Arbitration: *Shaffer v. Jeffery*. The Oklahoma Supreme Court Rejects the Separability Doctrine and Takes a Step Back in the Enforcement of Arbitration Clauses Under Oklahoma Law

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Arbitration: *Shaffer v. Jeffery*: The Oklahoma Supreme Court Rejects the Separability Doctrine and Takes a Step Back in the Enforcement of Arbitration Clauses Under Oklahoma Law*

I. Introduction

Arbitration provides an alternative to the judicial resolution of disputes. As such, it provides what many perceive to be advantages over the adjudication of parties' disagreements by the courts. For instance, parties often seek arbitration of either present or future controversies in order to avoid the potential for delay as well as the high costs of litigation, or as a result of their dissatisfaction with judges and juries. To assure that claims will be arbitrated, contracting parties include arbitration clauses in their contracts. The clause generally requires that the parties settle any dispute arising out of the contract through arbitration.

Courts at the turn of the century disfavored the enforcement of arbitration clauses. While courts would respect the decision of an arbitrator once both parties

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1. The term has been subject to various definitions, all amounting to the same thing. Perhaps the best definition was provided in *Gates v. Arizona Brewing Co.*, 95 P.2d 49 (Ariz. 1939), in which the court stated:

[A]rbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary processes of law.
*Id.* at 50.

2. See Stuart L. Bass, The Expanding Role of Arbitration and Judicial Concern: A Need to Redefine Ground Rules, *Lab. L.J.*, Dec. 1995, at I. At least one commentator has argued that arbitration can even have emotional and psychological benefits over courtroom adjudication of disputes since each party shares in control of the process. See Melvin Aron Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv. L. Rev. 637, 658 (1976). However, it should be noted that arbitration may also have disadvantages. Compare Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) (noting lack of right to jury trial, arbitrators' unfamiliarity with law, and limited judicial review) with 16 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts § 1923C (3d ed. 1976) (cautioning that arbitrators need not disclose reasons for their decision as well as noting the possibility that the award will be arbitrary).


had consented to and undergone the arbitration process, they would not enforce an arbitration clause if, prior to arbitration, one party wished to revoke the clause and take his case to court. However, following the passage of the Federal Arbitration Act (FAA) in 1925, the federal courts began to enforce arbitration clauses in cases falling within the statute's coverage.

Section 2 of the FAA has proven to be the key substantive provision. It states that arbitration clauses are valid, irrevocable, and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract. Based upon this section, federal courts have held that if a party seeking recision of a contract containing an arbitration clause alleges fraud in the inducement of the arbitration clause, certainly a ground for the revocation of any contract, then the clause will not be summarily enforced. Rather, a court applying the FAA will not compel arbitration until it has decided whether the clause was fraudulently induced. Similarly, section 4 of the FAA, a procedural provision, provides that "If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." This section has also provided a basis for requiring a judicial determination of the question of fraud in the inducement of the arbitration clause.

However, to avoid summary enforcement in cases governed by the FAA, a party must direct the claim of fraudulent inducement to the arbitration clause. If a party to a contract merely alleges that the contract as a whole was fraudulently induced and not the arbitration clause in particular, courts applying the FAA consider the arbitration clause to be independent, enforceable, and separable from the main

hostility of courts toward the arbitration process).

6. See Burke Grain Co. v. Stinchcomb, 173 P. 204 (Okla. 1918), in which the court stated: Where an arbitration is had, and the board of arbitrators acts within the scope of its authority, and notice of the time of hearing is given the parties, and the evidence received, and the amount of the award is not so excessive as that fraud may be presumed therefrom, the award made by such arbitrators determines the rights of the parties as effectually as a judgment by regular legal procedure . . .

Id. at 205-06.

7. See Wilson v. Gregg, 255 P.2d 517, 519 (Okla. 1952) ("[A]rbitration agreements to submit controversies arising in the future [are] unenforceable because they deprive the courts of jurisdiction and are contrary to public policy").


9. See Watkins v. Hudson Coal Co., 151 F.2d 311, 320-21 (3d Cir. 1945) (construing statutory exceptions broadly to allow case to fall within ambit of the FAA).

10. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 is the primary substantive provision of the Act . . . . The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").


contract. The court will separate the arbitration clause from the main contract so that its validity is not at issue and thus compel arbitration on the question of the validity of the contract as a whole. This is known as the separability doctrine.

The federal courts have utilized this doctrine to promote arbitration under the FAA for several decades, justifying the doctrine on four grounds. First, the doctrine conforms with the intent of the contracting parties to arbitrate any issues arising out of the contract. Second, enforcement of the doctrine furthers the policy of arbitration in general. Third, a legal presumption exists that parties agree to two contracts, the contract itself and the arbitration clause. Finally, courts have historically reviewed only the findings of arbitrators and not the merits of the dispute.

Unlike the federal courts, for much of this century Oklahoma courts refused to enforce arbitration clauses under state law, reasoning that their enforcement deprived the courts of what was rightfully their jurisdiction. However, in 1978 Oklahoma adopted the Uniform Arbitration Act (UAA), which provided a statutory basis for the enforcement of arbitration clauses. Since then, the Oklahoma Supreme Court has upheld the enforcement of arbitration clauses under the Act, despite concerns that doing so violates the Oklahoma Constitution's guarantee of the right of access to the courts.

As for the separability doctrine, courts followed the doctrine in cases governed by Oklahoma's version of the UAA provided that they were persuaded by the Oklahoma Court of Appeals' decision in Wetzl v. Covenant Oil Corp. in 1986. However, in Shaffer v. Jeffery, the Oklahoma Supreme Court rejected the doctrine, holding that allegations of fraud in the inducement of a contract, apart from the arbitration clause, must be resolved by a court before ordering arbitration or dismissing the case. With this decision, the court took a decisive step back in
what had previously appeared to be a stance in favor of the enforcement of arbitration clauses under the UAA.

However, the decision would be of limited importance were it not for a second, more problematic statement by the Shaffer court. The UAA, prior to Shaffer, governed only those Oklahoma cases which did not involve interstate commerce. Cases involving interstate commerce were instead governed by the FAA.28 However, the Shaffer court stated that while the FAA would otherwise govern arbitration in cases involving interstate commerce, parties may exclude the FAA by agreeing in a choice-of-law provision that state arbitration rules, as provided in the UAA, apply.29 This statement appears to have been an attempt by the court to take a stand against the encroachment of the FAA on state arbitration law by allowing parties to choose not to be governed by federal law.30 However, if followed, this rule could have quite the opposite effect.

After Shaffer's rejection of the separability doctrine, parties who wish to ensure arbitration of all disputes arising out of a contract will make certain that they do not include the UAA in a choice-of-law provision. Rather, they will make clear that their contract evidences an involvement with interstate commerce, perhaps even going so far as to include the FAA in a choice-of-law provision, and then raise the preemption issue when moving to compel arbitration so as to ensure that federal law applies. Therefore, the reaction of future contracting parties to Shaffer's rejection of the separability doctrine under state law and the Oklahoma Supreme Court's apparent willingness to apply that law even in cases governed by the FAA, could result in the virtual superfluity of state arbitration law and a de facto federalization of arbitration in Oklahoma.

This note will focus on the problems inherent in Shaffer and the potential impact of the case on arbitration in Oklahoma. Part II will analyze the problems with Shaffer's rejection of the separability doctrine. First, the history of the separability doctrine in federal and Oklahoma courts will be discussed. Next, the case itself will be examined in light of the federal courts' view of the doctrine, cases from other jurisdictions, and the Oklahoma Supreme Court's own decisions. Part III will discuss whether the Shaffer court was correct in holding that parties could choose not to be governed by federal law through a choice-of-law provision. The United States Supreme Court's treatment of the issue will be considered as the Court's view of the FAA's applicability makes clear that the Shaffer court erred in holding as it did.

29. See Shaffer, 915 P.2d at 915 n.10.
II. The Rejection of the Separability Doctrine

A. Law Prior to the Case

1. The Federal Courts' View of the Separability Doctrine Under the FAA

Shaffer's impact on arbitration in Oklahoma does not become clear without an examination of the federal courts' view of the separability doctrine. The reasons provided in the federal decisions for their adoption of the separability doctrine clearly demonstrate the soundness of the doctrine under the FAA and apply equally as well to an analysis of the issue under the UAA. With these reasons in mind, the shortcomings of Shaffer soon come to light.

The Second Circuit made the first clear pronouncement of the federal courts' view of the separability doctrine under the FAA in Robert Lawrence Co. v. Devonshire Fabrics, Inc.31 In Robert Lawrence, the plaintiff alleged that the contract in question was fraudulently induced.32 The contract contained an arbitration clause and the defendant moved to compel arbitration.33 Therefore, the court faced the issue of whether the arbitration clause was enforceable.

In accepting the separability doctrine, the court interpreted section 2 of the FAA. This section states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.34

The Robert Lawrence court reasoned that section 2 clearly focused on the arbitration clause rather than the contract as a whole and thus contemplated that the two were distinct.35 Since the two were distinct, if a party sought recision for fraud, alleging only fraudulent inducement of the contract as a whole, and not the arbitration clause in particular, then the arbitration clause was unaffected by the claim and stood as valid and irrevocable. Therefore, the matter of the validity of the main contract would be sent to arbitration as the resolution of such disputes was the purpose of the arbitration clause.36 Only if a party alleged fraud in the inducement of the arbitration clause itself would the FAA afford the federal courts jurisdiction

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31. 271 F.2d 402 (2d Cir. 1959).
32. See id. at 404.
33. See id.
35. See Robert Lawrence, 271 F.2d at 409-10.
36. See id. at 410.
to decide the issue.\textsuperscript{37} In addition to relying upon precedent which had upheld the separability of arbitration clauses, the Robert Lawrence court emphasized two other important policies behind the separability doctrine. The court noted that promoting arbitration through the doctrine satisfied the intent of the parties when they made the contract and lightened the dockets of the federal courts.\textsuperscript{38}

The United States Supreme Court followed the Robert Lawrence holding in Prima Paint Corp. v. Flood & Conklin Mfg. Co.\textsuperscript{39} In Prima Paint, the Court took a different approach in accepting the separability doctrine by relying upon section 4 of the FAA which mandates that federal courts are to order arbitration once they are satisfied that "the making of the agreement for arbitration . . . is not in issue."\textsuperscript{40} The Court held that federal courts may only consider whether the making and performance of the arbitration clause itself was fraudulently induced, or "in issue," and could not adjudicate claims as to fraudulent inducement of the contract as a whole.\textsuperscript{41} Since the Prima Paint decision, federal courts have consistently followed the separability doctrine.\textsuperscript{42}

2. The Separability Doctrine Under Oklahoma Law

Arbitration in Oklahoma cases not involving interstate commerce is governed by the UAA.\textsuperscript{43} Prior to Shaffer, the only Oklahoma case involving the applicability of the separability doctrine under Oklahoma's version of the UAA was handed down by the Oklahoma Court of Appeals in Wetzel v. Covenant Oil Corp.\textsuperscript{44} in 1986. In

\textsuperscript{37} See id. at 411.

\textsuperscript{38} See id. at 410. The court expanded on this notion, stating:

Once it is settled that arbitration agreements are "valid, irrevocable, and enforceable," we know of no principle of law that stands as an obstacle to a determination by the parties to the effect that arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, i.e. a speedy and relatively inexpensive trial before commercial specialists.


\textsuperscript{40} Prima Paine, 388 U.S. at 403 (quoting 9 U.S.C. § 4).

\textsuperscript{41} See id. at 403-04.


\textsuperscript{43} See Southern Oilda. Health Care Corp. v. JHBR, 900 P.2d 1017, 1020 (Okla. Ct. App. 1995) ("If the agreement . . . evidences a transaction involving interstate commerce, the FAA and accompanying federal law control, and the central provisions of the federal law must be applied by state courts") (citing Southland Corp. v. Keating, 465 U.S. 1 (1984)). However, this statement must be qualified by Shaffer. According to Shaffer, even if the transaction involves interstate commerce, the UAA will apply if selected by the parties in a choice-of-law clause. See Shaffer v. Jeffery, 915 P.2d 910, 915 n.10 (Okla. 1996).

\textsuperscript{44} 733 P.2d 424 (Okla. Ct. App. 1986). The Oklahoma Supreme Court also sided with the separability doctrine in Long v. DeGeer, 753 P.2d 1327, 1330 n.8 (Okla. 1987). However, the Shaffer court indicated that the decision was made according to New York law. See Shaffer, 915 P.2d at 915 n.9.
Wetzel, the court held that the district court had improperly denied arbitration when a party alleged fraud in the inducement of the main contract.45 In accepting the separability doctrine, the Wetzel court cited precedent in other states, as well as Prima Paint, and noted that section 801 of Oklahoma's version of the UAA directed courts to "effectuate [the Act's] general purpose to make uniform the law of those states which enact it."46 Thus, the Oklahoma Court of Appeals accepted the separability doctrine, in part basing its decision upon the need for uniformity with the decisions of other states which had adopted the separability doctrine under the UAA. In Shaffer, the Oklahoma Supreme Court rejected this view and placed Oklahoma in the minority of states which have considered the issue by holding that arbitration clauses are not separable from the contract in which they are contained.

B. Statement of the Case

1. Facts/Holding

In Shaffer, the plaintiffs were six couples who had hoped to adopt children.47 They entered into an agreement, which contained an arbitration clause, with an attorney who was to find a child for the couples.48 The lawyer collected his fee but only provided the plaintiffs with promises from nonexistent mothers and status reports from fictitious pregnancies.49 It became clear that there were no children, and the plaintiffs sued to rescind the contract, and sought damages for breach of contract, conversion, the tort of outrage, fraud, and legal malpractice.50 The Shaffer court clearly stated the issue: "Does a showing of fraud in the inducement of the attorney-client contract defeat the enforcement of the arbitration clause in that contract?"51 The court answered in the affirmative, rejecting the separability doctrine by holding that allegations of fraud in the inducement of the attorney-client contract, regardless of the arbitration clause, must be resolved by the court before compelling arbitration or dismissing the case.52 The court then apparently extended the holding to all contracts, not merely those between an attorney and client, stating, "[A]n agreement to arbitrate is voidable when either the arbitration provision of the agreement or the contract containing that agreement is fraudulently induced. The plaintiffs must be given the opportunity to prove the existence of the fraud they allege occurred."53 This holding squarely conflicts with federal jurisprudence and suffices as a clear rejection of the separability doctrine.

45. See Wetzel, 733 P.2d at 426.
46. Id. (quoting 15 Okla. Stat. § 801 (1981)).
47. See Shaffer, 915 P.2d at 912.
48. See id.
49. See id.
50. See id.
51. Id. at 914.
52. See id. at 917.
53. Id. at 918.
2. Rationale

The court placed the case within the ambit of the UAA, because the parties agreed in a choice-of-law provision that the Act would govern arbitration.\textsuperscript{54} According to the court, the relevant provision of the UAA was section 802(A) which states:

This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract.\textsuperscript{55}

The Shaffer court noted that the section was almost identical to section 2 of the FAA.\textsuperscript{56} However, rather than looking to any federal cases which had analyzed the separability doctrine under section 2, the court set the tone for its decision by stating that section 802(A) of the UAA, like section 2 of the FAA, made arbitration clauses revocable upon such grounds as existed at law or in equity for the revocation of any contract.\textsuperscript{57} This was a keen twist on the statute as section 802(A) focused on the irreversibility of arbitration clauses rather than situations in which they were revocable. Further, while the statement made clear that allegations of fraud directed toward the arbitration clause itself would render the clause invalid, it left open the question of whether allegations of fraud directed toward the contract as a whole made the arbitration clause subject to revocation, or whether the clause was separate from the main contract. In the end, though the court recognized Prima Paint as well as the Wetzel decision, it sided with Louisiana, Minnesota, and Tennessee in rejecting the separability doctrine in cases governed by state arbitration law.\textsuperscript{58}

After outlining the position of other courts, both federal and state, which had considered the issue, the Shaffer court at last began its analysis of the separability doctrine by attacking one of the doctrine's justifications. Specifically, the court recited the notion that staying arbitration pending the resolution of allegations of fraud in the inducement of a contract would delay a remedy which could be provided by arbitration.\textsuperscript{59} However, the court responded that the separability doctrine did not provide a solution as a party need only allege that the arbitration clause itself was fraudulently induced, and the matter would have to be decided by a court anyway.\textsuperscript{60}

Rather than analyzing further reasons which would justify adoption of the doctrine, the Shaffer court listed only more reasons for rejecting the separability
doctrine, including the principle set forth by Justice Black in his *Prima Paint* dissent that if "the contract was procured by fraud, then unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated." This statement was perhaps the central reason behind the court's rejection of the separability doctrine as it sums up the rather conclusory notion that the arbitration clause is merely a part of the main contract rather than a separate agreement. The court also cited a Louisiana case in which the Louisiana Supreme Court reasoned that courts have more experience in resolving matters that go to the validity of contract formation than do arbitrators.

Before announcing its holding, the court made two rather astounding comments which indicated the court's unwillingness to enforce arbitration clauses when fraud is alleged in the inducement of the main contract. First, as noted above, the court suggested that courts are better suited than arbitrators to determine issues of fraud. The court then stated that "[r]esolution of claims such as fraud by those who are best suited to perform the task will enhance the arbitration process." Not only does this statement assume that judges are better at resolving an issue which has a large factual component but more importantly reveals the court's failure to address the key issue of the parties' intent, never answering the question of whether the parties had actually agreed to have allegations of fraud resolved by arbitration. Even if courts were better suited than arbitrators to determine issues of fraud, refusing to enforce the arbitration clause would only frustrate the parties' intent. It is not clear how this would enhance the arbitration process.

Second, the court made a statement which revealed a fundamental weakness in the *Shaffer* rationale. The court stated that section 802(A) of the UAA applies not only to the arbitration clause, but also the underlying contract. In other words, not only the arbitration clause but also the main contract is irrevocable except upon such grounds as exist at law or in equity. However, this merely states the obvious. Clearly, the main contract is irrevocable except upon such grounds as exist at law or in equity. However, the legislature, fully aware of judicial hostility toward arbitration, envisioned a distinction between the main contract and the arbitration clause. For this reason, they saw fit to enact a statute providing that the arbitration clause itself was irrevocable, to the same extent as any other contract.

The rationale of the *Shaffer* court was hardly clear. The opinion recited a few of the reasons why some state courts had rejected the separability doctrine, but never analyzed the main reasons why both the federal and the majority of state courts had adopted it. The two primary reasons with which the court should have dealt were the intent of the contracting parties to arbitrate any issues arising out of the contract and the fact that section 802(A) of the UAA visualized the arbitration clause as

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61. *Id.* at 917 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395, 412 (1967) (Black, J., dissenting)).

62. *See id.* at 917 (citing *George Engine Co. v. Southern Shipbuilding Corp.*, 350 So. 2d 881, 885-86 (La. 1977)).

63. *Id.*

64. *See id.*
distinct from the main contract, and therefore separable. Instead, the Shaffer court concluded its analysis by stating that rejecting the separability doctrine simply "make[s] more sense."65

C. Analysis

1. Preliminary Problems

The Oklahoma Supreme Court's decision in Shaffer sends a clear signal that, in cases decided under Oklahoma arbitration law, courts will not enforce the separability doctrine. There are several problems with this decision. First, the case stands in opposition to the federal courts' interpretation of the FAA. Therefore, Shaffer creates two distinct bodies of arbitration law in Oklahoma courts. Absent a choice-of-law provision, if a contract involves interstate commerce, Oklahoma state courts will apply the FAA and enforce the separability doctrine under Prima Paint. If the contract does not involve interstate commerce, Oklahoma courts will apply the UAA and refuse to enforce the separability doctrine under Shaffer. Therefore, whether a party can enforce an arbitration clause in cases involving alleged fraudulent inducement of the main contract will often depend upon whether the party was fortunate enough to have entered into a contract involving interstate commerce.

Second, the case does not fall in line with the decisions of the majority of states that have adopted the UAA. Therefore, the Shaffer holding violates the spirit of section 801 of the UAA which states that the Act "shall be so construed as to effectuate its general purpose to make uniform the laws of those states which enact it."66 The importance of this section was pointed out by the Oklahoma Court of Appeals in Wetzel when that court accepted the separability doctrine. Further, the value of a uniform statute is lessened when courts refuse to apply it uniformly.

Finally, the decision adds to the uncertainty surrounding the Oklahoma Supreme Court's somewhat ambivalent attitude toward arbitration as evidenced by prior cases.67 After Shaffer, though parties may include an arbitration clause in a contract, they will not be able to compel arbitration on the issue of whether the contract was fraudulently induced if the case is governed by Oklahoma state arbitration law. This adds yet another question to the future of arbitration under Oklahoma law.

2. A Roundabout Response to the Federal Courts' Adherence to the Separability Doctrine

There are several problems with the Shaffer rationale insofar as it addressed the federal courts' view of the separability doctrine. First, the court stated that the

65. Id.
67. Compare Rollings v. Thermodyne Indus., Inc. 910 P.2d 1030 (Okla. 1996) (upholding enforcement of arbitration clause despite constitutional attack) with Cannon v. Lane, 867 P.2d 1235 (Okla. 1993) (refusing to enforce arbitration clause by finding that contract was not covered by the UAA).
relevant provision of Oklahoma's Uniform Arbitration Act which it was interpreting was section 802(A). However, the court never took into account the federal courts' analysis of section 2 of the FAA, a provision which even the Shaffer court noted was nearly identical to section 802(A) of the UAA. In doing so, the Shaffer court rejected the federal courts' adoption of the separability doctrine under section 2 of the FAA without addressing the reasons why those courts had accepted the doctrine. Addressing those reasons would have broadened the court's analysis by recognizing the argument that section 802(A) of the UAA visualizes the arbitration clause as distinct from the main contract and, therefore, separable.

Most notably, the Shaffer court failed to recognize the reasoning of the Second Circuit in Robert Lawrence Co. v. Devonshire Fabrics, Inc., a case relied upon by the United States Supreme Court when it reached its decision in Prima Paint. The analysis set forth in the decision bears repeating. The Robert Lawrence court interpreted section 2 of the FAA to mean that arbitration clauses were indeed separable from the main contract. The court found that the written agreement described in section 2 of the FAA was the arbitration clause. The statute, by singling out the arbitration clause, contemplated that it was distinct from the main contract. Finally, the statute plainly stated that the clause was valid, enforceable, and irrevocable, except on grounds that exist at law or in equity.

Thus, if a party alleges fraud in the inducement of the arbitration clause, clearly a ground for revoking contracts in the courts, then obviously a court must adjudicate the matter before enforcing the clause. However, if the party does not allege fraud in the arbitration clause but rather the main contract, then, according to the Robert Lawrence court, the arbitration clause remains distinct from the main contract. The allegation of fraud does not concern the arbitration clause and it remains valid, enforceable, and irrevocable. Therefore, the court will enforce it and compel arbitration on the question of whether the contract itself was fraudulently induced. The Robert Lawrence court bolstered its rationale with the policy of favoring arbitration in order to comply with the intent of the parties as well as to clear court congestion.

The Robert Lawrence rationale is uniquely applicable to the Shaffer analysis. Like its federal counterpart, section 802(A) of Oklahoma's version of the UAA envisions the arbitration clause on an equal footing with the main contract, and therefore, like the main contract, enforceable "except upon such grounds as exist at

68. See Shaffer, 915 F.2d at 914.
69. See id. at 914 nn.5 & 6.
70. 271 F.2d 402 (2d Cir. 1959).
71. See id. at 410.
72. See id. at 409-10.
73. See id.
74. See id. at 410.
75. See id. at 411.
76. See id.
77. See id. at 410.
78. See id.
law or in equity for the revocation of any contract.” It is obvious that the main contract is valid and irrevocable except upon grounds that exist at law or in equity. However, by making clear that the same applies to arbitration clauses, the Oklahoma legislature saw the two as distinct and placed arbitration clauses on level ground with other contracts. By allowing a party to avoid arbitration without directing the allegation of fraudulent inducement at the arbitration clause, the Shaffer decision allows a party to revoke the clause in a way not allowed under the statute. If a party may invalidate an arbitration clause without alleging that the clause itself was fraudulently induced, then the clause is revocable on grounds not existing at law or in equity. Though a separate contract, the arbitration clause is invalidated pending a court's decision that it was not fraudulently induced simply because it is printed on the same page as the main contract.

Further, other provisions of Oklahoma's version of the UAA contemplate that a party must specifically allege fraud in the inducement of the arbitration clause itself in order for a court to stay arbitration pending resolution of the claim. Section 803(A) states that, following a party's motion to compel arbitration,

If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue raised and shall order arbitration if the court resolves the issue in favor of the moving party; otherwise, the application shall be denied.  

Section 803(B) states that:

On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no valid agreement to arbitrate. Such an issue shall be summarily tried. If the issue is resolved in favor of the moving party, the court may order a permanent stay of such proceeding. If the issue is resolved in favor of the opposing party, the court shall order the parties to proceed to arbitration.

Both sections noted above clearly contemplate that in order for the court to resolve the issue of whether the arbitration clause is enforceable, the opposing party must specifically direct the allegation of fraud at the arbitration clause rather than merely toward the main contract.

The second problem with the Shaffer court's analysis of the federal position lies in its stretching to find federal case law to support its decision. This attempt to harmonize the federal courts' view of the issue with that of Shaffer demonstrates the difficulty with which the court tried to reconcile its view with established federal jurisprudence. For example, the court began its examination of the federal view of the separability doctrine by relying upon a United States Supreme Court case as

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81. Id. § 803(B) (emphasis added).
analogous when it actually involved a scenario quite different than that of Shaffer. The court cited Moseley v. Electronic & Missile Facilities, for the proposition that the question of fraud in the inducement of the contract as a whole must be adjudicated by a court before compelling arbitration. Under this view, the arbitration clause would not be separated from the main contract and enforced. Instead, a court would decide the validity of the main contract. If it was fraudulently procured, then the arbitration clause, as an inextricable part of that contract, would also be invalid. Because the arbitration clause was invalid, the court would not compel arbitration. To support this position, the Shaffer court quoted Moseley, stating that "the issue of fraud should first be adjudicated before the rights of the parties under the subcontracts can be determined . . . If [fraud is established] there can be no arbitration under the subcontracts."

There are two problems with the Shaffer court's interpretation of Moseley. First, the Shaffer court intended Moseley to provide an affirmative response to the issue it placed before itself. The court asked whether "a showing of fraud in the inducement of the . . . contract defeat[s] the enforcement of the arbitration clause in that contract?" However, when the Moseley Court discussed the issue of fraud, it was clearly referring to a showing of fraud in the inducement of the arbitration clause. The Moseley Court stated that "with reference to the allegation of fraud . . . the issue goes to the arbitration clause itself." Therefore, the Moseley Court asked whether the arbitration clause itself was induced by fraud, not the main contract.

Second, while the Shaffer court noted that in Moseley the plaintiff alleged fraudulent inducement of both the main contract and the arbitration clause, the court did not recognize the importance of these facts. The Moseley situation was not analogous to Shaffer. The plaintiffs in Shaffer only alleged that the main contract was fraudulently induced, never directing the allegation toward the arbitration clause. Therefore, the validity of the arbitration clause was not directly placed at issue by the pleadings in Shaffer as it was in Moseley, and there would be no reason for a court to adjudicate the matter. The Shaffer court may have read Moseley to represent a situation in which the validity of the arbitration clause was placed at issue because it was part of an overall fraudulent "scheme." However, a

84. See Shaffer v. Jeffery, 915 P.2d 910, 914 (Okla. 1996). The court stated that the issue was whether "a showing of fraud in the inducement of the attorney-client contract defeat[s] the enforcement of the arbitration clause in that contract?" Id.
85. Id. at 914-15 (quoting Moseley, 374 U. S. at 171).
86. Id. at 914 (emphasis added).
87. Moseley, 374 U.S. at 171.
88. The concurring opinion reiterated this point when the Chief Justice stated: "[w]e agree with the Court that fraud in the procurement of an arbitration contract, like fraud in the procurement of any contract, makes it void and unenforceable and that this question of fraud is a judicial one, which must be determined by a court. Moseley, 374 U.S. at 172 (Warren, C.J., concurring).
89. See Shaffer, 915 P.2d at 914.
90. See Moseley, 374 U.S. at 170 ("[T]he petitioner has attacked not only the subcontracts, but also the arbitration clauses contained therein").
clear reading of Moseley demonstrates that the plaintiff in the case attacked "the subcontracts, as well as the arbitration agreement, as being fraudulent."91

Instead of resolving the matter of whether arbitration clauses are separable from the contract in which they are contained, the Shaffer holding instead raises puzzling issues. For example, the court stated: "We conclude that allegations of fraud in the inducement of an agreement to arbitrate must be resolved by the court prior to either compelling arbitration or dismissing the case."92 This is nothing new. A federal court would also resolve the issue of whether the defendant had fraudulently induced the arbitration clause. However, the court added: "We also conclude that allegations of fraud in the inducement of the attorney-client contract or agreement generally, apart from the clause to arbitrate, must be resolved by the court prior to either compelling arbitration or dismissing the case."93

This holding, if interpreted literally, could make for a rather unique set of circumstances. The court clearly contemplated a situation in which a plaintiff alleged fraud in the inducement of the contract as one among several claims. Therefore, the court would first adjudicate the issue of fraud in the inducement of the contract. If the court found that the plaintiff's allegations were without merit, then it would compel arbitration on the other issues raised.

However, the rule set forth would appear to allow a court to decide the merits of the case but then compel arbitration on precisely the same issue. For example, consider a scenario in which a plaintiff were to seek recision of a contract which contained an arbitration clause. In seeking recision, the plaintiff in this hypothetical situation alleges only one ground, fraud in the inducement of the contract. Most likely, the defendant would move to compel arbitration. However, a court following Shaffer would be required to first adjudicate the issue of whether the contract as a whole was invalid. Since the arbitration clause is inseparable from the main contract, the court would also implicitly decide whether the arbitration clause was fraudulently induced. If the court decided that the main contract was not fraudulently induced, then the arbitration clause would also be valid. Because the clause was valid, would the court find for the defendant and compel arbitration on the matter of whether the contract was fraudulently induced, forcing him to go through the process a second time? This is obviously illogical and appears unlikely in light of res judicata concerns.94 At any rate, the defendant would most likely voluntarily dismiss his motion to compel arbitration. Still, it is important to note that this problem, albeit largely academic, would not arise were a court to make use of the separability doctrine since the court would not decide whether the main contract was fraudulently induced.95

91. Id. at 169; see also Jarvis v. Dean Witter Reynolds, Inc., 614 F. Supp. 1146, 1149 (D. Vt. 1985) (noting the importance of the fact that the plaintiff in Moseley specifically attacked the arbitration clause).
92. Shaffer, 915 P.2d at 917.
93. Id.
94. Cf. Mindana v. Office of Personnel Mgmt., 985 F.2d 1070 (Fed. Cir. 1993) (upholding trial court's enjoinment of arbitration of claims which could have been brought in prior federal action).
95. For example, in McElwee-Courbis Constr. Co. v. Rife, 133 F. Supp. 750 (M.D. Pa. 1955), the court used the separability doctrine to compel arbitration on the issue of fraud. The court dispelled any
The likely result in the scenario discussed above is that the court would merely dismiss the plaintiff's case, but, with the arbitration clause implicitly found valid, would the plaintiff then be free to submit the issue of fraudulent inducement to arbitration to give it another try? Again, this result seems illogical and unlikely due to the effect of res judicata.\textsuperscript{96} However, coupling the validity of the arbitration clause with that of the main contract raises just these sorts of logical inconsistencies. The enforcement of arbitration clauses via the separability doctrine would avoid these dilemmas.

There are other problems with \textit{Shaffer}’s look at the federal courts' view of the separability doctrine. After recognizing the United States Supreme Court's decision in \textit{Prima Paint}\textsuperscript{97} as well as the adoption of the separability doctrine by the Oklahoma Court of Appeals in \textit{Wetzel},\textsuperscript{98} the \textit{Shaffer} court took a rather interesting approach in attacking the separability doctrine. Rather than squarely confronting the federal courts' adoption of the separability doctrine, the court singled out and criticized the New York Court of Appeals' rationale for adopting the separability doctrine, apparently because New York's arbitration statute served as a model for the FAA.\textsuperscript{99}

This approach skirted the issue that the court placed before itself. The court stated that “[t]he question before us is whether we should give the Oklahoma Arbitration Act the same construction as given to the Federal Arbitration Act by the Supreme Court in \textit{Prima Paint}.”\textsuperscript{100} However, by attacking a New York court's rationale for adopting the separability doctrine, the court was able to criticize the separability doctrine by scrutinizing a reason given in a state case without analyzing the United States Supreme Court's reasoning in \textit{Prima Paint}\textsuperscript{101} or other federal cases\textsuperscript{102} involving the separability of arbitration clauses.

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\textsuperscript{96} It would appear that the doctrine of "bar" would preclude the plaintiff from raising the issue again. \textit{See United States v. Ryan}, 810 F.2d 650, 654 (7th Cir. 1987) ("Bar" means that a final judgment in favor of a defendant bars a second action by the plaintiff on the same claim).

\textsuperscript{97} \textit{See Shaffer}, 915 P.2d at 915, 916. The court merely stated the rule laid down in \textit{Prima Paint}. It never recognized the reasons given for the adoption of the separability doctrine in the case.

\textsuperscript{98} \textit{See id.} at 915. The same holds true for \textit{Wetzel}. The \textit{Shaffer} court merely recognized that the Oklahoma Court of Appeals had adopted the separability doctrine without analyzing why it had done so. \textit{See id.}

\textsuperscript{99} \textit{See id.} at 916.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{See supra} notes 39-42 and accompanying text.

\textsuperscript{102} \textit{See supra} notes 31-38 and accompanying text.
More importantly, the Shaffer court asked the wrong question. The court phrased the issue in terms of whether it should give the UAA the same construction given the FAA by the United States Supreme Court in Prima Paint. However, the Prima Paint Court focused on section 4 of the FAA. 103 The Shaffer court focused on a completely different section of the UAA, section 802(A), which is substantially identical to section 2 of the FAA. 104 Since the Shaffer court purported to decide a question of state law, 105 United States Supreme Court decisions were not controlling. Therefore, the court should have looked for guidance to a case more analogous to its situation. The court should have asked whether it should give section 802(A) of the UAA the same construction as that given the section by other state cases or that given section 2 of the FAA by the Second Circuit in Robert Lawrence.

Rather than responding to either Prima Paint or Robert Lawrence, the Shaffer court chose to focus on Weinrott v. Carp, 106 a 1973 case out of the New York Court of Appeals. According to the Shaffer court, the New York court adopted the separability doctrine because "an unsupported allegation of fraud [in the inducement of the main contract] could cause delay by allowing its resolution in the New York courts," thus delaying resolution of the matter and frustrating the parties' intent. 107 However, the Shaffer court responded by stating that enforcement of the separability doctrine would not prevent delay because even in courts that follow the doctrine, a party need only allege fraud in the arbitration clause itself and delay will result. 108

The Shaffer court attacked the separability doctrine by noting only one among the many reasons that courts have adopted the doctrine, the avoidance of delay, and then assailing that position. However, apart from failing to take into account the other reasons 109 why courts have adopted the doctrine, most notably the parties' intent to arbitrate, the Shaffer court's response to Weinrott failed to recognize the effect that Oklahoma procedural rules, if adequately enforced, could have in preventing unsupported allegations of fraud in the inducement of arbitration clauses. For instance, Oklahoma law requires that "[i]n averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." 110 As applied to allegations of fraud in the inducement of the arbitration clause, a party would have to make something more than a bare allegation of fraud in order to avoid dismissal. 111

104. See Shaffer, 915 P.2d at 914 nn.5 & 6.
105. It is not altogether clear whether this was a question of state law. The issue of whether the FAA preempted state law in this case constitutes Part III of this note.
107. Shaffer, 915 P.2d at 916 (citing Weinrott, 298 N.E.2d at 46).
108. See id.
109. See supra note 20 and accompanying text.
111. In Gay v. Akin, 766 P.2d 985 (Okla. 1988), the court outlined the parameters of Rule 2009(B) when it stated that the rule required "specification of the time, place and content of an alleged false
Further, Oklahoma rules of procedure raise the possibility of sanctions for attorneys who present pleadings to the court for the purpose of "unnecessary delay"\(^{112}\) or who present allegations with no evidentiary support.\(^{113}\) The federal courts have imposed Rule 11\(^{114}\) sanctions against parties who presented legally unsupportable allegations of fraud in the inducement of arbitration clauses in order to avoid arbitration.\(^{115}\) If Oklahoma courts were willing to use the state rules at their disposal to sanction those who attempt to avoid arbitration by making meritless allegations of fraud in the inducement of the arbitration clause, the Shaffer court's response to Weinstein would not stand. Parties would be hesitant to make unsupported allegations of fraud in the inducement of the arbitration clause for the sole purpose of keeping the question of the validity of the main contract out of arbitration.

Finally, by only responding to the question of delay, the Shaffer court neglected to address the most important reason behind the Weinstein court's adoption of the separability doctrine. The Weinstein court stated that when the parties to a contract have chosen to place all questions regarding the validity, interpretation and enforcement of the contract in the hands of arbitrators, then they have selected their tribunal and intend that it should decide the contract's validity should the issue arise.\(^{116}\) The central purpose behind the separability doctrine is then clearly a desire to comply with the contracting parties' intent.\(^{117}\) Implicit in the Weinstein reasoning is the notion that parties are free to include a clause in the main contract which refers all disputes arising out of the contract to arbitration, including claims of fraud in the inducement of the contract itself. However, the Shaffer court never addressed the key issue of whether the rejection of the separability doctrine frustrated the contracting parties' intent.

Instead, the Shaffer court took a different view. The court cited the dissent in Prima Paint, in which Justice Black stated, "if the contract was procured by fraud, representation, but not the circumstances or evidence from which fraudulent intent could be inferred."


117. See Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d. Cir. 1959) in which the court stated:

It would seem to be beyond dispute that the parties are entitled to agree, should they desire to do so, that one of the questions for the arbitrators to decide in case the controversy thereafter arises, is whether or not one of the parties was induced by fraud to make the principal contract . . . .

\textit{Id.} at 410.
then unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated."\textsuperscript{118} The court sided with this view, stating that it was in line with the court's view of Oklahoma's "state law as to contracts in general."\textsuperscript{119}

It is understandable how the court could adopt this position. The statement sums up the idea that if the main contract was procured by fraud, then it is void \textit{ab initio} and arbitration would be pointless. More specifically, if the main contract was tainted by fraud, then the arbitration clause, as a part of that contract, was also fraudulently procured and enforcement of the clause would be illogical.\textsuperscript{120} However, while this view more or less assumes that the arbitration clause is not a separate contract, but rather a part of the main contract, the crucial weakness in this view is one of \textit{timing}. Certainly, if the contract was fraudulently induced then, assuming the arbitration clause was inseparable, enforcement would be wrong. However, utilizing this view to reject the separability doctrine at the outset assumes that the contract \textit{was} procured by fraud. When the defendant moves to compel arbitration, the issue has not yet been decided. Therefore, it is by no means clear that either the main contract or the arbitration clause was induced by fraud. Further, this is precisely the sort of issue that the parties likely intended arbitration to resolve. By refusing to enforce the arbitration clause, a court essentially assumes that it was fraudulently procured.

While the \textit{Shaffer} court purported to deal with a contractual issue, it never considered the importance of the parties' intent in providing for arbitration. Even if parties intended that disputes regarding the alleged fraudulent inducement of a contract be referred to arbitration, after \textit{Shaffer}, courts may wholly overlook that intent when such disputes arise. Second, the court connoted that there was no real distinction between the arbitration clause and the main contract. The \textit{Shaffer} rationale implies that the arbitration clause is so inextricably woven into the main contract that the fraudulent inducement of the main contract necessarily entails the fraudulent inducement of the arbitration clause. However, this reasoning fails to take into account that the UAA specifically speaks in terms of the irrevocability of arbitration clauses, thus contemplating that the clause is distinct from the main contract and therefore separable.

\textbf{3. A Response to Other State Courts' Interpretations of the UAA}

Thirty-four states and the District of Columbia have adopted the UAA.\textsuperscript{121} The

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\item[119.] Id. at 917.
\item[120.] \textit{Cf.} Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251, 258-60 (Cal. 1983) (en banc) (Mosk, J., dissenting) (discussing the notion that fraudulent inducement of the main contract would void the arbitration clause).
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Shaffer court comforted itself in noting that Tennessee, Louisiana, and Minnesota have rejected the separability doctrine. However, by siding with these states, the court placed itself in opposition to the decisions of the majority of states which have adopted the UAA. Therefore, the court disregarded the admonition of section 801 of Oklahoma's version of the UAA which states, "[t]his act shall be so construed as to effectuate its general purpose to make uniform the laws of those states which enact it." Perhaps more importantly, the court relied upon the decisions of other states as a proxy for its own analysis of the separability doctrine. However, the reasons for rejecting the separability doctrine provided in these cases have limitations which in turn weaken the Shaffer rationale. The Shaffer court first relied upon City of Blaine v. John Coleman Hayes & Associates, Inc., a Tennessee Court of Appeals case.


122. See Shaffer, 915 P.2d at 916-17. Apparently, the Shaffer court was not aware that a North Carolina court has also rejected the separability doctrine. See T.J. Paramore v. Inter-Regional Pin. Group Leasing Co., 316 S.E.2d 90, 92 (N.C. Ct. App. 1984).


from 1991. The court apparently cited the case in support of the proposition that use of the separability doctrine would be contrary to the intent of the state legislature when it enacted the UAA.\textsuperscript{126} The \textit{Blaine} court focused on the same section of the UAA as did the \textit{Shaffer} court.\textsuperscript{127} Reiterating, the section emphasized the enforceability of arbitration clauses except "upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{128}

The \textit{Blaine} court rejected the separability doctrine by purporting to look at the intent of the Tennessee legislature when it adopted the UAA.\textsuperscript{129} The court stated that when the legislature adopted the Act, it was well aware that a party had a right to seek recision of a contract which was induced by fraud.\textsuperscript{130} Rather than going any further with this analysis, the \textit{Blaine} court merely adopted the reasoning of Justice Black's dissent in \textit{Prima Paint} to define the intent of the Tennessee legislature, stating "[f]raud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated."\textsuperscript{131}

The \textit{Blaine} analysis substituted Justice Black's understanding of the separability doctrine for the intent of the Tennessee legislature. \textit{Shaffer}, by analogy, would appear to substitute it for that of the Oklahoma legislature. However, in neither case were other possibilities discussed. What neither the \textit{Blaine} nor \textit{Shaffer} courts considered was that the legislatures of their respective states might have also understood that by adopting the UAA, they were overcoming judicial hostility toward arbitration clauses and placing the clauses on an equal footing with other contracts.\textsuperscript{132} Therefore, the legislature contemplated that the arbitration clause is a separate contract. Without an allegation of fraud directed at the arbitration clause itself, the clause is valid and irrevocable.

Instead, by accepting Justice Black's analysis, the \textit{Blaine} court made clear that if a dispute arises over whether the contract was void ab initio, then the existence of the arbitration clause, as a part of that contract, is also placed at issue, a question properly decided by the courts.\textsuperscript{133} However, such a view still does not address the

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\item See \textit{Shaffer}, 915 P.2d at 917 (citing \textit{Blaine}, 818 S.W.2d at 38).
\item The \textit{Blaine} court focused on TENN. CODE ANN. § 29-5-302 (Supp. 1990) which, in relevant part, is identical to 15 OKLA. STAT. § 802(A) (1991) as interpreted by the \textit{Shaffer} court.
\item TENN. CODE ANN. § 29-5-302 (Supp. 1990).
\item See \textit{Blaine}, 818 S.W.2d at 37-38.
\item See id. at 38.
\item \textit{Id.} (quoting \textit{Prima Paint Corp. v. Flood & Conklin Mfg. Co.}, 388 U.S. 402, 412 (1967) (Black, J., dissenting)).
\item This was Congress' intent when it enacted the FAA. See \textit{Southland Corp. v. Keating}, 465 U.S. 1, 15-16 (1984) (citing H.R. REP. NO. 68-96, at 1 (1924)).
\item See also \textit{The Batters Bldg. Materials Co. v. Kirschner}, 110 A.2d 464, 469 (Conn. 1954) ("[I]f one party to the alleged contract is contending that it is void ab initio ... the arbitration clause cannot operate, for ... the clause itself also is void"); Comment, \textit{Enforcement of Arbitration Clause Required Although Principal Contract Might Be Voidable}, 43 N.Y.U. L. REV. 565, 567 (1968) ("Logically, it is difficult to see how, if the entire contract is void, the arbitration clause can nevertheless be valid."). The problem with this approach is that it assumes that the contract is void. However, when the question of
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issue of the parties' intent. Parties include arbitration clauses in contracts in order to specify how they will settle disputes arising out of the contract, namely by arbitration. Under this reasoning, to hold that the arbitration clause is inseparable from the main contract and therefore unenforceable is to assume that the defendant who allegedly fraudulently induced the main contract necessarily would have fraudulently induced the arbitration clause. This rationale assumes too much, frustrates the parties' intent, and narrows the class of arbitrable issues arising out of a contract to those not pertaining to its formation.134

The Shaffer opinion also relied upon a Louisiana case for the view that the validity of the arbitration clause is merely a corollary to the answer to whether the main contract was valid.135 In George Engine Co. v. Southern Shipbuilding Corp.,136 the Louisiana Supreme Court interpreted a section of the state's arbitration statute137 identical to the section138 interpreted by the Shaffer court. The George Engine court, in rejecting the separability doctrine, held that the statute did not require a court to compel arbitration on the issue of whether the contract as a whole was void ab initio.139 The court based its decision on the notion that a question of fraudulent inducement requires adjudication of a legal issue, an issue properly decided by a court; in contrast, arbitrators are more properly qualified to decide factual issues.140

Assuming that the George Engine reasoning is sound, and courts should decide legal issues rather than arbitrators, this analysis fails to take into account the factual nature of claims of fraud. The adjudication of allegations of fraud are indeed questions of fact, and, according to the George Engine rationale, are therefore properly determined by arbitrators. In Robert Lawrence Co. v. Devonshire Fabrics, Inc.,141 the Second Circuit addressed the sort of reasoning found in George Engine when it stated that "[t]he issue of fraud seems inextricably enmeshed in the other factual issues of the case. Indeed, the difference between fraud in the inducement and mere failure of performance . . . depends upon little more than legal verbiage

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134. Justice Mosk, of the California Supreme Court, arguing against application of the separability doctrine, indicated that courts should also refuse to compel arbitration when other traditional contract defenses such as duress, menace, undue influence or mistake are raised. Erickson, Arbuthnot, McCarthy, Keamy & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251, 260 (Cal. 1983) (Mosk, J., dissenting).
136. 350 So. 2d 881, 884 (La. 1977).
137. The section is presently codified at LA. REV. STAT. ANN. § 9:4201 (West 1991). Lousiana has not adopted the UAA.
139. See George Engine, 350 So. 2d at 884.
140. See id. at 885-86; see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 415-16 (1967) (Black, J., dissenting) ("[C]ourts have far more expertise in resolving legal issues which go to the validity of a contract than do arbitrators.").
141. 271 F.2d 402 (2d Cir. 1959).
and the formulation of legal conclusions. Further, while a court may reach a legal conclusion when confronting a claim of fraud, arguably it would only be that the plaintiff’s complaint did or did not allege facts which, if true, would sustain a finding by a trier of fact that the contract was induced by fraud. Finally, the Oklahoma Supreme court itself, in Tice v. Tice, a 1983 case involving a claim of fraudulent inducement of marriage, arguably a tort claim, clearly stated, "[w]hen fraud is properly alleged by one party and denied by the other party, the existence or non-existence of fraud becomes a question of fact."

The George Engine reasoning provides a weak basis for rejecting the separability doctrine and actually frustrates the purposes of arbitration. Refusing to send a matter to arbitration based simply upon a court’s determination of the nature of the claim, whether factual or legal, not only frustrates the parties’ intent to have any claims arising out of the contract arbitrated, but also allows a party to delay arbitration. Following this reasoning, a party may avoid arbitration by merely alleging that the contract was void from its inception without addressing whether the arbitration clause itself was fraudulently induced. However, the Shaffer court followed the analysis, even going so far as to say that "[r]esolution of claims such as fraud by those who are best suited to perform the task will enhance the arbitration process."

142. Id. at 410.
144. 672 P.2d 1168 (Okla. 1983).
145. Id. at 1171.
146. See George Engine Co. v. Southern Shipbuilding Corp., 350 So. 2d 881 (La. 1977), in which the dissenting judge stated:

Where the parties freely consent to arbitration of future disputes arising out of or relating to a contract . . . the very purpose of their full consent to the arbitration agreement is to avoid the expense, delays and uncertainties of litigation regarding the validity of either the contractual undertaking itself or the contractual performance.

Id. at 887 (Tate, J., dissenting).
147. See id. (Tate, J., dissenting) ("To interpret the statutory language so, obviously opens up to either party his unilateral option to postpone indefinite arbitration. He may do so, once an arbitrable dispute arises, by filing judicial proceedings urging ground for recession of the parent contract"); see also Lummus Co. v. Commonwealth Oil Ref. Co., 280 P.2d 915 (1st Cir. 1960), in which the court stated:

We see no reason why parties should not agree, if they wish to, that if a question arises as to whether the principal agreement was obtained by fraud, that that question will be arbitrated. For a court to then hold that fraud which bore only upon the principal agreement automatically invalidated the arbitration contract would be to destroy precisely what the parties had sought to create. Moreover, any other approach sets the stage for delaying action, and invites the injured party to cast what is basically a claim for breach of warranty or failure to perform, which would be arbitrable, into an action based on fraudulent inducement.

Id. at 924.
Finally, the Shaffer court looked to the Minnesota Supreme Court’s view of the separability doctrine.\(^{149}\) Relying upon Minnesota’s supposed rejection of the separability doctrine in Atcas v. Credit Clearing Corp. of America,\(^{150}\) the Shaffer court stated that “[t]he Minnesota Supreme Court has concluded as a matter of state law that an arbitration agreement cannot be severed from the other contractual provisions contained in a contract.”\(^{151}\) Actually, the Minnesota court held that the arbitration clause in Atcas was severable.\(^{152}\) However, the court reasoned that the issue of severability was not important since the parties had failed to evince a clear intent in the arbitration clause to refer questions of fraud to arbitration.\(^{153}\)

For the Atcas court, the answer to whether the question of fraud in the inducement of the contract was for the court or for the arbitrators turned not on a hard, fast rule of separability or nonseparability such as that adopted in Shaffer. Instead, the Atcas court focused on whether the language of the arbitration clause was broad enough to include the question of fraud. The court articulated a two-pronged test: "If the language contained in the agreement evinces an intent of the parties to specifically arbitrate the issue of fraud or if the language used is sufficiently broad to comprehend that the issue of fraudulent inducement be arbitrated, then that issue is a proper subject for arbitration.”\(^{154}\) This test has been utilized by Minnesota courts to find that arbitration clauses were broad enough to encompass the question of fraudulent inducement of the contract as a whole.\(^{155}\)

Therefore, the Minnesota case relied upon in the Shaffer opinion does not represent a statement that, under the UAA, arbitration clauses are never separable, but rather that the question of arbitration of claims of fraudulent inducement will often turn upon the latitude afforded by the language of the arbitration clause. This was made clear in a recent Minnesota case in which one of the parties to a contract specifically alleged fraud in the arbitration clause. Even courts adhering to the separability doctrine would adjudicate this issue before compelling arbitration. However, the Minnesota Court of Appeals, rather than summarily adjudicating the matter, first asked whether the arbitration clause in question was broad enough to encompass the question.\(^{156}\) This view more accurately reflects the intent of the parties when contracting for arbitration than does the Shaffer holding.

\(^{149}\) See id.
\(^{150}\) 197 N.W.2d 448 (Minn. 1972).
\(^{151}\) See Shaffer, 915 P.2d at 917.
\(^{152}\) See Atcas, 197 N.W.2d at 457.
\(^{153}\) See id. at 456.
\(^{154}\) Id. (emphasis added).
\(^{155}\) See Michael-Curry Cos., Inc. v. Knutson Shareholders Liquidating Trust, 449 N.W.2d 139, 141-42 (Minn. 1989) (holding that an arbitration clause which stated "a]ny controversy or claim arising out of, or relating to this agreement, or the making, performance, or interpretation thereof, shall be settled by arbitration" was sufficiently broad to satisfy the Atcas test); Welch v. Buller, 481 N.W.2d 856, 858-59 (Minn. Ct. App. 1992) (holding that language of arbitration clause was broad enough to meet the Atcas requirements). But see Thayer v. American Fin. Advisers, Inc., 322 N.W.2d 599, 602-03 (Minn. 1982) (holding that arbitration clause failed to meet the Atcas test).
Rather than dealing with the reasons behind other courts' adoption of the separability doctrine, the Shaffer court relied upon the reasons given by a few state courts in rejecting the doctrine. However, in doing so, the Shaffer analysis is subject to the weaknesses of those decisions. Most importantly, the court never addressed the issue of the contracting parties' intent. Nor did the court analyze whether the UAA envisioned the arbitration clause as a distinct contract. Instead, the court relied upon a state court's interpretation of legislative intent, line drawing between factual and legal issues, and an apparent misreading of a decision. None of these reasons are sufficient for overlooking both the parties' intent and the plain language of the UAA.

4. Shaffer and Prior Statements by the Oklahoma Supreme Court Regarding Arbitration

Since the enactment of the UAA in Oklahoma in 1978, the Oklahoma Supreme Court has struggled, in various contexts, with the question of whether arbitration clauses are enforceable.\(^{157}\) Recent decisions, however, have come down on the side of enforceability.\(^{158}\) Despite this, the Shaffer decision limited the enforceability of arbitration clauses and thus stands in stark contrast to statements regarding arbitration made in previous decisions.

At times, the court appeared to wholeheartedly favor the enforcement of pre-dispute arbitration clauses. For example, in Voss v. City of Oklahoma City,\(^{159}\) the court upheld an arbitration agreement in the collective-bargaining context. In contrast to the Shaffer analysis, the court clearly stated, "[t]he fundamental purpose of arbitration is to preclude court intervention into the merits of disputes when arbitration has been provided for contractually."\(^{160}\) The court added that "[w]here arbitration has been contracted for, it constitutes a substantive and mandatory right."\(^{161}\) Finally, the court stated that "[i]f the arbitration clause is broad enough to include the alleged dispute, arbitration must be ordered."\(^{162}\)

Viewed in the light of this case and others like it, Shaffer would appear anomalous. However, the decision makes more sense when placed in the context of other decisions which have limited arbitration.\(^{163}\) These cases demonstrate that


\(^{158}\) See Rollings v. Thermodyne Indus., Inc., 910 P.2d 1030, 1036 (Okla. 1996) (holding that pre-dispute arbitration clauses are enforceable despite challenges based upon alleged violation of Oklahoma Constitution).

\(^{159}\) 618 P.2d 925 (Okla. 1980).

\(^{160}\) Id. at 927.

\(^{161}\) Id. at 928.

\(^{162}\) Id. It should be noted that many cases turn upon whether the court finds that the language of arbitration clause was broad enough to cover the question of fraudulent inducement. Perhaps an interpretation of the intent of parties to arbitrate claims of fraudulent inducement as manifested in the arbitration clause would have offered a better solution to the problem before the Shaffer court. See supra notes 154-56 and accompanying text.

\(^{163}\) Cf. Raines v. Independent School Dist. No. 6, 796 P.2d 303 (Okla. 1990) (refusing to enforce arbitration clause in collective bargaining agreement; Mindemann v. Independent School Dist. No. 6, 771
while the Oklahoma Supreme Court may favor arbitration in the abstract, the majority will often find a way to refuse enforcement in the particular. For example, in Cannon v. Lane, the court held that an agreement between a Health Maintenance Organization (HMO) and a participant which included an arbitration agreement was not governed by the UAA as it resembled a "contract with reference to insurance" which is not covered by the Act. The court held that arbitration in that instance was governed by Oklahoma's common law. As a result, the arbitration clause was unenforceable as a matter of public policy.

Perhaps most important is the concern of whether the enforcement of pre-dispute arbitration clauses violates the Oklahoma Constitution. Article 2, section 6 states that "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Also, article 23, section 8 states that "[a]ny provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void." The question of whether the enforcement of arbitration clauses violates these provisions has been consistently raised by Justice Opala. The concern has apparently been, for the time being, lain to rest in Rollings v. Thermodyne Industries, Inc. in which the court held that enforcement of arbitration clauses did not violate the Oklahoma Constitution.

Despite the court's recent willingness to favor arbitration in general, as evidenced in Rollings, the court's history of finding reasons to refuse to enforce arbitration

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P.2d 996 (Okla. 1989) (denying enforcement of arbitration clause in collective bargaining agreement). These decisions did not interpret the UAA but are important in that they demonstrate the court's reluctance to enforce arbitration clauses. See also Wiegand, supra note 157, at 636 (arguing that the Raines and Mindemann decisions reflected the court's continued hostility toward arbitration).


165. Cannon, 867 P.2d at 1237. The statutory exception relied upon by the court is found at 15 OKLA. STAT. § 802(A) (1991), which excludes from the UAA's coverage contracts relating to insurance.

166. See Cannon, 867 P.2d at 1238.

167. See id. at 1239.


170. OKLA. CONST. art. XXIII, § 8.


173. See id. at 1035-36.
clauses in particular situations, as demonstrated by the Cannon decision, may provide insight into why they refused to enforce the arbitration clause at issue in Shaffer. This is because Shaffer did not involve the usual commercial contract, but rather a fee agreement between an attorney and his clients. There has been debate over whether a lawyer violates his ethical duties by providing for arbitration of disputes arising out of his relationship with his client. The Shaffer court indicated that it was at least aware of this issue when it hinted at the specifics of the plaintiffs' situation. The court stated, "The parties do not raise, and we need not address, the propriety of an arbitration clause in an attorney fee agreement, or whether circumstances could exist that would void an arbitration clause in an attorney fee agreement."

Instead, the parties in Shaffer had alleged that the arbitration clause violated the Oklahoma Constitution. However, the court had put that question to rest in the Rollings decision. Since the parties did not raise the specific issue of whether the ethical dilemmas surrounding arbitration in the attorney-client context might be a sufficient reason for voiding the arbitration clause, the court never explicitly addressed the question. Instead, the court sided with the plaintiffs by refusing to compel arbitration because of the reason that they did raise — a rejection of the separability doctrine.

Thus, at first glance, it would appear that the court's recognition of the issue of arbitration in the attorney-client context was irrelevant to the decision it reached. However, in noting the peculiar nature of the case, despite the fact that neither party raised the issue, the court may have been making a thinly veiled expression of its disapproval of the practice of inserting arbitration clauses in attorney-client fee agreements as a possible attempt to limit the lawyer's liability in case of malpractice. This may have provided the impetus for denying arbitration.

This view is supported by the fact that the court may have preferred to limit its rejection of the separability doctrine to the context of attorney-client fee agreements. For instance, the court stated the issue placed before it in terms of whether claims of fraud in the inducement of the "attorney-client" contract would preclude enforcement of the arbitration clause. In announcing its holding, the court spoke in terms of attorney-client contracts, stating "allegations of fraud in the inducement of the attorney-client contract or agreement generally ... must be resolved by a court prior to either compelling arbitration or dismissing the case." This indicates that the court would have liked to have confined its holding to attorney-client agreements, or at least that the specifics of the plaintiffs' situation figured in their decision. However, since the parties never raised the issue of whether the

175. Shaffer, 915 P.2d at 913 n.2.
176. See id. at 912.
177. See OKLA. R. PROF. CONDUCT 1.8(h) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for the lawyer's personal malpractice").
178. See Shaffer, 915 P.2d at 914.
179. Id. at 917.
ethical complications surrounding arbitration clauses in attorney-client agreements would be sufficient reason to make them voidable, the court refused arbitration based upon the only reason raised by the parties, specifically, the separability doctrine. While arbitration in the context of attorney-client fee agreements is problematic and may indeed violate an attorney’s ethical obligations,\textsuperscript{180} the \textit{Shaffer} holding, by not dealing with the issue, could not be confined to the attorney-client context. Instead, the court dealt with a contracts issue and, therefore, logically extended its holding to contracts in general.\textsuperscript{181} It will be in the field of commercial contracts that the holding will have its greatest impact. However, in commercial contracts, the obligations attending the special relationship between an attorney and his client such as existed in \textit{Shaffer} simply do not apply. If anything, the holding should have been limited to arbitration clauses in attorney-client fee agreements. The language of the \textit{Shaffer} decision seems to leave open this possibility, and perhaps a future decision will so limit the court’s rejection of the separability doctrine.\textsuperscript{182}

The \textit{Shaffer} decision represents a step back in the enforceability of arbitration clauses under Oklahoma state law. However, the decision is not such a radical opinion when viewed in light of the court’s struggle with arbitration in general. The court indicated in prior decisions that while it favored arbitration, it would not enforce arbitration clauses if it thought that a mere technicality might deprive a party of his right to access to the courts. Perhaps the court saw \textit{Shaffer} as a close call due to the attorney-client relationship which had existed when the contract was made and came down on the side of the right of access to the courts. However, its impact will be most widely felt in the commercial context, and therefore the decision is lamentable.

\textbf{D. The Impact of the Rejection of the Separability Doctrine on Arbitration in Oklahoma}

\textit{Shaffer} makes clear that Oklahoma state courts will not enforce the separability doctrine in cases governed by the UAA. Thus, if a party alleges fraud in the inducement of a contract containing an arbitration clause, Oklahoma courts applying state law will not enforce arbitration of the issue but will instead resolve the matter in court.\textsuperscript{183} However, the United States Supreme Court’s decision in \textit{Prima

\textsuperscript{180} See Mark G. Anderson, Note, \textit{Arbitration Clauses in Retainer Agreements: A Lawyer’s License to Exploit the Client}, 1992 J. DISP. RESOL. 341 (discussing ethical problems involved with allowing lawyers to insert arbitration clauses in fee agreements).

\textsuperscript{181} See \textit{Shaffer}, 915 P.2d at 918; see also Patricia Ledvina Himes, New Oklahoma Supreme Court Decisions Regarding Arbitration — Sustaining Constitutionality and Expanding the Role of District Courts, 67 OKLA. B.J. 2887, 2890-91 (1996) ("[I]f a plaintiff alleges fraud in the inducement of the arbitration clause itself or the underlying agreement, the district court must adjudicate that issue before granting any relief based upon the validity of the arbitration clause").

\textsuperscript{182} The court might consider \textit{Renegar v. Staples}, 388 P.2d 867, 871-72 (Okla. 1963) (noting special relationship in attorney-client context when fraud is alleged), and \textit{Renegar v. Fleming}, 211 P.2d 272, 277-78 (Okla. 1949) (discussing unenforceability of fraudulently induced agreements between attorney and client).

\textsuperscript{183} See \textit{Shaffer}, 915 P.2d at 917.
Paint makes it equally clear that Oklahoma state courts deciding a case under the FAA are required to follow the separability doctrine. Applying the FAA, the court will treat the arbitration clause as a separate contract and enforce arbitration on the question of whether the underlying contract was fraudulently induced.

The bifurcation of federal and state arbitration law in Oklahoma courts by the Shaffer decision creates a problem. The FAA applies in both federal and state courts whenever the contract evidences an involvement with interstate commerce. However, the FAA does not provide, as a federal question, an independent ground for subject-matter jurisdiction in the federal courts. Parties invoking federal court jurisdiction by way of diversity will likely have entered into a contract involving interstate commerce and will therefore be able to take advantage of the FAA. However, nondiverse parties whose contractual dispute raises no federal question will have to bring their case in state court. Therefore, whether their claim is governed by the UAA or the FAA will depend upon whether their contract involves interstate commerce. If the defendant was fortunate enough to have entered into a contract with a sufficient nexus with interstate commerce to invoke the FAA, he will be able to enforce arbitration of claims of fraudulent inducement of the contract. If not, he will be subject to the UAA and the holding in Shaffer. Arbitrability of claims should not be subject to fortuity of circumstances but rather whether the parties intended to arbitrate their disputes.

Therefore, the likely impact of the decision will be that future contracting parties who wish to ensure arbitration of disputes will make certain that their contract in some way demonstrates an involvement with interstate commerce in order to take advantage of the protection of the FAA. Parties may even go so far as to include the FAA in a choice-of-law provision. Fewer and fewer contracts will be governed by the UAA. The result could be the withering of the UAA and the almost complete federalization of arbitration law in Oklahoma.

III. The Other Problem with Shaffer: Opting Out of Governance by Federal Law

A. The Fatal Flaw of Shaffer: A Logical Trap and the Trouble with Federalism

Had the Shaffer court merely rejected the separability doctrine, the case would have limited a impact. The United States Supreme Court has made clear that the FAA applies to all cases involving interstate commerce whether brought in federal

185. See id. at 403-04.
or state court.\textsuperscript{188} Oklahoma courts have followed this rule.\textsuperscript{189} Therefore, \textit{Shaffer}'s rejection of the separability doctrine would have applied only to those cases governed by the UAA, specifically, those cases which did not involve interstate commerce.

However, the \textit{Shaffer} court broadened the scope of the UAA at the expense of federal arbitration law. The court stated that parties could, through a choice-of-law provision, choose to have their case arbitrated under the UAA rather than the FAA even if the case involved interstate commerce.\textsuperscript{190} While Oklahoma courts have previously expressly declined to consider whether the FAA preempted the UAA when neither party raised the issue,\textsuperscript{191} the rule set forth by the \textit{Shaffer} court indicates that even if a party does raise the issue, the FAA will not preempt state law when selected in a choice-of-law provision.

However, it is not altogether clear that this is possible. The decision raises two problems, First, choice-of-law provisions are intended to allow parties to choose between the laws of different states. Choice-of-law provisions are clearly not intended to allow parties to choose between state and applicable federal law.\textsuperscript{192} By allowing parties to select the UAA in a choice-of-law provision, the \textit{Shaffer} decision allows parties to simply choose not to be governed by federal law. It is unlikely that Congress enacted the FAA intending that its scope would be determined by how many parties wanted to fall within its coverage.

Second, \textit{Shaffer}'s rejection of the separability doctrine contains an unmistakable logical inconsistency which would preclude enforcement of the choice-of-law provision in cases involving alleged fraudulent inducement of a contract. While the court held that an allegation of fraudulent inducement of the main contract rendered the arbitration clause unenforceable,\textsuperscript{193} the court never questioned whether the choice-of-law provision contained within that arbitration clause might also have been tainted by fraud. Also, while the court proved unwilling to abide the parties' intent to arbitrate, it was willing to enforce the parties' intent as to which law would govern. However, it is wholly unreasonable to assume that the parties would intend arbitration to be governed by state law, when that law would ultimately preclude arbitration in the first place.\textsuperscript{194}

\begin{footnotes}
\item[192] See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 490 (1989) (Brennan, J., dissenting) ("Choice-of-law clauses simply have never been used for the purpose of dealing with the relationship between state and federal law").
\item[193] See \textit{Shaffer}, 915 P.2d at 917-18.
\begin{quote}
To suggest, on the one hand, that the parties had expressed their willingness to arbitrate their future disputes, but on the other hand, intended the validity and enforceability of their arbitration clause to be governed by a particular state rule that would invalidate the
\end{quote}
\end{footnotes}
The court refused to separate the arbitration clause from the main contract, but was clearly willing to separate the choice-of-law provision from both. Not coincidentally, the enforcement of the choice-of-law provision took the case out of the ambit of the FAA and conferred upon the Oklahoma Supreme Court the ability to decide a question in an area increasingly governed by the federal law.

B. The Problem With Choosing Between State and Federal Law

According to Shaffer, if contracting parties provide that the UAA will govern arbitration of any future disputes in a choice-of-law provision, Oklahoma state courts must apply the UAA even if the contract involves interstate commerce and falls within the coverage of the FAA. This means that courts may reach the odd result of enforcing a choice-of-law provision in an arbitration agreement which selects a body of law that precludes arbitration altogether. Further, the statement means that parties may simply opt not to be governed by federal law. However, the United States Supreme Court has consistently affirmed the broad scope of the FAA and a brief look at these decisions makes clear that the Shaffer court's statement was in error.

The applicability of the FAA in state and federal courts has proven a difficult issue. Almost immediately after the statute's enactment, courts held that the FAA did not create an independent ground of federal subject-matter jurisdiction by way of a federal question. The courts did conclude, however, that the statute was applicable in diversity cases. Conversely, there was little indication that the statute applied in state courts.

Following the United States Supreme Court's decision in Erie Railroad Co. v. Tompkins in 1938, the issue surrounding the applicability of the FAA could be articulated as whether the statute was essentially substantive or procedural law. Erie mandated that federal courts sitting in diversity were to apply the substantive law of the forum state. Therefore, if the FAA were construed as substantive law,
federal courts would not apply the FAA in diversity cases but rather the arbitration law of the forum state. The FAA would have been a virtual nullity.

Though far from clear, it appeared that the FAA was procedural. While this would have resulted in application of the FAA in diversity cases, another landmark case dealt the FAA a blow. In Guaranty Trust Co. v. York in 1945, the Court reframed the question in terms of whether application of federal rather than state law would significantly affect the outcome of the decision. If it would, federal courts were to apply state law. Therefore, even if the FAA were considered procedural law, since its application would likely be "outcome-determinative" in light of states' disfavor toward arbitration, the federal courts would be precluded from applying it.

The crux of the problem lay in whether Congress enacted the FAA pursuant to its Article III power or instead relied upon its power to regulate interstate commerce. If Congress enacted the FAA under its Article III authority over the federal courts and intended it to apply only in the federal courts as a rule of procedure, then it would only apply in those courts. Further, as a rule of procedure, it would not offend the Erie rule of applying state substantive and federal procedural law in diversity cases. However, if Congress enacted the FAA under its power to regulate interstate commerce, then the statute would have a much broader reach and apply in both federal and state courts.

In Bernhardt v. Polygraphic Co. of America in 1956, the Court effectively closed any discussion on one of the possibilities when it found that enforcement of arbitration clauses under the FAA would violate the Guaranty Trust rule. In a diversity case, the court chose to apply state rather than federal law, since application of the FAA would substantially affect the outcome of the case. Therefore, in Guaranty Trust terms, the FAA would be essentially substantive rather than procedural. Thus, the Article III possibility of a federal procedural rule faded and application of the FAA in diversity cases was again doubtful. As one author has noted, short of overturning Erie, the only option remaining for broad application of the FAA rested in squaring the enactment of the statute with Congress' power to regulate interstate commerce.

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206. See id. at 109.
207. See id.
208. See Herold, supra note 204, at 575-76.
209. See Strickland, supra note 196, at 392; Hirshman, supra note 30, at 1314-17.
210. See Strickland, supra note 196, at 392.
211. See Hirshman, supra note 30, at 1316.
212. See Strickland, supra note 196, at 392.
214. See id. at 202-03.
215. See Hirshman, supra note 30, at 1320.
216. See id.
The broad reach of the statute was firmly established in *Prima Paint* in 1967. There, the Court held that the FAA presented no *Erie-Guaranty Trust* problem in diversity cases because Congress enacted the statute under its commerce clause authority. After *Prima Paint*, it was clear that the reach of the FAA had expanded. Federal courts would apply the FAA in diversity cases whenever the contract involved interstate commerce. While the FAA did not provide an independent ground for federal subject-matter jurisdiction as a federal question, it had indeed begun to expand its reach.

However, the question remained whether state courts were required to apply the FAA in cases in which the contract involved interstate commerce. The answer came in *Southland Corp. v. Keating* in 1984. In *Southland*, the Court held that the FAA was national substantive law applicable in both federal and state courts. The Court reaffirmed the *Prima Paint* analysis of the FAA and stated that Congress enacted the statute under its commerce clause authority. Therefore, following the *Southland* decision, any time a contract involved interstate commerce, the FAA governed, whether suit was brought in federal or state court.

The Court's latest comment on the scope of the FAA came in 1995 with *Allied-Bruce Terminix Companies v. Dobson*. In *Allied-Bruce*, the Court expanded the reach of the FAA even further when it adopted the "commerce-in-fact" test for whether the contract involved interstate commerce, thus triggering application of the statute. Under this interpretation of "involving" commerce, so long as the transaction turns out to have, in fact, involved commerce, it is of no importance that the parties did not contemplate a connection with interstate commerce when they entered into the contract. The Court stated that the words "involving commerce" were the functional equivalent of "affecting commerce" and demonstrated Congress' intent to use its Commerce Clause power to the full.

This line of cases demonstrates the FAA's broad scope. The *Shaffer* court recognized the *Southland* rule that the FAA preempts state arbitration law in cases

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219. *See supra* note 187 and accompanying text.
221. *See id.* at 12. That the FAA was applicable in both state and federal courts was stated somewhat less explicitly in a previous decision. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-36 & n.34 (1983).
involving interstate commerce.\textsuperscript{227} Under \textit{Allied-Bruce} this would include almost every case.\textsuperscript{228} Despite the reach of the FAA as articulated in this line of decisions, the \textit{Shaffer} court ruled that even if the FAA applies, state arbitration rules govern when agreed to by the parties.\textsuperscript{229} The \textit{Shaffer} court cited \textit{American Physicians Service Group, Inc. v. Port Lavaca Clinic Associates},\textsuperscript{230} a 1992 Texas Court of Appeals case, for this proposition that parties may, through a choice-of-law provision, select to have arbitration governed entirely by state arbitration rules.\textsuperscript{231}

As the court indicated, the authority for this statement was taken from the United States Supreme Court's 1989 decision in \textit{Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University}.\textsuperscript{232} However, both the \textit{American Physicians} and \textit{Shaffer} courts fundamentally misapprehended the \textit{Volt} decision and allowed parties not only to select to be governed by state procedural rules of arbitration which did not affect their ultimate right to arbitration, but also to be subject to state arbitration law which would preclude the enforceability of arbitration clauses in general.

A closer look at the \textit{Volt} decision will make clear the court's misunderstanding. In \textit{Volt}, the parties had included a choice-of-law provision which stated that the law of the place where the contract was performed would govern.\textsuperscript{233} When the plaintiff sued, the defendant moved to compel arbitration.\textsuperscript{234} However, the plaintiff moved to stay arbitration pursuant to a California arbitration rule\textsuperscript{235} which allowed a court to stay arbitration pending the resolution of related litigation between one of the parties to the agreement and third parties.\textsuperscript{236} Since the contract was performed in California, the Court faced the question of whether to enforce the choice-of-law provision and apply the California arbitration rule or whether the rule was preempted by the FAA.

Despite finding that the contract fell within the coverage of the FAA,\textsuperscript{237} the Court held that the FAA did not preempt the state arbitration rule.\textsuperscript{238} The Court first stated that the purpose underlying Congress' enactment of the FAA was its desire to overrule the judiciary's hostility toward arbitration.\textsuperscript{239} However, the Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of \textit{procedural rules}; the federal policy is simply to ensure the enforceability,

\textsuperscript{227} See \textit{Shaffer} v. Jeffery, 915 P.2d 910, 915 n.10 (Okla. 1996).

\textsuperscript{228} See Grossnickle, supra note 223, at 790 (citing Mr. Mudd, Inc. v. Petra Tech, Inc., 892 S.W.2d 389, 392 (Mo. Ct. App. 1995), in which the court held that the use of the United States Postal Service satisfied the \textit{Allied-Bruce} interstate commerce test for the application of the FAA).

\textsuperscript{229} See \textit{Shaffer}, 915 P.2d at 915 n.10.

\textsuperscript{230} 843 S.W.2d 675 (Tex. App. — Corpus Christi 1992, writ denied).

\textsuperscript{231} See \textit{Shaffer}, 915 P.2d at 915 n.10.

\textsuperscript{232} 489 U.S. 468 (1989).

\textsuperscript{233} See \textit{id.} at 470.

\textsuperscript{234} See \textit{id.} at 471.

\textsuperscript{235} \textit{CAL. CIV. PROC. CODE ANN.} § 1281.2(c) (West 1982).

\textsuperscript{236} See \textit{Volt}, 489 U.S. at 471.

\textsuperscript{237} See \textit{id.} at 476.

\textsuperscript{238} See \textit{id.} at 477, 479.

\textsuperscript{239} See \textit{id.} at 474.
according to their terms, of private agreements to arbitrate." The Court reasoned that application of the California rule would not undermine the policies behind the FAA, stating:

Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration — rules which are manifestly designed to encourage resort to the arbitral process — simply does not offend the rule of liberal construction set forth in Moses H. Cone,[241] nor does it offend any other policy embodied in the FAA.[242]

The Court stated that the FAA preempts state laws which "require a judicial forum for the resolution of claims which the contracting parties have agreed to resolve by arbitration." However, the FAA does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself."[244]

Therefore, Volt stands for the proposition that parties may agree to abide by state procedural rules of arbitration which only affect the logistics of the arbitration process but do not undermine the FAA's policy of enforcing arbitration clauses. Despite a choice-of-law provision, the FAA will still preempt any state law which precludes the ultimate enforcement of the arbitration clause[245] as this conflicts with the federal policy ensuring the enforceability of arbitration agreements.[246] In Volt, the Court was willing to avoid preemption and enforce the California rule because it merely stayed arbitration pending the resolution of related claims. The rule did not affect the ultimate enforceability of the arbitration clause.

However, the Shaffer court, by relying upon American Physicians, misread the Volt decision. The Shaffer court used the holding in American Physicians, and implicitly the holding in Volt, to state that if parties include a choice-of-law provision in an arbitration clause, that law will govern even if its application could potentially result in a court's refusal to enforce the clause, as well it did in Shaffer. However, the United States Supreme Court's decision in Volt simply does not lend itself to the notion that parties may choose altogether not to be governed by the FAA.

240. Id. at 476 (emphasis added).
241. The rule of statutory construction that the Court referenced was set forth in Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). The case is cited most often for the following statement regarding the construction courts should give to arbitration agreements governed by the FAA: "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. at 24-25.
243. Id. at 478 (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).
244. Id. at 479.
245. See id. at 477. The court stated that "[e]ven when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law — that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
246. See id. at 476.
This misunderstanding of the Volt distinction between procedural rules of arbitration and state law which would preclude enforcement is made clear by a closer examination of American Physicians. In American Physicians, the parties included a choice-of-law provision in their arbitration clause which stated that any disputes would be settled according to Texas law.

The trial court refused to enforce the arbitration clause since it did not comply with the substantive requirements of the Texas Arbitration Act as it was not underlined and printed on the first page of the contract. The defendants appealed, arguing that the Texas Arbitration Act was preempted by the FAA. The Texas Court of Appeals rejected the defendant's argument, holding that since the arbitration clause specifically stated in a choice-of-law provision that any disputes would be arbitrated under Texas law, the Texas statute was not preempted by federal law. The American Physicians court quoted Volt:

Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.

There is no question that American Physicians was wrongly decided. The court essentially held that the FAA did not preempt the Texas arbitration statute even though enforcement of the Texas law precluded the enforcement of the arbitration clause. This is due to the court's misunderstanding of Volt.

This misunderstanding was made abundantly clear by the United States Supreme Court in Doctor's Associates, Inc. v. Casarotto. In Casarotto, the Court held that a section of Montana's version of the UAA, identical to the section at issue in American Physicians, was preempted by the FAA because, by its application, enforceability of arbitration was precluded. Justice Ginsburg distinguished Volt, pointing out that:

Volt involved an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the resolution of a related judicial proceeding. The state rule examined in Volt determined only the efficient order of the proceedings; it did not affect the ultimate enforceability of the arbitration agreement itself.

248. See id. at 676 n.1.
249. See id. at 677.
250. See id. at 678.
251. Id. (quoting Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).
253. See id. at 1657.
254. Id. at 1656-57.
Like Casarotto and American Physicians, Shaffer did not involve a procedural rule of arbitration as set forth in the UAA. Rather, it involved the Oklahoma Supreme Court's interpretation of section 802(A) of the UAA, a substantive provision almost identical to section 2 of the FAA. The decision did not involve the logistics of the proceedings but rather the ultimate enforceability of the arbitration clause. 255 Therefore, despite the fact that the parties in Shaffer selected the UAA as the law governing arbitration, since the Act's application resulted in the court's refusal to enforce the arbitration clause via the separability doctrine, the Shaffer court's interpretation of the UAA contravened the policy of the FAA and should have been preempted by the federal Act 256.

Since the Volt decision, numerous courts and commentators 257 have pointed out the distinction between state procedural rules which do not affect the ultimate enforceability of the arbitration clause and inconsistent state law which would preclude enforcement. For instance, in Ackerberg v. Johnson, 258 the Eighth Circuit stated:

**Volt** thus holds that the parties to an arbitration agreement can agree that state rules concerning arbitration will govern their proceedings. It clearly does not hold that state law can determine whether any given claim is arbitrable under the Federal Arbitration Act. Whether a claim is arbitrable under federal law is not a procedural question, and Volt clearly relies on this distinction.... The Supreme Court did not hold that state law could prevent arbitration of a federal claim otherwise arbitrable under federal law. 259

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255. Whether to enforce arbitrations via the separability doctrine is not a procedural question. As one author has noted, "the decision whether to apply the doctrine of separability involves the substantive issue of the validity and enforceability of the arbitration agreement with regard to attacks upon container contracts." Jiang, supra note 194, at 506.

256. *Cf.* Perry v. Thomas, 482 U.S. 483 (1987), in which the Court stated:

[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with... § 2.


258. 892 F.2d 1328 (8th Cir. 1989).

259. *Id.* at 1334.
Similarly, in the context of judicial review of arbitrators' decisions, the Fifth Circuit made clear that the FAA will apply despite any choice-of-law provision selecting state law. In *Atlantic Aviation, Inc. v. EBM Group, Inc.*, the court unequivocally stated that "the FAA governs judicial review of arbitration proceedings notwithstanding any choice of law provision or state law to the contrary." Both before and after the *Volt* decision, this view was consistently held in federal and state courts.

It is clear that the *Shaffer* court misstated the holding in *Volt* when it held that "even when the federal act applies state arbitration rules govern when agreed to by the parties." The *Volt* decision only allowed parties to choose state procedural rules which did not affect the ultimate enforceability of the arbitration clause. However, the *Shaffer* court misread this to mean that parties could choose to be governed by state substantive arbitration law, the application of which could potentially result in the ultimate preclusion of arbitration.

**C. The Logical Trap**

In circumventing the application of the FAA by enforcing a choice-of-law provision, the *Shaffer* court created for itself a logical trap. If fraud potentially so

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260. 11 F.3d 1276 (5th Cir. 1994).
261. Id. at 1280.
262. *See* Appalachian Reg'l Healthcare, Inc. v. Beyt, Rish, Robbins Group, Architects, No. 91-6063, 1992 WL 107014, at *2 (6th Cir. May 19, 1992) (holding that choice-of-law provision does not require application of state law rather than FAA); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1062 (9th Cir. 1991) (holding that FAA rather than state law applied despite selection of state law in choice-of-law provision); Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243-44 (5th Cir. 1986) ("The fact that the parties intended arbitration under Louisiana law does not affect the question of arbitrability ... [T]he existence of commerce under the FAA is dispositive with respect to the law which governs arbitrability even where the parties contemplated state law governance"); Northern Ill. Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 274-75 (7th Cir. 1982) ("Notwithstanding the parties' choice of law provision in their contract calling for application of Illinois law, and irrespective of the fact that this is a diversity case, federal arbitration law governs the analysis of arbitration provisions in any contract evidencing a transaction in interstate commerce"); Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1269 (7th Cir. 1976) ("To permit the parties to contract away the application of the Act by adopting state law to govern their agreement would be inconsistent with the Act itself and the holding in *Prima Paint*"); Collins Radio Co. v. Ex-Cel-O Corp., 467 F.2d 995, 997 (8th Cir. 1972) ("[T]he Federal Act bars resort to state arbitration rules to determine the validity of arbitration clauses in interstate contracts"); Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Gregg, No. 93-177-CIV-OC-16, 1993 WL 616691, at *4 (M.D. Fla. Dec. 8, 1993) ("The [Volt] Court did not declare that all choice-of-law provisions automatically invoked the chosen state's arbitration law"); Babier v. Shearson Lehman Hutton, Inc., 752 F. Supp. 151, 156 (S.D.N.Y. 1990) ("Volt does not stand for the proposition that any time a choice-of-law provision is included in an arbitration agreement, such a provision necessarily requires the application of state, rather than federal, arbitration law", *aff'd in part and rev'd in part*, 948 F.2d 117 (2d Cir. 1991)).
pervaded the contract as to render the arbitration clause unenforceable without judicial resolution of the issue, would fraud not have also touched the choice-of-law provision? The choice-of-law provision was certainly important. Courts have noted the importance contracting parties place in the somewhat analogous forum-selection clause. At least in the context of international arbitration, the United States Supreme Court stated in *The Bremen v. Zapata Off-Shore Co.*, 265 "the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." 266

Certainly, the same logic would apply equally as forcefully to the selection of which law, federal or state, would govern. Perhaps more importantly, it appears strange that a court would seek to give effect to the parties' choice of state law when that law would preclude arbitration.267

In short, why would the *Shaffer* court, which refused to accord any credence to an arbitration clause when the existence of the main contract was at issue, accord without question credence to the choice-of-law provision included therein? The answer is simple. Were the court to have held that the choice-of-law provision was unenforceable, it is quite probable that under *Allied-Bruce*, the FAA would have applied and arbitration enforced according to federal law. By refusing to recognize the validity of the arbitration clause, yet at the same time recognizing the validity of its choice of law provision, the *Shaffer* court allowed itself to decide the case under state rather than federal law. Ironically, the same court which stated that the "[p]laintiffs in our cases today do not seek to uphold any provision of the fee agreements," 268 simultaneously upheld a provision of the fee agreement which took the case out of the ambit of the FAA and conferred upon the court the ability to use state law to strike a blow to the enforceability of arbitration clauses in Oklahoma.269

D. Potential Impact

The impact of the second holding in *Shaffer* could ironically be that fewer cases in Oklahoma courts will be governed by the UAA. While the rule handed down was apparently an attempt to stem the encroachment of federal arbitration law, the effect could be quite the opposite. Contracting parties who wish to ensure arbitration of any disputes arising out of their contract will be certain not to include the UAA in any choice-of-law provision. Parties will also likely take care not to choose

266. *Id.* at 14 (footnote omitted); *cf.* National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326 (5th Cir. 1987) (holding that since language of forum-selection clause contained within arbitration clause suggested that situs of arbitration was as important as arbitration itself, the two were entire and not divisible).
267. *Cf.* Booth v. Hume Pub'lg, Inc., 902 F.2d 925, 929 (11th Cir. 1990) (finding a solution to the dilemma by holding that when parties chose Georgia law to govern arbitration, they really intended federal law to govern since Georgia law would render the arbitration clause void).
269. *See id.* at 915 n.10.
"Oklahoma law" in their choice-of-law clauses, as a court would likely interpret this to mean the UAA, and thus apply Shaffer in cases of alleged fraudulent inducement. Instead, parties will make clear that their contract evidences an involvement with interstate commerce so that the FAA will apply. As a last resort, parties may even go so far to include the FAA in a choice-of-law clause.

IV. Conclusion

Shaffer was wrongly decided. The decision stands not only in opposition to federal jurisprudence but also to that of other jurisdictions and the Oklahoma Supreme Court's prior statements which indicated that it favored arbitration. The court's rejection of the separability doctrine frustrates the intent of the contracting parties and clearly misconstrues a statute which envisions the arbitration clause as distinct from the main contract in which it is contained.

Finally, the court's reasoning was flawed. While the Shaffer court was unwilling to separate the arbitration clause from the main contract and, thus, enforce it, the court was quick to separate a choice-of-law provision from the apparently invalid arbitration clause in order to avoid the encroachment of the FAA on arbitration law in Oklahoma. However, it is clear that a choice-of-law provision should not have the effect of avoiding the application of federal law enacted pursuant to the Commerce Clause. Since the decision precludes preemption of the UAA by the FAA given a choice-of-law provision selecting state law, the effect of the Shaffer decision is sure to be that parties, aware that allegations of fraud in contracts governed by the UAA will render the arbitration clause unenforceable pending an adjudication of the issue by a court, will make sure that arbitration of future contracts is governed by federal law. Parties will not choose the UAA in choice-of-law provisions and will likely make certain that their contract evidences some involvement with interstate commerce. The end result could well be a de facto federalization of arbitration in Oklahoma.

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270. But see supra note 267.

271. However, if a dispute arises, parties must make certain that they raise the preemption issue. In a case decided only a few months prior to Shaffer, the Oklahoma Court of Appeals expressly declined to consider the preemptive effect of the FAA in cases involving interstate commerce when the parties had chosen New York law as governing arbitration proceedings. The court did so because neither party raised the issue. See Williams v. Shearson Lehman Brothers, Inc., 917 P.2d 998, 1002 n.5 (Okla. Ct. App. 1995).

272. In his dissent, Justice Opala cautioned the court "not to dichotomize the body of law that governs arbitrable issues by creating exceptions in patent discord with federal jurisprudence." Shaffer, 915 P.2d at 919 (Opala, J., dissenting).