviewing the parties' agreement, the Court held that state contract law governs the interpretation of the contract.[111]

The threshold consideration, once again, was that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."[112] The Court stated that "[i]n this manner the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption."[113] This confirms the Court's conclusion that, in general, courts should resolve the question of arbitrability, absent a clear and unmistakable agreement to the contrary. Thus, courts should defer to the presumption in favor of arbitration only in those situations where the scope and breadth of the arbitration agreement—and not the agreement to arbitrate itself—are at issue.[114]

As in *AT&T Technologies*, however, the *First Options* Court failed to explain what constitutes clear and unmistakable evidence.[115] Instead, one is left to draw inferences from the Court's application of the general standard to the specific facts of the case. The Court noted that the arbitration clause in the Loan Agreement could not bind the Kaplans (since they did not sign it) even though they did sign the Letter Agreement and both documents were executed as part of one Workout Agreement.[116] The Court found no other clear and unmistakable evidence that the Kaplans had agreed to arbitrate questions of arbitrability.[117]

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110. *Id.* The internal inconsistency, indeed the circularity, of this reasoning should be clear. It tells little about how the court or arbitrator should decide if the parties agreed.

111. Although contract law certainly differs in the particulars, this Note will not evaluate certain state contract law. Most courts spend little, if any time, discussing the nuances of state contract law when dealing with questions about arbitrability of securities disputes. This may be because the principles are generally broad and similar among the states. *See infra* Part IV.A for a discussion of general contract principles as applied to the interpretation of Rule 10324.

112. *Id.* at 944.

113. *Id.* at 944-45.

114. Once an agreement to arbitrate is clearly shown by the evidence, an arbitrator can decide the scope of arbitration. *Id.*

115. *Id.* at 944-46; *see also* AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643 (1986).

116. *First Options*, 514 U.S. at 946.

117. *Id.*

Ultimately, the Supreme Court provided little guidance to lower courts charged with determining the exact parameters of the "clear and unmistakable" standard.[118] This problem was exacerbated by the fact that the arbitration agreements in *AT&T Technologies* and *First Options* differed from the standard Customer Agreements used by securities brokers, which incorporate the *NASD Code*.[119] In *AT&T Technologies*, the arbitration agreement was part of a collective bargaining contract that expressly limited the arbitrability of a particular type of claim.[120] In *First Options*, the customers did not sign the arbitration agreement, which was part of a larger Workout Agreement that deviated significantly from the standard-form Customer Agreement used by most securities brokerage firms.[121] Therefore, it is doubtful whether the analysis in these two cases should even be applied in disputes where the interpretation of a typical Customer Agreement is at issue. This uncertainty, and the inherent ambiguity of the clear and unmistakable standard itself, are nowhere more evident than in cases interpreting the scope of Rule 10324 of the *NASD Code*.

III. THE STRUCTURE OF SECURITIES ARBITRATION, RULE 10324 OF THE *NASD CODE*, AND THE CIRCUIT SPLIT

A. Securities Arbitration and the Predominance of the NASD Arbitral Forum

Before discussing the circuit split over the interpretation of *NASD Code* Rule 10324, it is necessary to explore the structure of securities arbitration itself. A predispute arbitration agreement generally provides investors with the option of two or more SRO forums and dictates that the procedural rules of the SRO will govern the agreement and any subsequent arbitration proceedings.[122] The choice for investors is of little consequence, however, since the procedural rules of the SRO arbitral forums are virtually identical.[123] The similarity derives from the fact that all SROs have

118. *See* Neesemann & Nelson, *supra* note 16, at 854 (recognizing the "confusion and disagreement among the Circuits regarding what contractual language suffices").

119. *See supra* note 2 (discussing the typical Customer Agreement).

120. *AT&T Techs.*, 475 U.S. at 644-45.

121. *First Options*, 514 U.S. at 940-41.

122. *See* GRANT, *supra* note 1, at 81-82 (providing a copy of a securities firm Client Agreement, which contains an arbitration provision); Harding, *supra* note 1, at 119.

123. *See* Costello, *supra* note 17, at 285-86; Masucci, *supra* note 1, at 187.

adopted the Uniform Code of Arbitration ("UCA"), with approval of the SEC.[124]

In an effort to encourage SROs to refine both arbitration procedures and the rules governing predispute arbitration agreements, the SEC initiated a movement to create a uniform process for the resolution of small claims by investors.[125] Spurred by the SEC, the securities industry established, in 1977, the Securities Industry Conference on Arbitration ("SICA"), consisting of both members of the general public and representatives of the SROs.[126] In 1984, the SICA presented the industry with the UCA, which all SROs, including the NASD, adopted with only minor alterations.[127] Although the arbitration procedures of the SROs provide for arbitration upon demand of the investor,[128] the rules do not require member-brokers to have their investors sign predispute arbitration agreements.[129] Although they are not mandatory, most brokers demand that their retail customers sign such agreements.[130] It is important to note that these agreements often incorporate, by reference, the arbitration rules of one or more of the SROs, usually the *NASD Code*.[131] Consequently, most retail investors are compelled to arbitrate.

As one commentator observed: "[t]he growing importance of arbitration in the securities markets cannot be overemphasized."[132] Likewise, the dominance of the NASD in conducting securities arbi-

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124. *See* GRANT, *supra* note 1, at 143 (discussing the UCA and its adoption by the SROs).

125. *See* Costello, *supra* note 17, at 285; Masucci, *supra* note 1, at 186.

126. *See* Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483 (1996) (providing a comprehensive history of the SICA).

127. Masucci, *supra* note 1, at 187.

128. *See* NASD CODE, Rule 10301. Rule 10301(a) provides:

> Any dispute, claim, or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer.

Id.

129. *See* Costello, *supra* note 17, at 285-86; *see generally* NASD CODE.

130. *See* Costello, *supra* note 17, at 285-86 (discussing how most securities dealers require investors to sign agreements as a precondition to opening an account).

131. *See, e.g.*, PaineWebber Inc. v. Elahi, 87 F.3d 589, 591 (1st Cir. 1996) (providing a portion of the arbitration agreement at issue in the case, which stated that "[a]ny arbitration shall be in accordance with the rules in effect of either the New York Stock Exchange, Inc., American Stock Exchange, Inc., National Association of Securities Dealers, Inc...."); *see also* GRANT, *supra* note 1, at 82 (including a copy of a securities broker's arbitration agreement).

132. Costello, *supra* note 17, at 285 n.8.

tration must be acknowledged.[133] Although most securities trading within the dealer-investor relationship occurs without controversy,[134] the number of claims filed with the NASD has increased steadily in the past two decades.[135] Resolution of these claims has proceeded apace, and the NASD arbitration process has proven itself a fast and efficient means of dispute resolution.[136]

Much of the activity within the NASD arbitral forum derives, perhaps, from a sense of customer confidence in the process.[137] This may be due in large part to the continual refining of the *NASD Code* in response to changes in the market, recommendations by the SEC, SICA, and the American Arbitration Association, and proposals initiated by internal monitoring.[138]

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133. *See* Masucci, *supra* note 1, at 188 (noting that the NASD arbitration forum hears between eighty-five and ninety percent of all securities arbitration in the United States). NASD Regulation, Inc., a subsidiary of NASD, Inc., provides the largest arbitration forum in the United States. NASD Regulation, Inc., oversees all securities brokers and brokerage firms with public customers. *See* NASD Regulation, Inc., Press Release, Aug. 5, 1999.

134. In 1994, the NASDAQ Stock Market alone reported an annual share volume of trading of 74.4 billion. In the same year, 5,570 new arbitration claims were filed under the NASD Code. For a claim to be filed under the *NASD Code*, the trading may take place through any SRO. Indeed, the only requirement is that the dealer be a NASD member. Therefore, the total annual volume in all United States securities markets shows that the 5,570 claims filed are relatively small, and that most trading occurs without dispute. *See* Masucci, *supra* note 1, at 188.

135. Claims filed under the *NASD Code* reached an all-time high in 1995, with 6,058 filings. The number fell to 5,631 in 1996, and to 4,938 in 1998. The number of NASD arbitration cases closed annually has followed a similar pattern, reaching a peak in 1996, with 6,331 closings, compared to 5,484 in 1998. The decrease in filings does not represent a decrease in the importance of NASD arbitration, for it continues to garner close to ninety percent of all claim filings in the securities industry. The decrease in filings may be explained by an increased emphasis by NASD in mediation, and due to investor satisfaction in the current bull market. *See* GRANT, *supra* note 1, at 95-96; Masucci, *supra* note 1, at 188; George H. Friedman, *Securities Arbitration: Still Effective as the Millennium Dawns*, 10 WORLD ARBITRAITON & MEDIATION REPORT 134 (May 1999); NASD Regulation, Inc., The Neutral Corner, 11 (Nov. 1999).

136. *See* GRANT, *supra* note 1, at 101-04. That NASD arbitration is at least efficient can be seen in 1994 statistics. In that year, when the NASD closed 4,561, "[t]he average length of time it took a case to close in 1994 was 10.4 months with the average hearing lasting 2.5 days." Masucci, *supra* note 1, at 188. This is considerably shorter than the average time for resolution in courts. *See id.* at 189-90; *see also* Anthony DeToro, *Waiver of the Right to Compel Arbitration of Investor-Broker Disputes*, 21 CUMB. L. REV. 615, 618-19 (1990-1991) (noting that courts favor arbitration because it provides a speedy alternative to litigation, lowers the cost to the parties, and relieves crowded court dockets).

137. *See* GRANT, *supra* note 1, at 105. *But see* Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 325 (1998) (arguing that mandatory securities arbitration "strips . . . customers of procedural and substantive rights").

138. *See* GRANT, *supra* note 1, at 143; Harding, *supra* note 1, at 115 n.28 (explaining how the SEC oversees SROs activities, and how SROs are responsible for policing their own rules and enforcing securities laws). The NASD appointed former SEC Chairman David Ruder to lead a task force to study several issues concerning securities arbitration. *See* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., SECURITIES REFORM, REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS,

Rule 10324 embodies the self-executing nature of the *NASD Code*. It states that "the arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties."[139] Despite this clear affirmation by the NASD of the authority of arbitrators to decide all issues that fall within the scope of the *Code*, and although most customer agreements expressly incorporate the *NASD Code*, broker-members routinely seek preliminary determination of arbitrability issues by the courts.[140]

B. Circuit Conflict over Rule 10324

1. Avoiding the Presumption of Arbitration—Circuits that Rule in Favor of Courts Deciding Arbitration

Four circuits, the Sixth, Seventh, Tenth, and Eleventh, have held that NASD Rule 10324 does not provide the kind of clear and unmistakable evidence of the parties' intent required by the Supreme Court in *AT&T Technologies* and *First Options*.[141]

Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. presents a set of facts typical of many of the cases examining the scope of Rule 10324.[142] Cogswell, the plaintiff, opened an account with the defendant-broker, which required Cogswell to sign a standard-form, non-negotiable agreement.[143] Like virtually all arbitration provisions used by other securities brokers, the clause here stated that Cogswell "agreed that any controversy arising out of her business or this Agreement shall be submitted to arbitration conducted ac-

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INC. (1996); *see also* Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV. 327 (1996) (providing a detailed analysis of the Ruder Report).

139. NASD CODE, Rule 10324.

140. *See, e.g.*, Smith Barney, Inc. v. Sarver, 108 F.3d 92, 93-94 (6th Cir. 1997); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1196 (2d Cir. 1996); *see also infra* Part IV.A.3 (discussing how brokers seek to avoid arbitration).

141. *See* Miller v. Flume, 139 F.3d 1130, 1134 (7th Cir. 1998); *Sarver*, 108 F.3d at 97; Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 480 (10th Cir. 1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 384 (11th Cir. 1995); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 n.6 (7th Cir. 1992).

142. *See Cogswell*, 78 F.3d at 475; *see also Sarver*, 108 F.3d at 93-94; *Cohen*, 62 F.3d at 382. For a discussion of a slightly different fact pattern, see the discussion of *Miller v. Flume*, *infra* text accompanying notes 169-82.

143. *Cogswell*, 78 F.3d at 475. For a discussion of standard customer agreements issued by securities brokers, see *supra* note 2 and accompanying text.

cording to the rules and procedures of . . . the . . . NASD."[144] In addition, the agreement incorporated, by reference, the *NASD Code*.[145]

Following the purchase of certain investments, their value declined significantly. This compelled Cogswell to file a NASD arbitration proceeding against Merrill Lynch on the grounds that the investments were of too high a risk and could not be liquidated for several years.[146] As in almost all cases that turn on the scope of Rule 10324, it was the securities broker, not the customer, who then sought an order from the court to enjoin arbitration.[147] Merrrill Lynch argued that the dispute was ineligible for arbitration pursuant to the time-bar provision outlined in Rule 10304 of the *NASD Code*, which bars arbitration of claims "where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."[148] In resolving the question whether a court or arbitrator should determine if a claim is time barred under Rule 10304, the *Cogswell* court rejected the plaintiff's argument that Rule 10324 permits the arbitrator to determine this threshold issue.[149] The court held that Rule 10324 does not constitute a clear and unmistakable expression of the parties' intent to have arbitrators decide whether they have jurisdiction over a customer's claim.[150] The court explained that Rule 10324 does not specifically state whether a court or arbitrator should determine the ambit of Rule 10304.[151] Relying on contract analysis, the court stated that specific provisions like Rule 10304 prevail over general provisions such as Rule 10324.[152] Thus, the court dismissed the ar-

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144. *Id.*

145. *Id.* at 478 (noting that both the customer and the broker agreed that the arbitration agreement incorporated the *NASD Code*).

146. *Id.* at 475.

147. *Id.* For a discussion of the importance of how it is usually the securities brokers, not the claimant/customer, who seek to avoid arbitration, see *infra* notes 265-72 and accompanying text.

148. *Id.* Rule 10304 (former Section 15) provides:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. The Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

NASD CODE, Rule 10304. An examination of the time-bar issue under Rule 10304 is beyond the scope of this Note. For a careful analysis of Rule 10304, see Costello, *supra* note 17, at 296-98.

149. *Cogswell*, 78 F.3d at 480.

150. *Id.* at 481.

151. *Id.* at 479-80.

152. *Id.* (" 'The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specifically directed to a particular

gument that the *NASD Code* should be read as a whole, holding instead that the *Code* should be treated as a series of loosely connected but independent provisions, to be read individually.

The *Cogswell* court again construed the *NASD Code* as a series of fragmented, independent provisions in its examination of Rule 10101.[153] A general provision like Rule 10324, Rule 10101 provides that in a dispute between a broker and a customer, once the obligation to arbitrate arises, the provisions of the *Code* apply to that arbitration.[154] The plaintiff argued that this provision, read in light of Rules 10324 and 10304, provides clear and unmistakable evidence of the parties' intent to submit all disputes to arbitration.[155] The court disagreed for three reasons.[156] First, Rules 10101 and 10304 concern different issues, and therefore neither prevails over the other.[157] Second, "even if [Rule 10101 and Rule 10304] conflicted, [Rule 10304] would control because it is specific rather than general."[158] Third, like Rule 10324, Rule 10101 is not the type of clear and unmistakable language required under the Supreme Court's *First Options* standard.[159]

The contract analysis line of reasoning in *Cogswell* closely resembles that of the other circuits that have ruled that Rule 10324 does not provide clear and unmistakable evidence of the parties intent to permit arbitrators to determine issues of arbitrability.[160] For example, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen,* the Eleventh Circuit Court of Appeals concluded that, at best, Rule 10324 creates an ambiguity as to who should resolve questions of arbitrability.[161] Such ambiguity is not the kind of "clear and unmistakable" evidence required under *First Options.*[162] The *Cohen* court construed Rule 10304 to mean that a customer-broker dispute is

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matter controls in respect thereto over one which is general in its terms.' ") (quoting Mutual Life Ins. Co. v. Hill, 193 U.S. 551, 558 (1904)).

153. *Id.* at 481.

154. *Id.* at 481. Rule 10101 (former Section 1) provides, in relevant part: "This Code of Arbitration Procedure is prescribed and adopted . . . for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association . . . ." NASD CODE, Rule 10101.

155. *Cogswell,* 78 F.3d at 481.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* The *Cogswell* court, however, did not discuss what type of language the *First Options* Court required to meet the "clear and unmistakable" standard. *Id.*

160. *See, e.g.,* Smith Barney, Inc. v. Sarver, 108 F.3d 92, 96-98 (6th Cir. 1997); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 383-84 (11th Cir. 1995).

161. *Cohen,* 62 F.3d at 383-84.

162. *Id.* As in *Cogswell,* the *Cohen* court did not define what kind of language the *First Options* Court required. *Id.*

eligible for arbitration only if it is submitted within six years of the event that caused the dispute.[163] This substantive prerequisite to arbitration is a specific provision of the *NASD Code*, whereas Rule 10324 is a general provision.[164] As in *Cogswell*, the *Cohen* court concluded that specific contract clauses take precedence over general provisions.[165] Consequently, the court held that Rule 10324 does not provide the kind of clear and unmistakable evidence envisioned by the *First Options* Court.[166]

In *Smith Barney, Inc. v. Sarver*, the Sixth Circuit closely adhered to the reasoning in *Cohen*.[167] The *Sarver* court quoted not only the substance of the *Cohen* court's analysis of Rule 10324, but also the entire analysis of Rule 10101 from the *Cogswell* opinion.[168] Therefore, *Sarver* provides little additional insight into the appropriate interpretation of the *NASD Code* and Rule 10324.

The most recent articulation of this side of the circuit split appears in the Seventh Circuit's decision in *Miller v. Flume*.[169] The facts are somewhat different from those of *Sarver*, *Cogswell*, and *Cohen*, however.[170] The Flumes, customers of a brokerage firm, filed an arbitration grievance with the NASD, to which the firm initially submitted.[171] The NASD arbitration panel found for the Flumes, awarding them $150,000 in damages and almost $30,000 in costs.[172] The firm appealed, and while the appeal was pending, the firm transferred all its assets to its parent company.[173] In response, the Flumes began a second arbitration proceeding.[174] This time the securities firm sought to avoid arbitration by filing in federal district court.[175] Finding for the brokerage firm, the district court ruled that Rule 10324 was not clear and unmistakable language sufficient to have a NASD arbitrator determine whether the dispute should be arbitrated.[176] The Seventh Circuit Court of Appeals offered a relatively brief discussion of the scope of Rule 10324 before ruling that

163. *Id.* at 384.
164. *Id.*
165. *Id.*
166. *Id.*; *see also* Kaplan v. First Options of Chicago, Inc., 514 U.S. 938, 944-45 (1995).
167. Smith Barney, Inc. v. Sarver, 108 F.3d 92, 96-98 (6th Cir. 1997).
168. *Id.* at 97-98.
169. Miller v. Flume, 139 F.3d 1130 (7th Cir. 1998).
170. *Id.* at 1131-32.
171. *Id.* at 1131.
172. *Id.* at 1132.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1133.

it "is not the kind of clear and unmistakable language that *First Options* requires."[177] The *Miller* court acknowledged the current circuit split and, curiously, noted that the Supreme Court has adopted a "hospitable approach" to arbitration.[178] Nonetheless, the Seventh Circuit followed the interpretation of Rule 10324 it had set out previously, in *Edward D. Jones & Co. v. Sorrells.*[179] Here, the court had concluded, "we do not believe that this provision is a clear and unmistakable expression of the parties' intent to have the arbitrators, and not the court, determine which dispute the parties have agreed to submit to arbitration."[180] The *Miller* court only slightly expanded on the *Sorrells* explanation of Rule 10324, tersely stating that the provision "says nothing about arbitrability."[181] The court suggested that Rule 10324 could be read to mean that arbitrators decide arbitrability issues, but that the language is not sufficiently clear and unmistakable to satisfy the *First Options* standard.[182] Thus, *Miller*, like *Sarver*, added nothing to the *Cogswell* and *Cohen* interpretations of Rule 10324, aside from support for the holdings.

Ultimately, the majority view relies primarily on the vaguely defined and perhaps misplaced contract principle that specific provisions prevail over general ones.[183] Moreover, the majority's narrow, formalistic approach to the *NASD Code* neglects the well-established federal policy, as evidenced in the FAA, that resolves ambiguous arbitration agreements in favor of arbitration.[184] Even less convincingly, these four circuits state that Rule 10324 does not provide the language required by *First Options*. This argument necessarily fails because *First Options* itself did not define

177. *Id.* at 1134.

178. *Id.*

179. *Id.*; *see also* Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 n.6 (7th Cir. 1992).

180. *Sorrells*, 957 F.2d at 514 n.6. Although the Seventh Circuit decided the *Sorrells* case in 1992, three years before *First Options*, the *Sorrells* court based its interpretation of Rule 10324 on *AT&T Technologies*. Since the *Miller* court presented its discussion of *First Options* as merely an affirmation of its *Sorrells* decision, it makes no difference to this discussion that *Sorrells* was decided earlier than *First Options*. The oft-quoted statement in *Sorrells* interpreting Rule 10324 was merely dicta, however, and it was relegated to a two sentence footnote. *See Miller*, 139 F.3d at 1134.

181. *Id.*

182. *Id.*

183. *See infra* Part IV.A (exploring the three common law contract principles the Supreme Court used to interpret the scope of a Customer Agreement).

184. *See supra* Part II.A (discussing the federal policy that favors arbitration as evidenced in the FAA).

the exact language that would satisfy the "clear and unmistakable" standard, and these cases offer even less guidance.[185]

2. Reading "Clear and Unmistakable" Broadly: Circuits that Rule in Favor of Arbitrators Deciding Arbitrability

Only two circuit courts, the Second and Eighth,[186] have held that Rule 10324 permits arbitrators to resolve arbitrability questions; however, several federal district courts, and a number of state courts, have ruled that arbitration agreements themselves provide the necessary clear and unmistakable language.[187] These opinions tend to present a more detailed, careful analysis of Rule 10324 and its relationship to Customer Agreements and the rest of the *NASD Code*. As a result, they are generally more convincing than the opinions espousing the majority view.

Perhaps the most widely cited circuit court opinion reflecting the minority view is *FSC Securities Corp. v. Freel*.[188] The securities broker, a member of the NASD, had Freel, the customer, sign a predispute arbitration agreement according to the industry standard.[189] After the Freels submitted an arbitration claim to the NASD, the broker moved to dismiss the claim under Rule 10304, arguing that the claim was time barred because the Freels failed to file a claim within six years of establishing their brokerage

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185. *See supra* Part II.C.2 (examining the ambiguity left by the *First Options* Court regarding the "clear and unmistakable" standard).

186. PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996); FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1313-14 (8th Cir. 1994).

187. *See* Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 754 (5th Cir. 1995) (holding that a standard securities industry customer agreement, which provides for the arbitration of "any controversy," satisfies the clear and unmistakable standard); First Montauk Sec. Corp. v. Menter, 26 F. Supp. 2d 688, 689 (S.D.N.Y. 1998) (holding that the Uniform Submission Agreement signed after the customer filed a claim with the NASD evinces a clear and unmistakable intent to arbitrate arbitrability); Singer v. Smith Barney Shearson, 926 F. Supp. 183, 187 (S.D. Fla. 1996) (holding that a contract provision, which stated that "any controversy" between the customer and the broker will be arbitrated, meets the clear and unmistakable language); Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39, 46-47 (N.Y. 1997) (holding that both the arbitration agreement itself and Rule 10324 of the *NASD Code* clearly and unmistakably evidence the parties' intent to arbitrate all issues, including arbitrability questions).

188. Miller v. Flume, 139 F.3d 1130, 1134 (7th Cir. 1998) (citing *Freel* for the proposition that Rule 10324 alone satisfies that parties clearly and unmistakably agreed to arbitrate questions of arbitrability); *see also* Smith Barney, Inc. v. Sarver, 108 F.3d 92, 96 n.5 (6th Cir. 1997) (same); Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 475-76 (10th Cir. 1996) (same); *Bybyk*, 81 F.3d at 1202 (same); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 383 (11th Cir. 1995) (same).

189. *Freel*, 14 F.3d at 1311.

account.[190] The district court found for the Freels, citing Rules 10101 and 10324 as clear and unmistakable evidence of the parties' intent to have arbitrators decide whether the Freels' claim was time barred.[191]

The circuit court, explicitly rejecting the holding in *Sorrells*, concluded that Rule 10324 is clear and unmistakable evidence of the parties' intent to present all arbitrability issues to an arbitrator.[192] The court reasoned that since the predispute arbitration agreement incorporated the entire *NASD Code*, Rule 10324 must be considered when resolving the arbitrability question.[193] Rule 10324, the court observed, clearly submits to arbitrators the interpretation of all sections of the *NASD Code*.[194] Reading the *NASD Code* "as a whole," the *Freel* court held that "by adopting the NASD Code of Arbitration Procedure as the rules governing their dispute, [the securities firm] agreed to give the arbitrators discretion via [Rule 10324] of that Code to interpret [Rule 10304's] time limitation."[195]

In *PaineWebber Inc. v. Bybyk*, the Second Circuit Court of Appeals agreed with the *Freel* holding and expanded upon its contract analysis.[196] The *Bybyk* facts follow the general pattern.[197] Upon opening an investment account with PaineWebber, the Bybyks signed the compulsory predispute arbitration agreement as part of the larger client agreement.[198] The agreement stated in part that "any and all controversies" arising between the Bybyks and PaineWebber were to be resolved through arbitration.[199] Additionally, the agreement provided that any customer claims were to be arbitrated under the rules of the governing SRO.[200] Alleging breach

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190. *Id.*; *see supra* note 148 for the text of Rule 10304.

191. *Freel*, 14 F.3d at 1312.

192. *Id.*

193. *Id.* at 1312-13.

194. *Id.* at 1313 ("In no uncertain terms, [Rule 10324] commits interpretation of all provisions of the NASD Code to the arbitrators.").

195. *Id.*

196. PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996); *see also* Harding, *supra* note 1, at 157 (noting that the *Freel* "court's reliance on [Rule 10324] is sound" because Rule 10324, which is "applicable to all the provisions of the Code, fills in that silence by unambiguously giving the arbitrators the power to interpret and determine the applicability of [Rule 10304]").

197. *Bybyk*, 81 F.3d at 1195-96. For an example of the general fact patterns in cases involving the interpretation of Rule 10324, see the discussion of *Cogswell supra* notes 142-48 and accompanying text.

198. *Bybyk*, 81 F.3d at 1196. The *Bybyk* opinion excerpted a large portion of the agreement. *Id.* at 1197. This demonstrates the court's approach of construing contract language in the context of the entire agreement. *Id.* at 1197, 1199-1200.

199. *Id.* at 1196.

200. *Id.*

of fiduciary duty and failure to monitor their account, the Bybyk's filed a claim against PaineWebber with the NASD.[201] As often occurs, the securities broker, PaineWebber, sought to enjoin the arbitration proceedings under the time bar provision in Rule 10304.[202]

The Second Circuit's detailed analysis began with the premise that a determination of whether to arbitrate arbitrability depends on whether or not the parties agreed to do so.[203] The court noted that this, in essence, is a contractual matter which must be resolved under the applicable state contract law.[204] The court also recognized the FAA's policy favoring arbitration in cases of ambiguity.[205] Citing *First Options*, however, the court acknowledged that if an arbitration agreement is ambiguous as to whether a claim is even eligible for arbitration, a court must decide that issue.[206] Thus, where ambiguity exists with regard to whether a claim in fact arises under the arbitration agreement, a court will resolve the question unless the agreement clearly and unmistakably expresses the parties intent to arbitrate arbitrability.[207]

The *Bybyk* court further noted that where ambiguity exists as to contract language, it should be construed against the party who drafted the contract.[208] This common law principle applies even in the context of predispute arbitration agreements.[209] Here, PaineWebber drafted the agreement, making it a nonnegotiable prerequisite for retaining the firm as an investment broker; accordingly, any ambiguous contract language should be construed against it.[210]

With these principles of contract interpretation in mind, the *Bybyk* court closely examined the language and structure of the relevant agreement.[211] The court interpreted the provision "any and

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201. *Id.* at 1195.

202. *Id.* at 1195-96; *see also* Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 475 (10th Cir. 1996) (Merrill Lynch petitioned the court "for an order permanently staying arbitration," after the customer submitted a claim to NASD arbitration); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 382 (11th Cir. 1995) (Merrill Lynch sought to avoid arbitration on grounds that the customer's claim was time-barred).

203. *Bybyk*, 81 F.3d at 1198.

204. *Id.*

205. *Id.* For a discussion of the Federal Arbitration Act and its policy favoring arbitration, see *supra* Part II.A.

206. *Bybyk*, 81 F.3d at 1198.

207. *Id.* at 1198-99 (citing *First Options* and *AT&T Technologies*.).

208. *Id.* at 1199 (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995)).

209. *Id.*

210. *Id.* at 1195, 1199.

211. *Id.* at 1199-1200.

all controversies . . . shall be determined to arbitration," to be "inclusive, categorical, unconditional and unlimited" language—a clear expression of the parties' intent to submit arbitrability questions to arbitration.[212] By reading the agreement inclusively, the court concluded that the Bybyks and PaineWebber had agreed to arbitrate arbitrability questions.[213]

The *Bybyk* court departed from the approach of other courts in determining whether predispute arbitration agreements drafted by securities brokerage firms incorporate by reference the *NASD Code*.[214] Although it concluded that the *NASD Code* was not incorporated into the agreement between PaineWebber and the Bybyks, the court stated that even if the *Code* had been incorporated, Rule 10324 would resolve the arbitrability question in favor of arbitration.[215] The court quoted the *Freel* opinion at length, observing that Rule 10324 "grants to the arbitrators the power to interpret and apply" Rule 10304.[216] Unlike the *Cogswell*, *Cohen*, and *Sarver* courts, the *Bybyk* court implied that Rule 10324 prevails over Rule 10304 in cases of apparent contradiction.[217] Consequently, the court stated, "[t]he language of the Code itself commits all issues, including issues of arbitrability and timeliness, to the arbitrators."[218]

In *Smith Barney Shearson, Inc. v. Sacharow*, the Court of Appeals of New York closely followed the reasoning of both *Freel* and *Bybyk*.[219] Notably, the *Sacharow* court added two significant policy justifications for its holding that the parties' agreement and Rule 10324, construed together, clearly and unmistakably provided

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212. *Id.* at 1199.

213. *Id.* at 1200.

214. *Id.* at 1201. Paine Webber argued that the agreement provision which stated that "arbitration shall be governed by the rules of the organization convening the panel" effectively incorporated by reference the entire NASD Code. *Id.* at 1200-01. The court, however, disagreed, ruling instead that since the agreement did not specifically call for arbitration only under the NASD Code, that Code was not incorporated by reference. *Id.* at 1201. In most cases discussed in this Note concerning the interpretation of Rule 10324, the courts do not discuss this issue. *See, e.g.*, Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 475 (10th Cir. 1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 382 (11th Cir. 1995). It appears that in many of these cases both parties either submit to the NASD Code expressly in the agreement or leave the choice up to the customer filing the complaint. *See* FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1311 (8th Cir. 1994); *Cogswell*, 78 F.3d at 475. In each case, the *NASD Code* is incorporated by reference into the agreement, as is standard industry practice. *See* GRANT, *supra* note 1 at 137.

215. *Bybyk*, 81 F.3d at 1202.

216. *Id.*

217. *Id.*

218. *Id.*

219. Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39, 46-47 (N.Y. 1997).

for arbitration of arbitrability questions.[220] First, the court explained that its holding bolstered the long-standing federal and New York policies favoring arbitration as a cheaper and more efficient means of dispute resolution.[221] In reviewing questions of arbitrability, therefore, courts should approach predispute arbitration agreements cautiously, considering them carefully before finding them invalid.[222] Second, the *Sacharow* court recognized the typical procedural postures of securities firms following the filing of a customer's claim with the NASD.[223] Since the brokerage firms draft the arbitration agreements and require their customers to sign them, courts should not allow the same firms to avoid these agreements when it appears advantageous for them to do so.[224] As the court noted, brokerage firms "should not garner that strategic advantage against their aggrieved or dissatisfied customers."[225]

Even without reference to the *NASD Code*, some courts have found the requisite clear and unmistakable language in the Customer Agreement itself.[226] For example, in *Smith Barney Shearson, Inc. v. Boone*, the Fifth Circuit held that the "broad language" of the predispute arbitration agreement presented clear and unmistakable evidence of the parties' intent to have "any controversy" decided by an arbitrator.[227] This included the resolution of arbitrability questions, such as those concerning counterclaims by dealers that the customer's claim was time barred.[228]

Two federal district court cases closely followed the *Boone* approach.[229] Noting that arbitration agreements are merely contracts, the court in *Singer v. Smith Barney Shearson* applied gen-

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220. *Id.* at 49-50.

221. *Id.*

222. *Id.* at 50.

223. *Id.*

224. *Id.*

225. *Id.*

226. *See, e.g.*, Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 754 (5th Cir. 1995); First Montauk Sec. Corp. v. Menter, 26 F. Supp. 2d 688, 689 (S.D.N.Y. 1998); Singer v. Smith Barney Shearson, 926 F. Supp. 183, 187 (S.D. Fla. 1996).

227. *Boone*, 47 F.3d at 754. The issue in *Boone* was whether a court or arbitrator should decide if the customer's claim is time-barred under Rule 10304 of the *NASD Code* or the corresponding rule in the *American Stock Exchange Code*, Rule 605. *Id.* at 752. The *Boone* court partially based its conclusion on the reasoning that such timeliness issues are procedural questions, which the Supreme Court has decided are for arbitrators, not courts, to decide. *Id.* at 753 (*citing* John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)). This reasoning assisted the court in ruling that it need not look beyond the terms of the agreement between the parties. *Id.* at 754. Thus, the *Boone* decision is a forceful judicial expression of the primacy of the language of the predispute arbitration agreement in determining questions of arbitrability.

228. *Id.*

229. *See First Montauk*, 26 F. Supp. 2d at 689; *Singer*, 926 F. Supp. at 187.

eral contract principles in interpreting a predispute arbitration agreement.[230] The *Singer* court held that the language of the agreement itself evinced a clear and unmistakable intent by the parties to resolve all disputes through arbitration.[231] The court in *First Montauk Securities Corp. v. Menter* took the same approach, holding that a Uniform Submission Agreement signed by the securities firm upon being joined as a defendant in a customer's class action suit satisfied the "clear and unmistakable" standard.[232]

Considered together, the cases explicating the minority view provide a preferable interpretation of the "clear and unmistakable" standard as applied to Rule 10324. Focusing on the intent of the parties, the courts in the minority read the Customer Agreement and the entire *NASD Code* as one contract. Consequently, they have held that the broad and overarching language of Rule 10324 clearly and unmistakably indicates that parties to such agreements intend to arbitrate arbitrability. Any other ruling would allow brokers to avoid the very contracts they require their customers to sign. Moreover, this approach upholds the well-established policy in favor of arbitration.[233]

IV. ADVOCATING ARBITRATION: TOWARD A MORE PRECISE STANDARD FOR DETERMINING ARBITRABILITY

The preceding discussion highlights the need for a more precise definition of the "clear and unmistakable" standard currently used to determine arbitrability in the securities context. Without such clarification, uncertainty and a lack of uniformity may undercut investor confidence in securities markets.[234]

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230. *Singer*, 926 F. Supp. at 187. The predispute arbitration agreement in this case mirrored the industry standard agreement. *Id.* It provided that "[a]ny controversy arising out of or relating to . . . this agreement" will be subject to arbitration. *Id.*

231. *Id.* Curiously, this court cited *AT&T Technologies*, not *First Options*, for the "clear and unmistakable" standard, even though the present case was decided in 1996, one year after *First Options*. *Id.*

232. *First Montauk*, 26 F. Supp. 2d at 689. A Uniform Submission Agreement is a form used by the parties submitting a dispute to arbitration. *See* GRANT, *supra* note 1, at 219. The agreement designates which SRO will govern the arbitration, and incorporates the arbitration rules of that SRO. *See id.* The agreement states the claim, facts, and remedies sought. *See id.* For a copy of a standard Uniform Submission Agreement, see *id.* at 220.

233. *See supra* Part II.A. (discussing the federal policy favoring arbitration).

234. *See* Costello, *supra* note 17, at 297 (noting that the circuit split over *NASD Code* Rule 10304 "breeds confusion among customers and increases the cost of transactions for all parties").

A. Reading Securities Arbitration Agreements and the NASD Code *Broadly—A Contract Interpretation*

The Supreme Court has consistently indicated that the arbitrability question is a matter of contract interpretation.[235] Of course, a party cannot be forced to arbitrate any issues it has not agreed to submit to arbitration.[236] Basic rules of contract interpretation support the proposition that predispute arbitration agreements satisfy the "clear and unmistakable" standard and thus permit arbitrators, not courts, to evaluate questions of arbitrability.[237] One commentator has even suggested that the *First Options* Court itself "had a definite end in mind: placing great importance on the agreement of the parties, so as to protect and promote contractual freedom in the arbitral setting."[238] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, a Supreme Court opinion issued in the same term as *First Options*, provides guidance on how to proceed with a contractual analysis of predispute arbitration agreements.[239]

The issue in *Mastrobuono* was whether an arbitrator's award was consistent with the intent of the parties to an arbitration agreement.[240] Significantly, the case turned on the interpretation of a typical Customer Agreement issued by a securities firm and signed by an individual customer.[241] Like virtually all the other agreements discussed in this Note, the agreement here stated that "any controversy" arising from the customer-broker relationship

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235. *See, e.g.*, AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) (noting that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").

236. *See id.* at 648-49.

237. One court has observed that "[a] cardinal principle of federal arbitration law is that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " PaineWebber Inc. v. Elahi, 87 F.3d 589, 594 (1st Cir. 1996) (quoting *AT&T Techs.*, 475 U.S. at 648).

238. Wyss, *supra* note 71, at 362.

239. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59-63 (1995). Many courts have cast their examinations of arbitration agreements in terms of contract interpretation. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (in reviewing an arbitration agreement, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"); McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994) (noting that whether the parties agreed to arbitrate the dispute under the terms of the agreement "is ordinarily a function of the parties' intent as expressed in the language of the contract documents"); Singer v. Smith Barney Shearson, 926 F. Supp. 183, 187 (S.D. Fla. 1996) ("It must be borne in mind that arbitration agreements are no more than contracts to which the usual rules of contract interpretation apply.").

240. *Mastrobuono*, 514 U.S. at 53-54.

241. *Id.* at 58 n.2. For a discussion of standard-form Customer Agreements issued by securities brokers, see *supra* note 2 and accompanying text.

"shall be settled by arbitration."[242] In addition, the agreement incorporated by reference the NASD Code.[243] The *Mastrobuono* Court interpreted the Customer Agreement in light of three established common law principles of contract interpretation: first, Customer Agreements and the incorporated NASD Code should be construed as a single writing and therefore should be interpreted as a whole; second, all the documents comprising the single agreement should be considered to be consistent with each other; third, ambiguous language should be construed against the drafting party.[244] These three principles suggest an integrated approach to interpreting Customer Agreements; together they provide support for the argument that arbitrators should determine whether customer claims are arbitrable.

1. Customer Agreements and Rule 10324 Should Be Interpreted as Part of the Same Contract

The first contract principle advanced by the *Mastrobuono* Court is that the provisions of the Customer Agreement, including Rule 10324, should be read as a whole.[245] That is, the Court construed the arbitration provision and the *NASD Code* as part of the same overall agreement.[246] This approach comports with Section 202(2) of the *Restatement (Second) of Contracts*, which states that "[a] writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."[247] Accordingly, provisions in standard-form Customer Agreements used by securities brokers should be read in accordance not only with other provisions in the same agreement, but also with the *NASD Code* whenever it is incorporated by reference.

This approach supports the Eighth Circuit's decision in *Freel* and the Second Circuit's decision in *Bybyk*.[248] These courts read the Customer Agreements broadly, concluding that they satisfied the "clear and unmistakable" standard.[249] Conversely, the

242. *Id.*

243. *Id.*

244. *Id.* at 59, 62-63.

245. *Id.* at 59 (citing *Restatement (Second) of Contracts* § 202(2) as support for construing together the meaning of two provisions in the Client Agreement); *see also* Harding, *supra* note 1, at 166 ("Ambiguous terms in contracts are construed against the interests of the party who drafted them.").

246. *Id.* at 59-60.

247. RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981).

248. *See supra* Part III.B.2.

249. *See supra* notes 186-218 and accompanying text.

whole interpretation principle, outlined in Section 202(2) of the *Restatement* and reaffirmed by *Mastrobuono*, undermines the approach taken in *Miller*, *Sarver*, *Cogswell*, *Cohen*, and *Sorrells*.[250]

Considered under the whole interpretation principle, Rule 10324 governs with respect to other provisions of the *NASD Code*. For example, if, in response to a customer's claim filed with the NASD arbitral forum, a broker counterclaims that the customer's claim is time-barred under Rule 10304, then Rule 10324 mandates that an arbitrator decide whether the claim is indeed time-barred.[251] While Rule 10304 is silent as to who should determine whether a claim is time-barred,[252] it expressly states that arbitrators have the power to determine the applicability of all sections of the *Code*.[253] Therefore, if the *Code* is read as a whole, Rule 10324 clearly and unmistakably provides that arbitrators are to resolve all disputes arising out of the broker-customer relationship.[254] This conclusion is supported by the fact that most Customer Agreements incorporate the *NASD Code* and state that any dispute will be resolved by an NASD arbitrator in accordance with the *Code*.

2. Contract Provisions Should Be Construed as Consistent with Each Other

The second, and closely related, common law contract principle adopted by the *Mastrobuono* Court is "that a document should be read to give effect to all its provisions and to render them consistent with each other."[255] This principle is embodied in Sections 202(5) and 203(a) of the *Restatement (Second) of Contracts*.[256] For example, Section 202(5) states that "[w]herever reasonable, the

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250. For a discussion of these five cases, see *supra* Part III.B.1.

251. For a discussion of Rule 10304, see *supra* note 148 and accompanying text.

252. Rule 10304 states only that a time-barred claim is not eligible for submission to NASD arbitration. NASD CODE, Rule 10304.

253. *See id.* Rule 10324.

254. *See* Harding, *supra* note 1, at 157 ("[Rule 10304] is silent as to who shall make the determination as to eligibility. [Rule 10324], applicable to all the provisions of the Code, fills in that silence by unambiguously giving the arbitrators the power to interpret and determine the applicability of [Rule 10304].").

255. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995).

256. RESTATEMENT (SECOND) OF CONTRACTS §§ 202(5), 203(a) (1981). Section 203(a) states that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Id.* § 203(a).

manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other."[257]

This principle contradicts one of the central arguments used by the *Sarver*, *Cogswell*, and *Cohen* courts.[258] In finding that neither the provisions of the *NASD Code* nor the Customer Agreements met the "clear and unmistakable" standard, these courts relied heavily on the premise that specific provisions such as Rule 10304 prevailed over general ones such as Rule 10324.[259] This approach directly contradicts both the *Restatement* and *Mastrobuono*; therefore, it should not survive as controlling precedent. Furthermore, in light of *Restatement* Section 202(5), it is fair to assert that a predispute arbitration agreement and the provisions of the incorporated *NASD Code* should be read as mutually consistent and not contradictory. In this light, it is at least arguable that Rule 10324 dictates that all disputes be determined by arbitration.

3. Ambiguous Contractual Language Should Be Interpreted Against the Drafter

Even if the preceding two contract principles do not dispose of a securities broker's argument that courts should ultimately decide arbitrability issues, the third principle enunciated by the *Mastrobuono* Court should resolve the question in favor of the *Freel-Bybyk* approach. The *Mastrobuono* Court stated that "a court should construe ambiguous language against the interest of the party that drafted it."[260] This rule protects the party that did not draft the contract from unfair and unintended results.[261] The Court cited Section 206 of the *Restatement (Second) of Contracts* for this proposition.[262] The Official Comment to Section 206 explains that the drafter of any agreement is likely to include language favoring its own position; the drafter is also in a better position to know of ambiguities and thus to guard against them.[263] Indeed, as one court has observed, "the drafters of these agreements include the invest-

257. *Id.* § 202(5).

258. *See* discussion *supra* Part III.B.1.

259. *See supra* notes 150-52 and accompanying text.

260. *Mastrobuono*, 514 U.S. at 62.

261. *Id.*

262. *Id.* Section 206 provides: "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." RESTATEMENT (SECOND) OF CONTRACTS § 206.

263. *Id.* § 206, cmt. a, *quoted in Mastrobuono*, 514 U.S. at 63 n.10.

ment houses through their customarily uniform industry standards and forms, and they can adequately protect their interests with specificity of inclusion and exclusion."[264]

Under this third contract principle, whenever a broker induces a customer to sign a predispute arbitration agreement and later seeks to enjoin arbitration in favor of judicial resolution of the dispute, any alleged ambiguities in the agreement should be resolved in favor of arbitration. This principle likewise can be applied to the *NASD Code* and Rule 10324. Although the brokers certainly did not draft the *Code*, they are in a position much more akin to a drafter than are customers. Where brokers incorporate the Code into Customer Agreement, they presumably understand the terms and scope of the *Code* much better than the average customer. Consequently, the principle that ambiguous agreements should be construed against the drafter weakens the typical argument by brokers that the question of arbitrability should be left to courts due to ambiguity in either the Customer Agreement or the *NASD Code*.

The contract principle favoring non-drafters is especially valid with respect to the circuit split cases. Without exception, all the circuit court cases discussed above involved situations where the securities brokerage firm, not the customer, sought to enjoin arbitration in favor of a judicial resolution.[265] This refutes the traditional assumption that brokers prefer arbitration to litigation.[266] That brokers would want to avoid the very agreements they drafted and required their customers to sign may at first appear paradoxi-

264. Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39, 46 (N.Y. 1997).

265. *See* Miller v. Flume, 139 F.3d 1130, 1131 (7th Cir. 1998); Smith Barney, Inc. v. Sarver, 108 F.3d 92, 93 (6th Cir. 1997); PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1195 (2d Cir. 1996); Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 475 (10th Cir. 1996); Merrill Lynch, Pierce, Fenner & Smith v. Cohen, 62 F.3d 381, 382 (11th Cir. 1995); FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1311 (8th Cir. 1994).

266. *See* GRANT, *supra* note 1, at 105 ("Brokers prefer arbitration as clearly expedient and less expensive than trial by jury and other litigation."); Davis, *supra* note 137, at 324 ("Securities firms want all claims against them arbitrated to benefit from the efficiency of the process."). *Cf. id.* (noting that investors too might prefer arbitration as a fast and efficient means of dispute resolution). Some critics of predispute arbitration agreements between individuals and organizations erroneously conflate employer-employee arbitration contracts with broker-customer agreements. *See* Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069, 1072-73 (1998). In so analogizing these disparate arrangements, critics assume that the individuals uniformly seek to avoid arbitration, while the organizations or corporations attempt to force arbitration. *See* Speidel, *supra* at 1072-74. Although these arrangements share some similarities, such as the fact that they are nonnegotiable, the presumption that individuals always seek judicial resolution does not hold true for the securities setting.

cal. Certain commentators, however, have offered convincing explanations as to why brokers prefer to resolve disputes in court.

One observer, for example, has suggested that firms distrust the SRO arbitration process due to what they perceive as "the independence of arbitrators from strict compliance with legal rules, from supervision by a trial court, and from review by an appellate court [all of which lead to] a 'runaway' panel [that] may unduly favor a claimant."[267] Another commentator has agreed, observing that arbitrators are permitted to resolve disputes by reference to equitable principles, whereas a court must strictly abide by the technical requirements of a particular rule. [268] Therefore, "[t]he unrelenting attempts by the securities firms to get the eligibility issue before the court is . . . a transparent attempt to control the ultimate outcome of the issue."[269] Yet another reason that securities brokers might want to resolve disputes in court is that, by doing so, they might deplete investors' resources.[270] If brokers can successfully get a case tied up in the court system, an investor with limited financial resocurces may be forced to either settle or withdraw the claim altogether in order to avoid the costs of a prolonged dispute.[271] Indeed, given the particular advantages brokers seek to gain through judicial resolution of their disputes with customers, construing ambiguities against the drafters, and in favor of arbitration, may be necessary in order to protect investors' interests.[272]

The strength of the *Mastrobuono* contract analysis is that it aids in discerning the parties' intent. Taken together, the three

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267. Poser, *supra* note 11, at 289.

268. *See* Harding, *supra* note 1, at 147 n.263.

269. *Id.* A Florida District Court of Appeals expounded on this explanation. It observed that:

> For its own purposes, Dean Witter chose to draft customer agreements requiring customers to submit to arbitration "any controversy." It is not surprising that, in circumstances like those presented in this case, Dean Witter would prefer the procedural and substantive advantages of a judicial forum for the prompt and dispassionate application of such legal defenses as the statute of limitations. But Dean Witter elected a different, nonjudicial forum for resolution of "any controversy" with its customers. Having provided for arbitration in its customer agreement, Dean Witter will have to trust the arbitrators to do their jobs properly.

Id., (quoting Victor v. Dean Witter Reynolds, Inc., 606 So.2d 681, 686 (Fla. Dist. Ct. App. 1992)).

270. *See* Poser, *supra* note 11, at 295.

271. *See id.*

272. *See supra* Part III.B.2. The *Sacharow* court observed that "it would be ironic and anomalous to permit parties from the securities industry, who generally derive benefits from the arbitration method they impose on their thousands of customers, to elude the comprehensive language of their own industry-drafted arbitration agreements." Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39, 50 (N.Y. 1997).

common law contract principles outlined in *Mastrobuono* provide clear and unmistakable evidence that parties to Customer Agreements intend to have arbitrators decide questions of arbitrability.

Finally, contract analysis arguably supports the conclusion that the language of the Customer Agreement itself satisfies the "clear and unmistakable" standard; thus, resorting to a consideration of Rule 10324 may be wholly unnecessary. Such an analysis closely follows the reasoning of the court in *Boone*, but it adds a stronger contract justification for the conclusion.[273] One court, for example, interpreted a Customer Agreement providing that "any and all controversies which may arise between [the parties] concerning any account, transaction, dispute or the construction, performance or breach of this or any other agreement . . . shall be determined by an arbitrator"[274] as indicating that the parties intended to arbitrate all matters.[275] Under this interpretation, the only way a dispute could be heard first by a court is if the agreement expressly excluded the particular type of claim from arbitration.[276]

B. Promoting the Federal Policy Favoring Arbitration

Permitting arbitrators to resolve arbitrability questions promotes the federal policy favoring arbitration.[277] As the Supreme Court has noted, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[278] Both the FAA and several Supreme Court decisions have reaffirmed the general policy that courts should "rigorously enforce agreements to arbitrate."[279]

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273. *See supra* notes 227-28 and accompanying text.

274. PaineWebber, Inc. v. Landay, 903 F. Supp. 193, 197 (D. Mass. 1995).

275. *See id.*; *see also* Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 121 (2d Cir. 1991) (holding that "any controversies" language is sufficiently broad to require arbitration of all arbitrability questions).

276. *See Landay*, 903 F. Supp. at 197.

277. *See supra* Part II.A (discussing the federal policy in favor of arbitration that originated with the passage of the FAA in 1925).

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

279. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985); *see* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (noting that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration"); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).

At the heart of this federal policy lies the maxim that arbitration is a fast and efficient means of dispute resolution. [280] As court dockets swell with a growing mass of litigation, arbitration is an increasingly viable, perhaps even vital, alternative. This is especially true of arbitration proceedings conducted by SROs because they offer heavily regulated and well-organized forums for dispute resolution.[281] As the Supreme Court has stated: "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."[282] If courts permitted brokers to avoid arbitration, the firmly entrenched policy favoring arbitration would be compromised.

V. CONCLUSION

Thoughtful contract analysis amply supports the conclusion that Rule 10324 clearly and unmistakably provides evidence of the parties' intent to submit all controversies arising out of securities agreements to arbitration. Contrary rulings, such as those handed down by the majority of circuits, eviscerate the well-established federal policy in favor of arbitration. These majority opinions have incorrectly interpreted and applied the Supreme Court's decisions in *First Options* and *AT&T Technologies* concerning the "clear and unmistakable" standard. They have failed to recognize the important differences between the arbitration agreements examined in those cases and the Customer Agreements analyzed in cases determining the scope of Rule 10324. Even if these reasons for resolving the circuit split in favor of the *Freel-Bybyk* model were not enough, the consequences of reaching a contrary resolution should put any doubt to rest.

Even if adherence to contract principles and the federal policy favoring arbitration alone do not conclusively support resolving the circuit split in favor to the *Freel-Bybyk* model, an examination

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280. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (upholding "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

281. *See* Poser, *supra* note 11, at 286 & n.61 (discussing how the SEC has power to oversee all activities of SROs); *see also* 15 U.S.C. § 78s (1994) (Exchange Act) (codifying the SEC's oversight power); Perry E. Wallace, Jr., *Securities Arbitration After* McMahon, Rodriguez, *and the New Rules: Can Investors' Rights Really Be Protected?*, 43 VAND. L. REV. 1199, 1205 (1990) (arguing that SRO and SEC rule changes better protect investors and help to effectuate a fast, fair, and efficient arbitration process).

282. Southland Corp. v. Keating, 465 U.S. 1, 7 (1984).

of the consequences of following the *Cogswell-Cohen* model mandates such a resolution. Under the *Cogswell-Cohen* model, securities brokers can continue to evade the very arbitration agreements they impose upon their customers by seeking judicial resolution of disputes. Permitting brokers to act in this manner creates investor uncertainty concerning the vitality of their claims against brokers; this uncertainty, in turn, may have odious ramifications in the securities markets. Adoption of the *Freel-Bybyk* model is necessary in order to combat this uncertainty, thereby protecting both the viability of the securities markets and the rights of individual investors.

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