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The Arbitrability of Domestic Antitrust Claims: An Evaluation of the American Safety Doctrine

Edward G. Heilig

COMMENTS

THE ARBITRABILITY OF DOMESTIC ANTITRUST CLAIMS: AN EVALUATION OF THE *AMERICAN SAFETY* DOCTRINE

Traditionally, judicial reaction to arbitration agreements has been hostile.[1] Over a period of time, this hostility lessened as litigants became increasingly dissatisfied with jury verdicts and lengthy delays became more common due to congested court dockets.[2]

Arbitration agreements were generally not enforceable in the United States until the passage of the Federal Arbitration Act in 1925.[3] The Federal Arbitration Act[4] has been described as "reversing centuries of judicial hostility towards arbitration agreements."[5]

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1. This notion is based on the belief that arbitration agreements, being private in nature, tend to "oust" the jurisdiction of the courts. Kill v. Hollister, 95 Eng. Rep. 532 (1746). *See* Kulukundis Shipping Co. v. Armtorg Trading Corp., 126 F.2d 978, 983-84 (2d Cir. 1942) (explaining the hostility against arbitration agreements shown by early common law courts). This antipathy towards arbitration can be traced back to decisions recorded in the fifteenth century holding arbitration agreements revocable. *See, e.g.*, Y.B. Mich. 8 Edw. 4, f. 9b, 10a, pl. 9 (1468); Y.B. Trin. 5 Edw. 4, f. 3b, pl. 2 (1465).

For a historical view of arbitration, *see* F. KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1927).

2. *See* 5 R. POUND, JURISPRUDENCE 359 (1959).

3. It was generally held at common law that an arbitration clause in a contract could be revoked. By giving notice of the revocation either party could void the power of the other party to compel arbitration. *See, e.g.*, Boston & L. R. Corp. v. Nashua & L. R. Corp., 139 Mass. 463, 31 N.E. 751 (1885) (railroad company revoked agreement to submit to arbitration certain claims arising from relationship with another railroad company); Meachem v. Jamestown R.R., 211 N.Y. 346 (1914) (plaintiff revoked arbitration clause in construction contract); Henry v. Lehigh Valley Coal Co., 215 Pa. 448 (1906) (lessor revoked arbitration clause in mining lease); Mead v. Owens, 83 Vt. 132 (1910) (party revoked submission to arbitration agreement and brought suit for an accounting of shared property).

4. Federal Arbitration Act, ch. 213, §§ 1-15, 43 Stat. 883-86 (1925) (current version at 9 U.S.C. §§ 1-14 (1982)).

5. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974). The legislative history of the Federal Arbitration Act shows that the Act was designed to avoid " 'the costliness and delays

Since the passage of the Act, however, courts have treated certain types of claims as being beyond the scope of arbitration and therefore nonarbitrable as a matter of public policy.[6] Claims based on violations of the antitrust laws represent an example of this type of treatment by the courts.[7] When deciding the arbitrability of antitrust claims, courts have interpreted the Sherman Act[8] as presenting strong public policy arguments against allowing the arbitration of such claims.[9]

This Comment examines the arbitrability of antitrust claims raised in a purely domestic context.[10] The ability of private parties to agree in advance to submit to arbitration any antitrust dispute that may arise in the future between the parties is the focal point of this Comment.

Judicial creation of an exception to the strong public policy favoring arbitration will be discussed by presenting the leading case of *American Safety Equipment Corp. v. J.P. Maguire & Co.*[11] The reasoning behind the court's decision in that case to hold antitrust claims nonarbitrable will be presented together with subsequent caselaw. Based on an analysis of the validity of the *American Safety* doctrine in light of recent Supreme Court decisions, the conclusion is reached that the *American Safety* doctrine is unpersuasive in hold-

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of litigation', and to place arbitration agreements upon the same footing as other contracts . . . ." *Id.* at 511 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1,2 (1924)); *See also* S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924).

6. *See* Wilko v. Swan, 346 U.S. 427 (1953) (claims arising under the Securities Act of 1933 are not arbitrable in order to protect investors); Beckman Instruments v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) (complex principles of patent law make patent validity claims "inappropriate" for arbitration); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (antitrust claims are nonarbitrable due to the public interest in private enforcement of the antitrust laws).

7. The most important antitrust statutes are the Sherman Act, 15 U.S.C. §§ 1-7 (1982), and the Clayton Act, 15 U.S.C. §§ 12-27 (1982). The majority of antitrust claims brought by private parties are asserted under § 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade." 15 U.S.C. § 1.

8. 15 U.S.C. §§ 1-7 (1982).

9. These public policy arguments are all based on the view that private antitrust actions vindicate public as well as private concerns and, therefore, the use of extrajudicial tribunals to decide these claims would not protect the public's interest in the enforcement of the antitrust laws. *See, e.g.*, Roso-lino Beverage Distribs. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984) (per curiam); Lake Communications v. ICC Corp., 738 F.2d 1473, 1479 (9th Cir. 1984); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-27 (2d Cir. 1968). *See infra* notes 12-42 and accompanying text.

10. The Supreme Court has recently held that antitrust claims arising in an international context are arbitrable. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S. Ct. 3346 (1985). *See infra* notes 46-74 and accompanying text.

11. 391 F.2d 821 (2d Cir. 1968).

ing antitrust claims nonarbitrable and is contrary to the intent of Congress and to decisions of the United States Supreme Court.

I. ARBITRATION OF STATUTORY CLAIMS

The Federal Arbitration Act is a codification of a strong national public policy favoring the arbitration of commercial disputes.[12] The active participation of the courts is called for in implementing this pro-arbitration policy.[13] If a valid agreement to arbitrate is present, a federal district court is required to stay litigation on any issue that is within the scope of the arbitration clause,[14] and must issue a decree compelling arbitration if requested to do so by either party.[15]

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12. The House Report accompanying the Act makes it clear that the purpose of the act was to afford arbitration agreements the same status as other contracts and to overrule the long-standing judicial refusal to enforce agreements to arbitrate. According to the report:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced and provides a procedure in the Federal courts for their enforcement.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). *See also* Cohn & Dayton, *The New Federal Arbitration Act*, 12 VA. L. REV. 265, 283-84 (1926).

13. The command of the Act is succinctly stated in section 2:

> 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 contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

14. 9 U.S.C. § 3 (1982). The text of § 3 reads as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id.

15. 9 U.S.C. § 4 (1982). The text of § 4 reads as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United Stated district court

Following arbitration of the dispute, if the parties have agreed, either party may obtain an order of the district court confirming the award and reducing it to judgment for up to one year following entry of the arbitrator's award.[16]

The courts, however, have failed to order the arbitration of disputes when the claim is founded upon certain statutory grounds.[17] It may be the case that a certain statute specifically denies the arbitration of claims asserted thereunder,[18] or the court itself interprets a statute as presenting broad public policy concerns that lead to denial of the arbitration of claims under that statute.[19] The latter approach requires the court to determine whether Congress has implicitly delegated to the courts exclusive jurisdiction over the subject matter of the dispute.[20]

Statutory defense claims to arbitration agreements have also been successfully raised in a number of areas of law.[21] In the area of se-

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which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

Id.

16. 9 U.S.C. § 9 (1982). The text of § 9 reads as follows:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . .

Id.

17. *See supra* note 6.

18. The Arbitration Act itself, for example, specifically exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1982); *See also* 15 U.S.C. § 78o-4(b)(2)(D) (arbitration may not be compelled of claims brought by customer against municipal securities broker or dealer); 49 U.S.C. § 11,711(b)(6) (Supp. 1983) (shipper of household goods may not be compelled to enter into pre-dispute arbitration agreement with a motor carrier).

19. *See* Wilko v. Swan, 346 U.S. 427 (1953). A claim brought under § 12(2) of the Securities Act was held to be nonarbitrable because Congress "has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights." *Id.* at 438.

20. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 n.11 (1984), where the Court found that in taking this approach courts must determine "whether Congress, in subsequently enacting [a statute], ha[s] in fact created . . . an exception [to the Federal Arbitration Act]." *Id.*

21. *See supra* note 6. *See also* S.A. Mineracao Da Trindade-Samitri v. Utah Int'l, 745 F.2d 190 (2d Cir. 1984) (claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) not arbitrable); Zimmerman v. Continental Airlines, 712 F.2d 55 (3d Cir. 1983), *cert denied*, 464 U.S. 1038 (1984) (claims under the 1978 Bankruptcy Code not arbitrable).

curities transactions, the Supreme Court has held that claims under the Securities Act of 1933 are not arbitrable.[22]

In *Wilko v. Swan*,[23] a domestic customer filed suit against a domestic securities brokerage firm under the civil liabilities provisions of section 12(2) of the 1933 Act. The sales contract between the parties called for arbitration of any controversy arising in the future between them,[24] but the Court held the agreement void under section 14 of the 1933 Act despite the provisions of the Arbitration Act.[25] Section 14 forbids parties from waiving compliance with any provision of the Securities Act through a stipulation in a contract.[26] The *Wilko* Court found that the arbitration agreement amounted to a stipulation waiving compliance with section 22 of the Act, which allows the securities purchaser to select the forum in which he or she will bring a claim.[27]

The denial of arbitration by the Court in *Wilko* was based on specific statutory language, found in section 14 of the Securities Act of 1933, which protected the public interest.[28] The Court found that the concern of protecting investors, which is the purpose of the Securities Act, is to be favored over the public policy considerations behind the Federal Arbitration Act.[29] The *Wilko* holding, however, has been limited by the Supreme Court to apply only in the case of domestic securities transactions.[30] When faced with securities claims that arise in an international setting, the Supreme Court held in *Scherk v. Alberto-Culver Co.*[31] that such disputes are arbitrable. In *Scherk,* Alberto-Culver Co., an American company, decided in the 1960's to expand its overseas operations. The company approached

22. Wilko v. Swan, 346 U.S. 427 (1953).

23. *Id.*

24. *Id.* at 429.

25. *Id.* at 438.

26. Section 14 provides that "any contract, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1982).

27. *Wilko,* 346 U.S. at 433-35.

28. *Id.* at 430-31.

29. *Id.* This is still the rule followed by the courts in the United States for purely domestic securities transactions. *See* Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., 558 F.2d 831, 833-36 (7th Cir. 1977) (reaffirming *Wilko* and extending its holding to securities transactions under the Securities Act of 1934). *But cf.* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 224-25 (1985) (concurring opinion of White, J.) (expressing doubt as to whether the holding in *Wilko* extends to transactions under the 1934 Act.).

30. Scherk v. Alberto-Culver Co., 417 U.S. 506, *reh'g denied,* 419 U.S. 885 (1974) ("a truly international agreement. . . involves considerations and policies significantly different from those found controlling in *Wilko*"). *Id.* at 515.

31. 417 U.S. 506 (1974).

Fritz Scherk, a German citizen residing in Switzerland, who owned three interrelated companies that were incorporated under the laws of Germany and Liechtenstein.[32] A contract was signed between Alberto-Culver and Scherk in 1969 which transferred ownership of Scherk's companies to Alberto-Culver and which contained a broad arbitration clause stipulating that any dispute or claim arising out of the contract would be settled exclusively by arbitration before the International Chamber of Commerce in Paris, France and that the laws of Illinois would govern the decision.[33] A dispute arose as to trademark rights and Alberto-Culver commenced an action contending that Scherk violated section 10(b) of the Securities Exchange Act of 1934.[34]

Scherk sought to stay the action pending arbitration in France. The district court denied the motion to stay based on the *Wilko* decision of the Supreme Court.[35] The court of appeals affirmed, also on the basis of *Wilko*.[36] The U.S. Supreme Court granted certiorari[37] and reversed, holding that *Wilko* did not apply to international transactions of this nature, and that the provisions of the Federal Arbitration Act governed this dispute.[38] The Court reasoned that in an international setting uncertainty exists at the time of agreement as to the applicable law in the event of future disputes. An arbitration agreement eliminates this uncertainty and is "therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[39] The Court held that judicial intervention was precluded due to the truly international character of the agreement that contained an arbitration clause.[40]

Special considerations for the international business community have also led the Supreme Court to hold that the doctrine of *Ameri-*

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32. *Id.* at 508.

33. *Id.*

34. *Id.* at 509.

35. Scherk v. Alberto-Culver Co., 484 F.2d 611, *cert. granted*, 414 U.S. 1156, *rev'd*, 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974).

36. *Id.*

37. *Scherk*, 414 U.S. 1156.

38. *Scherk*, 417 U.S. at 519-20.

39. *Id.* at 516.

40. *Id.* The Court in *Scherk* found a distinction between the provision of the 1933 Act at issue in *Wilko* and the 1934 Act, holding that the 1934 Act did not contain a provision similar to section 14 of the 1933 Act that would prevent the arbitration of claims arising under the 1934 Act. *Id.* at 513-14.

can Safety,[41] whereby antitrust claims are nonarbitrable as a matter of public policy, will not apply to antitrust claims arising out of an international transaction. If the international transaction contains a broad arbitration clause, antitrust claims based on the transaction are arbitrable.[42]

The argument that statutory claims in general are not suitable for arbitration was expressly rejected by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[43] The court found that "the [Federal Arbitration] Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."[44] Although finding that there is nothing that prevents the arbitration of statutory claims, the *Mitsubishi* Court held that there may be legal constraints external to the arbitration agreement which would foreclose the arbitration of such claims.[45] These legal restraints to which the Court refers are likely to be in the form of statutory exceptions to arbitration, as in *Wilko,* or in the form of broad public policy concerns, as in *American Safety,* where a court finds that Congress has implicitly denied the arbitration of certain statutory claims.

II. THE *AMERICAN SAFETY* DOCTRINE: ARBITRATION OF ANTITRUST CLAIMS

The judicially created rule that domestic antitrust claims are not arbitrable, which is an exception to the strong public policy favoring arbitration, was first announced in the case of *American Safety Equipment Corp. v. J.P. Maguire & Co.*[46]

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41. 391 F.2d 821 (2d Cir. 1968). *See infra* notes 46-61 and accompanying text for a lengthy discussion of the *American Safety* doctrine.

42. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S. Ct. 3346 (1985). *See infra* notes 64-74 and accompanying text.

43. 105 S. Ct. 3346 (1985).

44. *Id.* at 3355.

45. *Id.* The court stated:

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. . . having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 3355.

46. 391 F.2d 821 (2d Cir. 1968). *Cf.* Silvercup Bakers v. Fink Baking Corp., 273 F. Supp. 159, 162-63 (S.D.N.Y. 1967) (characterizing, in dictum, as "persuasive" the view that courts should not be displaced by arbitrators in deciding antitrust suits). The dispute in *Silvercup Bakers,* however, arose in a labor arbitration setting as opposed to the commercial arbitration setting in *American Safety.*

In 1963, American Safety Equipment Corp. (ASE), entered into a license agreement with Hickok Manufacturing Co., Inc. (Hickok), under which Hickok granted to ASE an exclusive license to use the Hickok trademark in connection with the production of seat belts and other safety devices manufactured by ASE.[47] The agreement provided for royalties to be paid to Hickok, for Hickok to have approval of any sublicense granted by ASE, and that in no event could a sublicense be given to a competitor of Hickok's. The agreement also limited each company to its own field of activity, thereby reducing competition between the two.[48] An arbitration clause was contained in the contract, which called for the arbitration of all disputes and claims arising out of the contract.[49]

Following a dispute between the two companies, ASE brought an action against Hickok based on the license agreement being void due to antitrust violations.[50] J.P. Maguire & Co., the assignee of Hickok's royalty rights under the contract, intervened and demanded that ASE arbitrate a claim for royalties due. Hickok also sought arbitration of its claims against ASE.[51]

The district court held that the arbitration clause was broad enough to encompass antitrust claims and found no public policy against referring them to arbitration.[52] The court then stayed ASE's motion for a declaratory judgment that the license agreement was illegal due to antitrust violations and ordered the parties to arbitrate their disputes.[53] ASE appealed. It was the Second Circuit Court of Appeals that then had to deal with the issue of whether or not the arbitration agreement was broad enough to encompass claims of antitrust violations in that certain provisions of the license agreement violated the Sherman Act.[54]

The court recognized that it was faced with a "clash of competing fundamental policies"[55] which it described as the "conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of ar-

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47. American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 822 (2d Cir. 1968).

48. *Id.* at 823.

49. *Id.*

50. *Id.*

51. *Id.*

52. American Safety Equip. Corp. v. Hickok Mfg. Co., 271 F. Supp. 961, 967 (S.D.N.Y. 1967), 391 F.2d 821 (2d Cir. 1968).

53. *Id.*

54. 15 U.S.C. §§ 1-8 (1982).

55. *American Safety Equip. Corp.*, 391 F.2d at 826.

bitration as a prompt, economical and adequate solution of controversies."[56] Concluding that Congress did not intend for antitrust claims to be resolved elsewhere but in the courts, the court held that due to the "pervasive public interest in [the] enforcement of the antitrust laws, and the nature of the claims that arise in such case . . . antitrust claims . . . are inappropriate for arbitration."[57]

The basis of the *American Safety* doctrine is found in the four reasons given by the court in its conclusion that antitrust claims are nonarbitrable. First, private parties play a crucial role in the enforcement of the antitrust laws by acting as private attorney generals in bringing private actions for treble damages.[58] Second, the strong possibility that contracts which generate antitrust claims may be contracts of adhesion dictates against automatic forum determination by contract.[59] Third, antitrust issues are often complicated and involve evidence which is extensive and complex and are better suited to judicial rather than arbitral procedures.[60] Finally, the court stated that it was improper to allow commercial arbitrators, drawn from the business community, to make decisions which affect the antitrust regulation of that same community.[61]

Holding antitrust claims nonarbitrable, the Second Circuit has applied the *American Safety* doctrine to subsequent cases,[62] and the doctrine has been adopted by various circuits of the United States Courts of Appeals.[63]

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56. *Id.*

57. *Id.* at 827-28.

58. *Id.* at 826.

59. The court was concerned that since agreements between monopolists and their customers were often contracts of adhesion, this inevitably led to the monopolist unfairly choosing the forum for settling disputes. *Id.* at 827.

60. *Id.*

61. *Id.*

62. *See* Roso-Lino Beverage Distribs. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984) (per curiam); N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972) (although holding that post-dispute agreements to arbitrate antitrust claims are enforceable as an exception to the general rule of *American Safety*).

63. Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679 (5th Cir. 1976) (court refused to allow antitrust claims to be submitted for arbitration in agency contract dispute); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) (antitrust claim involving disputed franchise agreement held not subject to arbitration); Buffler v. Electronic Computer Programming Inst., 466 F.2d 694 (6th Cir. 1972) (antitrust claims of franchise dispute may not be resolved by arbitration); Applied Digital Tech., v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978) (court enjoined arbitration of contract dispute pending resolution of antitrust issues in buy/sell agreement); Helfenbein v. International Indus., 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971) (lease dispute in which antitrust allegations were severed from eviction proceeding to allow for the arbitration of the eviction proceeding); Power Replacements v. Air

The United States Supreme Court has never been squarely faced with the issue of domestic antitrust claim arbitrability. Recently, however, the Court was presented with the issue of whether or not antitrust claims arising out of an international agreement are suitable for arbitration.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[64] a dispute arose from an international commercial relationship between a Japanese manufacturer, Mitsubishi Motors Corporation (Mitsubishi), a Swiss automobile dealer-franchiser, Chrysler International, S.A. (CISA) and a Puerto Rican franchisee, Soler Chrysler-Plymouth (Soler). Mitsubishi manufactured automobiles in Japan for sale through CISA's network of dealers. Soler bought these automobiles to sell in Puerto Rico. The 1979 contract between the parties called for arbitration of all disputes before the Japan Commercial Arbitration Association, with the arbitration to be governed by Swiss law.[65]

In 1981 a dispute arose when Soler was unable to sell its minimum commitment and was refused permission by Mitsubishi and CISA to ship their automobiles to markets outside Puerto Rico. Due to Soler's growing inventory and declining financial situation, Mitsubishi stopped shipping additional automobiles to Soler and instead stored more than 950 vehicles in Japan. After Soler disclaimed any responsibility for the stored automobiles, Mitsubishi petitioned a United States federal court for an order compelling arbitration in Japan. Mitsubishi alleged that Soler breached various provisions of the agreement and filed for arbitration before the Japan Commercial Arbitration Association.[66] Soler denied the allegations and counterclaimed that Mitsubishi had violated the antitrust laws under the Sherman Act.[67] The district court ordered arbitration of the anti-

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Preheater Co., 426 F.2d 980 (9th Cir. 1970) (agreement to arbitrate antitrust claims was not enforceable); A&E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968) (district court did not abuse its discretion by postponing the determination of alleged antitrust violations pending the results of arbitration hearing).

64. 105 S. Ct. 3346 (1985).

65. *Id.* at 3349. (The arbitration agreement provided that "[a]ll disputes, controversies, or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to . . . this agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."). *Id.*

66. *Mitsubishi*, 105 S. Ct. at 3348.

67. 15 U.S.C. §§ 1-8 (1982).

trust claim[68] and the court of appeals reversed, holding that antitrust claims are not arbitrable as a matter of law.[69]

The Supreme Court granted certiorari to decide the issue of the arbitrability of antitrust claims arising in an international context.[70] As noted by one commentator, the Court was faced with having to choose between extending their holding in *Scherk* to the antitrust area, or extending and applying the *American Safety* doctrine to hold international claims of antitrust violations nonarbitrable.[71] The Court chose the former and held that:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need[s] of the international commercial system for the predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[72]

In reinforcing the power of parties dealing in international commerce to specify their chosen forum in advance of disputes, the Court in *Mitsubishi* relied heavily on previous Supreme Court decisions[73] in holding that these decisions "establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution."[74]

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68. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, No. 82-538 (D.P.R. Nov. 24, 1982).

69. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155, 163 (1st Cir. 1983).

70. 467 U.S. 1225 (1984).

71. *See* Note, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 8 FORDHAM INT'L L.J. 194, 204 (1984).

72. *Mitsubishi*, 105 S. Ct. at 3335.

73. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (compelling an American company to abide by choice-of-forum clause provided in contract with a German corporation). The Court in *The Bremen* held that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." *Id.* at 13-14; *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (refusing to extend *Wilko* to an international agreement to arbitrate and holding that claims asserted under section 10-b of the Securities Act of 1934 are arbitrable).

74. *Mitsubishi*, 105 S. Ct. at 3356-57. The Court also relied on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208 (1982) (requires signatories to enforce international arbitration agreements.).

III. EVALUATION OF THE *AMERICAN SAFETY* DOCTRINE

Although the Court in *Mitsubishi* found it unnecessary to deal with the issue of domestic antitrust claim arbitrability,[75] it nevertheless confessed "some skepticism of certain aspects of the *American Safety* doctrine."[76] Concerns over contracts of adhesion being involved in agreements that produce antitrust claims were found to be unjustified by the Court as a reason for holding such claims nonarbitrable.[77] A party can attack directly the validity of the agreement to arbitrate, or attempt to set aside the forum selection clause, by showing fraud, overwhelming bargaining power, or other factors which would justify such action.[78]

In the area of commercial transactions there is often unequal, though not overwhelming, bargaining power between parties to a contract.[79] Smaller businesses deal on a daily basis with the largest corporations, and yet courts continue to enforce the contractual provisions between these unequal parties. There should be no different treatment applied to arbitration agreements. The Federal Arbitration Act calls for enforcing an agreement to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract."[80] If the agreement which contains the arbitration clause is truly a contract of adhesion resulting from the overwhelming bargaining power of one party, then it would be expected that the agreement would be found unconscionable under contract law and therefore revocable.[81]

The complexity of antitrust claims is also uncompelling as a reason for holding antitrust claims nonarbitrable. This view overlooks the flexibility of the arbitral process. Although commercial arbitration once employed only businessmen to settle disputes,[82] this is no

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75. *Mitsubishi*, 105 S. Ct. at 3350. The Court here was dealing with an international transaction and thus "[found] it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions." *Id.*

76. *Id.*, 105 S. Ct. at 3357.

77. *Id.*

78. *Id.*

79. *See* Aksen, *Arbitration and Antitrust: Are They Compatible?*, 44 N.Y.U. L. REV. 1097 (1969) [hereinafter cited as Aksen].

80. 9 U.S.C. § 2 (1982).

81. *See* Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629 (1943). *See also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (in a contract found to be unconscionable, the agreed to terms are not enforceable).

82. *See* G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION xi § 3.01 (2d ed. 1983).

longer the case.[83] It is perhaps easier to obtain experts in antitrust law in an arbitral setting than to burden trial judges and juries with such complex issues. Judges are not experts on federal antitrust law and are not chosen for their special understanding of antitrust law.[84] A judge at an antitrust trial, or at any trial dealing with complex issues, relies on the attorneys and expert witnesses to educate him or her as to the issues being litigated. It follows that if an arbitrator with expertise in antitrust law and policy is selected to arbitrate an antitrust dispute, this educational process that takes place in complex litigation need not occur. Thus, the "selection of such an arbitrator should not only ensure that fundamental antitrust principles are followed, but also should permit the proceeding to move more expeditiously than in a court room. An arbitrator without specialized antitrust knowledge however, should require no more education of the decisionmaker than normally is necessary in antitrust litigation."[85]

Juries in antitrust cases, and in complex cases generally, have difficulty dealing with the complexities of such litigation.[86] Allowing the arbitration of antitrust claims and the selection of an arbitrator with antitrust expertise would eliminate this confusion and would al-

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83. *See* Aksen, *supra* note 79, at 1105. For example, in *Mitsubishi* the arbitral tribunal selected by the parties consisted of three prominent Japanese attorneys: the former dean of the faculty of law of the University of Tokyo (who was chairman of the tribunal); a former Japanese district court judge; and an international lawyer and scholar who studied law in the United States and has written and published works on the competition laws of Japan and the United States.

One study shows that there is a vast diversity of training and experience among the 20,000 arbitrators used by the American Arbitration Association up to the time of the study, with the largest group being attorneys, not businessmen. See American Management Association: Resolving Business Disputes 68-69 (1965).

84. *See* United States v. Grinnell Corp., 236 F. Supp. 244, 247 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966) ("Few judges who have sat [in antitrust cases] have attempted to digest the plethora of evidence, or indeed could do so and at the same time do justice to other litigation.").

85. Allison, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accomodations of Conflicting Public Policies*, 64 N.C.L. REV. 219, 245 (1986) [hereinafter cited as Allison).

86. There is a growing body of authority for the proposition that many antitrust claims are too complex for jury determination. *See, e.g.*, P. MARCUS, ANTITRUST LAW AND PRACTICE § 52 (1980); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980) (suggesting that juries in antitrust cases be limited to those with relevant business experience or economic training). *Compare In re* Japanese Electronic Products Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (seventh amendment does not guarantee the right to a jury trial in complex antitrust litigation when the jury is unlikely to be able to perform its function in a rational manner), *with In re* United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) (seventh amendment right to a jury is absolute and applies to complex antitrust litigation).

low for more consistent decisions than in the litigation of antitrust disputes.[87]

The *Mitsubishi* Court found that "adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and the arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal."[88] Where arbitration is called for before a respected and impartial tribunal that employs fair and equitable procedures, such as the American Arbitration Association,[89] the complexity of antitrust issues would not be a bar to the arbitration of those issues.[90]

The argument that it is improper to have commercial arbitrators, drawn from the business community, settle antitrust disputes that regulate that community was disposed of by the Court in *Mitsub-*

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87. In antitrust litigation there exists a wide variety of judicial interpretations of the antitrust laws. *Compare* United States v. Colgate & Co., 250 U.S. 300 (1919) (Court found no agreement and thus no vertical price fixing) *with* United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (Court found illegal vertical price fixing on facts virtually identical to those in *Colgate*); *Compare* United States v. General Elec. Co., 272 U.S. 476 (1926) (Court found vertical price restrictions legal in consignment agreement) *with* Simpson v. Union Oil Co., 377 U.S. 13 (1964) (Court found vertical price fixing in consignment agreement on facts virtually identical to those in *General Electric); Compare* Times-Piscayune Pub. Co. v. United States, 345 U.S. 594 (1953) (Court required proof of market dominance for tying to be illegal) *with* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (Court substantially relaxed the proof of market power required for tying to be illegal) *and* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (Court returned to strong proof of market dominance required to prove illegal tying). If these inconsistent judicial decisions do not hurt the basic competitive policies behind the antitrust laws, it cannot seriously be argued that an arbitrator's decision in an antitrust case, which may even comport with judicial interpretation, would frustrate those policies.

88. *Mitsubishi,* 105 S. Ct. at 3352. *See, e.g.,* W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §§ 25.03, 26.04 (1984); UNCITRAL *Arbitration Rules,* II Y.B. COMMERCIAL ARBITRATION 161, 167 (1977).

89. It has been noted that the formation of the American Arbitration Association in New York in 1926 was perhaps the most important factor in the development of arbitration second only to the enactment of the Federal Arbitration Act in 1925. The Association's development of procedures and rules for the arbitral process served to give arbitration recognition and respect as an alternative dispute resolution technique. *See* Allison, *supra* note 85, at 226 n.6.

90. The same rationale behind the American Safety doctrine has been used to hold that claims arising under the patent laws are not suitable for arbitration. *See, e.g.,* Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976); Hanes Corp. v. Millard, 531 F.2d 585 (D.C. Cir. 1976). Since patent claims and antitrust claims are similar in that both deal with the notions of monopolistic behavior, one would expect the two types of claims to be treated in a similar manner. It is perhaps the case then that the arguments raised in *American Safety* have been effectively dismissed by Congress' recent enactment of amendments to the patent laws, which now expressly permit the arbitration of patent validity infringement and interference disputes. 35 U.S.C. § 294 (1982); 35 U.S.C. § 135(d) (1984).

ishi. The Court held that the arbitral process was quite capable of retaining competent, conscientious, and impartial arbitrators.[91]

The public policy justification for denying the arbitration of domestic antitrust claims, which the *Mitsubishi* Court found to be the "core" of the *American Safety* doctrine,[92] is also unconvincing. The *American Safety* court found that the private action for treble damages was more than a private matter and plays an important role in the enforcement of the antitrust laws.[93] In *Mitsubishi*, however, the Court stated that the "importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court."[94] The treble damages provision was "conceived of primarily as a remedy for the people of the United States as individuals"[95] and there is no reason that treble damages cannot be awarded by an arbitrator where called for by the applicable law.[96]

Since there is no requirement that individuals must bring an antitrust action if they are damaged by a violation of the antitrust laws,[97] two or more parties may be willing to forego the advantages of the statutory treble damages remedy in order to reach a more

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91. *Mitsubishi*, 105 S. Ct. at 3358. The Court stated that "[i]nternational arbitrators are frequently drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly." *Id.*

92. *Id.* at 3352. ("[W]e are left then with the core of the *American Safety* doctrine-the fundamental importance to American democratic capitalism of the regime of the antitrust laws.").

93. *American Safety Equip. Corp.*, 391 F.2d at 826. The court in *American Safety* found that "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.*

94. *Mitsubishi*, 105 S. Ct. at 3358-59.

95. *Id.* at 3359 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 486 n.10 (1977)). *See* 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb).

96. Arbitrators do not have their own set of laws but rather derive their power to adjudicate disputes solely from the arbitration agreement between the parties. The legal rights of the parties remain intact and barring anything in the agreement that denies the awarding of treble damages, an arbitrator would be within his or her rights if treble damages were awarded.

97. The Sherman Act, 15 U.S.C. § 15 (1982) provides:

> Any person who shall be injured in his business or property by reason[s] of anything forbidden in the antitrust laws *may* sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of [the] suit, including a reasonable attorney's fee. (emphasis added).

Id.

immediate decision, through arbitration, on whether their agreement violates the antitrust laws. Through litigation, it can take years before it is known whether or not an agreement violates the antitrust laws, and damages during this time can mount for the party who is found in violation of those laws. The courts should therefore give more attention to the intention of the parties when it is agreed that all future disputes will be arbitrated rather than holding that antitrust claims are strictly unsuitable for arbitration.

It is interesting to note that it is permissible to agree to submit existing antitrust claims to arbitration or to settle existing claims out of court.[98] In these cases the courts do not require that further litigation be pursued to vindicate the public interest. If the treble damages provision of the antitrust laws is indeed a tool in the enforcement of those laws,[99] how effective is it when a party knows that if an antitrust suit is brought against him, he will be able to avoid treble damages by settling the suit out of court? The parties bringing such suits would probably be inclined to accept, or indeed actively seek, settlement of their claims in order to avoid the enormous expense and time involved with the litigation of antitrust disputes.[100] "If a claim under the antitrust laws is not merely a private matter but is something that Congress intended to be resolved by court intervention, then voluntary abandonment and private settlement should also be impermissible."[101]

The public policy rationale of the *American Safety* doctrine also rests on the idea that antitrust violation claims can "affect hundreds of thousands - perhaps millions - of people and inflict staggering economic damage."[102] However, arbitration is used almost exclusively to resolve union-management terms under collective bargaining agreements. These agreements tend to affect many people, as they influence such economic factors as price, profit, inflation, and employment. Moreover, the type of antitrust claim most likely to be covered

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98. *See, e.g.*, Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) ("[T]here is an exception to the rule against arbitration of antitrust issues for cases where an agreement to arbitrate is made *after* a dispute arises."). *Id.* at 48; Coenen v. R.W. Presspich & Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972) (post-dispute agreement to arbitrate not against public policy).

99. *See* Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 138-39 (1968) (treble damages are applied as a primary tool to deter potential violators of antitrust statutes.)

100. One study showed that during the period 1964-69, more than 3,000 private antitrust cases were dismissed by settlement between the parties, while only 554 continued to judgment. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 382-83 (1970).

101. Aksen, *supra* note 79, at 1107.

102. *American Safety Equip. Corp.*, 391 F.2d at 826.

by a broad arbitration clause will be one that is considered "vertical" within the meaning of the antitrust laws.[103] Claims that are "vertical" in nature are unlikely to "inflict staggering economic damage." Where there does exist an antitrust violation that affects millions of people and is truly staggering to our economy, it is expected that the United States Attorney General's office or the Antitrust Division of the Department of Justice would discover it and bring suit to vindicate the public interest.

Perhaps the most troubling aspect of the *American Safety* doctrine is that the Court of Appeals for the Second Circuit may have based its decision in *American Safety* on an erroneous expansion of the Supreme Court's *Wilko v. Swan*[104] decision. In *Southland Corp. v. Keating*,[105] the Supreme Court observed that "[t]he question in *Wilko* was . . . whether Congress, in subsequently enacting the Securities Act, had in fact created . . . an exception [to section 2 of the Federal Arbitration Act]."[106] Therefore, in *Wilko* the Court deferred to Congress because it concluded that Congress had statutorily overriden the provisions of the Arbitration Act in enacting section 14 of the Securities Act of 1933.[107]

The Federal Arbitration Act contains no reference to an exception from its provisions for claims based on the antitrust laws.[108] The antitrust laws were in effect when this Act was enacted and if Congress had intended to exempt antitrust claims it could have done so as it did with its explicit exceptions for labor-related claims.[109] This reasoning leads to the conclusion that Congress did not intend even an implied exception for antitrust claims.

In *American Safety*, the court balanced the public policy factors behind the antitrust laws with the policy favoring the arbitration of disputes found in the Arbitration Act and concluded that "the antitrust claims raised here are inappropriate for arbitration."[110] It is for

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103. *See* Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977) ("Under the Sherman Act, it is unreasonable . . . for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.") (quoting United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967)).

104. 346 U.S. 427 (1953).

105. 465 U.S. 1 (1984).

106. *Id.*, 465 U.S. at 16 n.11. *Cf.* Scherk v. Alberto-Culver Co., 417 U.S. 509, 512-14 (1974) (also discussing *Wilko* as applied to the 1934 Securities Act).

107. *See supra* note 26.

108. The Committee Reports on the Federal Arbitration Act do not discuss exceptions to the Act for antitrust or other statutory claims. *See* S. Rep. No. 536, 68th Cong., 1st Sess. (1924); H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924).

109. *See supra* note 18.

110. *American Safety Equip. Corp.*, 391 F.2d at 828.

Congress, however, and not the courts, to engage in this sort of balancing as this is a primary legislative function. Just because the Supreme Court in *Wilko* deferred to an express Congressional policy decision as to the non-arbitrability of one type of claim, does not provide authority for ad hoc judicial determinations that there is a policy which it believes would be better served by litigation only. In *Mitsubishi,* the Supreme Court hinted at this usurpation of Congressional authority when it stated that the court in *American Safety* found antitrust claims inappropriate for arbitration "[n]otwithstanding the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act . . ."[111]

Allowing courts to apply the kind of balancing test utilized by the *American Safety* court can lead to both confusion and inconsistencies in lower court decisions dealing with statutory claims. An example of this confusion can be found in cases arising under the Commodities Exchange Act.[112] Claims arising under this statute have been found by several courts to be nonarbitrable due to their determinations that the policies behind the Commodities Exchange Act outweigh the policy favoring arbitration found in the Arbitration Act.[113] Other courts, however, have held that such claims are arbitrable.[114] Similar inconsistent results have been reached in cases dealing with the arbitrability of claims raised under the Employees Retirement Income Security Act [ERISA].[115]

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111. *Mitsubishi,* 105 S. Ct. at 3351.

112. 7 U.S.C. §§ 1-26 (1982).

113. *See, e.g.*, Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955 (D.N.J. 1982) (arbitral forum was inadequate to effectuate the policies underlying the Commodities Exchange Act); Milani v. Conticommodity Services, 462 F. Supp. 405 (N.D. Cal. 1976) (Commodity Exchange Act is clearly designed to protect the investing public and any claims of violation of the Act should be decided by the court, not by arbitrators).

114. *See, e.g.*, Smoky Greenhaw Cotton Co. v. Merrill Lynch Pierce Fenner & Smith, Inc., 720 F.2d 1446 (5th Cir. 1983) (court was unable to find a Congressional signal that predispute arbitration agreement was not allowed under the Commodity Exchange Act); Ingbar v. Drexel Burnham Lambert, Inc., 683 F.2d 603 (1st Cir. 1982) (finding no provision in the Commodities Exchange Act to forbid pre-dispute broker-customer agreements to arbitrate).

115. *Compare* Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977) (holding ERISA claims non-arbitrable), *with* Fox v. Merrill Lynch & Co., 453 F. Supp. 561 (S.D.N.Y. 1978) (referring ERISA claim to arbitration).

CONCLUSION

The United States Supreme Court has emphatically stated the strong public policy behind the Federal Arbitration Act.[116] In *Southland Corp. v. Keating*[117] the Court stated, "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." When a "contract fixing a particular forum for resolution of all disputes was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason, it should be honored by the parties and enforced by the courts."[118]

The Court has also observed that "the purpose of the [Federal Arbitration] Act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges."[119]

The *American Safety* doctrine does undermine the expectations of parties to arbitrate their antitrust claims when they have agreed to arbitrate any and all disputes arising out of their relationship. There is no support in either the Federal Arbitration Act or the Sherman Act for holding antitrust claims nonarbitrable as a matter of public policy. The complexity of antitrust claims can be dealt with by arbitrators as well as, or perhaps even better than, judges and juries. It is not likely that contracts of adhesion will exist in the majority of agreements that result in antitrust claims and if such a contract is present the agreement would be revocable as a matter of law. Arbitrators are no longer just commercial businessmen and therefore the concern over businessmen regulating themselves by allowing the arbitration of antitrust claims is unwarranted.

The *American Safety* doctrine does not apply to antitrust claims raised in an international context and thus, these claims are arbitrable. In so deciding, the Supreme Court in *Mitsubishi* declined to

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116. *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238 (1985) ("[T]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which the parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate."); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

117. 465 U.S. 1 (1984).

118. *Southland*, 465 U.S. at 7 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

119. 465 U.S. at 13.

discuss the arbitrability of antitrust claims raised in a purely domestic context but, nevertheless, it severely criticized the underpinnings of the doctrine and suggested that there may be no Congressional support for the decision reached in *American Safety*. The *Mitsubishi* decision has since led at least one federal district court to re-evaluate the application of the *American Safety* doctrine to hold domestic antitrust claims non-arbitrable.[120] In *Genna v. Lady Foot Int'l.*[121] there existed a franchise agreement similar in nature to the one in *Mitsubishi* with the difference being that the agreement was between two purely domestic parties. The agreement contained a broad arbitration clause[122] and when a dispute arose between the parties based on antitrust violations the plaintiffs argued that such claims are not arbitrable. The court held that because it was "persuaded that the Supreme Court's recent decision in *Mitsubishi* signals a rejection of the view expressed in other circuits, [i.e., the *American Safety* doctrine], . . . the antitrust claim asserted in this action is arbitrable."[123]

> Although the *Mitsubishi* Court specifically limited its holding to the international context, its reasoning is more compelling in the domestic context. Unlike foreign arbitrators who have had little or no experience with or exposure to our law and values, domestic arbitrators have the benefit of the American spirit of free competition. A domestic arbitral tribunal engrained with American antitrust jurisprudence is far better suited to vindicate these statutory causes of action than an international tribunal with its inherent ethnocentrism.[124]

The approach taken in the *Genna* case seems to be the proper one when dealing with the arbitrability of domestic antitrust claims. As the reasoning behind the *American Safety* doctrine seems to have been effectively assuaged by the Supreme Court's decision in *Mitsubishi* and its decisions in other cases concerning the strong federal policy favoring arbitration, this doctrine should no longer be applied by the courts to hold domestic antitrust claims not suitable for arbitration. Instead, courts should allow the arbitration of antitrust claims when the parties have freely and fairly agreed that they

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120. Genna v. Lady Foot Int'l., No. 85-4372 (E.D. Pa. Jan. 24, 1986) (LEXIS, Genfed library, Dist file).

121. *Id.*

122. The clause stated that "all disputes and claims relating to any provision hereof, any specification, standard or operating procedure or rule or any other obligation of [Genna] or [Lady Foot] . . . shall be settled by arbitration at Philadelphia, Pennsylvania by a panel of three (3) arbitrators in accordance with the United States Arbitration Act . . . and the rules of the American Arbitration Association . . . ." *Id.* at n.3.

123. *Genna*, No. 85-4372 (E.D. Pa. Jan. 24, 1986) (LEXIS, Genfed library, Dist file).

124. *Id.*

would arbitrate their disputes. Only in this way will the courts meet their "obligation to shake off the old judicial hostility to arbitration."[125]

Edward G. Heilig

125. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).