

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 KAREN HOWSAM, ETC., :
4 Petitioners :
5 v. : No. 01-800
6 DEAN WITTER REYNOLDS, INC. :
7 - - - - -X
8 Washington, D. C.
9 Wednesday, October 9, 2002
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:02 a.m.
13 APPEARANCES:
14 ALAN C. FRIEDBERG, ESQ., Denver, Colorado; on behalf of
15 the Petitioners.
16 MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D. C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioners.
20 KENNETH W. STARR, ESQ., Washington, D. C.; on behalf of
21 the Respondent.
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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-800, Karen Howsam v. Dean Witter Reynolds.

5 Mr. Friedberg.

6 ORAL ARGUMENT OF ALAN C. FRIEDBERG

7 ON BEHALF OF THE PETITIONERS

8 MR. FRIEDBERG: Mr. Chief Justice, and may it
9 please the Court:

10 There is at least a little irony in the fact
11 that Dean Witter is the litigant here before you, about 27
12 years past the time when it started with Dean Witter and
13 Byrd the -- the move toward closing the courthouse doors
14 to public investors and forcing them into industry-run
15 arbitration. Dean Witter is now back here attempting to
16 place a hurdle in the way of the public investor who
17 ironically at this point seeks to enforce an arbitration
18 agreement.

19 The issue today before the Court is the extent
20 to which the industry and Dean Witter may now invoke court
21 involvement to interfere with a customer's claims before
22 arbitration and -- and to decide whether the customer's
23 claims are timely under a section of an arbitration code
24 providing for a time limitation on eligibility. The issue
25 is who decides.

1 It is clear that -- that over the years a
2 presumption has developed in favor of arbitrability where
3 there is an arbitration clause in a contract. And the
4 cases say that that presumption can only be overcome by
5 clear and convincing evidence that the parties agreed to
6 have a court decide arbitrability issues within a --
7 within the scope of an arbitration agreement. In this
8 case, there is no such evidence.

9 The arbitration clause in the 1992 agreement
10 between the parties is as broad a clause as one can
11 imagine. The client agrees that all controversies between
12 her and Dean Witter concerning or arising from any account
13 or any transaction involving Dean Witter and the client,
14 whether or not it occurred in the account, or the
15 construction, performance, or breach of this or any other
16 agreement between us. It's an industry-designed
17 arbitration clause, meant to be as broad as possible. The
18 intent clearly is to move cases against brokers by
19 customers out of the courts and into arbitration.

20 That -- that 1992 agreement was, of course,
21 followed by a 1997 submission agreement signed by
22 Ms. Howsam which merely states that as an undersigned
23 party, she and her trust submit the present matter in
24 controversy, as set forth in the attached statement of
25 claim, to arbitration in accordance with the Constitution,

1 by-laws, rules, regulations, and/or code of arbitration
2 procedure of the sponsoring organization. In this case,
3 it's the NASD, but the -- the other self-regulatory
4 organizations and exchanges have similar rules to the 6-
5 year rule.

6 QUESTION: It seems to me that some of the
7 language in First Options, which the respondent relies on
8 cuts against your case. How -- how do you deal with that?

9 MR. FRIEDBERG: Well, first of all, First
10 Options is a case in which there was a question about
11 whether an arbitration agreement existed, which is not the
12 case here. And Justice Breyer, writing for the Court,
13 wrote that -- that in that situation, the presumption
14 shifts.

15 The AT&T case -- clearly the -- when the
16 question is just the scope of an arbitration agreement,
17 but there is no question about the existence of the
18 agreement, there needs to be clear and unmistakable
19 evidence of an intent to have the courts decide rather
20 than the arbitrators decide.

21 QUESTION: The respondents here, of course,
22 argue that because of the not to be submitted clause, the
23 6 years, that limits the scope of the -- of the
24 arbitration agreement.

25 MR. FRIEDBERG: The -- the respondent, of

1 course, is -- is referring to rule 10304, which says that
2 -- that disputes which arose out of transactions or events
3 more than 6 years prior are not eligible for submission to
4 arbitration.

5 First of all, that -- that rule is found in a
6 section of the arbitration code. It's not found in the
7 agreement itself. And it's found in a section of the Code
8 of Arbitration Procedure.

9 QUESTION: Well, so is 10324 which you're
10 relying on. That is, the arbitrator shall be empowered to
11 interrupt and determine the applicability of. I mean,
12 that's --

13 MR. FRIEDBERG: Exactly, Justice Scalia. And
14 the point I was -- was trying to make is that -- that the
15 code has to be read as -- as one code in that -- in that
16 respect.

17 The -- it's also, I think, illuminating that the
18 -- the section, the 300 series of the code in which that
19 is found, is -- is not the eligibility section in the
20 sense that the 100 series is. The 300 series is -- is
21 basically a procedural, instructive portion of the code
22 for the arbitrators to apply.

23 There is some -- we -- we've made the argument
24 and -- and I think it's a valid argument -- that eligible
25 for submission can mean a number of things. And -- and

1 that it refers, in this case to -- it could refer in this
2 case to when the arbitrators take the case under
3 submission, just as this Court takes the case under
4 submission after the petition, after the briefing, after
5 the arguments are made.

6 There -- there is, of course, the need to get
7 the case in front of a tribunal in order to -- to decide
8 whether or not the case is timely. So while the rule may
9 prevent the case from going all the way to the end zone,
10 it -- it certainly doesn't prevent the -- the litigant
11 from or the -- the person arbitrating from -- from getting
12 out of the starting gate.

13 Moreover --

14 QUESTION: Is -- is that your criterion, that --
15 that -- the -- on -- on the question of what --
16 arbitrability turns on the question, do you get in front
17 of the particular person or tribunal at all as opposed to
18 how long do you stay when you get there? In other words,
19 if -- if it's a question of whether you get there at all,
20 it's -- the question is arbitrability and the presumption
21 goes one way. If the question is how long you stay there
22 if you get in front of that person, that's not an
23 arbitrability question and the presumption goes the other
24 way. Is that -- that's your point.

25 MR. FRIEDBERG: That -- that is one point,

1 Justice Souter.

2 The -- the other point that -- that needs to be
3 made is that whether or not this is part of the code, part
4 of an agreement, it falls within the John Wiley and Moses
5 Cone case law as opposed to the First Options holding.
6 And in -- in John Wiley, if the Court will recall, there
7 were prerequisites, timeliness prerequisites, to filing
8 for arbitration, which the Court said, because there was
9 an arbitration agreement and there was no dispute about
10 that, were for the arbitrators to decide.

11 In Moses H. Cone Hospital, there were -- there
12 were prerequisites of timeliness. The -- as I recall, the
13 arbitration had to be filed within 30 days after an
14 opinion by an architect as to the disputed contracting
15 claims. And so -- and -- and the Court -- the Court
16 clearly said in Moses Cone that the Federal Arbitration
17 Act establishes as a matter of Federal law that any doubts
18 concerning the scope of arbitrable issues should be
19 resolved in favor of arbitration, whether the contract
20 involves construction of the contract language itself or
21 an allegation of waiver, delay, or a like defense to
22 arbitrability.

23 QUESTION: -- definition of the domain of
24 arbitrability? You're saying shall be eligible for
25 submission just means that the arbitration forum doesn't

1 get to the merits if more than 6 years have elapsed. But
2 -- so you say that's not a question of arbitrability but
3 how the arbitrator will proceed.

4 What is your definition of arbitrability?

5 MR. FRIEDBERG: Justice Ginsburg, our -- our
6 definition of arbitrability I think has to be broader than
7 that. But there is -- there is the merits arbitrability.
8 There is the --

9 QUESTION: Well, the question that doesn't go to
10 the arbitrator -- you're saying this one does. It's just
11 he has to take it up first -- or she. But we're dealing
12 with, if it's a question of arbitrability, the courts
13 decide it. If it's not a question of arbitrability, but
14 the -- the range of other questions, then it's for the
15 arbitrator.

16 So my question is, what -- the domain for the
17 court -- the question is it arbitrable is a question for
18 the court. What is the content of that label, arbitrable?

19 MR. FRIEDBERG: It's a hard question for me to
20 get my hands around, Justice Ginsburg, but there -- there
21 is no question that in the first instance the court has to
22 decide whether a claim is -- is arbitrable. And -- and if
23 the court finds that -- that there is an arbitration
24 clause that covers the merits of the dispute, then the
25 court should defer to arbitrators on any question

1 regarding scope.

2 QUESTION: Well, now --

3 MR. FRIEDBERG: I don't think --

4 QUESTION: -- this -- this is a contract matter.

5 Right? I mean, if -- if the parties clearly didn't want

6 the arbitrator to do this and wanted the court to do it,

7 you -- you don't dispute that the court would do it.

8 Right?

9 MR. FRIEDBERG: Right.

10 QUESTION: So it's just a question of contract.

11 Now, you concede the point that arbitrability is

12 for the courts. Right?

13 MR. FRIEDBERG: Right.

14 QUESTION: So presumably if 10304 had read no

15 dispute, claim, or controversy shall be arbitrable, okay,

16 under -- under this code where 6 years have elapsed, that

17 would -- would that exclude this from -- from the

18 arbitrator?

19 MR. FRIEDBERG: I believe not, Justice Scalia.

20 QUESTION: My goodness, it's using the exact

21 term that you concede sends it over to the -- to the

22 court.

23 MR. FRIEDBERG: Well --

24 QUESTION: It -- what do you have to do beyond

25 using the -- the very word that you say bounces it to the

1 court? They say it. It shall not be arbitrable. And
2 even that will not -- will not get it to the courts. What
3 -- what does one have to do to get it to the courts?

4 MR. FRIEDBERG: Well --

5 QUESTION: And my next question is going to be,
6 is there a whole lot of difference between saying it shall
7 not be arbitrable and saying, it shall not be eligible for
8 submission to arbitration?

9 MR. FRIEDBERG: I'm not --

10 QUESTION: And I don't think there is.

11 MR. FRIEDBERG: I don't think there is either,
12 Justice Scalia.

13 QUESTION: Okay. Which is why you're fighting
14 me so hard on this. Right?

15 (Laughter.)

16 MR. FRIEDBERG: Precisely.

17 I think what we have to do is look to the case
18 law, including the ATT case and -- and its progeny, and
19 First Options says the same thing really, that the court
20 has to decide in the first instance is there an
21 arbitration agreement. Having decided -- and in this case
22 it's undisputed -- that there is an arbitration agreement,
23 then the question is, does it go to the substance of the
24 case or is it a matter of the scope? And the cases say,
25 starting with the Gulf and Warrior --

1 QUESTION: What happened to the intent of the
2 parties?

3 MR. FRIEDBERG: That -- that's what --

4 QUESTION: I mean, you're talking as -- as
5 though this is some law being sent down from on high. I
6 thought we established that step one is what did the
7 parties intend.

8 MR. FRIEDBERG: Right.

9 QUESTION: And you say that even if the parties
10 say it's not arbitrable, well, that doesn't matter. We
11 still go through this -- this game that seems to come down
12 from on high.

13 MR. FRIEDBERG: But the question is who will
14 decide a certain issue of arbitrability, and AT&T and --
15 and Moses H. Cone and First Options even says that once
16 you find that there's an agreement to arbitrate the
17 substance of the -- the dispute, then the question is did
18 the parties, by unmistakable evidence, agree that the
19 courts, rather than the arbitrators, would decide that
20 scope issue.

21 QUESTION: So then you're saying arbitrability
22 under our cases is not for the court necessarily.

23 MR. FRIEDBERG: I'm saying --

24 QUESTION: I mean, you can't have it both ways.

25 MR. FRIEDBERG: There -- there's a --

1 QUESTION: If you say arbitrability is for the
2 courts, then if the -- if the agreement between the
3 parties says this is not arbitrable, that question of --
4 of whether those facts exist or not ought to be for the
5 courts.

6 MR. FRIEDBERG: I think that's true for that
7 threshold issue, but if we get to a point where all issues
8 that -- that may preclude ultimately submitting the case
9 to the arbitrators for determination have to be decided by
10 the court, then we're running afoul of John Wiley.

11 QUESTION: I -- I didn't understand it that way.
12 I thought the question was not what the parties intend.
13 It's how we find out what they intend. And I thought
14 we're trying to decide between a tough burden of proof
15 standard on that that favors courts and where you apply no
16 burden of proof standard or, if anything, favor the
17 arbitration. In both instances, we're trying to find out
18 what the party intended. But we assume that they intended
19 court unless there is clear and convincing evidence they
20 wanted this arbitrable. Am I right?

21 MR. FRIEDBERG: I think you're wrong, Justice
22 Breyer, although --

23 QUESTION: Because? Then I may not have stated
24 it correctly.

25 MR. FRIEDBERG: I think what -- what the --

1 again, what the initial issue for the Court is, did the
2 parties agree to arbitrate the substance of the dispute.

3 QUESTION: Yes, of course, and I thought what
4 my opinion said was that when we're trying to decide
5 whether they agreed to arbitrate or not, we apply a fairly
6 tough standard. They have to show rather clearly that
7 they did.

8 What were the -- what was the word you quoted at
9 the beginning from the opinion? Didn't you quote a phrase
10 that said on that -- in deciding whether an issue is
11 arbitrable, we apply the standard of?

12 MR. FRIEDBERG: I believe I quoted from the
13 Moses H. Cone --

14 QUESTION: Yes. I'm sorry. You go ahead.

15 MR. FRIEDBERG: -- decision which -- which says
16 -- which says that the presumption is in favor of the
17 arbitrator's deciding.

18 QUESTION: I'll get the phrase and then -- I'm
19 not communicating. I'm sorry.

20 QUESTION: I -- Justice Ginsburg asked a
21 question that I'm also interested in. Quite apart from
22 the reference of -- in the agreement to the fact that the
23 arbitrator shall decide this, your second argument, on
24 your first argument, what do you want me to say if I write
25 the opinion or another member of the Court writes the

1 opinion in your favor? If the essence of the dispute
2 involves the particular issue, then that is arbitrable and
3 that's for the arbitrators to decide?

4 MR. FRIEDBERG: No. I --

5 QUESTION: I -- I just don't know what you want
6 us to write. It's the same question Justice Ginsburg had.

7 MR. FRIEDBERG: Justice Kennedy, it's basically
8 what was announced in the AT&T case when it was sent back
9 to the court to decide who decides certain questions. The
10 Court should decide in this case that where there's a
11 valid, written agreement to arbitrate the subject matter
12 or the merits of the dispute, particularly where the
13 arbitration clause encompasses all controversies and the
14 parties have not clearly and unmistakably reserved certain
15 issues of arbitrability for a court decision and -- and I
16 mean, within the scope as opposed to the basic dispute --
17 the presumption in favor of arbitrability should apply,
18 and issues relating to the scope of the arbitration
19 agreement are for the arbitrators.

20 And in this case -- AT&T, when the Court sent
21 the case back to the lower court said, these issues are
22 for the arbitrators to decide unless you find unmistakable
23 evidence that the parties agreed -- and this is the intent
24 of the parties -- that the court would decide.

25 I -- I would like to reserve --

1 QUESTION: Mr. Friedberg, do you disagree with
2 the Government? The Government did say there are two
3 considerations. The first one you agree with obviously,
4 whether the parties entered into a binding arbitration
5 agreement. And then the Government says there's a second
6 question, that is, whether the subject matter of the
7 dispute falls within the scope of that agreement. Those
8 are the two things. You seem to be saying there's only
9 the one, did they agree to arbitrate.

10 MR. FRIEDBERG: No. I'm not -- obviously I'm
11 not doing a very good job of expressing our position.
12 Where the subject matter of the dispute, the merits-
13 related issue -- as in First Options, it was the question
14 of whether the Kaplans owed money or not -- is within an
15 arbitration agreement, then any ancillary type dispute as
16 to timeliness should go to the arbitrators to --

17 QUESTION: What -- what if I have an arbitration
18 agreement that says all -- all disputes arising from an --
19 an accident on the employer's premises shall be
20 arbitrable, and the issue is whether this accident
21 occurred on the employer's premises or not? One of the
22 parties -- or the -- the employer contends that this
23 injury occurred elsewhere entirely. Who decides whether
24 it occurred on the premises or elsewhere?

25 MR. FRIEDBERG: I think in the first instance

1 the court would decide that because the parties did not
2 agree to arbitrate any claims.

3 QUESTION: Why is that different from here? The
4 parties --

5 MR. FRIEDBERG: Because --

6 QUESTION: -- did not agree to arbitrate any
7 claims that -- with -- with regard to an accident that did
8 not occur on different premises, but that incurred --
9 occurred more than 6 years before.

10 MR. FRIEDBERG: Because --

11 QUESTION: They didn't agree to arbitrate it.
12 They said it shall be -- shall not be eligible for
13 submission to arbitration.

14 MR. FRIEDBERG: Because of the principle,
15 Justice Scalia, set out in the John Wiley case and the
16 Moses H. Cone --

17 QUESTION: But I don't see how that principle
18 applies -- doesn't apply here, but applies in the other
19 premises situation. I -- I just don't see any distinction
20 between the two.

21 MR. FRIEDBERG: I -- I think because the Court
22 has previously said that a timeliness issue is -- is a
23 procedural issue. It's intertwined with -- with
24 substantive issues, of course, but --

25 QUESTION: Well, can't you make it a -- I mean,

1 it's up to the parties, who are masters of their
2 agreement. If they want to make timeliness part of the
3 condition of the arbitration, surely they can do it, can't
4 they?

5 MR. FRIEDBERG: They could but they didn't in
6 this case.

7 QUESTION: What you're saying, I guess, is that
8 if the -- if the allegation of harm falls within the
9 subject of the arbitration clause, everything goes to the
10 arbitrator unless they have unmistakably said that some
11 subsidiary issue does not. Is that --

12 MR. FRIEDBERG: That -- that is what our
13 position is.

14 QUESTION: Thank you, Mr. Friedberg.

15 Mr. Roberts, we'll hear from you.

16 ORAL ARGUMENT OF MATTHEW D. ROBERTS

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

19 MR. ROBERTS: Mr. Chief Justice, and may it
20 please the Court:

21 For two reasons the question whether
22 petitioners' claims were submitted within the 6-year time
23 limit is for the arbitrators to decide.

24 First, as this Court held nearly 40 years ago in
25 John Wiley, when the parties have agreed to submit the

1 subject matter of the underlying dispute to arbitration,
2 the question whether the dispute was presented within a
3 contractual time limit is presumptively for the
4 arbitrators even if the time limit is a prerequisite that
5 conditions the duty to arbitrate.

6 Second, the time limit in this case is imposed
7 by the NASD Code of Arbitration Procedure, which the
8 parties incorporated into their agreement in full.

9 QUESTION: What is -- what is the general
10 principle that Justice Ginsburg was asking for that
11 controls your first conclusion?

12 MR. ROBERTS: Okay. Arbitrability is, as used
13 in the Court's cases, a term of art that includes two
14 questions. One of those questions is whether the parties
15 are bound by a valid arbitration agreement and the other
16 question is whether the subject matter of their underlying
17 dispute is within the scope of that agreement. And by the
18 subject matter of their underlying dispute, what I mean is
19 whether they agreed to arbitrate disputes about the
20 primary conduct that -- that is given rise to the -- to
21 the underlying claim

22 And what the Court held in -- in John Wiley is
23 once the parties -- once the court has determined that the
24 parties have agreed to arbitrate disputes arising out of
25 the -- the underlying conduct that's at issue, then

1 questions about their litigation conduct and how those --
2 how that dispute was processed after it arose -- those are
3 presumptively for the arbitrators to decide.

4 QUESTION: What was the text in John Wiley &
5 Sons? What was the language of the agreement? Did it --
6 did the agreement say that no controversy shall be
7 eligible for submission to arbitration?

8 MR. ROBERTS: No, Your Honor. The -- the
9 agreement didn't use that -- that language. It said the
10 failure of either party to file a grievance within this
11 time limitation shall be construed and be deemed to be an
12 abandonment of the grievance. But the point --

13 QUESTION: Why? That -- that seems to me -- let
14 me put -- it's the same question. Let me put it to -- to
15 you another way. Is there any difference between your
16 reading of this clause, shall be -- shall not be eligible
17 for submission to arbitration, and the -- the way you
18 would read a clause which said, no dispute, claim, or
19 controversy which -- which occurred 6 years previously
20 shall be --

21 QUESTION: Arbitrable.

22 QUESTION: No, not arbitrable -- shall be
23 remediable? No award shall be given for any -- for any
24 occurrence prior to 6 years.

25 MR. ROBERTS: There -- there may be --

1 QUESTION: Now, that -- that would be a merits
2 question, and that's what I think was at issue in -- you
3 know, it's a statute of limitations.

4 MR. ROBERTS: The --

5 QUESTION: This is not phrased as a statute.

6 MR. ROBERTS: There may be differences, Your
7 Honor, but -- but the -- the time limit language, the
8 eligible for submission language, what that indicates is
9 that the timely submission of a claim is a prerequisite to
10 arbitration of the merits of the claim. It doesn't say
11 one way or the other who decides whether that prerequisite
12 has been met. It doesn't say that the timeliness question
13 is not arbitrable.

14 QUESTION: Of course, it says the --

15 MR. ROBERTS: It says the underlying claim is
16 not arbitrable --

17 QUESTION: Neither --

18 MR. ROBERTS: -- if it's not timely.

19 QUESTION: Neither does a clause which says only
20 -- only events that occurred on the employer's premises
21 are arbitrable. That doesn't say --

22 MR. ROBERTS: No.

23 QUESTION: -- who decides that either. But --
24 but since it is an arbitrability question, you -- you
25 assume the court will decide.

1 MR. ROBERTS: You presume -- you presume that
2 because if the parties didn't -- didn't contemplate that
3 they would arbitrate about disputes arising from the --
4 from the underlying conduct, which that goes to, then they
5 presumably didn't think the arbitrators were going to have
6 anything to do with any questions connected with such a
7 dispute. But when they did -- no. Here -- here we know.

8 QUESTION: They didn't think they were going to
9 arbitrate about any matter that occurred more than 6 years
10 previously.

11 MR. ROBERTS: When --

12 QUESTION: And therefore, they didn't think the
13 arbitrator would be the one to decide whether it occurred
14 6 years previously or not.

15 MR. ROBERTS: They agreed and there's -- there's
16 no question about it that they agreed that disputes that
17 arose from petitioners' securities accounts would be
18 within the -- would the kind of disputes that they would
19 arbitrate. And so when this claim arose, it was within
20 the scope of -- of the agreement.

21 And the question here is not whether it's the
22 kind of claim that the parties agreed that they might
23 arbitrate about. It's a question of whether a claim that
24 was arbitrable when it arose has become not subject to
25 arbitration because of the parties' litigating conduct.

1 And ordinarily people -- people would assume that the --
2 the forum that they've selected to resolve the underlying
3 dispute is going to resolve ancillary questions about how
4 the dispute has been processed and the litigating --

5 QUESTION: There are all sorts of
6 characteristics of a claim where it occurred, when it
7 occurred, the people between whom it occurred, and so
8 forth. You -- you've given us no -- no basis for
9 distinguishing one of those characteristics from another
10 as far as whether the court or -- or the arbitrator
11 decides.

12 MR. ROBERTS: I --

13 QUESTION: I suggest that a very clear basis is
14 what the parties themselves have said. When they have
15 referred to a particular characteristic as being non-
16 arbitrable, it means that the question of whether that
17 issue -- whether that -- that fact rendering it non-
18 arbitrable exists is a question for the courts. That --
19 that would solve a lot of cases. And I don't know how
20 else you -- you -- you distinguish where from when from
21 between which people.

22 MR. ROBERTS: My -- my distinction is between
23 and it's the distinction the Court drew in the John Wiley
24 case and that the courts of appeals have followed for 40
25 years except in -- in the limited context of the question

1 presented here. It's the -- the distinction that's --
2 that's been embodied in the Uniform Arbitration Act, which
3 is cited on page 14 of the reply brief. It's the
4 distinction between the primary conduct and whether
5 there's a limit on what primary conduct is subject to
6 arbitrability and other questions about -- about
7 litigating conduct.

8 And the -- the rule that would focus on the
9 language of -- of the parties and parse that language to
10 see whether it's phrased as a limit of arbitrability, to
11 then decide whether the presumption in favor of courts
12 deciding the question of arbitrability imposes an extra
13 layer of complexity that doesn't -- it's not likely to
14 reflect the -- the real intent of the parties.

15 The -- what we're trying to figure out is not
16 whether the parties thought this was a question of
17 arbitrability, but who they intended to decide the -- who
18 they intended to decide the question. And the -- and when
19 the underlying claim is within the scope of their
20 agreement, it's likely that they intended that ancillary
21 questions would be decided by the party that they
22 committed the underlying dispute to.

23 But even setting that aside, here we've got
24 10324.

25 QUESTION: Here where language is not very

1 likely to reflect their intent, it's -- their language
2 will --

3 MR. ROBERTS: Their language reflects their
4 intent --

5 QUESTION: It's more likely to be reflected by
6 some arbitrary rule that if it relates to place, yes; if
7 it relates to time, no.

8 MR. ROBERTS: It reflects their intent that --
9 that timely submission of a claim is a prerequisite to
10 arbitration of the merits of that claim. But it doesn't
11 reflect their intent of who is to decide whether the
12 prerequisite is -- is met. There's -- it doesn't say
13 anything about that.

14 Rule 10324, which is also a part of the parties'
15 agreement, does say something about that. It says that
16 the arbitrator shall be empowered to interpret and
17 determine the applicability of all code provisions. And
18 the time limit is a code provision. The clear import of
19 that, regardless of the issue that we're discussing, is
20 that the arbitrators are empowered to apply the time
21 limit.

22 And so, even setting aside the 40 years of law
23 that's settled by John Wiley and the distinction between
24 the subject matter of the underlying dispute and -- and
25 questions that go to the parties' litigating conduct, the

1 agreement here is clear and that --

2 QUESTION: Mr. Roberts, are you saying
3 essentially the parties have an agreement to arbitrate,
4 and that looks like very broad, any and all questions, and
5 then there's this code of procedure? So what the NASD
6 code is directed to is how, if the arbitrator has
7 authority, the arbitrator is to proceed. Is that
8 essentially what you're saying?

9 MR. ROBERTS: Yes. It's -- it's concerned --
10 the -- the code is concerned with the rules of the
11 arbitrable forum, and it makes sense that the arbitrators
12 are the ones to interpret and apply those rules. And
13 that's confirmed by Rule 10324.

14 But -- but yes, the -- the question whether a
15 claim is timely submitted goes not to the character of the
16 underlying claim at the time it arose and whether claims
17 of that character are subject to arbitration.

18 QUESTION: And haven't we got to take that
19 position? Because otherwise we're just going to have
20 litigation chaos?

21 MR. ROBERTS: Yes. That -- it's going to
22 completely undermine the purpose of arbitration, Your
23 Honor. The reason that people agree to arbitration is
24 because they want cost effective and efficient dispute
25 resolution, and moving all these questions into antecedent

1 judicial proceedings is going to delay dispute resolution.
2 It's going to impose added costs on the parties, and it's
3 going to undermine the very reason they agreed to
4 arbitrate. And it's -- it's -- that's another reason why
5 it's just not likely that that's what they intended --
6 intended to happen.

7 QUESTION: Mr. Roberts, am I right in
8 understanding that this 6-year is a statute of limitations
9 for the arbitration forum?

10 MR. ROBERTS: Yes.

11 QUESTION: Because it says nothing about if the
12 case were in court what the limitation would be.

13 MR. ROBERTS: Yes. It's a forum-specific limit,
14 and that's another reason why it makes sense that the
15 forum that the limit applies to should be the one that --
16 that applies it. It says that cases won't be eligible for
17 arbitration under this code. It doesn't refer to whether
18 they might be pursued in other -- in other forums or other
19 venues. It reinforces the -- the expectation that the
20 arbitrators would decide it which, in any event, as I
21 said, is -- you know, you can't get any clearer than a
22 rule that says that the arbitrator shall be empowered to
23 interpret and determine the applicability of all code
24 provisions.

25 Thank you.

1 QUESTION: Thank you, Mr. Roberts.

2 Mr. Starr, we'll hear from you.

3 ORAL ARGUMENT OF KENNETH W. STARR

4 ON BEHALF OF THE RESPONDENT

5 MR. STARR: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 Let me begin with what we believe to be the
8 fundamental point in the case. It has been mentioned in
9 the opening arguments, and that is, this is in fact
10 determined by contract. What did the parties intend?

11 In response to the specific question posed by
12 Justice Ginsburg, the language of AT&T we think is quite
13 pertinent. It says arbitrability simply means whether the
14 parties' agreement creates a duty for the parties to
15 arbitrate the particular grievance, not whether there's an
16 arbitration clause at that level of generality.

17 QUESTION: But doesn't a grievance -- I mean,
18 isn't the point of speaking of grievance just what
19 Mr. Roberts said? The grievance has got to refer to the
20 primary conduct causing injury. If it is not limited to
21 that, in the absence of unmistakable language, then we're
22 going to have a trial before every arbitration if there is
23 any procedural or other defense that could be raised.

24 MR. STARR: We believe, Justice Souter, that the
25 language is in fact clear, of 10304. Let me return to

1 that.

2 But let me go to your point with respect to
3 litigation chaos.

4 QUESTION: Wait. Before you do that, do you
5 disagree with -- what he said the -- I thought that your
6 -- your -- you would accept what he says, but that -- that
7 your point is that the primary conduct causing the injury
8 under this agreement is conduct that occurred within the
9 last 6 years --

10 MR. STARR: It is --

11 QUESTION: -- and not conduct that occurred
12 before 6 years.

13 MR. STARR: It is going to the issue of what did
14 AT&T mean by the specific word grievance. What I believe
15 10304 is is a clear statement by the parties, leaving the
16 First Options presumption aside, which works for us. If
17 there is any doubt as to who decides, the presumption is
18 the courts decide. But here we know, by virtue of the
19 plain meaning of eligible for submission. When we couple
20 that, since this is an NASD rule -- and what we did not
21 hear from the SEC was what did the NASD intend. What have
22 they said this rule, which has been --

23 QUESTION: This is your submission argument,
24 your -- your argument based on the -- on the word
25 submission.

1 MR. STARR: It's eligible --

2 QUESTION: Okay.

3 MR. STARR: -- eligible for submission.

4 QUESTION: But submission -- I just don't see

5 how submission can decide this case because you can say

6 the -- the ultimate issue is submitted when the -- when

7 the whole case goes to the arbitrator, or you can say it

8 is submitted when the arbitrator gets beyond procedural

9 issues and gets down to the issue of the primary conduct

10 that caused the injury.

11 MR. STARR: Justice Souter --

12 QUESTION: So I don't see how submission is --

13 is going to be the -- the deciding factor.

14 MR. STARR: Justice Souter, we would guide the

15 Court first to the word eligible for submission. Eligible

16 -- and the NASD has described -- and we set this forth at

17 page 25 of the brief -- specifically what it means in this

18 context. But eligible is a very familiar term. It is

19 found in rule 6 of the Court, and what it means is if

20 you're not eligible, you don't get to this podium. You

21 don't go to the forum.

22 And the parties are -- I think what is

23 essentially dividing the parties here today is that there

24 is some sense that because of John Wiley & Sons, the

25 parties cannot agree to a temporal restriction. That

1 makes no sense whatever, and indeed it's inconsistent with
2 the Federal Arbitration Act, Congress' policy.

3 QUESTION: But you can agree to a temporal
4 restriction and still not commit yourself as to who
5 decides whether that restriction is true.

6 MR. STARR: And that guides us -- you're exactly
7 right, and so you then go to what is that temporal
8 restriction, and let's analyze that temporal restriction.
9 We believe the words --

10 QUESTION: But if the temporal restriction then
11 were phrased in terms of no relief shall be granted on a
12 claim arising, then it clearly would go to the arbitrator.

13 MR. STARR: It might very well go to the
14 arbitrator --

15 QUESTION: But it clearly would, wouldn't it?

16 MR. STARR: -- under -- under those
17 circumstances. It all depends upon the specific language.

18 QUESTION: So it depends on the wording of the
19 clause.

20 MR. STARR: Absolutely. But here, Your Honor --
21 Justice Stevens, we know -- and I would guide the Court or
22 refer the Court to page 25 where we summarize what the
23 NASD has said this is its rule. The rule is applicable
24 throughout the industry. This is commonplace. This is
25 what the rule means, and it is called a -- a

1 jurisdictional limitation, a -- a substantive
2 jurisdictional limitation, and it gives the reason.

3 QUESTION: But how -- how does the party that's
4 dealing with the NASD know that this is -- I mean, why
5 should it be bound by what the NASD has said in other
6 contexts? I mean, it's not a Government organization, is
7 it?

8 MR. STARR: Well, Mr. Chief Justice, the
9 submission agreement in 1997 -- and this is commonplace.
10 In that submission agreement, the petitioner did, indeed,
11 agree to submit the issue for arbitration to the NASD
12 under the rules.

13 QUESTION: No, no. To one of three -- I think
14 they agreed to submit to one of -- one of three or four
15 different arbitrators, and they happened to pick this one.
16 And if the other arbitrator had different rules, it would
17 have had a different result.

18 MR. STARR: But they -- they don't, and that's
19 the assurance I want to give and why it's odd that the SEC
20 has been silent on this. The SEC has had, in terms of
21 what the industry knows -- this is common practice in the
22 industry, this -- this rule, the eligibility rule that you
23 could use at a university, are you eligible for admission
24 to this university? Eligibility means qualified for our
25 justice. Chief -- now Chief Judge Becker described in

1 PaineWebber v. Hofmann -- we quote that language at page
2 20. 12 years ago he said, looking at the dictionary, at
3 Webster's, it can only have one reasonable meaning, and
4 that is qualified for it. One doesn't get in the door.

5 And there needs to be a gatekeeper. And it is,
6 under this Court's presumption -- this Court's law and
7 it's consistent with the Federal Arbitration Act as well
8 -- it makes sense for the courts to be the gatekeeper.

9 And I want to come, if I may, to Justice
10 Souter's concern about litigation chaos. To the contrary.
11 The rule that is being suggested here ushers in all manner
12 of difficulties and we would describe or refer the Court,
13 in particular -- this is in our brief -- to the Edward
14 Jones v. Sorrells case. The Seventh Circuit had before it
15 the following kind of question. Eligibility claim made.
16 No one went to court, but an eligibility defense offered
17 to the arbitrators. The arbitrators simply noted it.

18 Some of these arbitrations go on for years.
19 Literally 2 years is not unknown in the industry.

20 In that particular case, the arbitrators never
21 decided the eligibility issue.

22 And the NASD has said this -- we refer you to
23 page 7 of our brief, as well as page 25. There was a need
24 for the eligibility rule -- for that rule to be clear and
25 for there to be a gatekeeper.

1 QUESTION: Well, I thought that -- that what it
2 says, this rule says -- one interpretation of it,
3 plausible interpretation, is arbitrators decide the
4 eligibility question first.

5 Do you agree, Mr. Starr, that this 6-year rule
6 is a rule for the arbitration forum? That is, suppose
7 this dispute now goes to court and the court says, we
8 think that the 6-year limit has not been met. Then the
9 customer says, fine, court, but under New York law, the
10 limit, if we're in court, is 10 years and I'm well within
11 that. This is a limit, as I understand it, this 6-year
12 limit, is for the arbitration forum only, not for the
13 dispute.

14 MR. STARR: That is correct. But the issue is
15 who then decides whether this forum -- who is the
16 gatekeeper? That's what's before you.

17 QUESTION: That's now -- now, that's my puzzle
18 because isn't it odd that a limitation period that applies
19 only in the arbitration forum is then decided by a court
20 where the court would have a different limitation?

21 MR. STARR: Not -- not at all because if there
22 is a different limitation -- and, indeed, 10304 draws the
23 very distinction between the eligibility requirement to
24 get in the door of arbitration as opposed to a statute of
25 limitation which might vary.

1 Now, the 6-year limitation -- the eligibility
2 rule -- and we would guide the Court back to the meaning
3 of the word eligible for submission. We think that's
4 clear, but we think it's clear for the reasons Chief Judge
5 Becker said. But we would again refer the Court to what
6 the NASD has said. It is a substantive jurisdictional --

7 QUESTION: It said more than that. I mean, it
8 said -- you quote it on page 25. It said -- and this -- I
9 wanted to ask you how that got into the Federal Register.
10 It said, the courts determine the scope of the agreement
11 to arbitrate, including whether a matter is eligible for
12 arbitration on subject matter, timeliness, or other
13 grounds. And that's the NASD in the Federal -- what's it
14 doing in the Federal Register?

15 MR. STARR: Yes. The self-regulatory
16 organization, which is what the NASD and the exchanges
17 are, submit their proposed rules to the SEC which could
18 change this at the stroke of a pen. It has not done so
19 for 10 these years while these issues have been
20 languishing in -- in the courts.

21 QUESTION: I -- I would like to get back to the
22 question --

23 MR. STARR: Yes.

24 QUESTION: Well, why is these interpretations
25 that are not part of the agreement that the respondent or

1 the petitioner here signed -- why are they binding on the
2 petitioner?

3 MR. STARR: Because she agreed in the submission
4 agreement to be bound by arbitration under the code of
5 procedure. It's an express agreement by her which she
6 signed, which goes back to paragraph 19 --

7 QUESTION: Well, so we're just talking here,
8 when you say the NASD has said, this is incorporated in
9 the code of procedure which she agreed to be bound by?

10 MR. STARR: No.

11 QUESTION: Okay. I thought -- I thought you
12 said something else.

13 MR. STARR: What I tried to say is that the NASD
14 has described the reasons for the rule to which she
15 agrees.

16 QUESTION: Well, why should that bind her?

17 MR. STARR: It binds her only in the sense of it
18 helps the Court understand what the background of the rule
19 is. She is bound the rule. We are now moving to what
20 does the rule mean and what's the purpose of the rule. We
21 think, Mr. Chief --

22 QUESTION: Well, supposing I enter into a
23 contract with Sears and, say, I'll pay \$300 for something,
24 and then Sears has a publication which says, you know,
25 here's the warranty and, okay, you get the warranty. And

1 then Sears puts out a magazine and says, what we really
2 mean in this warranty is A, B, C. Now, certainly that
3 doesn't affect the terms -- how you interpret the terms of
4 the warranty.

5 MR. STARR: There may very well be, under those
6 circumstances, an issue of whether there was a contract.

7 The other side doesn't dispute that there is a
8 contract and that the NASD rule is a part of the contract.

9 QUESTION: But it's the NASD's interpretation of
10 the rule. I mean, if you have a private entity expressing
11 a view as to what the contract means, I just don't think
12 it binds the other side.

13 MR. STARR: I'm not suggesting binding
14 authority. I'm suggesting that illumination is provided
15 by the NASD's explanation, which also goes to the purpose.
16 Why is this? Is this simply an arbitrary rule? No. It
17 is a rule that is borne of experience of the entire
18 industry --

19 QUESTION: But, Dr. Starr, can I ask you a
20 question about the meaning of the rule? It may not really
21 be germane to this ques -- but I've been puzzled.
22 Supposing you had a case in which the conduct occurred 7
23 years ago and it was fraudulently concealed until 1 year
24 before the arbitration is requested. Would that be
25 arbitrable or not?

1 MR. STARR: Well, there would be an issue that
2 the Court would then analyze what is the occurrence or
3 event.

4 QUESTION: Well, I'm talking about the
5 occurrence is 7 years ago.

6 MR. STARR: And -- and in terms of purchase or
7 sale of security, it might very well that that would not
8 be arbitrable in this industry because of the occurrence
9 or event. There are also, as the Court knows, statutes of
10 repose in the statute of limitation -- in -- in the
11 Federal securities context as well.

12 But the point is the --

13 QUESTION: So this is an absolute rule without
14 any tolling provision.

15 MR. STARR: That's correct. It -- it is a
16 absolute eligibility rule that simply tells the person --
17 and again, there's no choice here in the sense of if she
18 had gone to the New York Stock Exchange or the American
19 Stock Exchange because the rule is exactly the same.

20 QUESTION: But I'd -- I'd like you to go back to
21 what I thought was the key question, Justice Ginsburg's
22 initial question. What is this term arbitrability?

23 That the context -- I've gotten not to an
24 answer, but I've gotten to a beginning with First Options.
25 First Options says that the question of whether you agreed

1 to arbitration is basically a matter of intent and apply
2 State law. That's the basic rule.

3 Then there's a subsidiary rule. The subsidiary
4 is, but if what you're interested in is whether the
5 parties agreed to arbitrate the question of arbitrability
6 -- see Justice Ginsburg says what is that -- at subsidiary
7 rule, what you do is assume that silence means no because
8 only if it's clear and unmistakable.

9 Then First Options goes on to say we'll give you
10 a couple of examples. An example whether or not a
11 particular merits-related dispute is arbitrable because it
12 was within the scope of a valid arbitration agreement,
13 that is not a question of arbitrability. Why not?
14 Because the parties, after all, have a contract for
15 arbitrability. They thought about the question of
16 arbitrability. It won't -- it -- it's all very likely
17 that they wanted this whole thing to be arbitrable. And
18 then they give you an example of where it is, where there
19 is no contract, where there is nothing, where the parties
20 never thought about arbitration, in all likelihood.

21 Now, with those examples, it seems to me that
22 we're honing in on but we don't have yet an answer to the
23 question Justice Ginsburg asked. Well, if there's a
24 contract and it's a thing they likely thought about and
25 it's sort of a minor subsidiary thing and, after all, it's

1 something that the arbitrator knows about and courts
2 don't, that would all say it's not about arbitrability in
3 the sense of requiring a special presumption. But if
4 there's nothing at all in writing, if it's something
5 courts know about, there is.

6 All right. That's where I am. That doesn't
7 help you because I think in this case, yours would fall in
8 the first category. But, nonetheless, I'd appreciate a
9 response because I -- I need my thinking developed on
10 this.

11 MR. STARR: Justice Breyer, I believe that the
12 question of arbitrability, the duty, and who decides that
13 question is guided by the -- is determined by the intent
14 of the parties.

15 QUESTION: And we agree with that.

16 MR. STARR: We now look to the contract.
17 There's some discussion as what does the contract include.
18 The parties have been in agreement that the contract
19 includes the rules, including 10304. That is the most
20 specific and targeted provision, that we then go to that
21 rule, and we say, what is the parties' intent with respect
22 to whether this issue is eligible -- this matter, dispute,
23 claim, or controversy shall be eligible for submission.
24 It does not say specifically the courts are going to
25 decide that. Right? But the First Options presumption,

1 since the language is not clear that the court shall
2 decide it, is that that is the baseline. That is, in
3 fact, the default position unless, indeed, the parties
4 have clearly and unmistakably provided that that is an
5 issue for the arbitrator.

6 QUESTION: Which brings you to 10324.

7 MR. STARR: And 10324 is, in fact, a broadly
8 worded provision that says on its face that the
9 arbitrators are empowered to decide, to interpret, and the
10 like, the provisions of the code.

11 Several points. The first is this is a very
12 general, as opposed to a quite specific, provision, and
13 when we then analyze it, and we analyze it in the context
14 of the remainder of the code -- and I would guide the
15 Court especially to rule -- or section 10104 that says
16 arbitrators shall be appointed --

17 QUESTION: Where do we find that in your brief?

18 MR. STARR: 10104 is at page 35 --

19 QUESTION: Thank you.

20 MR. STARR: -- of the brief, Mr. Chief Justice.

21 And that's 10304. And then at the bottom
22 paragraph, 10104 says that arbitrators shall be appointed
23 by whom? The director of arbitration only for cases that
24 shall be eligible for submission under the code. In other
25 words, when we take the code and we look at various

1 provisions -- and we refer the Court to our footnote 8 on
2 page 36 of our brief where we identify, Justice Kennedy, a
3 number of provisions of the code that cannot, in reason,
4 be interpreted by the arbitrators. The powers of the
5 director of arbitration, by way of example. We enumerate
6 six examples. I think they're more like 17, but when one
7 goes through the entire Code of Arbitration Procedure, one
8 will see a number of provisions that the arbitrators just
9 will not have occasion --

10 QUESTION: But are not -- but that those --
11 those provisions are not ones that the court decides
12 either.

13 And I'd like you, Mr. Starr, to tell me why I'm
14 wrong, because I take it from your argument you would say
15 I'm wrong, in saying we have an agreement to arbitrate
16 signed by the broker and the customer. That seems to be
17 as broad as you can get. And then we have a code of
18 procedure which says, if you are going to use the NASD
19 auspices, these are the procedural rules, including
20 statute of limitations, which you should decide up front
21 and not after you've decided the merits. Limitations
22 first, then merits. If I think of this as the agreement
23 is the agreement to arbitrate and sets what's arbitrable,
24 then the code of procedure is how you proceed in the
25 arbitration forum

1 What is wrong with that division?

2 MR. STARR: Because it is building in a
3 procedural versus subject matter distinction, a sort of
4 way of looking at the code as opposed to determining --
5 and you used the term, Justice Ginsburg, statute of
6 limitations. This is not a statute of limitations. We
7 would guide the Court again -- refer the Court to the
8 second sentence of 10304 which draws the distinction --
9 this also goes back to Justice Kennedy's question -- that
10 with respect to this -- the first sentence tells us, 6
11 years eligible for submission. It's not eligible for
12 submission --

13 QUESTION: Mr. Starr, can I interrupt?

14 MR. STARR: Yes.

15 QUESTION: Supposing the -- the claimant files a
16 piece of paper saying the events occurred 5 years and 11
17 months ago, and the -- a company comes in and files a
18 piece of paper and says, no, they occurred 6 years and 1
19 month ago. It depends on how you interpret it. Who's
20 going to decide which is right?

21 MR. STARR: That would be a question of -- for
22 the court. It's a question of arbitrability.

23 QUESTION: So just filing a defensive pleading
24 would oust the arbitrator of jurisdiction --

25 MR. STARR: Oh.

1 QUESTION: -- even though the claim itself said
2 it was 5 years.

3 MR. STARR: No. Under the -- I'm sorry. If
4 you're suggesting that -- and this is the Sorrells
5 example. The -- at -- there, there has been, in effect,
6 an agreement, as it were, to allow the arbitrators to take
7 that first cut which comes back to Justice Kennedy's rule.
8 They can, if the parties agree, make the eligibility
9 determination, but if they make it wrong, that's Sorrells.
10 If -- if the evidence is it's 6 months --

11 QUESTION: Well, so -- so in my hypothetical --

12 MR. STARR: Yes.

13 QUESTION: -- it would be the arbitrator's
14 initial task to resolve the question of fact.

15 MR. STARR: Only under the circumstances that --
16 I want to be very clear. The issue of eligibility is, in
17 fact, a question of arbitrability and it's presumptive --
18 it is for the courts to decide absent clear and convincing
19 evidence.

20 QUESTION: So then am I correct --

21 MR. STARR: But --

22 QUESTION: -- that if the -- if the claimant
23 files a claim saying it happened 5 years ago, and the
24 company files an answer saying, no, it happened 6-and-a-
25 half years ago, they would immediately refer that to the

1 court?

2 MR. STARR: Well, you're suggesting a procedural
3 issue, namely, filing an answer which suggests to me that
4 the company has, under those circumstances, agreed for the
5 arbitrators to decide that issue.

6 QUESTION: Why? Why? The whole reason for
7 filing the answer is to get it out of the arbitration.

8 MR. STARR: No, I'm sorry.

9 QUESTION: That's why you file. Go ahead.

10 MR. STARR: You can, under those circumstances,
11 say the arbitrators -- I will allow the arbitrators to
12 take this initial cut at that.

13 QUESTION: But you can, but what if you don't
14 say that? What if you say, I am saying it was 6 years and
15 1 month and for that reason this eligibility question is
16 jurisdictional and it goes to a court?

17 MR. STARR: Exactly. Exactly. And that's
18 what --

19 QUESTION: All right, and if that's what they
20 say, then they go to the court.

21 MR. STARR: That's right.

22 QUESTION: So all they've got to do is file a
23 paper and we're out of arbitration and into court. And
24 your theory --

25 MR. STARR: You're -- you're in -- you're in the

1 court. I was trying to respond to the specific --
2 specific hypothetical, but the principle is yes, you go to
3 the court. What you would do under those circumstances is
4 not file an answer. You would, in fact, say you go to
5 court and you go to court --

6 QUESTION: And it's the same thing if -- if you
7 say that the accident occurred somewhere other than in the
8 work place. And it --

9 MR. STARR: There's -- it's the same principle.
10 You're saying this is an eligible arbitration.

11 QUESTION: All right. And -- and doesn't
12 that --

13 MR. STARR: Are you going to stand -- I'm sorry.

14 QUESTION: No. You go ahead.

15 MR. STARR: I was just going to say the issue is
16 are you going to stand on your rights under the contract.
17 In your hypothetical, they're filing an answer which is
18 exactly what happened in Sorrells. It goes through
19 arbitration and eventually this is -- I want to provide
20 the Court again with the Sorrells exam --

21 QUESTION: They make --

22 MR. STARR: I'm sorry.

23 QUESTION: They make their submission in a
24 motion to dismiss, not in an answer. They say this is not
25 proper -- suited for arbitration because the time, in

1 fact, is different.

2 MR. STARR: You -- the point is you would file
3 that in court.

4 QUESTION: Can you step back one second -- one
5 second from these details you're in? Because I'm seeing
6 it not as a matter of detail. What we're after is the
7 parties' intent. In most places in the law, the law of
8 arbitration in this area is either neutral or sometimes
9 favorable to arbitration. But there is one exception.
10 The one exception is where the parties may or may not have
11 agreed to arbitrate arbitrability. And there we,
12 interestingly enough, use a presumption that's very
13 hostile to finding the intent to have the arbitrators
14 arbitrate arbitrability.

15 Now, in terms of the reason for that hostility,
16 how does that apply here? I would think, at first blush,
17 it shouldn't apply at all. Why? Because we're talking
18 about rules of an arbitration forum. And rules of an
19 arbitration forum -- after all, they're more expert in.
20 And moreover, the parties have agreed to go to arbitration
21 in a lot of circumstances anyway, so they at least know
22 something of what they're talking about. Why would we
23 want to apply so hostile an interpret -- hostile a
24 presumption as to what their intent really is in this kind
25 of an area?

1 MR. STARR: Justice Breyer, we're asking you not
2 to apply a presumption at all. We want you to follow the
3 intent of the parties --

4 QUESTION: Oh, well, fine. If no exception --
5 if no -- if -- if that's really what you mean, then you do
6 not mean that there has to be clear and unmistakable
7 evidence. What I mean by my assumption is these words,
8 clear and unmistakable evidence, because once we're out of
9 that box, then I think we're right into what Justice
10 Kennedy said and that's the end of the case. But, I mean,
11 it's only those words, clear and unmistakable, that help
12 you, and that's what I mean by the hostile presumption.

13 MR. STARR: But again, the presumption and the
14 analysis in First Options goes to where, in fact, the
15 parties have not spoken to this issue. We believe the
16 parties have spoken to the issue through the NASD rules
17 for the reasons that we have stated, and that is, it's not
18 that we're seeking to build in some new presumption. To
19 the contrary, we're suggesting --

20 QUESTION: No, I know. But would you agree --
21 you want it clear and unmistakable or not? Is that the
22 standard or not?

23 MR. STARR: That's the standard with respect to
24 -- the First Options presumption works for us. What we're
25 relying on is the intent of the parties as articulated in

1 the rules, and again, the NASD has said, here's the reason
2 for the rule.

3 QUESTION: Can I -- can I ask you about the
4 rules, about 10324 in particular which deals with the
5 interpretation of provisions of code?

6 MR. STARR: Yes.

7 QUESTION: I assume your -- the -- the other
8 side says that -- that that provision gives the arbitrator
9 the power to decide whether 6 years have elapsed or not.
10 If it did that, I suppose it would also give the
11 arbitrator the power to decide whether the injury was one
12 that occurred in the work place; that is, whether the
13 subject matter was also --

14 MR. STARR: The same logic applies.

15 QUESTION: I don't see how you could limit it to
16 the one and -- and not apply it to the other, could you?

17 MR. STARR: I don't think that they could.

18 QUESTION: Shall be empowered to -- so how do
19 you read it? Shall be empowered to interpret and
20 determine the applicability of all provisions. How do you
21 read it? Meaning what? Once he has -- once he has
22 jurisdiction.

23 MR. STARR: Once the arbitrator has juris --

24 QUESTION: Within the scope of --

25 MR. STARR: -- arbitrators have jurisdiction,

1 they are empowered to interpret the code. But it would be
2 passing strange to suggest that prior to arbitration a
3 number of the provisions of the code precede the
4 appointment of the arbitrators and go to the powers of the
5 director of arbitration. Therefore, it makes no sense to
6 say that the arbitrators can by virtue of the all
7 language, which this Court has said in a variety of
8 contexts, TWA, any number of contexts, to the effect that
9 that breadth, if anything, raises ambiguity.

10 I just to -- if I may respond, I believe again
11 the First Options presumption is the default presumption.
12 But we would guide the Court and we rest our case on
13 10304 --

14 QUESTION: So you don't think you even need it.
15 You don't think you even need the presumption.

16 MR. STARR: That's correct, because we think the
17 parties' intent is clear and the NASD is clear with
18 respect to why this rule exists. It exists because long,
19 stale claims, as good as the arbitration forum is -- and
20 it's a very fine forum. It's been used in the industry
21 since 1872. But it does not work for long, stale claims.
22 You can't say let's arbitrate a claim from 1929 --

23 QUESTION: Well, nobody is questioning the
24 6-year limitation, and the question is who decides it.
25 And I'm still left with the anomaly that a limitation,

1 applicable only in the arbitration forum, gets decided by
2 a court. It's not a limitation on court action. It's not
3 an all-purpose. It's not saying this -- these parties
4 will arbitrate -- will -- will have this dispute. This
5 dispute will be dead after 6 years. You've conceded that
6 that's not so. The dispute might be alive for 12 years
7 depending on what the State law is.

8 Isn't it odd that -- to read a contract to say
9 that a rule governing only the arbitration forum and not
10 the court is decided by the court?

11 MR. STARR: It's not odd in this context where
12 the original agreement -- there was not, Justice Ginsburg,
13 an agreement, in paragraph 19 of the original client
14 access agreement, to arbitrate in some generic,
15 undifferentiated way. It is to arbitrate under the rules
16 of either a self-regulatory organization or an exchange --

17 QUESTION: But that would --

18 QUESTION: Mr. Starr, I guess the same anomaly
19 occurs when -- when the dispute goes to whether the
20 primary conduct is covered. Isn't there the same
21 anomaly --

22 MR. STARR: It's the -- it's --

23 QUESTION: -- if the court decides it? And if
24 the court decides it, the arbitration can't go forward
25 even though the plaintiff may have a cause of action

1 before that court --

2 MR. STARR: It's the --

3 QUESTION: -- for the conduct that -- that is
4 not arbitrable.

5 MR. STARR: It is the same principle in terms of
6 to what did the parties agree. And I think Justice
7 Ginsburg is resisting -- I'm inferring -- resisting the
8 idea that something that is in the code could somehow be
9 in the contract. We would respectfully disagree and say
10 that will, indeed, create havoc in the securities --

11 QUESTION: What I was saying is that there's a
12 difference between a code of procedure that says we agree
13 to arbitrate and then this is the rules governing the
14 arbitration forum when you're in arbitration. The parties
15 have agreed to a code of procedure for arbitration.
16 That's how I'm reading this.

17 MR. STARR: But, Justice Ginsburg, I would guide
18 you back to 10304 and its language and the term eligible.
19 I think, with all due respect, that that interpretation
20 does grave violence to the term eligible for submission.
21 Eligible cannot mean that you go to the university and
22 then they said, whoops, you're now out. It cannot -- and
23 there needs to be a gatekeeper here --

24 QUESTION: But it could be if you say that all
25 this is is a code of procedure, like the Federal rules.

1 MR. STARR: Your Honor --

2 QUESTION: And if that's what you -- if you say

3 we opt for arbitration and we opt for it to proceed under

4 this set of procedural rules.

5 MR. STARR: May I briefly respond?

6 QUESTION: Very briefly.

7 MR. STARR: Justice Ginsburg, our submission is

8 rigorously enforce the contract. This is part of the

9 contract. That is what Dean Witter v. Byrd says.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Starr.

11 The case is submitted.

12 (Whereupon, at 12:03 p.m., the case in the

13 above-entitled matter was submitted.)

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