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Eric James Fuglsang

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THE ARBITRABILITY OF DOMESTIC ANTITRUST 
DISPUTES: WHERE DOES THE LAW STAND?

INTRODUCTION

Arbitration has rapidly become the preferred method of alternative dispute resolution ("ADR") in modern American society. Arbitration involves the voluntary submission of a dispute to a theoretically neutral third party, who then resolves the dispute by rendering a final and binding decision. Although arbitration has historically been disfavored by the judiciary, the numerous benefits of arbitration as an alternative to litigation were recognized by Congress in the passage of the Federal Arbitration Act of 1925 (the "FAA"). Among other things, the FAA assures parties submitting disputes to arbitration that the arbitrator’s decision will be final and binding except in certain narrow circumstances warranting judicial review. While the FAA and numerous federal judicial decisions recognize the strong federal policy favoring arbitration, until quite recently, certain classes of statutory claims have been exempted from the coverage of general mandatory arbitration clauses on public policy grounds.

2. See FRANCES KELLOR, ARBITRATION IN ACTION 3 (1941).
3. See Earl Wolaver, The Historical Background of Commercial Arbitration, 83 U. PA. L. REV. 132, 138 (1934); see also Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942) (suggesting that the traditional judicial antipathy toward arbitration was the result of the judiciary's self-interest in securing an optimal level of case fees from litigants).
5. The finality of the arbitrator's decision is subject to limited judicial review only in those cases in which "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1982).
7. See, e.g., Wilko v. Swan, 346 U.S. 427 (1953) (holding that claims arising under section 14 of the Securities Act of 1933 (the "Securities Act") are inarbitrable); Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (1st Cir. 1986) (recognizing that the quasi-criminal nature of the Racketeer Influenced Corrupt Organizations Act ("RICO") claims necessitates a judicial forum to ensure compliance with constitutional safeguards; hence, RICO claims are inarbitrable); Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983) (finding that bankruptcy claims are inappropriate subjects of arbitration); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (holding that antitrust disputes are not appropriate subjects of arbitration).
One such class of statutory claims previously excluded from the reach of mandatory arbitration clauses are federal antitrust disputes. The federal antitrust laws are concerned with the promotion of free and unfettered competition in the marketplace, as well as the prohibition of certain types of anticompetitive practices. Because antitrust disputes often involve strong underlying policy implications, such claims have traditionally been treated by the courts as requiring purely judicial resolution.

Nevertheless, the judicial antipathy toward the arbitrability of antitrust disputes has all but disappeared in light of recent United States Supreme Court decisions. In light of the Court’s evolving position on this issue, numerous lower courts have declared domestic antitrust disputes to be arbitrable. Other courts have relied on a more traditional contract analysis in approaching this issue by maintaining that antitrust disputes are subject to arbitration only if they fall within the scope of the contractual arbitration clause.


10. See American Safety, 391 F.2d at 826. "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." Id.

11. See, e.g., id. at 821; Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984); Applied Digital Tech., Inc. v. Continental Cas. Co., 576 F.2d 116 (7th Cir. 1978); Helfenbein v. Int'l Indus., Inc., 438 F.2d 1068 (8th Cir. 1971); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970).

12. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The Supreme Court in Mitsubishi held that antitrust disputes arising in the international commercial context could be arbitrable if so provided by the parties' agreement. Id. at 629. Although the Court specifically limited its holding to the international commercial context, the Court took definite exception to the Second Circuit's reasoning in American Safety as applied to international transactions. Id. at 632-36. However, the Court did refuse to expressly overrule the Second Circuit's decision, finding it "unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions." Id. at 629.


15. “An arbitration clause ‘does not extend to all disputes of any sort . . . but only to disputes touching specified provisions of the agreement.’” Coors Brewing Co., 51 F.3d at 1516 (quoting
The trend toward the arbitrability of domestic antitrust disputes has not been unanimous, however. Indeed, some lower courts have continued to apply a strict policy of inarbitrability when confronted with such disputes. These courts continue to stress the dangers that private arbitration poses to the public interests underlying antitrust disputes. As a result, courts adopting this philosophy continually refuse to compel arbitration of domestic antitrust disputes, even where the parties to the dispute are bound by contractual arbitration clauses that may suggest otherwise.

This Comment will commence with a brief examination of both commercial arbitration and antitrust law. Following this brief overview, this Comment will then examine relevant precedents and attempt to establish the current state of the law in the area of antitrust arbitration. Finally, this Comment will suggest that the public policy concerns underlying domestic antitrust disputes may be effectively vindicated through the arbitral process, provided that such disputes stem from, and fall within, the scope of the contract between the parties. If such disputes do not clearly fall within the scope of the parties' contract, then the dispute should not be arbitrable absent an express post-dispute agreement to arbitrate the antitrust issues. Additionally, certain procedural and judicial safeguards will be necessary to ensure that the strong public interests underlying effective antitrust enforcement are properly vindicated through the private arbitral process.

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17. The public policy rationale underlying domestic antitrust disputes concerns the broad national interest in unfettered competition in the capitalistic marketplace, which is at the very heart of antitrust law. See AREEDA, supra note 9, §§ 103-106. The courts have been cognizant of the importance of private enforcement, including the treble damages remedy, as an effective deterrent to anticompetitive activities. See, e.g., American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) (recognizing the broad national interest in competition and the widespread effects antitrust violations can have on consumers in general).
18. See infra notes 23-159 and accompanying text.
19. See infra notes 160-254 and accompanying text.
20. See infra notes 255-328 and accompanying text.
21. See infra notes 180-86 and accompanying text (discussing the Fifth Circuit's approval of post-dispute arbitration agreements).
22. See infra Part IV.C.2 and accompanying text.
I. The Evolution of Arbitration as a Preferred Method of Dispute Resolution

For various reasons, arbitration has gradually, but definitively, come to be the preeminent method of ADR. Despite a lengthy history of judicial opposition to the arbitral process, commercial arbitration has been generally favored by the business community as an efficient means of dispute resolution.\(^{23}\) The growing federal policy favoring arbitration is a direct result of the numerous benefits associated with arbitration as compared to conventional litigation.\(^{24}\)

### A. Arbitration: Its Nature and Purpose

Arbitration\(^{25}\) is designed to render a final and binding resolution of disputes without resort to the much maligned judicial process.\(^{26}\) The desirability of arbitration as an alternative to litigation stems from the fact that arbitration allows the parties to delve "deep into the causes, sift[ ] the facts and, unhampered by legal technicalities, see[ ] that justice is administered."\(^{27}\) Unlike other forms of ADR, arbitration offers a complete array of benefits including finality, expediency, privacy, and financial efficiency.\(^{28}\) In the vast majority of cases, the arbitrator's decision will have the same legally binding effect as a judicial determination.\(^{29}\) In order to be effective, the arbitral process must

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24. See infra note 28 and accompanying text.
25. Arbitration is defined as "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." **BLACK'S LAW DICTIONARY** 105 (6th ed. 1990).
26. See KELLOR, supra note 2, at 3.
27. Id. at 4.
28. Id.; see Warren E. Burger, Isn't There a Better Way?, 68 A.B.A. J. 274, 275-76 (1982) (noting the inherent delay and expense that are necessarily and inescapably associated with formal litigation); see also Soia Mentschikoff, **Commercial Arbitration**, 61 COLUM. L. REV. 846, 850 (1961) (noting the expediency and reduced costs associated with arbitration as compared to litigation). For an economic analysis of the possible benefits of arbitration, see Mark R. Lee, Antitrust and Commercial Arbitration: An Economic Analysis, 62 ST. JOHN'S L. REV. 1, 2 (1987) (stating that "promises to arbitrate are valuable only in so far as they permit the beneficiaries to economize on transaction costs"). As a cursory review of related materials indicates, there is almost universal consensus that arbitration is preferable to litigation from a practical standpoint in most cases.
29. KELLOR, supra note 2, at 4; see also 9 U.S.C. § 2 (1982). The text of section 2, specifically providing for the enforceability of arbitration decisions, reads as follows: A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such
abide by several fundamental principles, including voluntary submission, good faith, and an intention to be bound by the decision.\textsuperscript{30}

Commercial arbitration involves the settlement of disputes arising under business agreements.\textsuperscript{31} Arbitration may be applied to a wide variety of commercial transactions including sales and purchases, corporate and partnership relations, licensing agreements, insurance disputes, leases, and labor issues.\textsuperscript{32} The popularity of commercial arbitration stems from the business community's clear preference for an expeditious and effective method of resolving disagreements.\textsuperscript{33} The submission of a commercial dispute to arbitration is generally undertaken pursuant to a contractual arbitration provision, an agreement between the parties, or by a judicial order.\textsuperscript{34}

Once the decision to arbitrate is made, the parties must select the arbitrator, or arbitrators, as the case may be. The selection process is considered one of the most important aspects of the entire process.\textsuperscript{35} The selection can be done through mutual agreement,\textsuperscript{36} the use of an independent administrative agency,\textsuperscript{37} judicial appointment,\textsuperscript{38} or by

\begin{quote}
\textsuperscript{9} U.S.C. § 2.
\end{quote}

\textsuperscript{30} See Kellor, supra note 2, at 7-9. Kellor notes that agreements to submit disputes to arbitration must be voluntary, and not the products of coercion, duress, or misunderstanding. \textit{Id.} This principle will become important later with respect to broad arbitration clauses and unforeseen antitrust disputes between the contracting parties. A problem that often arises in this context occurs where a party finds itself forced to arbitrate an antitrust dispute (which it would not otherwise desire to arbitrate) solely by virtue of a broadly construed arbitration clause.

Assuming that a contract containing an arbitration clause was entered into voluntarily, then it follows, according to Kellor, that the agreement to arbitrate was also entered into voluntarily, absent a contract defense attacking the validity of the contract itself. \textit{Id.} Additionally, Kellor argues that the good faith of the parties is necessary in order for the parties to accept the arbitration decision as final and binding. \textit{Id.} Such good faith is also needed to ensure that the parties fulfill the conditions of the arbitral award. \textit{Id.} However, the good faith of the parties becomes much less important in the modern commercial context where arbitral awards are backed by threat of judicial sanctions provided for in the Federal Arbitration Act (the "FAA"). \textit{See infra} notes 82-97.

\textsuperscript{31} Kellor, supra note 2, at 4.
\textsuperscript{32} See Martin Domke, Domke on Commercial Arbitration § 1.01 (rev. ed. 1989).
\textsuperscript{33} Id. § 2.01.
\textsuperscript{34} Commercial Arbitration for the 1990s, supra note 1, at 17-18.
\textsuperscript{35} Id. at 27; see also Domke, supra note 32, § 20.00. "The arbitrator is the decisive element in any arbitration. His ability, expertness, and fairness are at the base of the arbitration process. The success or failure of an arbitration will largely depend on him." Domke, supra note 32, § 20.00.
\textsuperscript{36} Domke, supra note 32, § 20.00. This occurs where the parties mutually agree on who will be appointed as arbitrators for the particular dispute, often in consideration of the respective qualifications and experiences of the potential arbitrators.
\textsuperscript{37} Id. For example, the American Arbitration Association (the "AAA") often engages in the appointment of arbitrators for parties desiring such an appointment. For more on the AAA,
naming potential arbitrators in the contract itself. Once the selection process is complete, the proceedings may begin. Arbitration proceedings, not unlike judicial proceedings, give the parties an equal opportunity to present their respective cases, including the submission of evidence and the calling of witnesses.

Arbitrators are not usually bound by the intricate and exhaustive legal rules governing procedural and evidentiary matters. Obviously, the lack of formalistic procedural and evidentiary guidelines fuels the initial attraction of many parties to the arbitral process. However, arbitration is the target of a few relevant criticisms. The arbitration process has been accused of lacking the legitimacy associated with judicial forums because the arbitral tribunals are often temporary associations created solely to resolve specific disputes. In addition, because arbitration decisions are final and generally not subject to judicial review, there is a legitimate fear that injustices rendered through arbitral decisions may go unresolved.

Arbitration has been characterized by the Supreme Court as being a creature of contract. It is the general rule that parties cannot be required to submit disputes to arbitration unless they have agreed to do so. However, the standard arbitration clause inserted into con-

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39. 9 U.S.C. § 5 (1982). This practice has the advantage of alerting the parties beforehand of any potential problems that may arise concerning the naming of mutually acceptable arbitrators in the event of a dispute. Additionally, it gives the parties the option to ensure that competent or expert arbitrators will be present at the arbitral proceeding.
40. Id.
41. Id. § 7.
42. See Domke, supra note 32, § 1.01.
43. Id.
44. Id.
45. Id. Indeed, this is the very concern at the heart of the dispute concerning the arbitrability of domestic antitrust claims. There remains a fear that submitting such claims to arbitration would result in the subrogation of the public interest in free competition to individual compromise. See, e.g., American Safety Equip. Corp. v. J.P. Maquire & Co., 391 F.2d 821, 826-27 (2d Cir. 1968) (recognizing the danger that the strong public interests underlying antitrust disputes would not be effectively vindicated through the private arbitral process). As a result, whatever solution is reached regarding this issue, it must take into account the fact that arbitral decisions are generally not substantively reviewable.
47. See Atkinson, 370 U.S. at 241 (holding that a party cannot be forced to arbitrate that which he has not contractually agreed to arbitrate).
tracts, and recommended by the American Arbitration Association (the "AAA"), is rather broad, requiring the submission to arbitration of all disputes arising under the contract.

Disputes arise under an agreement when their resolution depends upon the judicial construction given to the contract. Not surprisingly, the broad and inclusive language of the standard arbitration clause, coupled with the difficulty of determining whether a dispute "arises under" a contract, has engendered considerable difficulty in interpretation and application. This is particularly evident in the area of antitrust arbitration, where the parties often fail to consider the possibility of future antitrust disputes. Before considering these potentially perplexing issues, however, a brief overview of the respective histories of commercial arbitration and antitrust law will prove helpful.

B. A Brief History of Commercial Arbitration

Arbitration has served as a useful method for resolving countless disputes since the dawn of primitive society. In one form or another,

48. The AAA was formed as a vehicle for stimulating the "public interest and opinion in support of the general acceptance of arbitration." KELLOR, supra note 37, at 22. As such, the AAA created and maintained a national system of arbitration for the benefit of disputing parties. Id. at 23. Additionally, the AAA creates and applies commercial arbitration rules in order to ensure a valid and competent framework for structuring arbitral proceedings and awards. See COMMERCIAL ARBITRATION FOR THE 1990s, supra note 1, at 78.

49. A sample broad arbitration clause states:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, in accordance with the Rules, then obtaining, of [name of agency administering arbitration], and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

DOMKE, supra note 32, § 5.03.

50. See Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress Int'l, Ltd., 1 F.3d 639, 642-43 (7th Cir. 1993) (stating that "arising out of" reaches all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract per se); Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983) (finding that an arbitration clause applying to disputes "arising hereunder" is applicable only to those disputes involving contractual interpretation and performance). Hence, following the reasoning applied by these courts, the omission of the phrase "relating to" removes fraudulent inducement from the scope of the arbitration clause.

51. The difficulty associated with the interpretation of arbitration clauses often hinges on mere semantics. Compare Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (disputes "arising out of or relating to" the contract encompass claims that the agreement was fraudulently induced), with Mediterranean Enters., 708 F.2d at 1464 (arbitration clause applying to disputes "arising hereunder" is much narrower, applying only to those disputes involving contractual interpretation and performance). Hence, following the reasoning applied by these courts, the omission of the phrase "relating to" removes fraudulent inducement from the scope of the arbitration clause.


53. KELLOR, supra note 37, at 3. See generally Frank D. Emerson, History of Arbitration Practice and Law, 19 CLEV. ST. L. REV. 155, 155-56 (1970) (recalling the ancient biblical fable of
arbitration has been a historically favored method for resolving a wide variety of disagreements, including personal disputes in ancient Greece, international political conflicts between Mediterranean nation-states, and wage disputes among seamen in colonial America. Indeed, commercial arbitration was a common method of dispute resolution among Phoenician and Greek merchants.

Commercial arbitration probably did not solidify into a commercially desirable practice in the English legal system, however, until it was employed as a means of resolving commercial disputes by medieval merchant guilds. Guild members were required to bring all disputes before the guild in order to seek effective resolution. Like modern arbitration proceedings, the guild decisions involved speedy, informal, and binding decisions. Unlike modern arbitration practices, however, submission to the guild's dispute resolution authority was not voluntary. Nonetheless, given that these proceedings developed as a means of avoiding the pitfalls of conventional litigation, including expense, delay, possible interruption of trade, and the negative impact on business goodwill, it is likely that these proceedings foreshadowed the evolution of modern commercial arbitration.

King Solomon, who arbitrated a maternal dispute between two recent mothers concerning the ownership of a single living child; when one mother agreed with Solomon's outlandish suggestion that the child be divided in half, Solomon promptly awarded the child to the other mother).

54. KELLOR, supra note 37, at 3. In the Homeric period, chiefs and elders often settled disputes between conflicting parties. Id. In the sixth century B.C. in Athens, Peisistratus authorized arbitrators to go throughout the city, settling interpersonal disputes whenever necessary. Id.

55. Id. at 4. In 600 B.C., in a territorial dispute between Athens and Megara concerning the island of Salamis, Spartan judges awarded the island to Athens. Id. In 480 B.C., a dispute between Corinth and Corcyra over Leucas was arbitrated by Themistocles. Id.

56. Id. at 5. This dispute was arbitrated by the Chamber of Commerce of New York, the first official American arbitration tribunal. Id.

57. Id. It was also a fairly common practice among the desert caravans of the Marco Polo era. Id.

58. See Wolaver, supra note 3, at 133-35 (stating that such guilds were created pursuant to a mercantile charter from the royalty and hinged the right to engage in the business upon guild membership); see also Mentschikoff, supra note 28, at 854-55 (noting the importance of self-contained trade group arbitration as a precursor to modern commercial arbitration).

59. Wolaver, supra note 3, at 134.

60. Id. at 137.

61. Id.

62. Id. at 144-45.

63. But see id. at 137. Wolaver argues that due to the involuntary nature of these proceedings, as well as the unduly rigid rules followed by some of these commercial guilds, such proceedings cannot be characterized as arbitration in the modern sense, which generally requires voluntary submission by the parties involved. Id.
English common law generally treated contractual arbitration clauses as revocable.\(^6\) The rule of revocability is thought to have originated from Lord Coke's dictum in *Vynior's Case*.\(^6\) Later decisions supported the general rule of revocability and offered distinct rationales in support of this presumption.\(^6\) The hostility of the common law courts toward arbitration is likely due to a combination of several factors, including the dependence of common law judges on case fees for income,\(^6\) interforum competition among the judiciary,\(^6\) and efforts to institutionalize the legal profession.\(^6\) However, the traditional hostility of the English judges toward arbitration has been greatly tempered with the passage of time. Indeed, subsequent English legislation, including the Common Law Procedure Act of 1854\(^7\) and the Arbitration Act of 1889,\(^7\) not only recognized the legitimacy of arbitration, but permitted arbitrators to submit their decisions to the courts for review.\(^7\) Interestingly, under the English statutes, both the procedural and substantive aspects of the arbitral process may be subject to judicial review.\(^7\)

\(^{64}\) Id. at 138.

\(^{65}\) 77 Eng. Rep. 597 (K.B. 1609). "[I]f I submit myself to arbitriment...yet I may revoke it for my act, or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." Id. at 599-600.

\(^{66}\) See Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746) (finding that arbitration agreements are revocable because they "oust" the courts from jurisdiction); see also Wellington v. MacKintosh, 26 Eng. Rep. 741 (Ch. 1743) (refusing to grant discovery to an arbitral panel). But see Halfhide v. Penning, 29 Eng. Rep. 187 (Ch. 1788) (recognizing the competency of skilled arbitrators to evaluate complex issues).

\(^{67}\) John R. Allison, * Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 224 (1986). Allison points to Lord Campbell's suggestion in *Scott v. Avery*, 10 Eng. Rep. 1121 (K.B. 1856), that because English judges had no fixed salary, they were entirely dependent upon case fees for income. Id. Hence, it was in the judiciary's self-interest to condemn arbitration since any alternative to litigation directly threatened the economic compensation of judges.

\(^{68}\) Id. A contributing factor was the competition occurring primarily between the older Anglo-Saxon courts and the upstart Norman courts that evolved following the Norman Conquest of 1066. Id. The Norman courts, which eventually developed into the common law judiciary, faced stiff and continuous competition from the older Anglo-Saxon courts. Id. Hence, the common law courts likely viewed arbitration as yet another outside challenge, both to their legitimacy and to their jurisdictional powers. Id. at 224-25.

\(^{69}\) Id. at 224. Allison notes that the judiciary's attempts to professionalize included the adoption of intricate procedural requirements necessary for effective litigation. Id. The complexity of these procedures, however, created a disincentive toward litigation. Id. Since arbitration lacked these complex procedural formalities, there was a perceived danger that arbitration might overtake the courts as the preferred method of dispute resolution. Id. at 224-25.

\(^{70}\) 17 & 18 Vict., ch. 125 § 5.

\(^{71}\) 52 & 53 Vict., ch. 49 § 7.

\(^{72}\) Mentschikoff, *supra* note 28, at 855.

\(^{73}\) Id. at 856.
The development of arbitration in America did not mirror the English experience.\textsuperscript{74} Arbitral proceedings did occur with some degree of frequency in trade exchanges, trade associations, and the New York Chamber of Commerce.\textsuperscript{75} Unlike English law, American law did not, and for all intents and purposes, still does not, permit judicial review of the substantive aspects of arbitral proceedings.\textsuperscript{76} Although there may be narrow exceptions for procedural errors,\textsuperscript{77} mistakes in the application of substantive law generally do not permit the vacating of arbitral awards.\textsuperscript{78}

Despite the sporadic early use of arbitration, arbitration has evolved into a legitimate and effective method of dispute resolution by the early Twentieth Century. In 1920, New York became the first state to adopt a modern arbitration statute.\textsuperscript{79} Shortly thereafter, in 1922, the AAA was founded as a vehicle for encouraging and legitimizing arbitration.\textsuperscript{80} This trend would culminate in the passage of the Federal Arbitration Act of 1925.\textsuperscript{81}

\textit{C. The Federal Arbitration Act and the Growing Policy Favoring Arbitration}

Congress passed the FAA\textsuperscript{82} in order to legitimize arbitration and give it statutory status as an acceptable form of ADR.\textsuperscript{83} The key provision of the FAA is section 2, which provides for the irrevocability and enforceability of arbitration agreements with only minor exceptions.\textsuperscript{84} The FAA expressly provides for the participation of the federal judiciary in the enforcement of arbitral awards by requiring

\textsuperscript{74} Id. at 855.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 856. Indeed, Mentschikoff notes that the earliest modern arbitration statute, the New York Arbitration Act of 1920, N.Y. Sess. Laws 1920, ch. 275, § 2, specifically excluded errors of law as a basis for setting aside arbitral awards. \textit{Id.} The FAA provided for a modification of an arbitral award “\textit{where the award is imperfect in matter of form not affecting the merits of the controversy}.” 9 U.S.C. § 11(c) (1982). Hence, the statutory language expressly excludes award modifications based on substantive errors.
\textsuperscript{77} 9 U.S.C. §§ 2, 10, 11.
\textsuperscript{78} Mentschikoff, \textit{supra} note 28, at 856. The general judicial refusal to substantively evaluate arbitral awards is exemplified by the FAA, examined more closely in Part I.C. The FAA provides for a more substantive review in only the narrowest of circumstances. \textit{See} 9 U.S.C. §§ 2, 10, 11 (1982).
\textsuperscript{80} KELLOK, \textit{supra} note 37, at 61.
\textsuperscript{81} 9 U.S.C. §§ 1-14.
\textsuperscript{84} 9 U.S.C. § 2. For the complete text of this section, see \textit{supra} note 29.
courts, in cases involving arbitration agreements, to stay litigation on arbitrable issues, to issue orders compelling arbitration, and to appoint arbitrators when necessary. Most importantly, to ensure compliance with the arbitral process, the FAA gives the arbitrators legally enforceable powers to summon persons, documents, records, and papers. Finally, the Act's pro-arbitration stance is evidenced by its procedures for vacating arbitral awards, which are limited to only a few non-substantive possibilities.

By generally not allowing for substantive review, the FAA strongly favors the employment of arbitration as an alternative to litigation. It includes strong provisions establishing enforceability and irrevocability of arbitration agreements, the granting of broad subpoena powers to arbitrators, and the minimization of grounds for review. Although the Supreme Court did enforce some arbitration agreements prior to the passage of the FAA, the Court generally refused to enforce agreements to arbitrate future disputes on the theory that such an agreement deprived the aggrieved party of the right to a judicial remedy. Following the Act's passage, the federal judiciary was

85. 9 U.S.C. § 3. Section 3 provides, in relevant part:

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 . . . .

Id.

86. Id. § 4. Section 4 provides, in relevant part, that "[a] party . . . may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." Id.

87. Id. § 5. Section 5 provides, in relevant part, that "if no method be provided therein . . . the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require . . . ." Id.

88. Id. § 7. Section 7 provides, in relevant part:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

Id.

89. Id. §§ 2, 10, 11.

90. Id. § 2.

91. Id. § 7.

92. Id. § 10.

93. See Burchell v. Marsh, 58 U.S. (17 How.) 344 (1854) (involving an arbitration agreement that was entered into after the dispute initially arose); Karthaus v. Yllas y Ferrer, 26 U.S. (1 Pet.) 222 (1828) (same).

94. See, e.g., Insurance Co. v. Morse, 87 U.S. 445 (1874).

95. Id. at 451. "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him." Id.
forced to overcome any historical hostility toward arbitration and to recognize the broad federal policy favoring arbitration. This shift in judicial attitudes is clearly demonstrated by the change in the arbitrability of statutory claims, particularly those in the area of federal securities law.

1. The Arbitrability of Federal Securities Disputes

The Supreme Court's initial brush with the arbitration of securities claims occurred in Wilko v. Swan. In Wilko, the Court was confronted with the issue of whether a dispute arising under section 12(2) of the Securities Act of 1933 (the "Securities Act") could be arbitrated. In concluding that such a claim could not be arbitrated, the Court relied on section 14 of the Securities Act, which provided that any contract which required a waiver of the rights granted to parties under the Securities Act was void. The Court reasoned that the Act created special rights for the protection of investors and, hence, those rights, coupled with the strong public interest in the prompt and economical resolution of controversies implicated by the Act, required vindication in a judicial forum.

The Court addressed a similar issue in Scherk v. Alberto-Culver Co. In Scherk, the plaintiff American company, Alberto-Culver, sued Scherk, a German citizen, for violating section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). While the Court indicated that the controversy would likely be inarbitrable in

96. See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1971). In this case, the Supreme Court expressly rejected the longstanding notion that arbitration encroached upon judicial authority. "The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction." Id. at 12.

97. See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989). "The Act was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate'... and place such agreements 'upon the same footing as other contracts'..." Id. at 474 (citations omitted); see also McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994) (holding that preferences in favor of arbitration are only applicable when parties have formally agreed to such a resolution); Deloitte Noraduit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060 (2d Cir. 1993) (noting that the FAA reflects congressional recognition of the benefits of arbitration); Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058 (5th Cir. 1990) (same); Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840 (2d Cir. 1987) (same).

100. Wilko, 346 U.S. at 429-30.
102. Wilko, 346 U.S. at 438.
103. Id.
105. Id. at 509. Section 10(b) of the Securities Exchange Act (the "Exchange Act") is codified at 15 U.S.C. § 78j(b).
the domestic context under the Wilko rationale, the international setting presented a different situation.\textsuperscript{106} Because the international context "involve[d] considerations and policies significantly different from those found controlling in Wilko,"\textsuperscript{107} the Court concluded that the statutory policy of protecting investors and the public interest in such protection was outweighed by international commercial concerns.\textsuperscript{108} Hence, disputes under the Exchange Act could be arbitrated if they occur in an international commercial setting and the balancing of the competing interests involved favors arbitration.\textsuperscript{109}

The international distinction lost considerable importance, however, following the Court's decision in Shearson/American Express, Inc. v. McMahon.\textsuperscript{110} In McMahon, the Court was faced with deciding whether domestic claims arising under the Exchange Act and the Racketeer Influenced Corrupt Organizations Act ("RICO")\textsuperscript{111} could be arbitrated.\textsuperscript{112} The agreement between the parties contained a broad arbitration clause covering "any controversy relating to the accounts."\textsuperscript{113} The Court ordered arbitration of the securities claims on the theory that nothing in the legislative history, or in the Exchange Act itself, indicated a congressional intention to "preclude a waiver of judicial remedies for the statutory rights at issue."\textsuperscript{114}

The Court recognized that Scherk was limited to international commercial transactions\textsuperscript{115} but noted that "the competence of arbitral tribunals to resolve § 10(b) claims is the same in both settings."\textsuperscript{116} Additionally, the Court found no problem in ordering arbitration of the RICO claims since nothing in RICO itself, or its legislative history, indicated a congressional intent to preclude arbitration of such claims.\textsuperscript{117} Interestingly, by comparing RICO claims to antitrust claims,\textsuperscript{118} including the treble damages provision present in both stat-

\textsuperscript{106} 417 U.S. at 515-20.
\textsuperscript{107}  Id. at 515.
\textsuperscript{108}  Id. at 519-20.
\textsuperscript{109}  Id.; see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630-31 (1985) (demonstrating the later importance of the international commercial nature of the dispute in the area of antitrust arbitration).
\textsuperscript{110} 482 U.S. 220 (1987).
\textsuperscript{112} 482 U.S. at 222.
\textsuperscript{113}  Id. at 223.
\textsuperscript{114}  Id. at 227 (citations omitted).
\textsuperscript{115}  Id. at 232.
\textsuperscript{116}  Id.
\textsuperscript{117}  Id. at 239-40.
\textsuperscript{118} At the time of the McMahon decision, the Court had already rendered its decision in Mitsubishi, which had held that antitrust claims arising in the international commercial context were arbitrable. See discussion infra Part III.B (discussing Mitsubishi and related cases).
utory schemes, the Court rejected the argument that RICO claims were too complex for effective resolution through the arbitral process.

Issues concerning the arbitrability of securities claims were most recently addressed by the Court in *Rodriguez de Quijas v. Shearson/ American Express, Inc.* In *Rodriguez de Quijas*, the Court definitively overruled *Wilko v. Swan* by holding that domestic claims under section 12(2) of the Securities Act could be arbitrated. Like *McMahon*, the agreement in *Rodriguez de Quijas* included a broad arbitration clause applying to all controversies "relating to [the] accounts" of the parties. In ruling that the claim in *Rodriguez de Quijas* must be submitted to arbitration pursuant to this broad contractual provision, Justice Kennedy's opinion noted that the Court's decision in *Wilko* was permeated by "the old judicial hostility to arbitration." This hostility was clearly eroded by subsequent decisions. Additionally, the Securities Act does not specifically require a judicial forum, nor does the policy of protecting purchasers of securities prevent the disputes from being arbitrated.

The Court concluded that *Wilko* was "incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions." Following the Court's decision in *Rodriguez de Quijas*, federal securities claims under either the Securities Act or the Exchange Act could now be arbitrated. As a result, the tension that had previously existed between the *Wilko* and *McMahon* decisions was seemingly removed.

119. *McMahon*, 482 U.S. at 238-40. The treble damages provision of RICO does not specifically preclude arbitration. "[S]o 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." *Id.* at 240 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985)).

120. *Id.* at 239.


122. *Id.* at 485.

123. *Id.* at 478.

124. *Id.* at 480 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).


127. *Id.* at 484.

128. *Id.* at 485.

129. *Id.* The Court removed the disparity by overruling *Wilko*. 
2. The Arbitrability of Other Federal Statutory Claims

A similar trend favoring the arbitrability of statutory claims has gradually occurred in other areas as well. Claims under the Age Discrimination in Employment Act (the "ADEA"),\(^ {130} \) the Carriage of Goods by Sea Act (the "COGSA"),\(^ {131} \) Title VII of the Civil Rights Act ("Title VII"),\(^ {132} \) and the Petroleum Marketing Practices Act (the "PMPA")\(^ {133} \) all have been subject to arbitration pursuant to contractual arbitration clauses. Additionally, patent claims, which were initially precluded from resolution through arbitration,\(^ {134} \) have been subsequently opened to arbitration via statute.\(^ {135} \) The trend toward the arbitrability of statutory claims is not surprising given that parties seeking to preclude the arbitration of statutory claims have the formidable burden of showing "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."\(^ {136} \) As a result of this trend, many commentators and courts have concluded that domestic antitrust claims are proper subjects of arbitration.\(^ {137} \)

II. The Evolution and Goals of Antitrust Law

Broadly speaking, the antitrust laws are designed to encourage free and fair competition in the open market by restricting numerous forms of anticompetitive and unfair conduct by market participants.\(^ {138} \) Both economic and noneconomic policies underlie the federal anti-

\(^ {130} \) 29 U.S.C. §§ 621-634 (1982); see, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (finding that absent a showing of congressional intent to preclude arbitration, claims under the ADEA may be arbitrated pursuant to an arbitration agreement).


\(^ {132} \) 42 U.S.C. § 2000e (1994); see, e.g., Prudential Ins. Co. of America v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (stating that Title VII claims may be arbitrated, but the Title VII plaintiff must knowingly agree to submit such claims to arbitration).

\(^ {133} \) 15 U.S.C. §§ 2801-2805 (1982); see, e.g., Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244, 1247-48 (9th Cir. 1994) (noting that the submission of PMPA claims to arbitration could be permissible provided that the dominant party does not compel the weaker party to surrender statutorily mandated protections).

\(^ {134} \) See, e.g., Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (holding that the validity of a patent is inappropriate for arbitration due to the public interest involved); Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970) (same).


\(^ {137} \) See Baker & Stabile, supra note 52, at 396 (arguing that, based on the Supreme Court's willingness to enforce arbitration agreements even as to federal statutory claims, the arbitration of domestic antitrust disputes is a current reality); see also Ngheim v. NEC Elecs., Inc. 25 F.3d 1437, 1441 (9th Cir. 1994) (finding domestic antitrust claims within the reach of contractual arbitration clauses); Kowalski v. Chicago Tribune Co., 854 F.2d 168, 173 (7th Cir. 1988) (same).

trust laws.\textsuperscript{139} The antitrust laws are viewed by many as the guardians of free competition and economic efficiency, both of which are key components of a capitalistic market economy and a democratic society.\textsuperscript{140}

Modern antitrust law likely had its antecedents in early English common law, which often rejected the validity of contracts in restraint of trade.\textsuperscript{141} It was not until 1890 that Congress passed the Sherman Act\textsuperscript{142} in order to prohibit conspiracies (among more than one firm)

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  \item It was not until 1890 that Congress passed the Sherman Act in order to prohibit conspiracies (among more than one firm).
\end{itemize}
or conduct (by one firm) in restraint of trade.\textsuperscript{143} Referred to as “the Magna Carta of free enterprise,”\textsuperscript{144} the Sherman Act, despite its relatively broad and ambiguous language,\textsuperscript{145} accounts for a significant number of antitrust claims.\textsuperscript{146} Other prominent antitrust statutes include the Clayton Act,\textsuperscript{147} the Robinson-Patman Act,\textsuperscript{148} and the Federal Trade Commission Act (the “FTC Act”).\textsuperscript{149}

Antitrust disputes usually involve exceedingly complex issues. Antitrust proceedings are fact-intensive endeavors, requiring detailed evidentiary findings and often involving complex market definition inquiries, which necessitate expert testimony concerning intricate economic theories.\textsuperscript{150} As a result of this inherent complexity, antitrust litigation is frequently costly and time-consuming.\textsuperscript{151} These difficulties have increased substantially since the Supreme Court began shun-

\textsuperscript{143} See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS (1994). The congressional debates surrounding the passage of the Sherman Act expressed strong concern over market concentration, monopoly power, and cartel formation. \textit{Id.} at 3. It was feared that these types of behavior would inevitably lead to the inefficient allocation of resources and higher prices for consumers. \textit{Id.} Also, Congress was quite concerned with protecting small businesses from the disastrous effects of trying to compete with larger, more efficient rivals. \textit{Id.} (citations omitted). Additional concerns of the 1890 Congress included entrepreneurial independence, distributional effects, equitable considerations, and freedom of independent decision making and contracting. \textit{Id.} at 2-3.

\textsuperscript{144} United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

\textsuperscript{145} Senator Sherman himself, the sponsor of the legislation, recognized the lack of clear guidelines provided by the statutory language. SULLIVAN \& HARRISON, supra note 143, at 5. Sherman noted that the “precise line between lawful and unlawful combinations . . . must be left for the courts to determine in each particular case.” 21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman).

\textsuperscript{146} For a general discussion of the requirements for bringing actions under the various antitrust statutes, including the scope of claims brought under the Sherman Act, see SULLIVAN \& HARRISON, supra note 143, at 35-72.


\textsuperscript{148} \textit{Id.} §§ 13-13b, 21a. The Robinson-Patman Act generally prohibits price discrimination involving like goods shipped in interstate commerce.


\textsuperscript{150} Baker \& Stabile, supra note 52, at 396.

\textsuperscript{151} \textit{Id.}
ning the relatively quicker per se categorization analysis in favor of the more searching, fact-intensive "rule of reason" analysis.

Antitrust suits may generally be commenced by governmental actors or private parties. Both the Justice Department and the Federal Trade Commission (the "FTC") are charged with the public enforcement of the antitrust laws. However, the antitrust laws are primarily enforced through lawsuits brought by private parties, largely because of the treble damages remedy provided in section 4 of the Clayton Act. The treble damages remedy was created expressly for the purpose of encouraging the active and liberal private enforcement

152. Per se rules in the antitrust context may be characterized as conclusive presumptions of illegality that do not require elaborate evidentiary showings, intensive investigations, or complex economic analysis. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 228 (1940). Such rules apply to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal per se.'" National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

The policy justifications for the per se rules include: business certainty resulting from bright-line rules clearly delineating what types of behavior will generate liability, judicial economy resulting from quicker and less intensive litigation, and the lack of any redeeming virtues inherent in the per se illegal conduct. Per se rules are currently restricted to price-fixing and horizontal market exclusions. Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 987 (5th Cir. 1983) (citations omitted).

The Supreme Court's current trend toward shunning per se rules began in NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 103 (1984), where the Court applied its rule-of-reason analysis in determining whether the NCAA restraints placed on televised college football broadcasts were unlawful horizontal restraints of trade. This trend has been recognized by lower courts confronted with antitrust issues. See, e.g., Brant v. United States Polo Ass'n, 631 F. Supp. 71, 75 (S.D. Fla. 1986) (recognizing the Supreme Court's shunning of per se analysis in favor of applying the rule-of-reason analysis).

153. Baker & Stabile, supra note 52, at 398 (citations omitted). Under the rule-of-reason analysis, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918). The competitive effects of such agreements are "evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reason why it was imposed." National Soc'y of Prof'l Eng'rs, 435 U.S. at 692. By definition, the rule-of-reason analysis requires a reasoned, detailed, and complex analysis of the possible anticompetitive effects and the possible procompetitive justifications of the challenged restraint. Board of Trade, 246 U.S. at 238. This necessarily translates into greater delays and increased costs, although it does alleviate the problem of applying one arbitrary rule to every restraint that may fall within the per se realm.

154. See generally Areeda, supra note 9, §§ 150-175 (noting the various methods of antitrust enforcement).

155. Both agencies have concurrent jurisdiction over various sections of the Clayton and Robinson-Patman Acts. Sullivan & Harrison, supra note 143, at 35. Only the Antitrust Division of the Justice Department has jurisdiction over the Sherman Act, including the Act's criminal sanctions. Id. Of course, this discussion does not contemplate the numerous state antitrust laws and their respective enforcement mechanisms.

156. 15 U.S.C. § 15 (1982). Section 15(a) provides, in relevant part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover three-fold the damages ... sustained ..." Id. § 15(a).
of the antitrust laws.\textsuperscript{157} Additionally, to further encourage private enforcement, a prior finding of liability in a governmental proceeding may be used by private parties as prima facie evidence of the defendant's liability in subsequent private lawsuits.\textsuperscript{158} The treble damages remedy has apparently had its desired effect, for it is estimated that ninety percent of all antitrust suits are initiated by private parties.\textsuperscript{159}

The importance of the antitrust laws to the judiciary, and to society as a whole, has often resulted in special considerations being given to difficult issues arising in the antitrust context. One such issue concerns whether antitrust claims may, given the important underlying public interests, be properly resolved through the private process of commercial arbitration.

III. The Arbitrability of Antitrust Disputes

A. American Safety and Its Progeny

The issue of whether domestic antitrust disputes could be arbitrated was first addressed by the Second Circuit in its landmark opinion in \textit{American Safety Equipment Corp. v. J.P. Maguire & Co.}.\textsuperscript{160} \textit{American Safety} was the first time that a federal court of appeals gave a clear indication that antitrust disputes were inarbitrable.\textsuperscript{161} The case involved a typical licensing agreement whereby the licensor granted the licensee the rights to use its trademark.\textsuperscript{162} The parties' licensing

\textsuperscript{157} HERBERT HOVENKAMP, ECONOMICS AND ANTITRUST LAW § 14.1 (1985) (citations omitted). However, the federal judiciary has attempted to set limits on private enforcement by enacting specific standing requirements, including the "antitrust injury" and "indirect purchaser" rules. \textit{Id.} (citation omitted). Additionally, various commentators have attacked the efficacy of the treble damages remedy on numerous grounds. See \textit{SULLIVAN & HARRISON, supra} note 143, § 3.02. It is argued that the treble damages provision acts as an overdeterrent by giving antitrust plaintiffs a windfall recovery, thereby removing any incentive to mitigate damages on the part of the plaintiff. \textit{Id.} § 3.07. Additionally, vague guidelines and the possibility of treble damages liability may discourage aggressive competition by firms unable to discount the possibility of potential liability. \textit{Id.} Also, meritless antitrust claims may be filed more frequently in order to elicit early and unfounded settlement offers from defendants unsure of their potential liability but unwilling to take the chance of litigating and suffering a large award for treble damages. \textit{Id.} (citation omitted). Lastly, treble damages are criticized for overcompensating antitrust plaintiffs and overpenalizing antitrust defendants. \textit{Id.}

\textsuperscript{158} 15 U.S.C. § 16(a).

\textsuperscript{159} SULLIVAN & HARRISON, supra note 143, § 3.02. It should be noted, however, that the federal treble damages remedy can only be pursued in a United States District Court, and there is no provision requiring such a remedy in state courts or private proceedings. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 654 (1985) (Stevens, J., dissenting).

\textsuperscript{160} 391 F.2d 821 (2d Cir. 1968).

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} at 822.
agreement contained a broad arbitration clause.\textsuperscript{163} After the business relationship soured, the licensee filed suit alleging that the licensing agreement violated the Sherman Act and sought a declaratory judgement stating that the agreement was illegal.\textsuperscript{164} The licensor sought to stay the litigation pending the outcome of arbitration.\textsuperscript{165} The district court granted the licensor’s motion to stay the litigation and ordered the parties to arbitrate the dispute, including the antitrust claims.\textsuperscript{166}

On appeal, the Second Circuit, relying on the reasoning of the Supreme Court’s decision in \textit{Wilko v. Swan},\textsuperscript{167} held that public policy considerations require that antitrust disputes not be submitted to arbitration.\textsuperscript{168} The key inquiry, according to the Second Circuit, was whether the statutory right in question was “of a character inappropriate for enforcement by arbitration.”\textsuperscript{169} The fundamental policy conflict in this case concerned the tension between the “federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and [the] encouragement of arbitration.”\textsuperscript{170}

In resolving the conflict in favor of the inarbitrability of antitrust claims, the Second Circuit espoused four key policy rationales supporting its decision. First and foremost, the court recognized that antitrust claims implicate the strong national interest in a freely competitive economy.\textsuperscript{171} Because antitrust claims have such a wide-ranging impact on the overall economic health of the public, the court reasoned that it was unlikely that Congress intended to allow the nonjudicial resolution of such claims.\textsuperscript{172} The second reason offered by the court concerned the contractual relationship of the parties in an antitrust dispute. There is a strong possibility that one party in such a case has superior bargaining power and can force the other party into a

\begin{itemize}
\item \textsuperscript{163} The clause provided that “[a]ll controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance thereof, shall be settled by arbitration.” \textit{Id.} at 823.
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} 346 U.S. 427, 438 (1953) (holding that securities claims under the Securities Act were inarbitrable in light of the public interests involved).
\item \textsuperscript{168} \textit{American Safety,} 391 F.2d 821.
\item \textsuperscript{169} \textit{Id.} at 825 (citing \textit{Wilko v. Swan}, 201 F.2d 439, 444 (2d Cir. 1953)).
\item \textsuperscript{170} \textit{Id.} at 826.
\item \textsuperscript{171} \textit{Id.} “The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public’s interest.” \textit{Id.}
\item \textsuperscript{172} \textit{Id.} at 827.
\end{itemize}
contract of adhesion. Hence, the stronger party, possibly a monopolist, could theoretically force the weaker party to involuntarily arbitrate any disputes that may arise.

The third reason given by the Second Circuit concerned the complexity of antitrust litigation. The court reasoned that complex economic inquiries and detailed evidentiary showings were more suited to the judicial forum, rather than the private arbitral forum. The fourth and final rationale relied on by the court concentrated on the arbitrators themselves. Because commercial arbitrators are generally drawn from the business community, and it is the business community itself that is subject to regulation by the antitrust laws, the court reasoned that there might be an inherent conflict of interest in allowing the arbitration of antitrust claims by so-called "businessmen arbitrators."

Following the American Safety decision, the general prohibition on the arbitration of antitrust disputes was applied by numerous courts within the various federal circuits. Not surprisingly, the Second Circuit's decision elicited a host of commentary, both pro and con.

173. Id. "[I]t is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. Here again, we think that Congress would have hardly intended that." Id.

174. Id.

175. Id.

176. Id.

177. Id. Although the court expressed no outright distrust of commercial arbitrators drawn from the business community, the general implication may be that these arbitrators would be inevitably biased against effective enforcement of the antitrust laws. Presumably, a conflict of interest is inescapable for "businessmen arbitrators." The court fails, however, to explain why judges are more suited to resolve complex commercial disputes than those engaged in commercial transactions as part of their profession.

178. See Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984) (recognizing an implied exception to the FAA barring submission of antitrust claims to arbitration); Applied Digital Tech., Inc. v. Continental Cas. Co., 576 F.2d 116 (7th Cir. 1978) (affirming the district court's decision to enjoin arbitration of antitrust issues); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) (holding the plaintiff's antitrust claims inarbitrable); Helffenbein v. Int'l Indus., Inc., 438 F.2d 1068 (8th Cir. 1971) (holding that arbitrators have no jurisdiction to pass upon substantive aspects of arbitration laws); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970) (holding an agreement to arbitrate antitrust issues invalid); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968) (holding that antitrust is not an arbitrable issue); Stendig Int'l, Inc. v. B. & B. Italia, S.p.A., 633 F. Supp. 27 (S.D.N.Y. 1986) (holding arbitration of antitrust claims unenforceable).

179. See Lee Loevinger, Antitrust Issues as Subjects of Arbitration, 44 N.Y.U. L. REV. 1085, 1089-90 (1969) (arguing that antitrust claims should not be subjects of arbitration because the disadvantages of such an approach clearly outweigh the possible advantages of expediency, expertise, and economy). Among the twelve noted disadvantages of arbitration are:

(1) inappropriateness of antitrust issues to the scope of the conventional arbitration clause;
(2) the complexity of antitrust determinations;
Additionally, an exception to the general rule of inarbitrability for antitrust claims arose shortly thereafter in the Fifth Circuit. In *Cobb v. Lewis*, the Fifth Circuit upheld the general policy of inarbitrability as applied to antitrust claims, but recognized that agreements to arbitrate antitrust disputes that were entered into after the dispute had arisen were enforceable. In reaching this conclusion,

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<td>(3)</td>
<td>the lack of antitrust experience by the arbitrators;</td>
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<td>a restrained antitrust enforcement by businessmen arbitrators;</td>
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<td>(5)</td>
<td>a much weaker form of discovery in the arbitral setting;</td>
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<td>(6)</td>
<td>inconsistent results due to the lack of binding precedent in arbitration;</td>
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<td>(7)</td>
<td>arbitrators may give undue weight to non-legal defenses;</td>
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<td>(8)</td>
<td>contracts of adhesion may force the weaker party to arbitrate;</td>
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<td>(9)</td>
<td>contracts that contemplate antitrust violations are void as against public policy;</td>
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<td>(10)</td>
<td>the arbitration clause itself may be an invalid restraint;</td>
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<td>(11)</td>
<td>the finality of arbitration and its lack of review; and</td>
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<td>(12)</td>
<td>the public interest in antitrust disputes.</td>
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*Id.* at 1090-91. Loewingr concludes that antitrust claims should not be arbitrated due to the inherent public policy ramifications and because such claims can easily be severed and evaluated independently from other arbitrable issues. *Id.* at 1096; *see also* Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. Rev. 1072, 1073-74 (1969) (arguing that the submission of antitrust disputes to arbitration will have a deleterious effect on the public policy of encouraging treble damages suits). For a criticism of Loewingr's approach, see Gerald Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. Rev. 1097 (1969), arguing that antitrust disputes should be submitted to arbitration. Aksen attempts to refute each of Loewingr's reasons for denying the arbitrability of antitrust claims with the following twelve responses:

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<td>(1)</td>
<td>parties may agree to arbitrate antitrust disputes for reasons of economy;</td>
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<td>(2)</td>
<td>it is relatively easy to obtain antitrust experts as arbitrators, and the judicial inconsistency in the area of antitrust militates against holding that the judicial forum is the superior forum;</td>
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<td>(3)</td>
<td>like (2), antitrust experts may be obtained as arbitrators;</td>
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<td>(4)</td>
<td>“businessmen arbitrators” can be supplanted by legal experts;</td>
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<td>(5)</td>
<td>parties seeking arbitration are likely to be cooperative; also, the FAA gives arbitrators limited discovery powers under 9 U.S.C. § 7;</td>
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<td>(6)</td>
<td>antitrust arbitrators must be aware of the law in order to perform capably; also, judicial reversal is allowed for arbitral awards which violate public policy;</td>
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<td>(7)</td>
<td>there is no evidence that nonlegal defenses will be given greater weight in the arbitral forum;</td>
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<td>(8)</td>
<td>unequal bargaining power may be present in other commercial contracts where arbitration clauses are enforced;</td>
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<td>(9)</td>
<td>arbitration clauses can survive a tainted contract; the clause is only voidable if it is itself tainted;</td>
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<td>(10)</td>
<td>if the clause itself involves an illegal restraint, it is voidable;</td>
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<td>(11)</td>
<td>there is the possibility of nonbinding arbitration; and</td>
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<td>(12)</td>
<td>other disputes involving the public interest are arbitrable (i.e. labor).</td>
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*Id.* at 1098-1104. Aksen concludes that antitrust disputes should be subject to arbitration if: (1) there is not a contract of adhesion; (2) the arbitration clause provides for “fair and equitable” arbitration through the AAA; and (3) the arbitration agreement is not merely a ploy for circumventing the antitrust laws. *Id.* at 1110.

180. 488 F.2d 41 (5th Cir. 1974).
181. *Id.* at 47.
the court relied on dictum in *American Safety* leaving open the issue of the enforceability of post-dispute agreements to arbitrate antitrust disputes,\(^1\) as well as relying on several securities cases that upheld similar post-dispute agreements to arbitrate.\(^2\) However, the *Cobb* court specifically noted that, in order to be enforceable, such agreements must be expressly made and must refer specifically to the controversy in question.\(^3\) Such post-dispute agreements to arbitrate cannot be found simply by virtue of the presence of an arbitration clause in the original contract.\(^4\) Notwithstanding the *Cobb* exception for post-dispute agreements to arbitrate, antitrust disputes generally remained inarbitrable until the Supreme Court's landmark decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*\(^5\)

### B. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

The *American Safety* doctrine continued as the general rule in this area until the Supreme Court rendered its decision in *Mitsubishi.*\(^6\) In *Mitsubishi*, the dispute centered on the territorial restrictions inserted into a distribution agreement between a Puerto Rican automobile dealership (Soler), a Japanese automobile manufacturer (Mitsubishi), and Chrysler International, S.A. (CISA).\(^7\) The agreement provided Soler with the authority to sell Mitsubishi automobiles within a designated geographic area.\(^8\) In addition, the agreement contained a broad arbitration clause.\(^9\)

When auto sales slumped in Puerto Rico due to an economic recession, Soler attempted to sell the autos outside of the contractually specified area.\(^10\) Mitsubishi protested and sought an order to compel

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1. Id. (citing American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968) and Power Replacements, 426 F.2d at 984).
2. Id. at 47-48. The two securities decisions relied upon which the *Cobb* court relied were Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242 (3d Cir. 1968) and Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972). In both cases, arbitration agreements were held enforceable when made after the initial dispute had arisen.
3. Cobb, 488 F.2d at 48.
4. Id.
5. Id.
7. Id.
8. Id. at 617.
9. Id.
10. Id. Paragraph VI of the Sales Agreement entitled "Arbitration of Certain Matters" provided that "[a]ll disputes, controversies, or differences which may arise . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." Id. (citation omitted).
11. Id. at 617-18.
arbitration before the Japanese tribunal.\textsuperscript{192} Soler counterclaimed on the theory that Mitsubishi violated the Sherman Act by conspiring to restrain trade.\textsuperscript{193} Although the district court ordered arbitration of the antitrust claims pursuant to the agreement between the parties,\textsuperscript{194} the First Circuit reversed as to the antitrust claims, stating that antitrust disputes were inarbitrable under the \textit{American Safety} doctrine.\textsuperscript{195}

The Supreme Court emphatically reversed the First Circuit, holding that antitrust disputes arising in the international commercial context may be arbitrated pursuant to a contractual arbitration clause.\textsuperscript{196} Relying on cases such as \textit{The Bremen v. Zapata Off-Shore Co.}\textsuperscript{197} and \textit{Scherk v. Alberto-Culver Co.},\textsuperscript{198} the Court emphasized the importance of the international commercial context and the need for dependability and honesty in facilitating international trade.\textsuperscript{199} The federal policy favoring the enforcement of freely negotiated choice-of-forum clauses,\textsuperscript{200} coupled with the strong federal policy favoring arbitration as an alternative to litigation,\textsuperscript{201} required enforcing the clause at issue, irrespective of the unique statutory nature of the dispute.\textsuperscript{202}

Although the Court could have relied solely on the international character of the dispute for enforcement of the arbitration clause at issue, it proceeded to address the merits of the \textit{American Safety} doctrine as applied to the arbitration of antitrust issues in the international commercial context.\textsuperscript{203} First, with respect to the Second

\begin{itemize}
  \item \textsuperscript{192} Id. at 619.
  \item \textsuperscript{193} Id. at 619-20.
  \item \textsuperscript{194} Id. at 620.
  \item \textsuperscript{195} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 162-66 (1st Cir. 1983).
  \item \textsuperscript{196} Mitsubishi, 473 U.S. at 639-40.
  \item \textsuperscript{197} 407 U.S. 1 (1972).
  \item \textsuperscript{198} 417 U.S. 506, 519-20 (1974) (holding that although claims under the Exchange Act would be inarbitrable in the domestic arena, the international commercial setting requires the submission of such disputes to arbitration).
  \item \textsuperscript{199} Mitsubishi, 473 U.S. at 629. "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement." \textit{Id.} This is so despite the possibility that "a contrary result would be forthcoming in a domestic context." \textit{Id.}
  \item \textsuperscript{200} Id. at 631 (citing Scherk v. Alberto-Culver, 417 U.S. 506, 516-17 (1974)). "A parochial refusal by 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." \textit{Id.} Such actions would "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." \textit{Id.}
  \item \textsuperscript{201} Id.
  \item \textsuperscript{202} Id.
  \item \textsuperscript{203} Id. at 632. The Court expressed its "skepticism of certain aspects of the \textit{American Safety} doctrine." \textit{Id.}
Circuit's concern that antitrust disputes will often involve contracts of adhesion, the Court noted that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." The Court reasoned that if the clause is truly tainted, then the parties are free to attack its validity directly by arguing fraud, undue influence, or unequal bargaining power.

With respect to the Second Circuit's concern that the complexity of antitrust claims renders them unsuitable for arbitration, the Court noted that "[t]he anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed." The Court further reasoned that antitrust experts may easily be called upon to serve as arbitrators in such a situation. Hence, as a result of the Court's analysis, the complexity of antitrust issues would no longer serve as a valid justification for denying arbitrability.

The Court expressly refused to consider as legitimate the Second Circuit's concern regarding the possibility of inherent bias on the part of arbitrators selected from the business community. Finally, the Court recognized the importance of private enforcement, particularly the treble damages remedy, to the effectiveness of the federal antitrust laws. However, the Court concluded that the private treble damages remedy could theoretically be sought in the international arbitral forum. Additionally, the Court reasoned that because parties are not compelled to initiate an antitrust suit in the first place, there is no reason why the parties cannot, at least in the international commercial context, provide in advance for the arbitration of future antitrust disputes.

The Mitsubishi decision did not expressly overrule the Second Circuit's holding in American Safety with respect to the arbitrability of domestic antitrust disputes. However, although the Court found it "unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transac-

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204. Id.
205. Id.
206. Id. at 633.
207. Id.
208. Id. at 633-34.
209. Id. at 634.
210. Id. at 635.
211. Id. "The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court." Id.
212. Id. at 636.
213. Id. at 638-39.
tions, the underlying rationale of that decision was substantially undermined by the Court’s criticism of the American Safety factors.

Justice Stevens dissented from the holding in Mitsubishi, arguing that arbitration is inappropriate in the antitrust context because of the position which the antitrust laws occupy in American jurisprudence. Because the antitrust laws occupy such an important position and implicate strong public interests in free and fair competition, Justice Stevens concluded that antitrust disputes are inappropriate for arbitration. Additionally, the dissent pointed to the fact that treble damages remedies may only be pursued in United States District Courts. Since the treble damages scheme is a key enforcement mechanism, Justice Stevens argued that its availability must be guaranteed by the judiciary. In further support of his position, Justice Stevens noted that prior to the Court’s decision in Mitsubishi, the United States Courts of Appeals had been unanimous in holding antitrust claims in arbitrable and that arbitral awards were subject only to limited judicial review. Notwithstanding Justice Stevens’ thoughtful dissent, the majority decision in Mitsubishi set the stage for a reversal of the judicial stance against the arbitrability of domestic antitrust disputes.

C. The Post-Mitsubishi Trend Toward Arbitrability

Following the Mitsubishi decision, numerous lower courts began to hold arbitration agreements enforceable as applied to domestic antitrust claims. In Nghiem v. NEC Electronics, Inc., the Ninth Cir-
cuit, convinced that the Supreme Court’s decision in *Mitsubishi* overruled the *American Safety* rule of inarbitrability, held for the first time that agreements to arbitrate domestic antitrust disputes were enforceable.\(^{225}\) The plaintiff in *Nghiem* sought to avoid the reach of an arbitration clause following his termination as an employee of NEC.\(^{226}\) The complaint, which included several different theories, also contained an antitrust claim, which the plaintiff argued was inarbitrable.\(^{227}\) In overruling its own precedent on this topic,\(^{228}\) the Ninth Circuit concluded that the reasoning underlying *American Safety* had been fatally undermined by the Supreme Court’s decision in *Mitsubishi*.\(^{229}\)

The *Nghiem* court based its decision on several related factors. First, the court noted that the Supreme Court had cited *Mitsubishi* in subsequent cases in support of the proposition that antitrust disputes may be arbitrated.\(^{230}\) Secondly, the Supreme Court in *Mitsubishi* specifically refuted the Second Circuit’s reasoning in *American Safety* in support of the inarbitrability of antitrust disputes.\(^{231}\) Lastly, the Ninth Circuit reasoned that *Mitsubishi* represented the Supreme Court’s increasing desire to subject statutory claims to arbitration.\(^{232}\) Based on these considerations, the *Nghiem* court concluded that domestic antitrust disputes are subject to arbitration.\(^{233}\)

A similar development occurred in the Tenth Circuit in *Coors Brewing Co. v. Molson Breweries*.\(^{234}\) In *Coors Brewing*, the dispute centered around a 1985 beer licensing agreement between Coors, a Colorado company, and Molson, a Canadian company.\(^{235}\) The agreement contained an arbitration clause which applied to “[a]ny dispute arising in connection with the implementation, interpretation or en-

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\(^{224}\) 25 F.3d 1437 (9th Cir. 1994).

\(^{225}\) Id. at 1441.

\(^{226}\) Id. at 1439.

\(^{227}\) Id. at 1441.

\(^{228}\) Id. at 1441-42. The Ninth Circuit overruled its previous decision in *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984), which held antitrust claims to be inarbitrable.

\(^{229}\) Id. at 1442.

\(^{230}\) Id. at 1441.

\(^{231}\) Id.

\(^{232}\) Id. at 1442.

\(^{233}\) Id.

\(^{234}\) 51 F.3d 1511 (10th Cir. 1995).

\(^{235}\) Id. at 1512.
forcement of this Agreement." After Molson entered into a partnership with Miller Brewing Company in 1993, while still bound under the Coors licensing agreement, Coors filed suit. Coors alleged that the Miller-Molson partnership was a combination in restraint of trade, that Miller would have access to Coors' secret product and marketing strategies, and that Miller would effectively control the marketing and distribution of Coors' products in Canada.

The Tenth Circuit recognized both the strong federal policy favoring arbitration and the Mitsubishi holding that antitrust claims within the scope of the contract may be arbitrated. The court's analysis focused specifically on whether the particular antitrust claim alleged by Coors fell within the scope of the parties' agreement. In doing so, the court reasoned that antitrust disputes fall within the scope of the contract if the disputes "turned upon specific contractual provisions." Since issues concerning the secrecy of Coors' product and marketing information were found to fall within the scope of the contract, the court held that these issues were subject to the arbitration clause.

However, Coors' claims concerning undue market concentration and likely anticompetitive effects stemming from the Miller-Molson arrangement were found not to fall within the scope of the contract largely because the parties contract could not be construed to apply to Molson's arrangement with Miller, a third party. Because these claims were not within the scope of the contract they were found to be litigable, and not subject to mandatory arbitration pursuant to the contractual arbitration clause. Hence, according to the Tenth Circuit's Coors Brewing decision, domestic antitrust claims that cannot be interpreted as falling within the scope of the parties' contract are not subject to the reach of a contractual arbitration clause.

D. Kotam Electronics—An Anomaly from the Past?

The general trend toward arbitrability in the antitrust context has not been unanimous, however. Quite recently, the Eleventh Circuit,
in *Kotam Electronics, Inc. v. JBL Consumer Products, Inc.*,245 ruled that antitrust claims arising in the domestic context remained inarbitrable and reaffirmed the continuing validity of *Cobb v. Lewis*,246 in which the Fifth Circuit specifically relied upon the *American Safety* rationale in holding domestic antitrust disputes inarbitrable.247 The dispute in *Kotam* concerned dealer and distributorship agreements between the parties.248 Each agreement contained a broad arbitration clause.249 When the dispute arose, JBL sought to compel arbitration on the theory that *Mitsubishi* overruled *Cobb* and thereby allowed the arbitration of antitrust disputes.250 However, the Eleventh Circuit rejected this argument in holding that pre-dispute agreements to arbitrate antitrust claims remain unenforceable.251

Because the Eleventh Circuit found *Cobb* to remain good law, it noted that *Mitsubishi* should be properly confined to its context of international commercial transactions.252 Additionally, the court reasoned that nothing which occurred subsequent to *Mitsubishi* compelled them to change this position.253 Furthermore, the court concluded that the inherent conflict between effective antitrust enforcement and private arbitration mandated that antitrust disputes continue to be inarbitrable in the domestic context.254 Consequently, the Eleventh Circuit’s decision in *Kotam* raises the question of whether or not domestic antitrust disputes are definitively arbitrable in light of the Supreme Court’s decisions concerning the arbitrability of statutory claims.

IV. Analysis

This brief overview of the relevant precedent in the area of statutory arbitration indicates a growing trend toward the arbitrability of statutory disputes. Whether or not this trend will definitively encompass domestic antitrust disputes remains to be seen. Nevertheless, there remains an inherent and inescapable tension between the underlying policies of antitrust law and private arbitration.255 Further, the
possibility of having different standards of enforceability in the various circuits or districts would not be conducive to business planning and commercial relations. There is obviously a need for a uniform standard within the federal judiciary regarding this issue, especially in light of the growing globalization of the marketplace, in which parties from widely divergent areas desire to enter into commercial relationships governed by a single set of rules.

While some courts confronted with this issue have concluded that the public interest will not be effectively vindicated through the private arbitral process, many other courts have taken the opposite view, concluding that the underlying policies of antitrust law may theoretically be realized through arbitration. Despite the conflicting approaches to this issue, it seems clear that the advantages of allowing domestic antitrust claims to be arbitrated outweigh the possible disadvantages of such a procedure. However, in order to justify the submission of statutory claims implicating broad public interests to arbitration, some degree of judicial supervision and a mechanism for judicial review over arbitration decisions in this area is needed. Providing for some level of judicial supervision and for a substantive review procedure may help to alleviate the legitimate concern that the public interest in free competition will be subverted to private concerns.

A. Rationales Supporting the Arbitrability of Domestic Antitrust Disputes

Numerous legitimate reasons may be advanced in support of the submission of domestic antitrust disputes to arbitration. First of all, the benefits inherent to the arbitral process, including expediency, finality, and efficiency, are equally applicable to the antitrust context. Unlike litigation, which can last indefinitely and involve astronomical expense, arbitration is specifically designed to render an expeditious

256. See, e.g., American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) ("A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.").

257. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (stating that "[t]he importance of the private damages remedy" does not compel the conclusion that arbitration, at least in the international commercial context, is not an effective forum in which to pursue such remedies).

258. See Aksen, supra note 179, at 1098-1104 (supplying twelve arguments in support of arbitrating antitrust claims); see also Allison, supra note 67, at 239-59 (refuting many of the underlying assumptions and rationales supporting the inarbitrability of domestic antitrust disputes).

259. See KELLOR, supra note 2, at 4.
decision involving the dispute at issue.\textsuperscript{260} The expense and delay of conventional litigation is particularly evident in the antitrust area, where complex evidentiary showings and seemingly endless discovery are the norm.\textsuperscript{261} Clearly, a streamlined arbitration procedure should prove advantageous in reducing the expense and delay of litigating antitrust disputes. This rationale is particularly compelling in the current commercial climate, in which globalization has placed a strong emphasis on cost minimization in virtually all areas of business.\textsuperscript{262}

Secondly, arbitral awards are, practically, final and binding. The FAA provides for judicial review only under very limited circumstances.\textsuperscript{263} However, in the rare instances where such review is granted, it is generally limited to non-substantive issues.\textsuperscript{264} Hence, parties to an arbitrated antitrust dispute can be relatively assured that the decision of the arbitrator, or arbitrators, assuming that the proper procedures are followed, will be final and binding and, unlike a judicial determination, not subject to expensive and seemingly endless appeals.

A third benefit associated with the arbitration of commercial disputes allows for the parties to maintain a mutually beneficial level of privacy concerning the dispute.\textsuperscript{265} Unlike judicial proceedings which, at least in principle, are public in nature, arbitral proceedings are a private matter between the parties.\textsuperscript{266} Hence, the dissemination of detailed accounts of unseemly anticompetitive conduct undertaken by

\textsuperscript{260} Id.

\textsuperscript{261} See Baker & Stabile, supra note 52, at 396 (noting that “[a]ntitrust litigation is notoriously fact-intensive, time-consuming, and expensive”); see also Allison, supra note 67, at 247 (noting the severe criticism by several key antitrust scholars, including Seventh Circuit Judges Posner and Easterbrook, concerning the unduly lengthy and complex discovery process in antitrust suits). According to Judges Posner and Easterbrook, the antitrust discovery process runs into “the millions of documents,” making the pretrial process “interminable.” Allison, supra note 67, at 247 (citations omitted).

\textsuperscript{262} See KELLOR, supra note 2, at 3-4.

\textsuperscript{263} 9 U.S.C. §§ 2, 10, 11 (1982).

\textsuperscript{264} Generally, judicial review of arbitration decisions is limited to instances where there is misconduct on the part of the arbitrators, M&A Elec. Power Coop. v. Local Union No. 702, International Bhd. of Elec. Workers, 773 F. Supp. 1259, 1262 (E.D. Mo. 1991), aff'd and remanded, 977 F.2d 1235, 1262 (8th Cir. 1992), where the decision reached is arbitrary and capricious, see, e.g., Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) (holding arbitrator's failure to award statutorily mandated damages for state securities law violations was arbitrary and capricious), where the award lacks fundamental rationality, see, e.g., Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1135 (3d Cir. 1972) (concluding that an arbitrator's award will not stand if it lacks fundamental rationality), or where the arbitrators exceed their authority, see, e.g., Eljer Mfg., Inc. v. Kovin Dev. Corp., 14 F.3d 1250, 1256-57 (7th Cir. 1994) (finding that an arbitrator exceeded his authority by awarding damages for losses not actually suffered).

\textsuperscript{265} See KELLOR, supra note 2, at 14.

\textsuperscript{266} See Philip Rothman, Psst, Please Keep It Confidential—Arbitration Makes It Possible, 49 Disp. Resol. J. 69 (1994).
either party will remain confidential, thereby removing the danger of adverse consumer reaction. Such a procedure may go far toward maintaining goodwill, not only between the parties themselves but also with respect to other business entities and the general public. Business goodwill remains a valuable commodity in the commercial community, especially in light of the increasing competitiveness inherent in the global marketplace, in which reputation and goodwill are becoming even more important as a means of distinguishing between various producers on a non-cost basis.267

Additionally, because the concept of business goodwill is an intangible quality, it does not lend itself to precise determinations of value.268 Hence, efforts to quantify compensatory damages in the judicial forum for a reduction in one party's business goodwill prove exceedingly difficult. Since damages for this component are difficult to calculate, it is obviously preferable for the offending party to keep antitrust proceedings, with their negative connotations, as confidential as possible. As a result, the arbitration alternative, with its accompanying confidentiality, is further strengthened as a reason to avoid conventional litigation.

Fourth, much of the Second Circuit's reasoning supporting its decision in American Safety has been subsequently undermined by the Supreme Court's decisions in Mitsubishi,269 McMahon,270 and Rodriguez de Quijas.271 Following Mitsubishi, it seems clear that arguments against arbitration focusing on either the inherent complexity of antitrust litigation, invalidity of the contractual arbitration provision due to unequal bargaining power, or possible bias on the part of the arbitrators will not be seriously entertained by a reviewing court. In removing barriers to the arbitrability of domestic securities disputes, both McMahon272 and Rodriguez de Quijas273 indicate a growing will-

268. See Toltec Fabrics, Inc. v. August, Inc., 29 F.3d 778, 781 (2d Cir. 1994) (holding that allegations of damages for lost goodwill require the plaintiff to establish an actual loss of goodwill, to send objective evidence as to the amount of the loss, and to show that the loss was caused by the defendant); Fonar Corp. v. Deccaid Servs., Inc., 787 F. Supp. 44, 48 (E.D.N.Y. 1992) (concluding that since damages for goodwill are not subject to ready calculation, they support a finding of irreparable injury for purposes of a preliminary injunction).
269. See supra notes 187-215 and accompanying text (discussing the Mitsubishi decision).
270. See supra notes 110-20 and accompanying text (discussing the McMahon decision).
271. See supra notes 121-29 and accompanying text (discussing the Rodriguez de Quijas decision).
ingness by the Court to submit statutory disputes to an arbitral forum absent a clear indication that such disputes were intended by the legislature to be resolved solely in a judicial forum.\textsuperscript{274} As a result of recent Supreme Court jurisprudence in this area, it may well be that the only justification retaining its validity concerns the vindication of the public interests underlying the federal antitrust laws, including free and fair competition and the need for private enforcement and deterrence.\textsuperscript{275}

A fifth reason supporting the submission of domestic antitrust disputes to arbitration concerns the disparity created by \textit{Cobb}.\textsuperscript{276} \textit{Cobb} held that agreements to arbitrate domestic antitrust disputes were enforceable if the parties voluntarily entered into such agreements after the dispute had arisen.\textsuperscript{277} The \textit{Cobb} court reasoned that permitting post-dispute agreements to arbitrate domestic antitrust disputes did not implicate public policy concerns in the same sense that pre-dispute agreements to arbitrate did.\textsuperscript{278} Apparently, the court believed that because the parties had voluntarily agreed to participate in the arbitral forum with full knowledge of the risks and, presumably, had full awareness of the underlying policy concerns, it was less likely that the public interest would be subverted to purely private concerns.

Although the \textit{Cobb} holding gave judicial effect to the parties' intentions in resolving their contractual dispute, the court failed to adequately explain how the public interests underlying antitrust disputes could be better realized if the arbitration agreement occurred post-dispute, rather than pre-dispute.\textsuperscript{279} As a matter of antitrust policy,

\textsuperscript{274} See \textit{supra} notes 110-14 and accompanying text (noting the Supreme Court's requirement that a party seeking to avoid the submission of a statutory claim to arbitration must clearly show a congressional intention to preclude arbitration of the claim at issue).

\textsuperscript{275} Indeed, at least two commentators agree that this argument is one of the few remaining arguments supporting inarbitrability that continues to be valid. \textit{See Allison, \textit{supra} note 67, at 275 ("The one rationale that best endures challenge is that incentives for private enforcement are likely to be reduced if antitrust claims are treated as arbitrable under future-disputes clauses."); Lee, \textit{supra} note 28, at 3-4 (noting that the only supporting argument from \textit{American Safety} that is not a "makeweight" concerns the reduced deterrent effect of antitrust law if antitrust disputes are submitted to arbitration).}

\textsuperscript{276} Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974) (holding that agreements to arbitrate antitrust disputes entered into after the dispute had arisen were enforceable).

\textsuperscript{277} Id.

\textsuperscript{278} Id.

\textsuperscript{279} Indeed, one would assume that the underlying public interests in free and unfettered competition remain the same whether an arbitration agreement occurs pre-dispute or post-dispute. It is unclear why the court arrived at this conclusion, but this decision was arguably a precursor to the Supreme Court's decision in \textit{Mitsubishi}, holding international agreements to arbitrate antitrust disputes enforceable.

It remains unclear how the Supreme Court would rule today on the precise issue of whether domestic antitrust disputes may be arbitrated via a broad pre-dispute contractual arbitration clause. One can only hypothesize that given the Court's willingness to find statutory disputes
this decision creates an odd doctrinal distinction between pre-dispute agreements to arbitrate, which may be unenforceable, and post-dispute arbitration agreements, which are enforceable.

It is arguable that if post-dispute agreements are enforceable, then pre-dispute agreements should also be enforceable since the underlying public policies are presumably identical. However, one can argue just as forcefully that the parties entering into a post-dispute arbitration agreement were cognizant of the policy implications and deliberately chose to resolve the dispute in the more convenient arbitral forum. Hence, they may take steps to ensure that the underlying policies will be effectively vindicated through the arbitral process by choosing competent arbitrators who are experienced in the field of antitrust enforcement and are willing to faithfully apply relevant laws and precedents to the dispute at hand. Further, the parties may specifically provide for the possibility of a treble damages remedy in the event that a violation is found to have occurred.

Conversely, parties entering into a pre-dispute arbitration agreement cannot predict with any degree of certainty whether antitrust disputes will arise under the parties’ contract. As a result, they cannot deliberately and voluntarily choose to vindicate those disputes through the arbitral forum. Indeed, they may be forced to arbitrate antitrust disputes that they would otherwise prefer to litigate. In a situation like this, it is unlikely that the party forced into arbitration will be overly concerned with the public policy implications of the underlying dispute.

The final rationale supporting the submission of domestic antitrust disputes to arbitration\textsuperscript{280} is the growing judicial trend permitting statutory disputes to be arbitrated. Both \textit{McMahon}\textsuperscript{281} and \textit{Rodriguez de Quijas}\textsuperscript{282} indicate a broad willingness on the part of the Supreme Court to order the arbitration of statutory issues.\textsuperscript{283} Interestingly, the

\begin{itemize}
  \item \textsuperscript{280} See \textit{supra} notes 98-129 and accompanying text.
  \item \textsuperscript{281} Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987) (finding that claims under the Exchange Act and RICO arbitrable).
  \item \textsuperscript{282} Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989) (holding that claims under the Securities Act were arbitrable).
  \item \textsuperscript{283} Both \textit{McMahon} and \textit{Rodriguez de Quijas} resulted in previously inarbitrable disputes under the federal securities laws becoming appropriate subjects of arbitration. Much like the federal antitrust laws, the federal securities laws, under both the Securities Act and the Exchange Act, implicate strong underlying public policies. The Acts were passed in the aftermath of the 1929 stock market crash leading to the Great Depression. Both Acts are designed to
Court in *McMahon* analogized RICO claims to antitrust claims and specifically noted the comparable treble damages remedy present in both statutory schemes. The *McMahon* Court specifically held RICO claims to be arbitrable. The *McMahon* decision strongly indicates that the Court would likely find domestic antitrust disputes subject to the reach of broad contractual arbitration clauses if directly confronted with the issue.

Following the course of the above analysis, it is clear that several valid and persuasive arguments can be made in support of permitting the arbitration of domestic antitrust disputes. The expediency, cost-effectiveness, and finality of arbitration, the notion of privacy and the protection of business goodwill, the seemingly odd distinction of allowing post-dispute agreements to arbitrate antitrust claims, the analytical position of the Supreme Court in analogous situations, and the growing trend allowing the arbitration of statutory claims all tend to support the arbitrability of domestic antitrust disputes.

**B. Rationales Opposing the Arbitrability of Domestic Antitrust Disputes**

Just as there are numerous rationales advanced in support of submitting domestic antitrust disputes to arbitration, there are also a number of arguments opposing such a result. First and foremost, the most compelling, yet the most quantitatively difficult, argument concerns the underlying public interests implicated by the federal antitrust laws. The public interest in free and unfettered competition in the marketplace is no less important in today's economic climate than it was in 1968, when the Second Circuit rendered its decision in *American Securities & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946) (recognizing the purpose of the Securities Act as compelling "full and fair disclosure" with respect to the various types of investment securities). One can hypothesize that the policy of protecting the investing public by requiring full and fair disclosure is equally as important as the public policy of ensuring free and unfettered competition, which underlies the federal antitrust laws. The public interest in free and unfettered competition in the marketplace is no less important in today's economic climate than it was in 1968, when the Second Circuit rendered its decision in *American Securities & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946) (recognizing the purpose of the Securities Act as compelling "full and fair disclosure" with respect to the various types of investment securities). One can hypothesize that the policy of protecting the investing public by requiring full and fair disclosure is equally as important as the public policy of ensuring free and unfettered competition, which underlies the federal antitrust laws. If, in fact, this is true, and disputes under the securities acts may be arbitrated without fear of subrogating the policies underlying those laws, then it would seem disingenuous to prohibit the arbitration of antitrust disputes.

284. 482 U.S. at 240.

285. *Id.* Both the civil portion of RICO, 18 U.S.C § 1964(c) (1994), and the federal antitrust laws, 15 U.S.C. § 15(a) (1994), provide for a treble damages remedy. Presumably, the purpose of providing such a remedy is to encourage the private enforcement of the relevant portions of each statutory scheme.

286. *See supra* notes 117-20 and accompanying text.

287. *Baker & Stabile, supra* note 52, at 396.
Indeed, with the advent of the global economy and the growing trend toward free international trade, these interests may be even more compelling today. Although the current Supreme Court has been reluctant to pursue vigorous enforcement of the antitrust laws, the federal antitrust regulatory scheme, despite some of its analytical drawbacks, remains an important guarantor of free and fair competition.

It is quite possible that private enforcement of the antitrust laws will result in the underlying policies being subrogated to private interests. The policies most likely to be adversely affected include the treble damages remedy and the deterrent function of the antitrust laws. The treble damages remedy not only encourages private enforcement of the antitrust laws, but it also acts as a deterrent to potential violators who must account for the possibility of large damages awards. A loosening of the treble damages requirement, so the argument goes, will necessarily lead to reduced deterrence.

There is little doubt that the possibility of recovering treble damages remains an important incentive for private plaintiffs to pursue

288. See id. at 403 (noting that the antitrust laws promote the national interest in a competitive economy) (citation omitted).

289. For an excellent discussion and analysis of the growing trend toward globalization and the international economy, including its potential impact on American workers and industries, see Robert Reich, The Work of Nations (1991).

290. These drawbacks are particularly evident in the area of health care. For example, the FTC has been severely criticized for its policies and the analytical framework it applies to evaluating the legality of hospital mergers. See Hearings on Global and Innovation-Based Competition Before the Federal Trade Comm’n, Nov. 14, 1995 (noting that hospital merger analysis requires a new analytical framework which takes into account specific market structures, realistic geographic market boundaries based on expanding HMO services, and the status of nonprofit hospitals) (remarks of Joe Sims, of Jones, Day, Reavis & Pogue); Hearings on Global and Innovation-Based Competition Before the Federal Trade Comm’n, Nov. 17, 1995 (market concentration is an improper basis upon which to assess competition in health care markets since increased concentration in these markets is associated with greater efficiency rather than a tendency to collude) (remarks of Richard L. Scott, President and CEO of Columbia/HCA Healthcare Corp.).

The FTC analyzes hospital markets much like it does any other market, trying to ensure competition through requiring numerous competitors and preventing market concentration levels from becoming unduly large. However, because hospital markets tend to be more efficient and less wasteful as they become more concentrated, largely because fewer hospitals tends to lead to fewer redundancies in the services provided, this analysis tends to perpetuate inefficiency in the health care marketplace. For a more intensive analysis of antitrust policy as it relates to health care, see David L. Meyer & Charles F. Rule, Health Care Collaboration Does Not Require Substantive Antitrust Reform, 29 Wake Forest L. Rev. 169, 171 (1994) (arguing that current antitrust policy can be effectively adapted to the unique structure of modern health care markets).

291. See Loevinger, supra note 179, at 1091 (arguing that the public interest in antitrust disputes cannot be effectively realized in the arbitral forum); Pitofsky, supra note 179, at 1072 (arguing that arbitration will cripple the policy of encouraging treble damages actions).

292. See supra notes 156-59 and accompanying text.
antitrust claims against offending parties. Because arbitration is designed primarily to reach a fair settlement or compromise between the parties, arbitrators are more likely to award only actual damages rather than the statutorily mandated treble damages. As a result, private plaintiffs would no longer have as strong an incentive to pursue antitrust claims when faced with a broad arbitration clause. Furthermore, potential antitrust violators are no longer as effectively deterred in the absence of clear treble damages liability. Consequently, both enforcement and deterrence would be necessarily diminished by permitting arbitration of domestic antitrust disputes. One must question whether such a result is consistent with the congressional purposes and public policies underlying the federal antitrust laws.

In further support of this argument, Justice Stevens, in his *Mitsubishi* dissent, noted that an antitrust action for treble damages may only be pursued in a United States District Court. Although this procedural requirement may not necessarily preclude the award of treble damages in the arbitral forum, it effectively neutralizes any contention that an arbitrator may be compelled to award treble damages to the successful antitrust plaintiff. Further, this result permits the award of a statutorily mandated remedy to become merely discretionary. As a result, some of the "teeth" are being pulled out of effective antitrust enforcement.

Additionally, an arbitrator's chief function is to render a fair solution or a compromise to a present dispute. This effectively removes the notion of deterrence from the scope of the arbitrator's authority. As a result, the sophisticated antitrust violator has an incentive to contractually bind any potential plaintiffs to broad arbitration clauses under which the violator can compel arbitration. The only way to circumvent the reach of an arbitration clause is to attack its validity directly, rather than the validity of the contract as a whole, and

293. *See Lee, supra* note 28, at 4. Lee notes that the only "real" argument supporting the inarbitrability of antitrust claims concerns the reduced deterrence that would occur as a result of submitting such claims to arbitration. *Id.* This reduced deterrence occurs because potential violators will no longer be concerned about the possibility of treble damages if they can contractually compel the other party to arbitrate any antitrust claims that could conceivably arise. *Id.*

294. *Id.*


296. *Id.*


298. *Mitsubishi*, 473 U.S. at 632. "A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate." *Id.* (citation omitted). A showing required to set aside the arbitration clause includes fraud, undue influence, or unequal bargaining power. *Id.*
parties may find themselves bound to arbitrate despite lacking any intention to do so. Under this scenario, the antitrust violator would clearly prefer the "fairness" of arbitration to the uncertainties of conventional litigation.

A second argument against the submission of domestic antitrust disputes to arbitration is the lack of substantive review of arbitral decisions. The lack of meaningful judicial review over the substantive aspects of arbitral awards creates a legitimate concern over possible abuses and mistakes of law. Because there is generally no mechanism for substantive review of the arbitral award, and there is usually no written record of the arbitral proceedings, there is no method of guaranteeing that the principles underlying antitrust law will be faithfully applied. Indeed, an arbitrator may not even be required to apply relevant antitrust principles and precedents.

Obviously, the benefits of expediency and relative simplicity associated with arbitration are directly related to the fact that arbitrators are not bound to rigorously apply the applicable legal framework. However, while the elimination of searching judicial inquiries and restrictive procedural guidelines may be attractive to some, this does little to guarantee application of antitrust principles. In the area of antitrust, application of the applicable laws and remedies, or at least the principles underlying such laws, is essential to the vindication of the underlying policies. At least one commentator has suggested that antitrust arbitrators are duty-bound to apply "at least . . . the general spirit of antitrust rules" in order to be faithful to their function. However, without a meaningful method of substantive judicial review, it is questionable whether relying on each individual arbitrator's sense of "duty" provides sufficient protection for antitrust policy.

Certainly, placing blind reliance on the discretion of individual arbitrators recalls the concern of the Second Circuit in American Safety

(citation omitted). However, this showing must apply directly to the arbitration clause itself. Attacks on the contract as a whole are subject to arbitration under the reach of the clause. This is a tenuous distinction at best.

299. Allison, supra note 67, at 240.
300. Id. at 240-41.
301. See Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995) (holding that factual or legal errors, even if gross or clear, do not authorize a court to overturn arbitral awards); Ainsworth v. Skurnick, 960 F.2d 939, 940 (11th Cir. 1992) (noting that courts are generally prohibited from vacating arbitral awards based on errors of law or interpretation); Office of Supply, Gov't of Republic of Korea v. New York Navigation Co., Inc., 469 F.2d 377, 379 (2d Cir. 1972) (finding that arbitral awards will not be set aside based on errors of law or interpretation of law).
303. Id. at 243.
It may well be that the vast majority of commercial arbitrators have no bias against the antitrust laws. However, the possibility of bias should not be overlooked given the immense authority vested in the arbitrators and the lack of meaningful substantive review measures over the decisions of arbitrators. To refuse to address this possibility is to effectively ignore, and perhaps condone, abuse of the arbitral process.

The difficulties associated with the lack of substantive review measures may be compounded by the subpar process of evidentiary production in the arbitral setting. Because the arbitral forum generally has no definitive discovery process, the production of evidence is generally left to the discretion of the arbitrator, who may or may not choose to exercise his or her subpoena power. This power may prove sufficient in a standard, two-party case, but it presents difficulties if the antitrust dispute involves third parties not subject to the arbitrator's subpoena power. It may prove virtually impossible to compel third parties unrelated to the proceeding to furnish the arbitral tribunal with evidentiary materials. Clearly, if material evidence is in the possession of uncooperative third parties, as it often is in complex antitrust cases involving allegations of conspiracy or price-fixing, the judicial forum, with its superior subpoena powers and its effective contempt powers, is preferable to the arbitral forum.

Arguments concerning the complexity of antitrust issues are clearly no longer viable in light of Mitsubishi. It seems obvious that disputing parties are free to retain antitrust experts or law professors as arbitrators. Indeed, such experts are probably far superior to the average judge presiding over complex antitrust cases who is generally not an antitrust or economics scholar. Additionally, if the courts are will-

304. See supra note 177 and accompanying text (noting the inherent conflict of interest when commercial arbitrators are drawn from the business community).

305. Indeed, it is an elementary principle of the law of evidence that bias on the part of a witness is always relevant, and is always a proper inquiry. One must wonder why the notion of bias is not as equally relevant in the context of commercial arbitration, which generally lacks the substantive review measures and appeals process associated with a trial court's evidentiary conclusions.


307. See supra note 88 and accompanying text (discussing the arbitrator's token subpoena power granted pursuant to 9 U.S.C. § 7 (1982)).

308. Baker & Stabile, supra note 52, at 410.

309. See id. The authors note that this barrier to effective resolution may prove to be "virtually insuperable" in antitrust disputes involving allegations of conspiracy. Id.

310. Of course, excepted from this broad generalization are recognized judicial antitrust and economics scholars such as Seventh Circuit Judges Posner and Easterbrook.
ing to submit complex antitrust issues to juries for resolution, what possible justification exists for refusing to submit those same disputes to commercial arbitrators, who are generally more experienced and insightful than the average juror?

As can be seen from this brief overview of the arguments supporting inarbitrability, real concerns exist which could serve as a valid basis for precluding the submission of domestic antitrust disputes to arbitration. The problem arises when one attempts to balance these concerns with the equally compelling arguments favoring the submission of domestic antitrust disputes to arbitration. Clearly, there must be a workable solution which would permit parties to take advantage of the numerous benefits associated with arbitration, while also protecting the broader public interests in effective antitrust enforcement.

C. Is There a Logical Solution?

At one extreme, all antitrust disputes can be submitted to arbitration without any type of restrictions or safeguards. Allowing a broad rule of arbitrability permits the parties to take advantage of the benefits of arbitration but ignores the dangers presented to the underlying public interests in such disputes. At the other end of the spectrum, a broad prohibition against the arbitration of any antitrust disputes may be adopted.311 While this alternative effectively protects the underlying policies, it prevents the parties from enjoying the benefits of arbitration and forces them to undertake litigation. It seems apparent that neither of these alternatives offers the best accommodation between the parties' interests and the vindication of public policies.

1. The Scope-of-the-Contract Rationale

A scope-of-the-contract rationale may offer a compromise position under which the parties may arbitrate only those antitrust disputes which fall within the scope of their contract. Certainly, a strong argument can be made that the scope-of-the-contract rationale is the most effective and logical solution. Clearly, if arbitration is truly a function of contract, then only those disputes falling within the scope of the contract itself should be subject to the reach of the arbitration clause. Given that the arbitration clause will be interpreted broadly by courts compelled to apply the strong federal policy favoring arbitration, with any uncertainty being resolved in favor of arbitration, the scope of the contract may prove to be rather broad. Of course, the parties always

311. See supra note 178 and accompanying text (indicating a line of cases that followed the general prohibition on the arbitration of antitrust disputes).
remain free to enter into post-dispute agreements to arbitrate anti-
trust disputes under the *Cobb* rationale. 312

Following the scope-of-the-contract rationale generally gives legal
effect to the intentions of the parties. Contracting parties, at least the-
oretically, through the drafting process, have complete control over
the proper reach of the arbitration clause. 313 They may draft the
clause as broadly, or as narrowly, as possible. By phrasing the clause
so as to expressly include or exclude specific disputes, the parties will
be placed on notice beforehand as to which disputes will be subject to
arbitration. 314 Most importantly, the parties remain free to exclude
antitrust issues from the scope of the arbitration clause by expressly
drafting such an exclusion. 315

It is well settled that arbitration cannot be compelled unless there is
an express agreement to do so. 316 Hence, if a dispute is expressly ex-
cluded from arbitration by virtue of proper drafting, it cannot be com-
pelled to undergo arbitration, unless of course the parties agree to do
so after the fact. 317 As a result, the true intentions of the parties will
be preserved if the parties take sufficient time and observe the proper
care during the drafting process. Of course, the dangers of dispropor-
tionate bargaining power and overreaching are always present in the
area of commercial contracting. Given the Supreme Court’s clearly
articulated stance on this issue, 318 the party alleging an abuse of
power must attack the validity of the arbitration clause directly, rather
than attacking the validity of the contract as a whole, in order to avoid
arbitration on these grounds. Nevertheless, the mere possibility of un-
equal bargaining power should not serve as a bar to arbitration.

Notwithstanding the benefits of a scope-of-the-contract approach,
there are a few relevant criticisms which must be addressed. Courts
often fail to pay attention to the notion of contractual intent in ad-
dressing the arbitrability of antitrust issues. 319 Many courts simply as-
sume that the parties intended the arbitration clause at issue to extend
to any dispute arising under the parties’ contract, including antitrust

312. See supra notes 180-86 and accompanying text (discussing the *Cobb* decision).
313. Baker & Stabile, supra note 52, at 420.
314. Id. at 423.
315. Of course, the key to successful construction of an arbitration clause rests within the
foresight and the semantic abilities of the drafter. For an excellent discussion of the issues facing
corporate counsel when drafting such agreements, see id.
316. See supra note 47 and accompanying text.
317. See supra notes 48-49 and accompanying text.
(1985).
319. Allison, supra note 67, at 239.
claims. Part of the reason for the failure of many courts to address effectively the notion of the parties' intent is due to the fact that most arbitration clauses are phrased in relatively broad and inclusive language, thereby making a subsequent judicial determination of the parties' true intent all the more difficult. Additionally, because of the generalized language employed in arbitration clauses, they are interpreted quite broadly and often applied even to disputes with indirect, tangential relationships to the contract itself.

In spite of these legitimate criticisms, however, the scope-of-the-contract rationale seems to be the one approach that is most faithful to the well-established notion that arbitration is a creature of contract. Not surprisingly, every one of the above-mentioned concerns could be entirely circumvented through proper drafting with an eye toward the possibility of future antitrust disputes. Thus, the burden would be placed on the parties' entering into a contract containing an arbitration clause to draft the clause so that it specifically conforms with their respective intentions. In the absence of fraud, undue influence, or overreaching, a court confronted with such a clause, which clearly embodies the intentions of the parties, will be required to enforce it as written. Hence, the parties are given the power to control whether certain disputes will be subject to arbitration or, instead, will be resolved solely through litigation.

2. Vindication of the Public Interests Underlying Antitrust Disputes

While the scope-of-the-contract rationale is an analytically preferable method for determining whether antitrust disputes should be arbitrated, it fails to adequately address the danger that the public interest will be subverted to private concerns in the arbitral forum. Obviously, the parties have the power to contract out of arbitrating antitrust disputes. Once an arbitration clause is found to reach an antitrust dispute falling within the scope of the parties' contract, however, it must be arbitrated. Hence, an effective means must be devised for ensuring that the underlying public interests are effectively realized. To this end, it is desirable to preserve both the treble damages remedy and its deterrent effect in the arbitral forum. However, this procedure must also respect the benefits of arbitration, including expediency, timeliness, and finality.

320. Id.
321. Id.
322. Id. at 240.
323. See Mitsubishi, 473 U.S. at 632.
The preservation of the underlying public policies could be effectively assured through a process of limited judicial supervision and review over arbitral proceedings involving complex antitrust issues. By ensuring that antitrust arbitrators apply at least the general principles underlying antitrust law, including the rules embodied in key precedents applicable to the dispute at issue and the treble damages remedy, the underlying public interests, particularly those of private enforcement and deterrence, may be given their full effect. Clearly, judicial supervision should not be required at every step of the arbitration process. This would serve only to tax an already overburdened federal judiciary and needlessly increase the cost of arbitration proceedings. Instead, judicial supervision should be required only over certain key areas of the arbitration process.

For instance, judicial supervision may be required in order to ensure that unbiased, expert arbitrators are selected by the parties. This is necessary to ensure that the arbitrators have an antitrust background, including an appreciation of the economic principles relevant to antitrust analysis, and that they can appreciate the broad public interests implicated by the dispute at hand. Further, the judiciary may need to ensure that relevant legal principles and rules are applied in a manner faithful to the proper enforcement of the antitrust laws. This may be accomplished by requiring a brief written record of the arbitral proceedings, which is composed primarily of the decision of the arbitrators and includes the relevant facts, the legal standards applied to those facts, and any public policy considerations that played a role in the final decision. Requiring a written record, however brief, allows a court to review the substance of the arbitration decision without being required to effectively rehear the entire case.

Additionally, courts must be given the power to vacate arbitral awards that fail to follow the applicable legal principles or violate public policy. Although the FAA does permit a court to vacate an arbitral award that clearly violates public policy, the vacation of awards under this provision are exceedingly rare and difficult to secure. As

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324. At least one commentator has agreed that minimal judicial supervision over antitrust arbitration would ensure that abuses do not occur and that the underlying public interest could be vindicated without disturbing the beneficial aspects of arbitration. See Allison, supra note 67, at 270-75.
325. Id. at 270.
326. Id.
328. See Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., Inc., 22 F.3d 1010, 1013-14 (10th Cir. 1994) (holding there is no violation of public policy underlying rules of evidence where prevailing party's attorney communicated non-prevailing party's settlement offer to arbitrators); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 782 (11th Cir. 1993) (stating that an arbi-
a result, it will be necessary to apply a liberalized standard to the substantive review of arbitral decisions in antitrust cases. This would permit a reviewing court to vacate any arbitral award that it found to be inconsistent with either established antitrust precedent or with clearly enumerated public policies. By allowing for a more liberal mechanism for the substantive review of arbitral awards involving antitrust issues, the public interests underlying such disputes will be protected to a much greater degree than they would be otherwise.

CONCLUSION

Arbitration is increasingly becoming the preferred method of resolving disputes in modern society. Its advantages as compared to litigation include expediency, timeliness, and cost-effectiveness. Given the growing judicial trend toward ordering the arbitration of all contractual disputes pursuant to broad contractual arbitration clauses, it is no surprise that statutory claims are becoming increasingly subject to the reach of arbitration clauses. As a result of the trend toward the arbitrability of statutory disputes, it is quite likely that domestic antitrust claims, which are also statutory in nature, will become universally subject to arbitration pursuant to such clauses.

Notwithstanding the significant policy implications underlying the federal antitrust laws, including the public interest in free and fair competition and the need for effective deterrence of unfair conduct, providing for the arbitrability of domestic antitrust claims would clearly result in quicker and cheaper resolutions to these disputes. Although there exists a possibility that arbitration could result in the subrogation of the public interests in such disputes, allowing for a properly administered program of judicial supervision and review of arbitral decisions involving antitrust issues would alleviate this danger and benefit the parties involved. Hinging the arbitrability of antitrust issues on the scope of the parties' contractual relationship ensures that the parties have some notice of when their antitrust disputes will be subject to arbitration. As a result, legal effect is given to the intentions of the parties, and the business community can operate more efficiently during the resolution of the antitrust disputes that will inevitably arise.

Eric James Fuglsang

*트라 결정 fails to award statutorily mandated damages for a state securities law violation did not contravene public policy). Under the *Brown* rationale, an arbitrator's failure to award treble damages for an antitrust violation would not likely violate public policy, a result clearly inconsistent with the spirit and the purpose of the antitrust laws.*