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Agreeing on Where to Disagree: Jain v. de Méré and International Arbitration Agreements

I. Introduction

In 1970, the U.S. Congress passed Chapter 2 of the Federal Arbitration Act, implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,\(^1\) in response to the increasing involvement of American businesses in international trade.\(^2\) The Seventh Circuit Court of Appeals' decision in Jain v. de Méré\(^3\) represents a novel interpretation and a broadening of Chapter 2's reach.\(^4\)

The petitioner-appellant, a citizen of India, sought to have the court compel the respondent-appellee, a French citizen, to submit to arbitration under an arbitration clause in a marketing agreement between the two parties.\(^5\) The United States District Court for the Northern District of Illinois, Eastern Division, held that it did not have the power to compel arbitration under Chapter 2 of the FAA, because the agreement did not specify the location of arbitration or the method of appointing an arbitrator.\(^6\) Nor could it compel arbitration under Chapter 1, which would require the court to have jurisdiction over the subject matter of the conflict, independent of the arbitration agreement.\(^7\)

The Court of Appeals for the Seventh Circuit reversed the district court's decision.\(^8\) It interpreted the FAA to mean that the court could compel arbitration in cases involving one or more foreign parties, where no location for arbitration was specified, even though it did not have subject matter jurisdiction.\(^9\)

This Note will explore the facts and holding of Jain v. de Méré in Part II. Part III will examine the background law, and Part IV will

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\(^3\) Jain v. de Méré, 51 F.3d 686 (7th Cir. 1995).

\(^4\) Ironically, despite the concern for American enterprise behind Chapter 2's genesis, neither of the parties in the case were American businesses.

\(^5\) Id.


\(^7\) Id. at *1.

\(^8\) 51 F.3d at 688.

\(^9\) Id. at 690.
provide an analysis of the court's opinion. Finally, this Note will conclude that the Seventh Circuit's interpretation of the Federal Arbitration Act is not supported by precedent and gives courts broader power to compel arbitration than the Act's authors intended them to have.

II. Statement of the Case

A. The Facts

Henri Courier de Méré, a citizen and resident of France, holds several patents pertaining to his invention of electronic ballasts for fluorescent and gas discharge lamps. He entered into a contract with Ishwar D. Jain, a citizen and resident of India, under which Jain agreed to help de Méré market those inventions and negotiate licenses. In return, de Méré would pay Jain ten percent of any amounts he received as a result of licensing deals negotiated by Jain.

In 1993, Jain negotiated a licensing agreement between de Méré and Motorola Lighting, Inc. of Illinois. The agreement provided for royalty payments from Motorola to de Méré. De Méré then paid Jain $25,000, ten percent of the first advanced royalty payment from Motorola. Jain contended that, under his agreement with de Méré, he was entitled to a percentage of other payments Motorola had made to de Méré, and de Méré disagreed.

The marketing agreement provided that "any disagreement arising out of this contract may only be presented to an arbitration commission applying French laws." It was silent as to the location of the arbitration and the method for choosing an arbitrator.


De Méré objected to the appointment of the AAA as the arbitration commission and to its appointment of de Seife as arbitra-
He contended that the only competent jurisdiction lay in France, and that French law dictated that the parties' disagreement over the appointment of an arbitrator coupled with the marketing agreement's failure to specify a method of appointment meant the arbitration clause was terminated. In response, Jain petitioned the district court for an order compelling de Méré to submit to arbitration and appointing Rodolphe J.A. de Seife as arbitrator.

B. The District Court's Opinion

The district court held that it had jurisdiction over this case under Chapter 2 of the Federal Arbitration Act (FAA). However, it ruled that it did not have authority to compel arbitration under Chapter 2 of the FAA because the agreement between Jain and de Méré did not specify a location for arbitration. Nor could the district court compel arbitration under Chapter 1 of the FAA, because that would require it to have jurisdiction over the subject matter of the suit, which it did not. The district court therefore denied Jain's petition.

C. The Court of Appeals' Opinion

The court of appeals reversed on the grounds that, as long as it had jurisdiction under Chapter 2, it did not need subject matter jurisdiction in order to compel arbitration in its own district, where no site for arbitration was named in the agreement. To the extent that they do not conflict with the provisions of Chapter 2, the provisions of Chapter 1 apply to cases that have been brought under Chapter 2, as this case was. Because the jurisdictional requirements of Chapter 1 conflict with Chapter 2's jurisdictional requirements, the court did not apply them. But, the court did apply Chapter 1's grant of authority to compel arbitration.

The court used the same reasoning to decide that it had authority to appoint an arbitrator, where the method of appointing an arbitrator was not addressed in the arbitration agreement. Under Chapter 2, the court has authority to appoint an arbitrator in accordance with the

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22 Id.
23 No. 94-C3388, 1994 WL 465818, at *1.
24 Id.
25 Id.
26 Id. at *2.
27 Id.
28 Id. at *3.
29 Jain v. de Méré, 51 F.3d 686, 689 (7th Cir. 1995).
30 Id. at 689.
31 Id. at 691.
32 Id. at 691.
33 Id. at 692.
provisions of the arbitration agreement\textsuperscript{34} in cases that meet Chapter 2's jurisdictional requirements.\textsuperscript{35} Because the method of appointing an arbitrator was not addressed in the agreement involved in this case, the court looked to Chapter 1, which gives the court authority to appoint an arbitrator.\textsuperscript{36} Unlike the Chapter 1 provision allowing the court to compel arbitration in its own district, there is no requirement of subject matter jurisdiction in the Chapter 1 provision allowing the court to appoint an arbitrator.\textsuperscript{37}

The court further stated that, though subject matter jurisdiction is not necessary in order for a court to compel arbitration in its own district, it still must have personal jurisdiction over the parties to exercise such authority.\textsuperscript{38} The respondent in this case never asserted that the court lacked personal jurisdiction, nor did he protest service of process, or argue forum non conveniens.\textsuperscript{39} The court did not pass judgment on whether such arguments by the respondent would have been successful, except to say that the time for either arguing that the court lacked personal jurisdiction or protesting service of process had passed under the Federal Rules of Civil Procedure.\textsuperscript{40}

III. Background Law

A. The Federal Arbitration Act: Chapter 1\textsuperscript{41}

1. Historical Background

Prior to the passage of the Federal Arbitration Act ("FAA"), the common law rule was that arbitration agreements were revocable and unenforceable.\textsuperscript{42} American courts applied the English theory that such agreements were contrary to public policy because they tended

\textsuperscript{34} 9 U.S.C. § 206 (1994).

\textsuperscript{35} See id. §§ 202, 203.

\textsuperscript{36} See id. §§ 4, 5.

\textsuperscript{37} See id. § 5.

\textsuperscript{38} Jain v. de Méry, 51 F.3d 686, 692 (7th Cir. 1995); see Asahi Metal Ind. v. Superior Court of California, 480 U.S. 102, 113-114 (1987) (minimum contacts are necessary for personal jurisdiction).

\textsuperscript{39} Id.

\textsuperscript{40} FED. R. CIV. P. 12(h)(1) provides:
A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

\textsuperscript{41} Id. FED. R. CIV. P. 12(h)(1).

to "oust" the courts of jurisdiction.\textsuperscript{43}

The U.S. Congress reversed centuries of hostility toward agreements to arbitrate when it passed the FAA in 1925, declaring that such agreements would be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{44} The FAA was designed to allow parties to avoid "the costliness and delays of litigation," and to place arbitration agreements "upon the same footing as other contracts."\textsuperscript{45}

2. Powers and Procedure
   a. The Statutory Language

Section 4 of the FAA directs the court to compel the parties to submit to arbitration in the court's own district, pursuant to an arbitration agreement.\textsuperscript{46} If no method for choosing an arbitrator is specified in the agreement, section 5 directs the court to appoint an arbitrator on its own.\textsuperscript{47}

Chapter 1 applies only in a limited number of cases.\textsuperscript{48} The

\textsuperscript{43} See Pietrowski, \textit{supra} note 2, at 57 n.3; Mitchell v. Dougherty, 90 F. 639, 644-45 (3d Cir. 1898) (agreement prior to dispute is unenforceable because it tends to oust court of jurisdiction); Dickson Mfg. Co. v. American Locomotive Co., 119 F. 488, 490 (M.D. Pa. 1902) (agreements in advance of dispute are illegal and void).

\textsuperscript{44} 9 U.S.C. \textsection 2 (1994). Section 2 provides:

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

\textit{Id.}

\textsuperscript{45} H.R. REP. NO. 96, 68th Cong., 1st Sess. 1,2 (1924).

\textsuperscript{46} 9 U.S.C. \textsection 4 (1994). Section 4 provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such an agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed . . . .

\textit{Id.}

\textsuperscript{47} \textsection 5. Section 5 provides:

If in the agreement provision be made for a method of naming and appointing an arbitrator or arbitrators or an umpire such method shall be followed; but if no method be provided therein . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator . . . .

\textit{Id.}

\textsuperscript{48} Quigley, \textit{supra} note 42, at 1050.
transaction in question must involve commerce, and the court must have jurisdiction under title 28, i.e., subject matter jurisdiction. The FAA itself does not create federal subject matter jurisdiction. That is, the fact that one of the parties is arguing that this federal law gives the court the authority to compel arbitration does not mean that a federal question has been presented. Therefore, a petitioner seeking to invoke Chapter 1 must allege either that there is diversity of citizenship and that the amount in controversy exceeds $50,000, or find some other federal question on which to base jurisdiction. Two foreign parties are not considered diverse.

b. Interpretation of the Statute

The case of Jain v. de Mére was not the first time the Seventh Circuit had interpreted section 4 of the FAA. In Snyder v. Smith, the plaintiff was the executrix for a decedent who was one of three partners in an investment group. As part of the partnership agreement, all the partners agreed that if one partner died, the other two would have an option to buy the deceased partner's share. The agreement also specified that any disagreements regarding the partnership agreement should be submitted to arbitration in Houston, Texas. When the decedent died, the plaintiff-executrix and the surviving partners were unable to agree on a purchase price for the decedent's share. The plaintiff then successfully petitioned a court in the Northern District of Illinois to order the parties to submit to arbitration in Rockford, Illinois. The Seventh Circuit reversed,

51 Quigley, supra note 42, at 1050.
52 28 U.S.C. § 1331 (1994). Section 1331 provides:
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
53 Id.
54 Id. § 1332. Section 1332 provides:
The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between — (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
55 Id.
56 736 F.2d 409 (7th Cir. 1984), cert. denied, 469 U.S. 1037 (1984).
57 Id. at 412.
58 Id.
59 Id.
60 Id. at 413.
61 Id.
finding that, although a court could compel arbitration only in its own district under section 4, it could not do so if the result would contravene a freely negotiated choice-of-forum clause. So, according to the reasoning in Snyder, in cases under Chapter 1 where the arbitration agreement does specify a forum, only a district court within that forum can compel arbitration. District courts not within that forum should dismiss the petition. The reasoning in Snyder has been adopted in at least two other circuits.

B. Chapter 2: The International Context

1. Historical Background

In 1970, Congress passed Chapter 2 of the Federal Arbitration Agreement, implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), which was adopted by the United Nations in 1958. At that time, the United States did not sign on to the Convention because the American delegation felt that it was in conflict with certain federal laws. The United States' decision to sign the Convention in 1968 was inspired, at least in part, by the increasing involvement of American businesses in international trade. In 1925, the year Chapter 1 of the Act was implemented, exports and imports from the United States totaled $4.91 billion and $4.28 billion worth of merchandise, respectively. By 1972, United States exports totaled $49.8 billion and imports totaled $55.6 billion. In 1993, the current value of exports from the United States was $200.5 billion, while the current value of imports was $258 billion.

When the Convention was finally implemented, it was passed as a separate chapter, rather than as an amendment to the already existing provisions of Chapter 1 of the Act. This was done in order to "leave unchanged the largely settled interpretation" of the Act.

62 Id. at 418.
63 Id. at 419.
64 Id. at 420.
65 See Roney & Co. v. Jacob Rivlin, 875 F.2d 1218 (6th Cir. 1989); Nat'l Iranian Oil Co. v. Ashland Oil Inc., 817 F.2d 326 (5th Cir. 1987).
67 Convention, supra note 1.
69 Id. at 3601-2.
70 Pietrowski, supra note 2, at 57 n.1.
71 Id.
72 Id.
73 Id.
74 H.R. REP. NO. 91-1181, supra note 68, at 3603.
2. Powers and Procedures

a. The Statutory Language

The jurisdictional limitations of Chapter 2 are quite different from those of Chapter 1. Any arbitration agreement which arises out of a commercial relationship falls under Chapter 2. It is excepted from coverage under Chapter 2 if the relationship is entirely between United States citizens, unless it involves property located in a foreign state or requires performance abroad. There is no amount in controversy requirement. In cases before state courts where the jurisdictional requirements of Chapter 2 have been met, the defendant may remove the case to federal district court.

Section 206 gives courts that have jurisdiction under Chapter 2 the power to compel the parties to submit to arbitration in the place provided for in the agreement, and to appoint an arbitrator "in accordance with the provisions of the agreement."

b. Interpretation of the Statute

i. General Policy

Four years after the passage of Chapter 2 of the Federal Arbitra-
international arbitration agreements

the U.S. Supreme Court established a policy of expansive interpretation of the FAA in Scherk v. Alberto-Culver Co. Though Scherk was actually decided under Chapter 1 of the FAA, it involved a foreign defendant and a domestic plaintiff, and would have met the jurisdictional requirements of Chapter 2 as well. In Scherk, the plaintiff, an American corporation, agreed to purchase three business entities owned by the German defendant. In the purchase agreement, the parties agreed that the plaintiff would receive all trademarks associated with those enterprises. They also agreed that “any controversy or claim” that arose out of the agreement “or the breach thereof” would be submitted to arbitration before the International Chamber of Commerce in Paris under the laws of Illinois.

When the plaintiff discovered that the trademarks the defendant had promised to convey were subject to substantial encumbrances, he brought suit under the Securities Exchange Act of 1934, contending that the defendant had made fraudulent representations as to the trademark rights. The defendant then moved to dismiss or, in the alternative, to stay the action pending arbitration under Chapter 1 of the FAA.

The district court refused to dismiss, and held that the arbitration clause was unenforceable under the Supreme Court’s decision in Wilko v. Swan, which held that “an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy,” in view of the language of the Securities Act of 1933. The Seventh Circuit affirmed the district court.

The Supreme Court refused to interpret language in the Securities Exchange Act of 1934 the same way it interpreted the language of the Securities Exchange Act of 1933 in Wilko. Instead, it reversed the lower court’s decision and enforced the arbitration clause, noting the growth of international trade and the passage of the Convention. The Court held: “Our conclusion today is confirmed by international developments and domestic legislation in the area of commercial

82 Id. at 508.
83 Id.
84 Id.
85 Id.
86 Id. at 509.
87 Id.
90 484 F.2d 611 (7th Cir. 1973).
91 Id. at 514; see Securities Exchange Act of 1934, 15 U.S.C. § 78(a) (1994). The Act provides that “[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.” Id.
arbitration . . . ." It added that:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate are observed . . . .

The presumption in favor of enforcing arbitration agreements, especially in the international context, was further strengthened in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. The respondent in Mitsubishi Motors, a Puerto Rican corporation, agreed to sell and distribute automobiles manufactured by the petitioner, a Japanese corporation. The parties agreed that any disputes arising out of the agreement would be submitted to arbitration in Japan by the Japan Commercial Arbitration Association. Two years into the distribution agreement, the respondent began having problems meeting its sales goals and attempted to arrange for "transshipments" or diversion of the automobiles to the United States and Latin America, but the petitioner refused. Attempts by the parties to reconcile their differences failed, and the petitioner filed suit under 9 U.S.C.A. §§ 4 and 201 to compel arbitration.

The respondent counterclaimed, asserting both an action under the Sherman Antitrust Act and a pair of defamation claims. The district court acknowledged the doctrine set forth in American Safety Equipment Corp. v. J.P. Maguire & Co., that antitrust disputes are "of a character inappropriate for enforcement by arbitration." But, relying on Scherk, it held that the international character of the transaction "required enforcement of the agreement to arbitrate even as to the antitrust claims." The First Circuit Court of Appeals reversed, holding the district court's decision erroneous to the extent that it had ordered the respondent's antitrust claims to arbitration.

The Supreme Court reversed the First Circuit on the grounds that, "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," there should be no exception to the federal policy of enforcing arbitration agree-

92 417 U.S. at 520-21.
93 Id. at 521 n.15.
95 Id. at 617.
96 Id.
97 Id. at 617-18.
98 Id.; see supra notes 46-55, 66-80 and accompanying text.
100 391 F.2d 821, 825 (2d Cir. 1968).
101 473 U.S. at 621 (quoting Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1953)).
102 473 U.S. at 621.
103 723 F. 2d 155 (1st Cir. 1983).
Following the policy set forth in *Scherk*, the Court concluded that:

concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.105

**ii. The Four-Part Test**

While *Scherk* and *Mitsubishi Motors* set a general policy for the interpretation of the statute, *Sedco v. Petroleos Mexicanos Mexican National Oil*106 sets forth a four-part test outlining how section 206 operates.107 In that case, the district court refused to order the parties to arbitrate their dispute over who was responsible for damages resulting from what was, at that time, the largest oil spill in world history.108 Sedco, an American corporation, chartered an oil tanker to Permargo, a Mexican drilling company. Permargo contracted with Pemex, a Mexican government-owned drilling company, to drill oil wells.109 The agreement between Sedco and Permargo stated that Permargo would indemnify Sedco for any damages caused as a result of Permargo’s use of the tanker.110 The agreement called for the two companies to submit “any dispute” to arbitration in New York under the rules of the International Chamber of Commerce.111

After a suit was filed by Sedco against Permargo and Pemex, Permargo moved for a stay pending arbitration, but the district court denied its motion.112 The court held that the litigation between Pemex and Sedco could not be completely resolved without Permargo being a party also.113

Upon appeal, the Fifth Circuit Court of Appeals had to decide whether to enforce the arbitration clause in the contract between the plaintiff-appellant Sedco and Permargo, the defendant-appellee.114 The circuit court reversed the district court and ordered the parties to proceed with arbitration in New York,115 using a four-part test first set forth in a 1982 case, *Ledee v. Ceramiche Ragno*.116

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104 475 U.S. at 628.
105 *Id.* at 629.
106 767 F.2d 1140 (5th Cir. 1985).
107 *Id.* at 1144-45.
108 *Id.* at 1142.
109 *Id.* at 1143.
110 *Id.* at 1143-44.
111 *Id.* at 1144.
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.* at 1144-45.
116 684 F.2d 184 (1st Cir. 1982).
1) [I]s there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow; 2) does the agreement provide for arbitration in the territory of a Convention signatory; 3) does the agreement to arbitrate arise out of a commercial legal relationship; 4) is a party to the agreement not an American citizen?\(^{117}\)

The court held that if the above four requirements were met, "the Convention requires district courts to order arbitration."\(^{118}\) The Fifth Circuit also affirmed the expansive policy toward arbitration set forth in *Scherk* and *Mitsubishi Motors*, stating that "[b]y its ratification in 1970, the United States obligated itself to enforce arbitration agreements between foreign and domestic contracting parties,"\(^{119}\) and that "the Convention was passed in order to secure the right of arbitration in a commercial context among foreign and domestic parties."\(^{120}\)

### iii. Sections 206, 208 and 4

While the Convention does require courts to enforce arbitration agreements that fall under its provisions, section 206 does not require courts to direct arbitration in the place provided for in the agreement.\(^{121}\) It merely gives them the power to do so.\(^{122}\) According to the legislative history:

Section 206 permits a court to direct that arbitration be held at the place provided for in the arbitration agreement. Since there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, section 206 is permissive rather than mandatory.\(^{123}\)

Under section 208 of Chapter 2, the provisions of Chapter 1 of the FAA apply to cases brought under Chapter 2, to the extent that those provisions do not conflict with the provisions of Chapter 2.\(^{124}\) Under

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\(^{117}\) 767 F.2d at 1144-45 (quoting Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982)).

\(^{118}\) Id. at 1145; see Convention, *supra* note 1, art. II. Article II provides that:

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Convention, *supra* note 1, art. II.

\(^{119}\) 767 F.2d at 1148.

\(^{120}\) Id. at 1149.


\(^{122}\) Id.


\(^{124}\) See 9 U.S.C. § 208 (1994) ("Chapter I applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the
Chapter 1, arbitration "shall be within the district in which the petition for an order directing such arbitration is filed." Thus, it appears that section 206 is "permissive" in the sense that it allows courts to compel arbitration in the place specified in the arbitration agreement. However, section 206 also permits courts to look to section 208, which allows courts to compel arbitration in their own district under section 4 of Chapter 1.

*Bauhinia Corp. v. China National Machine and Equipment Import and Export Corp.* illustrates how this works. In this Ninth Circuit case, the appellee, a California corporation founded and headed by a Chinese exile, had contracted to purchase nails from the appellant, a Chinese state trading organization. The contract between the parties included a clause which called for arbitration, but was ambiguous as to the site. When the appellant failed to deliver the nails, claiming that an edict from the Chinese government had prevented performance, the appellee sued. The appellant moved for the United States District Court for the Eastern District of California to compel arbitration before the China Council for the Promotion of International Trade. The district court agreed to compel arbitration, but ordered it to be heard before the American Arbitration Association in the Eastern District of California. The Ninth Circuit Court of Appeals upheld the court's decision.

The Ninth Circuit reasoned that, because the agreement called for arbitration of disputes but was ambiguous with respect to where such arbitration should take place, the court could not compel arbitration under section 206. Section 206, the court said, "by its terms ... does not permit a court to designate a foreign forum when the agreement fails to designate a place." Therefore, the court looked to section 208, which allowed it to apply section 4, under which it could compel arbitration in the Eastern District of California, where the court sits.

Of course, in *Bauhinia*, the parties were diverse, and the jurisdictional requirements of section 4 were met. The only case in which

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125 *Id.* § 4.
126 *Id.*
127 819 F.2d 247 (9th Cir. 1986).
128 *Id.* at 248.
129 *Id.*
130 *Id.*
131 *Id.* at 247.
132 *Id.* at 248.
133 *Id.* at 247.
134 *Id.* at 250.
135 *Id.*
136 *Id.*
a federal court has applied section 4 to a case where both parties were foreign nationals is Oil Basins Ltd. v. Broken Hill Proprietary Co. Ltd.\textsuperscript{138}

In Oil Basins, the defendants, two Australian corporations, agreed to pay the plaintiff, a Bermudian corporation, royalties on hydrocarbons produced by one of the defendants off the coast of Australia.\textsuperscript{139} The plaintiff’s sole responsibility was to act as trustee for the royalties, which were determined on the basis of the gross value of the hydrocarbons.\textsuperscript{140} The plaintiff brought suit, claiming that the defendants’ estimate of the gross value was too low.\textsuperscript{141} The defendants removed the case to federal court under section 205.\textsuperscript{142}

The parties agreed that, under their contract, the dispute was to be settled through arbitration.\textsuperscript{143} Their only dispute was over the location of the arbitration.\textsuperscript{144} Though the contract did not specify a location for arbitration and the court hearing their petition sat in the Southern District of New York, the defendant wanted the court to order arbitration in Australia, because it was the site “most closely connected to the dispute, most convenient to the parties, and the country whose law will effectively govern the dispute.”\textsuperscript{145} The plaintiff argued that the court had no authority to compel arbitration in Australia, absent some provision in the contract identifying Australia as the situs for arbitration, and the court agreed.\textsuperscript{146}

The court interpreted the legislative history of section 206 to mean that the court “may, if appropriate, direct arbitration to take place” at the site specified in the agreement. Where no location is specified in the agreement, the court can compel arbitration in its own district under section 4.\textsuperscript{147} According to the court, section 4 and section 206 are only at odds where the contract specifies a location, in which case section 206 would control.\textsuperscript{148} The court mentioned nothing of the sections’ conflicting jurisdictional requirements, nor did it acknowledge that the jurisdictional requirements of section 4 were not met in this case. It refused to grant the defendant’s request to expand the interpretation of Chapter 2 to allow courts to compel arbitration at a site different from the site specified in the agreement or, if no site was specified, outside of its own district.\textsuperscript{149} Instead, it granted the

\textsuperscript{139} Id. at 485.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 486.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 487.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 488.
plaintiff’s motion to compel arbitration in its own district under sections 4 and 206.  

iv. The Method for Appointing an Arbitrator

The operation of the statute where no method for choosing an arbitrator is specified in the arbitration agreement is illustrated by Euro-Mec Import, Inc. v. Pantrem & C., S.p.A. In that case, the plaintiff, a Pennsylvania corporation, and the defendant, an Italian corporation, entered into an agreement under which the plaintiff would become the sole distributor of the defendant’s goods in the United States, Puerto Rico, and Jamaica. The agreement also specified that disputes should be arbitrated in Geneva, but did not specify a method for choosing an arbitrator.

The defendant terminated its relationship with the plaintiff, claiming that the plaintiff had failed to pay for delivered goods. In response, the plaintiff filed suit in the United States District Court for the Eastern District of Pennsylvania alleging breach of contract. The defendant then moved for the court to compel arbitration. The plaintiff claimed that the arbitration clause was unenforceable because it lacked “specificity regarding the method of choosing arbitrators, the governing arbitration association, and the governing laws for arbitration.”

The court first determined that the case did fall under Chapter 2, using the four-part test set forth in Ledee. Though Chapter 2’s section 206 would allow the court to “appoint arbitrators in accordance with the provisions of the agreement,” that section was inapplicable in this case because there was no such provision in the agreement between the parties. Thus, the court looked to section 208, which allows a court to apply Chapter 1 “to international agreements to the extent that it does not conflict with Chapter 2.”

Citing Chapter 1, section 5, which allows the court to “designate and appoint an arbitrator or arbitrators or umpire,” the court held that section 5

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150 Id. On the defendant’s motion to reopen, the court eventually dismissed the case on grounds of forum non conveniens. Id.
152 Id. at *1.
153 Id. at *1-2.
154 Id. at *2.
155 Id.
156 Id.
157 Id. at *3.
158 Id. at *8-9 (citing Tennessee Imports, Inc. v. Filippi, 745 F. Supp. 1314, 1321-22 (M.D. Tenn. 1990) (citing Ledee v. Ceramiche Ragn, 684 F.2d 184, 186 (1st Cir. 1982))).
161 Id. at *8.
saved the arbitration clause from being held unenforceable for lack of specificity. Unlike Chapter 1's section 4, section 5 does not require that the court have jurisdiction under title 28.

IV. Significance of the Case

A. The Case Law

The Seventh Circuit's decision is not directly supported by any case law, save the decision made by the district court for the Southern District of New York in *Oil Basins*, which the Seventh Circuit itself distinguished from the case at hand. In that case, the district court seemed to be presenting a novel interpretation of the law without even knowing it. That is, it simply assumed that it did not need title 28 jurisdiction in order to compel jurisdiction in its own district, without even discussing or acknowledging that a court had never exercised this power before. The plaintiff, the defendant and the district court appeared to assume that the court could compel arbitration in New York under section 4, even though it did not have title 28 jurisdiction. The only question the district court was trying to answer was whether it could compel arbitration elsewhere. The court in *Jain* did not take it as given that it did not need title 28 jurisdiction to compel arbitration under section 4, but it came out with the same result as the *Oil Basins* court.

Furthermore, the Seventh Circuit's decision actually appears to conflict with the First Circuit's decision in *Ledee* and the Fifth Circuit's decision in *Sedco*. The second criteria of the four-part test first set forth in *Ledee* and repeated in *Sedco* asks: "does the agreement provide for arbitration in the territory of a Convention signatory?" Clearly, the arbitration clause that the Seventh Circuit in *Jain* had to

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165 See *Jain v. de Méré*, 51 F.3d 686, 691 (7th Cir. 1995). The Seventh Circuit argued: *Oil Basins* does present a scenario almost identical to the instant case. Yet in *Oil Basins*, . . . the defendants sought an expansive reading of § 206 rather than a restrictive reading of § 4. Both parties in *Oil Basins* wanted the court to compel arbitration, and it was only a matter of where that arbitration should occur. *Oil Basins*, therefore, did not directly address the issue de Méré raises.
166 Id.
168 See supra notes 144-50 and accompanying text.
169 51 F.3d at 691.
170 *Jain v. de Méré*, 684 F.2d 184, 185-86 (1st Cir. 1982); see supra notes 116-17 and accompanying text.
171 *Sedco v. Petroleos Mexicanos Nat'l Oil*, 767 F.2d 1140, 1144 (5th Cir. 1985); see supra notes 106-20 and accompanying text.
172 767 F.2d at 1145; see supra text accompanying note 117.
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contemplate did not, so it fails the four-part test to be used by
courts in deciding whether to enforce an arbitration clause.

Furthermore, the court in Sedco wrote of the United States' duty under
the Convention to enforce arbitration clauses between foreign and
domestic parties, not two foreign parties. A case between a foreign
and domestic party, as long as the amount in controversy topped
$50,000, would meet the jurisdictional requirements of section 4.

Of course, it could be said that the Seventh Circuit is merely
acting consistently with the strong policy for enforcing arbitration
agreements set forth by the Supreme Court in Scherk and Mitsubishi
Motors. In Scherk, the Supreme Court refused to interpret a federal
statute in the same manner as it had interpreted a nearly identical
statute in the past, in order to avoid the result of rendering arbitration
clauses unenforceable in cases involving securities claims. In
Mitsubishi, the Court reversed decades-old case law in order to avoid
rendering arbitration clauses in antitrust cases unenforceable. In
both cases, the Court cited the language of the Convention, which
states that: "Each Contracting State shall recognize an agreement in
writing under which the parties undertake to submit to arbitration all
or any differences which have arisen . . . ." The Convention
includes no exceptions for certain categories of conflicts.

It could be said that the Seventh Circuit's decision in Jain is
consistent with the Supreme Court's decisions in the sense that the
court interpreted the federal statute to avoid the result of excluding
from enforcement under the Convention a certain category of cases —
those between two foreign parties where no site for arbitration is speci-
fied.

But Jain could also be distinguished from the Supreme Court
precedent on two grounds. First, if the court in Jain had declined to
compel arbitration in its district, it would not necessarily have meant
that the clause was unenforceable, as it would have if the Supreme

173 See supra notes 17-18 and accompanying text.

174 See 51 F.3d at 691.

175 See 767 F.2d at 1148 ("By its ratification in 1970, the United States obligated itself to
enforce arbitration agreements between foreign and domestic contracting parties"); Id. at
1149 ("The Convention was passed in order to secure the right of arbitration in a commercial
context among foreign and domestic parties"); supra notes 119-20 and accompanying text.


177 Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); see supra notes 81-93 and
accompanying text.

178 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); see
supra notes 94-105 and accompanying text.

179 417 U.S. at 515-17; see supra notes 91-93 and accompanying text.

180 473 U.S. at 629; see supra notes 104-05 and accompanying text.

181 Convention, supra note 1, art. II, pt. 1 (emphasis added); 417 U.S. a: 520; 473 U.S.
629; see supra notes 66-75 and accompanying text.

182 Convention, supra note 1, art. II, pt. 1
Court had gone the other way in Scherk and Mitsubishi. It merely would have meant that the plaintiff would have had to go to another tribunal to try to get the arbitration clause enforced. Second, the Supreme Court's decisions in Scherk and Mitsubishi could be interpreted as establishing a policy of enforcing an arbitration clause regardless of the nature of the underlying dispute. But in Jain, the nature of the underlying dispute was not the reason that the district court refused to compel arbitration. It seems that, in Jain, the Seventh Circuit was trying to establish a policy of enforcing an arbitration clause regardless of whether the arbitration clause specified a location for arbitration or whether it even had jurisdiction under section 4.

B. The Federalization of Arbitration Suits

The respondent-appellee in Jain argued that the Seventh Circuit's decision to compel arbitration in its own district, despite its lack of subject matter jurisdiction, would lead to the federalization of arbitration suits. The jurisdictional limitations of section 4 protect against the federalization of domestic arbitration claims, but, in Jain, the Seventh Circuit bent, and even ignored, those limits. However, Congress already has established that international arbitration cases are the appropriate domain of federal courts by passing Chapter 2. Under the jurisdictional requirements of Chapter 2, the Jain case was properly in federal court, and the parties' failure to specify a site for arbitration does not change that.

The Jain decision does nothing to change the court's jurisdiction over purely domestic arbitration cases. Domestic cases must qualify under title 28 to be heard in federal court, and international cases must qualify under section 202 to be heard in federal court, regardless of whether the arbitration clause in question specifies a site for arbitration.

If the respondent-appellee's argument were accepted, a state court might have the power to compel arbitration where a federal court could not. For example, two Illinois statutes grant courts the authority to enforce arbitration agreements. But, under section 205 of the

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188 While Scherk involved a securities claim, Mitsubishi Motors involved an antitrust claim. See supra notes 81-105 and accompanying text.
184 See supra notes 25-28 and accompanying text.
185 See supra notes 29-40 and accompanying text.
186 Jain v. de Mére, 51 F.3d. at 691.
187 Id.
188 Id.
189 See Jain v. de Mére, No. 94-C3388, 1994 WL 465818 (holding that the court does have jurisdiction, but does not have authority to compel arbitration).
A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising
FAA, in a case between two foreign entities that meets the requirements of section 202, a party could remove the case from Illinois state court to federal court. Then, that same party could move to dismiss the case from federal court because there is no site specified for arbitration, making the court powerless to compel arbitration under section 206. Also, since the court does not have title 28 jurisdiction, it would be powerless to compel arbitration under section 4.

C. Foreign Nationals in American Courts

The respondent-appellee also argued that the Seventh Circuit's decision could have the effect of drawing disputes between two foreign entities into U.S. courts. It is possible to envision a scenario where two foreign parties sign a commercial contract with an arbitration clause that does not specify a site for arbitration. One party could petition a federal court to compel arbitration in its own district. Under the ruling in Jain v. de Méro, a federal court could do so, even if the contract had no relation to the United States whatsoever.

To a certain extent, the personal jurisdiction requirement protects against a "vast migration" to the United States of international arbitration suits that bear no relation to the United States. Even though, under Jain v. de Méro, a court does not have to have subject matter jurisdiction in order to compel arbitration in its own district, it still must have personal jurisdiction over the parties. So, although a court could conceivably force two foreign parties to submit to arbitration in the United States, it first would have to be established that they had minimum contacts with that district. In addition, even if the court does have personal jurisdiction over the parties, a forum non conveniens argument is still open for either foreign party to

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between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract.

Id.; see id. ¶ 102. Paragraph 102 provides:

On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

Id.

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191 Jain v. de Méro, 51 F.3d at 691.
192 Id.; see supra note 80 and accompanying text.
193 51 F.3d at 691; see supra notes 46-55 and accompanying text.
194 51 F.3d at 691.
195 Id.
196 Id.
197 See Asahi Metal Ind. v. Superior Court of California, 480 U.S. 102, 113-14 (1987).
make as grounds for dismissal.\textsuperscript{198}

The court limited the scope of its decision to the facts of this case: one foreign party can compel another foreign party to submit to arbitration in a federal district in the United States, but only if their arbitration agreement does not specify a location for arbitration and the parties have minimum contacts in that district.\textsuperscript{199}

V. Conclusion

Under the Seventh Circuit's decision, a foreign entity could be forced to submit to arbitration in any district in the United States in which it has minimum contacts, if it enters into a contract with another foreign entity that has an arbitration clause that fails to specify a site for arbitration.\textsuperscript{200} The court remarked that if a foreign party wants to avoid this result and ensure that it can control where it has to arbitrate, it should specify a site in the agreement.\textsuperscript{201}

The Convention was adopted in order to promote stability and consistency in international commercial dealings.\textsuperscript{202} It could be argued that the ruling in \textit{Jain} does nothing to further that cause in that a foreign party, once it signs an arbitration clause that does not specify a site, could be subjected to arbitration in any of a multitude of districts where it has merely minimum contacts.

If the Seventh Circuit had declined to compel arbitration in its own district, that would not necessarily have contravened the Convention's mandate that all arbitration clauses be enforced. It simply would have meant that the parties would have had to go to some other jurisdiction, such as a French court, to have their arbitration clause enforced.

The \textit{Mitsubishi Motors} Court wrote that: "Unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," there should be no exception to the federal policy of enforcing arbitration agreements.\textsuperscript{203} In this case, Congress has clearly "evinced its intentions" in section 4 — a court can compel arbitration in its own district, \textit{but only if it has title 28 jurisdiction}.\textsuperscript{204}

\begin{itemize}
\item \textsuperscript{198} In fact, the court of appeals appears to be inviting such an argument from the respondent-appellee in the last paragraph of its decision, reminding de Méré that: "the defendant may still invoke \textit{forum non conveniens} arguments." 51 F.3d at 692; \textit{see supra} note 39 and accompanying text.
\item \textsuperscript{199} 51 F.3d at 692; \textit{see supra} notes 29-40 and accompanying text.
\item \textsuperscript{200} 51 F.3d at 692.
\item \textsuperscript{201} Id.
\item \textsuperscript{203} Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1st Cir. 1985); \textit{see supra} note 104 and accompanying text.
\item \textsuperscript{204} \textit{See} 9 U.S.C. \textsection 4 (1994).
\end{itemize}
Because title 28 jurisdiction was lacking in *Jain v. de Méré*, the Seventh Circuit appears to have contradicted that intention.

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