

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: ANTONIO MASTROBUONO AND DIANA G.  
MASTROBUONO, Petitioners v. SHEARSON LEHMAN  
HUTTON, INC. ET AL.  
CASE NO: No. 94-18  
PLACE: Washington, D.C.  
DATE: Tuesday, January 10, 1995  
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IN THE SUPREME COURT OF THE UNITED STATES

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ANTONIO MASTROBUONO AND :  
DIANA G. MASTROBUONO, :  
Petitioners :  
v. : No. 94-18  
SHEARSON LEHMAN HUTTON, INC. :  
ET AL. :  
- - - - -X

Washington, D.C.  
Tuesday, January 10, 1995

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:10 a.m.

APPEARANCES:

WILLIAM J. HARTE, ESQ., Chicago, Illinois; on behalf of  
the Petitioners.  
MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as amicus curiae,  
supporting the Petitioners.  
JOSEPH POLIZZOTTO, ESQ., New York, New York; on behalf of  
the Respondents.

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1 PROCEEDINGS

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 94-18, Antonio Mastrobuono v. Shearson  
5 Lehman Hutton.

6 Mr. Harte.

7 ORAL ARGUMENT OF WILLIAM J. HARTE

8 ON BEHALF OF THE PETITIONERS

9 MR. HARTE: Mr. Chief Justice, may it please the  
10 Court:

11 The issue presented in this case is a  
12 straightforward one identified by paragraph 13 of the  
13 client's agreement which was presented to the  
14 Mastrobuonos -- Antonio Mastrobuono, a teacher of medieval  
15 history, and his wife, an artist, and the client's  
16 agreement provision provides, in relevant part, this  
17 agreement shall be governed by the State of New York.  
18 This is a choice-of-law clause. It then moves forward  
19 into a comprehensive arbitration agreement.

20 Now, the point I guess which we diverge on,  
21 myself and Shearson's counsel, is just essentially what  
22 was agreed by the Mastrobuonos. Parenthetically, to  
23 suggest that they agreed to give up any substantive rights  
24 knowingly is preposterous, but what they are said to have  
25 agreed.



1           They are said to have agreed to the Garrity rule  
2     by the first sentence of paragraph 13. The Garrity rule,  
3     a rule in New York of approximately 20 years, states  
4     essentially that arbitrators are not empowered to grant  
5     punitive damages, and therefore, essentially, resort must  
6     have to be taken to the judicial forum.

7           You move to the next aspect of the agreement,  
8     the comprehensive agreement which relates to arbitration,  
9     and it is straightforward. They agree to arbitrate any  
10    controversy arising out of or relating to my accounts, the  
11    transactions with you, your officers, directors, agents,  
12    or employees, the grants that say they shall be settled by  
13    arbitration in accordance with the rules in effect of the  
14    National Association of Securities Dealers.

15           Now, the point that we have sought to stress in  
16    our papers is that either the FAA is going to be employed  
17    or it isn't, so if the assertion is that the only judicial  
18    forum -- the only forum in New York available for punitive  
19    damages to the Mastrobuonos is a judicial forum, because  
20    of the comprehensive nature of the arbitration, and the  
21    statements of this Court time and again that if punitive  
22    damages are to be obtained only in the judicial forum,  
23    then there is a preemption because Federal law applies --

24           QUESTION: Mr. Harte, does the ultimate  
25    resolution of this case depend upon what it is the parties

1 contracted to do with regard to this matter?

2 MR. HARTE: It can be, yes, but --

3 QUESTION: And in that regard, help me out a  
4 little bit. It isn't clear to me that the arbitrator ever  
5 interpreted the parties' agreement. There was language  
6 that indicated that as a matter of equity, or justice, or  
7 something, the arbitrator thought that punitives should be  
8 awarded, but it was not expressly stated that the  
9 arbitrator was interpreting the parties' agreement as  
10 permitting the award of punitive damages.

11 MR. HARTE: Well, there was a reference made in  
12 the arbitrator's award that reliance was placed upon some  
13 papers filed by the Mastrobuonos. We assert in our  
14 supplemental brief that, indeed, within those papers was a  
15 statement that, look, there is preemption, and I frankly  
16 don't know and can't help you, because all I have is what  
17 the arbitrator said, but it would seem to me that they had  
18 to interpret it in order to get to a resolution.

19 They had in front of them --

20 QUESTION: Well, I wasn't asking you about  
21 preemption. I was asking about what the parties --

22 MR. HARTE: Agreed --

23 QUESTION: -- provided in their agreement as a  
24 matter of contract interpretation.

25 MR. HARTE: They would --

1 QUESTION: Did they or did they not contemplate  
2 the award of punitive damages as a possibility?

3 MR. HARTE: It would be my view that necessarily  
4 they would have had to do that, and did, because the  
5 issues were all presented to them. If we are to look into  
6 that determination, necessarily you would have to assume  
7 that they had interpreted what the parties had agreed to  
8 and what they had not agreed to.

9 QUESTION: But they also said they agreed to be  
10 bound by the laws of the State of New York.

11 MR. HARTE: Yes, Mr. Chief Justice. The --

12 QUESTION: And the laws of the State of New York  
13 do not allow arbitrators to award punitive damages.

14 MR. HARTE: But what -- the Garrity rule states  
15 that you do have punitive damages. You have them in a  
16 judicial forum.

17 QUESTION: Well, but --

18 MR. HARTE: However, you cannot get them --

19 QUESTION: -- just a minute.

20 MR. HARTE: -- from an arbitrator.

21 QUESTION: Are you questioning my statement that  
22 the law of the State of New York says that arbitrators  
23 cannot award punitive damages?

24 MR. HARTE: No.

25 QUESTION: Well, then, what difference does it

1 make to rephrase it to say you can get punitive damages in  
2 a nonarbitrable forum, i.e., a judicial forum?

3 MR. HARTE: Because --

4 QUESTION: They've agreed to be bound by the  
5 laws of the State of New York. The laws of the State of  
6 New York says arbitrators can't give punitive damages.

7 MR. HARTE: Yes. However, you move to the next  
8 sentence. The next sentence in the comprehensive  
9 arbitration agreement is that the parties are going to  
10 arbitrate any controversy. Now, at that point, one of the  
11 controversies would be that the Mastrobuonos were entitled  
12 to punitive damages in a judicial forum. Now, if you --

13 QUESTION: Well, now, did the contract also  
14 provide that the NASD rules apply --

15 MR. HARTE: Yes.

16 QUESTION: -- to any arbitration?

17 MR. HARTE: Yes.

18 QUESTION: Now, under the NASD rules, is it  
19 clear that punitives can be awarded, or not?

20 MR. HARTE: Yes.

21 QUESTION: So there may be a conflict in the  
22 terms of the contract.

23 MR. HARTE: Yes. One of our points is that the  
24 ambiguity --

25 QUESTION: So it may become important to know



1       what the parties intended.

2               MR. HARTE:   Yes.

3               QUESTION:   Is it correct, Mr. Harte, that the  
4 NASD rules do not require punitives to be awarded, nor do  
5 they preclude it?  The NASD rules are simply agnostic on  
6 the question, is that correct?

7               MR. HARTE:   That's correct.  However --

8               QUESTION:   So what we have is a juxtaposition of  
9 NASD rules which do not answer the question, they leave  
10 the question open, and a New York common law rule which  
11 does answer the question to the effect that an arbitrator  
12 may not, in fact, award punitive damages.  Is there any  
13 conflict there that needs to be resolved?

14              MR. HARTE:   I would respectfully submit, Justice  
15 Souter, that if the NASD rules are interpreted themselves,  
16 they're interpreted by the manual, and the manual  
17 addresses the arbitrators that they are permitted to grant  
18 punitive damages.

19              QUESTION:   But not required.  In other words,  
20 it's left open.

21              MR. HARTE:   Well, I assume that they are  
22 required if they're going to arbitrate any controversy,  
23 and one of the controversies was punitive damages.

24              QUESTION:   So you're --

25              MR. HARTE:   If it's given to them, they must --

1 QUESTION: So you're saying on the point in  
2 question the NASD rules really are not agnostic. They say  
3 you can award them, New York law says you can't. Clear  
4 conflict, that's your position.

5 MR. HARTE: Well, my position is that -- no. My  
6 position is that when you put in a comprehensive  
7 arbitration agreement to arbitrate any controversy, then  
8 the NASD rules are required to move forward with that  
9 issue, and the arbitrators must address it because  
10 obviously it is a controversy then that would be left not  
11 resolved.

12 QUESTION: Let me ask you a different kind of  
13 question. Under the FAA, there may be a judicial appeal  
14 on the question of whether an arbitrator has exceeded his  
15 authority as an arbitrator.

16 MR. HARTE: Yes.

17 QUESTION: Isn't the question here, whether an  
18 arbitrator may or may not award punitive damages, an issue  
19 properly considered as one of the arbitrator's authority?

20 MR. HARTE: Under the FAA?

21 QUESTION: Yes.

22 MR. HARTE: Under the FAA, it is my view that  
23 the arbitrators can, should, and must award punitive  
24 damages --

25 QUESTION: No, but that's --

1 MR. HARTE: -- if it is a controversy.

2 QUESTION: Excuse me. No, that's not my  
3 question. The question is, is the issue of whether they  
4 may award punitive damages an issue of their authority,  
5 which is subject to judicial appeal?

6 MR. HARTE: I do not believe that is an issue.  
7 I believe that is resolved, has been resolved continuously  
8 in --

9 QUESTION: Why isn't it an issue of the  
10 arbitrator's authority? One side says, you may award  
11 punitive damages under our contract. The other side says,  
12 you may not.

13 Isn't that an issue of the arbitrator's  
14 authority? All I want to know is whether that is subject  
15 to a judicial appeal, and it seems to me that it is an  
16 issue of the arbitrator's authority.

17 MR. HARTE: Respectfully, I believe the issue is  
18 resolved with the arbitrator's determination, and --

19 QUESTION: So that there can never be an appeal  
20 to the courts on that issue, under the FAA.

21 MR. HARTE: As to the authority? I believe that  
22 the FAA, as it has been construed by this Court, states  
23 essentially that where the parties agree to arbitrate any  
24 controversy, which is the issue here -- any controversy --  
25 and it is given to the arbitrators, then they have the

1 authority --

2 QUESTION: Well, that -- I think what you're  
3 telling me is the answer to the question if there is an  
4 appeal on that subject. I simply want to know, at this  
5 stage of the game, is the question of the arbitrator's  
6 authority to award punitive damages an issue which is  
7 properly subject to a --

8 MR. HARTE: The power --

9 QUESTION: -- judicial appeal under the FAA?

10 MR. HARTE: The power of the arbitrators, I  
11 would say yes, we have stated that that is an issue. The  
12 United States says that it is not an issue. It is not an  
13 issue to be resolved by the courts. Once the arbitrators  
14 have determined the scope of the agreement and their  
15 authority, it is not subject to appeal to the court  
16 system.

17 QUESTION: May I ask you this question, then?  
18 It's along the same line of the questions the chief  
19 justice was asking about, the status of the laws of New  
20 York.

21 Suppose you have two people in New York -- it's  
22 a hypothetical case, two people in New York. They sign an  
23 agreement where they say, we simply agree to arbitrate.

24 MR. HARTE: Yes.

25 QUESTION: It happens that their transaction



1 occurs in New York, and the arbitrator applies New York  
2 law. Do you take the position that in that case the FAA  
3 displaces the Garrity rule?

4 MR. HARTE: Yes. That would be --

5 QUESTION: All right, so your position, then, is  
6 that the FAA preempts the Garrity rule.

7 MR. HARTE: Yes. It is stated in our papers,  
8 assuming there is no choice of law agreement, assuming the  
9 most significant context rule is applied in conflict,  
10 assuming that the choice of law is necessarily under the  
11 New York law -- New York law, and the Garrity rule applies  
12 to New York law -- it is clear that when, in our view,  
13 anyway, where you agree to a comprehensive resolution to  
14 resolve any controversy, that the Federal law would  
15 preempt the New York law.

16 QUESTION: And so I take it it's your further  
17 position, or am I correct about this, that when the  
18 parties incorporate New York law in an agreement where  
19 they expressly refer to New York law --

20 MR. HARTE: Yes.

21 QUESTION: -- they incorporate New York law  
22 subject to Federal rules of preemption?

23 MR. HARTE: Correct, that it is the Federal law  
24 which applies to the comprehensive arbitration  
25 agreement --

1 QUESTION: How do you --

2 MR. HARTE: -- and we state that -- excuse me.

3 QUESTION: How do you reconcile your position  
4 with our decision in the Volt case several years ago?

5 MR. HARTE: Well, the -- if I can just continue  
6 a response -- well, I will respond to Volt.

7 It is, I guess, to some surprise that we look at  
8 Volt differently from the other side. It would seem that  
9 everybody would simply accept Volt as written, you know,  
10 what was said, but our position is that Volt is entirely  
11 consistent to your decision in Volt, because what you said  
12 there is, look, we're going to take a look at what's  
13 happening here, and if the California statute is such that  
14 it says we're going to wait with respect to arbitration,  
15 there are other litigants involved, the issue may be  
16 resolved, there is no magic in the procedure, it does not  
17 appear to us to be inconsistent with what the FAA is  
18 seeking to do.

19 There is no removal of our right under  
20 arbitration, and you state, quote, if I may, the FAA  
21 "preempts State laws which require a judicial forum for  
22 the resolution of claims which the contracting parties  
23 agree to resolve by arbitration."

24 So what I say is that also in Volt you said  
25 sections 3 and 4 have never been applied to State fori,

1     only to district court, but we're dealing with section 2,  
2     and we're dealing with entirely different issue here.

3             This issue is that the Garrity rule forecloses  
4     punitive damages in an arbitrable forum, and that is why I  
5     return again and again to what was agreed. There was  
6     agreed a choice of law forum which, if you accept their  
7     view, stated to the Mastrobuonos you must go to a judicial  
8     forum in order to obtain punitive damages under the choice  
9     of law.

10            But then you go to the arbitration agreement,  
11     the next sentence, and it fits entirely into what you've  
12     said in Volt, quoting from Perry v. Thomas, that State law  
13     must give way if the only way a person can get a remedy is  
14     to go to a judicial forum, and they have been -- they have  
15     entered into this arbitration agreement.

16            And for example, in Perry v. Thomas, the  
17     California -- State of California said in order to get a  
18     wage situation resolved they had to go to a judicial  
19     forum, and what you said is that the State law must give  
20     way if -- if the State law says judicial forum alone, and  
21     it leads from the decision.

22            You see it in McMahon, the concern about  
23     arbitration, the jealousy of the courts, and it is very  
24     paradoxical and ironic that this sophisticated group --  
25     the SIC, the industry and what -- would fight for

1 arbitration, would fight for this panel of three  
2 sophisticated people, would state that judges and juries  
3 were not to be trusted, and then weep and whine and hand-  
4 ring about the decision made in the forum that they wanted  
5 by this mumbo-jumbo now-you-see-it, now-you-don't --

6 QUESTION: Mr. Harte, may I -- maybe I  
7 misunderstood your interpretation of this contract clause,  
8 but I thought you were presenting the simple case that  
9 when we have a choice of law clause, New York law -- New  
10 York law permits punitive damages.

11 MR. HARTE: Yes.

12 QUESTION: And then we move on to the choice of  
13 forum clause, which is we're choosing arbitration under  
14 the NSAD rules, which are neutral, so you choose New York  
15 substantive law which permits punitive damages, you've  
16 chosen arbitration, the arbitration forum, which is  
17 governed by in this case NASD rules, not California rules,  
18 as in the other case, and that's -- it's as simple as  
19 that, is your contract interpretation, I thought, but what  
20 I'm hearing is a little more complicated.

21 MR. HARTE: Well, if you move into a  
22 requirement, and I simply state that the choice of law of  
23 New York adopts the law, that's not preempted by Federal  
24 law. Federal law applies to that second sentence.

25 QUESTION: Because if all you had --



1 MR. HARTE: That's what I'm saying, and that's  
2 preemption.

3 QUESTION: If all you had in this contract was a  
4 choice of law clause, then New York law permits punitive  
5 damages.

6 MR. HARTE: Yes.

7 QUESTION: And -- but that would say nothing  
8 about the forum. Then, going over to the forum, your  
9 position is, on the forum the NSAD rules control. There's  
10 no inconsistency.

11 MR. HARTE: Correct, but if -- if it is said  
12 that you cannot get punitive damages in an arbitra -- see,  
13 the Mastrobuonos get hit twice. First, they are said to  
14 have waived their right to punitive damages in any place  
15 but a judicial forum. Then they move to the next sentence  
16 and say they're going to arbitrate any controversy, and  
17 then it is claimed that they can't get punitive damages at  
18 arbitration because again they're hit with a choice of law  
19 forum.

20 QUESTION: Thank you, Mr. Harte.

21 Mr. Stewart, we'll hear from you.

22 ORAL ARGUMENT OF MALCOLM L. STEWART

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 MR. STEWART: Mr. Chief Justice and may it

1 please the Court:

2 In our briefs, and I think in the cases, we've  
3 spent a lot of time stressing the similarities between  
4 labor arbitration and Federal Arbitration Act arbitration,  
5 but I think there's one respect in which the two are  
6 different that's fairly central to this case.

7 That is, in labor arbitration, the arbitrator's  
8 power is typically restricted to the interpretation and  
9 the enforcement of the collective bargaining agreement  
10 itself, and if a dispute arises between an individual  
11 employee and the employer based upon some other source of  
12 law -- for instance, a title VII claim -- typically that  
13 would not be resolved by the arbitrator, it would be  
14 resolved in a judicial forum just as though there were no  
15 collective bargaining agreement.

16 Under -- in commercial arbitration under the  
17 FAA, the thing is really fundamentally different. That  
18 is, you do have a contract here. It's certainly possible  
19 that the Mastrobuonos could have filed an action for  
20 breach of contract contending that Shearson Lehman had  
21 breached its contractual duties, but the arbitrator's  
22 authority is not limited to suits arising under the  
23 agreement itself.

24 Typically, the presumption is that the  
25 arbitrator will resolve disputes arising under all sorts

1 of different other provisions of law that happened to  
2 involve the same transactions, and the arbitration  
3 agreement here stated that it would apply to all disputes  
4 arising out of or involving the petitioner's accounts, and  
5 consequently it was always within the natural  
6 contemplation of the parties that the arbitrator might  
7 ultimately be called upon to apply a variety of different  
8 bodies of law.

9 And therefore when the contract said that the  
10 contract, the agreement would be governed by the laws of  
11 the State of New York, it certainly implied that a breach  
12 of contract action would be governed by that law, but it  
13 certainly didn't imply that every aspect of every dispute  
14 between the parties would be so governed.

15 And, in fact, here the petitioner has filed  
16 claims based on Federal securities laws, based on Illinois  
17 and Texas law. Obviously nobody contended that New York  
18 law should have applied to --

19 QUESTION: So in your view this is just strictly  
20 a question of contract interpretation. You disagree with  
21 the court of appeals.

22 MR. STEWART: It's a question of contract  
23 interpretation subject to two caveats. First, that the  
24 policies underlying the FAA are influential in the  
25 interpretation of the contract, although they don't

1 preclude the parties from agreeing to waive punitive  
2 damages if they wish, and second, it's our view that  
3 because this comes down to a matter of contract  
4 interpretation, ultimately great deference is owed to the  
5 views of the arbitrator, and therefore --

6 QUESTION: But we don't know what those views  
7 are, because the arbitrator never said, this is what the  
8 parties agreed, and that's what I'm applying.

9 MR. STEWART: It's typically the case, Your  
10 Honor, that arbitrators will not give the reasons for  
11 their awards.

12 This Court recognized that in the steelworkers'  
13 trilogy, particularly in Enterprise Wheel, and the fact  
14 that the arbitrator doesn't make clear what the basis for  
15 his opinion is doesn't mean that we don't defer, so long  
16 as there is -- in a sense it's like review of an act of  
17 Congress, and the question is whether we can hypothesize a  
18 valid basis for the award, rather than whether there is a  
19 statement.

20 QUESTION: But in those cases, Mr. Stewart,  
21 there was a great deal of talk about the law of the shop  
22 and that sort of thing, which is really peculiar to labor  
23 arbitration, and I don't think you have any factors like  
24 that here.

25 MR. STEWART: It's certainly true that some of



1 the factors that this Court has relied on in the labor  
2 cases in stressing the difference owed to the arbitrator  
3 are unique to labor.

4 However, this Court also recognized in Wilko v.  
5 Swan that the arbitrator's decision under the FAA is not  
6 subject to review for legal error.

7 The Court has continued to recognize in McMahon,  
8 for instance, that the bases for overturning the  
9 arbitrator's decision remain limited, and the courts of  
10 appeals have uniformly been of the view that an arbitrator  
11 cannot be said to exceed his powers simply because the  
12 reviewing court believes that the arbitrator got wrong the  
13 question of contract interpretation.

14 QUESTION: Well, don't you have --

15 MR. STEWART: There has to be some sort of gross  
16 or clear error.

17 QUESTION: Don't you have something more here,  
18 though? The arbitrator in effect said in so many words,  
19 I'm not really following the contract as written, I'm  
20 following its spirit. I'm doing justice here.

21 MR. STEWART: Well, I don't think --

22 QUESTION: Doesn't the arbitrator in effect say,  
23 I'm remaking it my way?

24 MR. STEWART: We would certainly agree that if  
25 the arbitrator said, I'm ignoring the contract and acting

1 on the basis of my own views of justice, that award should  
2 not be sustained even if we could imagine a valid basis.

3 QUESTION: Well, he isn't going to be quite that  
4 dumb, but he came close to that, didn't he?

5 MR. STEWART: I don't think, with respect, Your  
6 Honor, that that's what he said.

7 What he said was that he was awarding punitive  
8 damages based on the authority as cited in the  
9 petitioner's brief to the arbitrator, and the petitioners  
10 made a number of arguments, some of which are quite  
11 similar to the ones that we're making today, namely that  
12 if punitive damages are awardable in a judicial forum they  
13 should ordinarily be awarded in arbitration as well.

14 One of the other things they said, and it was  
15 really just a passing comment, was to the effect that the  
16 arbitrator could look to the spirit rather than the letter  
17 of the agreement, but --

18 QUESTION: Well, if a reviewing court isn't  
19 sure, and thinks maybe the arbitrator was just relying on  
20 some spirit or sense of justice, and not relying on the  
21 contract terms at all, what is the reviewing court to  
22 do --

23 MR. STEWART: Well, I --

24 QUESTION: -- to send it back to the arbitrator?  
25 I mean, what's the role of the reviewing court, and is

1 your office taking a position in this First Options case  
2 that's going to be argued that seems to sort of raise this  
3 question?

4 MR. STEWART: Well, I guess there are about  
5 three different answers I should give.

6 First, the reviewing court will typically be  
7 unsure, because typically arbitrators give no explanation  
8 at all, so that really can't be --

9 QUESTION: But this one did give an explanation.

10 MR. STEWART: And the explanation was, I'm doing  
11 it for the reasons stated in the petitioner's brief, and I  
12 think probably the best indication -- it's about a four-  
13 page brief. It contains a number of arguments.

14 One of them was, you can look to the spirit  
15 rather than the letter of the agreement, but even that was  
16 taken as a direct quotation from a New York court of  
17 appeals case which said, arbitrators can look to the  
18 spirit rather than the letter of the parties' agreement,  
19 so even that isolated sentence was not an appeal to ignore  
20 the law, it was simply a statement of what the law was.

21 As to the First Options case, one of the  
22 questions presented is, if a district court denies a  
23 motion to vacate an award, what should the standard of  
24 review be on appeal, and the flip side is the question  
25 presented here, namely, when a district court grants a

1 motion to vacate an award, what is the standard of review?  
2 in that The conflict in the First Options case is that  
3 between the Third Circuit, which says de novo review of an  
4 denial of a motion to vacate, the Eleventh Circuit which  
5 says an abuse of discretion review. But even the Eleventh  
6 Circuit in Robbins v. Day, which is discussed in the  
7 petition in First Options, said that when you have granted  
8 a motion to vacate, that should be reviewed but de novo,  
9 so I think under the standard of any circuit, the Seventh  
10 Circuit was correct in reviewing de novo the determination  
11 of the district court that the arbitrable award should be  
12 vacated. or claim or grievance or cause of action was  
13 properly I want to address just briefly a comment that  
14 Justice Souter -- only there are a number of this Court's  
15 decisions QUESTION: Mr. Stewart, may I just ask, going  
16 back before the First Options question, wasn't that spirit  
17 of the law sentence followed up in that same brief by what  
18 I thought was the plaintiff's interpretation -- the is is  
19 petitioner's interpretation of the contract, that is, the  
20 choice of law clause governed only New York substantive  
21 law -- The only question is, what standard of law  
22 should the MR. STEWART: That's correct. are held in  
23 Enterprise QUESTION: -- i.e., punitive damages are then a  
24 available, and arbitration was governed by the NSAD rules?  
25 arbitrator MR. STEWART: That's correct. remedies are



1 appropriate As I say, there were a number of arguments made  
2 in that brief, many of which are similar to the ones that  
3 we're making today, so it was not at all a brief which in  
4 its essence asked the arbitrator to avoid applying the  
5 contract, it was essentially a brief about how the contract should be interpreted.

6  
7 I want to return to a question Justice Souter  
8 asked as to whether this is a case about the arbitrator's  
9 authority, and I think that there are two kinds of issues  
10 that may arise about authority.

11 One is arbitrability jurisdiction, whether a  
12 particular claim or grievance or cause of action was  
13 properly presented to the arbitrator rather than to the  
14 court, and certainly there are a number of this Court's  
15 decisions saying that the determination on that issue is  
16 for the court, albeit with a presumption of arbitrability.

17 This is not a case about arbitrability. This is  
18 a case in which it is clear that the determination as to  
19 whether punitive damages should be awarded is to be made  
20 by the arbitrator.

21 The only question is, what standard of law  
22 should the arbitrator apply, and the Court has held in  
23 Enterprise Wheel, in Misco, in W. H. Grace, that when a  
24 claim is clearly properly before the arbitrator, the  
25 arbitrator's determination as to what remedies are

1 appropriate is typically entrusted to his sound  
2 discretion, and that's particularly true here when the  
3 propriety of the remedy turns on interpretation of the  
4 contract. Mr. Polizzotto

5 That is, the respondents don't contend that the  
6 Garrity rule applies of its own force. They don't contend  
7 that there is some other provision of law which bars an  
8 award of punitive damages. They simply contend that the  
9 contract properly construed reflects the parties' agreement  
10 that punitive damages will not be awarded.

11 The question of whether they're right is a  
12 question of contract interpretation. The arbitrator  
13 evidently reached a different determination, and that  
14 judgment is entitled to substantial deference from the  
15 reviewing court.

16 As to Volt, we think really that's the  
17 fundamental difference between this case and Volt. In  
18 Volt, the State court determined that the choice of law  
19 clause was properly construed to incorporate California  
20 procedural rules. This Court said, we won't review that  
21 determination. Assuming it's correct, the FAA does not  
22 prohibit enforcing the agreement according to its terms.

23 Here, by contrast, the decisionmakers whose  
24 judgment is entitled to deference, namely the arbitrators,  
25 concluded that the choice of law clause did not have that

1 effect -- I'm sorry.

2 Thank you, Your Honor.

3 QUESTION: Thank you, Mr. Stewart.

4 Mr. Polizzotto.

5 ORAL ARGUMENT OF JOSEPH POLIZZOTTO

6 ON BEHALF OF THE RESPONDENTS

7 MR. POLIZZOTTO: Mr. Chief Justice, may it

8 please the Court:

9 I'm somewhat confused by the preemption argument

10 advanced by the petitioner. He's gone back and forth on

11 that issue in the past.

12 In our reading of this Court's cases, the terms

13 particularly the Volt case, the overriding, if not the

14 sole concern of the Federal Arbitration Act, is the

15 enforcement of the parties' agreement according to their

16 terms. This Court has said that repeatedly in virtually

17 every case decided in the mid to late eighties on the

18 arbitration subject, and perhaps most explicitly as it

19 pertains to this case in the Volt decision.

20 The preemptive force, if any, that the FAA has,

21 is with respect to attempting to determine what the

22 agreement of the party was -- what the agreement of the

23 parties were, so I am somewhat at a loss to understand the

24 argument of preemption under the Federal Arbitration Act.

25 QUESTION: Well, can I put my understanding of

1 the argument before you and ask you to comment on it?  
2 under each I suppose one could interpret the language, and  
3 governed by the laws of the State of New York, in one of  
4 two ways, the way the court of appeals did so that it  
5 picks up the Garrity rule, or one can read it to say, of  
6 apply the laws that a New York court would apply in the  
7 same controversy, and they obviously took the latter view.  
8 choice of Now, supposing under your view of the contract  
9 New York law, instead of providing punitive damages shall  
10 not be awarded, provided that no damages shall be awarded,  
11 and the arbitrator shall only have authority to enter the  
12 equivalent of a declaratory judgment construing the terms  
13 of the contract. Would that foreclose the award of  
14 damages? I against you.

15 MR. POLIZZOTTO: That arguably might foreclose  
16 the award of damages, because the claims sought to be  
17 brought under the FAA included claims for compensatory more  
18 damages. However, the preemptive force of the FAA with  
19 respect to what the parties' agreement is, in my view, air  
20 paramount and dispositive here. opinion I think reveals  
21 that. In The contract argument now being advanced here  
22 was not advanced below. In our view, the only fair said  
23 reading of the contract, and the clear constraint on  
24 arbitral authority here, was that New York law applies,  
25 New York law includes the Garrity rule, which is clear and



1 unmistakable, and the arbitrators exceeded their power  
2 under section 1084 of the FAA in not permitting an award  
3 of punitive -- and permitting --

4 QUESTION: Why isn't it a reasonable  
5 construction of this contract to say it's got a choice of  
6 law clause -- ordinarily that means substantive law,  
7 punitive damages okay under New York law -- it's got a  
8 choice of forum clause, that forum is arbitration governed  
9 by the NSAD rules, you read them compatibly to say, New  
10 York law says substantive damages, punitive damages are  
11 okay, NSAD procedural law says it's neutral, and so that's  
12 a reasonable construction of the contract? If the  
13 contract is ambiguous, you drew it. It should be  
14 construed against you.

15 MR. POLIZZOTTO: I've several responses to that.  
16 First of all, under New York law, it's fairly clear that  
17 the Garrity rule itself is a substantive rule. It is more  
18 than simply a procedural rule. There's an extremely  
19 strong and powerful policy under New York law, and a fair  
20 reading of Chief Judge Bertel's opinion I think reveals  
21 that. In addition, on their face --

22 QUESTION: So the parties could not have said,  
23 we want New York substantive law, and not New York  
24 arbitration law. We want New York substantive law to  
25 govern, and then we want the NSAD rules to govern

1 arbitration.

2 Suppose they had -- they certainly could have  
3 done that. There's nothing obligatory about New York law.  
4 This is for the parties to dispose of, right?

5 MR. POLIZZOTTO: I think that would have been a  
6 terribly confusing way of going about the issue, had they  
7 done so.

8 QUESTION: It's a question of what the parties  
9 mean, right?

10 MR. POLIZZOTTO: Correct.

11 QUESTION: They can write their own law into the  
12 contract. So they say, as a shorthand, instead of writing  
13 out all the terms and conditions, we pick New York. It's  
14 got good substantive law, good contract law. So we pick  
15 New York law to govern the terms and conditions, and we  
16 pick the NSAD arbitration rules.

17 MR. POLIZZOTTO: But the NASD rules themselves  
18 are totally silent on the issue of punitive damages.  
19 There's --

20 QUESTION: Which means they're allowed. Which  
21 means -- which means that so far as the NASD rules are  
22 concerned, the arbitrator can award them.

23 MR. POLIZZOTTO: To the extent -- to the extent  
24 that the parties' agreement otherwise would prohibit them,  
25 and in this case the adoption of the New York choice of

1 law provision, sweeping in the Garrity rule, makes that  
2 prohibition --

3 QUESTION: No, but --  
4 the rule, QUESTION: The question is whether it does sweep  
5 in -- I mean, you have admitted, and I think as you must,  
6 that the parties could draw their own bargain here, and  
7 the question is, what bargain did they draw, and why isn't  
8 it a logical reading to say that they picked up only New  
9 York substantive law?

10 MR. POLIZZOTTO: Well --

11 QUESTION: If you had nothing but that first  
12 sentence, you'd go into a court, because you have no  
13 arbitration, the agreement shall be governed by the laws  
14 of the State of New York. Bring that case in New York,  
15 you get punitive damages.

16 MR. POLIZZOTTO: The submission itself, the  
17 submission of the dispute itself before the NASD  
18 contemplated in the submission -- this is section 12 of  
19 the NASD Code of Arbitration.

20 QUESTION: Are you reading from somewhere in  
21 your brief?

22 MR. POLIZZOTTO: Yes. Page 29 in my brief. I'm  
23 reading from the NASD Code of Arbitration Procedure,  
24 section 12(a). The claim is submitted before the  
25 arbitrators as provided by a duly executed and enforceable

1 written agreement. The claim itself incorporates --

2 QUESTION: Now, where are you reading from?

3 MR. POLIZZOTTO: I'm reading from the quote of  
4 the rule, actually, which is the block in indented quote  
5 on page 29 of the respondent's brief.

6 QUESTION: Okay, go ahead.

7 MR. POLIZZOTTO: It includes other material  
8 provisions in the contract of which the --

9 QUESTION: Well, I don't -- are you sure you're  
10 on page 29?

11 MR. POLIZZOTTO: Yes, of respondent's brief,  
12 page 29.

13 QUESTION: And then tell us again where you're  
14 reading from.

15 MR. POLIZZOTTO: I was reading -- I was  
16 paraphrasing section 12 of the NASD Code of Arbitration  
17 Procedure.

18 QUESTION: Well, maybe that's what I didn't get.  
19 I thought you were reading verbatim.

20 MR. POLIZZOTTO: No. I'm sorry, Mr. Chief  
21 Justice.

22 QUESTION: Mr. Polizzotto, isn't the choice open  
23 to you something like this. If you read the contract the  
24 way Justice Ginsburg was suggesting, there's no conflict  
25 and there's no ambiguity as between the choice of law



1 provision and the choice of forum provision.

2 If you read the contract the way you were  
3 suggesting, there is an ambiguity, but that ambiguity  
4 would normally be resolvable against you as the party who  
5 drew the contract, so either way, you lose, and either way  
6 the arbitrator's award should be upheld.

7 MR. POLIZZOTTO: Well, I would say this.  
8 Virtually every case that has reviewed this question, the  
9 question of the applicability of the New York choice of  
10 law provision and whether it involves an exceeding of  
11 arbitral powers, has taken a fresh de novo review and I  
12 think that that would be the appropriate course here.

13 QUESTION: Well, have each -- I'm sorry, go  
14 ahead. No, go on.

15 Well, have each of the instances that you allude  
16 to been instances in which there was a potential conflict  
17 situation as between contractual provisions so that the  
18 reading in question either avoids the conflict, as in  
19 Justice Ginsburg's suggestion, or reads the other way to  
20 provide an ambiguity in which, under the rule of  
21 construing the contract against the maker, you would lose.

22 MR. POLIZZOTTO: I guess I don't see the --

23 QUESTION: Has that been the case in all of  
24 those instances that you allude to?

25 MR. POLIZZOTTO: I guess I don't see the

1 conflict, because the choice of law provision in our  
2 agreement is the preceding sentence to the dispute  
3 resolution provision, if you will, and I think for -- a  
4 better and more appropriate construction is that they're  
5 one and the same, for this purpose.

6 QUESTION: Mr. Polizzotto, do you think that the  
7 New York law at issue here has any existence except as  
8 something to be referred to by private parties? That is  
9 to say, if it were not adopted voluntarily by the parties,  
10 would this New York rule be enforceable under our current  
11 interpretation of the FAA?

12 MR. POLIZZOTTO: I think the answer to that  
13 question is probably yes, and let me explain why. The  
14 Court has made quite clear that the FAA does not preempt  
15 the whole law of arbitration, and in fact there needs to  
16 be a clear and unmistakable congressional intent to  
17 preempt. There's nothing in the FAA that says anything  
18 about punitive damages, so in the absence of an agreement  
19 between the parties on this question, I think it is  
20 entirely possible that a State rule such as this would  
21 have applicability when New York law applies of its own  
22 force.

23 QUESTION: So in --

24 MR. POLIZZOTTO: So we disagree with the  
25 Government on that point.

1 QUESTION: So instead of declining to honor  
2 arbitral awards, which would violate the FAA as we've  
3 interpreted it, the States could instead render arbitral  
4 awards worthless by piece-by-piece saying you can't give  
5 punitive damages, maybe you can't give expectation  
6 damages, maybe you can give nothing but a declaratory  
7 judgment. Could they do that, and that would -- wouldn't  
8 that violate the FAA?

9 MR. POLIZZOTTO: Well, the FAA has preemptive  
10 force in the context in which people are attempting to  
11 derive or get access to the arbitral forum as an initial  
12 matter.

13 QUESTION: Well, then, don't you think it means  
14 that the States cannot render the arbitral forum nugatory  
15 by simply saying, yes, we have a general law, but this law  
16 won't be applicable in an arbitral forum? That seems to  
17 me to violate the --

18 MR. POLIZZOTTO: It may mean that, Justice  
19 Scalia, but that's not this case. This case is a far  
20 clearer case.

21 QUESTION: It may be this case, because if this  
22 provision of New York law is totally preempted and is only  
23 there so it's a handy referral for a private agreement,  
24 which we've said can supersede the FAA, then maybe it's  
25 not New York law any more. I mean, if it has no binding

1 effect in and of itself, maybe it's not New York law.

2 I mean, I don't consider it law if it's just  
3 something that can be referred to by the parties if they  
4 want to adopt it, but that could not be imposed upon the  
5 parties absent their agreement. You think this could be  
6 imposed on the parties absent their agreement.

7 MR. POLIZZOTTO: I think there's an argument to  
8 suggest that the FAA does not have the type of preemptive  
9 force that would override the natural power of New York  
10 law, in an appropriate case.

11 QUESTION: But isn't this always --

12 QUESTION: It seems to me that your case may  
13 very well turn on that, because it strikes me as rather  
14 odd that if the parties simply agree to arbitrate without  
15 a choice of law clause or a mention of New York, and it  
16 happens to be that the transaction is in New York, the  
17 parties are in New York, they apply New York law, that  
18 they would apply the Federal preemptive portion of New  
19 York law and ignore the Garrity rule.

20 It seems to me rather strange that when the  
21 parties go one further step and say, we want New York law,  
22 that suddenly you interpret the contract as saying we want  
23 New York law absent prevailing Federal preemption law.  
24 That seems to me very odd.

25 MR. POLIZZOTTO: Well, it's --



1 QUESTION: And it seems to me that's what you  
2 have to say in order to win your case.

3 MR. POLIZZOTTO: Well, I think that's right to  
4 some extent, but that's because the animating policy and  
5 the animating preemptive force of the FAA is, what did the  
6 parties agree to in this case? So that's why I believe  
7 Justice O'Connor was correct in the very first question  
8 that she asked the petitioner, that fundamentally here  
9 what we are talking about is what did the agreement  
10 provide? We're not --

11 QUESTION: Mr. Polizzotto, on the question of  
12 what the parties could dispose of, these -- the  
13 Mastrobuonos, as I understand it, brought this case in  
14 Federal district court, and you removed it, is that  
15 correct?

16 MR. POLIZZOTTO: Correct.

17 QUESTION: So if they had brought this case in  
18 New York Federal District Court, or they brought it in  
19 Illinois Federal District Court and said, see this choice  
20 of law clause, shall be governed by the laws of New York,  
21 and so we want compensatory and punitive damages, suppose  
22 you had not asked to have the case dismissed because of  
23 the arbitration clause. You were not required to do that.  
24 That was something that no law required, no Illinois law,  
25 no New York law, no Federal law. It was yours to dispose

1 of.

2 So if they had just gone into Federal court, and  
3 you hadn't asked to have the arbitral forum, they would  
4 have gotten compensatory and punitive damages, right,  
5 assuming they proved their case?

6 MR. POLIZZOTTO: And assuming that the judge and  
7 jury would have agreed the same way --

8 QUESTION: Yes.

9 MR. POLIZZOTTO: -- that the arbitrators did  
10 here.

11 But that is precisely the distinction that is so  
12 powerful with respect to the Federal Arbitration Act. The  
13 provision that we relied on to compel the case was, of  
14 course, section 4 of the FAA, and it doesn't say, parties  
15 who are signatories to arbitration agreements, you can get  
16 orders from the Federal court directing that the matter  
17 proceed in arbitration.

18 What it says is that parties are entitled to an  
19 order directing that such manner -- arbitration proceed in  
20 the manner provided for in such agreement. Again, even in  
21 the procedural, largely procedural section of title 9  
22 relating to motions to compel, there is a harkening back  
23 to what was the parties' intent under the agreement?

24 QUESTION: So that's why I keep coming back to  
25 Justice Ginsburg's original question. The question as you

1 see it is, what did they agree to?

2 MR. POLIZZOTTO: Correct.

3 QUESTION: In my agreement, it says they agree  
4 to be governed by the laws of New York, and then they also  
5 agree that any controversy will be settled by the NASD  
6 rules.

7 The NASD rules specifically say in their  
8 arbitrator's manual that punitive damages may be a remedy,  
9 so it seems -- why isn't there at least an ambiguity as to  
10 what they meant, and once you find an ambiguity, then why  
11 aren't we simply required to follow what the arbitrator  
12 interpreted them to mean?

13 MR. POLIZZOTTO: The rules are -- the manual are  
14 not the rules, first of all. The manual is the manual.

15 QUESTION: But beside -- that's -- all I'm  
16 saying is, isn't it at least ambiguous as to what they  
17 meant, and once you find it even a little bit ambiguous,  
18 then doesn't the court -- don't the courts have to follow  
19 the arbitrator's interpretation of the contract as to what  
20 they meant? In other words, isn't this case way north of  
21 Misco? You don't have to get, you know, too technical  
22 about it. There's at least a big ambiguity here.

23 MR. POLIZZOTTO: I think the issue of arbitral  
24 power -- I think to some extent you're underestimating the  
25 force of section 10 of the Federal Arbitration Act, which

1 specifically gives to the courts -- it's a directive to  
2 the courts that says, you are obligated to vacate awards  
3 to the extent that the arbitrators have exceeded their  
4 authority.

5 QUESTION: Well, I mean, Misco says, yes, that's  
6 right, but don't ever do it, and that's in the labor area,  
7 so maybe we always used to follow it that way in the court  
8 of appeals, anyway, and now this isn't the labor area, so  
9 perhaps because it's not the labor area, it isn't true  
10 don't every do it, maybe sometimes do it, but at least  
11 there -- there I'm exaggerating, but you see my point.

12 MR. POLIZZOTTO: But there seems to me to be a  
13 distinction, and a valid one, between the question of  
14 whether an arbitrator has the power to award such  
15 relief --

16 QUESTION: Yes.

17 MR. POLIZZOTTO: -- and the question of whether,  
18 under the facts of a given case, the arbitrators correctly  
19 exercised that power. We're saying that this is the  
20 former situation.

21 QUESTION: Yes, I know, but I'm trying to get  
22 your answer to the question specifically, isn't there at  
23 least enough ambiguity as to what they meant that we'd  
24 have to follow the arbitrator? Why not? Is it because  
25 the arbitrator didn't give that as a reason? Is it



1 because there really isn't that ambiguity? What, in your  
2 view, is the basic reason --

3 MR. POLIZZOTTO: Well, one --

4 QUESTION: -- why we don't have to follow the  
5 arbitrator?

6 MR. POLIZZOTTO: One clear answer to that is the  
7 fact that this is not what the arbitrators were asked to  
8 do in this case.

9 QUESTION: Normally we pay no attention to that,  
10 except in extreme circumstances, in a court of appeals.  
11 That is, normally an arbitration award has no reasons, so  
12 normally you don't really cross-examine the arbitrator.

13 MR. POLIZZOTTO: Part of the record --

14 QUESTION: Why is this different?

15 MR. POLIZZOTTO: Part of the record in the  
16 district court was the submission made by the petitioners  
17 in which they urged the arbitration panel to disregard the  
18 law, disregard the authority and the constraints on that  
19 authority placed in the agreement that you signed.

20 QUESTION: Yes, but the next sentence  
21 contradicted that, and the parties say all kinds of things  
22 in their brief. The first said, spirit of the law, the  
23 second one said, this contract means New York substantive  
24 law, so I don't think you can hang a party on one sentence  
25 in a brief that's contradicted by the next sentence.

1 MR. POLIZZOTTO: Except in this case the  
2 application, I believe, and I think Garrity's -- a fair  
3 reading of Garrity indicates this. The Garrity rule, as  
4 it relates exclusively to arbitration, is a substantive  
5 pronouncement of law in the State of New York, and the  
6 petitioners concede this in their main brief. They say  
7 that flat out in their brief.

8 I would also say in partial further response to  
9 your question, Justice Breyer, there's a happy synergy, if  
10 you will, between the statutory language under section 10,  
11 which speaks about arbitrators exceeding their powers, and  
12 the Garrity case itself.

13 Garrity, Chief Judge Bertel uses precisely the  
14 same word in disposing of the case right at the beginning  
15 of the case. He says, the holding of this court is that  
16 the arbitrators do not have the power to award punitive  
17 damages.

18 QUESTION: -- that means we don't look at their  
19 reason. We assume that they would have given a right  
20 reason. So if they would have given a right reason here,  
21 namely, he'd said specifically, there are two sentences in  
22 this contract, one of which seems to contradict the other,  
23 I interpret those sentences to mean, just what I said, why  
24 would that exceed his power?

25 MR. POLIZZOTTO: Well, I suppose I don't agree

1 with your interpretation of the contract --

2 QUESTION: In other words, you're saying it's so  
3 clear.

4 MR. POLIZZOTTO: And I don't think the contract  
5 is -- can be interpreted in that fashion.

6 QUESTION: Okay.

7 MR. POLIZZOTTO: I think to some extent the  
8 Court needs to focus more on the historic purpose of  
9 choice of law clauses generally. I think under your  
10 analysis, Justice Breyer, the clause here would be given  
11 short shrift. In fact, they are very important aspects to  
12 American jurisprudence. They sweep in a whole compendium  
13 of issues that might otherwise bear on a dispute that  
14 parties may have with each other. They're powerful.

15 QUESTION: May I just point out this one problem  
16 with -- it's the first sentence, of course, we're focusing  
17 on in the agreement, and it says, the agreement shall be  
18 governed by the laws of the State of New York.

19 Now, as I understand it, thinking -- following  
20 up on Justice Ginsburg's thought, if the agreement had  
21 been construed in the Federal court it would have one  
22 meaning. If it was construed by an arbitrator, it would  
23 have a different meaning.

24 MR. POLIZZOTTO: No, because this particular  
25 Federal court construed the agreement the same way.

1 QUESTION: No, no, if the trial had been held in  
2 a Federal court --

3 MR. POLIZZOTTO: Oh --

4 QUESTION: -- if you had not removed it.

5 MR. POLIZZOTTO: There's no question that --

6 QUESTION: Then, applying the laws of New York,  
7 the agreement would have a different meaning than it was  
8 given in this case -- than the court gave it in this case.

9 MR. POLIZZOTTO: But that's precisely the  
10 difference. We are in arbitration. The parties have a  
11 contract, and the contract defines the agreement, and the  
12 difference is, is that the Garrity rule is a substantive  
13 rule that only relates to arbitrations. That's precisely  
14 the difference.

15 We're not contesting that these individuals, had  
16 we stayed in Federal court, might have been able to  
17 maintain State common law claims that might have had as a  
18 component some element of punitive damages. Of course,  
19 from a procedural safeguard perspective --

20 QUESTION: It would be different if this first  
21 sentence had said, any proceedings held pursuant to this  
22 clause shall be governed by the laws of the State of New  
23 York. It says, the agreement shall be governed, and then  
24 it's odd to say that the same law will give the same  
25 agreement two different meanings, depending on what judge



1 is interpreting it.

2 MR. POLIZZOTTO: This is, however, a rather  
3 lengthy agreement, and I think the fact that these --

4 QUESTION: Paragraph 13 isn't very long.

5 MR. POLIZZOTTO: -- these two thoughts are in  
6 tandem in the contract is of some significance.

7 QUESTION: Well, it would still be governed by  
8 the same law, whether brought in Federal court or in  
9 arbitration, to wit, the law that you can't give punitive  
10 damages in arbitration. That rule wouldn't be  
11 contradicted by the Federal suit. It just wouldn't be  
12 applicable in the Federal suit.

13 MR. POLIZZOTTO: Absolutely.

14 QUESTION: So it's not that two different laws  
15 would be applied.

16 MR. POLIZZOTTO: No, that's correct.

17 I would again urge the Court that with respect  
18 to the preemption issue, it's really a nonissue here.  
19 Volt controls that most particularly. I think the Court  
20 is correct in focusing on the contract questions. It's  
21 our view that the contract is clear.

22 It's also, if I may spend a few minutes on the  
23 section 10 argument, I think the Government -- the  
24 Government's advancement of their argument under section  
25 10 which, by the way, is not an argument that the

1 petitioners advanced until the reply brief, is an overly  
2 constrained reading of the proper meaning of section  
3 10(a)(4).

4 Section 10(a)(4) is a clear directive of the  
5 courts to act in appropriate cases. That is something  
6 that is entitled to de novo action on the part of the  
7 courts, and to read it in any other fashion does violence  
8 to the force behind it.

9 There are only limited bases upon which  
10 arbitration awards can be vacated, but to remove that  
11 basis, which is I think effectively what the Government is  
12 arguing, from a party who believes to be aggrieved from an  
13 arbitration award really severely undercuts the force of  
14 the vacation statute, section 10.

15 If the Court doesn't have any further questions,  
16 I would rest.

17 CHIEF JUSTICE REHNQUIST: Thank you,  
18 Mr. Polizzotto.

19 The case is submitted.

20 (Whereupon, at 12:04 p.m., the case in the  
21 above-entitled matter was submitted.)  
22  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*ANTONIO MASTROBUONO AND DIANA G. MASTROBUONO, Petitioners v. SHEARSON LEHMAN HUTTON, INC. ET AL.*

*CASE NO.:94-18*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)

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