No. 01-800

In the Supreme Court of the United States

KAREN HOWSAM, ETC., PETITIONER

v.

DEAN WITTER REYNOLDS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Petitioner and respondent have agreed to arbitrate "all controversies * * * concerning or arising from" petitioner's securities accounts with respondent, including "the construction, performance or breach of this or any other agreement between us." The arbitration agreement makes applicable the rules of the arbitral forum selected by petitioner, the National Association of Securities Dealers, Inc. (NASD). The NASD rules provide, among other things, that the "arbitrators shall be empowered to interpret and determine the applicability of all" the rules. The question presented is whether the arbitrator, rather than a court, is to decide whether petitioner's claims are barred by the NASD rule that no claim is "eligible for submission to arbitration" by the NASD if more than six years "have elapsed from the occurrence or event giving rise to the" claim.

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

Under Section 19 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78s, the Securities and Exchange Commission (SEC) oversees and approves the rules of the National Association of Securities Dealers, Inc. (NASD), and other securities industry self-regulatory organizations (SROs), such as the New York Stock Exchange (NYSE) and the American Stock Exchange (AMEX), to ensure that the rules adequately protect the rights of customers. See *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 233-234 (1987). The SEC has a substantial interest in ensuring that SRO rules governing the arbitration of customer disputes are interpreted correctly, so that arbitration is fair and not unnecessarily complex, time consuming or expensive.[1]

[1] The NASD is registered with the SEC as a national securities association under Section 15A of the Exchange Act, 15 U.S.C. 78*o*-3. It is

The question presented in this case is whether NASD Rule 10304, which imposes a time limit for submission of claims to arbitration by the NASD, is to be applied by the arbitrator, subject to judicial review as provided in the Federal Arbitration Act, 9 U.S.C. 1 *et seq*., or is instead to be applied by a court in advance of arbitration. The holding of the court of appeals that the rule is to be applied by a court in advance of arbitration imposes a costly and time-consuming judicial proceeding antecedent to arbitration that is not required by the SEC-approved NASD rules or by the parties' arbitration agreement. The SEC therefore has a strong interest in the correct resolution of the question presented.

STATEMENT

1. Petitioner Karen Howsam was a customer of respondent Dean Witter Reynolds, Inc., a securities broker-dealer, from the spring of 1986, when she purchased interests in four limited partnerships, until late 1994, when she closed her accounts. Pet. App. 3. In March 1997, petitioner commenced an arbitration proceeding against respondent pursuant to the arbitration clause in her customer agreement. *Id.* at 4. That agreement, which was drafted by respondent, provides in relevant part:

> The Client agrees that all controversies between the Client and Dean Witter * * * concerning or arising

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the only registered national securities association. Subject to comprehensive oversight by the SEC, the NASD is responsible for regulation of those who sell securities in the over-the-counter market. As a result of Section 15(b)(8) of the Exchange Act, 15 U.S.C. 78*o*(b)(8), broker-dealers must belong to the NASD unless they execute transactions only on a registered national exchange. In the summer of 2000, the component of the NASD that administers alternative dispute resolution was incorporated as a separate subsidiary, NASD Dispute Resolution, Inc. See <http://www.nasdadr.com/whatdr.asp#nasd_dispute>. For simplicity, this brief refers to both entities as the NASD.

> from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client, * * * or (iii) the construction, performance or breach of this or any other agreement between us * * * shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member. The Client may elect which of these arbitration forums shall hear the matter.

Access Client Services Agreement Between Karen Howsam and Dean Witter Reynolds, Inc. ¶ 19 (Aug. 26, 1992) (1992 Agreement). The agreement also provides that it "shall be construed and enforced in accordance with the laws of the State of New York without reference to choice of law doctrine." *Id.* ¶ 18.

Petitioner alleges that respondent made material misrepresentations about her investments before she purchased them and that the investments were unsuitable for someone with her investment needs. Pet. App. 4. She further alleges that respondent continued to inform her that the investments were sound, despite indications to the contrary, and that the misinformation impeded her understanding of the true nature of the investments until 1994. *Ibid.*

Petitioner initiated arbitration before the NASD by executing a Uniform Submission Agreement, as required by the NASD. Pet. App. 4. The Submission Agreement incorporates the NASD Code of Arbitration Procedure (NASD Code) by providing that the parties "hereby submit the present matter in controversy, as set forth in the attached statement of claim, * * * to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization." Uniform Submission Agreement ¶ 1 (Apr. 16, 1997) (1997 Agreement). Although only petitioner signed the 1997 Agreement, respondent's signature was unnecessary: the 1992 Agreement gave petitioner the power to select the

arbitral forum, and the 1997 Agreement was a necessary consequence of petitioner's selection of the NASD. See Pet. App. 5.

The NASD Code contains a provision entitled "Time Limitation Upon Submissions," which provides that "[n]o 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." NASD Rule 10304. Another provision of the NASD Code provides that the "arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD Code.]" NASD Rule 10324.[2]

2. Respondent filed an action in the United States District Court for the District of Colorado in which respondent requested a declaratory judgment that petitioner's

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[2] The NASD Code was renumbered in May 1996. See Norman Poser, *Making Securities Arbitration Work*, 50 SMU L. Rev. 277, 291 n.88 (1996). Current Rule 10304 was formerly Rule 15, and current Rule 10324 was formerly Rule 35. *Id.* at 291 & n.88, 334 & n.349. The SEC is considering a proposal by the NASD to revise Rules 10304 and 10324 to provide, among other things, that the NASD Director of Arbitration, rather than either a court or an arbitrator, will determine whether a claim is barred by the six-year time limit in Rule 10304. See 67 Fed. Reg. 19,464 (2002). The deadline for submission of comments on the proposed rule changes was May 10, 2002, and the SEC is currently reviewing the comments received. Although adoption of the new rules would reduce the future importance of this case, the proposed rule changes would not be retroactive, see *id.* at 19,466, and therefore they would not affect the outcome of this case. Moreover, the case would still be of some continuing significance because the proposed rules would apply only to arbitrations before the NASD and would not change rules similar to the current NASD Rule 10304 that are in effect at other SROs. See, *e.g.*, NYSE Rule 603; Pacific Exchange Rule 12.4. Although the NASD conducts about 90% of SRO arbitrations, other SROs also conduct a substantial number of arbitrations. See Securities Industry Conference on Arbitration, *Eleventh Report* 111, 113, 117, 119, 121, 125 (July 2001).

claims are untimely under NASD Rule 10304 and thus not eligible for arbitration before the NASD. Pet. App. 5-6. Respondent also sought to enjoin the arbitration pending resolution of its court action. *Id.* at 6.

Petitioner moved to dismiss respondent's district court action. Petitioner contended that the parties had agreed that the arbitrator would decide all controversies arising out of her securities accounts with respondent and the agreements concerning those accounts. Pet. App. 6. Respondent argued that compliance with NASD Rule 10304 concerns the arbitrability of the dispute, and, therefore, under this Court's precedents, the issue is for the courts to decide, unless the parties have clearly and unmistakably manifested an intent to submit the issue to the arbitrator. Furthermore, respondent contended, its agreement with petitioner does not contain a sufficiently clear and unmistakable expression of intent on that issue, so Rule 10304 should be applied by the courts. *Id.* at 6-7.

The district court ruled that the broad language of the arbitration provision, which, as noted above, provides for the arbitration of "all controversies" between the parties, including "construction" of the arbitration agreement, authorizes the arbitrator to apply the six-year rule to the facts of petitioner's claims. Pet. App. 31-36. The court therefore granted the motion to dismiss for lack of subject matter jurisdiction and entered judgment for petitioner. *Id.* at 37-38.

3. The United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court. Pet. App. 1-30. Based on its analysis of this Court's decisions in *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), as well as the Tenth Circuit's prior decision in *Cogswell* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (1996), the court of appeals concluded that the

question whether petitioner's claims are barred by the time limit in NASD Rule 10304 is an element of the arbitrability of her claims. Pet. App. 16-17. The court therefore applied the principle that the issue of arbitrability is to be decided by the courts unless the parties have clearly and unmistakably provided otherwise. *Id.* at 17 (quoting *First Options*, 514 U.S. at 944 (citing *AT&T*, 475 U.S. at 649)).

The court of appeals rejected petitioner's contention that, because the agreement contains a choice-of-law clause providing that the agreement is subject to New York law, the court was bound by the interpretation of the NASD rules and a similar arbitration clause that the New York Court of Appeals adopted in *Smith Barney Shearson Inc.* v. *Sacharow*, 91 N.Y.2d 39 (1997). Pet. App. 19-24. Instead, relying on its own prior decision in *Cogswell*, the Tenth Circuit concluded that neither the broad arbitration provision in the customer agreement nor the applicable provisions of the NASD Code clearly and unmistakably provide that the arbitrator will decide whether claims are barred by NASD Rule 10304. *Id.* at 18-19 & n.4, 24-28.

SUMMARY OF ARGUMENT

The parties' arbitration agreement, the NASD rules that it makes applicable, and the policies of the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, all indicate that the arbitrator, rather than the a court, is to decide whether petitioner's claims were filed within the time limit prescribed by NASD Rule 10304. Because arbitration is generally a matter of contract between the parties, whether the arbitrator or a court decides a particular question is determined by the parties' agreement. In ascertaining what the parties have agreed, courts generally apply ordinary principles of state contract law. Federal law, based on the Federal Arbitration Act, however, imposes some constraints.

The Federal Arbitration Act embodies a federal policy favoring enforcement of arbitration contracts and ensuring

that arbitration, when it has been selected by parties to a contract, is speedy and not subject to delay and obstruction in the courts. When arbitration agreements are subject to the Act, as the agreement in this case is, federal law generally requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration. There is, however, an exception to the presumption in favor of having the arbitrator resolve disputed issues when the issue in dispute is arbitrability itself. In that circumstance, a contrary presumption applies, and a court may conclude that the parties agreed to arbitrate arbitrability only if there is clear and unmistakable evidence that they did so. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995).

Because of that contrary presumption, a broad view of the questions encompassed within arbitrability could undermine the Federal Arbitration Act's fundamental goals of enforcing arbitration agreements and preventing delay and obstruction of arbitration proceedings in the courts. This Court has therefore been careful to construe arbitrability narrowly. The Court's decisions limit arbitrability to two questions central to whether the parties have agreed to subject themselves to the power of an arbitrator: whether the parties are bound by a valid arbitration agreement, and whether the subject matter of their underlying dispute falls within that agreement. *E.g.*, *First Options*, *supra*; *AT&T Tech., Inc.* v. *Communications Workers*, 475 U.S. 643 (1986). Arbitrability does not include whether the parties have complied with contractual and other time limits on the submission of claims. Those issues are instead subject to the general presumption in favor of resolution by the arbitrator. See *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555-559 (1964); *International Union of Operating Eng'rs* v. *Flair Builders, Inc.*, 406 U.S. 487, 491-492 (1972).

The presumption that the arbitrator is to resolve questions of timeliness advances the purposes behind the Federal

Arbitration Act. When the parties enter into a valid arbitration agreement, and the agreement covers the subject matter of their underlying dispute, then they most likely intend that the arbitrator will resolve all issues that arise concerning their dispute. If courts resolved timeliness questions in proceedings antecedent to arbitration, courts would be required to delve into the facts of the underlying disputes, because resolving timeliness questions frequently requires interpretation and factual assessment of the underlying claims. Requiring such extensive mini-trials in advance of arbitration would frustrate the Federal Arbitration Act's goal that parties to arbitration not face lengthy and costly delays in court. Indeed, the costs of antecedent judicial proceedings could lead some claimants to forgo their claims entirely.

NASD Rule 10304 imposes a time limit on submission of claims, and it therefore presents not a question of arbitrability but an ancillary procedural question that is presumptively to be decided by the arbitrator. That conclusion holds true even though Rule 10304 is phrased in terms of whether a claim is "eligible for submission to arbitration." This Court's precedents and the policies they reflect do not support treating a timeliness requirement as an issue of arbitrability merely because the timeliness requirement is phrased in certain language. See *John Wiley*, 376 U.S. at 555-559.

Because NASD Rule 10304 does not present an arbitrability issue, the court of appeals erred in presuming that a court is to apply the rule in the first instance unless the parties clearly and unmistakably provided otherwise. The court of appeals should instead have applied ordinary principles of state contract law, supplemented by the general federal law presumption in favor of dispute resolution by the arbitrator. Under those principles, it is clear that the parties

agreed that the arbitrator would decide whether petitioner's claims are timely under Rule 10304.

The arbitration agreement contains a broad arbitration clause that provides for arbitration of "all controversies" between the parties, including controversies about construction or performance of the agreement. The agreement also incorporates all the NASD arbitration rules, which include both the time limit in NASD Rule 10304 and a rule stating that the arbitrator is "empowered to interpret and determine the applicability of all" the rules. NASD Rule 10324. Thus, if the agreement is interpreted using the presumption favoring arbitration, there can be no doubt that it provides for the arbitrator to interpret and apply Rule 10304 in the first instance. Indeed, the agreement clearly and unmistakably provides for the arbitrator to apply Rule 10304 even if the contrary presumption against the arbitration of arbitrability were applicable.

ARGUMENT

WHETHER PETITIONER'S CLAIMS ARE BARRED BY THE TIME LIMIT IN NASD RULE 10304 IS FOR THE NASD ARBITRATOR TO DECIDE

Arbitration is generally "a matter of contract between the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (citing *inter alia AT&T Tech., Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986)).[3] Therefore,

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[3] Petitioner sought arbitration pursuant to an arbitration agreement with respondent, and most arbitrations arise from arbitration agreements. This brief therefore analyzes the question presented under the legal framework governing arbitration by agreement of the parties. The rules of the NASD, however, give customers the right to demand arbitration of disputes with NASD member firms even absent an arbitration agreement between the customer and the firm. See NASD Rule 10301(a). The NASD rules further prohibit customer agreements from including provisions that limit or contradict the rules of any SRO or that limit the ability of customers to file claims in arbitration. See NASD Rule

whether a particular dispute between the parties to an arbitration agreement is decided in the first instance by the arbitrator or by a court depends on the parties' agreement. If the parties have agreed to submit the issue to arbitration, then the arbitrator decides the issue. If the parties have not agreed to submit the issue to arbitration, then the court decides the issue. See *First Options*, 514 U.S. at 943. Here, the parties' agreement (including the NASD rules of arbitration that it makes applicable), interpreted with due regard for the policies underlying the Federal Arbitration Act, provides that the arbitrator, not a court, is to decide in the first instance whether petitioner's claims are barred by the time limit in NASD Rule 10304.[4]

A. When Parties Have Agreed To Arbitration, They Are Presumed To Intend That The Arbitrator Will Resolve Their Disputes, Unless The Disputed Issue Is Arbitrability Itself

When deciding whether the parties have agreed to arbitrate a certain matter, courts generally apply ordinary principles of state contract law. See *First Options*, 514 U.S.

3110(f)(4). As discussed below, one of the NASD rules also clearly provides that arbitrators are authorized to apply the other NASD rules, including the time limit in NASD Rule 10304. See pp. 28-30, *infra* (discussing NASD Rule 10324). Thus, even if this case were governed solely by the NASD rules rather than by the terms of the parties' arbitration agreement, the arbitrator, rather than a court, would decide whether claims had been submitted in compliance with Rule 10304's time limit.

[4] Arbitrators' decisions on the time-limit issue, like their decisions on the merits of underlying disputes, are subject to judicial review upon conclusion of the arbitration to ensure, among other things, that the arbitrators did not "exceed[] their powers," 9 U.S.C. 10(a)(4), or act in "manifest disregard" of the law, see *First Options*, 514 U.S. at 942 (quoting *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)).

at 944; *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 & n.9 (1995); *Volt Info. Sciences, Inc.* v. *Board of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-476 (1989). Federal law, however, imposes some constraints on the application of state law. See *First Options*, 514 U.S. at 944-945. The federal law principles flow from the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, which "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

The Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Act, which applies broadly to arbitration agreements concerning "any maritime transaction or a contract evidencing a transaction involving commerce," provides that such agreements "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 Federal Arbitration Act's principal purposes are "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Info. Sciences, Inc.*, 489 U.S. at 478. The Act also evinces an "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." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). See H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924) (noting that arbitration can eliminate "the costliness and delays of litigation").

For arbitration agreements covered by the Act, such as the agreement in this case, the "Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,

whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. See also *First Options*, 514 U.S. at 944-945. Thus, "[a]n order to arbitrate the particular [dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T*, 475 U.S. at 650 (quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960)).

The presumption in favor of having the arbitrator resolve disputed issues both advances the federal policy favoring arbitration and reflects the likely intent of the parties. See *First Options*, 514 U.S. at 945; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). "[W]hen the parties have a contract that provides for arbitration of some issues," they "likely gave at least some thought to the scope of arbitration." *First Options*, 514 U.S. at 945. Therefore, "given the law's permissive policies in respect to arbitration, * * * the law * * * insist[s] upon clarity before concluding that the parties did *not* want to arbitrate a related matter." *Ibid.*

There is, however, an exception to the general presumption that the parties have agreed that any disputed issue will be resolved by the arbitrator. When the issue to be resolved is "arbitrability" itself—whether the parties "agreed to arbitrate" one or more underlying disputes, the general presumption does not apply. *First Options*, 514 U.S. at 942, 944-945. Instead, the parties are presumed to intend that the courts, rather than the arbitrator, will decide the question of arbitrability. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT&T*, 475 U.S. at 649). See *Warrior & Gulf*, 363 U.S. at 583 n.7.

The Court has explained that the reason for the presumption against arbitration of arbitrability is that the question who should decide arbitrability is "rather arcane." *First Options*, 514 U.S. at 945. "A party often might not focus upon that question," and, therefore, a presumption that the arbitrator has the power to decide arbitrability "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Ibid.*

B. Whether A Party Has Complied With An Applicable Time Limit On Claim Submission Is Not A Question Of Arbitrability

As explained above, classifying a dispute as one about arbitrability not only exempts the dispute from the general presumption in favor of arbitration, but also subjects it to a contrary presumption against arbitration. As a result, a broad view of the questions encompassed within the concept of arbitrability could undermine the Federal Arbitration Act's fundamental goals of enforcing arbitration agreements and protecting the arbitration procedure from delay and obstruction in the courts. Mindful of that concern, this Court has construed arbitrability narrowly.

1. Arbitrability includes only the questions whether the parties are bound by a valid agreement to arbitrate and whether the subject matter of the underlying dispute is within that agreement

The Court has used a variety of different formulations to describe arbitrability. See, *e.g.*, *First Options*, 514 U.S. at 942 ("whether [the parties] agreed to arbitrate the merits" of their dispute); *AT&T*, 475 U.S. at 649 (whether the "agreement creates a duty for the parties to arbitrate the particular grievance"); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547 (1964) (whether the party "is bound at all by the agreement's arbitration provision" and whether the party "agreed to arbitrate disputes of a particular kind"); *Atkinson*

v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("whether or not the [party] was bound to arbitrate, as well as what issues it must arbitrate"). A review of the Court's decisions reveals that the Court has considered disputes to concern arbitrability only when they have involved one of two fundamental questions: (1) whether the parties are bound by a valid agreement to arbitrate; and (2) whether the subject matter of the underlying dispute falls within that agreement.

Examples of cases that have involved the question whether the parties are bound by a valid agreement to arbitrate include *First Options*, *John Wiley*, and *Prima Paint*. The arbitrability issue in *First Options* was whether a couple was bound to arbitrate a dispute with a securities clearing firm when only the husband's wholly-owned trading firm and not the couple had signed an arbitration agreement. See 514 U.S. at 940-941. Similarly, the arbitrability issue in *John Wiley* was whether John Wiley was bound by an arbitration agreement to which another corporation, with which John Wiley merged, had agreed before the merger. See 376 U.S. at 546-547.

Prima Paint involved the question whether a consulting agreement that included an arbitration clause had been induced by fraud. 388 U.S. at 402. The Court held that that question should not be decided by the courts, because the fraud was not alleged to have induced the arbitration provision itself but rather the contract as a whole. *Id.* at 403-404. In so holding, however, the Court stated that, if the claim were fraud in the inducement of the arbitration clause itself, then that issue would be resolved by the courts. See *ibid.* See also *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963).

Cases that have involved the question whether the subject matter of the underlying dispute is within the arbitration agreement include *AT&T*, *Warrior & Gulf*, and *Atkinson*. In *AT&T*, the arbitrability question was whether the

decision to lay off workers was subject to arbitration or was instead an exercise of management functions that were expressly exempt from arbitration under the agreement. See 475 U.S. at 644-646. Similarly, the arbitrability issue in *Warrior & Gulf* was whether the decision to contract out certain work was subject to arbitration. See 363 U.S. at 583-585. In *Atkinson*, the arbitrability issue was whether, under an arbitration clause that provided for the arbitration of "individual or local employee or local committee grievances," a company was bound to arbitrate its claim for damages against the union for breach of its promise not to strike. See 370 U.S. at 241-243.

Defining arbitrability to include such questions—which involve the fundamental issue whether the parties have agreed to subject themselves to the power of an arbitrator—preserves for the courts the important function of preventing parties who have not consented to arbitration from being forced to submit to it. This Court has been careful, however, not to extend the definition of arbitrability so far that it interferes with the policies underlying the Federal Arbitration Act.

That caution explains why the Court concluded in *Prima Paint* that the question whether there was fraud in the inducement of a business contract that includes an arbitration clause should be decided by the arbitrator even though the question whether the arbitration clause itself was induced by fraud should be decided by the courts. The Court explained that, under the Federal Arbitration Act, a federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue." 388 U.S. at 403 (quoting 9 U.S.C. 4). The Court also noted that its holding advanced the Federal Arbitration Act's goal of ensuring that "the arbitration procedure, when

selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Id.* at 404.

In a similar vein, the Court has held that courts must guard against ruling on the merits of the underlying claim when deciding whether the parties have agreed to submit a particular grievance to arbitration. *AT&T*, 475 U.S. at 649. If questions of arbitrability required the courts to delve deeply into the facts of the underlying dispute, then preliminary adjudication of arbitrability issues could interfere with "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. In light of that concern, the Court has held that even the question whether a claim is so frivolous that it is not subject to arbitration is presumptively for the arbitrator rather than the courts to decide. See *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

2. Whether a party to an arbitration agreement has complied with applicable time limits is presumptively an issue for the arbitrator

Similar considerations have led the Court to make clear that, when the subject matter of the underlying dispute between the parties is arbitrable, "the question whether 'procedural' conditions to arbitration have been met" is presumptively for the arbitrator to decide. See *John Wiley*, 376 U.S. at 556-558. The Court's decisions thus establish that questions concerning compliance with contractual exhaustion requirements and time limits, as well as questions about the applicability of extrinsic time limitations such as laches, are *not* issues of arbitrability that the parties are presumed to have intended that the courts would decide.

In *John Wiley*, after holding that whether the obligation to arbitrate survived the merger was an arbitrability issue to be decided by the courts, 376 U.S. at 546-551, the Court

considered "the question of so-called 'procedural arbitrability,'" *id.* at 555. John Wiley contended that it was not required to arbitrate because the union had not invoked the informal grievance procedures that the arbitration agreement imposed as a prerequisite to arbitration. *Id.* at 555-556. The company also contended that the union had not complied with the agreement's requirement that the union provide notice of any grievance within four weeks after its occurrence or latest existence. *Id.* at 556 n.11. The Court held that, "[o]nce it is determined * * * that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557.[5]

The Court reasoned that whether procedural prerequisites apply, whether they have been followed or excused, and whether the unexcused failure to follow them bars arbitration "cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration." 376 U.S. at 557. The Court thought "[i]t would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other."

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[5] The Court did not address whether the parties to an arbitration agreement could, in their agreement, override the rule that the arbitrator, not the courts, decide whether time limits and other procedural preconditions to arbitration have been satisfied. Because arbitration is fundamentally "a matter of contract between the parties," *First Options*, 514 U.S. at 943, there is no reason, as a general matter, to conclude that the parties could not do so, although any doubts about the parties' intent would be resolved in favor of the arbitrator's deciding the time limit issue. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. As noted above, however, the NASD rules prohibit customer agreements from restricting or contradicting the rules of any SRO or limiting a customer's right to file a claim in arbitration. See note 3, *supra* (discussing NASD Rule 3110(f)(4)).

Ibid. The Court also noted that "judicial proceedings preliminary to arbitration" present "opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay" occasioned by the separation of the "procedural" and "substantive" elements of a dispute. *Id.* at 558. Indeed, antecedent judicial proceedings not only delay resolution of the underlying dispute but impose increased costs on the parties, a result that is contrary to the very reasons that the parties agreed to arbitration in the first place—to increase the speed and decrease the cost of resolving their disputes. *Ibid.*

Similarly, in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), the Court held that whether arbitration was barred by laches was a question for the arbitrator to decide because the agreement called for arbitration of "any difference" between the parties. The Court noted that the court is responsible for determining "whether a union and employer have agreed to arbitration" as well as "the scope of the arbitration clause." *Id.* at 491. Once it was determined, however, that the parties had signed an agreement to arbitrate "any difference," then "a claim that particular grievances are barred by laches is an arbitrable question under the agreement." *Id.* at 491-492.

The Court based its holding in *Flair Builders, Inc.* on the conclusion that the parties had agreed to arbitrate the issue of laches rather than on the principle established in *John Wiley* that, if the subject matter of the underlying dispute is subject to arbitration, ancillary procedural questions should also be decided by the arbitrator. See 406 U.S. at 490-491 (reserving question whether *John Wiley* principle applies only to procedural prerequisites imposed by the arbitration agreement and not to extrinsic limitations). Notably, however, in determining whether the parties had agreed to arbitrate the issue of laches, the Court did not require a

"clear" indication that the parties had so agreed. See *ibid.* The Court thus did not treat the issue of laches as presenting a question of arbitrability that is presumptively for the courts to decide. Cf. *Warrior & Gulf*, 363 U.S. at 583 n.7 (issue of arbitrability is decided by courts absent "clear demonstration" that parties intended the contrary).

In *Moses H. Cone Memorial Hospital*, *supra*, the Court once again confirmed that the presumption "in favor of arbitration" applies "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, *delay*, or a like defense to arbitrability." 460 U.S. at 25 (emphasis added). Among the cases that the Court cited in support of that proposition was a decision by the United States Court of Appeals for the District of Columbia that applied the presumption in favor of arbitration to the question whether the court or the arbitrator should decide if a claim was barred by the statute of limitations. See *id.* at 25 n.31 (citing *Hanes Corp.* v. *Millard*, 531 F.2d 585, 598 (1976)). The D.C. Circuit in *Hanes* had relied both on this Court's decision in *Flair Builders, Inc.*, see 531 F.2d at 599-600, and on two Second Circuit decisions, one that involved the application of a statute of limitations and another that involved the application of a contractual time bar, see *id.* at 598-599 (citing *Reconstruction Fin. Corp.* v. *Harrisons & Crosfield, Ltd.*, 204 F.2d 366, 367, 369, cert. denied, 346 U.S. 854 (1953), and *Office of Supply, Gov't of the Republic of Korea* v. *New York Navigation Co.*, 469 F.2d 377, 380 (1972)).

C. The Presumption That The Arbitrator Is To Decide Whether Claims Were Submitted Within Applicable Time Limits Advances The Purposes Of The Federal Arbitration Act

The presumption that the arbitrator rather than a court is to decide whether a party to an arbitration agreement has satisfied contractual or other time limits not only is sup-

ported by this Court's precedents but also advances the purposes behind the Federal Arbitration Act. See Poser, *supra*, 50 SMU L. Rev. at 279-280, 295, 329-336.

As noted above, the Act's principal purpose is to ensure that arbitration agreements are enforced in accordance with the parties' intent. See p. 11, *supra*. If the parties enter into a valid arbitration agreement that covers the subject matter of their underlying dispute, then the parties "most likely intend and expect that the arbitrator should resolve all issues that arise concerning that subject." *Painewebber Inc.* v. *Elahi*, 87 F.3d 589, 599 (1st Cir. 1996). At the very least, the time limit question "arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And given the law's permissive policies in respect to arbitration, * * * one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate" the time limit question. *First Options*, 514 U.S. at 945 (internal citation omitted).

The presumption that the arbitrator is to decide timeliness issues also prevents the courts from becoming enmeshed in the facts of the underlying dispute that the parties have agreed to arbitrate. See p. 16, *supra*. As the Court recognized in *John Wiley*, it is often difficult to separate timeliness issues from the substance of the parties' underlying dispute. 376 U.S. at 557. The timeliness requirement at issue in this case illustrates the point. To determine whether a claim is timely under NASD Rule 10304, the decision-maker must identify the "occurrence or event" that gives rise to the underlying claim. For example, petitioner purchased her investments in 1986 but did not file her arbitration claim until March 1997. She alleges, however, not only that respondent sold her unsuitable investments and made misrepresentations at the time that she made the investments, but also that respondent provided misinforma-

tion about the investments on an ongoing basis until 1994. To the extent petitioner claims that respondent made misrepresentations within six years prior to the date that she requested arbitration and that those misrepresentations caused her to retain the investments, then that claim would be timely, even though the original sale occurred more than six years before petitioner requested arbitration. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Cohen*, 62 F.3d 381, 385 (11th Cir. 1995); *Painewebber Inc.* v. *Hofmann*, 984 F.2d 1372, 1381 (3d Cir. 1993). Thus, a court could not resolve the question whether petitioner complied with NASD Rule 10304 without conducting a detailed inquiry into the nature and extent of petitioner's underlying claims. *E.g.*, *Cohen*, 62 F.3d at 384-385 (remanding for district court to conduct such a factual inquiry); *Hofmann*, 984 F.2d at 1374 (same).

Requiring such an extensive mini-trial before petitioner could proceed to arbitration would ill serve Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Instead, it would allow the kind of "delay and obstruction in the courts" that the Federal Arbitration Act was designed to avoid. See *Prima Paint Corp.*, 388 U.S. at 404. Indeed, the "costs and delays involved in resolving eligibility disputes affect the ability of customers (investors) to receive complete recovery on their claims. Under some circumstances, customers (investors) are discouraged or prevented from seeking recovery for their claims because the costs and delays of litigating eligibility * * * approach or exceed the value of their claims." 63 Fed. Reg. 588, 591 (1998) (views of the NASD, reprinted in SEC notice of proposed rulemaking to approve amendment to Rule 10304).

When parties who have signed an agreement to arbitrate are forced to litigate collateral issues before they can pro-

ceed to arbitration, the advantages that arbitration offers over judicial resolution are undermined. "If arbitration is to enable parties to resolve their differences with speed, economy, informality, privacy, and finality, then the ability of arbitrating parties to also resort to the courts must be reduced to a minimum." Poser, *supra*, 50 SMU L. Rev. at 279.

There is no need to permit resort to the courts here. Allowing the arbitrator to decide timeliness issues does not pose a significant risk of "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945. The contention that an arbitration claim was not timely filed is different in character from the contention that a party never consented to arbitration at all or did not consent to arbitration of certain subject matters. The contention is not that the party did not intend an arbitrator to have the power to resolve the underlying dispute but that the claimant, because of the passage of time, can no longer arbitrate a claim that would otherwise be within the scope of the agreement. An arbitrator can appropriately decide that issue without any risk that the arbitration forum is forcing its process upon a non-consenting party. See *John Wiley*, 376 U.S. at 558-559 ("Refusal to order arbitration of subjects which the parties have not agreed to arbitrate does not entail the fractionating of disputes about subjects which the parties do wish to have submitted."); Barbara Black, *Securities Arbitration Is Not Supposed To Be So Complicated: Arbitrability, the Eligibility Rule, And Whose Law Decides* (to be published in *Securities Regulation Law Journal* (Summer 2002)) (copy lodged with Court). Finally, the arbitrator's decision on the time-limit issue is subject to judicial review upon completion of the arbitration to ensure, among other things, that the arbitrator did not exceed his powers or manifestly disregard the law. See note 4, *supra*.

D. NASD Rule 10304's Use Of The Phrase "Eligible For Submission To Arbitration" Does Not Make The Rule's Application A Question Of Arbitrability

Consistent with this Court's decisions and the policies underlying the Federal Arbitration Act, the courts of appeals have almost uniformly held that the arbitrator, rather than a court, is to decide whether claims have been submitted within contractual time limits, at least outside the specific context of the question presented in this case. See *Washington Hosp. Ctr.* v. *Service Employees Int'l Union, Local 722*, 746 F.2d 1503, 1506 (D.C. Cir. 1984); *Local 285, Serv. Employees Int'l Union* v. *Nonotuck Resource Assoc.*, 64 F.3d 735, 739-741 (1st Cir. 1995); *Martens* v. *Thomann*, 273 F.3d 159, 179 n.14 (2d Cir. 2001); *Nursing Home & Hosp. Union No. 434* v. *Sky Vue Terrace, Inc.*, 759 F.2d 1094, 1097 (3d Cir. 1985); *Glass* v. *Kidder Peabody & Co.*, 114 F.3d 446, 455-456 (4th Cir. 1997); *Oil Workers' Int'l Union, Local 4-447* v. *Chevron Chem. Co.*, 815 F.2d 338, 341-343 (5th Cir. 1987); *Armco Employees Indep. Fed.* v. *AK Steel Corp.*, 252 F.3d 854, 858-861 (6th Cir. 2001); *Beer, Local Union No. 744* v. *Metropolitan Distrib., Inc.*, 763 F.2d 300, 303 (7th Cir. 1985); *Automotive Employees Union, Local No. 618* v. *Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983); *Local Union No. 370* v. *Morrison-Knudsen Co.*, 786 F.2d 1356 (9th Cir. 1986) (per curiam); *Denhardt* v. *Trailways, Inc.*, 767 F.2d 687 (10th Cir. 1985); *Belke* v. *Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1027 (11th Cir. 1982).[6]

There is, however, substantial division among the courts of appeals regarding the specific question of who decides

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[6] There have been some divergent decisions within some of the courts of appeals. See *Kennecott Utah Copper Corp.* v. *Becker*, 186 F.3d 1261, 1267-1268 (10th Cir. 1999) (acknowledging the possible existence of a divergent Tenth Circuit opinion); *General Drivers, Local Union 89* v. *Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988) ("virtually limited to its facts" by *Armco Employees Indep. Fed.*, 252 F.3d at 860).

whether a party has complied with the time limit imposed by NASD Rule 10304 and parallel arbitration rules of other SROs. See *Elahi*, 87 F.3d at 592 (noting a nearly even circuit split). Those courts that have held that NASD Rule 10304 and parallel rules of other SROs should be applied by the courts at the outset have relied almost exclusively on the rules' use of the phrase "eligible for submission to arbitration." The courts reason that, because failure to comply with the time limit bars eligibility for arbitration, the rule is not simply a contractual timeliness requirement, but is instead a substantive or jurisdictional limitation and thus a component of arbitrability.[7]

The fact that Rule 10304 is phrased in terms of whether a claim is "eligible for submission to arbitration" does not mean that it involves the question of arbitrability. The rule, the NASD has explained, originally reflected a judgment that claims that were more than six years old could be unsuitable for arbitration, largely because brokerage firms were not required to maintain records longer than that period of time. See 63 Fed. Reg. at 590. That objective does not support according the rule "arbitrability" status.[8]

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[7] See *Cogswell* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 476-477, 479 (10th Cir. 1996); *Cohen*, 62 F.3d at 384; *Painewebber Inc.* v. *Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993); *Roney & Co.* v. *Kassab*, 981 F.2d 894, 898-899 (6th Cir. 1992); *Edward D. Jones & Co.* v. *Sorrells*, 957 F.2d 509, 512, 514 (7th Cir. 1992).

[8] The NASD has referred to the rule as a "substantive jurisdictional time limitation on the dispute that could be arbitrated." 63 Fed. Reg. at 592. It is unclear what the NASD meant by those terms and what consequences the NASD thought might flow from that characterization. As explained in the text above, however, this Court's decisions indicate that the arbitrator rather than the courts should apply the rule. Nor could the NASD have meant to suggest differently, because it had expressly stated that the rule "does not specify the party responsible for determining whether 6 years have elapsed from the occurrence or event giving rise to

Nor is the language of the rule substantially different from the language of the notification provision in *John Wiley*, which this Court held was to be applied by the arbitrator. That notification provision stated that "[t]he failure of either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance." 376 U.S. at 556 n.11. NASD Rule 10304 could easily have been phrased using similar language, so that the failure to bring a claim within six years would be "deemed to be an abandonment of" the right to seek arbitration. That change in language would not alter the operative effect of the rule, and it should likewise make no difference regarding whether the arbitrator or a court applies the rule in the first instance.

Similarly, the policy considerations that support the Court's decision in *John Wiley* still apply however Rule 10304 is phrased. Even though the rule uses the words "eligible for submission to arbitration," the parties likely intended that the arbitrator would decide the timeliness of claims that otherwise would be subject to arbitration, particularly because the timeliness decision often requires a detailed understanding and factual assessment of the underlying claims. Moreover, lengthy judicial proceedings prior to arbitration would still deprive parties whose claims are found to meet the timeliness requirement of the speedy, less costly dispute resolution that they bargained for in the arbitration agreement. See pp. 17-18, 20-22, *supra*.

Some courts that have held that Rule 10304 should be applied by the courts have also suggested that the word "eligible" differs in an important way from the language of statutes of limitations, which the courts agree should be applied by the arbitrator. See *Painewebber Inc.* v. *Hofmann*, 984 F.2d 1372, 1378 (3d Cir. 1993) (quoting *Paine-*

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the matter." 59 Fed. Reg. 39,373, 39,374 (1994) (NASD description of the rule reprinted in earlier SEC notice of proposed rulemaking).

webber Inc. v. *Hartmann*, 921 F.2d 507, 513-514 (3d Cir. 1990)); *Roney*, 981 F.2d at 899 (also agreeing with *Hartmann*); see also p. 19, *supra*. There is, however, no meaningful difference, for purposes of deciding whether Rule 10304 presents an issue of arbitrability, between the language of the rule and the language of statutes of limitations. For example, the statute of limitations adopted by the Court for private actions under Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), provides that "[n]o action shall be maintained to enforce any liability * * * unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. 78i(e); see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n.9 (1991). Given that Rule 10304 would be applied by the arbitrator if it provided that no arbitration claims over six years old "shall be maintained," then it should likewise be applied by the arbitrator even though it provides instead that no such claims "shall be eligible for submission to arbitration." Whether the rule is applied by the courts or by the arbitrator should not turn on subtleties in the rule's language that were never intended to bear such weight.

There are distinctions between a statute of limitations and Rule 10304. For example, a claim can be barred by a statute of limitations and yet satisfy the time limit imposed by the rule, or vice versa. See 63 Fed. Reg. at 594 (views of the NASD). In addition, a statute of limitations affects a party's right to recover in any forum, but Rule 10304 provides only that certain claims are not eligible for "arbitration under [the NASD] Code." NASD Rule 10304. Despite those differences, statutes of limitations and Rule 10304 both impose timing requirements on claims, and there is no persuasive reason why statutes of limitations should be applied by the arbitrator but Rule 10304 should not. Indeed, because Rule 10304 is essentially a forum-specific limitations provision, it

is especially appropriate that it should be applied by the forum created by the very rules that impose the limitation, rather than by the courts.

E. The Parties To This Case Agreed That The Arbitrator Would Decide Whether Claims Are Barred By The Time Limit In NASD Rule 10304

For the reasons stated above, NASD Rule 10304, like other time limitations, does not involve a question of arbitrability. Therefore, the court of appeals erred in presuming that the parties intended the courts to decide whether petitioner's claims are barred by the rule. See Pet. App. 16-19, 24-25. Instead, the court of appeals should have applied ordinary state law contract principles, supplemented by the general federal law presumption that parties to a valid arbitration agreement intend the arbitrators to decide disputed issues. See pp. 10-12, *supra*. When the parties' agreement is considered under that analytical framework, it is clear that the arbitrator, not the courts, is to decide whether petitioner's claims are time barred under Rule 10304.

Because the agreement contains a choice-of-law clause providing for application of New York law, see 1992 Agreement ¶ 18, interpretation of the agreement begins with application of the substantive rules of the New York state law of contracts. See *Elahi*, 87 F.3d at 600; *Painewebber Inc.* v. *Bybyk*, 81 F.3d 1193, 1198-1199 (2d Cir. 1996); see generally *Mastrobuono*, 514 U.S. at 63-64 (interpreting similar choice-of-law clause to require application of the "substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators").

Under New York law, a court "enforce[s] the plain meaning of th[e] agreement" between the parties. *Bybyk*, 81 F.3d at 1199 (citing New York law); accord *Elahi*, 87 F.3d at 600 (same). The basic arbitration clause in the parties' agreement provides that the parties will arbitrate "all controver-

sies between [them] * * * concerning or arising from (i) any account maintained with [respondent] by [petitioner]; (ii) any transaction involving [respondent and petitioner], * * * or (iii) the construction, performance or breach of this or any other agreement between [respondent and petitioner]." 1992 Agreement ¶ 19. The plain meaning of that provision is that the parties will arbitrate "all" disputes arising from petitioner's securities accounts with respondent, including whether petitioner's request for arbitration by the NASD of her claim that respondent breached its fiduciary duty was timely filed. The word "all" encompasses disputes over whether an underlying claim concerning the account is timely. Cf. *Flair Builders, Inc.*, 406 U.S. at 491-492. Any doubt on that point is eliminated by the express provision that disputes about the "construction" and "performance" of the arbitration agreement or any other agreement between the parties are themselves subject to arbitration. See *Bybyk*, 81 F.3d at 1199; *Smith Barney Shearson, Inc.* v. *Sacharow*, 91 N.Y.2d 39, 46 (1997). Moreover, any ambiguity in the scope of the clause must be construed against respondent, which drafted the agreement. See *Mastrobuono*, 514 U.S. at 63 (citing New York law).

Consideration of other terms of the agreement reinforces that reading of the basic arbitration clause. See *Mastrobuono*, 514 U.S. at 63 (under New York law, agreement is "read to give effect to all its provisions and to render them consistent with each other"). The 1992 Agreement authorizes petitioner to select the arbitral forum, 1992 Agreement ¶ 19, and her selection of the NASD makes applicable the NASD Code, 1997 Agreement ¶ 1. The NASD Code, in turn, includes not only the time limit in NASD Rule 10304 but also NASD Rule 10324, which provides that the "arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD Code.]" Because Rule 10304 is a provision of the NASD Code, the clear import of

Rule 10324 is that arbitrators are empowered to determine whether a claim complies with Rule 10304. See 67 Fed. Reg. at 19,466 n.11 (expressing SEC's view to that effect); *Bybyk*, 81 F.3d at 1202; *FSC Sec. Corp.* v. *Freel*, 14 F.3d 1310, 1312-1313 (8th Cir. 1994); *Sacharow*, 91 N.Y.2d at 46-47.

Thus, interpreted under ordinary principles of contract law, the parties' agreement provides that the arbitrator is to decide whether petitioner's claims were filed within the time limit in NASD Rule 10304. The federal law presumption that parties to a valid arbitration agreement intend for the arbitrator to resolve their disputes only reinforces that conclusion. Indeed, even if the contrary presumption that governs arbitrability issues applied, Rule 10324 would provide the necessary "clear and unmistakable" evidence that the parties intended for the arbitrator to apply Rule 10304 in the first instance. See *Bybyk*, 81 F.3d at 1202; *Freel*, 14 F.3d at 1312-1313; *Sacharow*, 91 N.Y.2d at 46-47.

Some courts that have rejected reliance on Rule 10324 have found it insufficiently clear because it does not expressly address arbitrability. *Jones*, 957 F.2d at 514 n.6. Other courts have relied on the principle of contract interpretation that a specific provision controls over a conflicting more general provision, and have reasoned that the specific provision in Rule 10304 trumps the general delegation of authority to the arbitrator in Rule 10324. *Cogswell*, 78 F.3d at 480; *Cohen*, 62 F.3d at 384. Those arguments are unpersuasive. Rule 10324 gives the arbitrator authority to interpret and apply *all* provisions of the NASD Code, one of which is the time limit in Rule 10304. Because both Rule 10324 and Rule 10304 appear in the NASD Code, a party reading the Code could have no doubt that arbitrators are empowered to interpret and apply the time limit. Furthermore, the principle that a specific provision controls over a conflicting more general provision is not applicable here, because there is no conflict between Rule 10304 and Rule

10324. Rule 10304 only imposes a time limit; it does not speak to the question which decision-maker—the arbitrator or a court—is to apply the time limit to determine whether a claim has been timely submitted. Rule 10324 addresses that question, by providing that the arbitrator has the authority to apply *all* provisions of the NASD Code, including the time limit in Rule 10304.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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