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The Arbitration of Federal Domestic Antitrust Claims: How Safe is the *American Safety* Doctrine?

I. INTRODUCTION

In 1968, the United States Court of Appeals for the Second Circuit held in *American Safety Equipment Corp. v. J. P. Maguire & Co.*¹ that predispute agreements to arbitrate all claims arising from an agreement or contract were unenforceable as to federal antitrust claims. This ruling, known as the *American Safety* doctrine, has been accepted as law on the arbitrability of federal antitrust claims. Recent cases, however, have limited the reach of the *American Safety* doctrine and have called into question its viability. In 1985, the Supreme Court in *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*² held that the *American Safety* doctrine no longer applied to federal antitrust claims that arose from international transactions. The Court agreed, however, that the *American Safety* rule still applied to domestic antitrust claims. Most recently, the Supreme Court held in *Shearson/American Express, Inc. v. McMahon*³ that claims brought under the Securities Exchange Act of 1934 (the 1934 Act)⁴ and the Racketeering Influenced and Corrupt Organizations Act (RICO)⁵ were arbitrable.⁶ While not addressing whether the *American Safety* doctrine continues to apply to domestic antitrust claims, the *McMahon* holding, by analogy, may have sounded its death knell.

This comment begins with a brief overview of commercial arbitration in the United States. Part III examines the Supreme Court's cases on commercial arbitration, specifically with regard to claims arising under the Securities Act of 1933 (the 1933 Act),⁷ the 1934 Act,⁸ and international antitrust claims arising under the Sherman

1. 391 F.2d 821 (2d Cir. 1968).

2. 473 U.S. 614 (1985).

3. 107 S. Ct. 2332 (1987).

4. 15 U.S.C. §§ 78a-77kk (1982 & Supp. IV 1986).

5. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

6. *McMahon*, 107 S. Ct. at 2343, 2345-46.

7. 15 U.S.C. §§ 771-777bbbb (1982 & Supp. IV 1986).

8. *Id.* §§ 78a-78kk.

Act⁹ and Clayton Act,¹⁰ and RICO¹¹ claims. This section argues that, based on the Supreme Court's analysis of the arbitrability of these federal statutory claims, domestic antitrust claims, previously considered nonarbitrable under *American Safety*, should be arbitrable. Not only has the Court narrowed the doctrine in *Mitsubishi* so that only domestic claims are nonarbitrable, it has also held that claims under the RICO Act, which was explicitly patterned after the Sherman and Clayton Antitrust Acts, are arbitrable under *McMahon*. These decisions, along with Congress' choice to allow arbitration of patent law claims,¹² signal to the court that it should similarly find domestic antitrust claims arbitrable. Finally, Part IV examines *McMahon* and the analogy between antitrust law and RICO and discusses the conflicting rationales underlying the arbitrability of domestic antitrust claims, concluding that because arbitration can adequately protect the public's interest in the enforcement of the antitrust laws, such claims should be arbitrable.

II. ARBITRATION AND THE LEGAL SYSTEM

A. An Overview of Commercial Arbitration

Today, the judicial system faces a litigation "crisis" as dockets have become increasingly crowded and the court system overburdened and overworked. Commentators have argued that time and money spent on the judicial resolution of disputes is largely wasted and only slightly benefits our economy.¹³ The growing dissatisfaction with the cumbersome and inefficient judicial system has increased interest in the many alternatives to litigation available to parties seeking to resolve a dispute. Among the alternatives advocated by those in the Alternative Dispute Resolution (ADR) movement are mediation,

9. *Id.* §§ 1-7.

10. *Id.* §§ 12-27.

11. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

12. See generally 35 U.S.C. § 294 (1982 & Supp. IV 1986) (voluntary arbitration allowed for patent claims).

13. See R. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* (1985); Bok, *A "Flawed" Profession*, N.Y.S.T. B. J., Nov. 1983, at 31, 32; Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982); Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 71 (1981) (federal case filings rose from 36,734 in 1940 to 168,789 in 1980); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3 (1984). Some commentators, however, view the empirical data differently and believe that no litigation crisis exists. These experts point out that throughout modern history, complaints of increasing litigation were commonplace, even as far back as the 1800s. See, e.g., Alschuler, *Mediation with a Muger: The Shortage of Adjudicative Services and the Need for a Two-tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-20 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983). The perception of an explosion, rightly or wrongly held, has enhanced the growth of arbitration as a method of alternative dispute resolution.

mini-trials, and summary jury trials.¹⁴ This comment will focus solely on one form of alternative dispute resolution—commercial arbitration.

Commercial arbitration of a dispute commonly results when two or more contracting parties include in the contract a provision requiring all disputes and claims to be resolved through arbitration rather than through the court system.¹⁵ For numerous reasons, commercial arbitration has become increasingly popular during the past two decades.

With the dramatic rise in litigation costs, businesses have turned to arbitration of commercial disputes because it is generally a quicker, more efficient, and less costly alternative to litigation. The efficiency of arbitration is readily apparent. Arbitration is characterized by an "absence of . . . 'dead time' between hearings and other active phases of the process."¹⁶ Since "the parties buy and schedule the arbitrator's time directly, there is rarely the kind of costly waiting" common to adjudication.¹⁷ Moreover, "arbitration provides a higher ratio of actual adjudications per unit of resource expenditure."¹⁸

Because arbitral awards are generally unreviewable by courts, parties reach a quicker and cheaper final resolution and avoid the costs incurred in appellate litigation. An award by an arbitrator is final and binds the parties. Under the Federal Arbitration Act, the award must be confirmed by a court unless the party challenging the award can show: (1) it was procured by corruption, fraud, or undue means; (2) the arbitrator failed to render a final decision; or (3) the arbitrator demonstrated a "manifest disregard for the law."¹⁹ Because an

14. See L. KANOWITZ, *CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION* (1986); JOHNSON, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* (1977).

15. The arbitration provision is commonly a boilerplate clause inserted into the contract by one party often with little resistance from the other. A standard clause may provide that "the parties agree to submit all disputes arising from the performance or breach of this contract to arbitration in accordance with the rules of the American Arbitration Association. Any award rendered shall be final and binding upon the parties." The parties may, of course, restrict the scope of the provision by appropriate language. When the restrictive language is not clear, however, courts will resolve all doubts in favor of arbitration. See McClendon, *Subject Matter Arbitrability in International Cases: Mitsubishi Motors Closes the Circle*, 11 N.C.J. INT'L L. & COMM. REG. 81, 92 (1987).

16. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WISC. L. REV. 893, 987.

17. *Id.* at 987.

18. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219 (1985).

19. Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L.

arbitrator need not provide the reasoning behind an award, arbitral decisions essentially are unreviewable. Judicial review of arbitral awards would negate the chief benefits of arbitration, namely speed and efficiency.²⁰

Parties often will agree to arbitrate future disputes in an effort to preserve their business relationship and avoid the antagonism of formal adjudication. Arbitration, with its relaxed rules of evidence and procedure, is conducted in a private and informal atmosphere which tends to promote good will between the parties. The parties may be more willing to arbitrate a claim than litigate, knowing that the conflict most likely will not result in a deterioration of their business relationship. Furthermore, arbitration minimizes the opportunity for such a deterioration to occur due to its simplified and expeditious procedures.²¹

Parties in a particular industry or trade may seek commercial arbitration because it allows them to select the arbitrator familiar with the practices and customs peculiar to the industry.²² In litigation, the parties must acquaint the trier of fact—either the judge or jury—with industry customs and practices and hope that the decision will be an informed one. This can be a costly and often unsuccessful gamble. Moreover, litigants must realize that juries are often persuaded by bias and emotion in resolving conflicts. Big business has grown to fear the “deep-pocket” mentality of the typical civil jury. In seeking arbitration, the parties can reduce the costs and risks associated with formal judicial dispute resolution. In addition to being cheaper, arbitration provides both convenience and certainty to the commercial disputant.

Arbitration, generally private in nature, usually provides greater confidentiality than litigation, making it far less likely that trade secrets will be compromised. Additionally, arbitration generally involves limited discovery, and thus provides a plaintiff with less incentive to bring a suit to discover corporate secrets or other information.

While arbitration may be more efficient and expeditious, only recently has it been embraced by the legal and business community as a viable alternative to judicial dispute resolution. This lack of accept-

REV. 1, 28 & n. 135 (1987) (citing 9 U.S.C. § 10(a)-(d) (1982)); see also *infra* text accompanying notes 39-45.

20. See Brunet, *supra* note 19, at 53-54.

21. See MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo classical and Relational Contract Law*, 72 NW. U.L. REV. 854, 867 (1978) (noting that “[p]lanning for the arbitration of rights disputes is an important aspect of risk planning. But arbitration is also used for filling gaps in performance planning Interest disputes and hence their arbitration are inherently more open-ended than rights disputes.”).

22. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486, 489 (1981).

ance may have been due primarily to the fact that arbitration lacks the numerous safeguards present in the judicial system.

Arbitrators are not bound to follow applicable law, unless commanded to do so by the express terms of the arbitration agreement.²³ Arbitration provisions are commonly boilerplate provisions and usually do not contain restrictions limiting the power of the arbitrator. The arbitrator may make any award he deems just, equitable, and within the scope of the agreement between the parties. Moreover, an arbitrator is not required to provide the reasons behind the decision or to explain the decision. As a result, arbitration awards generally provide a scant record for review.²⁴ Parties to a dispute, therefore, have reason to fear that a clearly erroneous decision by an arbitrator will be binding. In contrast, a party involved in formal litigation can turn to an impartial appellate court to review the judicial record and overrule a clearly erroneous decision by the trier of fact.²⁵

Just as the absence of a record hinders judicial review, it also fails to provide guidance for future commercial behavior.²⁶ In contrast, a judicial resolution can influence future conduct by yielding an opinion written by the judge, which lays out the facts and the law along with the reasoning behind the court's decision. As will be seen, the belief that judicial dispute resolution is needed to protect the public's interest in the proper enforcement of certain federal statutes and to provide necessary precedent to guide future behavior has led courts to hold that arbitration is inappropriate for such federal claims.²⁷ Finally, the benefits of arbitration must be balanced against the loss of constitutional guarantees of due process, findings of fact, conclusions of law, federal pleading and discovery rules, and the possible risk of collateral estoppel or inconsistent verdicts.

23. M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 25.01 (1968 & Supp. 1983).

24. *Id.* § 29.06.

25. One possible check on this risk is the arbitrator's incentive to reach a fair and equitable decision. Failing to do so, he may quickly find himself out of a job because the parties may select another arbitrator in future agreements. Some believe that this leads arbitrators to reach compromises rather than "all-or-nothing" decisions because they seek to please both of the parties so that they will be used in future arbitrations.

26. One commentator notes that "even assuming that arbitrators do formulate and utilize given decision rules, these rules are simply not communicated to non-parties . . . and therefore cannot readily influence future behavior, thus rendering arbitration incapable of significantly reducing activity/disparity/oppression costs." Bush, *supra* note 16, at 989.

27. See notes 56-57 and accompanying text.

B. *The Development of Arbitration in the United States*

Arbitration has a long and storied past. Indeed, arbitration awards can be found in the Old Testament and Greek mythology.²⁸ In later times, it thrived in desert caravans in Marco Polo's time. Arbitration has continued into the modern era as an alternative to more established forms of judicial dispute resolution.²⁹

With the exception of the English common law tradition, most legal systems have viewed arbitration favorably.³⁰ The common law's innate hostility towards arbitration increased over time as arbitration often was confused with other dispute resolution techniques, such as mediation or conciliation, which were based on a bargaining process.³¹ Arbitration in sixteenth and seventeenth century England fell into disuse as the absence of contemporary arbitration machinery or established rules of procedure made it easier for parties to litigate than to arbitrate.³²

The colonists brought arbitration with them to America. At first glance, arbitration would appear to have been ideally suited for a new nation whose people were bent on freedom, discipline, and self-regulation; however, arbitration, which embodies these principles, was largely ignored.³³ Not until the beginning of the twentieth century did the United States begin to embrace arbitration as a feasible

28. A few of these early arbitral awards have assumed legendary status today. For instance, Paris, a royal shepherd, was called upon to deliver one of the most famous arbitral decisions. As all other means of settlement had failed between the parties, Luno, Pallas Athene, and Athena agreed to resolve their competing claims of beauty through arbitration, with Paris as the arbitrator. In biblical times, Solomon made a wise arbitral award in the legendary story of two women claiming to be the natural mother of the same child. 1 *Kings* 3:16-28.

29. For a general overview of the history of arbitration, see generally F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* (1948); Sayre, *The Development of Commercial Arbitration Law*, 37 *YALE L. J.* 595 (1925).

30. 5 R. POUND, *JURISPRUDENCE* 356-60 (1959). There are several theories as to why arbitration was disfavored by the common law. Some commentators believe that the early English courts were hostile to nonjudicial forums because they deprived the English courts of jurisdiction. *Id.* at 358 & nn.38-39.

31. These techniques were designed to effect compromise rather than justice between the parties and, as arbitration became indiscriminately applied to all these processes, the result was a general rejection by the common law of arbitration as a valid alternative dispute resolution. F. KELLOR, *supra* note 29, at 5.

32. *Id.* at 5-6.

33. This development has been traced to America's view toward discord and dispute:

They [disputes] were complacently accepted phenomenon to be settled by force or by litigation, if need be. America was such a rich country, full of adventure, and could afford a considerable volume of disputes at a high cost of settlement. As disputes were regarded as an inevitable and healthful process in the development of a new country, the prospect that they might become a menace to society was not an immediate concern . . . as the attribute of economy was not an attraction to arbitration.

Id. at 6.

alternative to judicial dispute resolution. "[D]issatisfaction with juries as the triers of fact in commercial litigation and the long delays due to congested dockets" in an increasingly litigious society, led disputants to search for alternatives.³⁴ Arbitration, the closest to litigation of all the alternative dispute resolution techniques, was quickly adopted by many American businesses to avoid the costs and inefficiencies of litigation.

A new era for arbitration in America began in 1920, when New York enacted the first modern arbitration law.³⁵ The law allowed "enforcement of agreements to arbitrate future disputes" and provided "very limited judicial review of arbitrators' awards."³⁶ Several states followed New York's lead and adopted similar legislation.³⁷ In 1922, the Arbitration Society of America, later the American Arbitration Association (the Association), became the nation's first permanent institution devoted to developing arbitration as an acceptable alternative form of dispute resolution.³⁸

The major breakthrough for the acceptance of arbitration in America, however, did not occur until Congress enacted the Federal Arbitration Act (the Arbitration Act) in 1925.³⁹ By establishing a public policy in favor of arbitration, the drafters of the Arbitration Act sought to overcome the anachronistic judicial hostility (borrowed by American courts from the English common law courts) toward ar-

34. R. POUND, *supra* note 30, at 359.

35. Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (currently codified in N.Y. CIV. PRAC. L. & R. 7501-7514 (McKinney 1980 & Supp. 1989)).

36. Allison, *supra* note 18, at 226.

37. *Id.*

38. The Association developed new leadership and outspoken advocates for arbitration as it "brought businessmen, lawyers, economists, teaching and professional men together in a common endeavor." F. KELLOR, *supra* note 29, at 61.

39. 9 U.S.C. §§ 1-14 (1982). The Federal Arbitration Act (the Arbitration Act) provides that written agreements to arbitrate arising out of any maritime transaction or transaction involving interstate commerce be "valid, irrevocable, and enforceable, save upon such ground as exist at law or in equity for the revocation of any contract." *Id.* § 2. The Arbitration Act also empowers the federal district courts to determine the validity of arbitration agreements, to compel arbitration, and to confirm and enforce arbitral awards. *Id.* §§ 3, 4, 9 & 10.

In 1970, Congress amended the Arbitration Act to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 2520, T.I.A.S. No. 6997, 30 U.N.T.S. 38 [hereinafter the Convention] (implemented at 9 U.S.C. §§ 201-208 (1982)). "The Convention creates a framework to facilitate and encourage international arbitration by providing uniform standards for the enforcement of arbitration agreements and awards." Note, *Arbitrability of Antitrust Claims Arising from International Commercial Disputes Recognized under the Federal Arbitration Act*, 17 SETON HALL L. REV. 448, 454-57 (1986).

bitration agreements.⁴⁰ The Arbitration Act 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."⁴¹ Towards this end, it provided for the enforcement of all agreements to arbitrate except those found to be against public policy⁴² or to be the result of a tainted contract.⁴³ By allowing only limited judicial review of arbitration awards,⁴⁴ the Arbitration Act promoted the major advantages of arbitration over litigation—economy and efficiency—by preventing courts from expending time and resources in a free wheeling examination of an arbitration award.

Following the creation of the Association and the enactment of the Arbitration Act, the historical judicial hostility towards arbitration gave way to a growing acceptance of the process. As courts increasingly became overburdened, and the societal costs of litigation grew to enormous proportions, courts were compelled to enforce valid arbitration clauses simply to clear their dockets. Judicial acceptance of arbitration has grown, particularly in the 1980s, and the rules and procedures of arbitration have become commensurately more sophisticated.⁴⁵ Courts have struggled, however, in developing a coherent

40. F. KELLOR, *supra* note 29, at 64.

41. *Id.*

42. Section 3 of the Arbitration Act states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue *referable* to arbitration under an agreement in writing . . . the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration* under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3 (1982) (emphasis added).

43. The Arbitration Act's power is grounded in section 2, which states:

A written provision in any maritime transaction or a contract . . . involving commerce to settle by arbitration a controversy thereafter arising out of such a 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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2.

44. *Id.* §§ 10-11. A party can request judicial review of an arbitral award when: the award was procured by corruption, fraud or undue influence; there was overt partiality in the arbitrator; the arbitrator exceeded his power or was guilty of misconduct in unjustly refusing to postpone a hearing or in refusing to hear pertinent evidence; misbehavior prejudiced a party. *Id.*

45. In 1980, Congress passed the Dispute Resolution Act (DRA) to support further experimentation with varying approaches to ADR. The DRA was designed to provide seed money for programs and to develop a national resource center for research and technical assistance in dispute settlement. The DRA was signed into law in February of 1980, but because of budget cutbacks was never funded; it expired in 1984. In 1986, the Alternative Dispute Resolution Act of 1986, S. 2038, 99th Cong., 2d Sess. § 3(a), 132 CONG. REC. 5848 (1986) [hereinafter the ADR Act], was before Congress. See Note, *The Alternative Dispute Resolution Act of 1986: A Critical Analysis*, 31 ST. LOUIS U.L.J.

principle of arbitrability for various federal statutory laws that enact policies inconsistent with the arbitral process.

III. THE SCOPE OF COMMERCIAL ARBITRATION PROVISIONS: THE DEVELOPMENT OF THE *AMERICAN SAFETY* DOCTRINE

When parties agree to include in a contract an arbitration provision, a broad boilerplate provision commonly is included to counteract the unforeseeable disputes that may arise during the course of their contractual relationship. These broad provisions created a great deal of confusion for courts, which struggled to determine the scope and nature of claims arbitrable under these provisions. Despite the presumption in favor of arbitrability embodied in the Arbitration Act, some statutory claims are nonarbitrable because the congressional intent behind them is thought to be incompatible with arbitration. Accordingly, courts have held that claims arising under several federal statutes are inappropriate for arbitration and must be resolved through litigation.

Unfortunately, courts have been unable to delineate a clear principle for determining the arbitrability of these statutory claims. They have adopted various lines of reasoning for determining the arbitrability of, among others, claims arising under RICO, the 1933 Act, and the 1934 Act, as well as the Sherman and Clayton Acts. The Supreme Court has adopted two approaches to determine arbitrability: first, it has distinguished between international and domestic transactions and demonstrated a willingness to find claims arising from international transactions to be arbitrable; and second, it has examined the "public interest" in the enforcement of the statutory claims and has held those implicating such an interest to be nonarbitrable.

In *Wilko v. Swan*,⁴⁶ the Supreme Court's first commercial arbitration case, the Court adopted a "public interest" approach and found 1933 Act claims to be nonarbitrable.⁴⁷ Applying this analysis in

981, 981 n.1 (1987). The ADR bill would have amended Rule 16.1 of the Federal Rules of Civil Procedure (FRCP) by requiring attorneys both to advise the client of the availability of alternative dispute resolution and to file notice with the court confirming such advice. The bill would have also amended Rule 68 by allowing the court to impose sanctions upon a party who unreasonably rejects an offer of settlement or an offer to engage in ADR. *Id.* This proposed addition to the FRCP was not passed by Congress.

46. 346 U.S. 427 (1953).

47. *Id.* at 438.

American Safety Equipment Corp. v. J. P. Maguire & Co.,⁴⁸ the United States Court of Appeals for the Second Circuit held that antitrust claims were nonarbitrable.⁴⁹ In *Scherk v. Alberto-Culver Co.*,⁵⁰ the Court abandoned the public interest approach and adopted an international/domestic transaction distinction in finding international 1933 Act claims to be arbitrable.⁵¹ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁵² the Court extended the international/domestic transaction distinction to antitrust claims in holding that international antitrust claims were arbitrable.⁵³ Finally, in the Court's most recent commercial arbitration case, *Shearson/American Express, Inc. v. McMahon*,⁵⁴ the Court abandoned both approaches and concluded that 1934 Act and RICO claims were arbitrable.⁵⁵

A. *The Arbitrability of Claims Arising Under the Securities Act of 1933*

In 1953, the Supreme Court first addressed the arbitrability of federal statutory claims arising out of a commercial agreement. In *Wilko v. Swan*,⁵⁶ the plaintiff, a purchaser of securities, sued a brokerage firm in federal court under section 12(2) of the 1933 Act, claiming that the broker misrepresented and omitted material information in a stock sale transaction. The margin agreement between the parties contained a broad boilerplate arbitration provision. The broker sought an order to stay the litigation and to compel arbitration under the arbitration provision.⁵⁷

The Supreme Court held that the arbitration provision was unenforceable with regard to the 1933 Act claims.⁵⁸ The Court main-

48. 391 F.2d 821 (2d Cir. 1968).

49. *Id.* at 828.

50. 417 U.S. 506 (1974).

51. *Id.* at 519-20.

52. 473 U.S. 614 (1985).

53. *Id.* at 636.

54. 107 S. Ct. 2332 (1987).

55. *Id.* at 2343, 2345-46.

56. 346 U.S. 427 (1953).

57. *Id.* at 429. Recognizing the conflict between the Arbitration Act's preference for arbitration and the 1933 Act's policy of investor protection, the district court denied the stay and held that arbitration of 1933 Act claims could not be compelled. 107 F. Supp. 75, 79 (S.D.N.Y. 1952). The court of appeals found the policies of the Arbitration Act outweighed those of the 1933 Act and reversed the district court's holding. 201 F.2d 439 (2d Cir. 1953). The appellate court stated: "[W]e do not find in the purpose of the language of the statute [the 1933 Act] any policy argument strong enough to override the policy of the Arbitration Act. If Congress had intended to forbid arbitration in a suit based on Section 12(2), we believe it would have expressed such intent." *Id.* at 445.

58. *Wilko*, 446 U.S. at 438. Specifically, the Court based its holding on section 14 of the 1933 Act which states: "[A]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or the rules and regulations of the Commission shall be void." *Id.* at 430 n.6.

tained that the public interest in the proper enforcement of the 1933 Act, coupled with that Act's stated intent to protect investors, mandated that such claims be resolved in a judicial forum.⁵⁹ This holding was clearly grounded in the prevailing judicial perception that the investor protection policy inherent in the 1933 Act could not be policed adequately through the arbitration process.⁶⁰ The Court reasoned that the weaknesses of arbitration mandated that 1933 Act claims be nonarbitrable.⁶¹ These weaknesses were described as: (1) the need for "subjective findings on the purpose and knowledge of an alleged violator of the act";⁶² and (2) the lack of "judicial instruction on the law" for arbitrators making such determinations.⁶³ The Court also noted that the possibility that an arbitrator would grant an award without an accompanying opinion limited the power of courts to examine the arbitrator's construction of certain statutory requirements.⁶⁴

B. The Arbitrability of Federal Antitrust Claims: The American Safety Doctrine

In *American Safety Equipment Corp. v. J. P. Maguire & Co.*,⁶⁵ the United States Court of Appeals for the Second Circuit adopted a *Wilko*-type analysis in considering the enforcement of an agreement to arbitrate all disputes arising from a contract. At issue were claims and defenses founded on the Sherman and Clayton Antitrust Acts.⁶⁶ The defendant, a clothing manufacturer, had entered into a contract granting the plaintiff an exclusive license to use the defendant's

Therefore, the parties could not waive the provision that vested exclusive jurisdiction in the federal courts of all 1933 Act claims. *Id.* at 437.

59. *Id.* at 438.

60. *Id.* at 435. The Court stated that "[e]ven though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings." *Id.*

61. *Id.* at 430-31. Furthermore, the Court noted that the power to vacate an arbitration award is limited. *Id.* at 431 (citing 9 U.S.C. § 10).

62. *Id.* at 435-36.

63. *Id.* at 436.

64. *Id.*

65. 391 F.2d 821 (2d Cir. 1968).

66. *Id.* at 824. Several earlier cases discussed the arbitrability of federal antitrust claims. See, e.g., *Silvercup Bakers, Inc. v. Fink Baking Corp.*, 273 F. Supp. 159, 162 (S.D.N.Y. 1967) (court characterized as persuasive the view that courts should not be displaced by labor arbitrators in deciding antitrust disputes); *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 107 F. Supp. 532, 548 (S.D.N.Y. 1952) (court stating that enforceability of arbitration provision as to antitrust claims "would be questionable, because it would be contrary to public policy implicit in the federal antitrust laws"), *rev'd on other grounds*, 202 F.2d 731 (2d Cir. 1953).

trademark. The contract granted a sublicense for foreign territories⁶⁷ and provided that "[a]ll controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration."⁶⁸

When the relationship between the two parties deteriorated, the plaintiff sought a judgment declaring the contract void under the Sherman Act, alleging that an extension of the defendant's trademark monopoly amounted to an unreasonable restriction of the plaintiff's business.⁶⁹ The defendant sought a stay pending arbitration pursuant to the boilerplate arbitration provision contained in the contract.⁷⁰ The plaintiff then moved for a preliminary injunction against the arbitration.⁷¹ The district court stayed the declaratory judgment action and compelled arbitration.⁷²

The Court of Appeals for the Second Circuit, relying on the Supreme Court's earlier analysis in *Wilko v. Swan*,⁷³ held that federal antitrust claims are unsuitable for arbitration and must be resolved in a judicial forum.⁷⁴ Following the reasoning of *Wilko*, the

67. *American Safety*, 391 F.2d at 822.

68. *Id.* at 823. The provision provided in full:

All controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration in New York State in accordance with the laws of the State of New York and the rules then obtaining of the American Arbitration Association. Any reward rendered in such arbitration shall be final and binding upon the parties and judgment may be rendered thereon by any court having jurisdiction.

American Safety Equip. Corp. v. Hickock Mfg. Co., 271 F. Supp. 961, 965-66 (S.D.N.Y. 1967).

69. *Id.* at 962.

70. *Id.* at 964. Specifically, the defendant moved under sections 2, 3, 4, and 6 of the Arbitration Act (9 U.S.C. §§ 2, 3, 4, and 6) to stay the instant action and compel arbitration.

71. 271 F. Supp. at 964.

72. *Id.* at 967. The court contended:

The arbitration clause in the License Agreement is broad enough to encompass legal issues. Thus, the legal issue which ASE makes the basis of a suit is an "issue referable to arbitration upon the agreement in writing for such arbitration." 9 U.S.C. § 3. This court, therefore, is required by the Arbitration Act to stay this action pending arbitration of the projected legal issue. 9 U.S.C. § 3. . . . There appears to be no public policy bar to permitting parties to a contract to agree that legal issues arising in connection therewith, including issues arising under federal law, shall be referred to arbitration.

Id. at 966-67.

73. 346 U.S. 426 (1953).

74. *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968). The court quoted the applicable language in *Wilko*:

We think that the remedy a statute provides for violation of the statutory right it creates may be sought not only in "any court of competent jurisdiction" but also in any other competent tribunal, such as arbitration *unless the right itself is of such a character inappropriate for enforcement by arbitration.*

Id. (citing *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953) (emphasis added)).

American Safety court balanced the policy objectives of the Arbitration Act against the conflicting concerns of the Sherman and Clayton Acts. While recognizing the Arbitration Act's presumption in favor of arbitration as both an economical and efficient alternative to litigation, the court held that antitrust claims were "inappropriate for arbitration" because of the "nature of the claims that arise" and the public interest involved in the enforcement of such claims.⁷⁵

Specifically, the *American Safety* court advanced four reasons to support its judgment that antitrust claims are unsuitable for arbitration. First, and most important, the court acknowledged the effect antitrust violations have on the public, stating that "[a] claim under the antitrust laws is not merely a private matter."⁷⁶ The private antitrust plaintiff serves as a "private attorney-general who protects the public interest."⁷⁷ Furthermore, the court reasoned that the public has not consented to arbitration and that the public's interests are not adequately represented in arbitration, which primarily concerns the interests of the private parties. The court recognized that "antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage."⁷⁸ As such, these violations are far too important to the public to allow private parties to resolve such claims through arbitration.⁷⁹ Because of the substantial public interest involved, the court concluded that "[w]e do not believe that Congress intended such claims to be resolved elsewhere than in the courts."⁸⁰

Second, the court suggested that the possibility that contracts generating antitrust disputes may be adhesion contracts militates against automatic forum selection by contract.⁸¹ Stating that arbitration clauses may represent the attempt of a monopolist, through adhesion contracts, to preselect the forum for trying antitrust disputes, the court found arbitration clauses inconsistent with the policies inherent in the antitrust laws and thus unenforceable.⁸²

Third, the court maintained that the complicated nature of antitrust issues is more suitable for judicial than arbitral procedures.⁸³

75. *Id.* at 827-28.

76. *Id.* at 826.

77. *Id.* at 826-27.

78. *Id.* at 826.

79. *Id.* at 826-27.

80. *Id.* at 827.

81. *Id.*

82. *Id.*

83. *Id.* at 827-28.

Because antitrust claims are complicated and require sophisticated legal and economic analysis, they are especially ill-suited to the strengths of arbitration.⁸⁴ Further, arbitration's limited discovery process and streamlined procedures are ultimately incompatible with complex antitrust issues.

Finally, the court stated that the antitrust laws were designed to regulate the business community. Since arbitrators are often members of the business community and are selected primarily for their business expertise, it is improper "for them to determine these issues of great public interest."⁸⁵ The court questioned the wisdom of allowing the business community to select an arbitrator to enforce policies designed to regulate the business community itself.⁸⁶

The holding in *American Safety* was adopted by every court that addressed the arbitrability of federal antitrust claims.⁸⁷ However, the growing acceptance of commercial arbitration in the 1970s and 1980s led the Supreme Court to narrow the scope of this doctrine.

C. *The Expansion of Arbitrability: The Supreme Court's International Transaction Distinction and 1934 Act Claims*

The Supreme Court's first step in restricting the *American Safety* doctrine occurred in a case involving claims under the 1934 Act. In *Scherk v. Alberto-Culver Co.*,⁸⁸ the American company Alberto-Culver had purchased from Scherk, a German citizen, several interrelated business enterprises organized under the laws of Germany and Liechtenstein, along with certain trademarks owned by these enterprises.⁸⁹ The sales contract contained a clause providing for arbitration before the International Chamber of Commerce in Paris of "any controversy or claims [that] shall arise out of this agreement or breach thereof."⁹⁰ Alberto-Culver subsequently brought suit against

84. *Id.*

85. *Id.* at 827.

86. *Id.*

87. See, e.g., *Applied Digital Technology v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970).

88. 417 U.S. 506 (1974).

89. *Id.* at 508.

90. *Id.* The provision reads in its entirety:

The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party

Scherk alleging that he had violated section 10(b) of the 1934 Act⁹¹ by fraudulently misrepresenting the status of the trademarks as unencumbered.⁹²

The Supreme Court, citing concerns of international commerce and comity, enforced the arbitration agreement as to the 1934 Act claims.⁹³ Although it recognized the controversy would be nonarbitrable under *Wilko*⁹⁴ had it arisen out of a domestic transaction, the Court maintained that the international nature of the claim "involves considerations and policies significantly different from those found controlling in *Wilko*."⁹⁵ The Court stated:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.⁹⁶

The Court upheld the agreement to arbitrate because to do otherwise would "surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."⁹⁷ The 1934 Act's policy of protecting investors was outweighed by considerations of international commerce and comity.

The Court distinguished *Scherk* from *Wilko* and *American Safety*⁹⁸ based on the international nature of the transaction.⁹⁹ The Court relied in part on *The Bremen v. Zapata Offshore Co.*,¹⁰⁰ which held that a forum selection clause of an international agreement "should control absent a strong showing that it should be set

to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.

Id. at 508-09 n.1.

91. Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982).

92. *Scherk*, 417 U.S. at 509.

93. *Id.* at 519-20.

94. 346 U.S. 426 (1953).

95. *Id.* at 515.

96. *Id.* at 516-17.

97. *Id.* at 517.

98. 391 F.2d 821 (2d Cir. 1968).

99. *Scherk*, 417 U.S. at 518.

100. 407 U.S. 1 (1972).

aside."¹⁰¹ The *Bremen* Court, in an oft-cited quotation, stated:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.¹⁰²

Unlike the *Wilko* and *American Safety* courts, which weighed the policies of the Arbitration Act against the conflicting policies they found in the relevant federal statutes, *Scherk* added a third factor: international commercial considerations. This factor was sufficient to tilt the balance in favor of arbitration.¹⁰³ Under the *Scherk* rationale, a domestic 1934 Act claim would be nonarbitrable because *Wilko* would presumably still control. Indeed, several courts have subsequently held that agreements to arbitrate domestic-based 1933 and 1934 Act claims were unenforceable.¹⁰⁴

In *Scherk*, it appeared that the Court had abandoned the public interest approach and adopted an international transaction test to help implement the federal policy favoring arbitration as enunciated in the Arbitration Act. Having found international 1934 Act claims to be arbitrable, the Court next addressed the arbitrability of international antitrust claims.

D. The Arbitrability of International Antitrust Claims: Narrowing the American Safety Doctrine

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹⁰⁵ the Supreme Court was forced to confront the clash between its public interest and international transaction approaches. In that case, the Court addressed whether statutory claims founded on the Sherman and Clayton Antitrust Acts are arbitrable when they arise from an international commercial agreement containing a broad arbitration provision. In 1974, Soler Chrysler-Plymouth (Soler), a Puerto Rican corporation, entered into distribution and sales agreements with Mitsubishi Motors Corporation (Mitsubishi), a Japanese corporation that is the product of a joint venture between Chrysler International, S.A. (Chrysler), a Swiss corporation, and another Japanese corporation. Under the agreement, Soler was to act as an agent for Chrysler in distributing vehicles manufactured by Mitsubishi. The major area of

101. *Id.* at 15.

102. *Id.* at 9.

103. *Scherk*, 417 U.S. at 516-17.

104. See, e.g., *Dean Witter Reynolds v. Byrd*, 105 U.S. 1240, 1244 n.1 (1985). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court stated that *Wilko*, which held that claims arising under the 1933 Act could not be compelled to arbitration, would also ban arbitration of 1934 Act claims arising in a domestic context. 473 U.S. 614, 630-31.

105. 473 U.S. 614 (1985).

distribution was to be outside the continental United States.¹⁰⁶ The agreement provided for "arbitration by the Japanese Commercial Arbitration Association of all disputes arising out of . . . the agreement or for the breach thereof."¹⁰⁷

In 1981, disputes between the parties arose due to declining sales. Subsequently, Mitsubishi sought an order to compel arbitration of the disputes under the arbitration provision and in accordance with the Arbitration Act and the Convention on the Recognition of Foreign Arbitral Awards.¹⁰⁸ Soler counterclaimed that Mitsubishi's actions violated the Sherman Act, alleging that Mitsubishi and Chrysler conspired to divide markets, thereby imposing restraints on trade.¹⁰⁹

The district court ordered arbitration of the federal antitrust issues.¹¹⁰ The Court of Appeals for the First Circuit reversed and held the antitrust issues to be nonarbitrable.¹¹¹ The Supreme Court in turn reversed the First Circuit and held that predispute agreements to arbitrate all claims arising from an *international* contractual agreement are enforceable with regard to federal antitrust claims.¹¹²

The Court based its holding primarily on the recognition in *Scherk* of the unique concerns of international comity and commerce. It also agreed with the reasoning in *The Bremen* that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."¹¹³ The Court fur-

106. *Id.* at 616-17.

107. *Id.* at 614. The arbitration provision provided:

All disputes, controversies, or differences that may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japanese Commercial Arbitration Association.

Id. at 617.

108. *See supra* note 39. Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association. *Mitsubishi*, 473 U.S. at 619.

109. *Mitsubishi*, 473 U.S. at 619-20. According to Soler, Mitsubishi executed its plan by refusing to permit Soler to resell to buyers in North, South, or Central America vehicles it was obligated to purchase from Mitsubishi; refusing to ship ordered parts that would be necessary to permit Soler to make its vehicles suitable for resale outside of Puerto Rico; and coercively attempting to replace Soler and its other Puerto Rico distributors with a wholly-owned subsidiary serving as the exclusive Mitsubishi distributor in Puerto Rico. *Id.* at 618, 620.

110. *Id.*

111. 723 F.2d 155, 166 (1st Cir. 1983).

112. *Mitsubishi*, 473 U.S. at 639-40.

113. *Id.* at 630 (quoting *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 13-14 (1972)).

ther noted that while “international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes.”¹¹⁴ This expansion had led international arbitral institutions to resolve increasingly diverse and complex claims. The Court contended that the potential for these tribunals to efficiently resolve disputes had not yet been tested and “[i]f they are to take a central place in the international legal order, national courts will need to ‘shake off the old judicial hostility to arbitration,’ and . . . cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.”¹¹⁵ The Court concluded that it was, therefore, necessary that the “national courts subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”¹¹⁶

Relying on its analysis in *Scherk*, the Court found a strong presumption in favor of freely-negotiated contractual choice of forum provisions.¹¹⁷ It maintained that this presumption is reinforced by “the liberal federal policy favoring arbitration agreements” as enunciated in the Arbitration Act¹¹⁸—a policy that “applies with special force in the field of international commerce.”¹¹⁹ The Court concluded that this presumption, coupled with “concerns of international comity [and] respect for the capacities of foreign and transnational tribunals”¹²⁰ and the “sensitivity to the need of the international commercial system for predictability in the resolution of disputes,”¹²¹ required enforcement of the parties’ agreement, notwithstanding that a different conclusion would be reached for domestic disputes.¹²²

The Court believed that international arbitration could sufficiently protect the nation’s interests in the enforcement of its antitrust laws. The Court reasoned that an international tribunal, although not bound to follow United States antitrust law, is bound to respect the interests of the parties, and “therefore should be bound to decide that dispute in accord with the national law giving rise to the claim[s].”¹²³ Moreover, the United States’ interest in the proper enforcement of its antitrust laws can be protected at the award enforcement stage because the Convention grants countries the power to negate a holding

114. *Id.* at 638.

115. *Id.* (citing *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942)).

116. *Id.* at 639.

117. *Id.* at 631.

118. *Id.* at 625 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

119. *Mitsubishi*, 473 U.S. at 631.

120. *Id.* at 629.

121. *Id.*

122. *Id.*

123. *Id.* at 636-37.

that violates a nation's public policy.¹²⁴ Such a ruling, the Court believed, would require minimal review.

Mitsubishi's holding, therefore, effectively overruled the *American Safety* doctrine in the international setting. The Court, however, did not explicitly overrule *American Safety* as to domestic claims. Instead, it distinguished the doctrine by finding "it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions."¹²⁵ In dicta, the Court scrutinized the four reasons the *American Safety* court had given for precluding arbitration of antitrust disputes, finding three of the four to be either unjustified or unpersuasive.

First, the Court rejected the assertion that contracts which generate antitrust disputes are likely to be contracts of adhesion,¹²⁶ reasoning that "the mere appearance of an antitrust dispute alone does not warrant invalidation of the arbitration agreement on the undemonstrated assumption that the arbitration clause is tainted."¹²⁷ Moreover, a party resisting arbitration can make a direct attack on the validity of the agreement to arbitrate in a court action.¹²⁸ Thus, the Court stated "absent such a showing . . . there is no basis for assuming the forum inadequate or its selection unfair."¹²⁹

Second, the Court disagreed that the potential complexity of antitrust disputes was a valid reason for deeming them nonarbitrable. The Court maintained that this argument had been undermined by

124. Convention, *supra* note 39, art. V(2)(b), 21 U.S.T., at 2520. Article V(2) provides in full:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id.; see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14. For an analysis of the scope of the public policy exception, see McClendon, *supra* note 15, at 96-99; Note, *Public Policy Exception to Arbitration of Antitrust Issues*, 25 HARV. INT'L L.J. 427, 430 n.25 (1984).

125. *Mitsubishi*, 472 U.S. at 629.

126. *Id.* at 632.

127. *Id.*

128. *Id.* Specifically, a party may show that the agreement was "[a]ffected by fraud, undue influence, or overwhelming bargaining power"; or that "enforcement would be unreasonable and unjust"; or that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be denied of his day in court." *Id.* (citing *Prima Paint Corp. v. Hood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

129. *Id.*

court decisions that *post-dispute* agreements to arbitrate antitrust claims are enforceable.¹³⁰ Moreover, the vertical restraints which most frequently give rise to antitrust disputes “will not generate monstrous antitrust litigation.”¹³¹ The Court contended that because “adaptability and access to expertise are . . . ‘the main benefits of arbitration’ . . . arbitral rules typically provide” expert arbitrators as well as access to experts: Therefore, threats of complexity can be adequately controlled.¹³² Parties also may prefer a streamlined proceeding as a means of keeping costs and efforts within reasonable bounds.¹³³ Thus, the Court concluded that “the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.”¹³⁴

The Court went on to reject the proposition that “decisions as to antitrust regulation[s] . . . are too important to be lodged in arbitrators chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our laws and values.”¹³⁵ Noting that international arbitrators are commonly drawn from the legal as well as the business community, particularly where disputes involve legal issues,¹³⁶ the Court “decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.”¹³⁷

Having disapproved three of the *American Safety* court’s reasons for holding antitrust claims nonarbitrable, the Court characterized the fourth rationale of the *American Safety* doctrine as its core: “the fundamental importance of American democratic capitalism of the regime of the antitrust laws: and, specifically, the notion that private parties played a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages.”¹³⁸ “The treble damages [rule is] wielded by the private litigant [as] a chief tool in . . . antitrust enforcement,” acting as a “crucial deterrent to potential violators.”¹³⁹ While finding this a powerful justi-

130. See *Cobb v. Lewis*, 488 F.2d 41, 48 (5th Cir. 1974); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972).

131. *Mitsubishi*, 473 U.S. at 633.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 634 n.18.

136. *Id.* at 634. For support of this proposition, the Court pointed out that the arbitration panel selected to hear the instant dispute consisted of a former law school dean, a former judge, and a practicing attorney. *Id.* at 634 n.18.

137. *Id.* at 634.

138. *Id.* at 634-35. The dissent believed that the extraordinary importance of antitrust law to western democratic capitalism meant that such claims could not be arbitrated. *Id.* at 653.

139. *Id.* at 635.

fication for holding antitrust claims nonarbitrable, the Court concluded that, because the treble damages remedy is primarily remedial in nature, it "does not compel the conclusion that it may not be sought outside an American court."¹⁴⁰ Emphasizing the priority of the compensatory function over the deterrent function of the treble damages remedy, the Court stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."¹⁴¹ Therefore, the core economic philosophy of the *American Safety* doctrine, which emphasizes the importance of the antitrust laws to democratic capitalism, was not violated through international arbitration.

E. The Strength of the American Safety Doctrine after Mitsubishi

While the Supreme Court in *Mitsubishi* overruled the *American Safety* doctrine only with regard to international antitrust claims, two broad policy considerations previously adopted by the Court to support the nonarbitrability of federal statutory claims may still be applied to domestic antitrust claims. First, the public's interest in the judicial enforcement of antitrust claims may be a compelling reason to preclude the arbitration of domestic claims. Second, the inherent differences between domestic and international commerce make international claims more suitable for arbitration. A careful analysis reveals, however, that while these policy considerations have some strength, they are weakened by internal inconsistencies and outweighed by countervailing concerns that support extending the Court's holding in *Mitsubishi* to domestic antitrust claims.

In *Mitsubishi*, the Court held that international antitrust claims were suitable for arbitration. Unlike domestic antitrust disputes, the Convention's "public policy" exception provides federal courts with the opportunity at the award enforcement stage to protect the legitimate public interests at stake in antitrust claims. A court can review an international arbitral award under the Convention whereas, in contrast, the Arbitration Act provides for very limited review of arbitral awards for domestic claims. Accordingly, no such judicial review of domestic claims exists to protect the public's interest in the proper enforcement of the antitrust laws. Therefore, *Mitsubishi's* interna-

140. *Id.*

141. *Id.* at 637.

tional/domestic distinction arguably has some merit for domestic antitrust claims.

While the foregoing argument has a surface appeal, serious flaws in the Court's international transaction distinction undermine its validity. First, the Court's distinction was based on the assumption that international arbitral awards will, under the Convention's public policy exception, be subject to judicial review. The review afforded by the Convention is, however, essentially illusory; present law permits only a very narrow review of the public policy aspect of arbitral awards.¹⁴² One federal court has held that the public policy exception can be triggered only where enforcement of foreign arbitral awards "would violate the forum state's most basic notions of morality and justice."¹⁴³ The *Mitsubishi* Court supported such a narrow review: "[The] efficacy of the arbitral process requires that substantive review at the award enforcement stage remain minimal."¹⁴⁴ The Court perceived the scope of review as an inquiry into whether the "tribunal took cognizance of the antitrust claims and actually decided them."¹⁴⁵ Because arbitration, both international and domestic, is characterized by the lack of a record, such a limited review of international arbitral awards is essentially useless in ensuring the proper enforcement of the antitrust laws. The scope of review of arbitral awards afforded international claims under *Mitsubishi* is basically the same as that afforded domestic arbitral awards.¹⁴⁶

The Court in *Mitsubishi* asserted that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."¹⁴⁷ With the limited review afforded by the Convention, there is no reason to think that a party to an international dispute is more likely to vindicate its statutory cause of action than would a disputant in a domestic arbitration. Indeed, one district court, in the time period between *Mitsubishi* and *McMahon*,¹⁴⁸ overruled the *American Safety* doctrine in the domestic context precisely because it found the *Mitsubishi* reasoning to be more compelling in the domestic context.¹⁴⁹ Specifically, the court asserted that

142. 9 U.S.C. §§ 2-4 (1982).

143. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

144. *Mitsubishi*, 473 U.S. at 638.

145. *Id.*

146. See Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. TRANSNAT'L L.J. 265, 279-80 (1987).

147. *Mitsubishi* 473 U.S. at 637.

148. *Shearson/American Express v. McMahon*, 107 S. Ct. 2332 (1987).

149. *New York City Shoe Co. v. Coray Management, Inc.*, No. 87-0790, slip op. (E.D. Pa. May 7, 1987) ("despite strong public policy reasons [which] suggest a contrary result, arbitration of plaintiff's [domestic] antitrust claim is compelled by *Mitsubishi*").

"[u]nlike foreign arbitrators who have had little or no experience with or exposure to our law and values, domestic arbitrators have the benefit of the American spirit of free competition."¹⁵⁰ Thus, "[a] domestic arbitral tribunal ingrained with American antitrust jurisprudence is far better suited to vindicate these statutory causes of action than an international tribunal with its inherent ethnocentrism."¹⁵¹

The weakness of the international transaction distinction can also be seen in the difficulty of developing a workable criteria for the definition of "international" transactions. As one commentator has pointed out, the distinction between domestic and international transactions made necessary by *Mitsubishi* likely will give rise to litigation.¹⁵² As the number of commercial transactions connected to international trade steadily increases, this issue will grow in significance. In fact, the international transaction distinction may create incentives for including an "international ingredient" in a contract to ensure eligibility for arbitration.

The tenuous rationale for creating an international distinction, and the costs involved in implementing it, suggest that the distinction should be abandoned and domestic antitrust claims held arbitrable.¹⁵³

Genna v. Lady Foot Int'l, Inc., 1986-3 Trade Cas. (CCH) 67, at 317 (E.D. Pa. Jan. 24, 1986).

While these two cases overrule the *American Safety* doctrine in the domestic context, several other federal district courts have upheld it. See *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986) (accepting the validity of the *American Safety* doctrine to domestic claims following *Mitsubishi*); *Stendig Int'l, Inc. v. B & B Italia*, 633 F. Supp. 27 (S.D.N.Y. 1986) (antitrust claims remain nonarbitrable following *Mitsubishi*); *Smith v. Payfone Systems, Inc.*, 627 F. Supp. 121 (N.D. Ga. 1985) (concluding that domestic antitrust claims remain nonarbitrable following *Mitsubishi*).

150. *Genna*, 1986-3 Trade Cas. (CCH), at 61.

151. *Id.*

152. Comment, *Arbitrability of Antitrust Claims under U.S., German, and EEC Law: The "International Transaction": Criterion and Public Policy*, 22 TEX. INT'L. L.J. 291, 318 (1987). Furthermore, in drafting the private treble damage provision of the antitrust laws, Congress drew no distinction between domestic antitrust claims and those that would arise in connection with international transactions. If an international transaction involving an unreasonable restraint of trade has sufficient effect on United States commerce to come within the federal antitrust laws, private antitrust suits attacking that restraint will serve the same public interest functions as a similar suit in a domestic context. Moreover, the strengths of arbitration recognized in *Mitsubishi*—namely efficiency, speed, arbitrator expertise, and flexibility—are equally applicable to domestic claims.

153. *Id.* at 318. Moreover, some federal courts have recognized that antitrust claims arising in contractual disputes are often frivolous. See, e.g., *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1178 n.25 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982). Therefore, parties to a dispute also have an incentive to assert antitrust claims, even on weak grounds, in an attempt to provide federal court

Indeed, the Court in *McMahon*¹⁵⁴ recognized the foregoing problems with the international transaction distinction and abandoned it altogether, declaring *all* RICO claims to be arbitrable, domestic as well as international.¹⁵⁵

The second broad policy consideration cited in support of the *American Safety* doctrine is the public's interest in the proper enforcement of the antitrust laws, which requires that domestic antitrust disputes be settled in a judicial forum. The antitrust laws are not designed to protect either of the contracting parties from overreaching by the other, but to promote competition in the economic system. Commentators have argued that arbitration is unfit to promote such a purpose because it is primarily private in nature, designed only to reach an equitable solution between the two parties. Arbitration does not take into account the effect that the antitrust laws have on third parties,¹⁵⁶ as an arbitrator will not "sacrifice the most equitable resolution . . . between the parties [for] . . . the economic needs of society as expressed in the antitrust laws."¹⁵⁷

Recognition of the importance of the public's interest in the proper enforcement of the antitrust laws can be found by examining the texts of the Sherman and Clayton Acts, other statutes, and the courts' treatment of the antitrust laws in general. Several unusual features of the Sherman and Clayton Acts, most notably that "an antitrust treble damage case can only be brought in a District Court of the United States,"¹⁵⁸ support the conclusion that "these cases are 'too important to be decided otherwise than by competent tribunals' [and] surely [we] cannot allow private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States."¹⁵⁹ The ex-

jurisdiction and remove the dispute to a forum perceived by the antitrust claimant as more favorable to case.

154. *Shearson/American Express v. McMahon*, 107 S. Ct. 2332 (1987).

155. See *infra* notes 169-202 and accompanying text. Indeed, the Court stated that while *Scherk* "was limited to international agreements, the competence of arbitral tribunals to resolve § 10(b) claims is the same in both [domestic and international] settings." *McMahon*, 107 S. Ct. at 2340.

156. One commentator warns that if the ADR movement expands dramatically, the resulting adverse effect upon third parties must be taken into account. In the worst case scenario, widespread ADR, independent of substantive law, could actually increase the number of disputes because third parties could lose the incentive to perform in accordance with legal norms. Once a party loses predictability, the benefit of law as a signal is lost. Brunet, *supra* note 19, at 19.

157. Sterk, *supra* note 21, at 503-04. Moreover, the lack of a written public record explaining the reasoning of the decision makes arbitration incompatible with society's and the business community's needs for behavioral guidelines regarding competitive behavior.

158. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 654 (Stevens, J., dissenting) (quoting *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920)).

159. *Mitsubishi*, 473 U.S. at 654 (Stevens, J., dissenting) (quoting *University Life Ins. Co. v. Unimarc, Ltd.*, 699 F.2d 846 (7th Cir. 1983)). Justice Stevens also noted that:

traordinary public importance of the antitrust laws is emphasized in other statutes enacted by Congress. For instance, in 1913, Congress passed a special act guaranteeing public access to depositions in governmental civil proceedings to enforce the Sherman Act.¹⁶⁰

The conventional wisdom in antitrust cases is that the antitrust laws function as a principal bulwark of western democratic capitalism. Several courts have even analogized the antitrust laws to the Bill of Rights with regard to their importance to our society. Indeed, Justice Marshall characterized the Sherman Act as the "character of freedom' that may be compared to a constitutional provision" and as "the Magna Carta of free enterprise."¹⁶¹ Moreover, the survival of the *American Safety* doctrine at a time when judicial acceptance of arbitration of federal statutory claims has reached a peak signifies the courts' recognition of the importance of the antitrust laws.

Despite the apparent validity of the public interest rationale in precluding the arbitration of domestic antitrust disputes, several arguments undermine it, and thus support the arbitrability of such claims.

The unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress. Since its enactment in 1890, the Sherman Act has provided for public enforcement through criminal as well as civil sanctions. . . . Section 7 . . . uses the broadest possible language to describe the class of litigants who may invoke its protection. . . . The provision for mandatory treble damages—unique in federal law when the statute was enacted—provides a special incentive to the private enforcement of the statute, as well as an especially powerful deterrent to violators.

Id. at 652-53 (Stevens, J., dissenting).

160. 15 U.S.C. § 30 (1913).

161. *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1971). Justice Marshall characterized the antitrust laws as:

[T]he Magna Carta of free enterprise. They are as important to the preservation of economic freedom as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens . . . believe that such foreclosure might promote greater competition in a more important sector of the economy.

Id. at 610. Justice Black has commented that:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pac. R. R. Co. v. United States, 356 U.S. 1, 4 (1957).

First, the public interest argument is weakened by the fact that all courts allow the private settlement antitrust claims.¹⁶² Thus, the courts recognize that "Congress has indicated that antitrust considerations may be subordinated to a just resolution of the dispute between the parties."¹⁶³ Significantly, Congress has not required judicial approval of settlements, as it has in other contexts where the public interest is thought to be at stake, such as class actions.¹⁶⁴ Settlement of antitrust claims fails to protect the public's interest in the antitrust laws because it is wholly private in nature and does not take into account the third party interests involved in the antitrust laws. Because arbitration itself is a form of private settlement, allowing formal settlement of antitrust disputes is inconsistent with precluding arbitration.¹⁶⁵

Equally inconsistent is the universally accepted doctrine that a *post-dispute* agreement to arbitrate both domestic and international antitrust disputes is enforceable.¹⁶⁶ Courts have uniformly permitted arbitration in these situations because it promotes settlement.¹⁶⁷ Furthermore, "the right of disputants to pursue an agreed settlement is a deeply embedded attribute of the freedom of contract."¹⁶⁸ The strengths and weaknesses of arbitration are the same regardless of whether the antitrust claims already were asserted when the agreement to arbitrate was made; the same public interest may be frus-

162. For instance, during the period between 1964-1969, over 3000 private antitrust cases were dismissed by agreement of the parties while only 554 continued to judgment. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 382-83 (1970).

163. Sterk, *supra* note 21, at 508.

164. FED. R. CIV. P. 23(e).

165. Perhaps if Congress were really concerned with the public interest in antitrust litigation, we would require all claims to be litigated and ban the private settlement of such claims. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

166. See *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972). The *Coenen* court stated that:

The courts give as reasons for this that the parties already know just what they are agreeing to arbitrate, and also that, as a claimant is not required to sue and is always free to settle a private triple-damage antitrust case, his agreement to arbitrate is in effect an agreement to settle the dispute. So here the agreement to arbitrate may be regarded as an agreement to arbitrate specific existing dispute.

453 F.2d at 1215. See generally Allison, *supra* note 18, at 260-62.

167. Sterk, *supra* note 21, at 507-08. Sterk asserts that permitting arbitration after a dispute arises is logically consistent, because parties will look at arbitration with the prospects of success in litigation in mind and will choose arbitration only if litigation is likely to be unsuccessful. As long as the parties are well-informed and rational, an agreement to arbitrate is likely unless it is also probable that the arbitration award will be the rough equivalent of the court result. Sterk concluded that permitting the arbitration of existing disputes is unlikely to frustrate antitrust policy. *Id.* at 511. This argument, however, fails to address the public policy concerns of using antitrust precedent to guide future behavior.

168. Allison, *supra* note 18, at 259-60.

trated in arbitrating existing and future disputes. All four original rationales behind the *American Safety* doctrine—concerns of complexity, contracts of adhesion, public interest, and the regulation of the business community—are inconsistent with enforcing post-dispute agreements to arbitrate antitrust claims.

The importance of the public interest in the proper enforcement of the antitrust laws, coupled with the Court's international transaction distinction in *Mitsubishi*, argue for preserving the *American Safety* doctrine in the domestic context. However, the counterarguments—namely, the inconsistencies of permitting settlement of antitrust disputes, enforcing post-dispute agreements to arbitrate, and the arbitrariness of the international transaction distinction—severely weaken the case for continuing to apply the *American Safety* doctrine to domestic claims. Additionally, the Supreme Court's latest case involving commercial arbitration, while not directly addressing the *American Safety* doctrine or the antitrust laws, has by analogy foreshadowed the death of the doctrine.

IV. ATTACK BY ANALOGY: THE ABANDONMENT OF THE AMERICAN SAFETY DOCTRINE

A. *The Arbitrability of Claims Brought Under the RICO Act and Securities Exchange Act of 1934*

In the Supreme Court's most recent case on commercial arbitration, *Shearson/American Express, Inc. v. McMahon*,¹⁶⁹ the Court examined the arbitrability of claims arising under the 1934 Act¹⁷⁰ and RICO.¹⁷¹ The plaintiffs, Eugene and Julia McMahon, were customers of the defendant, a brokerage firm. "Two customer agreements signed by Julia McMahon provided for arbitration of any controversy relating to the accounts the McMahons maintained with Shearson."¹⁷² In October 1984, the McMahons filed a complaint in the United States District Court for the Southern District of New York

169. 107 S. Ct. 2332 (1987).

170. 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986).

171. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

172. *McMahon*, 107 S. Ct. at 2335. The arbitration clause stated:

Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect.

Id. at 2335-36.

alleging that the defendant violated section 10(b) of the 1934 Act and rule 10b-5¹⁷³ by engaging in fraudulent, excessive trading on their accounts and by making false statements and omitting material facts from the advice given to them. Furthermore, the complaint alleged a RICO violation,¹⁷⁴ and included state law claims for fraud and breach of fiduciary duty.

The defendants moved to compel arbitration under the applicable provision in the customer agreements and pursuant to section 3 of the Arbitration Act.¹⁷⁵ The district court granted the defendants' motion as to the 1934 Act claims and the state law claims.¹⁷⁶ The United States Court of Appeals for the Second Circuit, joining the majority of circuits which have addressed the issue, affirmed the district court's holding on the state law and RICO claims, but reversed on the 1934 Act claims.¹⁷⁷ The Supreme Court then granted certiorari¹⁷⁸ to resolve the split amongst the circuits regarding the arbitrability of section 10(b) claims¹⁷⁹ and RICO claims.¹⁸⁰

173. 17 C.F.R. § 240.10b-5 (1988).

174. 18 U.S.C. § 1962(c) (1982).

175. 9 U.S.C. § 3 (1982). Section 3 mandates that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under a specific agreement. *Id.*

176. *McMahon v. Shearson/American Express, Inc.*, 618 F. Supp. 384, 388 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987). Analogizing the RICO Act to the antitrust laws, the court found that the RICO claim was nonarbitrable "because of the important federal policies inherent in the enforcement of RICO by the federal courts." *Id.* at 387.

177. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987). In upholding the district court, the court of appeals found that public policy considerations made it inappropriate to apply the provisions of the Arbitration Act to RICO suits. The court reasoned that RICO claims, like antitrust claims, are "not merely a private matter" because a RICO plaintiff can be "likened to a private attorney general" protecting the public interest. Thus, such claims must be resolved in a judicial forum. *Id.* The disputes in *McMahon* arose from a domestic agreement.

In reversing the district court with regard to the section 10(b) claims, the court of appeals relied upon the reasoning in *Wilko* that claims under section 12(2) of the Securities Act of 1933 were nonarbitrable. *Id.* at 97-98. While recognizing that *Scherk* and *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985), have cast doubt on *Wilko's* applicability to section 10(b) claims, the second circuit was bound by its previous decisions which extended *Wilko* to claims under section 10(b) and rule 10b-5. *McMahon*, 788 F.2d at 97-98; *see Wilko v. Swan*, 346 U.S. 427 (1953).

178. 479 U.S. 812 (1986).

179. *Compare Sterne v. Dean Witter Reynolds, Inc.*, 808 F.2d 480 (6th Cir. 1987); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986); *with Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

180. *Compare McMahon v. Shearson/American Express*, 788 F.2d 94 (2d Cir. 1986); *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291 (1st Cir. 1986); *with Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir. 1986).

The Supreme Court began its analysis by recognizing that the purpose of the Arbitration Act was to establish "a federal policy favoring arbitration,"¹⁸¹ mandating the "enforcement of agreements to arbitrate statutory claims."¹⁸² While the Court recognized this mandate could be overridden by a "contrary congressional command," the Court placed the burden on the party opposing arbitration "to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."¹⁸³ Specifically, to overcome the presumption of arbitrability, the moving party must "demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act, an intention discernible from the text, history, or purposes of the statute."¹⁸⁴

The Court could not find in the 1934 Act the requisite congressional intent to overcome the presumption of arbitrability.¹⁸⁵ The Court rejected the McMahons' argument that section 29(a), which voids the waiver of any provision of the Act,¹⁸⁶ forbids waiver of section 27, which grants exclusive jurisdiction to the district courts of all actions arising from the 1934 Act.¹⁸⁷ The Court maintained that an arbitration agreement merely waives the *procedural* component of the 1934 Act, giving federal courts exclusive jurisdiction over these claims, and that section 29 does not cover such a procedural waiver.¹⁸⁸

In reaching its holding, the Court reinterpreted *Wilko* under *Scherk* "as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue."¹⁸⁹ The Court

181. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (1987) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court in *Cone* stated:

The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Cone, 460 U.S. at 24-25.

182. *McMahon*, 107 S. Ct. at 2339.

183. *Id.*

184. *Id.* at 2338.

185. *Id.*

186. 15 U.S.C. § 78cc(a) (1982).

187. *McMahon*, 107 S. Ct. at 2338. Section 27 states, in pertinent part: "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter of the rules and regulations thereunder." 15 U.S.C. § 78aa (1982).

188. *McMahon*, 107 S. Ct. at 2338.

189. *Id.* at 2339.

found that arbitration had developed and matured since the 1950s: "It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions [including both *Mitsubishi* and *Scherk*] involving the Arbitration Act."¹⁹⁰ *Wilko*'s assumptions regarding arbitration "do not hold true today for arbitration procedures subject to the SEC's oversight authority¹⁹¹ and the new strict procedural guidelines, established by the American Arbitration Association."¹⁹²

The arbitrability of RICO claims was a much easier issue for the Court to analyze because it found that RICO's text and legislative history fail to reveal any intent to override the provisions of the Arbitration Act.¹⁹³ Therefore, the plaintiffs must prove "an irreconcilable conflict between arbitration and RICO's underlying purposes."¹⁹⁴ The plaintiffs here were unable to do so. Furthermore, RICO, unlike the 1934 Act, contains no antiwaiver provision and its jurisdictional provision does not specify that federal courts will have exclusive jurisdiction. Without this obstacle to arbitrability, the Court had little problem reaching the conclusion that RICO claims are arbitrable.¹⁹⁵

In rejecting the argument that RICO claims are too complex or too complicated by their criminal component to be arbitrable, the Court adopted the reasoning of *Mitsubishi*.¹⁹⁶ The Court contended that "potential complexity should not suffice to ward off arbitration"¹⁹⁷ because "antitrust matters are every bit as complex as RICO claims, but . . . the adaptability and access to expertise characteristic of arbitration rebutted the view that an arbitral tribunal could not properly handle an antitrust matter."¹⁹⁸

The Court also used *Mitsubishi* to reject the argument that the public interest in enforcing RICO precludes submission of such claims to arbitration.¹⁹⁹ After examining RICO's legislative history,

190. *Id.* at 2340-41.

191. *Id.* at 2341. The Court also rejected the McMahon's argument that *Wilko* barred enforcement of predispute agreements because arbitration clauses in securities sales are not freely negotiated and frequently tend to result from broker overreaching. *Id.* at 2339. Finally, the Court rejected the argument that even if section 29(a) as enacted does not void arbitration agreements, Congress subsequently has amended the 1934 Act to do so. *Id.* at 2342.

192. See *AAA Releases New Arbitration Rules*, 19 Sec. Reg. & L. Rep. (BNA) 1392 (Sept. 18, 1987).

193. *McMahon*, 107 S. Ct. at 2344.

194. *Id.*

195. *Id.* at 2345-46.

196. *Id.* at 2344.

197. *Id.*

198. *Id.* With regard to RICO's criminal provisions and arbitrability, the Court, relying upon *Mitsubishi*'s analysis of the antitrust act's criminal provisions, stated: "We similarly find that the criminal provisions of RICO do not preclude arbitration of bona fide civil actions brought under § 1964(c)." *Id.*

199. *Id.* at 2345.

the Court adopted *Mitsubishi's* analysis of the remedial function of the treble damage remedy of the antitrust laws. The Court considered this analysis equally applicable to RICO claims and asserted that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."²⁰⁰ Finding that "the private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff," the Court concluded that "there is even more reason to suppose that arbitration will adequately serve the purposes of RICO than that it will adequately protect private enforcement of the antitrust laws."²⁰¹ Accordingly, the Court found that the *McMahons*, "having made the bargain to arbitrate, will be held to their bargain."²⁰²

B. The RICO-Antitrust Analogy: The Arbitration of Federal Domestic Antitrust Claims

After *McMahon*, few federal statutory claims are not subject to arbitration. A court interpreting a standard arbitration clause will find its scope broad enough to cover almost all commercial claims.²⁰³ However, a plaintiff bringing a domestic transaction claim under the federal antitrust laws will face the *American Safety* doctrine, which still is accepted by courts after *Mitsubishi* and *McMahon*.²⁰⁴ Despite continuing acceptance of the doctrine, it appears that while *Mitsubishi* limited the doctrine to the domestic context, the Court's holding in *McMahon* signalled its impending death. The text of RICO, its legislative history, and Court commentary on the statute clearly demonstrate that RICO's remedial provisions were patterned directly after

200. *Id.*

201. *Id.* at 2346.

202. *Id.*

203. After *McMahon*, 1933 Act claims remained nonarbitrable under *Wilko*. It is apparent, however, that the *McMahon* holding severely weakened the *Wilko* court's analysis; at least one federal court has expressly overruled *Wilko* and allowed arbitration of 1933 Act claims. See *Staiman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 673 F. Supp. 1009 (C.D. Cal. 1987).

Other claims which are presently nonarbitrable include: Title VII claims, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); FSLA claims, *Barentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1975); tort claims (though several state legislatures have enacted statutes providing for arbitration of medical malpractice claims); and federal claims under the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1982)), *McDonald v. West Branch*, 466 U.S. 284, 292 (1984).

204. All federal courts, but one, that have addressed the viability of the *American Safety* doctrine after *Mitsubishi* and *McMahon* still find it controlling. See *supra* note 149.

the antitrust acts. With this recognition, the Court's holding in *McMahon* that domestic and international RICO claims are arbitrable leads to the conclusion, by analogy, that domestic antitrust claims similarly must be arbitrable. Moreover, the fact that Congress has recently enacted legislation permitting the arbitration of patent law claims supports the conclusion that domestic antitrust claims are arbitrable.²⁰⁵

The text of RICO demonstrates that it was patterned directly after the Clayton and Sherman Antitrust Acts. The language permitting "any person injured in his business and property" to sue in a federal district court for treble damages and attorney's fees was taken verbatim from the Clayton Act.²⁰⁶ Moreover, RICO and the antitrust laws are virtually identical in their remedial provisions. Section 4 of the Clayton Act states that a civil plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fee";²⁰⁷ section 1964(c) of RICO provides that a civil RICO plaintiff "shall recover threefold the damages he sustains and the cost of the suit including reasonable attorney's fee."²⁰⁸ The close relationship between the remedies for RICO violations and for antitrust violations is not coincidental; the Justice Department, for example, had previously used the antitrust laws to combat union racketeering.²⁰⁹

The legislative history of RICO further demonstrates the similarity in remedial approach. When RICO was in its formative stages before the House, both the Department of Justice and the American Bar Association proposed an amendment "authorizing private damage suits based upon the concept of section 4 of the Clayton Act."²¹⁰ Similarly, Representative Poff noted that the provision "has its counterpart almost in *haec verba* in the antitrust statutes."²¹¹ Moreover, section 4 of the Clayton Act was "recurrently invoked during the congressional discussion of RICO's private treble damages provision."²¹²

The Supreme Court itself has expressly recognized that the treble

205. See *supra* note 12.

206. Compare 18 U.S.C. § 1964(c) (1982) (RICO) with 15 U.S.C. § 15 (1982) (Clayton Act).

207. 15 U.S.C. § 15 (1982).

208. 18 U.S.C. § 1964(c) (1982).

209. Only 11 criminal antitrust cases resulted in jail sentences for businessmen between 1890 and 1940. Ten of those cases involved overt acts of racketeering such as threats, intimidation and violence. A number of antitrust violations in the 1950s and 1960s involved what can be viewed as racketeering activity. See Hartwell, *Criminal RICO and Antitrust*, 52 ANTITRUST L.J. 311, 312 (1983).

210. *Hearings on S. 30, and Related Proposals before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 544 (1970).

211. 116 CONG. REC. 35, 295 (1970).

212. *Mayaja, Inc. v. Bodkin*, 803 F.2d 157, 165 (1986).

damages remedy of RICO was patterned directly after section 4 of the Clayton Act. The Court has observed that "[t]he clearest current in [RICO's] history is the reliance on the Clayton Act model, under which private and governmental actions are entirely distinct."²¹³ Furthermore, the Court recognized that the RICO treble damage provision "tracks virtually word for word the treble damage provision of the antitrust laws, § 4 of the Clayton Act; given this parallel, there can be little doubt that the latter served as a model for the former."²¹⁴ The Court has quoted RICO's sponsor: "Despite the willingness of the courts to apply the Sherman Antitrust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap."²¹⁵

The text, legislative history, and Supreme Court commentary support the antitrust/RICO analogy. By holding RICO claims arbitrable, the *McMahon* Court sent an implied signal that antitrust claims must similarly be arbitrable. Moreover, the *American Safety* doctrine fails to survive the *McMahon* analytical framework for the arbitrability of federal statutory claims. Under *McMahon*, the party moving to prevent arbitration must demonstrate that Congress intended to make an exception to the Arbitration Act for the claims, and the intent must be discernible from the text, history, or purpose of the stat-

213. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985).

214. *Id.* at 510 (Marshall, J., dissenting). Prior to *McMahon*, several courts analogized the antitrust statutes and RICO to find the latter nonarbitrable under the rationale of the *American Safety* doctrine. See, e.g., *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274 (5th Cir. 1986); *S.A. Mineracao Da Trindade-Samitri v. Utah Int'l Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1983). Now that the Supreme Court has overruled these courts and found RICO claims arbitrable, the courts' analogy leads to the opposite conclusion—antitrust claims must be arbitrable because RICO claims are arbitrable.

215. *Sedima*, 473 U.S. at 516 (Marshall, J., dissenting) (emphasis added). Furthermore, the prosecution of RICO and antitrust claims overlap. RICO's civil provisions have been used in cases involving allegations of horizontal and vertical price fixing, attempted monopolization, anticompetitive mergers, collusion over municipal contracts, industrial espionage, and Robinson-Patman violations. See Nathan, *Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO*, 52 ANTITRUST L.J. 327 (1983). Indeed, Congress intended RICO's civil provisions to allow private parties to use machinery based on the antitrust model to supplement the federal government's criminal enforcement of RICO. Moreover, one commentator has contended that RICO and the antitrust laws are both concerned with creating a fair, efficient economy. Congress designed RICO to eliminate the infiltration of organized crime into legitimate business organizations, unions, and government. See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations Act (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

ute.²¹⁶ Just as the *McMahon* Court failed to find such intent behind RICO, there is no evidence of a congressional intent to preclude the arbitration of antitrust claims. Therefore, a party must prove an irreconcilable conflict between arbitration and antitrust. The irreconcilable conflict on which the *American Safety* doctrine is based, namely the public's interest in the proper enforcement of the antitrust laws, was rejected as a reason to preclude arbitration by the Court in both *Mitsubishi* and *McMahon*. Therefore, the *American Safety* doctrine fails to survive the *McMahon* analysis; domestic antitrust claims, under the mandate of the Arbitration Act, must be arbitrable.

C. *The Arbitrability of "Monopoly Issues": The Arbitration of Patent Claims*

Consistent with the Court's ruling on RICO claims, Congress's recent mandate that patent law claims are arbitrable supports the arbitrability of domestic antitrust claims.²¹⁷ The patent laws are substantively similar in that a patent, in effect, is the granting of a monopoly. Prior to 1982, claims under the patent laws were held nonarbitrable because of the public interest in patent enforcement. In 1982 and 1984, Congress adopted legislation making patent validity, infringement, and interference arbitrable.²¹⁸

In allowing arbitration of "monopoly issues" with regard to patent claims, Congress demonstrated its growing acceptance of arbitration for important statutory claims. Public interest concerns were outweighed by Congress's recognition of the benefits of commercial arbitration. The Court should follow Congress's lead by rejecting the same public interest concern behind the *American Safety* doctrine. Allowing the arbitrability of patent claims involving "monopoly issues" supports the rejection of the *American Safety* doctrine.

The analogy between RICO and the antitrust acts indicates that, after *McMahon*, domestic antitrust claims should be arbitrable. Due to the clear similarity between the remedial provisions of RICO and the antitrust acts, the *McMahon* rationale applies equally well to domestic antitrust claims. Moreover, the Court in *McMahon* rejected the international transaction distinction holding that all RICO claims are arbitrable. Both the Court in *McMahon*, and Congress through

216. See *supra* notes 183-84 and accompanying text.

217. Carmichael, *The Arbitration of Patent Disputes*, ARB. J., Mar. 1983, at 3; McClendon, *supra* note 15, at 96.

218. 35 U.S.C. § 294 (1982); 35 U.S.C. § 135(d) (Supp. IV 1986). The legislative history asserts that arbitration of patent disputes would serve the public interest by encouraging innovation and relieving some of the burdens on the overworked federal courts. See Tupman, *Arbitration of Intellectual Property Disputes Under U.S. Law*, ARB. J., Dec. 1987, at 3, 4.

the patent laws, have rejected the public policy rationale at the heart of the *American Safety* doctrine by finding that arbitration can effectively protect the public interest. Thus, it is logically inconsistent under *McMahon* to allow the arbitration of domestic RICO claims but not domestic antitrust claims. This reasoning, coupled with the Court's holding in *Mitsubishi* that international antitrust claims are arbitrable, signals that the time has come for the *American Safety* doctrine to take "its proper place among the graveyard of ideas."²¹⁹

V. CONCLUSION

Today's litigious society demands that our court system recognize the viability of alternative dispute resolution techniques. Congress recognized this need and instituted, in the Arbitration Act, a national policy favoring the arbitration of commercial claims. The Arbitration Act was designed to overcome anachronistic judicial hostility towards agreements to arbitrate. Arbitration subsequently has proven to be a viable alternative to the judicial resolution of disputes. Because it is more efficient, less costly, and non-adversarial, commercial parties frequently include arbitration provisions in their agreements.

As the use of commercial arbitration provisions has grown, courts have been required to determine the arbitrability of federal statutes involving policies that conflict with the arbitral process. Although the Arbitration Act recognized that the benefits of arbitration outweigh its inherent weaknesses, the courts have had difficulty reconciling arbitration with the traditional fears of alternative dispute resolution techniques. Until recently, courts clung to archaic fears, and in doing so, adopted two suspect lines of reasoning to find federal statutory claims nonarbitrable. First, courts found that certain federal statutory claims, such as those under the 1933 Act and antitrust laws, were nonarbitrable due to the public's interest in proper enforcement. Later, the courts abandoned this public policy rationale and adopted an international transaction test to find international 1934 Act and antitrust claims to be arbitrable.

Presently, the only remaining vestige of the anachronistic judicial hostility to arbitration is the application of the *American Safety* doctrine to domestic antitrust claims. The public policy distinction and international transaction test have been discredited due to their internal inconsistencies and the existence of persuasive countervailing

219. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2347 n.2 (Blackmun, J., dissenting).

concerns. Moreover, the Supreme Court now has implicitly recognized the weakness of these distinctions and found that both international and domestic RICO claims are arbitrable. Furthermore, Congress has recently enacted legislation permitting patent claims to be arbitrable.

These developments signal that the Court should now repudiate its remaining outdated fears, reject the *American Safety* doctrine, and accept arbitration of all commercial claims. By doing so, the Court can be faithful to the policy of the Arbitration Act favoring arbitration and, at the same time, signal potential commercial disputants that arbitration is a viable form of alternative dispute resolution within the federal court system. The Court will create, therefore, further incentives for the judicial system to develop and experiment with other forms of dispute resolution such as the mini-trial, mediation, and the summary jury trial. With no end to the litigation crisis in sight, such a development is surely welcome.

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