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THE ENFORCEMENT OF ARBITRATION AGREEMENTS IN THE FEDERAL COURTS: ERIE V. TOMPKINS

David R. Kochery*

The Federal Arbitration Act\(^1\) confers irrevocability and enforceability upon written agreements for arbitration which come within its purview. But the Act contains limitations and exclusions\(^2\) with the result that there is a reasonably broad area in which the provisions of the Act will not apply,\(^3\) even though a case involving an arbitration clause happens


\(^3\) It has been held that the enforcement provisions of the Federal Arbitration Act, particularly § 3, are not circumscribed by the limitations of § 2 relating to “commerce” and “admiralty”, but that enforcement may be had of any arbitration agreement so long as the federal court has jurisdiction on grounds of diversity or otherwise. Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945); Agostini Bros. Bldg. Corp. v. United States, 142
to be in a federal court on grounds of diversity. For example, if the contract in which the arbitration clause appears does not involve either admiralty or interstate commerce, the Federal Act would not apply even though the litigation were properly brought in a federal court. Given diversity jurisdiction in a case where no federal law is involved, the question then presented is whether to apply local state law on the revocability and enforceability of arbitration agreements or to apply the federal "common law". In short, what choice of law does *Erie v. Tompkins* dictate in this situation?

The opinion has been expressed that the question of the revocability or enforceability of agreements to arbitrate is "quite remote" from the *Erie* requirement that federal courts duplicate state courts in diversity cases. The essence of this statement seems to be that "arbitration" is a matter relating to "procedure" or "remedy", and perforce *Erie v. Tompkins* requires the application in diversity cases of the federal rule (the "law of the forum") respecting the enforceability and revocability of the arbitration clause. The federal "common law" rule denies enforceability of such executory clauses and permits at-will revocability, F.2d 854 (4th Cir. 1944); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1944), overruling Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184 (D. Del. 1930); Wilson & Co. v. Fremont Cake & Meal Co., 77 F. Supp. 364 (D. Neb. 1948); Pioneer Trust & Savings Bank v. Screw Machine Products Co., 73 F. Supp. 578 (E. D. Wis. 1947). Contra: Amalgamated Ass'n, etc. v. Pennsylvania Greyhound Lines, 192 F.2d 310 (3d Cir. 1951), where the third circuit concluded that its prior broad construction of the Act in the Watkins case was inconsistent with the intention of Congress. It is submitted that this latter third circuit decision is by far the better view since the contrary notion effects the almost complete emasculation of sections 1 and 2 of the Act. The Act is an entity and the various sections should be construed together. Though leaving much to be desired, the draftsmanship of the Act is not so shabby as these cases would indicate. See Sturges and Murphy, "Arbitration Under the United States Arbitration Act," 17 Law & Contemp. Prob. 580, 598-604 (1952).

For the purposes of this article, those cases holding contrary to the opinion in Amalgamated Ass'n, etc. v. Pennsylvania Greyhound Lines, supra, will be considered as supporting a minority view.

4 304 U.S. 64 (1938).
5 Sturges and Murphy, supra note 3, at 594. This article is designed to answer some of the conclusions reached by Dean Sturges and Mr. Murphy with respect to the Erie doctrine and arbitration.

while many states have passed statutes rendering arbitration clauses irrevocable and enforceable.\(^7\)

With deference, the position which holds that “arbitration” is “procedure” under the *Erie* doctrine cannot be supported. It is submitted that this position is erroneous inasmuch as it seems to be founded on (1) reliance on somewhat irrelevant pre-*Erie* decisions; (2) reliance on dicta in post-*Erie* decisions in non-diversity cases; and (3) reliance on a misconception of the policy behind the *Erie* decision itself.\(^8\)

The issue thus joined, the following discussion seeks to justify and defend a “substantive” classification of arbitration in the federal courts in cases where the Federal Arbitration Act is not applicable and where there is no federal law involved.

**Substance v. Procedure: Pre-*Erie* Decisions**

Judges, for better or for worse, are often forced to make some distinction between “substance” and “procedure”.\(^9\) The need for making the distinction arises in attempting to administer a broader policy or purpose. These purposes may be quite varied, e.g., fairness to litigants, judicial administrative convenience, uniformity of decision (nation-wide or state-wide), etc. Where the purpose varies from case to case, it is not surprising to discover that the “substance” or “procedure” characterization also changes. A common example in this area is “burden of proof”. The burden of proving contributory negligence is procedural.

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\(^8\) This paper is not designed either as a defense of or an attack upon the *Erie* doctrine. By hedging thus, the writer escapes any necessity of attempting to cope with Professor Crosskey’s stimulating discussion. 2 Crosskey, Politics and the Constitution 912-937 (1953).

in most cases involving federal pleading\textsuperscript{10} (judicial convenience, nationwide uniformity), but it becomes substantive where local law shifts the burden from the defendant to the plaintiff\textsuperscript{11} (fairness to litigants, statewide uniformity). When the question is whether a statute is constitutional which shifts the burden of proof on the issue of contributory negligence from the plaintiff to the defendant and operates retroactively, the statute has been held procedural\textsuperscript{12} (fairness to litigants); but where a state court is hearing a case involving an action against an interstate carrier, the matter of burden of proof is labeled substantive and the federal rule is applied\textsuperscript{13} (nation-wide uniformity).

What of arbitration? "Arbitration, rightly or wrongly, has long been considered procedural.\textsuperscript{14} Heckers v. Fowler\textsuperscript{15} involved an action to recover damages for breach of covenant. While the case was pending the parties agreed to refer all the issues in dispute to a referee and requested the court to order such reference. This was done. The award of the referee was immediately entered as a judgment of the court. Defendants appealed on the ground that such a reference was beyond the power of the federal court since there was no Act of Congress which conferred such authority. In affirming the decision of the lower court the Supreme Court said:

Scope of the objection has respect to the mode of trial as substituting the report of a referee for the verdict of a jury. Circuit Courts, as well as all other Federal Courts, have authority to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States. Practice of referring pending actions is coeval with the organization of our judicial system, and the defendants do not venture the suggestion that the practice is repugnant to any act of Congress. On the contrary, . . . a trial by arbitrators, appointed by the court, with the consent of the parties, was one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as by equity . . . .\textsuperscript{16}

No one would dispute the fact that it is "procedure" when a court grants an uncontested motion to refer to arbitrators rather than to submit the issues to a jury, just as no one would dispute the fact that a particular system of pleading facts may be "procedural" for most purposes. But

\textsuperscript{10} Fed. R. Civ. P. 8(c); Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291 (1876).
\textsuperscript{14} 5 Moore, Federal Practice 128 (2d ed. 1948).
\textsuperscript{15} 2 Wall. 123 (U.S. 1864).
\textsuperscript{16} Id. at 128.
is it procedural for all purposes when two contracting parties mutually
promise that, in case of a future dispute, all issues shall be determined
by certain arbitrators? Is the law "procedural" which provides that these
parties may freely revoke their promises? Or is it only the method of
enforcement that is procedural? In short, is there not a distinction
between (a) the law on revocability and (b) the law providing machinery
to enforce a promise? The federal courts have never made this distinction.
Whether referring to the law on revocability or to the enforcement
machinery, the federal courts have always held that arbitration is a
question of "general law", or, later, that it relates to "remedy" or
"procedure".

As stated above, the "procedure" characterization made in *Heckers v. Fowler* is defensible since that particular arbitration was under rule of
court and related to the mode or sequence of trial. Between the decision
in *Heckers v. Fowler* in 1864, and the year 1924, when *Red Cross Line v. Atlantic Fruit Co.* was decided, the Supreme Court made no determina-
tion on the characterization to be given to agreements to arbitrate. The trend in the lower federal courts, however, was to treat any and
all arbitration issues as questions of "general law" to be determined by
the law of the federal courts. This was true whether the case was in
admiralty or otherwise. Most of these cases were diversity cases, and
it is submitted that the "general law" characterization made therein
smacks strongly of the *Swift v. Tyson* decision that federal courts
sitting in diversity cases were not bound by state decision on questions
of "general law", whether of the conflict of laws, equity jurisprudence,
general commercial law, general tort law, *et al*. These early diversity
cases involved arbitration agreements and conflict of laws problems—
the latter clearly a question of "general law" under *Swift v. Tyson*.

17 264 U.S. 109 (1924).
18 Although the Court had held that arbitration agreements were freely revocable. See *Insurance Co. v. Morse*, 20 Wall. 445 (U.S. 1874). And see *The Atlanten*, 252 U.S. 313 (1920).
20 16 Pet. 1 (U.S. 1842). *Swift v. Tyson* held that, in diversity cases, questions of general
commercial law were questions of "general law." Later cases held that "general law" also
included questions of general tort law, non-statutory public policy, conflict of laws, general
equity jurisprudence, and general damages, all of which appear to relate to matters of
of trade not applicable in federal court); *Greaves v. Neal*, 57 Fed. 816 (D. Mass. 1893)
By labeling the question of arbitration one of "general law" the court was not necessarily referring to "procedure" at all.\textsuperscript{21} If the courts had intended to call it "procedure" in order to apply federal law they could have done so simply by holding that federal courts sitting in equity are not bound by the procedures of state court under the Conformity Act.\textsuperscript{22} This is particularly well borne out by the decision in \textit{Rae v. Luzerne County},\textsuperscript{23} which, belatedly (1932), applied the "general law" characterization. The action was one to recover damages for breach of contract. The defense was a plea in bar, alleging the arbitration clause barred the action. The action was one wholly at law. If the question of the revocability of arbitration agreements was truly a question of procedure, the Conformity Act would seem to have required the application of state law.\textsuperscript{24} However, the court determined that it was a question of "general law" and the decisions of the federal courts were controlling. Likewise, in a libel in admiralty, the court referred to New York decisions holding arbitration agreements enforceable, then stated:

The question here presented being one of \textit{general law}, the decisions of the Court of Appeals of the State of New York are not binding upon the federal courts. (Emphasis added.)\textsuperscript{25}

\textsuperscript{21} See Sturges and Murphy, supra note 3, at 590 and n. 19.
\textsuperscript{22} The Conformity Act, 17 Stat. 196 (1872), 28 U.S.C. § 724 (1946) provided:
That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding:
Provided, however, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.
The Conformity Act is generally thought to have been repealed by the Federal Rules of Civil Procedure. See Sibbach v. Wilson, 312 U.S. 1 (1941); 2 Moore, op. cit. supra, note 14 at 6-8.
The diversity cases cited note 19 supra, were in equity.
\textsuperscript{24} This type of "procedure" would not seem to come within any of the recognized exceptions to that Act. See Nudd v. Barrows, 91 U.S. 426 (1875) (matters of personal conduct of the judge); United States v. Reading Ry., 123 U.S. 113 (1887) (commenting on the evidence).
\textsuperscript{25} Aktieselskabet K.F.K. v. Red. Atlanten, 250 Fed. 935, 937 (2d Cir. 1918) (noting, inter alia, that the New York court had held arbitration to relate to "remedy"). The district court had held that arbitration was both a question of "general" law as well as a question of remedy, citing New York decisional law. 232 Fed. 403, 405, 406 (S.D.N.Y. 1916). On appeal to the Supreme Court [The Atlanten, 252 U.S. 313 (1919)], it appears that all the various characterizations made by the lower courts were needless since the Supreme Court held that the dispute was not referable to arbitration under the contract anyway. "... we agree that the refusal was not a 'dispute' of the kind referred to in the arbitration clause." 252 U.S. at 315.
If the question were one of "procedure" the court, sitting in admiralty, could likewise simply have stated that the Conformity Act does not apply to cases in admiralty.\(^{26}\)

It is to be noted that all the cases thus far discussed involved the question of whether the federal court should apply a state rule or the federal rule on the revocability of arbitration agreements. The general purpose in all cases was to establish nation-wide uniformity of decision. The choice was federal law, not because the question was one of "procedure" at all, but because it was a question of "general law". And "general law", in the light of *Swift v. Tyson* and the Conformity Act, seems to sound more in "substance" than in "procedure". It is submitted that these cases exemplified the general trend in diversity suits in the federal courts prior to 1924. This trend was not toward a "procedure" classification.

There were, on the other hand, federal court decisions prior to 1924 which characterized arbitration as relating to "remedy" rather than to "general law"; but they were cases in admiralty rather than diversity, and they involved either a conflict of laws characterization or a characterization for purposes of applying federal law rather than state law in admiralty.\(^{27}\) In the latter situation (admiralty), a "remedy" classification was not necessary to the result since, in order to create uniformity of decision in cases in admiralty, the federal court necessarily relies on "general" federal admiralty law, not state law.\(^{28}\) In the former class of cases (conflict of laws) the federal courts relied on a concurring opinion of Judge Cardozo in *Meacham v. Jamestown Franklin & Clearfield Ry.*,\(^{29}\) a New York decision. In this concurring opinion a "remedy" classification appeared for the first time in any court in the United States. The *Meacham* case had involved the application of Pennsylvania law to the enforcement in a New York court of an arbitration agreement appearing in a Pennsylvania contract. The majority of the court refused to enforce the arbitration agreement according to Pennsylvania law not on the

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\(^{26}\) See note 22 supra.

\(^{27}\) Atlantic Fruit Co. v. Red Cross Line, 5 F.2d 218, 219 (2d Cir. 1924); The Eros, 241 Fed. 186 (E.D.N.Y. 1916), aff'd, 251 Fed. 45 (2d Cir. 1918); United States Asphalt Refining Co. v. Trinidad Lake Petrol. Co., 222 Fed. 1006, 1011 (S.D.N.Y. 1915).

\(^{28}\) Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1926); Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); The Loccawana, 21 Wall. 558 (U.S. 1874); The Betsey, 3 Dall. 6 (U.S. 1794). And, more recently, Levinson v. Deupree, 345 U.S. 648 (1953); Seas Shipping Co. v. Sieracki, 328 U.S. 88 (1945); Hawn v. Pope & Talbot, Inc., 198 F.2d 800 (3d Cir. 1951).

\(^{29}\) 211 N.Y. 346, 105 N.E. 653 (1914).
ground of a "remedy" classification, but on the ground of "public policy":

Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provisions of a contract which is contrary to a declared policy of our courts . . . shall be enforced as between non-residents of our jurisdiction. 30

Judge Cardozo, however, in concurring, stated:

An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. . . . Such a contract, whatever form it may assume affects in its operation the remedy alone. 31

No authority was cited in support of this statement. Indeed there was none available. And Judge Cardozo failed to distinguish between that Pennsylvania law which imposed on the parties a duty not to revoke and that Pennsylvania law which provided a method for enforcement of the right to proceed to arbitration. 32 Thus an irrevocable right in Pennsylvania became a revocable right in New York. The method provided for enforcement concededly may relate to "remedy", but it is submitted that the rights and duties established respecting revocability relate to "substance". 33 In any event, the "remedy" characterization in the Meacham case by Judge Cardozo, and in the federal cases following that opinion, involving as they did a non-diversity conflict of laws characterization, are shaky precedents when a characterization must be made in a case under federal diversity jurisdiction.

Finally, in 1924, the Supreme Court handed down its decision in Red Cross Line v. Atlantic Fruit Co. 34 There, parties to a contract had been denied an application for an order to proceed to arbitration under the New York arbitration Act in the Court of Appeals of that state, 35 and that decision was appealed to the United States Supreme Court. The question presented to the Supreme Court was whether the New York Supreme Court could enforce an arbitration clause by a general order to proceed under the New York arbitration statute notwithstanding the controversy arose within the admiralty and maritime jurisdiction of the courts of the United States. The New York Court of Appeals itself felt that such an order would be unconstitutional:

30 Id. at 351-352, 105 N.E. at 655.
31 Id. at 352, 105 N.E. at 655.
33 For further discussion of this point, see pp. 86 to 98 infra.
34 264 U.S. 109 (1924).
35 233 N.Y. 373, 135 N.E. 821 (1922).
... a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory construction, but because it thought the Federal Constitution required such action.\(^6\)

And the New York Court of Appeals was of the opinion that such application of the New York Act was unconstitutional despite its own prior characterization that the New York Arbitration Act related only to “remedy” in the leading case of Matter of Berkowitz v. Arbib & Holberg.\(^7\) However, on appeal, the Supreme Court held the New York Act constitutional. First of all, arbitration contracts are valid in admiralty courts—they just are not enforced:

The substantive right created by the agreement to submit disputes to arbitration is recognized as a perfect obligation.\(^8\)

Although none of the cases cited for this proposition mentioned anything of the sort, it is believed that the court referred to the fact that a refusal to perform an arbitration agreement created a cause of action for nominal damages.\(^9\) An award of merely nominal damages, it is submitted, is hardly a vindication of a “substantive right”, and it is unconvincing to assert that such an agreement is “recognized as a perfect obligation.” The Supreme Court stated further:

\(^6\) 264 U.S. 109 at 120 (1924).
\(^7\) 230 N.Y. 261, 130 N.E. 288 (1921). The constitutionality of the New York Act was upheld. The Act had been attacked because of its retroactive application. Whereas, in the Meacham case, supra note 29, Judge Cardozo had been the only member of the court to label arbitration as “remedy,” he had by now convinced all his colleagues that his was the correct characterization. Since the Act related only to remedy, the retroactive application was constitutional:

The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies... The rule to be applied is the rule of the forum [citing his own concurring opinion in the Meacham case]. Both in this court and elsewhere the law has been so declared [relying on his own former concurring opinion and on two federal cases which in turn relied on his concurring opinion]. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences may be settled. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing. 230 N.Y. at 270, 130 N.E. at 289, 290.

By assuming that promises to arbitrate were already enforceable in New York (by awarding nominal damages) the court obviously felt that the Act merely created a new way of enforcing them. Thus was a “remedy” characterization made for the purpose of declaring constitutional retroactive legislation. The precedents relied upon had made the characterization for the purpose of conflict of laws. In labeling arbitration “remedy” for any and all purposes Judge Cardozo would seem to be violating his own counsel against “the extension of a maxim or a definition with relentless disregard of the consequences to a 'dryly logical extreme'.” Hynes v. N.Y. Cent. R.R. 231 N.Y. 229, 235, 131 N.E. 989, 900 (1921) [quoting from Found, "Mechanical Jurisprudence," 8 Col. L. Rev. 605, 608 (1906)].

\(^8\) 264 U.S. at 123.
The arbitration law [i.e., the New York Act] deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to modify the substantive maritime law or to deal with the remedy in the courts of admiralty.\footnote{264 U.S. at 124.}

The transformation of a revocable right (in a federal admiralty court) to one that is irrevocable (in a New York court) clearly seems to go to substance rather than merely to remedy. Thus the Supreme Court should have declared the New York Act unconstitutional as applied to cases in admiralty, just as the New York Court of Appeals had done.\footnote{See note 35 supra.} The Court's characterization of the New York Act as one relating to "remedy" was the result of Judge Cardozo's prior characterization of the same Act.\footnote{See note 37 supra.} The Supreme Court's reliance on Judge Cardozo's characterization is particularly questionable when it is considered that the characterization made by Cardozo was for an entirely different purpose (retroactive legislation) than the purpose involved in the \textit{Red Cross Line} case. And, notwithstanding the opinion of the Court, this decision must be deemed to interfere with the "uniformity doctrine" as established by the Supreme Court itself in admiralty.\footnote{In suits under the admiralty "saving to suitors" clause, the desirability of nation-wide uniformity generally requires the application of "general federal law." See cases cited note 28 supra.}

Thus, for the first time, the Supreme Court determined that arbitration referred wholly to "remedy". Only one other time has the Court been faced with the problem of making the characterization. In \textit{Marine Transit Corp. v. Dreyfus}\footnote{284 U.S. 263 (1932).} the question before the court was the constitutionality of the Federal Arbitration Act. It was contended that the Act was invalid as extending the federal judicial power in admiralty in violation of Article III of the Constitution. More narrowly defined, the sole question before the court was as follows: since, prior to the Act, an admiralty court did not have the power to grant an injunction or any other equitable relief,\footnote{\textit{Red Cross Line v. Atlantic Fruit Co.}, 264 U.S. 109, 123 (1924) (citing cases).} were the enforcement provisions of the Act (Section 4 in this case) which gave the court that power for the first time constitutional? The Court's answer was in the affirmative, as it should have been. It is submitted that the new power which the Act gave to an admiralty court is purely a new remedy, or procedure, and therefore the following language of the Court cannot be disputed:

\begin{quote}
The general power of the Congress to provide remedies in matters falling
\end{quote}
within the admiralty jurisdiction of the federal courts, is indisputable. . . . It is well established that the Congress, in providing appropriate means to enforce obligations cognizable in admiralty, may draw upon other systems. . . .

Note that the decision does not hold that Section 2 of the Act, making arbitration agreements irrevocable, is "procedural" or "remedial". The Court only refers to the enforcement provisions of Section 4.

The Supreme Court has never yet determined whether a provision of a state statute or local common law relating only to the revocability of arbitration agreements is "procedural" or "substantive" in a case arising under diversity jurisdiction. What effect has the Supreme Court's "remedy" classifications of arbitration had on non-admiralty diversity cases in the lower federal courts? As stated above, every diversity case decided prior to the decision of the Supreme Court in the Red Cross Line case (1924) characterized arbitration as relating to a question of "general law" and thus applied the federal rule on revocability and enforceability. To repeat, such characterization seems to smack more of substance than of procedure. All pre-1924 federal decisions characterizing arbitration as "remedy" were non-diversity cases. Between 1924 and 1938, when Erie v. Tompkins was decided, only one court of appeals has spoken on the problem—the Court of Appeals for the Ninth Circuit—and two district courts. All these cases were under diversity jurisdiction, but in only one of them was federal law applied on the ground of a "procedure" characterization of arbitration. That case was California Prune & Apricot Growers Ass'n v. Catz American Co. where the court relied heavily on the decision of the New York court in the Berkowitz case and characterized the arbitration clause involved as relating to "procedure". In denying petitioner's request for an order to proceed to arbitration under the California Arbitration Act, the court said:

The [agreement for arbitration] . . . was merely a method of procedure adopted by the parties for settlement of controversies arising thereunder, without litigation.

Once the problem was classified as "remedial", and since the suit was in equity, the court then was free to refuse to apply state statutory law under the then-established doctrine of Pusey & Jones Co. v. Hanssen. Thus the court declared:

47 304 U.S. 64 (1938).
48 60 F.2d 788 (9th Cir. 1932).
49 See note 37 supra.
50 60 F.2d at 790.
51 261 U.S. 491 (1923) (state law cannot enlarge the equity jurisdiction of a federal
The law that governs in the matter of remedy is the law of the forum and no other. The courts are without jurisdiction or power to enforce a purely remedial or procedural state law.\(^{52}\)

It is worthy of note that a prior Ninth Circuit opinion had applied the California Act (by granting a stay of proceedings pending arbitration) but without discussion of the procedure-substance problem.\(^{53}\)

Other than the Ninth Circuit cases mentioned above only two other cases, both in district courts, have passed on the problem of classifying arbitration clauses in diversity cases. In both cases the federal rule of revocability was applied, but in neither case was the decision grounded on a "remedy" classification. In *Lappe v. Wilcox*\(^{54}\) the grounds for refusing to apply state law were (a) that the New York Arbitration Act could not deprive non-residents of recourse to the New York federal courts and (b) that the provisions of the New York Act do not mention that they are to be applied by any other than the New York courts. In *Rae v. Luzerne County*\(^{55}\) the federal rule was applied on the ground that the arbitration clause related to a question of "general law" which, as has been stated herein, is not necessarily the same as "procedure".

A review of federal court decisions (and the New York decision relied on so heavily) which have classified arbitration as "remedy" or "procedure" prior to 1938 discloses that the classifications have been for the following varied purposes:

1. For the purpose of the conflict of laws (three cases).
2. For the purpose of giving retroactive effect to legislation (one case).
3. For the purpose of declaring a state law constitutional as not infringing upon federal admiralty jurisdiction (one case).
4. For the purpose of declaring a federal statute constitutional as not extending the judicial power of the United States under the Constitution (one case).
5. For the purpose of diversity jurisdiction (one case).
6. For the purpose of applying general admiralty law (two cases).

It is to be noted that, with but one exception, all diversity cases prior to *Erie v. Tompkins* had characterized arbitration as relating to "general law", not to "remedy" or "procedure". It is submitted that a "remedy" classification was properly made only in the case coming under (4), above, since in that case (*Dreyfus*) the Court was referring only to the machinery for the enforcement of rights, and was not referring to the court. Herein, a state statute had given the chancellor power to appoint a receiver on request of an unsecured corporation creditor). See note 102 infra.

\(^{52}\) 60 F.2d at 793.

\(^{53}\) Pacific Indemnity Co. v. Ins. Co. of North America, 25 F.2d 390 (9th Cir. 1928).

\(^{54}\) 14 F.2d 861 (N.D.N.Y. 1926).

\(^{55}\) 58 F.2d 829 (N.D. Pa. 1932). See note 23 supra.
revocable or irrevocable rights themselves. Where a "remedy" characterization was used in the remaining sub-headings above, the characterization was erroneous. In those cases the courts failed to distinguish between (1) the right to revoke, or the right to be free from revocation, and (2) the method of enforcing a right.

The Supreme Court has never yet, either before or after *Erie v. Tompkins*, made a characterization of arbitration in a case arising under the diversity jurisdiction. How have the lower federal courts handled the problem since the *Erie* decision?

**Arbitration and *Erie v. Tompkins***

Some of the arbitration cases after *Erie v. Tompkins*, though involving diversity jurisdiction, also involved an arbitration agreement in a contract involving admiralty or commerce so that the enforcement provisions of the Federal Arbitration Act would automatically apply. Cases in this category which might have labeled arbitration as a matter of "remedy", to be governed by the law of the forum, must be deemed to have done so gratuitously.\(^{66}\) The "law of the forum" should be applied anyway—not because it was a matter of "remedy", but because Congress had occupied the field. In the federal cases where the Federal Act admittedly was not applicable, because the contract did not involve either admiralty or commerce, substantial difficulty is encountered in attempting to determine on what grounds federal jurisdiction is based. The cases simply do not make it clear. The reason for the difficulty is that, since 1938, many of the arbitration cases involve a recovery sought under one or more of various federal acts—e.g., FLSA, LMRA, etc.\(^{67}\) The courts neglect to say whether jurisdiction is based on diversity or the federal question. However that may be, even if a federal question case also contains diversity of citizenship, it seems clear that federal courts are not bound to apply local substantive law under the *Erie* doctrine. The desire for nation-wide uniformity of decision under the particular federal statute involved is paramount to the desire for conformity which would ordinarily be required by *Erie*.\(^{68}\) Thus, where a case involves an

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\(^{66}\) The following cases seem to fall within this category: Hudson Lumber Co. v. U.S. Plywood Corp., 181 F.2d 927 (9th Cir. 1950); Murray Oil Co. v. Mitsui & Co., 146 F.2d 381 (2d Cir. 1944); Parry v. Bache, 123 F.2d 493 (5th Cir. 1942); Wilson & Co. v. Fremont, 77 F. Supp. 364 (D. Neb. 1948).

\(^{67}\) See Wilko v. Swan, 201 F.2d 439 (2d Cir. 1953) (Securities Act); Int. Union United Furn. Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948) (LMRA); Gatlliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944) (FLSA); Agostini Bldg. Corp. v. United States, 142 F.2d 854 (4th Cir. 1944) (Miller Act); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943) (FLSA).

arbitration clause which does not comply with the Federal Arbitration Act, and the action is based on another federal statute, the presence or absence of diversity should make no difference—the federal rule, whether one labels it substantive or procedural, should govern the case. Therefore, any statement in such cases relating arbitration to "remedy" or "procedure" are, again, pure superfluity.  

There are very few cases involving arbitration since Erie where federal jurisdiction seems truly to have been based solely on diversity. At least two of those cases are somewhat less than conclusive authority inasmuch as they involved the confirmation of an arbitration award already rendered in the state. They did not involve the question of the revocability of the arbitration agreement prior to the award. In the first case, Tejas Development Co. v. McGough Bros., the Fifth Circuit held that the validity of the award should be tested according to the law of the State of Texas, since it involved a question of substance. The court also used some other language, however, which may indicate a trend in that circuit:

[The questions are] the validity of the award and the binding effect of the agreement to arbitrate, both of which are matters of State substantive law, since contract and arbitrament arose under state law. . . . so the effect of their general agreement to arbitrate, their submissions of the particular disputes, and the awards, stand under the common law as generally applied in the United States, with special reference to the decisions in Texas. (Emphasis added.)

The causes for attacking the validity of the award, as the Texas court held, should be state causes, not federal. This kind of case involves a contest between a state court and a federal court so that even the most enthusiastic supporters of the non-Erie character of arbitration should agree with the result. The same question was presented in United Fuel Gas Co. v. Columbian Fuel Corp. There, again, the question presented to the court was the confirmation of an award which had already been based on diversity, but federal "common law" is applied to determine how far a patentee may go in price-fixing). See note 59 infra.

59 The following cases seem to fall within this category: Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944) (apparently applying Kentucky law despite its reference to "remedy," 142 F.2d at 881); Boston & Maine R.R. v. Amalgamated Ass'n, etc. of America, 106 F. Supp. 334 (D. Mass. 1952); Voutrey v. General Baking Co., 39 F. Supp. 974 (E.D. Pa. 1941).

See Motor Terminals v. National Car Co., 92 F. Supp. 155, 162 (D. Del. 1949) where the Federal Act is not mentioned, and it is difficult to tell whether the court applies federal or state law when refusing to honor the arbitration clause.

60 165 F.2d 276 (5th Cir. 1947).


62 As indeed they do. See Sturges and Murphy, supra note 3, at 594 n. 32.

63 165 F.2d 746 (4th Cir. 1948).
rendered in a state arbitral proceeding according to the agreement of the parties. The agreement provided that the award was to be enforced according to the provisions of the West Virginia Arbitration Act. After stating that a federal court had power to enforce an award in equity, the court confirmed the award, citing West Virginia decisions.

The cases discussed above are somewhat irrelevant to the question at hand inasmuch as they involve the enforcement of an award rather than the enforcement of the executory agreement itself. On the other hand, in two district court cases since the *Erie* decision, the question of the revocability of arbitration agreements has been held to be "procedural" under diversity jurisdiction. In *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, the plaintiff sued for damages resulting from defendant's alleged breach of a contract for the sale and delivery of soybean oil. Federal jurisdiction was grounded on diversity. In granting defendant's motion to stay the action pending arbitration as provided in the contract, the district court discussed the applicability of the Federal Arbitration Act. To plaintiff's argument that the arbitration agreement was not in a contract evidencing "a transaction involving commerce" the court held:

> Appraising the contract in its entirety, the court is of the opinion that it does evidence "a transaction involving commerce." And if that view be correct the plaintiff's negation of the applicability of Title 9 U.S.C.A. § 3 necessarily fails.65

As stated previously, if the contract does involve commerce and the action is in the federal court on grounds of diversity or otherwise, then there arises no question of the choice of law. The federal law applies because Congress has occupied the field.66 But the court in the *Wilson & Co.* case went further. Even if the contract in question did not evidence "a transaction involving commerce" within Section 2 of the Act, still Section 3 of the Act is not thereby limited in its operation. After discussing prior authorities, the court concluded:

> Considering the several reported opinions upon the issue, and especially the statute itself, this court, by way of conclusion, is inclined to the opinion that the stay provisions of Section 3 are not limited to cases resting upon maritime transactions or upon contracts evidencing transaction involving commerce.67

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65 Id. at 374.
66 Text supported by note 56 supra and note 67 infra.
67 77 F. Supp. at 379.

Where jurisdiction is based on a right under a federal law, it is generally considered that uniformity of decision on a nation-wide basis is desirable. This uniformity should go, not
Thereupon the court determined that the local state law on agreements to arbitrate was inapplicable since "the issue is one of procedure":

To the contention that the laws of Nebraska upon the subject of agreements to arbitrate already concluded, the parties have agreed upon arbitration and the case is one in which Title 9 U.S.C.A. § 3 applies, then the issue is one of procedure, not of substantive right, and Nebraska's laws are neither controlling nor even instructive. 68

The court's conclusion that Section 3 of the Act is not limited by Section 2 is of doubtful validity. 69 But, assuming the court was correct on that point, the additional conclusion that Section 3 applies regardless of state law on the validity or revocability of the arbitration agreement is of questionable merit. Such a conclusion has the result of conferring upon Congress the power to regulate purely intrastate agreements by declaring that they are irrevocable. Whether Congress has the power to legislate upon the validity of contracts generally is highly doubtful. 70

Since 1938, only one other district court, sitting in diversity, has classified arbitration as relating to "procedure" and has applied the federal law on revocability and enforceability. In Pioneer Trust & Savings Bank v. Screw Machine Products Co., 71 plaintiff sued to recover minimum royalty payments pursuant to a license agreement. The action was brought in a Wisconsin district court. Plaintiff was an Illinois corporation; defendant was a Wisconsin corporation. Even under the patent laws an action for royalties will not ground federal jurisdiction, 72 therefore it must be assumed that the action was brought under diversity jurisdiction. It is not made clear whether the contract evidenced "a transaction involving commerce" within the Federal Arbitration Act, but the court indicated that Section 3 of the Act would apply anyway, 73 and

only to the interpretation of the particular statute involved, but also to the closing in of gaps by interstitial decision. Thus federal law is applied, not state law. See Dice v. Akron, C. & Y. R. R., 342 U.S. 359 (1952) (validity of a release under F.E.L.A. to be determined by federal law); Urie v. Thompson, 337 U.S. 163 (1949) (negligence under F.E.L.A. to be determined by federal law); MacGregor v. Westinghouse Electric & Mfg. Co., 329 U.S. 402 (1947) (price fixing covenant in a patent contract not subject to state law of estoppel or severability but to federal law under the Clayton Act); N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944) (the meaning of "employee" as used in N.L.R.A. to be determined by federal, not state, law).

68 Ibid.
69 See note 3 supra.
70 See text supported by notes 97-99 infra.
71 73 F. Supp. 578 (E.D. Wis. 1947).
the motion to stay the action pending arbitration was granted. Plaintiff argued that the district court should apply Illinois law on agreements to arbitrate since the contract provided that "this contract shall be interpreted under the laws of the State of Illinois," and Illinois holds executory agreements to arbitrate invalid. But the district court applied federal law since arbitration agreements relate to the law of remedies:

This court is not required to apply the law of Illinois as to arbitration. Arbitration agreements relate to the law of remedies and their enforcement is a question of remedy to be determined by the law of the forum.

Questions of the conflict of laws are "substantive" as to non-federal matters under Erie; but the court in the Pioneer case made no reference at all to the conflicts rule on arbitration of the state of Wisconsin, where the court was sitting. And, as in the Wilson & Co. case, the court is conferring upon Congress a power to legislate upon the validity of contracts generally, a power generally thought to be within the domain of the states.

Prior to the decision in Erie v. Tompkins, when nation-wide uniformity of decision was the vogue, diversity cases involving agreements to arbitrate classified those agreements as relating to "general law" and the federal rule was applied. Subsequent to the Erie decision the two diversity cases discussed above employed a "remedy" classification and continued to apply the federal rule. Thus, under the "remedy" label, uniformity of decision in arbitration cases continues despite the Erie decision and its emphasis on conformity.

What is the policy behind the Rules of Decision Act as interpreted by Erie v. Tompkins? That policy is deemed to be as follows:

There are many difficulties in allocating authority between two sovereign and largely competitive judicial systems operating within the same national framework. In order to attempt to balance the conflicts between state's rights and federal power it is thought that a federal court should choose and apply the state's substantive law in a case which could just as easily have been tried in a state court except for the facts of diversity of citizenship of the parties. And one facet of the whole problem is the determination of what is substantive and what is

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74 73 F. Supp. at 580.
75 Ibid.
77 See notes 19-27 supra.
procedural. Since the state "laws" which were to govern cases in federal courts were not defined by the Rules of Decision Act, *Swift v. Tyson* had undertaken to define those "laws" for the federal courts sitting in diversity cases. That case confined the state "laws" which must be applied in diversity cases to the constitutions, statutes, and decisions of state courts interpreting them; and to those other state decisions relating to "matters immovable and intraterritorial in their nature and character." The result of that decision was to leave the federal courts free to apply a federal "general law" to a vast area of cases, resulting in a substantial nation-wide uniformity of decision. Whether because of various unfortunate decisions resulting from a too-rigid application of *Swift v. Tyson*, or because of some belief that *Swift v. Tyson* involved an unconstitutional assumption of power by the federal courts, it became generally felt that the rule of that case was not carrying out the general purpose and policy intended, viz., the balancing of the conflicting interests between state's rights and federal powers and between two sovereign judicial systems. Thus, in *Erie v. Tompkins*, the Supreme Court disapproved *Swift v. Tyson*’s application of the Rules of Decision Act, and began a new era the general goal of which in diversity cases was state-wide uniformity of decision rather than nation-wide uniformity. *Erie* thus determined that, in diversity cases, federal courts were bound to apply all state rules of substantive law as to non-federal matters. *Swift v. Tyson* was held to be historically unsound, impolitic, and an unconstitutional assumption of power by the courts of the United States. But further:

... [*Erie*] did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been lain bare. ... a federal court adjudicating a state-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the State. ... *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. ... The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of


80 16 Pet. 1 (U.S. 1842).

81 Holmes, dissenting in the Black & White Taxicab Co. v. Yellow & Brown Taxicab Co. case, 276 U.S. at 532.
in a State court a block away, should not lead to a substantially different result.\textsuperscript{82}

Whatever may have been, or may be, a particular classification in terms of substance or procedure for other purposes, it is “substantive” under the \textit{Erie} doctrine whenever its application will prevent a “substantially different result” from that which might have been reached by a state court had the suit been litigated there. Matters of “remedy” and matters of “substance” are mere “abstractions” until measured against the purpose of the \textit{Erie} decision. Further:

...the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.\textsuperscript{83}

So much for the general policy behind \textit{Erie v. Tompkins}. It may be noted, in passing, that the year 1938, when \textit{Erie} was decided, was also the year of the adoption of the Federal Rules of Civil Procedure,\textsuperscript{84} which effected the substantial repeal of the Conformity Act.\textsuperscript{85} How should a question involving the revocability or enforceability of an agreement to arbitrate fit into this new era? Assume an action for breach of contract pending in a federal court with jurisdiction based on diversity of citizenship, with no federal law involved, and where there is an arbitration clause which does not fall within the Federal Act. Assume also, that had the case been tried in the state court, the arbitration clause would not be enforced and would not be pleadable in bar under state law, and, that the federal rule is that the federal court will grant an injunction of the legal action for damages pending arbitration and will specifically enforce the arbitration agreement. Which law should the federal court apply to the case? The answer must necessarily be “state law” under the doctrine of the \textit{Erie} case as that doctrine has been developed by \textit{Guaranty Trust Co. v. York}\textsuperscript{86} and \textit{Angel v. Bullington}.\textsuperscript{87} This must be so because otherwise the outcome of the litigation in the federal court might be “substantially different” from the outcome in the state court. First, the case in the federal court would result in a \textit{refusal to try} any of the matters referable to arbitration under the contract. The result in the state court

\begin{itemize}
  \item \textsuperscript{83} Id. at 109.
  \item \textsuperscript{84} The \textit{Erie} case was decided April 25, 1938. The Federal Rules were promulgated in December, 1937, and became effective September 16, 1938.
  \item \textsuperscript{85} See note 22 supra.
  \item \textsuperscript{86} See note 82 supra.
  \item \textsuperscript{87} 330 U.S. 183 (1947).
\end{itemize}
would be to try all those matters in defiance of the agreement to arbitrate. Second, the referable issues in the federal court's lawsuit would be tried and determined by arbitrators in utter disregard of legal rules as those rules may determine the outcome of a dispute. In the state court, the court would try and would determine all those issues in strict compliance with those legal rules, including burden of proof, res judicata, competency of witnesses, admissibility of testimony, sufficiency of evidence, and others. Burden of proof, competency of witnesses, and admissibility of testimony are deemed so important in non-arbitration cases that they are held to be "substantive" under Erie to avoid a "substantially different result." A federal court order to proceed to arbitration would directly result in an ultimate judgment based on the non-application of these legal rules, whereas the local state court would have applied them. If, in a non-arbitration case, it is thought that an application of a different legal rule on burden of proof, et al., than the state court would have applied might bring about a different result, then, a fortiori, an order resulting in the failure to apply any rule at all on burden of proof, et al., would bring about a different result. And this is what would occur in the type of case posed above. The same reasoning would seem to apply if the situation were reversed, i.e., if the state law made arbitration agreements irrevocable, but the federal law did not. In such case it would be the federal court which would try all the issues and apply all applicable rules, whereas in the state action those issues would have been tried by arbitrators without applying any legal rules. It is submitted that the language of Justice Frankfurter in the Guaranty Trust case, last quoted above, could be rephrased without taking any liberties with its spirit or intent as follows (new matter in brackets):

... the [ultimate] outcome of the litigation [begun] in the federal court should be substantially the same, so far as [the application or non-application of] legal rules determine the outcome of a litigation, as it would be if [begun or] tried in a state court.

The opinion has been expressed that the question of the revocability or enforceability of agreements to arbitrate is "quite remote" from the Erie requirement that federal courts duplicate state courts in diversity cases.

88 "The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of law." Pacific Indemnity Co. v. Ins. Co., 25 F.2d 930, 931 (9th Cir. 1928).
89 Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Palmer v. Hoffman, 318 U.S. 109 (1943); Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940); Wright v. Wilson, 154 F.2d 616 (3d Cir. 1946).
91 Sturges and Murphy, supra note 3, at 594.
That position seems to be based on the fact that, once enforceability of the arbitration agreement is determined, the issues will not be adjudicated by any court, but by the arbitrators; and that the *Erie* doctrine envisions only litigations in a *court*, where "legal rules" of some kind will be applied. With deference, this position cannot be supported. The conflicting state-federal interests sought to be resolved by the Rules of Decision Act and its *Erie* interpretation cannot be reduced to a mere "state court v. federal court" rivalry in the manner stated. Rather, those interests involve far broader conflicts: state's rights v. federal power; a policy of uniformity v. a policy of conformity; fairness to litigants v. unfairness to litigants. The mere fact that particular matters in dispute are to be determined by arbitrators rather than in a "court" is not decisive. "Results" and "outcomes" of litigations are what concern the policy-orientation behind the *Erie* decision. And, if you wish, those results and outcomes in arbitration cases will finally find their enforcement in a "court" of one kind or another, either by a trial or by the enforcement of an award rendered by arbitrators.

Classifying the matter of the enforceability of arbitration agreement as "substantive" for purposes of *Erie* is not inconsistent with the Supreme Court's "remedy" classification in the *Red Cross Line* and *Dreyfus* cases. First of all, those decisions did not involve a diversity problem; rather, they involved a question of the constitutionality of statutes. Secondly, whereas those cases based their classification in heavy reliance on the New York decisions in the *Meacham* and *Berkowitz* cases, federal courts are not bound by such state classifications under the *Erie* doctrine. Finally, what may be "remedy" or "procedure" for other purposes has often been held "substance" for purposes of *Erie*. Witness, for example, some of the Rules of Civil Procedure, burden of proof, competency of witnesses and admissibility of testimony.

Assuming, despite some decisions to the contrary, that the present enforcement provisions of the Federal Arbitration Act do not apply to contracts other than those involving admiralty or commerce, could the Congress validly amend the Act so as to make them applicable? The

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92 See notes 34 and 44 supra.
94 See notes 10 and 11 supra [Rule 8(c)]; Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (Rule 17(b)); Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) (Rule 23(b)).
95 See note 89 supra.
96 Ibid.
97 See cases cited note 3 supra.
position has been taken that this could be done. While it is true that Congress could validly institute a procedural machinery for the special enforcement of agreements to arbitrate (possibly this could be done even through a Supreme Court Rule), it is not quite so clear that at the same time Congress could validly render all contracts to arbitrate irrevocable and enforceable. This view would seem to ignore the fact that "arbitration" involves both a "procedure" and a "substance"—the machinery to enforce and the revocable or irrevocable right. For the Congress to declare that the right to revoke is abolished in all arbitration agreements would be to expand the Commerce Clause to the breaking point. And this is so whether one assumes that the Erie case itself involves a constitutional question or not. It is suggested that the language of Judge Parker in Agostini Bros. Bldg. Corp. v. United States is not to be taken lightly in this regard:

The Senate Committee struck the word "contract" from the section [of the Federal Act] and rewrote the language in its present form, so as to cover only maritime transactions and transactions involving interstate and foreign commerce. . . . This was evidently done because it was realized that Congress had no power to legislate with respect to the validity of contracts generally but only as to the validity of those which related to matters subject to its control.

Thus, it would seem that special enforcement provisions might be enacted by Congress to enforce all arbitration agreements in the federal courts, provided, however, that such enforcement applies only to those non-admiralty and non-commerce agreements which would be enforceable under applicable state law.

Assuming that there is at present no special procedural law relating to arbitration agreements which do not comply with the Act, how would a federal court, in a diversity suit, enforce the agreement in light of the position herein taken that the matter of revocability is one of "substance" under Erie v. Tompkins? Since federal district courts today are required to follow the Federal Rules of Civil Procedure they could not very well apply the state's enforcement machinery. But the federal court could come to the same result as the state court by use of its general equity power. Thus the federal court could stay an action or an arbitration proceeding by injunction; and it could issue a general order to proceed to arbitration or could appoint arbitrators by issuing a decree of specific performance. If the state enforcement statute provides (as they

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98 Sturges and Murphy, supra note 3, at 584-598.
99 142 F.2d 854, 856 (4th Cir. 1944). And see, to similar effect, Judge Goodrich in Donahue v. Susquehanna Collieries Co., 138 F.2d 3, 5 (3d Cir. 1943).
generally do) for a jury trial on the issue of the "making of the contract", the federal court probably could not comply with that provision since the effect thereof would be state-extension of federal equity jurisdiction in violation of Article III of the Federal Constitution. But that is small loss to the parties since trial by jury in such a case is not a constitutional right anyway. The former reluctance by the federal courts to enforce state statutory rights in equity is deemed to have been swept away by *Erie* and the adoption of the Federal Rules.

We have been told, in *Angel v. Bullington*, that a federal court in a diversity case cannot in a non-federal matter give that which the state has withheld. The converse must also be true in order to carry out the "nub of the policy that underlies *Erie v. Tompkins*," viz., that which a state gives a federal court cannot withhold, unless Congress has validly restricted its power to do so. Therefore, if the state court would enforce an agreement to arbitrate by granting relief akin to equitable relief, then the federal court sitting in such a non-federal diversity case is required to do the same. The essence of diversity jurisdiction is that federal court enforces both state law and state policy. And this can only be done, in respect to revocability of arbitration agreements, if the federal court conforms to applicable state law on the matter.

The Supreme Court's recent decision in *Transcontinental & Western Air, Inc. v. Koppal*, may conceivably represent a trend toward the application of state law in this field. The case involved an action by an employee for wrongful discharge under a collective bargaining agreement. The jurisdiction of the district court rested on diversity of citizenship and an adequate amount in controversy.

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100 Mississippi Mills v. Cohn, 150 U.S. 202 (1893); McConihy v. Wright, 121 U.S. 201 (1887).
107 345 U.S. 656 n. 1.
agreement provided that no employee shall be discharged without a fair hearing before a designated hearing officer of the company, followed by an appeal to the company's chief operating officer, and, if necessary, to the system board of adjustment "or, by mutual agreement, to arbitration." The court did not discuss whether arbitration was substantive or procedural under the Erie doctrine, although the Court did state that "the substantive law of Missouri should determine the requirements of the cause of action, the interpretation of the contract and the measure of damages to be applied." Since the plaintiff-employee had not exhausted his contractual remedies, described above, under the collective agreement, and since the law of Missouri required that "an employee must exhaust his administrative remedies under his contract of employment in order to sustain his cause of action in such a case," it was held that plaintiff had not satisfied the requirements of his cause of action:

Where the applicable law permits his [plaintiff's] recovery without showing his prior exhaustion of his administrative remedies, he may so recover. . . . On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so.

In a previous decision, Moore v. Illinois Central R.R., the Court had stated that there was no need to exhaust the administrative remedies in a collective agreement entered into in Mississippi. The Court in the Moore case did not refer to Mississippi law, but the later decision in the Transcontinental case announced that Mississippi law had been applied in the prior case.

Although a collective agreement has been described as a form of legislation, rather than contract, the Court in the Transcontinental case treated the cause of action as one based upon contract. Since one of the "remedies" provided in the contract was a reference to arbitration, it may well be contended that the Court, in diversity cases, will apply the state law on irrevocability or revocability of arbitration clauses by in-

108 345 U.S. at 659.
109 Id. at 656, 657.
110 Id. at 657, discussing Missouri authorities.
111 Id. at 661.
112 312 U.S. 630 (1941), note 107 supra.
113 345 U.S. 661, n. 4.
115 "... unlawful discharge in violation of a contract, made in Missouri, to be performed in Missouri and agreed by the parties to be a "Missouri contract"" 345 U.S. at 656.
direction—viz., by applying the state law on "exhaustion of administrative remedies." There is nothing in the opinion of the Supreme Court indicating that the decision was affected either by the presence of the collective agreement or by the Railway Labor Act. By applying the state law on "exhaustion of remedies" a federal court is enabled to avoid making an express substantive-procedural classification of arbitration; and the arbitration clause of the contract is treated no differently from any other contract term, the necessity of compliance with which is determined by the applicable state law. Necessarily, however, the very application of state law on "exhaustion of remedies" where there is an arbitration clause has the effect of characterizing arbitration as relating to substance. Indeed the Court in the Transcontinental case may be deemed to have made such a characterization unconsciously when it stated that "the substantive law of Missouri should determine the requirements of the cause of action."116

The net effect of the decision was to apply state law on the revocability or irrevocability of agreements to arbitrate; but it does not reach the question of whether a federal court would enforce an arbitration clause according to state law. A Supreme Court decision on the latter point would be of great interest inasmuch as the Court would then be faced squarely with the problem of making an express characterization of arbitration under Erie v. Tompkins.

CONCLUSION

It has been advocated herein that the federal courts should realign themselves and re-classify the question of the revocability of agreements to arbitrate as one of "substance". With deference it is urged that the Red Cross Line case should be re-examined insofar as it held that all elements of "arbitration" are "remedial". The Dreyfus case, on the other hand, is defensible on the ground that its classification of "remedy" related only to the enforcement of rights—the conferring of the power to grant specific performance on admiralty courts. Cases in the lower federal courts which have followed those Supreme Court decisions have recklessly made a "remedy" classification for all purposes, and—especially in the conflict of laws cases—with quite gruesome results.

Unless the Transcontinental case, discussed above, is deemed to be an exception, it still remains that the Supreme Court, in diversity cases, has made no pronouncement on the proper Erie characterization to be conferred upon arbitration where no federal law is involved. Not only is the field for decision clear; the policy behind Erie should also make the ultimate determination clear, viz., the right to revoke or not to revoke a promise to arbitrate relates to "substance".

116 345 U.S. at 657.