Washington and Lee Law Review

Volume 42 | Issue 3 Article 8

Summer 6-1-1985

Predispute Agreements to Arbitrate Claims Arising Under the Commodity Exchange Act

PREDISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER THE COMMODITY EXCHANGE ACT

The Commodity Exchange Act (CEA)[1] regulates trading on the United States contract markets.[2] Section 5a(11)[3] of the CEA provides that each contract market shall provide a fair and equitable procedure through arbi-

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1. Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1982). The current Commodity Exchange Act (CEA) is the result of a long history of amendments. *See* 1 P. JOHNSON, COMMODITIES REGULATION xxv (1982) (discussing development of CEA); Stassen, *The Commodity Exchange Act in Perspective,* 39 WASH. & LEE L. REV. 825, 825-43 (1982) (review of history of futures trading legislation in United States). In 1982 Congress enacted the most recent amendments to the CEA by passing the Futures Trading Act of 1982. *See* Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983) (codified as amended in scattered sections of 7 U.S.C. §§ 1-26 (1982)); Connolly, *A Review of the Futures Trading Act of 1982,* 6 CORP. L. REV. 342, 342-59 (analysis of Futures Trading Act of 1982).

2. *See* H. FRIEDMAN, SECURITIES AND COMMODITIES ENFORCEMENT 159-72 (1981) (discussion of regulation and enforcement under CEA). The CEA defines commodities broadly. *See* 7 U.S.C. § 2 (1982) (defining commodities as 28 enumerated agricultural products and all other goods, articles, services, rights, and interests in which contracts for future delivery are presently or in future dealt in, except onions). Commodities trading consists of contracts to buy or sell commodities at a future date. *See* 1 P. JOHNSON, *supra* note 1, at § 1.03 (1982). Contracts to buy or sell commodities at a future date are futures contracts. *Id.* A board of trade is any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling commodities or receiving commodities for sale on consignment. 7 U.S.C. § 2 (1982). A board of trade that complies with and carries out the conditions and requirements of § 5 of the CEA may be designated a contract market by the Commodity Futures Trading Commission. 7 U.S.C. § 7 (1982). The CEA restricts all trading in futures contracts to the contract markets. 7 U.S.C. § 6(a) (1982). The vast majority of futures contracts do not result in the actual delivery of the commodity but are extinguished through an offsetting transaction. *See* P. JOHNSON, *supra* note 1, at § 1.04 (discussion of offset transactions). An offset transaction occurs when a party to a futures contract subsequently enters the futures market to obtain the same type of contract but with the opposite obligation of his first contract. *Id.* For example, a party whose first contract obligates that party to sell wheat for September delivery will acquire a second contract to buy wheat for September delivery, thereby offsetting the first contract. *Id.* A market price fluctuation between the two transactions would either require the offsetting party to pay the price difference or entitle the offsetting party to receive money, depending upon the nature of the first contract and the direction in which the market price moved. *Id.*

3. 7 U.S.C. § 7a(11) (1982). In 1974 Congress amended the CEA by passing the Commodity Futures Trading Commission Act. *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended in scattered sections of 7 U.S.C. §§ 1-26 (1982)). Section 209 of the Commodity Futures Trading Commission Act added § 5a(11) to the CEA requiring contract markets to provide a fair, equitable and voluntary procedure through arbitration or otherwise for the settlement of customer claims of less than $15,000 against any contract market member or contract market member employee. Pub. L. No. 93-463, § 209, 88 Stat. 1389, 1401 (1974) (codified at 7 U.S.C. § 7a(11)). Congress enacted § 209 of the Commodity Futures Trading Commission Act of 1974 to encourage the informal resolution of contract market customer complaints. H. R. REP. No. 93-975, 93d Cong., 2d Sess. 22 (1974). In 1982, Congress enacted § 217 of the Futures Trading Act of 1982 which eliminated the $15,000 ceiling on arbitrable claims. *See* Futures Trading Act of 1982, Pub. L.

tration or otherwise for the settlement of customer claims against any contract market member or employee of any contract market member.[4] Section 5a(11) further provides that a customer's use of the fair and equitable procedure for the settlement of the customer's claim must be voluntary.[5] Additionally, section 17(b)(10)[6] of the CEA requires registered futures associations[7] to provide the same procedure as defined in section 5a(11) for the settlement of customer claims against any futures association member or employees of any futures association member.[8] Sections 5a(11) and 17(b)(10) of the CEA

No. 97-444, § 217, 96 Stat. 2294 (1983). Congress enacted § 217 of the Futures Trading Act of 1982 to promote further the use of arbitration for the resolution of CEA disputes. *See* H. R. REP. No. 565, Part 1, 97th Cong., 2d Sess. 56 (1982) (purpose of amendments to §§ 5a(11) and 17(b)(10) of CEA is to enhance attractiveness of arbitration as out-of-court forum for resolution of customer-contract market member disputes), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS. 3871, 3905; 46 Fed. Reg. 60,834 (1981) (stated purpose of amendments to §§ 5a(11) and 17(b)(10) of CEA is to encourage customer use of arbitration).

4. 7 U.S.C. § 7a(11) (1982). Section 5a(11) of the CEA provides that the term "customer" as used in § 5a(11) shall not include another member of the contract market. *Id.* Section 101 of the Commodity Futures Trading Commission Act of 1974 created the Commodities Futures Trading Commission (CFTC) which replaced the Commodity Exchange Authority. *See* 7 U.S.C. § 4a (1982) (establishing CFTC). In 1976 the CFTC, under § 5a(11) of the CEA, adopted regulations that established standards of fairness, equitableness and voluntariness which the required arbitration procedures of the contract markets had to satisfy. *See* 7 U.S.C. § 7a(11) (1982) (contract markets must provide fair, equitable and voluntary procedure through arbitration or otherwise for settlement of customer claims); 17 C.F.R. §§ 180.1-180.5 (1984) (CFTC regulations concerning arbitration and other dispute resolution procedures); *infra* notes 63-67 and accompanying text (discussing CFTC regulation § 180.2 which establishes standards for fair and equitable arbitration procedures).

5. 7 U.S.C. § 7a(11) (1982); *see infra* notes 68-75 and accompanying text (discussing CFTC regulation § 180.3 which establishes standards for voluntary arbitration procedures).

6. 7 U.S.C. § 21(b)(10) (1982). Section 17(b)(10) of the CEA provides that the term "customer" as used in § 17(b)(10) shall not include a futures commission merchant or a floor broker. *Id.* The CFTC regulations that establish the standards of fairness, equitableness and voluntariness of arbitration procedures also apply to registered futures association procedures. 17 C.F.R. §§ 180.1-180.5 (1984); *see infra* notes 62-76 and accompanying text (discussing CFTC regulations §§ 180.2 and 180.3 which contain standards for fair, equitable and voluntary arbitration procedures).

7. *See* 1 P. JOHNSON, *supra* note 1, at §§ 1.89-1.92 (1982) (discussion of registered futures associations). In response to the growing number of commodity firms electing not to belong to contract markets because of increased membership costs and the elimination of minimum commission rates for contract market members, Congress enacted in 1974 a new § 17 to the CEA. *See id.;* 7 U.S.C. § 21 (1982) (authorizing registered futures associations). Section 17 of the CEA encourages commodities firms to join a futures association to avoid the additional fees, charges and regulatory requirements that § 17 of the CEA authorizes the CFTC to impose on nonjoiners. 1 P. JOHNSON, *supra* note 1, at § 1.89; *see* 7 U.S.C. §§ 21(d), (e) (1982) (authorizing CFTC to levy additional fees and charges and to impose additional regulatory requirements and obligations on nonmembers of registered futures associations). Through the creation of registered futures associations Congress alleviated the growing burden on the CFTC of regulating independent commodity firms and merchants by assigning a self-regulatory role to futures associations under close CFTC oversight. *See* 1 P. JOHNSON, supra note 1, at § 1.89 (discussing registered futures associations); 7 U.S.C. § 21 (1982) (terms and conditions imposed on registered futures associations).

8. 7 U.S.C. § 21(b)(10) (1982).

represent express statements of congressional intent to encourage arbitration as a means of settling disputes between customers and members of commodity markets and registered futures associations.[9]

The United States Arbitration Act (Arbitration Act)[10] governs arbitration agreements contained in contracts between customers and commodity market members or futures association members, and in all other contracts involving interstate commerce.[11] Section 2[12] of the Arbitration Act provides that an arbitration agreement in a contract involving interstate commerce shall be valid, irrevocable, and enforceable, except when grounds exist at law or in equity for the revocation of any contract.[13] In *Wilko v. Swan,*[14] the United States Supreme Court, notwithstanding section 2 of the Arbitration Act, invalidated a predispute agreement to arbitrate federal securities law claims by holding that the Securities Act of 1933 ('33 Act),[15] and the policy behind its enactment, constituted grounds for invalidating the predispute arbitration agreement.[16] The Supreme Court, however, has not yet addressed whether the *Wilko* doctrine is applicable on analogous grounds to predispute agreements to arbitrate claims arising under the CEA.[17]

In *Wilko,* a customer of a securities brokerage firm brought an action against the firm under section 12(2) of the '33 Act.[18] The customer's

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9. *See* 7 U.S.C. §§ 7a(11), 21(b)(10) (1982) (contract markets and registered futures associations must provide fair, equitable and voluntary procedure through arbitration or otherwise for settlement of customers' claims against any contract market or futures association, member or employee); *supra* note 3 (discussing legislative history of Commodity Futures Trading Commission Act of 1974 and Futures Trading Act of 1982). Legislative history addressing the arbitration of disputes arising under the CEA is scarce.

10. 9 U.S.C. §§ 1-208 (1982). Congress enacted the United States Arbitration Act (Arbitration Act) to promote arbitration as an alternative to the expense and delay of litigation. S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924); H. R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924). The Arbitration Act overruled the common law rule that an agreement between parties to settle any dispute between them by arbitration is against public policy and void as an attempt to oust the courts of jurisdiction over the dispute. National R.R. Passenger Corp. v. Missouri Pac. R. Co., 501 F.2d 423, 426 (8th Cir. 1974).

11. 9 U.S.C. § 2 (1982).

12. *Id.*

13. *Id.; see* World Brilliance Corp. v. Bethlehem Steel Co., 342 F.2d 362, 364 (2d Cir. 1965) (word "revocation" in § 2 of Arbitration Act making arbitration agreements valid and enforceable, except upon legal and equitable grounds for revocation of any contract, applies to cases in which courts will rescind arbitration agreement for reasons such as fraud, duress, or undue influence).

14. 346 U.S. 427 (1953).

15. 15 U.S.C. §§ 77a-77bbbb (1982).

16. *Wilko,* 346 U.S. at 438; *see supra* notes 18-41 and accompanying text (discussion of *Wilko); infra* notes 42-56 and accompanying text (discussion of *Wilko* doctrine application to Securities Exchange Act of 1934).

17. *See infra* notes 78-132 and accompanying text (discussing federal court of appeals and federal district court decisions addressing whether *Wilko* doctrine applies to predispute agreements to arbitrate claims arising under CEA).

18. *Wilko,* 346 U.S. at 428. Section 12(2) of the Securities Act of 1933 ('33 Act) provides that any person who offers or sells a security in interstate commerce by means of a prospectus

complaint in *Wilko* alleged that the firm induced the customer to sell his stock at a loss through misrepresentations and omissions of material information regarding the stock.[19] The margin agreement between the customer and the firm contained a clause which provided that any controversy arising between the two parties would be resolved through arbitration pursuant to the arbitration laws of the state of New York.[20] Upon receipt of the complaint from the customer, the brokerage firm moved to stay the trial pursuant to section 3[21] of the Arbitration Act until an arbitration of the dispute took place in accordance with the margin agreement.[22] The United States District Court for the Southern District of New York denied the brokerage firm's motion to stay the proceedings pending arbitration on the grounds that the predispute arbitration agreement deprived the customer of the judicial rememdy that section 12(2) of the '33 Act provided.[23] The United States Court of Appeals for the Second Circuit reversed on the grounds that the '33 Act did not prohibit the enforcement of the arbitration agreement.[24] *Wilko* presented the United States Supreme Court with the question of whether the '33 Act invalidated an otherwise valid agreement between a brokerage firm and its customer to arbitrate future controversies arising between them.[25]

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or oral agreement that misstates or omits any material facts, and who fails to carry the burden of proof of his lack of knowledge thereof, shall be liable to the person purchasing the security from him. 15 U.S.C. § 77l (2) (1982).

19. *Wilko,* 346 U.S. at 428-29. The customer's complaint in *Wilko* specifically alleged that the brokerage firm induced the customer to purchase 1600 shares of the common stock of Air Associates, Inc., by misrepresentations that a merger contract with the Borg Warner Corp. would increase the value of Air Associates common stock 6 dollars per share. *Id.* The customer's complaint further alleged that the brokerage firm misrepresented that financial interests were buying up Air Associates common stock for the speculative profit. *Id.* at 429. The customer's complaint in *Wilko* also alleged that the brokerage firm failed to inform the customer that an Air Associates director was then selling his own Air Associates stock, including some or all of the stock that the customer purchased. *Id.* The customer in *Wilko* sold his Air Associates stock at a loss two weeks after he purchased the stock from the brokerage firm. *Id.*

20. *Id.* at 432 n.15. The arbitration agreement in *Wilko* provided that any arbitration between the parties would be subject to the rules of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Arbitration Committee of the New York Stock Exchange or any other Exchange having jurisdiction over the controversy, at the election of the customer. *Id.*

21. 9 U.S.C. § 3 (1982). Section 3 of the Arbitration Act provides that if any suit is brought in federal court upon an issue referable to arbitration under a written agreement, the court shall, on the motion of one of the parties, stay the trial of the action until arbitration has been had in accordance with the terms of the agreements. *Id.; see supra* note 10 and accompanying text (discussing purpose of Arbitration Act).

22. *Wilko,* 346 U.S. at 429; *see supra* note 20 and accompanying text (discussing arbitration agreement in *Wilko).*

23. Wilko v. Swan, 107 F. Supp. 75, 79 (S.D.N.Y. 1953). Section 12(2) of the '33 Act provides that a defrauded purchaser of stock may sue the seller of that stock at law or in equity. 15 U.S.C. § 77l(2) (1982); *see supra* note 18 and accompanying text (discussing § 12(2) of '33 Act).

24. Wilko v. Swan, 201 F.2d 439, 445 (2d Cir. 1953).

25. *Wilko,* 346 U.S. at 430.

On the basis of sections 12(2), 14, and 22(a) of the '33 Act[26] and the policy underlying the enactment of the '33 Act, the *Wilko* Court held that the '33 Act invalidates predispute arbitration agreements between a brokerage firm and its customer.[27] The Court noted that Congress enacted the '33 Act to protect investors by requiring issuers, underwriters, and dealers of securities to make full and fair disclosure of the character of securities sold in interstate commerce and to prevent fraud in the sale of securities in interstate commerce.[28] The Court stated that to effectuate the congressional intent to protect investors, section 12(2) of the '33 Act provides investors with a special right to recover for misrepresentations and omissions made in connection with the purchase or sale of a security in interstate commerce without having to bear the burden of proving scienter[29] on the part of the seller.[30] The *Wilko* Court noted that section 22(a)[31] of the '33 Act provided section 12(2)'s right to recover for misrepresentation with several advantages including the right to bring suit in federal district court where the claimant has nationwide service of process, a wide choice of venue and no jurisdictional amount requirements.[32] The Supreme Court further stated that section 14[33] of the '33 Act guarantees the rights of investors under the '33 Act by providing that any stipulation binding any person acquiring any security to waive compliance with any provision of the '33 Act is void.[34] The Court ruled that section 14 of the '33 Act invalidated the arbitration agreement

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26. 15 U.S.C. §§ 77l(2), 77n & 77v(a) (1982); *see supra* note 18 and accompanying text (discussing § 12(2) of '33 Act); *infra* notes 33-34 and accompanying text (discussing § 14 of '33 Act); *infra* notes 31-32 and accompanying text (discussing § 22(a) of '33 Act).

27. *Wilko,* 346 U.S. at 430-38.

28. *Id.* at 431 (citing S. REP. No. 47, 73d Cong., 1st Sess. 1, (1933)).

29. *See* Woodward v. Wright, 266 F.2d 108, 116 (10th Cir. 1959). In *Woodward v. Wright,* the United States Court of Appeals for the Tenth Circuit discussed the difference between an action for fraud under § 12(2) of the '33 Act and a common-law action for fraud. *Id.* The *Woodward* court noted that in a common-law action for fraud, the buyer must prove that the seller knew that the fraudulent statements were false or that the seller could have known in the exercise of reasonable care. *Id.* The Tenth Circuit in *Woodward* then stated that a § 12(2) action differs from a common-law action for fraud in that once a buyer proves falsity, materiality and excusable ignorance, the buyer is entitled to recover unless the seller proves that the seller did not know that the statements were false or could not have known in the exercises of reasonable care. *Id.*

30. *Wilko,* 346 U.S. at 431; *see supra* note 18 and accompanying text (discussing § 12(2) of '33 Act).

31. 15 U.S.C. § 77v(a) (1982). Section 22(a) of the '33 Act concerns the jurisdiction of offenses and suits under the '33 Act. *Id.* Section 22(a) specifically provides that United States district courts have jurisdiction of offenses and violations under the '33 Act, and, concurrent with state courts, of all suits in equity and at law to enforce any liability or duty that the '33 Act creates. *Id.*

32. *Id.*

33. 15 U.S.C. § 77n (1982). Section 14 of the '33 act provides that any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of the '33 Act is void. *Id.*

34. *Wilko,* 346 U.S. at 434, 435.

contained in the margin agreement between the customer and brokerage firm.[35] The *Wilko* Court reasoned that the arbitration agreement constituted a stipulation under section 14 that waived compliance with the provisions of section 22(a) which provide a security buyer with the right to select a judicial forum.[36] In essence, the *Wilko* Court held that the arbitration agreement directly violated section 14, the anti-waiver provision of the '33 Act, by waiving the customer's right to a judicial remedy under the '33 Act.[37]

In holding that sections 22(a) and 14 of the '33 Act invalidated the arbitration agreement between the customer and brokerage firm, the *Wilko* Court rejected the brokerage firm's contention that the Arbitration Act, which encourages the arbitration of disputes, did not conflict with section 22(a) of the '33 Act.[38] The firm argued that arbitration is merely another form of trial and that arbitration does not relieve the security seller of liability or burden of proof.[39] The Supreme Court stated that when a security buyer waives his right to sue in court by signing a predispute arbitration agreement, the security buyer gives up more than he would in an ordinary business transaction and the buyer does so at a time when he is less able to realize the disadvantages the '33 Act places on the seller.[40] The *Wilko* Court, therefore, ruled that the '33 Act's purpose of protecting investors, as evidenced by the special right to recover for misrepresentation that section 22(a) affords investors and the anti-waiver provision of section 14, outweighed the Arbitration Act's purpose of promoting dispute resolution through arbitration.[41]

The courts have extended the *Wilko* doctrine of invalidating predispute agreements to arbitrate claims arising under the '33 Act on analogous policy and statutory grounds to claims arising under the Securities Exchange Act of 1934 ('34 Act).[42] For example, in *Merrill Lynch, Pierce, Fenner & Smith,*

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35. *Id.* at 437; *see supra* note 20 and accompanying text (discussing arbitration agreement in *Wilko).*

36. *Wilko,* 346 U.S. at 434, 435; *see supra* notes 31-34 and accompanying text (discussing §§ 14 and 22(a) of '33 Act).

37. *Wilko,* 346 U.S. at 434, 435.

38. *Id.* at 433.

39. *Id.*

40. *Id.* at 435. The Supreme Court in *Wilko* stated that even though the provisions of the '33 Act would apply in arbitration, the effectiveness of the '33 Act provisions in arbitration, relative to judicial proceedings, would be lessened. *Id.* The Court reasoned that a claim under § 12(2) of the '33 Act required legal conclusions as to the issues of burden of proof, reasonable care, and material fact, and that a judge was better equipped than an arbitrator to make such legal conclusions. *Id.* at 436. The Court noted that the Arbitration Act contains no provision for judicial determination of legal issues. *Id.*

41. *See Wilko,* 346 U.S. at 430-38.

42. 15 U.S.C. §§ 78a-78lll (1982); *see, e.g.,* Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1030 (6th Cir. 1979) (Wilko doctrine applies to claims arising under '34 Act); Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Moore, 590 F.2d 823, 827 (10th Cir. 1978) (Wilko doctrine applicable to '34 Act claims); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 835 (7th Cir. 1977) (Wilko doctrine applies to SEC rule 10b-5 claims absent presence of international concerns). *But cf.* Scherk v. Alberto-Culver Co., 447 U.S. 506, 519,

Inc., v. Moore,[43] a customer brought an action against his broker alleging that the broker defrauded the customer in the handling of the customer's investments in violation of section 17(a)[44] of the '33 Act, section 10(b)[45] of the '34 Act, and Securities and Exchange Commission (SEC) rule 10b-5.[46] The United States District Court for the Northern District of Oklahoma ordered the parties to proceed to arbitration in accordance with the terms of the arbitration agreement contained in the parties' investment contracts.[47] The United States Court of Appeals for the Tenth Circuit reversed and held the arbitration agreement void with respect to all three of the customer's claims.[48]

In examining the fact situation in *Moore,* the Tenth Circuit first held that the *Wilko* doctrine, which invalidates predispute agreements to arbitrate claims arising under the '33 Act, applied fully to the customer's claim under the '33 Act on the grounds that no difference existed between the section 12(2) remedy in *Wilko* and the section 12(2) remedy in *Moore.*[49] The Tenth Circuit then addressed whether the *Wilko* doctrine applied to the customer's claims arising under the '34 Act.[50] The *Moore* court stated that the policy of investor protection underlying the enactment of the '33 Act does not differ from the policy underlying the enactment of the '34 Act.[51] The Tenth Circuit also noted that rule 10b-5, promulgated pursuant to section 10(b) of the '34

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520 (1974) (agreement to arbitrate dispute arising out of international commercial transaction enforceable even though claim arose under '34 Act). *See generally,* Greenbaum, *Avoiding the Protections of the Federal Securities Laws: The Anti-waiver Provisions,* 20 SANTA CLARA L. REV. 49, 49-73 (1980) (discussing *Wilko* doctrine applicability of '33 act and '34 Act, and *Scherk* exception to *Wilko* doctrine).

43. 590 F.2d 823, 825 (10th Cir. 1978).

44. 15 U.S.C. § 77q(a) (1982). Section 17(a) of the '33 Act proscribes the sale or purchase or any security through fraud or through the use of materially false or misleading statements or omissions. *Id.*

45. 15 U.S.C. § 78j(b) (1982). Section 10(b) of the '34 Act prohibits any person, through the use of any means or instrumentality of interstate commerce, from using or employing, in connection with any security, any manipulative or deceptive device or contrivance in contravention of any rules and regulations that the Security Exchange Commission (SEC) might prescribe for the protection of the public interest and investors. *Id.*

46. 17 C.F.R. § 240.10b-5 (1984). Rule 10b-5 prohibits any person, through the use of any means or instrumentality of interstate commerce, from using or employing any deceptive or manipulative device in connection with the purchase or sale of any security. *Id.*

47. *Moore,* 590 F.2d at 825. The arbitration agreement in *Moore* provided that the parties would settle any future controversy between the parties by arbitration before the National Association of Securities Dealers, or the New York Stock Exchange, or the American Stock Exchange. *Id.* at 825 n.2. The arbitration agreement provided that the customer would have the right to elect which arbitral tribunal would conduct the arbitration. *Id.*

48. *Id.* at 829.

49. *Id.* at 827; *see supra* note 18 and accompanying text (discussing § 12(2) of '33 Act).

50. *Moore,* 590 F.2d at 827. The brokerage firm in *Moore* argued that *Wilko* is limited to § 12(2) of the '33 Act and that *Wilko* is not applicable to arbitration agreements concerning '34 Act claims. *Id.*

51. *Id.* The *Moore* court stated that the purpose of the rule 10b-5 remedy is to protect "vulnerable" investors from "aggressive and sophisticated" sellers. *Id.*

Act, provides investors with a judicial remedy for claims arising under section 10(b) of the '34 Act.[52] Finally, the *Moore* court noted that section 29(a)[53] of the '34 Act, which is identical to section 14 of the '33 Act, voids any stipulation that binds a person to waive compliance with any provision of the '34 Act or any rule or regulation under the '34 act.[54] The *Moore* court held that the anti-waiver provision of the '34 Act, section 29(a), forbade a waiver of the judicial remedy pursuant to rule 10b-5 through a predispute arbitration agreement.[55] The courts are virtually unanimous in applying the *Wilko* doctrine to the '34 Act on the grounds enunciated in *Moore.*[56]

Wilko and the cases that apply *Wilko* to the '34 Act have interpreted section 14 of the '33 Act and section 29(a) of the '34 Act to void predispute arbitration agreements as a means of enforcing compliance with the judicial remedy afforded by section 12(2) of the '33 Act and rule 10b-5 under the '34 Act.[57] Underlying these statutory interpretations is the policy of protecting "vulnerable" security investors from "aggressive and sophisticated" security sellers.[58] Whether the *Wilko* doctrine applies to claims arising under the CEA depends upon the existence of an anti-waiver provision similar to section 14 of the '33 Act or section 29(a) of the '34 Act in the CEA and the policy considerations underlying the enactment of the CEA.[59]

Unlike the '33 Act and '34 Act, the CEA specifically encourages arbitration of disputes arising under the CEA.[60] Sections 5a(11) and 17(b)(10) state

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52. *Id.; see supra* note 46 and accompanying text (discussing rule 10b-5 remedy).

53. 15 U.S.C. § 78cc(a) (1982). Section 29(a) of the '34 Act provides that any condition, stipulation, or provision binding any person to waive compliance with any provision of the '34 Act or of any rule or regulation thereunder, or of any rule of an exchange is void. *Id.; see also supra* notes 33-34 and accompanying text (discussing § 14 of '33 Act).

54. *Moore,* 590 F.2d at 827.

55. *Id.* The Tenth Circuit in *Moore* stated that through § 29(a) of the '34 Act, Congress carried the investor protection policy of § 14 of the '33 Act into the '34 Act. *Id.; see supra* notes 33-34 and accompanying text (discussing § 14 of '33 Act). The *Moore* court stated that even though arbitration would be faster and less costly to the public, the policy of investor protection underlying the anti-waiver provision should prevail. *Moore,* 590 F.2d at 827.

56. *See supra* note 42 and accompanying text (discussing cases that hold *Wilko* doctrine applicable to '34 Act claims). The courts have created several exceptions to the *Wilko* doctrine which invalidates predispute agreements to arbitrate claims arising under the federal securities laws. *See* Scherk v. Alberto-Culver Co., 447 U.S. 506, 519, 520 (1974) (agreement to arbitrate dispute arising out of international commercial transaction enforceable even though claim arose under '34 Act); Tullis v. Kohlmeyer & Co., 551 F.2d 632, 637, 638 (1977)(*Wilko* doctrine does not extend beyond cases involving unsophisticated investors to cases between stock exchange members); *cf.* Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238, 1241 (1985) (Arbitration Act requires district court to grant motion to compel arbitration of state claims pendant to federal securities laws claims).

57. *See supra* notes 14-56 and accompanying text (discussing *Wilko* doctrine as applied to '33 Act and '34 Act).

58. *Moore,* 590 F.2d at 827.

59. *See infra* notes 60-168 and accompanying text (discussing applicability of *Wilko* doctrine to claims arising under CEA).

60. *See supra* notes 3-9 and accompanying text (discussing §§ 5a(11) and 17(b)(10) of

that contract markets and registered futures associations must provide a "fair", "equitable" and "voluntary" procedure through arbitration or otherwise for the settlement of customer claims against any member or employee of a contract market or registered futures association.[61] To clarify the general language of sections 5a(11) and 17(b)(10) of the CEA, the Commodity Futures Trading Commission (CFTC) promulgated regulations sections 180.1 to 180.5.[62] Regulation section 180.2[63] defines the minimum requirements that a contract market or registered futures association must provide for a fair and equitable procedure for the settlement of customer claims under sections 5a(11) and 17(b)(10) of the CEA.[64] Regulation section 180.2 requires that customers have the choice of an arbitration panel or other decision maker of which at least a majority are associated with a contract market or any member or employee of a contract market, and that each party has the right to be represented by counsel before the decision maker.[65] Regulation section 180.2 also requires that the procedure for the settlement of customer claims provide for the prompt settlement of claims, that notice to the parties be adequate, that there be an opportunity for a prompt hearing, and that the hearing not be so informal as to deny due process.[66] Finally, regulation section 180.2 requires that each party be entitled to examine other parties, witnesses and relevant documents, that a record of the hearing be available upon request, that the arbitral tribunal render the settlement award promptly and in writing, that the settlement award be final, and that the procedure shall not impose any restrictions on the jurisdiction or venue of any court to enforce an award so rendered.[67]

CEA); *supra* text accompanying notes 57-58 (§ 14 of '33 Act and § 29(a) of '34 Act void predispute agreements to arbitrate claims arising under '33 and '34 Acts). The CEA does not contain an anti-waiver provision similar to § 14 of the '33 Act or § 29(a) of the '34 Act. *See* 7 U.S.C. §§ 1-26 (1982).

61. 7 U.S.C. §§ 7a(11), 21(b)(10) (1982).

62. *See* 17 C.F.R. §§ 180.1-180.5 (1984) (CFTC regulations concerning arbitration and other dispute resolution procedures); *supra* note 4 and accompanying text (discussing background of CFTC regulations); *infra* notes 63-76 and accompanying text (discussing CFTC regulations). An arbitration agreement that fails to comply with the CFTC regulations is invalid and unenforceable. *See, e.g.*, Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1179 (2d Cir. 1977) (arbitration agreements that do not conform to CFTC regulations are invalid); Wanty v. Sprow, 1977-80 COMM. FUT. L. REP. (CCH) 20,548 AT 22,556 (S.D.N.Y. 1978) (court cannot compel arbitration if arbitration agreement does not comply with CFTC regulation § 180.3); Markowitz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 105 Misc. 2d 971, 972, 430 N.Y.S.2d 774, 775 (N.Y. Sup. Ct. 1980) (arbitration agreements that do not conform to CFTC regulation § 180.3 are void).

63. 17 C.F.R. § 180.2 (1984).

64. *Id.; see supra* notes 3-9 and accompanying text (discussing §§ 5a(11) and 17(b)(10) of CEA).

65. 17 C.F.R. § 180.2 (1984).

66. *Id.*

67. *Id.* CFTC regulation § 180.2 provides that there is no right of appeal to any entity within the contract market that can overturn the settlement procedure decision and that the

In addition to requiring contract markets and futures associations to provide a procedure through arbitration or otherwise for the settlement of customer claims that is fair and equitable, sections 5a(11) and 17(b)(10) of the CEA require that such procedure be voluntary.[68] While sections 5a(11) and 17(b)(10) do not concern expressly the validity of a predispute arbitration agreement between a customer and contract market member,[69] regulation section 180.3 addresses the requirement that a predispute arbitration agreement be voluntary.[70] Regulation section 180.3 requires that the predispute arbitration agreement not be made a condition precedent to the customer's use of the contract market member's offered services and that the customer separately endorse the arbitration agreement.[71] Additionally, regulation section 180.3 provides that the predispute arbitration agreement may not require the customer to waive his right to seek reparations under section 14[72] of the CEA and that the agreement inform the customer of his right to select the arbitration forum.[73] Finally, regulation section 180.3 requires that the predispute arbitration agreement include, in large boldface type, the cautionary

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only right of appeal is that which exists under applicable law. 17 C.F.R. § 180.2(f) (1984). The law applicable to a predispute agreement to arbitrate claims arising under the CEA is the Arbitration Act. 9 U.S.C. § 2 (1982); *see supra* notes 10-11 and accompanying text (discussing Arbitration Act). Under the Arbitration Act, the grounds upon which a court will vacate, modify or correct an arbitration award, or direct a rehearing by the arbitrators, are very limited. *See* 9 U.S.C. §§ 10, 11 (1982) (setting forth grounds upon which a court will vacate, modify or correct an arbitration award, or direct a rehearing by the arbitrators).

68. 7 U.S.C. §§ 7a(11), 21(b)(10) (1982); *see supra* notes 3-9 and accompanying text (discussing §§ 5a(11) and 17(b)(10) of CEA).

69. *See* 7 U.S.C. §§ 7a(11), 21(b)(10) (1982). Sections 5a(11) and 17(b)(10) of the CEA require contract markets and registered futures associations to provide a fair, equitable and voluntary procedure through arbitration or otherwise to settle customers' claims but sections 5a(11) and 17(b)(10) neither sanction nor prohibit the use of predispute arbitration agreements). *See id.*

70. 17 C.F.R. § 180.3 (1984). The CFTC enacted regulation § 180.3 in response to the widespread practice by commodities brokerage firms of compelling customers to sign predispute arbitration clauses as a precondition to doing business with the firm. 41 Fed. Reg. 27,526 (1976); 41 Fed. Reg. 42,945 (1976). The CFTC found compulsory predispute arbitration agreements to be so prevalent that a customer could be frozen out of the futures market if he refused to sign a predispute arbitration agreement. *Id.* The CFTC issued regulation § 180.3 to insure that the customer's agreement to arbitrate was truly voluntary. 42 Fed. Reg. 27,526-28 (1976).

71. 17 C.F.R. § 180.3 (1984); *see* Ames v. Merrill Lynch, Pierce, Fenner & Smith, 567 F.2d 1174, 1179-81 (2d Cir. 1977) (court held compulsory predispute arbitration agreement unenforceable under CFTC regulation § 180.3).

72. 7 U.S.C. § 18 (1982). Section 14 of the CEA provides that any person complaining of any violation of the CEA or any rule, regulation or order thereunder by another person required to be registered under the CEA, may file a complaint for damages with the CFTC within two years after the claim arises. *Id.* The CFTC may award damages to the complainant if it finds that a violation of the CEA resulting in monetary injury to the complainant has occurred. *Id.; see* 1 P. JOHNSON, *supra* note 1, at § 1.84 (discussing CEA reparations proceedings).

73. 17 C.F.R. § 180.3 (1984).

language spelled out in regulation section 180.3 (b)(6)[74] which informs the customer of the consequences of signing an arbitration agreement and notifies the customer that he need not sign the arbitration agreement.[75] Courts have held that predispute arbitration agreements which fail to meet the requirements of the CFTC regulations are invalid.[76] The question remains whether a predispute arbitration agreement that complies with the CFTC regulations is nonetheless invalid under the *Wilko* doctrine which invalidates predispute agreements to arbitrate federal securities law claims.[77]

The majority of the courts that have addressed the issue of whether a predispute arbitration agreement that complies with the CFTC regulations is valid in light of the *Wilko* doctrine have enforced the agreement.[78] For

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74. 17 C.F.R. § 180.3(b)(6) (1984).

75. *Id.* CFTC regulation § 180.3(b) (6) requires every predispute arbitration agreement to include the following language printed in large boldface type:

> THREE FORMS EXIST FOR THE RESOLUTION OF COMMODITIES DISPUTES: CIVIL COURT LITIGATION, REPARATIONS AT THE COMMODITIES FUTURES TRADING COMMISSION (CFTC) AND ARBITRATION CONDUCTED BY A SELF-REGULATORY OR OTHER PRIVATE ORGANIZATION.
>
> THE CFTC RECOGNIZES THAT THE OPPORTUNITY TO SETTLE DISPUTES BY ARBITRATION MAY IN SOME CASES PROVIDE MANY BENEFITS TO CUSTOMERS, INCLUDING THE ABILITY TO OBTAIN AN EXPEDITIOUS AND FINAL RESOLUTION OF DISPUTES WITHOUT INCURRING SUBSTANTIAL COSTS. THE CFTC REQUIRES, HOWEVER, THAT EACH CUSTOMER INDIVIDUALLY EXAMINE THE RELATIVE MERITS OF ARBITRATION AND THAT YOUR CONSENT TO THIS ARBITRATION AGREEMENT BE VOLUNTARY.
>
> BY SIGNING THIS AGREEMENT YOU: (1) MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW: AND (2) ARE AGREEING TO BE BOUND BY ARBITRATION OF ANY CLAIMS OR COUNTERCLAIMS WHICH YOU OR [NAME] MAY SUBMIT TO ARBITRATION UNDER THIS AGREEMENT. YOU ARE NOT, HOWEVER, WAIVING YOUR RIGHT TO ELECT INSTEAD TO PETITION THE CFTC TO INSTITUTE REPARATIONS PROCEEDINGS UNDER SECTION 14 OF THE COMMODITY EXCHANGE ACT WITH RESPECT TO ANY DISPUTE WHICH MAY BE ARBITRATED PURSUANT TO THIS AGREEMENT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [NAME] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL HAVE 45 DAYS FROM THE DATE OF SUCH NOTICE IN WHICH TO MAKE THAT ELECTION.
>
> YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [NAME]. SEE 17 C.F.R. 180.1-180.5.

Id.

76. *See supra* note 62 and accompanying text (discussion of cases holding invalid predispute arbitration agreements that fail to comply with CFTC regulations).

77. *See supra* notes 62-76 and accompanying text (discussing CFTC regulations concerning arbitration); *supra* notes 14-58 and accompanying text (discussing *Wilko* doctrine).

78. *See* Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner & Smith,

example, in *Ingbar v. Drexel Burnham Lambert, Inc.*,[79] the United States Court of Appeals for the First Circuit held that a predispute arbitration agreement that complied with the CFTC regulations was valid and enforceable.[80] The plaintiff customer in *Ingbar* signed an arbitration agreement when he opened an account with the defendant commodities brokerage firm.[81] The customer in *Ingbar* later brought an action against the firm under the CEA for the loss of money invested with the firm.[82] The brokerage firm moved initially for a stay of the trial pursuant to section 3 of the Arbitration Act.[83] The United States District Court for the District of Massachusetts denied the defendant's motion with respect to the plaintiff's CEA claims.[84]

On appeal to the First Circuit, the customer in *Ingbar* argued that the CEA implicity forbids all predispute arbitration agreements between commodities brokers and their customers under the *Wilko* doctrine, and alternatively, that the arbitration agreement failed to satisfy the CFTC regulations.[85] Despite the customer's argument, the *Ingbar* court refused to extend the *Wilko* doctrine to claims arising under the CEA.[86] The First Circuit stated

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Inc., 720 F.2d 1446, 1449 (5th Cir. 1983). (arbitration of CEA claims is permissible as *Wilko* doctrine does not extend to CEA cases); Ingbar v. Drexel Burnham Lambert Inc., 683 F.2d 603, 605-06 (1st Cir. 1982) (predispute arbitration agreement that complies with CFTC regulations is valid); Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 682 F.2d 459, 460 (3d Cir. 1982) (holding predispute agreements to arbitrate CEA claims valid); Tamari v. Bache & Co. (Lebanon) S.A.L., 565 F.2d 1194, 1200 (7th Cir. 1977) (CEA does not prohibit predispute arbitration agreements), *cert. denied,* 435 U.S. 905 (1978); Corcoran v. Shearson American Express, Inc., 596 F. Supp. 1113, 1116 (N.D. Ga. 1984) (nothing in CEA or legislative history reveals congressional intent that predispute agreements to arbitrate CEA claims should not be enforceable); Hagstron v. Breutman, 572 F. Supp. 692, 700-01 (N.D. Ill. 1983) (no basis for extending *Wilko* doctrine to claims arising under CEA); Romnes v. Bache & Co., Inc., 439 F. Supp. 833, 838 (W.D. Wis. 1977) (predispute agreements to arbitrate CEA claims are valid).

79. 683 F.2d 603 (1st Cir. 1982).

80. *Id.* at 605-08; *see infra* notes 81-96 and accompanying text (discussing *Ingbar).*

81. *Ingbar,* 683 F.2d at 604. The arbitration agreement in *Ingbar* provided that the customer and brokerage firm would submit any future controversy between them to arbitration before the American Arbitration Association or the Board of Arbitration of the New York Stock Exchange. *Id.*

82. *Id.* The plaintiff in *Ingbar* alleged that the defendant brokerage firm was legally liable for $24,000 that the plaintiff lost through investments with the firm. *Id.*

83. *Id.; see supra* note 21 and accompanying text (discussing § 3 of Arbitration Act).

84. *Ingbar,* 683 F.2d at 604.

85. *Id.* at 606-08. The customer in *Ingbar* claimed that the arbitration agreement violated CFTC regulation § 180.3 (b)(1) which states that signing an arbitration agreement may not be made a precondition for the customer's utilization of the services offered by the commodities merchant. *Id.* at 607; *see* 17 C.F.R. § 180.3(b)(1) (1984). The customer claimed that the arbitration agreement violated CFTC regulation § 180.3(b)(1) because the brokerage firm told the customer that the customer had to sign the "contract" to open an account with the firm and the customer understood the term "contract" to include the account agreement and the arbitration agreement. *Ingbar,* 683 F.2d at 607; *see supra* notes 68-75 and accompanying text (discussing CFTC regulation § 180.3); *infra* note 96 and accompanying text (discussing *Ingbar* court's holding on customer's claim that arbitration agreement violated CFTC regulation § 180.3).

86. *Ingbar,* 683 F.2d at 605-06.

that *Wilko* turned on the language of specific provisions of the '33 act that have no similar counterparts in the CEA.[87] The *Ingbar* court noted that the CEA has no provision similar to section 22(a) of the '33 Act that grants plaintiffs the right to select the judicial forum,[88] nor section 14 of the '33 Act which forbids a waiver of any of the rights granted under the '33 Act.[89] The First Circuit also stated that section 5a(11) of the CEA compels contract markets to provide a fair and equitable procedure through arbitration or otherwise to settle customer claims against contract market members.[90] Finally, the *Ingbar* court noted that the CFTC promulgated regulations which specifically sanction the use of predispute arbitration agreements.[91] The First Circuit in *Ingbar* concluded, therefore, that the statutory language basis of the *Wilko* decision had no applicability to the CEA.[92]

In addition to ruling that the statutory basis of the *Wilko* decision did not apply to the CEA, the *Ingbar* court rejected the plaintiff's contention that the policy considerations underlying the *Wilko* decision applied to the CEA.[93] The First Circuit stated that the strict requirements imposed by the CFTC regulations on predispute arbitration agreements assure that commodity customers enter predispute arbitration agreements voluntarily and that the agreements are fair.[94] The *Ingbar* court ruled that the CFTC regulations satisfy the practical concerns of unequal bargaining power and broker aggressiveness that *Wilko* addressed.[95] The First Circuit in *Ingbar* found that the arbitration agreement between the customer and brokerage firm met the requirements of the CFTC regulations and, therefore, held the agreement valid and enforceable.[96]

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87. *Id.* at 605.

88. *Id.; see* 15 U.S.C. § 77v(a) (1982) (granting jurisdiction of offenses and suits under '33 Act to United States district courts and state courts); *supra* text accompanying notes 31-32 (discussing § 22(a) of '33 Act).

89. *Ingbar,* 683 F.2d at 605; *see* 15 U.S.C. § 77n (1982) (voiding stipulations binding persons acquiring securities to waive compliance with provisions of '33 Act); *supra* notes 33-34 and accompanying text (discussing § 14 of '33 Act).

90. *Ingbar,* 683 F.2d at 605; *see* 7 U.S.C. § 7a(11) (1982) (contract markets must provide fair, equitable and voluntary procedure through arbitration or otherwise for settlement of customers' claims); *supra* text accompanying notes 3-5 (discussing § 5a(11) of CEA).

91. *Ingbar,* 683 F.2d at 605; *see* 17 C.F.R. §§ 180.1-180.5 (1984) (CFTC regulations concerning arbitration and other dispute settlement procedures); *supra* text accompanying notes 62-76 (discussing CFTC regulations).

92. *Ingbar,* 683 F.2d at 605.

93. *Id.; see supra* notes 40-41 and accompanying text (discussing policy basis of *Wilko* doctrine).

94. *Ingbar,* 683 F.2d at 604; *see supra* notes 62-76 and accompanying text (discussing CFTC regulations concerning arbitration agreements).

95. *Ingbar,* 683 F.2d at 605-06.

96. *Id.* at 606-08. The *Ingbar* court rejected the customer's claim that the arbitration agreement violated CFTC regulation § 180.3(b)(1). *Id.* at 607; *see supra* note 85 and accompanying text (discussing customer's claim in *Ingbar* that arbitration agreement violated CFTC regulation § 180.3(b)(1). The *Ingbar* court ruled that given the customer's advanced education,

The few courts that have extended the *Wilko* doctrine, which invalidates predispute agreements to arbitrate claims arising under the federal securities laws, to CEA claims have done so on policy grounds.[97] In *Milani v. ContiCommodity Services, Inc.*,[98] the plaintiff, a former customer of the defendant commodities brokerage firm, brought an action against the defendant alleging violations of sections 4b and 4o of the CEA.[99] The defendant in *Milani* filed a motion to compel arbitration of the plaintiff's claims in accordance with the arbitration clause contained in the customer's agreement that the plaintiff had signed.[100] The United States District Court for the Northern District of California denied the defendant's motion to compel arbitration.[101] The *Milani* court cited *Wilko* in stating that judicial direction is essential to assure the proper application of legislation designed to protect investors and the integrity of the marketplace.[102] The district court in *Milani* concluded that because the CEA, like the '33 and '34 Acts, is designed to protect the investing public, the *Wilko* doctrine applies to invalidate predispute agreements to arbitrate CEA claims.[103]

In *Breyer v. First Nat. Monetary Corp.*,[104] the United States District Court for the District of New Jersey also extended the *Wilko* doctrine to invalidate a predispute agreement to arbitrate CEA claims.[105] The plaintiff in *Breyer,* a customer, entered a commodities trading agreement with the defendant, a commodities trading advisor.[106] The plaintiff signed a customer

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the bold type of the arbitration agreement, the plain language of the arbitration agreement, the separate signature of the arbitration agreement, and the totality of the circumstances, the arbitration agreement did not violate CFTC regulation § 180.3(b)(1). *Ingbar,* 683 F.2d at 607.

97. *See* Marchese v. Shearson Hayden Stone, Inc., COMM. FUT. L. REP. (CCH) 22,217 at 29,148-49 (9th Cir. 1984) (predispute arbitration agreement invalid as to customer's CEA claim that required statutory interpretation of CEA); Breyer v. First Nat. Monetary Corp., 548 F. SUPP. 955, 961 (D.N.J. 1982) (arbitration generally is unsuitable for CEA claims except under narrow circumstances delineated in § 5a(11) of CEA); Milani v. ContiCommodity Serv., Inc., 462 F. Supp. 405, 407 (N.D. Cal. 1976) (CEA policy of protecting investors outweighs Arbitration Act policy of promoting arbitration); *infra* notes 98-132 and accompanying text (discussing *Marchese, Breyer* and *Milani).*

98. 462 F. Supp. 405 (N.D. Cal 1976).

99. *Id.* at 406. Section 4b of the CEA regulates commodity contracts designed to defraud or mislead, bucketing orders, and buying and selling orders for commodities. 7 U.S.C. § 6b (1982). Section 4o of the CEA regulates fraud and misrepresentation by commodities trading advisors and commodity pool operators. 7 U.S.C. § 6o (1982).

100. *Milani,* 462 F. Supp. at 406. The arbitration agreement in *Milani* provided that any controversy between the parties would be settled by arbitration in accordance with the rules of the American Arbitration Association or the arbitration committee of any exchange. *Id.*

101. *Id.* at 407.

102. *Id.* (citing Wilko v. Swan, 346 U.S. 427, 436-37).

103. *Milani,* 462 F. Supp. at 407; *see supra* notes 148-52 and accompanying text (analysis of *Milani).*

104. 548 F. Supp. 955 (D.N.J. 1982).

105. *Id.* at 961; *see infra* notes 106-20 and accompanying text (discussing *Breyer).*

106. *Breyer,* 548 F. Supp. at 956. A commodities trading advisor is a person who, for compensation or profit, is in the business of advising others as to the value of or the advisability

account agreement that contained a clause requiring the arbitration of any dispute arising from the commodities trading agreement at the election of either party.[107] When the plaintiff's account suffered substantial losses as a result of a fall in the price of silver, the defendant issued a call to the plaintiff for additional collateral to raise the account to the required maintenance level.[108] As authorized by the customer account agreement the defendant liquidated the plaintiff's account after the plaintiff failed to provide the additional collateral.[109] The defendant then instituted arbitration proceedings against the plaintiff to recover the 61,000 dollar deficit in the plaintiff's account.[110] The plaintiff responded by filing an action in the United States District Court for the District of New Jersey alleging violations of various provisions of the '33 Act, the '34 Act, SEC rule 10b-5, and the CEA.[111]

The district court in *Breyer* addressed the issue of whether the plaintiff's CEA claims should have been resolved by arbitration pursuant to the predispute arbitration clause in the customer account agreement.[112] The *Breyer* court first noted that federal policy favors arbitration of disputes and that section 2 of the Arbitration Act implements that policy.[113] The district court in *Breyer* also noted that the courts have established an exception to the Arbitration Act in cases such as *Wilko* that involved federal legislation designed to protect a large segment of the public, often in an inferior bargaining position.[114] The *Breyer* court stated that the rationale supporting an exception to the Arbitration Act in cases involving protective federal legislation is the principle that the arbitral forum is inadequate to effectuate

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of trading in any futures contract made or to be made on or subject to the rules of a contract market. 7 U.S.C. § 2 (1982).

107. *Breyer,* 548 F. Supp. at 955. The arbitration clause in *Breyer* provided for arbitration in accordance with the rules of the American Arbitration Association. *Id.* at n.3.

108. *Id.* at 955.

109. *Id.*

110. *Id.*

111. *Id.* The plaintiff in *Breyer* alleged that the defendant fraudulently induced the plaintiff to trade in commodities by misrepresenting the level of risk involved. *Id.* The plaintiff in *Breyer* further alleged that the defendant manipulated the plaintiff's commodities account to the benefit of the defendant. *Id.*

112. *Id.* at 958-61.

113. *Id.* at 959; *see supra* text accompanying note 12 (discussing § 2 of Arbitration Act).

114. *Breyer,* 548 F. Supp. at 959. The *Breyer* court cited several other areas of protective federal legislation in addition to the federal securities laws, in which courts have held arbitration agreements unenforceable. *Id.; see, e.g.,* Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117 (7th Cir. 1978) (claims under antitrust laws are inappropriate for enforcement by arbitration); Allegaert v. Perot, 548 F.2d 432, 436-37 (2d Cir.) (Bankruptcy Act claims are not arbitrable), *cert. denied,* 432 U.S. 910 (1977); Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55, 63 (7th Cir. 1970) (patent validity issues are inappropriate for arbitration proceedings), *cert. denied,* 401 U.S. 976 (1971); *cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (Court held that Title VII claimant did not waive his statutory right to trial by claimant's prior submission of claim to arbitration).

the protective policies underlying the protective federal legislation.[115] The district court in *Breyer* then examined whether claims arising under the CEA fell within the protective federal legislation exception to the Arbitration Act.[116]

The *Breyer* court stated that although Congress expressly sanctioned the arbitration of CEA claims through the 1974 enactment of section 5a(11) of the CEA, Congress narrowly limited the arbitration procedure to CEA claims of less than 15,000 dollars.[117] The district court in *Breyer* stated that the 15,000 dollar limit implies that Congress did not consider arbitration of CEA claims in excess of 15,000 dollars to be permissible.[118] Since the defendant's claim in *Breyer* of 60,000 dollars greatly exceeded the 15,000 dollar limit Congress imposed on arbitrable CEA claims, the *Breyer* court held the arbitration agreement unenforceable on the basis of the protective federal legislation exception to the Arbitration Act.[119] In effect, the *Breyer* court held that the *Wilko* doctrine applies to CEA claims in excess of the 15,000 dollar limit Congress established in section 5a(11) of the CEA.[120]

The United States Court of Appeals for the Ninth Circuit extended the *Wilko* doctrine to invalidate a predispute agreement to arbitrate CEA claims on a much more limited basis than in *Milani* or *Breyer,* in *Marchese v. Shearson Hayden Stone, Inc.*[121] In *Marchese,* the plaintiff customer engaged in commodities futures trading through the defendant, a securities broker

115. *Breyer,* 548 F. Supp. at 959. The *Breyer* court stated that the protective federal legislation exception applies when a collision occurs between the competing policies of federal statutory protection of a large segment of the public, often in an inferior bargaining position, and promotion of arbitration as a speedy and economical solution of disputes. *Id.*

116. *Id.* at 960-61.

117. *Id.; see supra* notes 3-5 and accompanying text (discussing § 5a(11) of CEA). Prior to the enactment of the Futures Trading Act of 1982, the required arbitration procedure of §§ 5a(11) and 17(b)(10) of the CEA did not apply to claims in excess of $15,000. *See* 7 U.S.C. §§ 7a(11) (ii), 21(b)(10)(ii) (1980) (limiting required arbitration procedure to customer claims of less than $15,000); *supra* note 3 and accompanying text (discussing § 217 of Futures Trading Act of 1982 which eliminated $15,000 ceiling on arbitrable claims). The United States District Court for the District of New Jersey decided *Breyer* prior to the enactment of the Futures Trading Act. *Breyer,* 548 F. Supp. 955.

118. *Breyer,* 548 F. Supp. at 960.

119. *Id.* at 961. The *Breyer* court ruled that when a party seeks arbitration of claims outside the narrow limitations of section 5a(11) of the CEA, the protective federal legislation exception applies to deny enforcement of the arbitration agreement. *Id.*

120. *Breyer,* 545 F.2d at 960-61; *see infra* notes 153-58 and accompanying text (analysis of *Breyer* in light of § 217 of Futures Trading Act of 1982 which eliminated $15,000 ceiling on arbitrable claims).

121. COMM. FUT. L. REP. (CCH) 22,217 at 29,144 (9th Cir. 1984).

122. COMM. FUT. L. REP. (CCH) 22,217, at 29,144. A commodities futures commission merchant is any individual, association, partnership, corporation or trust engaged in soliciting or accepting orders to buy or sell futures contracts on or subject to the rules of any contract market and who, in connection with such solicitation or acceptance of orders, accepts any money, securities or property, or extends credit to margin, guarantee, or secure any trades or contracts that might result from the solicitation or acceptance of orders to buy or sell futures contracts. 7 U.S.C. § 2 (1982).

and commodities futures commission merchant.[122] A "Commodity Customer Agreement" that contained an arbitration clause governed the relationship between the plaintiff and defendant.[123] The plaintiff filed an action in the United States District Court for the Central District of California seeking a declaratory judgment that section 4d[124] of the CEA and its attendant regulations provide that the plaintiff is entitled to the "interest and increment" on the plaintiff's margin deposits except to the extent of the defendant's lawful brokerage commission.[125] The district court ordered the plaintiff to submit his claim to arbitration pursuant to the arbitration agreement.[126]

The United States Court of Appeals for the Ninth Circuit reversed the district court and held the arbitration agreement unenforceable with respect to the plaintiff's CEA claim.[127] The *Marchese* court stated that the customer's claim involved the interpretation for the first time in the Ninth Circuit of section 4d of the CEA.[128] The *Marchese* court ruled that statutory interpretation is a duty of the courts, not arbitrators.[129] The Ninth Circuit stated that protective legislation, such as the CEA, especially requires judicial interpretation because arbitrators might include the commodities industry insiders who would deny the customer of the objectivity intended by the protective legislation.[130] The *Marchese* court, however, did not rule out the possibility of future arbitration of similar CEA claims.[131] The Ninth Circuit stated that judicial construction of section 4d of the CEA now would eliminate the need for further judicial consideration of the issue and provide guidance to future arbitrators of section 4d by clarifying the law.[132]

The *Milani, Breyer,* and *Marchese* decisions are reconcilable with the proposition that the *Wilko* doctrine, which invalidates predispute agreements

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123. *Marchese,* COMM. FUT. L. REP. (CCH) 22,217, at 29,145. The arbitration agreement in *Marchese* provided that any controversy arising between the parties would be settled by arbitration in accordance with the rules, then in effect, of the American Arbitration Association of the Board of Directors of the New York Stock Exchange, Inc. *Id.* at n.2.

124. 7 U.S.C. § 6d (1982). Section 4d of the CEA regulates futures commission merchants and the care and use of monies and securities of customers received by futures commission merchants. *Id.*

125. *Marchese,* COMM. FUT. L. REP. 22,217, at 29,147.

126. *Id.* The district court in *Marchese* held that the arbitration agreement complied with the CFTC regulations and that the customer's claim fell within the scope of the arbitration agreement. *Id.; see supra* notes 62-76 and accompanying text (discussing CFTC regulations concerning arbitration).

127. *Marchese,* COMM. FUT. L. REP. 22,217, at 29,148; *see infra* notes 128-32 and accompanying text (discussing rationale of Ninth Circuit in *Marchese).*

128. *Marchese,* COMM. FUT. L. REP. 22,217, at 29,149; *see supra* notes 124-25 and accompanying text (discussing § 4d of CEA).

129. *Id.* (citing Amaro v. Continental Can Co., 724 F.2d 747, 750 (9th Cir. 1984)).

130. *Marchese,* COMM. FUT. L. REP. 22,217, at 29,148 (citing Tamari v. Bache & Co. (Lebanon) S.A.L., 565 F.2d 1194, 1205-06 (7th Cir. 1977) (Swygert, J., dissenting), *cert. denied,* 435 U.S. 905 (1978)).

131. COMM. FUT. L. REP. 22,217, at 29,149.

132. Id.; *see infra* notes 159-64 and accompanying text (analysis of *Marchese).*

to arbitrate claims arising under the securities laws, does not extend to claims arising under the CEA.[133] The *Wilko* doctrine is an exception to the Arbitration Act.[134] The *Wilko* doctrine is the result of a congressional determination, expressed in the anti-waiver provisions of the '33 Act and '34 Act, that a stipulation which waives an investor's special right to a judicial forum is void.[135] Additionally, the *Wilko* doctrine is grounded in the underlying policy of the federal securities laws to protect unsophisticated investors from sophisticated sellers.[136] The *Wilko* doctrine prevents sellers from maneuvering buyers into a position that would weaken the investor's ability to recover under the federal securities laws.[137] The statutory and policy bases that comprise the *Wilko* doctrine justify the numerous court decisions which hold that predispute agreements to arbitrate federal securities law claims are an exception to the Arbitration Act's mandate that agreements to arbitrate shall be valid, irrevocable, and enforceable.[138]

Unlike the federal securities laws, the CEA contains neither the statutory provisions nor the underlying policy considerations to sustain an exception to the Arbitration Act similar to the *Wilko* doctrine.[139] In contrast to the anti-waiver provisions of the '33 and '34 Acts, which void any stipulation that waives an investor's right to select a judicial forum, sections 5a(11) and 17(b)(10) of the CEA encourage the use of arbitration to resolve CEA

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133. *See supra* notes 14-58 and accompanying text (discussing *Wilko* doctrine); *supra* notes 98-132 and accompanying text (discussing *Milani, Breyer,* and *Marchese* decisions); *infra* notes 133-68 and accompanying text (analysis of whether *Wilko* doctrine extends to claims arising under CEA).

134. *See* 9 U.S.C. § 2 (1982) (arbitration agreement in contract involving interstate commerce shall be valid, irrevocable and enforceable except when grounds exist at law or in equity for revocation of any contract). The Arbitration Act embodies a strong federal policy to encourage arbitration and to relieve congestion in the federal courts. *See* Prima Paint v. Flood & Conklin, 388 U.S. 395, 403-04 (1967) (purpose of Arbitration Act is to provide arbitration procedure, when selected by parties to contract, that is speedy and not subject to delay and obstruction); Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Circ.) (Congress enacted Arbitration Act to establish alternative to complications of litigation), *cert. denied,* 446 U.S. 983 (1980); *supra* notes 10-13 and accompanying text (discussing Arbitration Act).

135. *See supra* notes 14-58 and accompanying text (discussing *Wilko* doctrine); *supra* notes 32-34, 53-55 and accompanying text (discussing anti-waiver provisions of '33 Act and '34 Act); *supra* notes 18, 23, 46, 52 (discussing investor's right to judicial forum under '33 Act and '34 Act).

136. *Wilko,* 346 U.S. at 432, 435.

137. *Id.*

138. *See* 9 U.S.C. § 2 (1982) (arbitration agreement in contract involving interstate commerce shall be valid, irrevocable and enforceable except when grounds exist at law or in equity for revocation of any contract). The anti-waiver provisions of the '33 Act, § 14, and the '34 Act, § 29(a), provide grounds at law for the revocation of the arbitration agreement. *See id.; supra* notes 32-34, 53-55 and accompanying text (discussing anti-waiver provision of '33 Act and '34 Act); *supra* note 42 and accompanying text (cases applying *Wilko* doctrine to '33 Act and '34 Act).

139. *See infra* notes 140-45 and accompanying text (discussing CEA and arbitration).

disputes.[140] Congress enacted sections 5a(11) and 17(b)(10) of the CEA to promote the use of arbitration as an out-of-court forum for the resolution of CEA disputes.[141] Furthermore, the CFTC enacted regulations sections 180.1 through 180.5 to ensure that the arbitration procedure is fair, equitable, and voluntary.[142] An arbitration agreement or procedure that does not satisfy the CFTC requirements is invalid.[143] The CFTC regulations, therefore, meet the policy concern of the *Wilko* doctrine that sophisticated sellers will take advantage of unsophisticated buyers, by ensuring that commodity market members may not compel a commodity investor to submit his CEA claim to an unfair or inequitable arbitration proceeding.[144] Absent grounds for an exception, the Arbitration Act requires a court to enforce a predispute agreement to arbitrate claims arising under the CEA.[145]

In light of the CFTC's promulgation of regulations sections 180.2 and 180.3, which ensure that the arbitration of CEA claims is fair, equitable, and voluntary, and the enactment of section 217 of the Futures Trading Act of 1982[146] which eliminated the 15,000 dollar ceiling on arbitrable CEA claims, the grounds supporting the decisions in *Milani* and *Breyer* to extend the *Wilko* doctrine to claims arising under the CEA are no longer valid.[147] The United States District Court for the Northern District of California decided *Milani* before CFTC regulation section 180.3 became effective and less than one month after CFTC regulation section 180.2 became effective.[148] The district court in *Milani* did not mention the CFTC regulations in the

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140. *See* 7 U.S.C. §§ 7a(11), 21(b)(10) (1982) (contract markets and registered futures associations must provide fair, equitable and voluntary procedure through arbitration or otherwise for settlement of customer's claims).

141. *See supra* note 3 and accompanying text (discussing legislative history of §§ 5a(11) and 17(b)(10) of CEA).

142. *See* 17 C.F.R. §§ 180.1-180.5 (1984) (CFTC regulations concerning arbitration and other dispute settlement procedures); *supra* notes 62-76 and accompanying text (discussing CFTC arbitration regulations).

143. *See supra* note 62 and accompanying text (discussing cases holding that arbitration agreements which fail to conform to CFTC regulations are invalid).

144. *See id.*

145. *See* 9 U.S.C. § 2 (1982) (arbitration agreement in contract involving interstate commerce is valid, irrevocable, and enforceable, except when grounds exist at law or in equity for revocation of any contract).

146. Pub. L. No. 97-444, § 217, 96 Stat. 2294 (1983) (codified at 7 U.S.C. §§ 7a(11), 21(b)(10) (1982); *see supra* note 3 and accompanying text (discussing legislative history of § 217 of Futures Trading Act of 1982).

147. *See supra* notes 62-76 and accompanying text (discussing CFTC regulations concerning arbitration); *supra* notes 98-120 and accompanying text (discussing *Milani* and *Breyer* decisions); *infra* notes 148-58 and accompanying text (analysis of *Milani* and *Breyer* decisions).

148. *Milani*, 462 F. Supp. 405 (1976). The United States District Court for the Northern District of California decided *Milani* on October 26, 1976. *Id.* CFTC regulation § 180.3 did not become effective until November 29, 1976. 41 Fed. Reg. 42,942-47 (1976). CFTC regulation § 180.2 became effective on September 30, 1976. 41 Fed. Reg. 27,523 (1976).

court's opinion.[149] The *Milani* court relied upon the grounds of investor protection enunciated in *Wilko* to invalidate the predispute arbitration agreement.[150] The CFTC regulations promulgated just prior to and after the *Milani* decision satisfy the policy concerns of investor protection present in *Wilko* and echoed in *Milani.*[151] The district court in *Milani,* therefore, might not have invalidated the predispute arbitration agreement had it considered the agreements in light of the CFTC regulations.[152]

The *Breyer* decision, like *Milani,* is also reconcilable with the *Wilko* doctrine as a decision of poor timing.[153] The United States District Court for the District of New Jersey decided *Breyer* prior to Congress' enactment of the Futures Trading Act of 1982.[154] Section 217 of the Futures Trading Act amended sections 5a(11) and 17(b)(10) of the CEA to eliminate the 15,000 dollar ceiling on arbitrable CEA claims.[155] Congress eliminated the 15,000 dollar ceiling to encourage further the use of arbitration as a means of settling customer disputes arising under the CEA.[156] In *Breyer,* the district court held the predispute arbitration agreement unenforceable because the CEA claim involved exceeded the old 15,000 dollar limit on arbitrable CEA claims.[157] The *Breyer* court probably would not reach the same result today in light of the subsequent passage of section 217 of the Futures Trading Act of 1982.[158]

The Ninth Circuit's decision in *Marchese* is also reconcilable with the

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149. *Milani,* 462 F. Supp. at 405-07.

150. *See supra* notes 98-103 and accompanying text (discussing *Milani).*

151. *See supra* notes 62-75 and accompanying text (discussing CFTC regulations); *supra* notes 78-96 and accompanying text (discussing cases holding that predispute agreements to arbitrate CEA claims that comply with CFTC regulations are valid nowithstanding *Wilko).*

152. *See supra* notes 148-51 and accompanying text (reconciling *Milani* with proposition that *Wilko* doctrine does not extend to claims arising under CEA).

153. *See supra* notes 104-20 and accompanying text (discussing *Breyer); infra* notes 154-58 and accompanying text (analysis of *Breyer).*

154. *Breyer,* 548 F. Supp. at 955. The United States Court of Appeals for the Ninth Circuit decided *Breyer* on September 9, 1982. *Id.* The Futures Trading Act of 1982 became effective on January 11, 1983. Futures Trading Act of 1982, Pub. L. No. 97-444, § 239, 96 Stat. 2294 (1983).

155. Futures Trading Act of 1982, Pub. L. No. 97-444, § 217, 96 Stat. 2294 (1983) (codified at 7 U.S.C. §§ 5a(11), 17(b) (10) (1982)); *see supra* note 3 and accompanying text (discussing § 219 of Futures Trading Act of 1982).

156. *See* H. R. REP. No. 565, Part 1, 97th Cong., 2d Sess. 56 (1982) (purpose of amendments to §§ 5a(11) and 17(b)(10) of CEA was to enhance attractiveness of arbitration as out-of-court forum for resolution of customer-contract market member disputes), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3871, 3905.

157. *Breyer,* 548 F. Supp. at 961.

158. *See Breyer,* 548 F. Supp. at 961. The *Breyer* court relied on the implication that Congress did not approve of the arbitration of CEA claims in excess of the old $15,000 ceiling on arbitrable claims to deny arbitration of the $60,000 CEA claim in *Breyer. Id.* Since Congress expressly approved the arbitration of CEA claims in excess of $15,000 by enacting § 217 of the Futures Trading Act of 1982, the United States District Court for the District of New Jersey probably would not decide *Breyer* the same way today.

proposition that the *Wilko* doctrine does not extend to claims arising under the CEA.[159] The *Marchese* court did not hold that predispute agreements to arbitrate CEA claims are invalid on the statutory and policy grounds of the *Wilko* doctrine.[160] The *Marchese* decision is limited to CEA claims that involve statutory interpretations of first impression of CEA provisions.[161] The customer's claim in *Marchese* involved the interpretation of section 4d of the CEA for the first time in the Ninth Circuit.[162] The Ninth Circuit stated that a judicial interpretation of section 4d of the CEA would eliminate the need for further judicial consideration of section 4d and assist future arbitrators by clarifying the meaning of section 4d.[163] The Ninth Circuit's decision in *Marchese,* therefore, implicitly supports the arbitration of CEA claims in cases that do not involve statutory interpretations of first impression of CEA provisions.[164]

With the limited exception of the Ninth Circuit's decision in *Marchese,* there exists no statutory nor policy grounds for a court to extend the *Wilko* doctrine to invalidate a predispute agreement to arbitrate CEA claims that complies with the CFTC regulations.[165] Congress enacted sections 5a(11) and 17(b)(10) of the CEA to promote the use of arbitration as an out-of-court forum for the resolution of CEA disputes.[166] The CFTC promulgated CFTC regulations sections 180.1 through 180.5 to meet the policy concerns of the *Wilko* doctrine by ensuring that predispute agreements to arbitrate CEA claims are fair, equitable, and voluntary.[167] In the absence of statutory or policy grounds for an exception, the Arbitration Act requires a court to enforce a predispute agreement to arbitrate claims arising under the CEA.[168]

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159. *See supra* notes 121-32 and accompanying text (discussing *Marchese); infra* notes 160-64 and accompanying text (analysis of *Marchese).*

160. *Marchese,* COMM. FUT. L. REP. 22,217, at 29,149. The Ninth Circuit in *Marchese* stated that its holding was consistent with the policies favoring arbitration. *Id.*

161. *Id.; see infra* text accompanying notes 162-64 (explaining limitation of *Marchese* holding).

162. *Marchese,* COMM. FUT. L. REP. 22,217 at 29,149.

163. *Id.*

164. *See id.*

165. *See supra* notes 159-64 and accompanying text (reconciling *Marchese* with proposition that *Wilko* doctrine does not extend to claims arising under CEA); *infra* notes 166-68 (discussing *Wilko* doctrine's inapplicability to predispute agreements to arbitrate CEA claims that comply with CFTC regulations).

166. *See supra* note 3 and accompanying text (discussing legislative history of §§ 5a(11) and 17(b)(10) of CEA).

167. *See supra* notes 62-76 and accompanying text (discussing CFTC regulations §§ 180.1-180.5).

168. *See supra* text accompanying notes 12-13 (discussing § 2 of Arbitration Act).