South Carolina Law Review

Volume 40 | Issue 4 Article 3

Summer 1989

Of "Procedural Arbitrability": The Effect of Noncompliance With Contract Claims Procedures

Thomas J. Stipanowich
University of Kentucky

OF "PROCEDURAL ARBITRABILITY": THE EFFECT OF NONCOMPLIANCE WITH CONTRACT CLAIMS PROCEDURES

THOMAS J. STIPANOWICH*

I. INTRODUCTION

Long before arbitration attracted public attention as a wide-ranging alternative to litigation, construction contractors and building owners submitted controversies to adjudication by private panels of experts.[1] Despite continuing controversy regarding its ascribed virtues,[2] arbitration remains a popular means of resolving disputes associated with building design and construction.[3]

In current industry models, construction arbitration represents the final stage in a complex process of dispute resolution.[4] Before arbitrating, parties advancing a claim typically are required to put the matter before the project architect or engineer and to observe various notification and filing requirements for initiation of the arbitration process.[5] A claimant's noncompliance with the contractual recipe for handling disputes often raises questions regarding the enforceability of the arbitration

---

* Associate Professor of Law, University of Kentucky College of Law. B.S., 1974; M. Architecture, 1976; J.D., 1980, University of Illinois. This article is one of a series dealing with various aspects of commercial arbitration.

1. Arbitration provisions have appeared in American construction contracts for the better part of two centuries. *See* Coulson, *Preface* to M. GIBBONS & L. MILLER, CONSTRUCTION ARBITRATION: SELECTED READINGS at v (1981).

2. *See generally* Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988) (summarizing perceived advantages and shortcomings of commercial arbitration and analyzing A.B.A. survey data on attorney attitudes toward arbitration of construction disputes).

3. An extensive, thoughtful treatment of statutory and case law affecting all aspects of construction arbitration is provided in J. ACRET, CONSTRUCTION ARBITRATION HANDBOOK (1985).

4. *See infra* notes 14-16 and accompanying text.

5. *See infra* notes 17-23 and accompanying text.

agreement.[6] Some courts thereupon deny that party the right to arbitrate,[7] while others, mindful of contemporary policies favoring agreements to arbitrate, stay their hand and leave procedural issues to the arbitrators.[8] At least one jurisdiction, on the other hand, has sought a middle ground.[9]

This article surveys contemporary judicial attitudes regarding the effect of noncompliance with procedures for handling claims and controversies.[10] It also analyzes the policies advanced in support of deferring questions of "procedural arbitrability" to arbitration[11] and proposes a straightforward rationale for judicial disposition of such issues.[12] Although the discussion emphasizes scenarios involving construction contracts, the principles addressed in this article are applicable to commercial arbitration agreements generally and may be extended by analogy to the labor sphere.[13]

II. TREATMENT OF PROCEDURAL PREREQUISITES TO ARBITRATED RESOLUTION OF CLAIMS

A. Dispute Resolution Under Construction Contracts

For many years the construction industry has functioned as a laboratory for development of private dispute resolution systems. The modern industry archetype is a multistage process including first-tier adjudication by design professionals and, when necessary, submission of controversies to a neutral panel of arbi-

6. *See infra* notes 24-27 and accompanying text.
7. *See infra* notes 27-48 and accompanying text.
8. *See infra* notes 49-73 and accompanying text.
9. *See infra* notes 74-100 and accompanying text.
10. *See infra* notes 27-100 and accompanying text.
11. *See infra* notes 104-159 and accompanying text.
12. *See infra* notes 159-205 and accompanying text.
13. While labor arbitration and commercial arbitration differ in character and purpose, labor precedents often are considered in commercial cases and vice versa. *See* Stipanowich, *Punitive Damages in Arbitration:* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U.L. REV. 953 (1986); *see also* Swift Indus. v. Botany Indus., 466 F.2d 1125, 1129-30 (3d Cir. 1972) (discussing general principles of law governing disputes about an arbitrator's authority and noting their applicability in both commercial and labor arbitrations). An incisive commentary on procedural issues under collective bargaining agreements was provided by Alan Schwartz in Note, *Procedural Arbitrability Under Section 301 of the LMRA*, 73 YALE L.J. 1459 (1964).

trators.[14] In recent editions of the widely used general construction contract promulgated by the American Institute of Architects (AIA), this procedure has grown in detail and complexity.[15] The current AIA version imposes a series of procedural requisites on those who would put forward a claim or try a dispute.[16]

Under AIA procedure, disagreements between project owners and contractors regarding payments of money, time extensions, and other issues concerning contract terms or performance must be referred initially to the project architect for his decision.[17] With certain limited exceptions, disputes that the architect fails to resolve to the parties' satisfaction may be settled by arbitration.[18] Among other things, a party desiring arbitration must file a demand within thirty days of receipt of the architect's decision if that decision was in writing, specified that it was "final but subject to arbitration," and required initiation of arbitration within that period.[19] Otherwise, the demand must be filed "within a reasonable time after the claim has arisen."[20]

In addition to setting forth a detailed process for dispute resolution, the AIA document establishes separate guidelines for pursuing various claims. For example, claims by either party must be made in writing "within 21 days after occurrence of the

---

14. *See, e.g.*, AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, §§ 4.3-.5 (1987) [hereinafter AIA A201].

15. *Compare* AIA A201, *supra* note 14, *with* AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, §§ 2.2.12, 7.9, 8.3, 12.0 (1976 ed.). For a penetrating critique of recent changes in the AIA dispute resolution system, see J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS §§ 11.8-.17 (1987).

16. *See supra* note 14; *see also* SWEET, *supra* note 15, §§ 22.1-.26 (1987) (discussing arbitration under the current AIA A201).

17. *See* AIA A201, *supra* note 14, § 4.3.2.

18. The substantive scope of the agreement to arbitrate is set forth as follows:

> Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims related to aesthetic effect and except those waived [by the making of final payment]. Such controversies or Claims upon which the Architect has given notice and rendered a decision . . . shall be subject to arbitration upon written demand of either party.

Id. § 4.5.1.

19. *Id.* § 4.5.4.1.

20. *Id.* § 4.5.4.2.

event" that triggered them.[21] Further detailed instructions are provided for handling both claims associated with differing site conditions and contractor claims for adjustments of the contract price or timetable.[22] Still other provisions direct that certain owner and contractor claims may be waived by the making and acceptance of final payment.[23]

Noncompliance with any of these contractual requisites may call into question the claimant's right to present his case before a panel of arbitrators. The issue may come before a court as a defense to a motion to compel arbitration[24] or to stay related litigation pending arbitration of disputes;[25] it also may be raised in support of a petition to enjoin arbitration proceedings.[26] Judicial responses to the problem reflect a substantial difference of opinion regarding treatment of contract terms governing processing of contract-related disputes and courts' and arbitrators' roles in handling procedural issues.

B. Decisions Supporting Judicial Resolution of Procedural Issues

In some jurisdictions, questions arising from an alleged failure to meet time limits for the filing of arbitration demands or to satisfy other procedural prerequisites for arbitration are justiciable.[27] By assuming responsibility for such determinations, tribunals enhance their ability to preclude arbitration of claims.

This judicial attitude is exemplified by the decision of the

---

21. *Id.* § 4.3.3.

22. *See id.* § 4.3.6.

23. *See id.* § 4.3.5.

24. *See, e.g.*, Contracting Northwest, Inc. v. City of Fredericksburg, 713 F.2d 382 (8th Cir. 1983).

25. *See, e.g.*, Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334 (5th Cir. 1984).

26. *See, e.g.*, United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978).

27. *See, e.g.*, Frank J. Rooney, Inc. v. Food Fair Indus., 254 So. 2d 30 (Fla. Dist. Ct. App. 1971); Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc., 274 Md. 307, 334 A.2d 526 (1975); Stauffer Constr. Co. v. Board of Educ., 54 Md. App. 658, 460 A.2d 609 (Ct. Spec. App. 1983); Torcon, Inc. v. Alexian Bros. Hosp., 205 N.J. Super. 428, 501 A.2d 182 (Ct. Ch. Div. 1985), *aff'd per curiam*, 209 N.J. Super. 239, 507 A.2d 284 (Ct. App. Div.), *cert. denied*, 104 N.J. 440, 517 A.2d 431 (1986); Brick Township Mun. Util. Auth. v. Diversified R.B.& T. Constr. Co., 171 N.J. Super. 397, 409 A.2d 806 (Ct. App. Div. 1979); Geo. V. Nolte & Co. v. Pieler Constr. Co., 54 Wash. 2d 30, 337 P.2d 710 (1959).

Maryland Court of Appeals in *Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc.*[28] The case arose from an owner's refusal to honor a contractor's requisition for payment under a contract for construction of a nursing home.[29] The contractor sought to enjoin the owner's efforts to arbitrate the dispute because, *inter alia*, the owner had failed to demand arbitration within a "reasonable time" after the claim had arisen. Such demand was required by the AIA-type general conditions incorporated in the parties' contract.[30] The trial court granted the injunction after finding that the owner's demand, which postdated the contractor's lien foreclosure action, was not filed in a timely manner.[31] On appeal by the owner, the Maryland Court of Special Appeals vacated the injunction, concluding that "question[s] of compliance with the procedural requisite of a timely demand" arising in the context of an otherwise arbitrable dispute was for the arbitrators and not the courts to resolve.[32] Although the Maryland Court of Appeals affirmed the decision, it made clear that the timeliness of the demand was, "in the first instance, for the courts."[33] Ignoring the trial court's contrary finding, the court of appeals held that the owner's demand "was made within the reasonable time stipulated by [the] General Conditions."[34]

Although the Maryland Court of Appeals offered no rationale in support of the *Bel Pre* holding, the Maryland Court of Special Appeals ventured one in a later decision. In *Stauffer Construction Co. v. Board of Education*[35] that court viewed *Bel Pre* as an exercise of judicial authority to determine the "existence or enforceability of the agreement to arbitrate," the role mandated for courts under the applicable arbitration statute.[36] The *Stauffer* court reasoned that the lateness of the owner's demand, arguably resulting in a "waiver" of its right to arbitrate, raised questions about the continued existence of a mutually

28. 274 Md. 307, 334 A.2d 526 (1975).

29. *See id.* at 308, 334 A.2d at 527.

30. *See id.* at 310-11, 334 A.2d at 528-29.

31. *See id.* at 309, 334 A.2d at 528.

32. *See* Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md. App. 307, 323, 320 A.2d 558, 567 (Ct. Spec. App. 1974).

33. 274 Md. at 309, 334 A.2d at 530.

34. *See id.* at 315, 334 A.2d at 531.

35. 54 Md. App. 658, 460 A.2d 609 (Ct. Spec. App. 1983).

36. *See id.* at 666, 460 A.2d at 613.

binding agreement to arbitrate disputes:[37]

> Because an inappropriate delay in demanding arbitration acts as a relinquishment of the contractual right to compel such a proceeding, where that matter is in dispute, its resolution constitutes, in effect, a determination of whether the agreement to arbitrate still exists; and, under the statute, that *is* a proper issue for the court.[38]

Stauffer involved review of the denial of a construction company's demand for arbitration of various disputes with the project owner.[39] The court concluded that the contractor's failure to present claims to the project architect in accordance with the requirements of the AIA-type construction contract amounted to a waiver of the right to arbitrate and precluded enforcement of the arbitration clause.[40] The court of special appeals vacated the trial court's judgment because the lower court improperly had addressed issues going to the merits of the underlying claims[41] and failed to consider, among other things, whether the claimant had waived its right to arbitrate by not making a timely demand for arbitration.[42] The court remanded the case for consideration of factual issues bearing upon the possible waiver.[43] Other opinions supporting judicial treatment of contractual procedural questions emphasize the court's desire to

---

37. *See id.*

38. *Id.* at 668, 460 A.2d at 614. The court concluded that a determination that the right to arbitrate had been relinquished would have "no bearing . . . upon either the validity or the enforceability of the underlying claims," but only would remit them to the judicial process. *See id.* This conclusion conflicts with the weight of judicial opinion, which regards the election to arbitrate as a waiver of the right to judicial resolution of disputes. *See infra* note 201 and accompanying text. Significantly, the same court later upheld a trial court order granting a summary judgment to a defendant on the basis that the plaintiff had waived the right to arbitrate by failing to initiate arbitration properly; having lost the right to arbitrate, the court concluded, the plaintiff was not entitled to relief in court. *See* Gold Coast Mall, Inc. v. Larmar Corp., No. 1732 (Md. Ct. Spec. App. Aug. 4, 1982) (per curiam) (unreported), *rev'd*, 298 Md. 96, 468 A.2d 91 (1983).

39. As in *Bel Pre*, the parties' contract incorporated the AIA Form 201 General Conditions. *See Stauffer*, 54 Md. App. at 669, 460 A.2d at 615.

40. *See id.* at 672, 460 A.2d at 616.

41. According to the court of special appeals, the trial court erred by denying arbitration on the basis of the contractor's noncompliance with contractual provisions requiring that requests for increased compensation and extensions of time be made within a specific period after events causing increased cost or delay. *See id.*

42. *See id.*

43. *See id.*

effectuate the parties' intent with respect to arbitration. In *Brick Township Municipal Utilities Authority v. Diversified R.B.&T. Construction Co.*[44] a New Jersey appellate court acknowledged the broad public policy favoring arbitration, but observed that judicial enforcement of arbitration depended upon mutual assent of the parties to the process.[45] On this basis the court enjoined a contractor from arbitrating contract-related disputes with a project owner because the contractor failed to file an arbitration demand within thirty days after the project engineer rendered a decision; the contract provided that such a failure would render the engineer's decision final and binding.[46]

One early New York decision, which denied arbitration when the claimant missed the contractual deadline for filing a demand, concluded that this approach actually promoted the policy favoring agreements to arbitrate.[47] The court reasoned that although the claimant's delay foreclosed the right to a hearing before arbitrators, the parties' intent respecting resolution of disputes nevertheless was fulfilled by enforcement of the provisional time limit.[48]

C. Decisions Deferring Questions of "Procedural Arbitrability" to Arbitration

In *John Wiley & Sons, Inc. v. Livingston*[49] the Supreme Court enunciated a broad policy favoring arbitrability of issues associated with procedural limitations on arbitration. The case, which arose under the Taft-Hartley Act,[50] concerned a union's motion to compel arbitration under the terms of a collective bargaining agreement. The corporate employer raised certain issues in response to the motion, including the union's noncompliance

---

44. 171 N.J. Super. 397, 409 A.2d 806 (Ct. App. Div. 1979).

45. *See id.* at 402, 409 A.2d at 808.

46. *See id.* at 402-03, 409 A.2d at 808-09. The contract provided that "no demand for arbitration shall be made later than thirty (30) days after the date which the engineer rendered his written decision," and "the failure to demand arbitration within said thirty (30) day period shall result in the engineer's decision being final and binding." *Id.* at 402, 409 A.2d at 808.

47. *See* River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545, 548-49 (1953).

48. *See id.*

49. 376 U.S. 543 (1964).

50. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1982).

with certain steps in the stipulated grievance procedure leading up to arbitration.[51] The Court rejected the employer's contention that the latter issue was one for the courts and not the arbitrator. It also expressed the concern that questions regarding the applicability of grievance procedures and compliance with such requirements often were inseparable from the merits of the underlying dispute and, therefore, should be left to the arbitrator's informed discretion.[52] Thus, the Court concluded, "Once 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."[53] According to the Court, a contrary rule inevitably would involve judges in the difficult task of distinguishing justiciable "procedural" questions from nonjusticiable substantive issues[54] and would increase the probability of delays to the commencement of arbitration,[55] "contrary to the aims of national labor policy."[56]

Although *Wiley* concerned the purposes and policies under-

---

51. *See id.* The action was brought by the Retail, Wholesale and Department Store Union against John Wiley & Sons, Inc., pursuant to a collective bargaining agreement with Interscience Publishers, Inc., a company that subsequently merged with Wiley. *See* 376 U.S. at 544-45. When Wiley refused to recognize the prior collective bargaining agreement or the representative status of the union under that agreement, the union sought arbitration of the issues. *See id.* at 546. Although the district court denied its motion to compel arbitration, the district court, the Second Circuit reversed that judgment and ordered arbitration. *See Wiley*, 313 F.2d 52 (2d Cir. 1963). The Supreme Court granted certiorari in order to consider: (1) the effect of corporate mergers on arbitration clauses incorporated in prior collective bargaining agreements and (2) whether courts or arbitrators were responsible for determining if procedural prerequisites to arbitration, which were incorporated in the stipulated grievance procedures, have been met. 376 U.S. at 544.

The agreement before the Court established a three-step grievance procedure. The initial step was a conference between the affected employee, a union steward, and an employer representative. If that conference failed to resolve the dispute, a second conference, attended by an employer's officer or representative and the union shop committee or a union representative, could be held. Should this second step fail to resolve the dispute, the matter was to be submitted to arbitration. The employer alleged that the union had failed to comply with the first two steps prior to seeking arbitration, thereby releasing the employer from any duty to arbitrate. *See id.* at 555-56.

52. *See id.* at 556-57; *see also infra* notes 104-118 and accompanying text.

53. *Id.* at 557. The Court already had concluded that in the case before it, the arbitration clause was sufficiently broad to cover the subject matter of the parties' dispute. *See id.* at 553-55.

54. *See id.* at 558.

55. *See id*; *see also infra* notes 140-151 and accompanying text.

56. *Id.*

lying arbitration under federal labor law,[57] that decision has greatly influenced judicial treatment of "procedural arbitrability" questions arising under commercial contracts. *Del E. Webb Construction v. Richardson Hospital Authority*[58] is exemplary of the trend among federal courts.[59] In that case the Fifth Circuit ruled that a federal district court lacked authority to consider contractual requirements regarding the filing of an arbitration demand in acting upon a motion to compel arbitration under section 4 of the Federal Arbitration Act (FAA).[60] Observing that the FAA required courts to order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,"[61] the court followed *Wiley* and held that compliance with contractual prerequisites was an issue for the arbitrator.[62]

The Eighth Circuit used similar reasoning in *Contracting Northwest, Inc. v. City of Fredericksburg*.[63] The court in that case affirmed a judicial order compelling a municipality to arbitrate disputes under a construction contract and staying related litigation. It refused to entertain the city's objections that the construction contractor had failed to deliver a demand within ten days of the project engineer's decision as required by the contract and also had failed to comply with EPA and contractual requirements regarding certification and documentation of claims.[64] The court found that the parties had agreed to arbitrate "a dispute about any matter involving a decision of the Engineer" and, therefore, had obligated themselves to submit the subject matter of the instant disputes to arbitration.[65] Because the city's objections were "procedural" issues growing out

57. *See id.* at 559.

58. 823 F.2d 145 (5th Cir. 1987).

59. *See, e.g.*, Commerce Park at DFW Freeport v. Mardian Const. Co., 729 F.2d 334, 339 n.5 (5th Cir. 1984); Contracting Northwest, Inc. v. City of Fredericksburg, 713 F.2d 382, 385-86 (8th Cir. 1983); Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980); World Brilliance Corp. v. Bethlehem Steel Co., 342 F.2d 362, 365 (2d Cir. 1965); Siam Feather & Forest Prods. Co. v. Midwest Feather Co., 503 F. Supp. 239, 241-42 (S.D. Ohio 1980), *aff'd*, 663 F.2d 1073 (6th Cir. 1981).

60. *See* 823 F.2d at 149.

61. *Id.* (quoting 9 U.S.C. § 4 (1982)).

62. *See id.*

63. 713 F.2d 382 (8th Cir. 1983).

64. *See id.* at 385-86.

65. *See id.*

of an otherwise arbitrable dispute and affecting its eventual disposition, only the arbitrators, the court concluded, had the authority to dispose of them.[66]

These judicial attitudes are mirrored in the state courts, as illustrated by *Village of Carpentersville v. Mayfair Construction Co.*[67] That decision concerned a village's request for a judicial declaration that claims submitted by a contractor under a contract for the reconstruction of waste-treatment facilities were nonarbitrable. Among other things, the village asserted that the contractor had failed to comply with certain contractual preconditions to arbitration, including time limits associated with claims related to owner-ordered changes and requirements for filing an arbitration demand after a decision of the project architect-engineer.[68] Finding no controlling authority on the subject, the court surveyed opinions of other state courts and found that the majority favored arbitration of questions of compliance with contract procedures.[69] Concluding that "[p]rocedural questions often cannot be resolved without construing the contract as a whole and the transactions under the contract in light of the customs and practices of the industry[,] . . . [a] task peculiarly within the competence of the arbitrator," the court ruled that "matters of timeliness and waiver and the other procedural matters in question" were arbitrable.[70]

Liberal judicial attitudes toward arbitrability of procedural matters affect not only issues raised by missed filing deadlines but also those raised by noncompliance with provisions requiring submission of disputes to design professionals. In *Village of Carpentersville*, for example, the contractor's retainage claims were held arbitrable even though no claim for retainage had been filed with the project architect, and therefore, the architect

66. *See id.* at 386.

67. 100 Ill. App. 3d 128, 426 N.E.2d 558 (1981). For other representative state court cases, see Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, Inc., 408 A.2d 957 (Del. Ch. 1979); Bartley, Inc. v. Jefferson Parish School Bd., 302 So. 2d 280, 282-83 (La. 1974); Willis-Knighton Medical Center v. Southern Builders, Inc., 392 So. 2d 505, 507-08 (La. App. Ct. 1980); Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 558 P.2d 517 (1976); Kardon v. Portare, 466 Pa. 306, 353 A.2d 368 (1976); Shamokin Area School Auth. v. Farfield Co., 308 Pa. Super. 271, 279, 454 A.2d 126, 127 (1982).

68. *See* 100 Ill. App. 3d at 129-30, 426 N.E.2d at 560-61.

69. *See id.* at 132-33, 426 N.E.2d at 562.

70. *Id.* at 133, 426 N.E.2d at 562-63.

had rendered no appealable decision.[71] The court noted that while the contract provided that the design professional "shall render decisions . . . on all matters pertaining to the progress of the work," the failure to seek the architect's decision was a "matter of procedural arbitrability not subject matter arbitrability."[72] Similarly, in *Contracting Northwest* the Eighth Circuit held that a contractor's failure to submit requested documentation to the project engineer was arbitrable under a clause providing for arbitration of "any matter involving a decision of the Engineer."[73]

D. The New York Approach: A Middle Ground

Since New York pioneered the field of commercial arbitration, its courts frequently — and, often, persuasively — have addressed various aspects of the subject.[74] In a series of decisions dealing with procedural prerequisites to arbitration, New York courts have defined a unique approach to their treatment.

Initially New York tribunals dealt routinely with contractual time limitations when considering the enforceability of agreements to arbitrate.[75] In *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.*[76] the court of appeals affirmed a stay of arbitration under the terms of a sales contract because the claimant-buyer had failed to comply with the requirement that " '[a]ny

71. *See id.* at 134, 426 N.E.2 at 563.

72. *Id.* at 563. In another case the Louisiana Supreme Court ordered arbitration of contractor claims against an owner despite the latter's contention that arbitration would be "premature," or alternatively that arbitration had been waived, because the claims never were submitted to the project architect. *See* Bartley, Inc. v. Jefferson Parish School Bd., 302 So. 2d 280, 283 (La. 1974). Finding no grounds upon which to deny enforcement of the arbitration agreement, the court concluded that such questions of "procedural arbitrability" themselves were arbitrable. *See id.* The court did not attempt to reconcile this conclusion with the language of the arbitration agreement, which provided for arbitration only of "[a]ny claim, dispute or other matter that has been referred to the Architect." *Id.* at 282 n.4.

73. 713 F.2d at 386.

74. For a summary of pertinent decisions by the state's highest court, see Jones, *Arbitration From the Viewpoint of the Practicing Attorney: An Analysis of Arbitration Cases Decided By the New York State Court of Appeals from January, 1973 to September, 1985*, 14 FORDHAM URB. L.J. 523 (1986).

75. *See* River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953); *In re* Duke Laboratories, Inc., 9 Misc. 2d 779, 168 N.Y.S.2d 998 (Sup. Ct. 1957).

76. 305 N.Y. 36, 110 N.E.2d 545 (1953).

demand for arbitration must be made within five days after tender.' "[77] The disputed issues once were referable to arbitration, reasoned the court, but were "no longer so referable only because the parties wrote their own time limitation beyond which no step toward such relief could be taken."[78] By denying the buyer the right to arbitrate, then, the court was doing no more than enforcing the parties' own agreement, including their "exclusive remedy for its attempted breach."[79]

In the wake of the Supreme Court's pronouncement in *John Wiley & Sons, Inc. v. Livingston*,[80] however, the New York court announced a different rule for arbitration under the terms of collective bargaining agreements. In *Long Island Lumber Co. v. Martin*[81] the court declared that under the terms of section 301 of the Taft-Hartley Act[82] as well as the law of New York, issues regarding compliance with "steps preliminary and necessary to" arbitration under a collective bargaining agreement were arbitrable and not justiciable.[83] The case concerned a contract grievance procedure requiring controversies to be referred initially to a "committee of Arbitration" consisting of representatives of the union and the employer; if the committee could not agree on a decision, the matter was to be submitted for final and binding arbitration before a designated trucking industry tribunal.[84] During a wage dispute, the employer sought and received a stay of the second arbitration proceedings because no properly established "committee" had first reviewed the matter;[85] the union appealed from an affirmation of the order by the appellate division.[86] Reversing the lower courts, the court of appeals cited the body of federal labor law supporting the presumption that questions of arbitrability are for arbitrators.[87] Absent "unmistakeably clear language" deferring issues of procedure or substance to the courts, it concluded, such matters were

77. *Id.* at 39, 110 N.E.2d at 546.
78. *Id.* at 43, 110 N.E.2d at 548.
79. *Id.*
80. 376 U.S. 543 (1964). *See supra* notes 49-56 and accompanying text.
81. 15 N.Y.2d 380, 207 N.E.2d 190, 259 N.Y.S.2d 142 (1965).
82. Labor Management Relations (Taft-Hartley Act) § 301, 29 U.S.C. § 185 (1958).
83. *See* 15 N.Y.2d at 382, 207 N.E.2d at 191, 259 N.Y.S.2d at 144.
84. *See id.* at 383, 207 N.E.2d at 191-92, 259 N.Y.S.2d at 144-45.
85. *See id.* at 384, 207 N.E.2d at 192, 259 N.Y.S.2d at 145.
86. *See id.*
87. *See id.* at 384-85, 207 N.E.2d at 192-93, 259 N.Y.S.2d at 145-47.

arbitrable.[88] Of particular significance was *Wiley*, which involved circumstances similar to those before the court of appeals, and its conclusion that procedural questions arising from an otherwise arbitrable dispute were to be left to the arbitrator.[89] Under the broad language of the arbitration provision in the parties' collective bargaining agreement, which covered " 'all grievances' " and " 'all disputes with respect to the interpretation of this agreement,' " the court concluded that both procedural and substantive issues were arbitrable.[90]

Although the *Long Island Lumber* decision specifically was limited to labor cases,[91] its rationale eventually was extended to commercial arbitration. In *Board of Education v. Wager Construction Corp.*,[92] a case concerning disputes under a construction contract, the court of appeals cited *Long Island Lumber* and other decisions for the proposition that while statutory prerequisites to arbitration were justiciable, "under a broad arbitration clause timely compliance with contractual notice provisions . . . as well as various time requirements in grievance procedure, pose issues whose resolution lies solely with the arbitrator."[93]

The New York courts, however, identified an apparent exception to this broad mandate for leaving procedural questions to arbitrators: the issue of compliance with terms that were clear conditions precedent to arbitration.[94] The court of appeals made this manifest in *United Nations Development Corp. v. Norkin Plumbing Co.*,[95] a decision that attempted to categorize and reconcile previous opinions dealing with contractual limitations on arbitration procedures. The court considered the justiciability of a claimant's failure to comply with provisions of a subcontract

88. *See id.* at 385, 207 N.E.2d at 193, 259 N.Y.S.2d at 146.

89. *See id.* at 385-86, 207 N.E.2d at 193, 259 N.Y.S.2d at 146-47. Although the New York court quoted *Wiley* at length in support of its decision, its observation that parties, by clear expressions of intent, may reserve procedural as well as substantive issues for the courts is a caveat unstated in the Supreme Court's decision. *See infra* notes 181-205 and accompanying text.

90. *See id.* at 387, 207 N.E.2d at 194, 259 N.Y.S.2d at 147.

91. *See id.* at 387, 207 N.E.2d at 194, 259 N.Y.S.2d at 148 ("Such a rule would not be applicable to all situations in which a contract arbitration clause was before the courts, the doctrine of the present case arising solely from the special economic circumstances which surround the institution of collective bargaining.").

92. 37 N.Y.2d 283, 333 N.E.2d 353, 372 N.Y.S.2d 45 (1975).

93. *Id.* at 289, 333 N.E.2d at 356, 372 N.Y.S.2d at 49.

94. *See id.* 333 N.E.2d at 356, 372 N.Y.S.2d at 48-49.

95. 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978).

that required a "demand for arbitration . . . [to] be made within 60 days after the claim, dispute or other matter in question has arisen."[96] It concluded that the primary question was "whether the condition imposed by [the parties'] agreement is an express or implied condition precedent [to arbitration]."[97] Although issues regarding "compliance with contractual notice provisions" and "time requirements" generally were arbitrable under broadly framed arbitration provisions, issues regarding contractual limitations that were expressly made conditions precedent initially were questions for the courts.[98] Because the parties had agreed to arbitrate "all claims, disputes and other matters in question arising out of, or relating to [the] Contract or the breach thereof,"[99] and the sixty-day filing limit was not an express condition precedent to submission of a claim or dispute to arbitration, the defense based on lack of compliance was for the arbitrator and not the court.[100]

Whatever the New York approach may have to recommend it, the weight of judicial opinion still favors the "all or nothing" rationale advanced by the Supreme Court in *John Wiley & Sons, Inc. v. Livingston.*[101] Since *Wiley* set forth the case for deferring matters of "procedural arbitrability" to arbitrators in labor disputes, its logic has been applied uncritically in numerous commercial cases.[102] An analytical perspective on the poli-

96. *Id.* at 362, 380 N.E.2d at 254, 408 N.Y.S.2d at 426.

97. *Id.* 380 N.E.2d at 255, 408 N.Y.S.2d at 427.

98. *See id.* at 363, 380 N.E.2d at 255-56, 408 N.Y.S.2d at 427-28.

99. *Id.* at 364, 380 N.E.2d at 256, 408 N.Y.S.2d at 428.

100. *See id.* at 364-65, 380 N.E.2d at 256, 408 N.Y.S.2d at 428.

101. *See supra* notes 58-73 and accompanying text. A few courts in other jurisdictions have explicitly adopted the New York approach to the treatment of procedural limitations. *See, e.g.*, Public Health Trust v. M.R. Harrison Constr. Co., 451 So. 2d 756, 757-58 (Fla. Dist. Ct. App. 1982) (citing New York precedents approvingly). Other decisions, while not referencing New York law, have adopted a similar rationale. *See, e.g.*, Brinkman v. Buffalo Bills Football Club, 433 F. Supp. 699 (W.D.N.Y. 1977) (barring breach of contract claims because claimant failed to follow contractual conditions precedent to arbitration); *see also* Conticommodity Serv., Inc. v. Philipp & Lion, 613 F.2d 1222, 1227 (2d Cir. 1980) (stating in dicta that questions regarding the effect of time limitations were arbitrable "in the absence of express language in the contract referring to a court questions concerning the timeliness of a demand for arbitration"). In Village of Carpentersville v. Mayfair Constr. Co., 100 Ill. App. 3d 128, 426 N.E.2d 558 (1981), the court cited *Norkin Plumbing* but did not explicitly adopt the approach of that case even though it determined that "no express condition precedent" to arbitration was present in the case before it. *Id.* at 133, 426 N.E.2d at 562.

102. *See* cases cited *supra* notes 58-59.

cies offered in support of categorical deferral of procedural questions is long overdue.[103]

III. AN APPRECIATION OF CONCERNS UNDERLYING JUDICIAL DEFERMENT OF "PROCEDURAL ARBITRABILITY" QUESTIONS

A. Concerns Regarding the Intertwining of Substantive and Procedural Issues

Courts supporting arbitration of procedural issues frequently note that such questions tend to be intertwined with underlying substantive controversies, which are the arbitrator's province under the typical broadly framed arbitration provision.[104] This rationale echoes *Wiley*, in which the Supreme Court reasoned that "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it."[105]

The issue of compliance with pre-arbitration grievance procedures in *Wiley* apparently could not be resolved without understanding the underlying substantive disputes. The controversy concerned the merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. and the effect of that corporate reorganization on the existing collective bargaining agreement between Interscience and a union representing half of its employees.[106] In response to Wiley's argument that the union had forfeited the right to arbitrate by failing to comply with contract provisions requiring settlement conferences, the union insisted that such steps would have been "utterly futile" in light of the publisher's refusal to recognize its status.[107] The union also argued that time limitations in the stipulated procedure were not controlling because the publisher's conduct constituted a contin-

---

103. For an excellent discussion of procedural arbitrability in labor cases, see Note, *supra* note 13.

104. *See, e.g.*, Western Automatic Mach. Screw Co. v. United Auto., Aircraft, & Agricultural Implement Workers Local 101, 335 F.2d 103 (6th Cir. 1964); Village of Carpentersville v. Mayfair Constr. Co., 100 Ill. App. 3d 128, 426 N.E.2d 558 (1981); Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 558 P.2d 517 (1976).

105. 376 U.S. at 556-57.

106. *See id.* at 544-46.

107. *See id.* at 557.

uing violation of the collective bargaining agreement.[108] Because the union's arguments about procedural questions hinged on the effect of the merger on the collective bargaining agreement, the Court refused to allocate questions of substance and procedure to two different forums.[109]

Procedural concerns likewise may implicate the merits of an otherwise arbitrable dispute under the terms of a standard AIA construction contract.[110] For example, assume a contractor suffers job delays because of the project architect's failure to correct design deficiencies or to clarify ambiguities in the contract documents. Faced with serious economic consequences, the contractor informs the project owner that the inaction of the latter's agent constitutes a material breach of the owner's obligation to the general contractor and discharges the contractor's obligation of further performance. When the contractor demands arbitration of its claim against the owner under the contract or, alternatively, a claim for restitution,[111] the owner seeks to avoid arbitration on the basis that the contractor failed to present its claim to the architect in accordance with stipulated dispute resolution procedures.[112] The contractor responds that submission to the design professional would be futile since the latter's acts and omissions were the focus of the underlying dispute. Under these circumstances a court passing on the "procedural arbitrability" issue might involve itself in the very merits of the case, trespassing on the arbitration panel's domain as defined by the AIA General Conditions.[113]

Whether procedural questions actually implicate the ultimate issues in the case depends in part on how such questions are framed. In the hypothetical, for example, an allegation that the architect's repeated failure to correct design deficiencies released the contractor from the obligation to submit related

108. *See id.*

109. *See id.* at 557-58.

110. *See supra* notes 17-20 and accompanying text.

111. Under a broad-form arbitration agreement, such as that contained in the AIA General Conditions, requests for rescission and restitution generally are regarded as arbitrable. *See, e.g.*, Dierson v. Jo Kiem Builders, Inc., 153 Ill. App. 3d 373, 505 N.E.2d 1325 (1987) (affirming motion to compel arbitration of request for rescission based on allegations of fraud in the inducement).

112. *See supra* note 17 and accompanying text.

113. *See supra* note 18 and accompanying text.

owner-contractor disputes to the architect may require substantial inquiry into the the pattern of action or inaction lying at the heart of the parties' controversy.[114] On the other hand, if the contractor argues that the requirement of first-tier decisionmaking by the architect was not intended to apply to disputes involving the design professional's own acts or omissions, the court conceivably might address this question of mutual intent without delving deeply into the course of conduct underlying the contractor's claims for damages.[115]

Moreover, it is doubtful whether the circumstances of *Wiley* and the hypothetical above represent a majority of cases involving allegations of noncompliance with contractual prerequisites to arbitration. A party's purported failure to file an arbitration demand within a contractually stipulated period, while requiring factual inquiry into the content and timing of written or oral communications, often bears no relationship to the merits of the claim or dispute giving rise to the demand.[116] In many cases there may not even be a real controversy regarding the fact of a missed deadline.[117]

Thus, although *Wiley* describes a policy committing "procedural arbitrability" issues to arbitration, its broad holding is not supported by concerns about procedural defenses that are factually related to the merits of the dispute. Courts nevertheless are reluctant to limit the *Wiley* rationale to those cases in which procedural issues are intertwined with substantive controversies.[118] These decisions must be justified by a more broadly

---

114. This situation would be directly analogous to the circumstances present in *Wiley*.

115. In actuality, such an argument would be unavailing under the present form of the AIA General Conditions. Drafters of that document anticipated such situations and specified that "[c]laims, *including those alleging an error or omission by the Architect*, shall be referred initially to the Architect for action." *See* AIA A201, *supra* note 14, § 4.3.2 (emphasis added).

116. In this regard a number of courts dealt with arguments that the *Wiley* rationale does not extend to cases in which procedural issues are independent of the underlying dispute. *See, e.g.*, Tobacco Workers Int'l Union Local 317 v. Lorillard Corp., 448 F.2d 949, 953 (4th Cir. 1971); Rochester Tel. Corp. v. Communication Workers of Am., 340 F.2d 237, 238-39 (2d Cir. 1965); Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 386-87, 207 N.E.2d 190, 193, 259 N.Y.S.2d 142, 147 (1965).

117. *See, e.g.*, River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953); *In re* Duke Laboratories, Inc. v. Albert A. Lutz Co., 9 Misc. 2d 779, 168 N.Y.S.2d 998 (Sup. Ct. 1957).

118. *See* cases cited *supra* note 116.

based rationale.

B. Concerns Based Upon the Purposes and Policies Served by Agreements to Arbitrate

In the commercial sphere as well as the labor arena, agreements to arbitrate are enforced vigorously under contemporary legislation.[119] Consistent with the notion that by electing arbitration, the parties have chosen their own system of civil justice, courts tend to adhere strictly to the limits of their enforcement role under modern statutes and avoid encroachments upon the domain of the arbitrator.[120] Such concerns are implicit in *Wiley* and other judicial decisions deferring issues of contract procedure to arbitration.[121]

Under the Federal Arbitration Act and parallel state statutes, doubts about the scope of an arbitration provision are to be resolved in favor of arbitrability.[122] The liberality of contemporary judicial treatment is reflected by the variety of claims and disputes referred to arbitration under broad executory agreements to arbitrate, including tort claims,[123] statutory actions,[124]

---

119. *See generally* Stipanowich, *supra* note 13, at 970-78 (describing broadening concepts of arbitrability under federal and state statutes).

120. Under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), courts have very limited roles in the enforcement process. *See* Associated Brick Mason Contractors of Greater N.Y., Inc. v. Harrington, 820 F.2d 31, 35 (2d Cir. 1987) (describing the determinations that a court must make under federal arbitration law); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987) (same). The judicial role is similarly circumscribed under legislation in most states. *See, e.g.*, Loomis, Inc. v. Cudahy, 104 Idaho 106, 109, 656 P.2d 1359, 1362 (1983) (holding that court's inquiry is limited to determining the existence of an agreement to arbitrate); Village of Cairo v. Bodine Contracting Co., 685 S.W.2d 253, 257-58 (Mo. Ct. App. 1985) (comparing court's role under the Uniform Arbitration Act to that under the Federal Arbitration Act).

121. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 559 (1964); Village of Carpentersville v. Mayfair Constr. Co., 100 Ill. App. 3d 128, 135, 426 N.E.2d 558, 562-63 (1981).

122. *See, e.g.*, AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (doubts regarding scope of an arbitration agreement generally are resolved in favor of coverage); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 847 (stating that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 558 P.2d 517, 522 (1976) (citing Arizona law for the same proposition).

123. *See* Stipanowich, *supra* note 13, at 971-72.

124. *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 57 U.S.L.W. 4539 (U.S. May 16, 1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953), and holding

petitions for equitable relief,[125] and demands for punitive damages.[126]

By resolving doubts in favor of arbitrability and limiting their own roles in the enforcement process, courts seek to further certain purposes and goals generally associated with arbitration: expert decisionmaking, speed, and economy.[127] Arbitrators, operating within the flexible confines of their roles, potentially are able to bring to bear a wealth of knowledge and experience about the commercial or industrial settings of disputes, the terms of agreement commonly used by actors within those settings, and standards of performance imposed by contract and common expectations to the process of dispute resolution.[128] Efficient disposition of disputes by arbitration assertedly helps to preserve the maintenance of peace in the work place[129] and offers an economical substitute for litigation of commercial controversies.[130] Courts adopting the *Wiley* approach presumably do so in the hopes of furthering these salutary purposes.[131]

---

that arbitration clauses in investor agreements with securities brokers are enforceable for disputes arising the Securities Act of 1933); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (recognizing arbitrability of RICO claims and claims arising under § 10(b) of the Securities Exchange Act of 1934); Southland Corp. v. Keating, 465 U.S. 1 (1984) (ordering arbitration of action under state franchise investment statute).

125. *See, e.g.*, Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984) (temporary injunction); Mobil Oil Indonesia v. Asamera Oil, 487 F. Supp. 63, 66 (S.D.N.Y. 1980) (reformation); Staklinski v. Pyramid Co., 6 N.Y.2d 159, 163-64, 160 N.E.2d 78, 80, 188 N.Y.S.2d 541, 543 (1959) (specific performance); Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958) (injunction).

126. *See, e.g.*, Willoughby Roofing & Supply Co. v. Kajima Int'l, 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985). *See generally* Stipanowich, *supra* note 13.

127. Conticommodity Servs. v. Philipp & Lion, 613 F.2d 1222, 1224 (2d Cir. 1980) (noting that the Federal Arbitration Act "carefully limits the role of the courts in considering motions to compel arbitration" to prevent frustration of the goals of arbitration, which is "a speedy and relatively inexpensive trial before specialists" that "eases the workload of the courts").

128. *See generally* Stipanowich, *supra* note 2, at 435-38, 447-50 (1988) (discussing the perception that arbitrators are knowledgeable and experienced triers of fact).

129. *See* United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 581 (1960) (describing the function of arbitration as a "substitute for industrial strife").

130. *See generally* Stipanowich, *supra* note 2, at 433-35, 438-47, 450-53 (addressing perceptions regarding the relative informality, flexibility, speed, and economy of arbitration).

131. *See, e.g., Conticommodity Servs. 613 F.2d at 1224; Bartley, Inc. v. Jefferson Parish School Bd., 302 So. 2d 280, 283 (La. 1974).*

1. Procedural Issues and Arbitrator Expertise

Commercial arbitrators typically are chosen for their pertinent knowledge and expertise. Members of the national construction panel of the American Arbitration Association, which furnishes arbitrators for thousands of construction cases each year, generally are contractors, engineers, architects, owner representatives, or lawyers with construction experience.[132] Construction arbitration panels tend to be multidisciplinary, representing a range of construction experience as well as a diversity of professional viewpoint.[133] The hope is that disputes will be resolved with an informed understanding of pertinent contract terms and usages and an appreciation of the reasonable expectations of the parties.

If the parties have described the arbitrators' authority as extending to "any controversy or [c]laim arising out of or related to the [c]ontract, or the breach thereof,"[134] one may logically conclude that this authorization encompasses interpretation of contractual provisions governing the resolution of disputes.[135] From a policy perspective, it is appealing to accord the same flexible, informed approach to procedural compliance issues that arbitrators bring to their interpretive roles generally.[136] A proper

---

132. *See* Stipanowich, *supra* note 2, at 438.

133. *See id.* The American Arbitration Association (AAA) has a policy of appointing three-member panels in cases in which more than $100,000 is in dispute. *See id.* at 438 n. 72.

134. AIA A201, *supra* note 14, § 4.5.1.

135. *See* Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, Inc., 408 A.2d 957, 963 (Del. Ch. 1979) (reasoning that "the question of what procedure must be followed to initiate the arbitration process is . . . a matter of construing the contract and thus within the scope of the arbitration agreement"); Shamokin Area School Auth. v. Farfield Co., 308 Pa. Super. 271, 274, 454 A.2d 126, 127 (1982) (concluding that when "the parties have agreed to arbitrate all issues arising from the contractual relationship, procedural questions such as timeliness are reserved for the arbitrators"); *see also* Livingston v. John Wiley & Sons, Inc., 313 F.2d 52, 62 (2d Cir. 1963) (citing a number of sources for the proposition that labor arbitration agreements should include "implementation of the arbitration clause and its procedural aspects"), *aff'd*, 376 U.S. 543 (1964).

136. One court reasoned:

> Procedural questions often cannot be resolved without construing the contract as a whole and without considering the transactions under the contract in light of the customs and practices of the industry. This task is peculiarly within the competence of the arbitrator, who will presumably hold the parties to the essence of their bargain.

Village of Carpentersville v. Mayfair Constr. Co., 100 Ill. App. 3d 128, 133, 426 N.E.2d

understanding of the realities of the job site may be as essential to determination of what constitutes a reasonable time for submission of an arbitration demand as it is to establishing the propriety of a claim for extras.[137] Moreover, as previously noted, questions of adherence to procedural formulae occasionally may be intermingled with the merits of the underlying dispute.[138]

Countervailing arguments, however, can be made. Although arbitrators' informed discretion may be preferable to judicial resolution when it comes to filling gaps and resolving ambiguities in a contract, arbitrator expertise may offer fewer advantages when contract terms are clear and specific.[139] Arguably, courts are just as well equipped to apply lengthy, detailed dispute resolution provisions that establish explicit guidelines for treatment of claims and controversies. Moreover, arbitrators often lack legal training and may be uncomfortable disposing of a case on the basis of a missed deadline or other procedural defect; courts, on the other hand, are equipped by training and experience to deal with such issues in summary fashion. Thus, it is hard to justify blanket submission of "procedural" issues to arbitrators strictly on the basis of relative expertise.

2. *Procedural Issues and Concerns Regarding Avoidance of Delay*

In *Wiley* the Supreme Court expressed the concern that judicial handling of "procedural" elements of an otherwise arbitrable dispute would create "opportunities for deliberate delay" as well as "the possibility of well-intentioned but no less serious

---

558, 562-63 (1981).

137. *See* Graham Contracting, Inc. v. Flagler County, 444 So. 2d 971 (Fla. Dist. Ct. App. 1984) (deferring question of whether demand was brought within reasonable time to arbitrators).

138. *See supra* notes 104-113 and accompanying text.

139. *See* Note, *supra* note 13, at 1469-70. The length and specificity of the dispute resolution provisions in the AIA General Conditions has been noted. *See supra* notes 15-20 and accompanying text.

On the other hand, even specific and seemingly straightforward contract language may benefit from an informed interpretation. As observed in Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md. App. 307, 320 A.2d 558 (Ct. Spec. App. 1974), *rev'd on other grounds*, 274 Md. 307, 334 A.2d 526 (1975), parties expect the expert arbitrator to "produce a judgment which is founded not only upon a literal meaning of the words appearing in the contract document itself, but also their meaning in the context of the practices and customs associated with their use." *Id.* at 316, 320 A.2d at 563.

delay."[140] The Court thus echoed the decision of the Second Circuit in the same case, in which Judge Medina, speaking for a unanimous court, stated:

> It is of the essence of arbitration that it be speedy and that the source of friction between the parties be promptly eliminated. . . . The numerous cases involving a great variety of procedural niceties . . . make it abundantly clear that, were we to decide that procedural questions under an arbitration clause of a collective bargaining agreement are for the court, we would open the door wide to all kinds of technical obstructionism.[141]

The court of appeals therefore concluded that whether or not a matter of procedural compliance required special expertise and familiarity with industry conditions and practices, such questions should be left to the arbitrator.[142]

Avoiding threshold obstacles is a highly desirable goal in both commercial and labor arbitration.[143] Parties adopting such processes often are attracted by abbreviated prehearing procedures and relaxed evidentiary rules that hold out the promise of efficient and economical dispute resolution.[144] Such expectations may be frustrated if hearings are postponed for months or years by litigation over enforcement issues.[145] If a claimant seeks arbitration of a matter that is arguably within the scope of the agreement to arbitrate, deferring questions of missed deadlines and other procedural issues to arbitration should discourage parties from litigating such defenses, increase public confidence in the enforceability of agreements to arbitrate, reduce expenditures of participants' time and money, and conserve judicial resources.

As compelling as these arguments may be, however, one may question whether the desire for speed and economy is sufficient justification for wholesale elimination of an entire class of

---

140. 376 U.S. at 558.

141. Livingston v. John Wiley & Sons, Inc., 313 F.2d 52, 63 (2d Cir. 1963).

142. *See id.* at 63-64.

143. *See id. See generally* Stipanowich, *supra* note 2, at 438-40 (discussing speed and efficiency of arbitration process).

144. *See id.*

145. *See id.* at 451. If it is ultimately determined that the dispute is arbitrable, "the arbitrator would ordinarily remain free to reconsider the ground covered by the court insofar as it bore on the merits of the dispute," thus compounding pre-arbitration delays. *See Wiley*, 376 U.S. at 558.

defenses to arbitrability. Modern courts routinely consider issues under the heading of "substantive arbitrability" — that is, issues addressing the scope of the parties' agreement to submit disputes to arbitration.[146] The widespread use of broad form arbitration clauses and the liberality of judicial interpretation typically result in judicial compulsion of arbitration proceedings and undoubtedly have reduced litigation of "substantive arbitrability" questions.[147] The courts, however, have never suggested that such questions are wholly inappropriate for judicial consideration; their treatment is considered an essential element in effectuating the intent of the parties.[148]

While permitting courts to entertain procedural compliance issues may only delay the commencement of arbitration hearings, in some cases judicial prescreening of claims may lead to more rapid resolution of disputes. Should a court refuse to order arbitration of a claim or dispute, the effect in most cases would be like that of a summary judgment: the matter is resolved short of a full hearing on the merits.[149] Although a party is foreclosed from pursuing a desired remedy, all participants are spared the time and expense of preparation and presentation of the case before a panel of arbitrators.

Deferring such matters along with substantive controversies to arbitrators, on the other hand, may postpone their consideration until the conclusion of a decision on the merits. Such treatment may be appropriate when procedural questions are inextricably intertwined with the basic issues of the case, as in the

---

146. *See Wiley*, 376 U.S. at 546-47; Contracting Northwest, Inc. v. City of Fredericksburg, 713 F.2d 382, 384 (8th Cir. 1983); *see also supra* note 120 and accompanying text.

147. *See supra* notes 119-127. *See generally* M. DOMKE, COMMERCIAL ARBITRATION § 12, at 151-59 (G. Wilner ed. 1984) (reviewing judicial decisions affecting arbitrability and observing that "[t]he restrictive approach in interpreting the scope of arbitration agreements which results in the removal of certain controversies from the arbitration process, generally has been eliminated by [judicial] decisions"). When whether the subject matter of the dispute falls within the scope of the arbitration agreement is unclear, legislative policy favoring arbitration dictates deferring the matter to the arbitrator. *See* Acevedo Maldonado v. PPG Indus., 514 F.2d 614, 617 (1st Cir. 1975); Gold Coast Mall, Inc. v. Larmar, 298 Md. 96, 468 A.2d 91 (1983).

148. Absent an express agreement to arbitrate disputes instead of submitting them to the courts, no party may be required to submit to arbitration. *See* M. DOMKE, *supra* note 147, § 1.01, at 1.

149. *See, e.g.*, River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953).

foregoing hypothetical.[150] Other situations may arise, however, in which the arbitrators' own lack of confidence or experience in dealing with procedural issues causes them to postpone ruling on such matters until the entire case has been heard. Such possibilities are enhanced by the fact that many arbitrators lack legal training or judicial experience, and most arbitrations are conducted in the relative absence of procedural rules governing disposition of such issues.[151]

As the foregoing discussion reveals, whether the general purposes and goals of arbitration are best served by consistently deferring issues of procedural compliance to arbitrators is debatable. Although parties may incorporate an agreement to arbitrate with the goal of having arbitrators deal with all issues as speedily and efficiently as possible, procedural requirements also may be intended as a device for screening claims and disputes before they ever reach an arbitration panel.

3. Furthering the Parties' Intentions

The commitment to arbitrate is a contractual agreement. By contract the parties establish arbitration as the forum for dispute resolution, define its jurisdiction, and determine its characteristics.[152] Not surprisingly, contract-based arguments have been offered by those favoring justiciability of matters associated with procedural terms, as well as by those supporting arbitrability of such issues.

No party may be compelled to arbitrate a dispute until he has agreed to do so.[153] When parties have agreed that certain steps — such as filing a demand or submission of disputes to a design professional — shall be performed prior to arbitration, some courts believe the mutual intent of the parties can be given effect only by a judicial refusal to compel arbitration except

---

150. *See supra* text accompanying notes 110-113.

151. *See generally* Stipanowich, *supra* note 2, at 433-35 (discussing the informalities of arbitration proceedings). Moreover, if the arbitrators' decision on procedural matters is challenged, the appellate process will result in postponement of the ultimate award. *See* Willis-Knighton Medical Center v. Southern Builders, Inc., 392 So. 2d 505, 508 (La. Ct. App. 1980) (reasoning that "issues of procedural arbitrability should not be decided by the courts without first having been submitted to the arbitrator").

152. *See Willis-Knighton*, 392 So. 2d at 508.

153. *See supra* note 148.

when stipulated procedures have been properly observed.[154]

If procedural limitations are imposed by a contract providing for arbitration of "all disputes" or the equivalent, however, a number of courts take a very different view of the parties' intent in establishing procedural limitations. *Wiley* and its progeny stand for the proposition that under an agreement of such broad scope, arbitrators must consider all issues, including procedural matters.[155]

Although their focus upon the parties' intentions is appropriate, these opposing judicial philosophies are equally flawed in their attempts to define and dispose of "procedural arbitrability" issues in monolithic fashion. Arbitration is not a monolithic phenomenon. In each case it is what the parties desire it to be: complex or simple; extended or abbreviated; wide-ranging or narrowly focused.[156] Participants desiring maximum speed and efficiency may submit to a streamlined procedure under which all contract-related issues are arbitrable and few roadblocks are placed in the way of a party desiring arbitration. Other parties, perhaps hoping to end disputes before formal adversary procedures begin, may opt for multistage processes similar to labor grievance procedures and place various limitations on the right to arbitrate. Courts are required to effectuate the parties' intent regarding dispute resolution even if the result is not the most efficient and expeditious means of resolving controversies.[157] As the Supreme Court noted in one recent case concerning application of the Federal Arbitration Act:

> [P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.[158]

---

154. *See supra* notes 44-48 and accompanying text.

155. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 559 (concluding that "[a]lthough a party may resist arbitration once a grievance has arisen, we think it best accords with the usual purposes of an arbitration clause . . . to regard procedural disagreements [as arbitrable aspects of the dispute]"); *see also supra* note 135 and accompanying text.

156. *See* Stipanowich, *supra* note 2, at 433.

157. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).

158. *Id.* at 220.

A logical resolution of the problem of "procedural arbitrability" requires careful attention to the language by which parties have bound themselves to arbitrate and the guidelines established by modern statutes for judicial enforcement of those agreements. Assisted by traditional rules of contract construction, it is possible to delineate an ordered scheme for treatment of contractual time limitations and other constraints on arbitration.

IV. A PROPOSED APPROACH TO PROCEDURAL LIMITATIONS ON ARBITRATION

A. The Separability Principle and Contractual Limitations

Under the Federal Arbitration Act (FAA), agreements to arbitrate are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[159] As interpreted, this provision establishes that agreements to arbitrate may be denied enforcement on the same bases courts refuse to give legal effect to agreements generally.[160] This basic proposition governs judicial treatment of requests for orders staying litigation of arbitrable matters and for orders compelling arbitration.[161] Most modern state arbitration statutes contain similar language.[162]

A cardinal principle of judicial action under the FAA and similar state statutes is the separability doctrine, which rests upon the concept that the agreement to arbitrate is separate and independent from the contract in which it is contained.[163] The doctrine is in part the ironic result of judicial antipathy toward arbitration that traditionally led courts to "sever" arbitration clauses from the contract in order to declare them invalid and

159. 9 U.S.C. § 2 (1982).

160. *See* M. DOMKE, *supra* note 147, § 4.03, at 31; *see also* Loomis, Inc. v. Cudahy, 104 Idaho 106, 108, 656 P.2d 1359, 1361-62 (1983) (citing cases defining "revocation" as used in arbitration statutes).

161. *Loomis, Inc.*, 104 Idaho at 108, 656 P.2d at 1361.

162. *See* UNIF. ARBITRATION ACT § 1, 7 U.L.A. 5 (1955).

163. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-05 (1967) (concluding that fraud issues implicating the contract containing the arbitration agreement did not affect arbitrability under the FAA); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409-11 (2d Cir. 1959). *See generally* Annotation, *Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract*, 11 A.L.R.4TH 774 (1982).

unenforceable.[164] In today's more favorable judicial climate, however, the separability principle operates to preserve the agreement to arbitrate when the enforceability of the contract, as a whole, is challenged.[165] Enforcement will be barred only when one party can demonstrate that there is no fairly achieved agreement to arbitrate or that some other legal or equitable grounds upon which the agreement to arbitrate, as opposed to the contract as a whole, should not be enforced.[166] This approach reinforces public policies favoring agreements to arbitrate and furthers the presumed intent of the parties to leave the merits to arbitrators.[167]

The separability concept provides a useful starting point for analyzing contract terms governing disposition of claims and disputes. Under this approach, only procedural terms that directly affect the duty to arbitrate should be pertinent to the judicial inquiry. Thus, for example, allegations of noncompliance with a time limitation where the filing of a demand is a necessary preliminary commencement of arbitration hearing, the failure to meet a filing deadline might raise an issue regarding the enforceability of the agreement to arbitrate and, therefore, be proper for judicial consideration.[168] On the other hand, failure to notify an owner or architect of the existence of differing site conditions or delay-related claims within a specific period of the happening of a particular event[169] — a matter bearing no relation to the duty to arbitrate but rather to separate aspects of the container contract that are for the arbitrator — should play no part in the court's judgment regarding arbitrability. Published decisions, although rarely discussing the underlying rationale, generally re-

164. *Robert Lawrence Co.*, 271 F.2d at 410.

165. *See supra* note 163; *see also* Sauer-Getrieve KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) (applying doctrine in context of allegations that container contract was unconscionable, inequitable, lacking in consideration, fatally vague, and violative of antitrust laws); Village of Cairo v. Bodine Contracting Co., 685 S.W.2d 253 (Mo. Ct. App. 1985) (declaring issue of material breach of contract arbitrable, except in cases when the issue affects enforceability of arbitration agreement). *But see* Borck v. Holewinski, 459 So. 2d 405 (Fla. Dist. Ct. App. 1984) (rejecting separability doctrine).

166. *See Robert Lawrence Co.*, 271 F.2d at 411.

167. *See supra* notes 119-130 and accompanying text.

168. *See, e.g.*, Frouge Corp. v. New York City Hous. Auth., 26 A.D.2d 269, 272, 273 N.Y.S.2d 657, 660 (Ct. App. Div. 1966) (per curiam) (denying arbitration because a condition precedent in a housing authority agreement had not been met).

169. *See supra* notes 21-22 and accompanying text.

flect this distinction.[170]

As the conflicting judicial responses indicate, however, procedural prerequisites directly related to arbitration raise more difficult analytical questions.[171] Because such limitations almost always accompany a provision mandating arbitration of virtually any controversy associated with the contract or its breach, a satisfactory approach to the former must consider the latter.

B. Treatment of Procedural Limits Under Broad Arbitration Provisions

The broad mantle of authority conferred upon arbitrators by clauses committing "all disputes" to arbitration suggest inclusion of authority to determine the bounds of their own jurisdiction. It is generally recognized, however, that modern statutory schemes reserve jurisdictional questions, at least initially, for the courts.[172] Moreover, close inspection reveals ample statutory authority for judicial treatment of certain procedural limitations on arbitration.

Significantly, arbitration statutes typically do not distinguish between issues of "substantive arbitrability" and "procedural arbitrability" in describing the judicial role in enforcement of arbitration agreements.[173] The judicial inquiry may be described as "substantive" in nature because the court seeks to determine whether the parties agreed to refer the subject matter of a particular dispute to arbitration and remain bound to do so. In making this determination, the initial focus falls logically on the term describing the topical scope of the parties' agreement.[174] There may be other terms, however, that are procedural in nature and directly affect the basic commitment to arbitrate a dis-

170. *See, e.g.*, Village of Carpentersville v. Mayfair Constr. Co., 100 Ill. App. 3d 128, 131, 426 N.E.2d 558, 561 (1981) (holding that noncompliance with contract provisions governing claims for additional compensation "[did] not speak to arbitrability . . . [and therefore was] not relevant to the issue of arbitrability"); Stauffer Constr. Co. v. Board of Educ., 54 Md. App. 658, 670-72, 460 A.2d 609, 616 (Ct. Spec. App. 1983) (distinguishing procedures that affect the agreement to arbitrate from those that affect the validity of underlying claims).

171. *See supra* notes 27-100 and accompanying text.

172. *See supra* notes 146-147.

173. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982); UNIF. ARBITRATION ACT §§ 1, 2, 7 U.L.A. 5, 68, 114 (1955).

174. *See supra* note 18.

pute. By conditioning enforcement of the arbitration contract on compliance with contractual procedures, parties may remove an otherwise arbitrable dispute from the permissible scope of arbitration. By this logic, so-called "substantive arbitrability" questions apparently may implicate not only omnibus scope terms but also procedural limitations on the arbitration agreement.

The fallacy inherent in attempting to resolve arbitrability issues on the basis of "substance" and "procedure" may be further emphasized by comparing the contract terms in *Village of Carpentersville v. Mayfair Construction Co.*[175] with those discussed in *Contracting Northwest, Inc. v. City of Fredericksburg.*[176] In *Village of Carpentersville* the court ruled that a contractor's claim for withheld retainage was arbitrable under an AIA-type contract even though the claim was never submitted to the project architect for a preliminary decision.[177] It considered the failure to submit the claim to the architect a question of "procedural arbitrability" and not an issue going to the substance of the agreement to arbitrate.[178]

In *Contracting Northwest*, however, the Eighth Circuit reviewed a contract in which the parties specifically limited the *substantive scope* of arbitration to disputes regarding decisions of the project engineer.[179] Although the court, in ordering arbitration of certain disputes, espoused the same principles enunciated in *Carpentersville*,[180] it was not faced with a claimant who had failed to submit claims for decision by the engineer. Had that been the case, as it was in *Carpentersville*, the Eighth Circuit presumably would have considered the question a justiciable one dealing with the breadth of the parties' agreement and not a "procedural" matter. If procedural limitations can be described so easily in substantive terms, categorical treatment on the basis of such distinctions exalts form over substance.

Judicial review of arbitrability questions should not begin and end with a consideration of only one aspect of the agreement to arbitrate. Courts must deal with the arbitration contract

175. 100 Ill. App. 3d 128, 426 N.E.2d 558 (1981).

176. 713 F.2d 382 (8th Cir. 1983).

177. *See* 100 Ill. App. 3d at 134, 426 N.E.2d at 563.

178. *See id.*

179. The contract provided that "a dispute about any matter involving the decision of the Engineer" was arbitrable. 713 F.2d at 386.

180. *See supra* notes 63-66 and accompanying text.

in its entirety and address all terms, regardless of their form, that represent explicit limits on enforceability of that agreement. A more logical approach to handling time limits and other contractual prerequisites is to ascertain whether noncompliance with a particular provision raises a legitimate issue regarding enforcement of the arbitration agreement. The New York courts effectively have framed the issue of "procedural arbitrability" in terms of the law of conditions:[181] if parties clearly have stipulated that the duty to perform under the arbitration agreement is conditioned upon the happening of certain specified events, their intent should be honored regardless of the breadth of the term defining the substantive scope of the arbitration agreement.[182]

---

181. *See supra* notes 74-100 and accompanying text.

182. In United Nations Dev. Corp. v. Norkin Plumbing Co., Inc., 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978), the New York Court of Appeals described such situations as a narrow exception to the rule that under broad arbitration clauses "compliance with contractual notice provisions as well as time requirements . . . are issues to be determined by the arbitrator." *Id.* at 363, 380 N.E.2d at 255-56, 408 N.Y.S.2d at 427. The court reasoned that "compliance with contractual limitations, expressly made conditions precedent to arbitration by the parties' agreement, is a question for threshold judicial resolution." *Id.* at 364, 380 N.E.2d at 256, 408 N.Y.S.2d at 428 (citations omitted).

In County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 409 N.E.2d 951, 431 N.Y.S.2d 478 (1980), the New York court further described the process by which courts should make the determination regarding arbitrability:

> The parties are entitled first to a judicial determination whether there was a valid agreement to arbitrate. If the court determines that the parties had not made an agreement to arbitrate, that concludes the matter and a stay of arbitration will be granted or the application to compel arbitration will be denied. . . . Similarly, if the court concludes that, while the parties may have made a valid agreement to arbitrate, the particular agreement they made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope, there will likewise be a stay of arbitration or a denial of the motion to compel arbitration. . . .
>
> If, however, it is concluded that the parties did make an agreement to arbitrate and that the particular claim sought to be arbitrated comes within the scope of their agreement, there then may be a second threshold question for judicial determination — has the agreement that they made been complied with? This calls for a judicial determination as to whether there is any preliminary requirement or condition precedent to arbitration to be complied with, and if so, whether there has been compliance with such requirement or condition precedent. Thus, the parties may have erected a prerequisite to the submission of any dispute to arbitration, in effect a precondition to access to the arbitral forum. In such event the reluctant party may be forced to arbitration only if the court determines that this portion of the agreement has been complied with . . . .

Id. at 7-8, 409 N.E.2d at 953-54, 431 N.Y.S.2d at 480-82 (citations omitted).

Conditions have never been favored as a matter of judicial interpretation. The *Restatement of Contracts* provides that when doubts arise about whether a stipulated event is a condition to a party's performance, courts prefer an interpretation that will reduce the risk that the other party will suffer a forfeiture of his expectations in the exchange.[183] Even if the event falls within the control of the party expecting performance, courts prefer when possible to avoid interpreting the happening of the event as a condition of the other party's performance obligation.[184] Moreover, although a contract term clearly is a condition, the court may excuse the nonoccurrence of that condition if the consequence of its enforcement would be disproportionate forfeiture.[185]

Applied to terms associated with the agreement to arbitrate, these general principles of contract law reinforce legislative and judicial policies favoring arbitration of disputes and deferring doubtful questions to arbitration.[186] They may provide a court with a rationale for distinguishing a term that "is in essence a prerequisite to entry into the arbitration process" from a provision functioning as "a procedural prescription for the management of [the arbitration] process."[187]

For example, consider the familiar requirement of AIA-type construction contracts that demands for arbitration be made

---

Presumably the same end could be accomplished by a contract provision clearly describing the nonoccurrence of an event, such as filing a demand within a specified time, as grounds for discharge of the opposing party's duty to arbitrate. Although expressed in the form of a condition subsequent, the term likely will be interpreted as creating what traditionally has been described as a condition precedent to the duty to arbitrate. *See* RESTATEMENT (SECOND) OF CONTRACTS § 227(3) comment e, illustrations 12, 13 (1979) [hereainfter RESTATEMENT].

A number of courts have addressed noncompliance with procedural limitations in the context of waiver of the contractual right to arbitrate. *See, e.g., supra* text accompanying notes 35-38. Although an analysis of the waiver defense to arbitrability is beyond the scope of this article, this vague concept clearly fails to advance the foregoing analysis in the case of procedural limitations on the right to arbitration.

183. RESTATEMENT, *supra* note 182, § 227(1). *See generally* E. FARNSWORTH, CONTRACTS § 8.4, at 548-55 (1982).

184. *See* RESTATEMENT, *supra* note 182, § 227(2); *see also* E. FARNSWORTH, *supra* note 183, § 8.4, at 550-51.

185. *See* RESTATEMENT, *supra* note 182, § 229; *see also* E. FARNSWORTH, *supra* note 183, § 8.4, at 552.

186. *See supra* notes 119-122.

187. *County of Rockland*, 51 N.Y.2d at 9, 409 N.E.2d at 954, 431 N.Y.S.2d at 482.

"within a reasonable time after the [c]laim has arisen."[188] In the American Arbitration Association procedure embodied in the AIA documents, filing a demand is a necessary step in bringing a claim or dispute before a panel of arbitrators.[189] The filing requirement is also a contractual event within the claimant's control, yet it is not expressly identified as a condition precedent to the other party's duty to arbitrate. Under traditional principles of contract interpretation, the preferable interpretation is that the term does not establish such a condition.[190] This result is also supported by the broad language of the AIA arbitration agreement[191] and by modern legislative and judicial policies favoring arbitrability of disputes.[192] These policies also dictate that once a court determines that the duty to arbitrate is not clearly conditioned on fulfillment of the requirement, it should defer further consideration of the matter to the arbitration panel.[193] The arbitrators ultimately may conclude that under all the circumstances, the demand was made within a reasonable time or, alternatively, that there was a failure of compliance. In the case of failure of compliance, the arbitrators, acting within the flexible contours of their own authority to resolve disputes under omnibus arbitration provisions, may decline to hear the affected claim, award damages for noncompliance, or render such other relief as they consider appropriate.[194]

---

188. AIA A201, *supra* note 14, § 4.3.2; *see also supra* text accompanying note 20.

189. *See* AMERICAN ARBITRATION ASS'N, CONSTRUCTION INDUSTRY ARBITRATION RULES § 7 (Sept. 1, 1988).

190. *See supra* note 184. In such cases it is preferable to regard the term governing the filing of a demand as creating a promise. *See* RESTATEMENT, supra note 182, § 227(2). Because the court is only considering the effect of the term on arbitrability of the underlying dispute, however, such characterization is irrelevant except to the extent that it identifies the term as creating something other than a condition of the duty to arbitrate.

191. *See supra* note 18.

192. *See supra* notes 119-131.

193. *See, e.g.*, United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 365, 380 N.E.2d 253, 256-57, 431 N.Y.S.2d 424, 428 (1978) (committing question of timeliness to arbitral determination under broad AIA-form scope provision in absence of clear condition precedent); Pearl St. Dev. Corp. v. Conduit & Found. Corp., 41 N.Y.2d 167, 359 N.E.2d 693, 291 N.Y.S.2d 98 (1976) (holding question of time limitations in prime contract arbitrable under broad arbitration provision in subcontract); *see also* Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222, 1226 (2d Cir. 1980) (explaining that judicial refusal to deny arbitration on basis of a time limitation does not render such limits meaningless, since presumably the arbitrator will address the provision).

194. Although fulfillment of conditions precedent "is a question at least initially for

The AIA General Conditions apparently are intended to condition the parties' obligations to arbitrate upon presubmission of claims to the project architect. The architect's decision on a particular claim is "required as a condition precedent to arbitration or litigation" of that subject matter.[195] While the drafters might have made their intentions even clearer by describing initial submission to the design professional as a "prerequisite to judicial enforcement of the agreement to arbitrate" or by the use of similar language, one reasonably may assume that courts will view the provision as making the effect of noncompliance a justiciable issue. This screening device should be accorded the same judicial deference as a scope provision that limits arbitration to certain controversies or makes certain issues nonarbitrable.[196] In such cases the court should address the question of noncompliance and its effect upon the arbitration agreement. In addition to the factual question of noncompliance, the court should consider other arguments against enforcing the condition. In some cases, for example, it may be unclear whether or not a particular condition applies to those disputes before the court.[197] The effect of noncompliance may differ depending upon

---

the court," once a case is referred to arbitration, questions of fact or law come under the "judicially unreviewable purview of the arbitrator." Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 282, 208 N.E.2d 91, 94, 344 N.Y.S.2d 917, 922 (1973) (quoting *In re* S & W Fine Foods, 8 A.D.2d 130, 131, 185 N.Y.S.2d 1021, 1022 (Ct. App. Div. 1959), *aff'd*, 7 N.Y.2d 1018, 166 N.E.2d 853, 200 N.Y.S.2d 59 (1960)). As a general proposition, then, once a court determines for any reason that arbitration is not barred by noncompliance with a procedural term, procedural issues apparently may be raised before the arbitrator. *See* Acevedo Maldonado v. PPG Indus., Inc., 514 F.2d 614, 617 (1st Cir. 1975) (reasoning that "[t]he arbitrator must ultimately pass on the outer boundaries of what is arbitrable"). The Supreme Court has reserved the question of "the arbitrator's authority to consider arbitrability following referral." Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 255 n.8 (1977).

As a practical matter, the limited scope of judicial review and the tendency to avoid written opinions in commercial arbitrations are profound obstacles to vacating arbitrator decisions. *See* Stipanowich, *supra* note 13, at 982-86; Stipanowich, *supra* note 2, at 439.

195. The General Conditions provide:

> Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action. . . . A decision by the Architect . . . shall be required as a condition precedent to arbitration or litigation of a Claim between the contractor and owner . . . .

AIA A201, *supra* note 14, § 4.3.2.

196. In the AIA General Conditions, the "condition precedent" language of § 4.3.2 actually is reinforced by limitations on the substantive scope of the arbitration agreement. *See supra* note 18.

197. *See, e.g*, County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 409 N.E.2d

the status of the actor; a long line of cases holds that those defending claims, unlike those pursuing them, have no obligation to comply with contractual time limits and other preconditions to arbitration.[198] A condition may be avoided, moreover, if it is unconscionable or effectively deprives the claimant of a remedy.[199]

Perhaps most important is a court's discretion to deny enforcement of a condition when a party's noncompliance results in serious forfeiture.[200] The nonoccurrence of a condition precedent to arbitration typically jeopardizes not only the right to arbitrate but also the availability of any remedy. Because arbitration agreements usually describe the procedure as the sole mechanism for dispute resolution, foreclosure of that avenue eliminates all chance of relief for a party pursuing a claim or seeking third-party resolution of disputes.[201] Under the circumstances courts should carefully consider the purpose of contractual time limits and other express conditions and excuse noncompliance that does not hinder those goals.[202] By barely missing a deadline for filing an arbitration demand, for example, a claimant may sacrifice any possibility of recovering substantial sums in damages. If the purpose of setting a deadline for filing a demand is to alert the opposing party and to permit relatively prompt investigation of the facts underlying the dispute, however, a filing that is late by only a few days might fulfill these goals. Under these circumstances a court might not hold the

---

951, 431 N.Y.S.2d 478 (1980) (holding that noncompliance with a provision making submission of disputes to the project architect a condition precedent to arbitration did not prevent arbitration of a delay claim asserted two years after project completion).

198. *See, e.g.*, Milton Schwartz & Assocs. v. Magness Corp., 368 F. Supp. 749 (D. Del. 1974); Gold Coast Mall, Inc. v. Larmar Corp., 298 Md. 96, 468 A.2d 91 (1984).

199. *See, e.g.*, Brown & Guenther v. North Queensview Homes, Inc., 18 A.D.2d 327, 239 N.Y.S.2d 482 (Ct. App. Div. 1963) (holding that provision requiring arbitration demand to be brought within fifteen days after dispute had arisen was unenforceable because it was unreasonable and fatally vague); *see also* River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 41, 110 N.E.2d 545, 547 (1953) (indicating that a time limitation requiring a demand to be made within five days after tender of goods might be found "so ambiguous or so unreasonably harsh . . . as to be unenforceable").

200. *See supra* note 185 and accompanying text.

201. *See River Brand Rice Mills*, 305 N.Y. 36, 110 N.E.2d 545 (1953) (foreclosing judicial action in light of claimant's failure to demand arbitration in accordance with the parties' contract).

202. *See* RESTATEMENT, *supra* note 182, § 229 comments a, b (1979).

claimant to the consequences of strict compliance.[203]

With these considerations in mind a court may treat explicit procedural limitations on the arbitration contract with the same dignity accorded to limitations on the substantive scope. In each case all doubts about the effect of a term, or noncompliance with that term, should be resolved in favor of enforcing the arbitration contract and leaving ultimate resolution of disputes to the arbitrators.[204] Although judicial resolution of arbitrability issues inevitably results in a delay to the commencement of arbitration proceedings, this approach best effectuates the clear intent of the parties while paying heed to compelling policies favoring arbitration. In some cases, moreover, it may substantially reduce the duration and cost of dispute resolution.[205]

V. CONCLUSION

Motivated by the desire to avoid judicial encroachment upon the realm of the arbitrator under broadly framed agreements to arbitrate — a goal consistent with contemporary public policies encouraging arbitration of disputes — many courts have decided that if disputes are otherwise arbitrable, "procedural arbitrability" questions are routinely submissible to arbitration. Unfortunately, neither this sweeping approach nor any other attempt to treat procedural issues categorically is supported by the concerns identified by its adherents.

Applying well defined common-law precepts regarding conditions of performance to the arbitration agreement itself, parties may establish procedural as well as substantive limits that courts may consider in giving effect to such agreements under modern statutes. Even so, the purposes and policies underlying such legislation severely limit the judicial role. Procedural noncompliance should prevent arbitration only when a clear bar to the enforceability of the agreement unavoidably mandates a denial of the right to arbitrate; all doubts should be resolved in favor of arbitrability.

---

203. *Id.* comment b, illustration 2.
204. *See supra* note 122 and accompanying text.
205. *See supra* notes 149-151 and accompanying text.