



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 64 | Number 2

Article 5

1-1-1986

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Recommended Citation

John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219 (1986).

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ARBITRATION AGREEMENTS AND ANTITRUST CLAIMS: THE NEED FOR ENHANCED ACCOMMODATION OF CONFLICTING PUBLIC POLICIES

JOHN R. ALLISON†

Arbitration agreements in interstate commerce transactions are favored by the law, particularly by the Federal Arbitration Act of 1925. The choice of the arbitral forum typically is final. When antitrust disputes arise between parties to arbitration agreements, however, the policy favoring arbitration clashes with the antitrust laws' reliance on private enforcement as a primary means for securing the ideal competitive markets toward which the antitrust laws aim. Because private enforcement of the antitrust laws presupposes a litigation setting, such enforcement necessarily competes with a preexisting arbitration agreement. Courts typically have resolved the conflict between the two policies in favor of private litigation of antitrust issues. Professor Allison believes a greater harmony between the two policies is possible. He examines both policies and calls for different methods by which the two might better accommodate one another.

One of the more important developments in twentieth century American jurisprudence has been the evolution of a generally favorable attitude toward binding arbitration as an alternative dispute resolution mechanism.¹ Perhaps the most evident reflection of this phenomenon was the enactment and subsequent expansive interpretation of the Federal Arbitration Act of 1925.² Under the Act, when parties to a transaction involving interstate commerce agree in writing to submit existing or future disputes to binding arbitration, their choice of the arbitral forum is generally final and the arbitrator's decision, or award, is subject only to very limited judicial review.³

The federal antitrust laws form the core of another extremely important national policy.⁴ The promotion of competitive markets in the interest of en-

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1. See *infra* text accompanying notes 21-77. This Article focuses on commercial arbitration only; labor arbitration does not play a significant role in the analysis contained in the Article because the policy conflict examined herein normally arises in commercial disputes. Although commercial arbitration and labor arbitration possess many common characteristics, the two have traditionally been viewed as distinct. The federal law governing commercial arbitration, the Federal Arbitration Act, expressly excludes labor disputes from its coverage. 9 U.S.C. § 1 (1982). The enforceability of arbitration agreements in the labor-management relations context is governed by § 301 of the Taft-Hartley Act, 29 U.S.C. § 185(b) (1982).

2. Act of Feb. 12, 1925, Pub. L. No. 401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1982)).

3. 9 U.S.C. § 10 (1982).

4. The most important antitrust statutes are the Sherman Act, 15 U.S.C. §§ 1-8 (1982), and

hancing allocative efficiency, preserving economic freedom of choice, and discouraging perpetuation of inordinate aggregations of economic power has long been recognized as a preeminent societal objective in America.⁵ Private enforcement of the antitrust laws as an adjunct to government enforcement has played a pivotal role in deterring antitrust violations and in furthering the overall goal of preserving competition.⁶

Private antitrust claims can arise in many contexts. Although a preexisting contractual relationship between an antitrust plaintiff and defendant is not a prerequisite to establishing an antitrust violation, it is not uncommon for such a relationship to have existed.⁷ Many antitrust claims have arisen between the parties to franchise agreements,⁸ nonfranchise distribution arrangements,⁹ contractual joint ventures,¹⁰ and patent, trade secret, or other technology licenses.¹¹ When such contracts contain clauses committing the parties to arbitration of

the Clayton Act, 15 U.S.C. §§ 12-27 (1982). Although the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1982), provides a statutory basis for antitrust enforcement activity by the Federal Trade Commission, it cannot be enforced by private parties and has no relevance to the discussion in this Article, which focuses on private enforcement of the antitrust laws. Another relevant statute, the Robinson-Patman Antidiscrimination Act, 49 Stat. 1526 (1936), is the amended version of § 2 of the Clayton Act, 15 U.S.C. § 13 (1982).

5. Although beyond the scope of this Article, there is lively debate today as to whether economic freedom of choice, disaggregation of power, or other objectives are or should be legitimate goals of antitrust law. Many scholars continue to believe that these are the broad policy goals of the antitrust laws. See, e.g., F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 12-20 (2d ed. 1980); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 1-14 (1977); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979). There also is significant scholarly opinion that enhancement of consumer welfare through improved allocative efficiency is, or at least should be, the only goal of antitrust. See, e.g., R. BORK, THE ANTITRUST PARADOX 50-89 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4-20 (1976).

6. See *infra* text accompanying notes 78-90.

7. The great majority of private antitrust claims are asserted under § 1 of the Sherman Act, 15 U.S.C. § 1 (1982), which prohibits "contracts, combinations, or conspiracies in restraint of trade." *Id.* Under § 1 some contract or other plurality of action among two or more economic entities is a jurisdictional prerequisite. Often this means joint activity among two or more defendants or among a defendant and one or more nonparty actors. However, even though a contractual relationship between plaintiff and defendant is not required for § 1 to apply, such a relationship often exists and may be used to fulfill the plurality requirement. A preexisting contractual relationship between plaintiff and defendant is an especially common basis for meeting the jurisdictional requirement of § 1 in the case of antitrust disputes arising out of a distribution arrangement between the parties. If a provision of the contract itself allegedly violates § 1, the plurality requirement is met without question. See, e.g., *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977) (location clause in franchise agreement was the basis for a § 1 claim). If the § 1 claim is not based on an express provision in plaintiff's and defendant's contract, other evidence is necessary to establish a nexus between the challenged conduct and an agreement between defendant and plaintiff (or between defendant and some other actor). See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (combination between newspaper company and carrier, forcing independent carrier to adhere to maximum price, was illegal restraint of trade under § 1 of Sherman Act). When a private antitrust claim is based on a contractual arrangement between a plaintiff and a defendant, the plaintiff's claim is not barred because of its participation in the arrangement as a whole or in the particular conduct being questioned; the defendant may not assert *in pari delicto* as a defense in a private antitrust action. *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968).

8. See, e.g., *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

9. See, e.g., *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963).

10. See, e.g., *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

11. See, e.g., *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969) (patent license); *Electronic Data Sys. Corp. v. Sigma Sys. Corp.*, 500 F.2d 241 (5th Cir. 1974) (trade secret license).

disputes that might subsequently arise under the agreement, the policies favoring arbitration and private antitrust enforcement create perplexing crosscurrents. Because private antitrust actions vindicate public as well as private concerns, antitrust policy has always presupposed the use of litigation rather than an extrajudicial tribunal. Courts confronted with the conflict between arbitration and antitrust policy have unanimously concluded that arbitration clauses are not binding insofar as private antitrust claims are concerned and, consequently, that arbitration of such claims cannot be compelled.¹²

This Article will examine the conceptual foundations of the fundamental public policies favoring arbitration clauses and antitrust laws and critically analyze the rationales employed by courts in denying the arbitrability of antitrust claims. A study will be made of the courts' efforts to accommodate the two policies. Drawing upon this analysis of underlying rationales and accommodation efforts, the Article will evaluate the availability and efficacy of other measures for achieving greater accommodation.

I. THE POLICY FAVORING ARBITRATION

Today there exists in this country a strong public policy in favor of arbitration—the resolution of disputes by referral to one or more disinterested third parties for binding determination.¹³ There are many reasons for such a policy, not the least of which are the well-publicized delay and expense associated with formal litigation.¹⁴ Available data confirm that arbitration normally is a faster and less expensive means for settling controversies than litigation.¹⁵ Experience

12. See *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (per curiam); *Applied Digital Technology, Inc. v. Continental Cas. Co.*, 576 F.2d 116 (7th Cir. 1978); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949 (1972); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), cert. denied, 404 U.S. 872 (1971); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546 (7th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968); *NPS Communications, Inc. v. Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); *Andriot v. Quickprint of Am., Inc.*, 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977); *Black v. Econo-Car Int'l, Inc.*, 404 F. Supp. 600 (D. Mass. 1975); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987 (1975).

13. See *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967).

14. See 5 R. POUND, *JURISPRUDENCE* 356-60 (1959); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Dombroff, *Judicial Resolutions Not Always the Most Desirable*, *Legal Times of Wash.*, Feb. 28, 1983, at 15, col. 1.

15. With respect to the relative speed of arbitration and litigation, see R. COULSON, *BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW* 89 (1982); G. GOLDBERG, *A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION* xi (2d ed. 1983); Ferguson, *The Adjudication of Commercial Disputes*

has also taught that the adversary process of litigation often renders the continuation of any productive relationship between the parties difficult and that a less combative process such as arbitration is far less likely to destroy such a relationship.¹⁶ Furthermore, because the arbitration process usually does not involve a substantially greater investment of time and money than a settlement negotiation,¹⁷ a relatively small percentage of disputes submitted to arbitration are settled prior to a final arbitral determination.¹⁸ On the other hand, a large percentage of disputes in litigation are settled prior to a final judicial determination, often virtually on the steps of the courthouse after countless hours and many thousands of dollars have been spent during pretrial preparation.¹⁹ Thus, arbitration produces a significantly higher ratio of actual adjudications per unit of resource expenditure.²⁰

Despite the strength and clarity of the modern policy favoring arbitration, the traditional common-law disposition toward this type of extrajudicial dispute resolution procedure was anything but favorable. Before examining in detail the legislative expression of current policy, it is instructive to consider the historical contexts of societal and governmental sentiments toward arbitration.

A. *Early History of Arbitration*

The use of arbitration as a dispute resolution mechanism is of ancient origin.²¹ Although often viewed as innovative, arbitration actually antedates the

and the Legal System in Modern England, 7 BRIT. J. LAW & SOC'Y 141 (1980); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850 (1961).

On the question of relative costs, see AMERICAN MANAGEMENT ASS'N, *RESOLVING BUSINESS DISPUTES* 127-33 (1965) [hereinafter cited as A.M.A.]; ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS 6-7 (A. Widiss ed. 1979) [hereinafter cited as ARBITRATION: COMMERCIAL DISPUTES]; Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUST. SYS. J. 6 (1983). Most authorities have viewed the lower cost of arbitration as a given. A.M.A., *supra*, at 127-33; ARBITRATION: COMMERCIAL DISPUTES, *supra*, at 6-7. Comments by those who actually have submitted commercial disputes to arbitration substantiate the cost savings feature of that dispute resolution mechanism. See, e.g., Janicke & Borovoy, *Resolving Patent Disputes by Arbitration: An Alternative to Litigation*, 62 J. PAT. OFF. SOC'Y 337 (1980). However, one finding by Kritzer and Anderson indicates that arbitrating a dispute through the American Arbitration Association is not always less expensive than litigation, primarily because arbitration is so much more likely to proceed to an adjudicated conclusion than is litigation. Kritzer & Anderson, *supra*, at 18-19. It should be noted that Kritzer and Anderson's cost study took into account only attorney fees, which previous research had shown to comprise the bulk of costs associated with dispute resolution. *Id.* at 7. A complete comparison of arbitration and litigation costs would include an assessment of other types of costs not measured by Kritzer and Anderson.

16. See Burger, *supra* note 14, at 275; Janicke & Borovoy, *supra* note 15, at 339.

17. Kritzer & Anderson, *supra* note 15, at 11.

18. See Janicke & Borovoy, *supra* note 15, at 358.

19. Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphian Labor*, 62 CORNELL L. REV. 1, 5 (1976).

20. Kritzer & Anderson, *supra* note 15, at 17-19.

21. For a view of arbitration in its historical context, see F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* (1948); Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155 (1970); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1927); and Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

formal judiciary by centuries.²² It is found in Old Testament scripture²³ and in Greek mythology.²⁴ Arbitration enjoyed some popularity in the settlement of political disputes in the first millenium B.C. Controversies between Athens and Megara over possession of the island of Salamis in about 600 B.C., between Corinth and Corcyra over possession of Leucas in 480 B.C., and between Genoa and the Viturians over a common boundary in 117 B.C. were all settled by arbitration.²⁵ Evidence also exists that various employment disputes in ancient times were frequently arbitrated.²⁶ Of more particular relevance to the present discussion, the arbitration of commercial disputes was demonstrably commonplace through the centuries in many different civilizations. It was common among traders from the Phoenicians and Greeks to the desert caravans of Marco Polo's time.²⁷

With the notable exception of the English common law, the development of formal legal systems and professional judiciaries normally did not produce significant hostility toward arbitration.²⁸ Roman law recognized the validity of arbitration agreements and provided rules for their enforcement.²⁹ This receptive attitude carried over to the civil law and to continental procedural codes.³⁰

The posture of the English, however, was altogether different, and common-law courts very early exhibited a repugnance to nonjudicial forums.³¹ Arbitration agreements were said to contravene public policy because they ousted the courts of jurisdiction.³² The origin of the rule against arbitration can be traced at least as far back as the fifteenth century, to four cases holding arbitration agreements revocable.³³ The rule apparently was given additional strength by Lord Coke's dictum in *Vynior's Case*³⁴ in 1609: "[I]f I submit myself to an arbitrimt . . . 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."³⁵ In later years Coke's statement took on an identity and vitality of its

22. F. KELLOR, *supra* note 21, at 3-6; Emerson, *supra* note 21, at 155-57; Sayre, *supra* note 21, at 598; Wolaver, *supra* note 21, at 132-38.

23. 1 *Kings* 3:16-28.

24. F. KELLOR, *supra* note 21, at 3; Emerson, *supra* note 21, at 156.

25. F. KELLOR, *supra* note 21, at 4; Emerson, *supra* note 21, at 156.

26. F. KELLOR, *supra* note 21, at 4; Emerson, *supra* note 21, at 156.

27. F. KELLOR, *supra* note 21, at 3; Emerson, *supra* note 21, at 156.

28. R. POUND, *supra* note 14, at 356-60.

29. *Id.* at 360.

30. *Id.* The official attitude toward arbitration in France, however, could be characterized as relatively hostile until 1806. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 *TEX. INT'L L.J.* 33, 53 (1984).

31. L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 432-33 (3d ed. 1972); R. POUND, *supra* note 14, at 357-58; Carbonneau, *supra* note 30, at 40-44; Sayre, *supra* note 21, at 596-605; Wolaver, *supra* note 21, at 138-46.

32. L. FULLER & M. EISENBERG, *supra* note 31, at 432-33; R. POUND, *supra* note 14, at 357-58; Carbonneau, *supra* note 30, at 40-44; Sayre, *supra* note 21, at 596-605; Wolaver, *supra* note 21, at 138-46.

33. Y.B. Mich. 8 Edw. 4, f. 9b, 10a, pl. 9 (1468); Y.B. Trin. 5 Edw. 4, f. 3b, pl. 2 (1465); Y.B. Pasch. 28 Hen. 6, f. 6, pl. 4 (1449); Y.B. Hil. 21 Hen. 6, f. 30a, pl. 14 (1442).

34. 8 Co. 80a, 81b (1609).

35. *Id.* at 81b.

own, apart from the context in which it arose.³⁶

Although the precise reasons for the development of a common-law bias against arbitration are obscure, it is possible to understand better the English experience with arbitration by considering the common-law judiciary in its historical context. In 1856 Lord Campbell speculated that the rule against arbitration agreements probably originated with English judges' almost total dependence on fees from cases for income.³⁷ Another contributing factor might have been the centuries-long struggle of the early law courts for jurisdiction. After the Norman conquest in 1066, the hundred, shire, manorial, and borough courts of Anglo-Saxon origin continued to function along with the newer king's courts constituted by the Normans.³⁸ This latter system of courts, from which the common-law system evolved, competed for jurisdiction with the shire courts for two hundred years and with the manorial and borough courts for seven hundred years.³⁹ Moreover, in the fifteenth century, by which time the common-law courts and their system of law had become highly developed and relatively secure, these courts faced another and far more significant jurisdictional challenge from the Chancery, a challenge that would continue for four hundred years.⁴⁰

The efforts of the bar to institutionalize the legal profession might also have contributed to the common-law bias against extrajudicial dispute resolution.⁴¹ The success of any group in its attempts to professionalize depends partly on how well the group can differentiate its expertise. This differentiation contains elements of both substance and illusion. In the community of common-law practitioners, there was substance—more and more specialized knowledge became necessary to practice law competently as the years passed.⁴² There also was the appearance of differentiation. Part of this aura of specialized expertise was the body of procedure woven into the litigation process. Regardless of how useful these litigation procedures might have been at the time they were adopted, they probably contributed to the common-law attitude toward arbitration by creating disincentives within the developing legal profession to encourage the use of extrajudicial forums. No body of technical procedure attached to the resolution of disputes through arbitration or other means of self-help; thus, there was a danger that such nontechnical methods would become

36. Wolaver, *supra* note 21, at 138-43.

37. In earlier times judges had not been paid salaries. *Scott v. Avery*, 5 H.L. Cas. 811, 853, 10 Eng. Rep. 1121, 1138 (1856). As recorded in another reporter, Lord Campbell said that "the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salary there was great competition to get as much as possible of litigation into Westminster Hall." 25 L.J. (n.s.) 313 (Ex. 1856).

38. See generally F. KEMPIN, *HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW*, 23-29 (2d ed. 1973) (outlining the judicial system in England after the Norman conquest).

39. See *id.* at 24, 27.

40. See generally *id.* at 36-40 (outlining the rise of courts of equity).

41. It has been observed that the bar has traditionally exhibited a degree of antagonism toward arbitration. See, e.g., A.M.A., *supra* note 15, at 20; Burger, *supra* note 14, at 277; Dobkin, *Arbitrability of Patent Disputes Under the U.S. Arbitration Act*, 23 *ARB. J.* 2-3 (1968).

42. See generally F. KEMPIN, *supra* note 38, at 65-69 (outlining the advent of professional lawyers).

popular and alter the public's perceptions about the need for professional assistance.

With such a background, it is natural that the common law looked upon agreements to arbitrate with suspicion. This suspicion led to the rule that agreements to submit future disputes to arbitration were unenforceable.⁴³ Even if the parties adhered to the arbitration agreement voluntarily, the arbitrator's award was subject to thorough judicial review.⁴⁴ Ultimately the common law took the view that an agreement to submit a specific, existing dispute to arbitration was enforceable, but the rule against enforcement of agreements to arbitrate future disputes remained inviolate until it was changed by legislation.⁴⁵ The rule against enforcement of agreements to arbitrate future disputes came to America with the common law⁴⁶ and, according to one commentator, might have been fueled even further by unique characteristics of this country.

It is probable that [the nonacceptance of arbitration] was due somewhat to the attitude of Americans toward discord and dispute. They were complacently accepted phenomena, to be settled by force or by litigation, if need be. America was a rich country, full of adventure and could afford a considerable volume of disputes at a high cost of settlement. As disputes were regarded as an inevitable and healthful process in the development of a new country, the prospect that they might sometime become a menace to society was not of immediate concern. Since in trade and commerce the margin of profit was then sufficient to allow for a very considerable waste, the attribute of economy was not an attraction to arbitration. . . .

It is also probable that this early American attitude toward disputes . . . failed to give arbitration any outstanding advocates. Without such leadership, so conspicuous in other advancing fields of endeavor, arbitration could not present an effective challenge to the fast-growing volume of disputes.⁴⁷

B. *The Movement Toward More Favorable Treatment of Arbitration Agreements*

In both England and America the bias against arbitration was slow to change. Nineteenth century legislation in England made future-disputes arbitration agreements enforceable and attempted to provide a procedural structure for judicial review of arbitration awards; however, this review continued to involve a thorough examination on the merits.⁴⁸ Legislation in that country in the mid-twentieth century again recognized the enforceability of agreements to sub-

43. See 6A A. CORBIN, CORBIN ON CONTRACTS § 1433 (1962); L. FULLER & M. EISENBERG, *supra* note 31, at 432; R. POUND, *supra* note 14, at 358; Carbonneau, *supra* note 30, at 39 n.12; Sayre, *supra* note 21, at 601; Wolaver, *supra* note 21, at 138.

44. Carbonneau, *supra* note 30, at 40-41.

45. See A. CORBIN, *supra* note 43, at § 1431 ("In the absence of statute to the contrary, no agreement to arbitrate will be specifically enforced.").

46. See R. POUND, *supra* note 14, at 359; Carbonneau, *supra* note 30, at 39 n.12, 45.

47. F. KELLOR, *supra* note 21, at 6-7.

48. Carbonneau, *supra* note 30, at 41; Sayre, *supra* note 21, at 606-08.

mit future disputes to arbitration, but judicial review of awards remained comprehensive.⁴⁹ It was not until 1979 that England adopted legislation making the modern policy in favor of arbitration a truly effective one. This legislation not only recognized the enforceability of agreements to arbitrate existing and future disputes; it also greatly limited the scope of judicial review.⁵⁰

Almost all of the American states passed arbitration legislation during the nineteenth century, but these statutes did little more than codify the common-law attitude and outline procedures for review.⁵¹ In the twentieth century, however, dissatisfaction with juries as triers of fact in commercial litigation and long delays due to congested court dockets led to dramatic changes in American sentiments toward arbitration.⁵² Frustration with the adjudicatory process, which began early in the twentieth century and has continued to intensify, was well capsulized recently by Chief Justice Burger:

We, as lawyers, know that litigation is not only stressful and frustrating but expensive and frequently unrewarding for litigants. . . . Commercial litigation takes business executives and their staffs away from the creative paths of development and production and often inflicts more wear and tear on them than the most difficult business problems.⁵³

In 1920 New York became the first state to enact a modern arbitration statute providing for the enforcement of agreements to arbitrate future disputes and for very limited judicial review of arbitrators' awards.⁵⁴ In time, similar legislation was enacted in the majority of other states, and in a few the same result was reached by judicial rejection of the common-law rule.⁵⁵

The most important development, however, was not the advent of state legislation extending favorable treatment to arbitration agreements but the passage of federal legislation in 1925.⁵⁶ Because of its general importance and its centrality to later analysis in this Article, a closer examination of the federal law is warranted.

C. *The Federal Arbitration Act of 1925*

Responding to "a great demand for the correction of what seems to be an

49. Carbonneau, *supra* note 30, at 42-44.

50. *Id.* at 44-45.

51. L. FULLER & M. EISENBERG, *supra* note 31, at 433; Sayre, *supra* note 21, at 612-13.

52. R. POUND, *supra* note 14, at 359.

53. Burger, *supra* note 14, at 275.

54. Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803, *cited in* L. FULLER & M. EISENBERG, *supra* note 31, at 433.

55. G. GOLDBERG, *supra* note 15, at 6-7.

56. Federal Arbitration Act of 1925, Pub. L. No. 401, 43 Stat. 883 (codified as amended at 9 U.S.C §§ 1-14 (1982)). The formation of the American Arbitration Association in New York in 1926 was probably the second most important development because the Association was the first effective, organized advocate of arbitration as a desirable dispute resolution mechanism. The Association ultimately created a recognized set of procedures for selecting arbitrators and conducting arbitration hearings. See F. KELLOR, *supra* note 21, at 15-33.

anachronism in our law,"⁵⁷ Congress passed the Federal Arbitration Act of 1925.⁵⁸ At the core of the Act is section 2, which provides that in a maritime transaction or in a contract evidencing a transaction involving interstate commerce, a written provision calling for arbitration of either an existing dispute or any future dispute arising out of the transaction is "valid, irrevocable, and enforceable."⁵⁹ The Act has come to occupy a paramount place in the American process of dispute resolution for three reasons. First, liberality in the interpretation of the Constitution's commerce clause has given the Act the same broad applicability as other commerce clause-based statutes.⁶⁰ Second, the Act has been interpreted as an expression of substantive law, not just as an alteration of procedure,⁶¹ with the result that it displaces any conflicting state law under the supremacy clause of the Constitution.⁶² Third, the Act has been held applicable even if the parties have agreed that state law will apply.⁶³

The Arbitration Act goes far beyond merely validating arbitration clauses and in several ways mandates the active involvement of federal courts in implementing the Act's pro-arbitration policy. When a valid arbitration agreement exists, a federal district court is required to stay litigation on any issue that is

57. 65 CONG. REC. 1931 (1924) (statement of Rep. Graham).

58. Pub. L. No. 401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1982)).

59. 9 U.S.C. § 2 (1982). The text of § 2 is 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 a 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.

Id.

60. For cases interpreting the commerce clause expansively, see, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (consulting agreement to obtain assistance in moving business from New Jersey to Maryland and continuing operations of an interstate manufacturing and wholesaling business are clearly interstate commerce); *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 384 (2d Cir.) (employers and materials used in business cross state lines even though work was to be done within one state), *cert. denied*, 368 U.S. 817 (1961); see also *Associated Metals & Minerals Corp. v. The Steamship Mihalis Angelos*, 234 F. Supp. 236 (S.D.N.Y. 1964) (maritime jurisdiction construed broadly).

61. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956).

62. *Southland Corp. v. Keating*, 104 S. Ct. 852, 858 (1984). In *Southland* the Court held that the Federal Arbitration Act prevailed over a provision of the California Franchise Investment Law, CAL. CORP. CODE § 31512 (West 1977), that prohibited waiver of rights. The waiver of rights provision could not be applied to preclude arbitration.

It should be noted, however, that the characterization of the Federal Arbitration Act as substantive law also means that state law will be applied by a federal court if the federal law is found inapplicable for some reason. Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), federal courts are required to apply federal procedural law, but in the absence of controlling federal substantive law, they must apply state substantive law. Thus, the result that occurred in *Southland* can occur only when the jurisdictional prerequisites of the Federal Arbitration Act are present, that is, when (a) there is a transaction involving either interstate commerce or maritime trade, and (b) there is a written agreement to arbitrate. For example, in *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956), interstate commerce was not involved, and, consequently, state arbitration law applied because the Federal Arbitration Act is substantive federal law.

63. *Georgia Power Co. v. Cimarron Coal Corp.*, 526 F.2d 101 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976); *Metro Indus. Parking Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir. 1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960).

within the scope of the arbitration clause⁶⁴ and, upon application by either party, must issue a decree compelling arbitration.⁶⁵ Moreover, when a valid arbitration agreement is in force but an arbitrator has not been selected, the district court is required to appoint an arbitrator upon application by either party.⁶⁶ The Act provides arbitrators complete subpoena powers for evidence-gathering purposes; in the event of noncompliance with an arbitrator's subpoena, the district court may issue an order compelling compliance or hold the noncomplying party in contempt without benefit of a prior compliance order.⁶⁷ If the parties have so agreed, either party may obtain an order of the district

64. 9 U.S.C. § 3 (1982). The text of § 3 is 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 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id.

65. 9 U.S.C. § 4 (1982). The text of § 4 is 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 States district court 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. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Id.

66. 9 U.S.C. § 5 (1982). The text of § 5 is as follows:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Id.

67. 9 U.S.C. § 7 (1982). The text of § 7 is as follows:

court confirming the award and reducing it to judgment for up to one year following entry of the arbitrator's award.⁶⁸

The Act makes it clear that judicial involvement in the merits of the dispute is to be almost nonexistent. Section 2 provides that arbitration provisions are valid, irrevocable, and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."⁶⁹ Although this qualification of the validity of arbitration agreements incorporates all the common-law contract defenses such as fraud, mistake, duress, undue influence, and illegality, the federal courts have given a pro-arbitral interpretation to this proviso so that issues such as fraud or illegality are for the arbitrator to decide unless the issues relate specifically to the arbitration clause. In other words, such defenses to the enforceability of the contract as a whole are within the purview of the commercial arbitration process. These defenses are beyond the arbitrator's authority and, consequently, are decided by the court only when the assertion is that the arbitration clause itself was induced by fraud, tainted by illegality, or otherwise rendered invalid.⁷⁰

A further demonstration of the congressional desire for judicial noninvolvement in the merits of an arbitrable dispute is found in section 10, which provides

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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Id.

68. 9 U.S.C. § 9 (1982). The text of § 9 is 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. If no court is specified in the agreement of the parties then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Id.

69. 9 U.S.C. § 2 (1982).

70. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

that an arbitration award may be set aside by a court only on specific grounds unrelated to the substantive merits:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁷¹

Even if an arbitration award is set aside on any of these grounds, the Act specifies that the court may direct a rehearing by the arbitrator.⁷² This "second chance" further reflects a congressional desire to honor the arbitration process to the fullest extent possible without sacrificing fundamental fairness. The Act apparently does not contemplate a judicial ruling on the merits even when an award is vacated.⁷³

Federal courts have also implemented the legislative intent to promote commercial arbitration by giving expansive interpretations to arbitration clauses when determining whether the party seeking arbitration has asserted a claim within the scope of the clause.⁷⁴ In *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*⁷⁵ the Supreme Court stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of . . . a . . . defense to arbitrability."⁷⁶ An examination of the cases has led one commentator to observe that "a particular dispute will be arbitrable unless the arbitration agreement cannot be rationally interpreted to cover it."⁷⁷

71. 9 U.S.C. § 10 (1982). In addition, § 11 of the Act, 9 U.S.C. § 11 (1982), provides for judicial modification of the arbitrator's award in the following circumstances:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

72. 9 U.S.C. § 10(e) (1982). The text of § 10(e) is as follows:

- (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

73. See Carbonneau, *supra* note 30, at 48 n.56.

74. See, e.g., *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 412 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dismissed, 364 U.S. 801 (1960); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282, 1291 (E.D.N.Y. 1979).

75. 460 U.S. 1 (1983).

76. *Id.* at 24-25.

77. Krause, *Securities Litigation: The Unsolved Problem of Predispute Arbitration Agreements for Pendent Claims*, 29 DEPAUL L. REV. 693, 699 (1980).

From the language of the statute and from the judicial implementation of the statutory provisions, it is evident that the American position in favor of commercial arbitration is among the strongest and most clearly expressed public policies of this century.

II. THE POLICY FAVORING PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS

The antitrust laws, which seek to promote competitive markets by outlawing various anticompetitive practices, are at the very heart of government economic policy.⁷⁸ The Sherman Act,⁷⁹ which was the first and is still the most fundamental antitrust statute, has been judicially characterized as a "charter of freedom" possessing an almost constitutional status.⁸⁰ Similar views of antitrust's place in American law have been expressed time and again by the Supreme Court. The words of Justice Black in *Northern Pacific Railway Co. v. United States*⁸¹ are representative:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁸²

Private enforcement has been a cornerstone of antitrust policy since its inception.⁸³ Section 4 of the Clayton Act provides that "any person injured in his business or property" by a violation of the antitrust laws may sue and recover threefold damages.⁸⁴ Section 16 of the Clayton Act permits a suit for injunctive relief by an injured private party.⁸⁵ In addition, in either a treble damage or injunctive suit, a successful plaintiff is entitled to reasonable attorney fees and costs.⁸⁶ Adding to these private enforcement incentives are the Clayton Act provisions allowing liberal venue selection⁸⁷ and use of findings from prior Justice Department civil or criminal cases as prima facie evidence of liability in

78. See generally, L. SULLIVAN, *supra* note 5, § 1 (discussing importance of economic objectives in antitrust law).

79. 15 U.S.C. §§ 1-8 (1982).

80. *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936) (provisions in Sherman Act are broad and are interpreted like a constitution).

81. 356 U.S. 1 (1958).

82. *Id.* at 4.

83. The original § 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890), provided for the recovery of treble damages, costs, and attorney fees by a private party injured as a result of a violation of the antitrust laws. This provision was later superseded by § 4 of the Clayton Act, ch. 323, 38 Stat. 731 (1914), and was ultimately repealed in 1955 by Act of July 7, 1955, ch. 283, 69 Stat. 283 (1955).

84. 15 U.S.C. § 15 (1982).

85. 15 U.S.C. § 26 (1982).

86. 15 U.S.C. §§ 15, 26 (1982).

87. 15 U.S.C. § 22 (1982).

private antitrust suits.⁸⁸

The treble damage remedy provides a powerful incentive for private enforcement. Indeed, Congress intended such an effect when it created the remedy. Recognizing that government enforcement would be perpetually hampered by limited resources, necessarily selective, and not likely to be concerned with local or less than flagrant offenses, Congress created the treble damage remedy to increase the incidence of enforcement actions.⁸⁹ The resulting large number of "private attorneys general" greatly increases the probability that a given violation will be detected. These greater odds of detection, when coupled with the enlarged cost to those found liable, enhance the deterrent effect of antitrust laws.⁹⁰

III. ARBITRATION OF PRIVATE ANTITRUST CLAIMS—THE POLICIES IN CONFLICT

It is relatively common to find a preexisting contractual relationship between the parties to a private antitrust dispute.⁹¹ In conjunction with antitrust issues, such a dispute often involves nonantitrust issues such as fraud,⁹² breach of contract,⁹³ breach of warranty,⁹⁴ patent infringement,⁹⁵ misappropriation of trade secrets or other unpatented know-how,⁹⁶ tortious interference with contract,⁹⁷ breach of fiduciary duty,⁹⁸ duress,⁹⁹ unconscionability,¹⁰⁰ or mistake.¹⁰¹ When the parties' contract includes a clause providing for the arbitration of future disputes, some interesting questions arise. Because of the paramount importance of antitrust law to national economic policy, even private antitrust disputes are not purely private but are semipublic in character.¹⁰² The question naturally arises, therefore, whether antitrust policy can be properly recognized and protected when antitrust questions are submitted to a privately selected arbitrator rather than to a federal court.

88. 15 U.S.C. § 16(a) (1982).

89. See, e.g., P. AREEDA, *ANTITRUST ANALYSIS* § 159 (3d ed. 1981).

90. *Id.* It should be noted that although many of the cases dealing with arbitration of antitrust claims have involved requests by the antitrust claimant for either injunctive relief or declaratory judgment of contract invalidity rather than treble damages, the courts have made no distinction based on the remedy sought and have lumped all private antitrust enforcement actions together when discussing the arbitrability question.

91. See *supra* text accompanying notes 7-11.

92. See, e.g., *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974).

93. See, e.g., *Sam Reinfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976).

94. See, e.g., *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974).

95. See, e.g., *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976).

96. See, e.g., *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

97. See, e.g., *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978).

98. See, e.g., *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983).

99. See, e.g., *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982).

100. *Id.*

101. *Id.*

102. *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968).

A. Emergence of the Public Interest Rule

Antitrust claims are not the only claims that raise issues of public interest in the course of private disputes. The question whether private claims affecting the public interest are arbitrable first arose in the securities context. In *Wilko v. Swan*¹⁰³ a customer sued a brokerage firm under section 12(2) of the Securities Act of 1933¹⁰⁴ for allegedly misrepresenting and omitting material facts in connection with a sale of stock. Defendant sought an order staying the litigation and compelling arbitration in accordance with the arbitration clause in plaintiff's margin agreement with defendant.¹⁰⁵ The district court denied the stay, concluding that arbitration of the Securities Act claim could not be compelled.¹⁰⁶ A divided court of appeals reversed and held that arbitration was required.¹⁰⁷ Agreeing with the district court's resolution of the policy conflict, the Supreme Court reversed the court of appeals decision.¹⁰⁸ Contrary to the normal judicial attitude toward arbitration under the Federal Arbitration Act, the Court concluded that the arbitration agreement was not binding in this particular dispute.¹⁰⁹ The Court's conclusion was based on section 14 of the Securities Act, which specifies that any provision, stipulation, or condition binding a person acquiring a security to waive compliance with any provision of that Act is void.¹¹⁰ The Court viewed the right to bring suit in federal district court as a provision of the Securities Act that could not be waived.¹¹¹ The waiver prohibition of section 14 has produced the same result in disputes involving other sections of the Securities Act.¹¹²

Although the development of a nonarbitrability rule for securities claims was based on a specific statutory prohibition of waiver, the rule was actually a broadly based product of the public interest nature of the securities laws. Such a conclusion is apparent from the reasons asserted for construing the waiver prohibition to extend to a waiver of the right to litigate. In *Wilko* the Court empha-

103. 346 U.S. 427 (1953).

104. 15 U.S.C. § 771(2) (1982).

105. *Wilko*, 346 U.S. at 429.

106. *Wilko v. Swan*, 107 F. Supp. 75 (S.D.N.Y. 1952).

107. *Wilko v. Swan*, 201 F.2d 439 (1953).

108. *Wilko*, 346 U.S. at 438.

109. *Id.*

110. 15 U.S.C. § 77n (1982).

111. *Wilko*, 346 U.S. at 427.

112. For example, courts have held that the right to litigate claims under § 5, 15 U.S.C. § 77e (1982), which deals with registration requirements, cannot be waived and that such claims thus are not arbitrable. *See, e.g.*, *Laupheimer v. McDonnell & Co.*, 500 F.2d 21 (2d Cir. 1974); *Maheu v. Reynolds & Co.*, 282 F. Supp. 423 (S.D.N.Y. 1968). The same result has been reached under § 17, 15 U.S.C. § 77q (1982), which deals with fraud. *See, e.g.*, *Davend Corp. v. Michael*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,540 (S.D.N.Y. 1976); *Frier Indus. v. Glickman*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,845 (S.D.N.Y. 1974). Moreover, the Securities Exchange Act of 1934 contains a provision similar to § 14 of the Securities Act of 1933. *See* Securities Exchange Act of 1934, § 29(a), 15 U.S.C. § 78cc(a) (1982). Consequently, claims based on the 1934 Act have also been held nonarbitrable. *See, e.g.*, *Weissbuch v. Merrill Lynch, Inc.*, 558 F.2d 831 (7th Cir. 1977); *Laupheimer v. McDonnell & Co.*, 500 F.2d 21 (2d Cir. 1974); *Reader v. Hirsch & Co.*, 197 F. Supp. 111 (S.D.N.Y. 1961).

sized that the stated policy of the Securities Act was to protect investors¹¹³ and that, in furtherance of this policy, the Act created "special right[s]" more protective than those at common law.¹¹⁴ In *Wilko* and in subsequent cases, the right to sue in federal court was characterized as a nonwaivable "special right"; because the investor has such a wide choice of venue in securities litigation, nationwide service of process is available to the plaintiff, and the investor probably is unable "to judge the weight of the handicap the Securities Act places upon his adversary" at the time future-dispute arbitration agreements are made.¹¹⁵ In the end, the conclusion that securities claims are nonarbitrable is clearly grounded in a judicial perception that the investor-protection policy underlying the securities laws simply cannot be policed adequately in the arbitration process.¹¹⁶

The rule that private claims imbued with a public interest are not arbitrable has also been applied to questions concerning the validity of patents. Although a recent amendment to the patent code rendered patent-validity issues arbitrable,¹¹⁷ the courts previously had consistently treated such questions as beyond the purview of the arbitration process.¹¹⁸ In a similar vein, claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)¹¹⁹ have been held nonarbitrable.¹²⁰ In another area, there is considerable conflict among federal courts on the question whether claims related to bankruptcy proceedings are arbitrable or whether the public interest aspects of the 1978 Bankruptcy Code¹²¹ require implied repeal of the Arbitration Act.¹²²

113. *Wilko*, 346 U.S. at 431.

114. *Id.*

115. *See id.* at 434-38.

116. *See* Krause, *supra* note 77, at 704-05; Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 516-21 (1981).

117. 35 U.S.C. § 294 (1982). Although this amendment renders patent-validity questions arbitrable, the arbitrator's award on such issues is effective only between the parties and does not have the effect on third parties of a judicial declaration regarding patent validity. 35 U.S.C. § 294(c).

118. *See, e.g.*, *N.V. Maatschappij Voor Industriële 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); *Diematic Mfg. Corp. v. Packaging Indus.*, 381 F. Supp. 1057 (S.D.N.Y. 1974), *appeal dismissed*, 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975). *See generally* Carmichael, *Arbitration of Patent Disputes*, 38 ARB. J. 3 (1983) (analyzing the new patent arbitration legislation in light of the history of patent disputes); Dobkin, *Arbitrability of Patent Disputes Under the U.S. Arbitration Act*, 23 ARB. J. 1 (1968) (compatibility of arbitration and patent disputes); Janicke & Borovoy, *supra* note 15 (discussing arbitration of patent disputes in actual practice); Sterk, *supra* note 116, at 512-16 (discussing courts' holdings prior to patent arbitration legislation); Timberg, *Antitrust Aspects of Patent Litigation, Arbitration and Settlement*, 59 J. PAT. OFF. SOC'Y 244 (1977) (questioning why patent arbitration is not generally accepted in light of the strong public policy favoring arbitration of commercial disputes).

119. 18 U.S.C. §§ 1961-68 (1982).

120. *See S.A. Mineracao Da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190 (2d Cir. 1984).

121. 11 U.S.C. §§ 101-151326 (1982).

122. *See Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 699 (1984); *Coar v. Brown*, 29 Bankr. 806 (N.D. Ill. 1983); *In re Braniff Airways, Inc.*, 33 Bankr. 33 (Bankr. N.D. Tex. 1983); *In re Good Hope Indus.*, 16 Bankr. 719 (Bankr. D. Mass. 1982) (refusing to compel arbitration when bankruptcy issues are present); *see also In re Hart Ski Mfg. Co.*, 711 F.2d 845 (8th Cir. 1983) (if court finds agreement to arbitrate, court will order arbitration despite bankruptcy issues); *In re Morgan*, 28 Bankr. 3 (Bankr. 9th Cir. 1983) (court enforced arbitration agreement, holding that when a debtor brings suit against a party who has made no claim on the estate, there is no competing "bankruptcy policy"); *In re Cres Rivera Concrete Co.*, 21 Bankr. 155 (Bankr. D.N.M. 1982) (discussing the controversial application of arbitration agreements to bank-

B. *Application of The Public Interest Rule to Antitrust Claims*¹²³

The arbitrability of public interest issues arising in an antitrust context was first confronted directly in *American Safety Equipment Corp. v. J.P. Maguire & Co.*¹²⁴ In that case Hickok Manufacturing Company, a maker of men's belts, apparel, and gift items, licensed its Hickok trademark to American Safety Equipment Corporation (ASE) for use in connection with ASE's manufacture and sale of seat belts and other automotive safety devices.¹²⁵ The license included a provision by which each party agreed not to encroach on the other's product line, as well as a clause requiring arbitration of all disputes arising out of or relating to the license agreement.¹²⁶ After the parties experienced several profitable years of operation under the license, their relationship deteriorated.¹²⁷ ASE filed suit against Hickok, asserting the invalidity of the license on the ground that the product line restriction violated the Sherman Act.¹²⁸ In response, Hickok and Maguire, the assignee of Hickok's royalty rights, asserted a claim for royalties due and demanded arbitration.¹²⁹ The district court stayed the litigation and ordered arbitration of all issues.¹³⁰

On appeal, the United States Court of Appeals for the Second Circuit characterized the issue as whether "the statutory right ASE seeks to enforce is 'of a

ruptcy disputes). See generally Deitrick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 BUS. LAW. 33 (1984) (analysis of conflicts between Arbitration Act and Bankruptcy Reform Act of 1978).

123. Although courts of appeals for six of the eleven circuits have held antitrust claims to be nonarbitrable, *infra* notes 124-38 and accompanying text, the Supreme Court has not confronted the issue directly. The Court, however, has dealt with the arbitrability question in an international context. At the close of its 1984-85 term, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), the Court held that private antitrust claims are arbitrable in a transaction arising in international commerce. The Court's holding in *Mitsubishi* followed its decision in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), which had held the *Wilko* rule of nonarbitrability for securities claims inapplicable in an international transaction.

Because there are important additional policy considerations to be weighed in determining the arbitrability question in an international context, and because the question of domestic arbitrability was not presented, the Court in *Mitsubishi* expressly did not rule on the arbitrability of antitrust claims in the domestic context. *Mitsubishi*, 105 S. Ct. at 3355. Consequently, the *Mitsubishi* holding does not affect the analysis in this Article, except insofar as the Court in that case cast doubt on some of the rationales that had been employed to deny arbitrability to domestic antitrust claims.

124. 391 F.2d 821 (2d Cir. 1968). Although *American Safety* was the first case that directly confronted the question in a commercial arbitration context, several previous federal court decisions had touched peripherally on the issue in a labor arbitration setting. In *Silvercup Bakers, Inc. v. Fink Baking Corp.*, 273 F. Supp. 159, 162-63 (S.D.N.Y. 1967), the court in dictum characterized as "persuasive" the view that courts should not be displaced by labor arbitrators in deciding antitrust suits. A similar view had been expressed earlier in *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 107 F. Supp. 532, 548 (S.D.N.Y. 1952). Another earlier case, *Greenstein v. National Skirt & Sportswear Ass'n*, 178 F. Supp. 681 (S.D.N.Y. 1959), *appeal dismissed*, 274 F.2d 430 (2d Cir. 1960), took an arguably contrary view by refusing to stay arbitration under a collective bargaining agreement even though plaintiff claimed, among other things, that provisions of the agreement violated the antitrust laws.

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

126. *Id.* at 823.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 823-24.

character inappropriate for enforcement by arbitration.'"¹³¹ Concluding that antitrust claims are not appropriate for enforcement by arbitration, the court stated:

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. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. . . . We do not suggest that all antitrust litigations attain these swollen proportions. . . . But in fashioning a rule to govern the arbitrability of antitrust claims, we must consider the rule's potential effect. For the same reason, it 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 hardly have intended that. . . .

[I]n addition, the issues in antitrust cases are prone to be complicated, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest.¹³²

The Second Circuit has reiterated its holding that arbitration of antitrust claims may not be compelled;¹³³ and that holding has been adopted by the United States Courts of Appeals for the Fifth,¹³⁴ Sixth,¹³⁵ Seventh,¹³⁶ Eighth,¹³⁷ and Ninth¹³⁸ Circuits. Claims under state antitrust laws have simi-

131. *Id.* at 825 (quoting its own opinion in *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir.), *rev'd*, 346 U.S. 427 (1953)).

132. *American Safety*, 391 F.2d at 826-27.

133. *See* *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (*per curiam*); *N.V. Maatschappij Voor Industriële 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).

134. *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974).

135. *Buffer v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972).

136. *Applied Digital Tech., Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546 (7th Cir. 1970).

137. *Helfenbein v. International Indus.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971).

138. *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *see* *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

There are also a number of district court decisions applying the rule. *See, e.g.*, *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282, 1291 (E.D.N.Y. 1979); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10, 25 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 518 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *NPS Communications, Inc. v. Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (S.D.N.Y. 1984); *Andriot v. Quickprint of Am., Inc.*, 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp.

larly been held nonarbitrable.¹³⁹ The rule against arbitration of antitrust claims has been qualified by only one exception. Courts have held that such claims may be arbitrated if the agreement to arbitrate was made *after* the dispute arose.¹⁴⁰ The reasoning behind the exception is that the arbitration agreement in such a case is nothing more than a particular vehicle for settlement and that the law generally favors settlements¹⁴¹ even in disputes to which the public interest attaches.

The United States Court of Appeals for the Second Circuit in *American Safety* employed four basic rationales in reaching its conclusion that antitrust claims are not subject to arbitration: (1) arbitration proceedings inadequately protect the public interest; (2) the contract containing the arbitration clause is likely to be a contract of adhesion; (3) antitrust claims are evidentially complex; and (4) arbitrators lack sufficient expertise to decide antitrust claims.¹⁴² Other courts,¹⁴³ as well as several commentators,¹⁴⁴ have since expanded the list to include a host of other rationales, the most clearly identifiable of which are the following: (5) antitrust claims should be viewed as beyond the scope of the arbitration clause;¹⁴⁵ (6) the arbitration process possesses an anonymity and confidentiality unsuited to the protection of such important rights because arbitrators

1243 (W.D. Pa. 1983); *Taylor v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Black v. Econo-Car Int'l, Inc.*, 404 F. Supp. 600 (D. Mass. 1975)

139. See, e.g., *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

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

141. *Cobb v. Lewis*, 488 F.2d 41, 49 (5th Cir. 1974); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), cert. denied, 406 U.S. 949 (1972).

142. *American Safety*, 391 F.2d at 826-27.

143. *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (per curiam); *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949 (1972); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), cert. denied, 404 U.S. 872 (1971); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *Associated Milk Dealers, Inc. v. Milk Drivers Union Local 753*, 422 F.2d 546 (7th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *NPS Communications, Inc. v. The Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); *Andriot v. Quickprint of Am., Inc.*, 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977); *Black v. Econo-Car Int'l, Inc.*, 404 F. Supp. 600 (D. Mass. 1975); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987 (1975).

144. See Farber, *The Antitrust Claimant and Compulsory Arbitration Clauses*, 28 FED. B.J. 90 (1968); Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085 (1969); Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072 (1969); Sterk, *supra* note 116, at 503-11; Timberg, *supra* note 118, at 244-45 (1977); Comment, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 B.C. INDUS. & COM. L. REV. 406 (1969). But see Aksent, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097 (1969) (the only previous expression of significant disagreement with the rule of nonarbitrability).

145. See, e.g., Loevinger, *supra* note 144, at 1090.

usually are not required to follow precisely the governing legal principles, publish findings, or give reasons for a decision;¹⁴⁶ (7) the lack of judicial review precludes the development of precedent to guide the legal and business communities;¹⁴⁷ (8) the antitrust plaintiff is deprived of important statutory rights in arbitration proceedings, such as the rights to treble damages, attorney fees, and liberal forum selection;¹⁴⁸ (9) an arbitrator is unlikely to give adequate effect to a prior judicial decree in a government antitrust suit based on the same facts;¹⁴⁹ (10) contrary to the normally extensive evidentiary production process of antitrust litigation, arbitration proceedings are characterized by meager fact gathering;¹⁵⁰ and (11) arbitrators are more likely to give weight to equitable considerations that would be impermissible in litigation.¹⁵¹ Several of these arguments shade substantially into one another and therefore warrant consolidated analysis.

IV. RATIONALES FOR THE NONARBITRABILITY OF ANTITRUST CLAIMS

A. *Scope of the Arbitration Clause*

When interpreting the Federal Arbitration Act,¹⁵² the courts have made it clear that the duty to arbitrate is purely a creature of agreement and that no one may be compelled to arbitrate a claim outside the scope of that agreement.¹⁵³ Some commentators have observed that the parties to an average predispute arbitration agreement are not likely to have foreseen an antitrust dispute or to have intended to include antitrust claims within the scope of the arbitration clause.¹⁵⁴ No court, however, has based its decision not to compel arbitration of antitrust claims on a lack of specific contractual intent; the decisions have

146. See, e.g., *id.* at 1091; Pitofsky, *supra* note 144, at 1076-77; Comment, *supra* note 144, at 416.

147. See, e.g., Pitofsky, *supra* note 144, at 1076-77; Comment, *supra* note 144, at 412.

148. See, e.g., Farber, *supra* note 144, at 92-93; Pitofsky, *supra* note 144, at 1078-79; Comment, *supra* note 144, at 415.

149. See, e.g., Farber, *supra* note 144, at 93; Pitofsky, *supra* note 144, at 1077-78; Comment, *supra* note 144, at 416.

150. See, e.g., Farber, *supra* note 144, at 94-95; Loevinger, *supra* note 144, at 1090-91; Pitofsky, *supra* note 144, at 1080.

151. See, e.g., Loevinger, *supra* note 144, at 1091; Pitofsky, *supra* note 144, at 1078; Comment, *supra* note 144, at 417.

152. Federal Arbitration Act, §§ 2-3, 9 U.S.C. §§ 1-14 (1982).

153. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); ARBITRATION: COMMERCIAL DISPUTES, *supra* note 15, at 127. The statement that the duty to arbitrate is purely a creature of agreement must be qualified in those situations in which mandatory arbitration regimes have been instituted. For example, some states have mandatory arbitration laws for relatively small claims, and two federal districts have adopted rules requiring arbitration of relatively large claims. See *infra* note 369 and accompanying text. When arbitration is mandatory rather than based on agreement, it is by necessity either nonbinding or subject to full judicial review. See generally D. HENSLER, A. LIPSON, & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981) (discussing the use of court-annexed arbitration in California); Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537 (1983) (discussing the use of court-annexed arbitration as an alternative method of dispute resolution); Nejelski & Zeldin, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983) (describing implementation characteristics and successes of court-annexed arbitration program five years after implementation). See also *infra* text accompanying notes 366-69 (summarizing use of court-annexed arbitration).

154. Loevinger, *supra* note 144, at 1090.

clearly focused on other policy concerns.¹⁵⁵

An excellent illustration is found in *Power Replacements, Inc. v. Air Preheater Co.*¹⁵⁶ in which plaintiff, after an attempted market entry, sued the market's dominant firm for alleged price discrimination and predatory pricing aimed at eliminating plaintiff as a competitor. The settlement agreement reached by the parties included a clause requiring arbitration of any other antitrust claims occurring between the parties during the following two years.¹⁵⁷ When a similar dispute arose in a different geographic locale within the two-year period and the market entrant again filed an antitrust suit, defendant asserted the arbitration agreement as a bar to the litigation.¹⁵⁸ Because the agreement in question was a future-disputes arbitration clause, the court held that the clause did not compel arbitration of the antitrust claims.¹⁵⁹ The clause, however, had dealt specifically with anticipated antitrust claims; therefore, the court's decision was in direct opposition to the parties' intent.

In addition to the courts' failure to pay attention to the question of contractual intent in ruling on the arbitrability of antitrust claims, the scope-of-clause argument is faulty for at least two other reasons. First, most arbitration clauses are extremely broad, often tracking the American Arbitration Association's suggested language, which provides for submission of "[a]ny controversy or claim arising out of or relating to" the underlying transaction.¹⁶⁰ In most cases in which the antitrust arbitrability issue arises, the underlying transaction involves a franchise,¹⁶¹ a licensing agreement,¹⁶² or some other arrangement¹⁶³ that normally contemplates a business relationship of substantial duration and scope and with recurrent contact between the parties. The use of general contractual lan-

155. See Aksen, *supra* note 144, at 1098-99.

156. 426 F.2d 980 (9th Cir. 1970).

157. *Id.* at 981.

158. *Id.* at 982.

159. *Id.* at 984.

160. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (preamble) (1982).

161. *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (per curiam); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *Helpfenbein v. International Indus.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); *Andriot v. Quickprint of Am., Inc.*, 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

162. *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968); *NPS Communications, Inc. v. The Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984).

163. *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978) (sale of computer hardware plus development and maintenance of software, the latter aspect contemplating an ongoing relationship); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972) (relationship between members of New York Stock Exchange); *Associated Milk Dealers, Inc. v. Milk Drivers Union Local 753*, 422 F.2d 546 (7th Cir. 1970) (collective bargaining agreement between multiemployer bargaining unit and union); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976) (long-term sharing agreement among oil companies operating in the Middle East), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

guage to describe the scope of a dispute-resolution mechanism in a relationship characterized by continuity, breadth, and frequent interaction probably indicates the parties' intent to include within that mechanism any dispute touching on the relationship.

Second, arbitration clauses are interpreted with great liberality; general clauses are normally construed to include claims such as fraud,¹⁶⁴ theft of trade secrets,¹⁶⁵ trade disparagement,¹⁶⁶ defamation,¹⁶⁷ breach of fiduciary duty,¹⁶⁸ and negligence,¹⁶⁹ in addition to the obviously arbitrable claim for breach of contract. Moreover, even when the arbitration clause is somewhat narrower than the standard "arising out of or relating to" provision, it is given an expansive construction. For example, in *Hannah Furniture Co. v. Workbench, Inc.*,¹⁷⁰ a clause providing for mandatory arbitration of "[a]ll complaints, disputes or grievances between the parties involving questions of interpretation of any of the provisions of this Agreement"¹⁷¹ was found to encompass claims of fraud and breach of fiduciary duty. Claims of this nature are not more foreseeable to the contracting parties than antitrust claims.

B. *Method of Decisionmaking and Lack of Review*

Several closely related arguments against the arbitrability of antitrust claims have centered on the methods by which the arbitrator reaches a decision and the lack of external control over those methods. The essence of these arguments is that certain methodological characteristics indigenous to the arbitration process make it inevitably unsuitable for safeguarding the public interest attaching to every private antitrust claim. Some commentators, for example, have emphasized that arbitrators normally are not required to produce written opinions or to formulate detailed findings of fact.¹⁷² Consequently, the decisions of arbitrators do not add to the body of precedential literature necessary for the development and refinement of antitrust legal theory, and both the legal and business communities are partially deprived of essential guidance in an area of law in which guidance is crucial.¹⁷³ Along similar lines, it has been observed that arbitrators are not required to follow pertinent legal rules precisely and that there is little opportunity for judicial review.¹⁷⁴ As a result, it is argued, it is impossible to determine whether an important public policy such as that embodied in the

164. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

165. *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367 (D.D.C. 1972).

166. *Id.*

167. *Id.*

168. *DeHart v. Moore*, 424 F. Supp. 55 (S.D. Fla. 1976).

169. *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965).

170. 561 F. Supp. 1243 (W.D. Pa. 1983).

171. *Id.* at 1244.

172. *See, e.g.*, Pitofsky, *supra* note 144, at 1076-77; Comment, *supra* note 144, at 413-16.

173. *See, e.g.*, Pitofsky, *supra* note 144, at 1076-77; Comment, *supra* note 144, at 412.

174. *See, e.g.*, Loevinger, *supra* note 144, at 1091; Pitofsky, *supra* note 144, at 1076-77; Comment, *supra* note 144, at 413.

antitrust laws is being furthered or frustrated in the course of arbitration.¹⁷⁵ These criticisms are insubstantial for several reasons.

1. Development of Precedent

It is true, as one commentator has stated, that a great deal of important law has been made in the context of private litigation.¹⁷⁶ It simply does not follow, however, that permitting arbitration of antitrust claims would substantially diminish the role of the courts in defining the contours of antitrust law. Over the past fifteen years, an average of over 1,100 private antitrust cases per year have been filed in federal district courts.¹⁷⁷ A rule permitting arbitration of antitrust claims would no doubt reduce this number. It seems totally implausible, however, that the number would be so reduced that private antitrust suits would cease to provide an important vehicle for the development and refinement of antitrust precedent. The number of cases in which antitrust claims and arbitration clauses have intersected is extremely small in relation to the total number of private antitrust suits. Even though the use of arbitration clauses conceivably could increase as a consequence of giving arbitrators a role in resolving public interest issues, the number of arbitrated antitrust cases surely would remain a relatively small part of the total. The determination whether to bargain for inclusion of an arbitration clause or any other provision in a commercial contract is dependent on a complex, uncertain, and intensely individualized calculation of incentives¹⁷⁸ that would be altered little, if any, by changing the law to permit arbitration of antitrust claims.

The criticism that arbitrators are not required to produce written decisions and, consequently, do not contribute to the body of legal precedent was raised during the 1960s when antitrust theory was still developing quite rapidly. New theories of liability were emerging from the courts with some regularity.¹⁷⁹ Today, however, antitrust law is much more settled. Although change still occurs, it is more of a refinement process, and antitrust law certainly can no longer be viewed as expanding. If anything, antitrust theory is undergoing a phase of gradual contraction.¹⁸⁰ The fundamental rules are set, and antitrust law now

175. See, e.g., Loevinger, *supra* note 144, at 1091; Pitofsky, *supra* note 144, at 1076-77; Comment, *supra* note 144, at 412-16.

176. Pitofsky, *supra* note 144, at 1077.

177. See AD. OFF. OF THE U.S. COURTS, 1983 ANN. REP. 128.

178. See, e.g., Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); MacNeil, *The Many Futures of Contracts*, 47 S. CALIF. L. REV. 691 (1974); Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981).

179. At least forty of the United States Supreme Court's decisions in antitrust cases during the period 1960-1969 can be characterized as substantive expansions of antitrust theory. Sixteen of these were actions brought by private parties. During this period, no more than two of the Supreme Court's antitrust decisions could be viewed as representing contractions of antitrust liability. See M. DUGGAN, *ANTITRUST AND THE SUPREME COURT, 1829-1980*, at 71-96 (2d ed. 1981).

180. During the period 1970-1979, approximately 25 of the Supreme Court's decisions involved substantive expressions of antitrust theory. Of this number, 13 can be characterized as contractions of antitrust liability, and 12 as either confirmations of previous liability theories or very minor expansions of liability. Of the total, 15 were private actions and 10 were government actions. See DUGGAN, *supra* note 179, at 96-111.

has more in common with other bodies of law commonly applied by arbitrators than it did when this anonymity argument was first made.

The criticism that arbitration awards cannot contribute to the body of legal literature is further weakened by the fact that federal courts are themselves rather selective about the publication of formal opinions, and a great many of their decisions are not published.¹⁸¹ Calling attention to these necessary characteristics of judicial publication does not completely rebut this aspect of the anonymity argument because commercial arbitration decisions normally are not published at all. The exercise of substantial judicial discretion regarding opinion publication does indicate, however, that the failure of the arbitral process to produce published opinions is not a critical one.

2. Adherence to Antitrust Laws

Arbitrators normally are not required to follow pertinent rules of law precisely unless the parties have contractually created such an obligation, and arbitrators' decisions are subject to little judicial review. These characteristics of the arbitral process, which are among the reasons that arbitration is such an attractive dispute resolution alternative for many business firms, also form the basis for another aspect of the argument that antitrust policy cannot be entrusted to arbitration.

In addition to its other flaws, the argument that implementation of important antitrust public policy cannot be left to a process that is both unbounded by rules of law and unreviewable reflects a purely static view of arbitration. Many of the rationales for precluding antitrust claims from the arbitral forum reflect the notion that arbitration must continue to be exactly as it always has been and that arbitration and litigation must forever remain in separate universes. However, many of the concerns related to the arbitral process' ability to protect the public interest can easily be resolved by allowing a minimal degree of judicial supervision over arbitration proceedings. For several reasons that will be explored in more depth, it probably is not necessary for arbitrators to follow all antitrust laws precisely to further antitrust policy adequately; however, if deemed necessary in a given case a court can identify and outline these laws and require the arbitrator to apply them. Some suggestions for accomplishing minimal judicial supervision, and for establishing legal authority for such supervision, are discussed below.¹⁸²

Even in the absence of judicial supervision, arbitrators have strong incentives to decide antitrust claims in a manner consistent with the antitrust laws. The fundamental function of arbitrators is to do justice between the parties.¹⁸³

181. One study found that the rules of many federal circuits create a presumption against publication and that, on the average, only 38% of federal courts of appeals opinions are published. Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 592 (1981). It would seem logical to assume that a lower percentage of district court opinions are published.

182. See *infra* text accompanying notes 352-64.

183. See, e.g., JOINT COMM. OF THE AM. ARBITRATION ASS'N & THE AM. BAR ASS'N, CODE

In the instance of an antitrust claim, the arbitrator can do justice only by giving careful consideration to the basic nature of the claim. Arbitrators must adhere at least to the general spirit of antitrust rules to perform their arbitral function responsibly and to fulfill their contractual obligations to the parties. Further, it is in the antitrust claimant's self-interest—an interest that is coterminous with the public interest in antitrust enforcement¹⁸⁴—to bring as much pressure as possible to bear on the arbitrator, with the objective of insuring adherence to antitrust rules. Because arbitration is a creature of agreement, the ultimate constraint on the power of arbitrators is the faith of contracting parties in the arbitration process. If arbitrators ignore fundamental legal principles relevant to the dispute at hand, this faith will be eroded and arbitration clauses will be employed with decreasing frequency. Furthermore, it is logical to presume that arbitrators themselves have some faith in the arbitration process, are committed to its preservation, and will strive to render decisions that tend to promote the institution.

Judicial review is available to ensure that the arbitrator has adhered to the basic spirit of the antitrust laws. In *Wilko v. Swan*¹⁸⁵ the Supreme Court indicated that, in addition to the Federal Arbitration Act's stated grounds for vacating an arbitrator's award, such an award also might be set aside for "manifest disregard of the law."¹⁸⁶ Although the Court was careful to note that mere errors of interpretation do not amount to manifest disregard of the law¹⁸⁷ and subsequent cases have indicated that the party seeking review on such grounds will bear a heavy burden,¹⁸⁸ an arbitrator's failure to adhere to the fundamental spirit of antitrust principles should constitute a manifest disregard for the law. The public policy in favor of competitive markets can be furthered sufficiently by an arbitration process that observes the underlying spirit of the antitrust laws even if occasional departures in interpretation occur. Variations in judicial interpretation of antitrust laws are quite well known and seemingly are accepted without serious doubt that basic competitive policy is being furthered in the long run.¹⁸⁹ Variations in interpretation by arbitrators, even if unreviewable, also

OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon V (1977). See also Sterk, *supra* note 116, at 491, 543 (discussing the meaning of "justice between the parties").

184. See *infra* text accompanying notes 251-67.

185. 346 U.S. 427 (1953).

186. *Id.* at 436.

187. *Id.* at 436-37.

188. See *Drayer v. Krasner*, 572 F.2d 348 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2d Cir. 1968); *Saxis S.S. Co. v. Multifacs Int'l Traders*, 375 F.2d 577 (2d Cir. 1967); *Sidarma Societa Italiana Di Armamento Spa, Venice v. Holt Marine Indus.*, 515 F. Supp. 1302 (S.D.N.Y. 1981); *Dundas Shipping & Trading Co. v. Stravelakis Bros.*, 508 F. Supp. 1000 (S.D.N.Y. 1981); *In re Puerto Rico Maritime Shipping Auth.*, 496 F. Supp. 14 (S.D.N.Y. 1979).

189. 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 arrangement) with *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (Court found illegal vertical price fixing in consignment arrangement on facts virtually identical to those in *General Electric*); compare *Times-Picayune 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

should not significantly affect the furtherance of antitrust policy, particularly because the antitrust claimant has such a strong motivation to seek adherence to basic antitrust principles in the arbitration process.

C. *Arbitrator Expertise and Evidentiary Complexity*

Two of the rationales employed by the *American Safety* court,¹⁹⁰ which subsequently have been reiterated by other courts and voiced by several commentators,¹⁹¹ relate to the perceived lack of arbitrator expertise in dealing with antitrust claims and the normal evidentiary complexity of antitrust cases. These arguments are sufficiently related to be treated as a unit because evidentiary complexity is one of the reasons for the assertion that antitrust cases are beyond the ken of the average arbitrator. Both points are analytically vulnerable upon close examination.

As was true of the criticisms directed at the methodology of arbitration,¹⁹² the arguments relating to expertise and complexity presume an inflexible state of arbitrator competency. It is true that arbitrators are frequently business executives, chosen for their commercial expertise rather than for their economic or legal knowledge,¹⁹³ and that it may be incongruous to employ business executives to apply a set of rules created to regulate the business community.¹⁹⁴ As the General Counsel for the American Arbitration Association has noted, however, "the court decisions reveal a total unawareness of the varieties of arbitration procedure that are currently employed to avoid litigation," and the conception of commercial arbitration solely as a "businessman's remedy to resolve commercial-type disputes . . . is an obsolete characterization."¹⁹⁵

Despite the persistent stereotyping of arbitration by attorneys and judges, arbitration's inherent flexibility has already been extended to the arbitrator selection process. For instance, architects and engineers often serve as arbitrators in construction disputes.¹⁹⁶ The rules of the American Arbitration Association require the use of lawyer-arbitrators in uninsured motorist and other accident-related disputes.¹⁹⁷ Attorneys generally serve as arbitrators in statutorily mandated small claims arbitration.¹⁹⁸ One commentator has intimated that attor-

(1958) (Court substantially relaxed required proof of market power for tying to be illegal) and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (Court returned to market dominance requirement for tying to be illegal).

190. *American Safety*, 391 F.2d at 827.

191. See, e.g., *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Loevinger*, *supra* note 144, at 1090; *Pitofsky*, *supra* note 144, at 1077-78.

192. See *supra* text accompanying notes 172-75.

193. See ARBITRATION: COMMERCIAL DISPUTES, *supra* note 15, at 116-17; G. GOLDBERG, *supra* note 15, § 3.01.

194. *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Loevinger*, *supra* note 144, at 1090; *Pitofsky*, *supra* note 144, at 1077-78.

195. *Aksen*, *supra* note 144, at 1105.

196. ARBITRATION: COMMERCIAL DISPUTES, *supra* note 15, at 91-92.

197. G. GOLDBERG, *supra* note 15, at 3.

198. S. ELLIOTT, MATERIALS & CASES ON ARBITRATION 199-229 (1968).

neys do not make the best arbitrators in ordinary sale-of-goods disputes.¹⁹⁹ Even if true, however, this conclusion apparently reflects the perception of the business community only when technical questions of product quality are concerned because attorneys are widely used as arbitrators when the interpretation of contract language is at issue.²⁰⁰ Retired judges have frequently been used as arbitrators as well.²⁰¹ One study found vast diversity of training and background among the 20,000 arbitrators used by the American Arbitration Association, the largest single group being lawyers, not businesspersons.²⁰² There is no good reason that lawyers with antitrust expertise, retired judges, industrial organization economists, or others with relevant backgrounds could not be used as arbitrators in cases involving antitrust claims. Minimal court supervision of the arbitrator selection process in cases involving public interest issues would suffice to ensure adequate expertise.²⁰³

It also is worth noting that federal judges are not antitrust experts. Judges are not chosen for their specialized expertise. In antitrust cases, as in other types of cases, it is the responsibility of the attorneys and expert witnesses to educate the judge. An arbitrator with antitrust expertise would not need this education. Consequently, 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.

Juries, which are often impaneled in private antitrust cases, also lack knowledge of antitrust principles.²⁰⁴ The average juror is not likely to understand antitrust issues any more readily than is the average arbitrator, even when the arbitrator has no legal or economic training. And juries would obviously have more difficulty with antitrust cases than would an arbitrator with some degree of relevant training or experience. A jury in an antitrust case is usually taught some basic economics by expert witnesses and is instructed on the relevant legal principles by the district judge, who, as has just been observed, often receives an antitrust education during the proceedings from the attorneys, expert witnesses, and his or her own research. This education process for both judge and jury occurs in any case involving questions of conceptual difficulty. There is no reason that such an educational process could not take place in antitrust arbitration. The need for this educational process could be greatly ameliorated, however, by selection of an arbitrator with relevant training or experience. In addition, the attorneys for each party in arbitration should have the same incen-

199. G. GOLDBERG, *supra* note 15, § 4.05.

200. ARBITRATION: COMMERCIAL DISPUTES, *supra* note 15, at 116-17.

201. Aksen, *supra* note 144, at 1100. Retired judges serve as permanent arbitrators in some large distribution systems. For example, a retired judge always served as permanent arbitrator for disputes within the Carling Brewery distribution system. *Id.* General Motors currently uses a retired federal judge to arbitrate supply disputes with its dealers. Wall St. J., Feb. 15, 1985, at 3, col. 2.

202. A.M.A., *supra* note 15, at 68-69.

203. The legal authority for judicial supervision is discussed *infra* at text accompanying notes 352-64.

204. See P. MARCUS, ANTITRUST LAW & PRACTICE § 52 (1980).

tive to further the educational process as they have in litigation. They certainly have the same responsibility to their clients.

Another point that cannot be ignored is that juries commonly have extreme difficulty with the issues in antitrust cases despite the efforts of the attorneys, the judge, and expert witnesses to inform them.²⁰⁵ An apt illustration is found in *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*²⁰⁶ Toward the end of a five-month trial, and prior to nineteen days of jury deliberation, the judge questioned jurors about several of the fundamental principles underlying the antitrust issues, including cross elasticity of demand, cross elasticity of supply, barriers to entry, reverse engineering, and simple definitions of computer terms. The jury demonstrated almost no understanding of these basic concepts.²⁰⁷ One is led to wonder whether the rule prohibiting arbitration of antitrust claims actually contributes to the interest that a party with a weak claim has in generating confusion.

D. *Procedures for Discovery*

The arbitral forum has also been criticized as inherently unsuitable for the disposition of antitrust claims because of its traditionally minimal generation of evidence.²⁰⁸ The cornerstone of this criticism is the absence of compulsory discovery in arbitration.²⁰⁹ This rationale for the nonarbitrability of antitrust claims is also deficient in several particulars.

1. The State of Pretrial Discovery in Antitrust Litigation

The statement that arbitration is unsuitable for resolving antitrust claims because it is not characterized by extensive discovery presumes that lengthy and costly discovery is an institution to be venerated. Quite to the contrary, the almost incredible proportions achieved by discovery in modern antitrust cases

205. See P. AREEDA, *supra* note 89, §§ 169-70; P. MARCUS, *supra* note 204, § 104. The suggestion has been made that juries in antitrust cases be limited to those with relevant business experience or economic training. Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980). Some commentators have even questioned whether juries should be used at all in complex antitrust cases. See generally Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980) (exploring English common law exception to right to jury trial for complex cases as applied to determine right to jury trial under U.S. CONST. amend. VII); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of The Seventh Amendment*, 80 COLUM. L. REV. 43 (1980) (refuting existence of exception to right to jury trial in English common law for complex cases). In one case, *In re Japanese Elecs. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980), the court held that the 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. However, another court of appeals has held that the seventh amendment right to a jury trial is absolute and that there is no exception to this right in complex antitrust litigation. *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

206. 458 F. Supp. 423 (N.D. Cal. 1978).

207. *Id.* at 447-48.

208. Farber, *supra* note 144, at 94-95; Loevinger, *supra* note 144, at 1090-91; Pitofsky, *supra* note 144, at 1080.

209. See *supra* note 208; see also G. GOLDBERG, *supra* note 15, § 3.03 (pre-arbitration discovery impractical because no arbitrator has been appointed).

are perceived by antitrust's critics as one of its chief evils.²¹⁰ Even strong supporters of antitrust policy cringe at the extraordinary amount of resources expended in discovery.²¹¹ Indeed, the basic soundness of national antitrust policy probably has been obscured significantly by excessive discovery. Posner and Easterbrook point to "the adversary process itself, including the rules for discovery," as one of the reasons that antitrust cases are so costly to litigate.²¹² More particularly, they observe:

Discovery of millions of documents is routine; so is the spectre of teams of lawyers devoting good chunks of their lives to a single case. The high costs of litigation make it infeasible for some meritorious cases to be brought; they make it rational for defendants to settle without contesting liability (recall that this is one source of plaintiffs' asserted ability to use legal blackmail in class actions); they use valuable attorneys' and judges' time when litigation occurs. Neither judge nor jury can comprehend a 100,000 page record or assimilate 1,000,000 exhibits. Facts that overwhelm also trivialize.²¹³

. . . .

Pretrial procedures may be more costly and difficult than the trials themselves. Discovery is permitted in all civil [antitrust] cases even into irrelevant matters; the theory is that the irrelevant will lead to the relevant. This approach, combined with the difficulty of supervising any discovery running onto the millions of documents, has made the pretrial process interminable.²¹⁴

Areeda states that "[a] few words can hardly convey the fearful dimensions of many antitrust cases."²¹⁵ Judge Wyzanski has referred to the "enormous, nearly cancerous, growth of exhibits, depositions, and *ore tenus* testimony" in antitrust cases, noting that "[f]ew judges who have sat in such cases have attempted to digest the plethora of evidence, or indeed could do so and at the same time do justice to other litigation in their courts."²¹⁶ Judge Renfrew asked whether open-ended discovery has replaced "trial by ambush" with "trial by avalanche."²¹⁷ After taking note of the millions of pages of documents often produced in antitrust cases, Laurence Tribe commented: "Surely a celestial visitor would think us mad if informed that we endeavor to promote economic efficiency through this process."²¹⁸

210. See, e.g., R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 232 (1976); R. POSNER & F. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, & OTHER MATERIALS* 595-600 (2d ed. 1981).

211. See, e.g., P. AREEDA, *supra* note 89, § 170; M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 54-55 (2d ed. 1983); F. SCHERER, *supra* note 5, at 510-12; L. SCHWARTZ, J. FLYNN & H. FIRST, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION* 24 (6th ed. 1983).

212. R. POSNER & F. EASTERBROOK, *supra* note 210, at 596.

213. *Id.* at 595.

214. *Id.* at 599.

215. P. AREEDA, *supra* note 89, § 170.

216. *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).

217. Panel Discussion, *Discovery in Civil Antitrust Suits*, 44 *ANTITRUST L.J.* 57, 59 (1975).

218. Tribe, *Too Much Law, Too Little Justice*, *THE ATLANTIC*, July 1979, at 25, 28.

There is at present a burgeoning movement to correct the many vices of antitrust and other complex litigation, including excessive discovery.²¹⁹ This problem is of far greater scope and magnitude than the one under discussion here, although the two problems are intertwined. One frequent suggestion of the reform movement is that there be greater encouragement of the use of nonjudicial forums.²²⁰ Permitting arbitration of antitrust claims will not solve the problems of our judicial system—we are dealing here with a very small part of the total picture. On the other hand, it seems rather clear that the existing rule of nonarbitrability for such claims is incongruous in the present judicial environment of congestion, delay, inordinate cost, and intemperate discovery. That excessive discovery is perceived as one of the primary ills of our legal system generally, and of antitrust litigation particularly, leads to the conclusion that lack of discovery is quite a tenuous ground for attacking the suitability of arbitration.

2. The Arbitrator's Subpoena Power

Some limited discovery is available in arbitration proceedings. Although arbitrators do not have specific legal authority to compel prehearing discovery, section 7 of the Federal Arbitration Act provides the arbitrator with authority to compel witnesses to testify before the arbitrator and to bring "any book, record, document, or paper which may be deemed material as evidence in the case."²²¹ The arbitrator, in other words, has complete subpoena power that can be enforced through a contempt citation.²²² This power normally is not used to compel the type of extensive prehearing discovery common to litigation because such discovery is inimical to the fundamental nature of arbitration as an efficient, inexpensive process and usually would not be desired by the parties to arbitration. On the other hand, this complete subpoena power can be molded to fit the needs of the proceedings. Even though the arbitrator's authority to compel production of evidence is limited to proceedings in the arbitrator's presence, this authority could be employed in a variety of ways. A form of discovery can be conducted, for example, in a prehearing conference attended by the arbitrator. The use of such a conference is already known to the arbitration process.²²³ The arbitrator's subpoena power can also be exercised prior to the hearing at various

219. See, e.g., SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE, AMERICAN BAR ASS'N SECTION OF LITIGATION, FIRST REPORT (1977), reprinted in 92 F.R.D. 140 (1982); SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE, AMERICAN BAR ASS'N SECTION OF LITIGATION, SECOND REPORT (1980), reprinted in 92 F.R.D. 140 (1982); Gruenberger, *Discovery Abusers Have Many Bags Full of Tricks*, Legal Times of Wash., July 4, 1983, at 18, col. 1; *The Costly Paper Chase Clogging the Courts*, BUS. WK., June 23, 1980, at 134. Federal discovery rules were amended in 1983 with a view toward reducing the abuse of discovery procedures, but a commonly held view is that these changes are essentially symbolic and will be effective only if the courts are serious about enforcing them. See, e.g., *id.*

220. See, e.g., Pogue, Hobbs, Barnette, Marks & Hall, *Symposium on Alternative Dispute Resolution Techniques*, 53 ANTITRUST L.J. 271 (1984); Dombroff, *Judicial Resolutions Not Always the Most Desirable*, Legal Times of Wash., Feb. 28, 1983, at 15, col. 1.

221. 9 U.S.C. § 7 (1982).

222. *Id.*

223. See AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 10 (1982).

times and places so as to resemble traditional discovery if this is what the parties desire.

Complementing the power to compel the production of evidence is the arbitrator's authority and responsibility to draw any appropriate inferences from a party's failure to produce evidence at the hearing.²²⁴ Whenever logic suggests that a particular bit of testimony or an item of physical evidence probably exists and that it probably is in one party's possession, that party's failure to produce either the evidence or a satisfactory explanation for its absence can be given significant probative weight by the arbitrator.²²⁵ Fact finders in litigation draw inferences from silence, thus creating an important incentive for the parties to disclose all relevant evidence. An arbitrator with any substantial experience in gathering and evaluating information, whether as an attorney, former judge, academic researcher, or practitioner of some other analytically oriented vocation, should be able to perform this inference-drawing function.

3. The Success of Arbitration in Handling Similarly Complex Issues

Many questions in antitrust cases are quite fact-sensitive, such as those involving the existence of a conspiracy,²²⁶ the presence of a price manipulative²²⁷ or exclusionary motive,²²⁸ or the possession and degree of market power.²²⁹ Sometimes the evidence bearing on these and other issues is elusive, conflicting, and confusing. The same might be said, however, about many of the issues commonly dealt with by arbitrators, such as fraud,²³⁰ good or bad faith,²³¹ duress,²³² unconscionability,²³³ existence and strength of an alleged industry custom,²³⁴ the scope of a promise of confidentiality,²³⁵ or breach of fiduciary

224. Aksen, *supra* note 144, at 1101; *see also* AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 31-32 (1982) (arbitrator is judge of relevancy and materiality of evidence and may request additional evidence from the parties); JOINT COMM. OF THE AM. ARBITRATION ASS'N & THE AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon IV.G. (1977) (arbitrator has broad authority regarding evidentiary weight).

225. *See supra* note 224 and accompanying text.

226. *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464 (1984); Theatre Enter. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

227. *See, e.g.*, Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207 (4th Cir.), *cert. denied*, 104 S. Ct. 242 (1983); Alloy Int'l v. Hooker-NSK Bearing Co., 635 F.2d 1222 (7th Cir. 1980); Girardi v. Gates Rubber Co., 325 F.2d 196 (9th Cir. 1963).

228. *See, e.g.*, Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914).

229. *See, e.g.*, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292 (5th Cir. 1981); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir.), *cert. denied*, 454 U.S. 827 (1981); Cowley v. Braden Indus., Inc., 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980).

230. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Andriot v. Quickprint of Am., Inc., 563 F. Supp. 48 (S.D. Ohio 1983).

231. *See, e.g.*, Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 508 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

232. *See, e.g.*, Taylor v. Dynamit Nobel of Am., Inc., 558 F. Supp. 875 (N.D. Ill. 1982).

233. *Id.*

234. For a discussion demonstrating the importance of custom and usage of trade in textile industry arbitration, *see* ARBITRATION: COMMERCIAL DISPUTES, *supra* note 15, at 150-53.

235. *See, e.g.*, N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976).

duty.²³⁶ Without the far-reaching inquiry for which discovery in antitrust cases is so notorious, there obviously will not be the same exhaustion of every detail in arbitration as there is in litigation. That many elusive, fact-sensitive issues are determined routinely in arbitration, apparently to the general satisfaction of the many parties who continue to include arbitration clauses in their contracts, however, suggests that similar kinds of questions in antitrust cases could also be resolved satisfactorily without extensive discovery. Contrary to the normal mentality in litigation, a few stones may remain unturned without perverting the basic fact-finding process. This, essentially, is what the parties stipulated when they agreed to arbitration.²³⁷ And, it must be remembered, the cases in which the issue of antitrust arbitrability has arisen have been primarily private, contract-based disputes, despite their public interest overtones. More will be made of this point later, but it bears emphasis that these usually are *not* the types of antitrust cases in which the history and structure of an entire industry are critical inquiries.²³⁸ The parties to such a private antitrust suit might try to inundate one another with such evidence, but the crucial issues normally are much narrower.²³⁹

4. The Potential for Court-Ordered Discovery in Aid of Arbitration

Although courts traditionally have ordered discovery in aid of the arbitration process only if state law has so provided,²⁴⁰ if the parties have so agreed,²⁴¹ or if exceptional circumstances have been present,²⁴² in recent years several federal courts have demonstrated less reluctance to issue discovery orders in connection with pending arbitration proceedings.²⁴³ Even without such a trend,

236. See, e.g., *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979).

237. In *Wilko v. Swan*, 346 U.S. 427, 438 (1953), the Supreme Court noted this trade-off between economy and legal certainty: "Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."

238. See *infra* text accompanying notes 288-91.

239. See *supra* text accompanying notes 161-63.

240. See, e.g., CONN. GEN. STAT. § 52-412 (1982); N.Y. CIV. PRAC. LAW § 3102(c) (McKinney 1970); 42 PA. CONS. STAT. ANN. § 7309(a) (Purdon 1981).

241. See, e.g., *Mobil Oil Indonesia, Inc. v. Asamera Oil, Ltd.*, 43 N.Y.2d 276, 372 N.E.2d 21, 401 N.Y.S.2d 186 (1977).

242. See, e.g., *Coastal States Trading, Inc. v. Zenith Nav. S.A.*, 446 F. Supp. 330, 342 (S.D.N.Y. 1977) (no showing of compelling circumstances in diversity action brought against a Panamanian vessel owner to recover the value of cargo lost when vessel disappeared at sea); *Bergen Shipping Co. v. Japan Marine Servs., Ltd.*, 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974) (test is "necessity"; the ship's crew was about to leave U.S. and be assigned to international vessels); *Ferro Union Corp. v. S.S. Ionic Coast*, 43 F.R.D. 11, 14 (S.D. Tex. 1967) (that ship was chartered under foreign flag and would be docked at an American port only for four days, and that future ports were unknown held to be exceptional circumstances); *Penn Tanker Co. v. C.H.Z. Rolimpex, Warszawa*, 199 F. Supp. 716, 718 (S.D.N.Y. 1961) (no need to compel respondent to comply with discovery in arbitration proceedings involving claim for damages for breach of charter party agreement); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 363 (S.D.N.Y. 1957) (that respondent needed information from petitioner's employers, who were residing in another state, held not sufficiently compelling to order discovery).

243. See Willenken, *The Often Overlooked Use of Discovery in Aid of Arbitration and the Spread of the New York Rule to Federal Common Law*, 35 BUS. LAW. 173 (1979); Note, *Relaxing the*

however, the mere presence of colorable antitrust claims would seem to be an exceptional circumstance warranting court-ordered discovery in aid of arbitration.²⁴⁴ On the other hand, the existence of a legal basis for court-ordered discovery in conjunction with arbitration certainly does not mean that discovery should always be employed in the arbitration of antitrust claims.²⁴⁵ Moreover, if it is employed, its dimensions should be restricted to comport with the basic nature of arbitration. That is, discovery can be made available when necessary, but it should never be permitted to turn arbitration into the paper-ridden nightmare that antitrust litigation has become.

E. *Protection of the Public Interest*

The broadest argument against the arbitrability of antitrust claims, and perhaps the most difficult to articulate precisely, is that the public interest in competitive markets cannot be protected adequately in the arbitral process. One commentator, agreeing with the existing rule of nonarbitrability, recently characterized this rationale as the only truly cogent argument supporting the rule.²⁴⁶ His position is that arbitrators serve only to do justice between the parties, whereas the underlying purpose of the antitrust laws has little to do with justice. Rather, the purpose of antitrust is to protect those not party to the arbitration process, namely, the public.²⁴⁷

In addition to antitrust claims, there are other types of claims, some of which were mentioned earlier,²⁴⁸ in which the prospect of arbitration has produced varying degrees of uneasiness among courts and commentators because third party interests not represented in the arbitration proceedings might be affected significantly.²⁴⁹ It has been posited that the arbitrability of such claims should turn on whether the law creating the particular rights in question was intended primarily to do justice between the parties or to accomplish some broader goal.²⁵⁰ According to this line of reasoning, which supports the rule of nonarbitrability for antitrust claims, arbitration is well suited for resolution of those disputes in the former category, but not for those in the latter. Although

Standard for Court-Ordered Discovery in Aid of Commercial Arbitration, 50 FORDHAM L. REV. 1448 (1982).

244. The factors leading courts to conclude that exceptional circumstances sufficient to warrant court-ordered discovery existed were identified by Willenken, *supra* note 243, at 181-82, as follows: (1) information exclusively within the possession of hostile witnesses; (2) size of the claim; (3) complexity of the claim; (4) need for documentary proof; (5) unknown defense; (6) cost of discovery compared to magnitude of claim; (7) potential to accomplish discovery without delaying arbitration; and (8) unknown identity of persons potentially liable. Several of these factors would usually be present in the typical case involving a private antitrust claim.

245. For some cautionary observations about discovery getting out of hand in arbitration, see Callahan, *Discovery in Construction Arbitration*, 37 ARB. J. 3 (1982).

246. Sterk, *supra* note 116, at 503-07.

247. *Id.* at 507 n.90.

248. *Supra* text accompanying notes 103-22.

249. Domestic relations cases, for instance, often involve the additional interests of children. See Sterk, *supra* note 116, at 493-502. Disputes involving claims against a bankrupt debtor frequently affect the interest of other creditors. Deitrick, *supra* note 122; Sterk, *supra* note 116, at 533-37.

250. Sterk, *supra* note 116, at 491-93, 543.

this argument is logical and is attractive for its simplicity in situations in which the underlying statutory objective can be ascertained with reasonable assurance, it does not go far enough. In the end, the suitability of arbitration for private claims that also involve the interests of either specifically identifiable third parties or the general public depends on (1) the alignment of those outsider interests with the interests of the parties themselves and (2) the nature of the incentives for pursuing such interests.

1. Alignment of Interests

If the private interest of the claimant is the same as the broader public interest that prompted creation of the private right in the first place, private resolution of the claim will normally serve the public interest.²⁵¹ Although this general proposition is self-evident, it is necessary to clarify exactly what is meant by interest. The typical private party asserting an antitrust claim cares little about vindicating the public interest in competitive markets. Instead, the plaintiff's immediate concern is to protect a private property interest. In fact, because of the prospect of treble damages, the plaintiff's immediate goal might be the procurement of a windfall. Motive and interest are not the same, however. If the law defines the standards for measuring the validity of the private claim in the same way that it defines the standards for furthering the public interest, the private and public interests are not antagonistic and the pursuance of the former serves the latter. This is, of course, the whole idea behind private antitrust enforcement. Legal standards for the proof of civil antitrust claims²⁵² are the same whether the plaintiff is a private party or the government.

The choice of a dispute resolution forum does not affect this alignment of private and public interests; these interests remain the same whether litigation, settlement, or arbitration is chosen. The confidential nature of arbitration has led some courts and commentators to theorize that if private antitrust claims are arbitrated the arbitration process itself could subvert the public interest by being used as a vehicle to restrain trade.²⁵³ This argument is not persuasive for several reasons. First, the resolution of a private antitrust dispute normally cannot be

251. Some antitrust doctrine, especially that relating to "vertical restraints" such as resale price maintenance and tying agreements, has been criticized by several observers as inimical to consumer welfare and, consequently, contrary to the public interest. See, e.g., R. BORK, *THE ANTITRUST PARADOX* 280-98, 365-81 (1978); Bork, *The Rule of Reason and the Per Se Rule: Price Fixing and Market Division*, 75 *YALE L.J.* 373 (1966); Bowman, *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 *J.L. & ECON.* 86 (1960).

Regardless of any debate concerning the wisdom of a given legal theory, for present purposes it must be assumed that the public interest is what Congress and the courts have defined it to be.

252. Of course, the legal standards for proof of *criminal* violations of the antitrust laws are somewhat different because of the greater burden of proof borne by the government and because of the necessity of proving criminal intent. See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

253. See, e.g., *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968) (arbitration inappropriate for determination of whether license agreement violated the Sherman Act because Congress intended these claims to be litigated); Loevinger, *supra* note 144, at 1091 (listing disadvantages of the arbitral process—one such disadvantage being the invalidity of the arbitration clause because the agreement itself might constitute restraint of trade).

employed as a means to suppress competition without collusion between the parties to the dispute. There is not the slightest hint of collusion between the parties for the purpose of restraining competition in any of the cases involving arbitration and antitrust claims. The parties have clearly been antagonists in the truest sense, and the only role that arbitration could have played is the salutary one of reducing the intensity of the conflict. Second, if restraint of trade is the motive of the parties, they are not likely to use the arbitration process as a tool to accomplish their goal. It would be foolish to bring in an independent referee when the objective is to violate the law. The arbitrator would have to be a party to the collusion, and the difficulty of achieving and maintaining an agreement in restraint of trade normally increases as the number of participants increases.²⁵⁴ Third, the possibility that private antitrust dispute resolution might itself result in a collusive restraint of trade is certainly no greater in arbitration than it is when the parties reach an out-of-court settlement. In fact, because the presence of an arbitrator introduces significant complicating factors into such a scheme, contractual settlements are much more likely to be used as a method for facilitating competitive restraints than arbitration proceedings.

More will be said later about the anomaly of favoring settlement of antitrust claims while prohibiting arbitration,²⁵⁵ but it bears emphasizing that the Antitrust Division of the Department of Justice has the authority and responsibility to police the results of private antitrust dispute resolution whether settlement or arbitration is the chosen vehicle. In past years, the Division has taken action against settlement agreements deemed to have been trade restraints themselves. In *Sugar Institute, Inc. v. United States*²⁵⁶ the government successfully challenged as price fixing an agreement among fifteen sugar refiners that required each firm to announce publicly any price change and then to adhere to that price until it made another, similarly publicized price change. The genesis of the agreement had been a dispute among refiners over the practice of granting secret price concessions to certain customers. Those concessions were viewed by some firms as constituting violations of the price discrimination prohibition of section 2 of the Clayton Act,²⁵⁷ and the ultimate agreement was essentially a settlement of the dispute. Out-of-court settlement of other types of claims, such as patent infringement, also have resulted in government antitrust action.²⁵⁸

The idea that the private antitrust claimant's interest aligns with the public interest has also been challenged because contracts of adhesion are likely to exist in cases in which antitrust claims are raised.²⁵⁹ According to this argument, if the relationship between the parties is characterized by a gross inequality of bar-

254. See Fraas & Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J. INDUS. ECON. 21 (1977); Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13 (1974).

255. See *infra* text accompanying notes 293-305.

256. 297 U.S. 553 (1936).

257. 15 U.S.C. § 13 (1982).

258. See, e.g., *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931) (the "Cracking" case).

259. See *supra* note 253 and accompanying text; see also Comment, *supra* note 144, at 415 (discussing the use of arbitration by a private party to insulate itself from the full force of antitrust laws).

gaining power and overreaching so that the contract containing the arbitration clause was foisted upon a weaker party, that party is essentially a pawn of the "monopolist" and is in no position to represent the public interest effectively.²⁶⁰ This hypothesis, too, is speculative; there is no evidence that gross power disparity and overreaching are any more likely to occur in a dispute in which an anti-trust claim is asserted than in other disputes arising out of contractual relationships. There is no indication in any of the antitrust-arbitration cases that the underlying contract or the arbitration clause was anything other than the product of arm's length bargaining.

Some antitrust-arbitration cases no doubt involve parties of unequal bargaining power. As previously observed, the preexisting contractual relationship between parties to an antitrust dispute frequently takes the form of a franchise or other distribution arrangement.²⁶¹ In these arrangements it is not uncommon for the franchisee or other distributor to possess fewer resources and possibly less bargaining power than the supplier.²⁶² That there is not precise parity of bargaining power, however, does not mean that the weaker party is bereft of the ability to actively pursue its own interests. The weaker party inevitably is a business firm, presumably with *some* resources and a degree of relevant skill. Moreover, such contracts are of such obvious importance that even a party operating at a resource disadvantage would be expected to have access to legal counsel,²⁶³ whose responsibilities to the client would include an explanation of the legal effect of the arbitration clause and other proposed contractual provisions.

Even accepting the proposition that contracts of adhesion are likely to exist in relationships that later give rise to antitrust claims, the alignment of public and private interests is not necessarily altered for at least three reasons. First, the district courts are required by the Federal Arbitration Act to inquire into the existence of a written agreement to arbitrate prior to ordering arbitration.²⁶⁴ An assertion that gross inequality of bargaining power had produced a contract of adhesion would, of course, be subject to determination by the court only if it related specifically to the arbitration clause itself.²⁶⁵ Any claim of adhesion relating to the entire contract would be determined by the arbitrator.²⁶⁶ This type of issue, involving basic notions of fair play, is of a character traditionally viewed as particularly well suited to the arbitration process.²⁶⁷ Therefore, a claim of overreaching should be susceptible to adequate scrutiny before either forum.

260. See *supra* note 259 and accompanying text.

261. See *supra* text accompanying notes 161-63.

262. See generally Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEX. L. REV. 1180, 1181 (1975) (advocating stricter controls over the discretion of the franchisor to terminate the franchise as one way of dealing with the problems and abuses arising from the disparity in economic power between the franchisor and franchisee).

263. Such legal expenses usually would be deductible under I.R.C. § 162(a) (1984) as "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business."

264. 9 U.S.C. § 4 (1982).

265. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

266. *Id.*

267. The arbitral forum has been perceived as suitable for resolution of related issues such as fraud, duress, unconscionability, and breach of fiduciary duty. See *supra* text accompanying notes 164-69.

Second, the "weaker" party continues to possess the same interest in pursuing an antitrust or any other type of claim regardless of the forum, and, indeed, actually might be more prone than a stronger party to pursue a claim vigorously because his or her livelihood is more dependent on a successful resolution. The nature of the dispute resolution forum does not reconfigure this interest. Third, it could be plausibly argued that the party with less bargaining power in an adhesion scenario has interests that are much more closely aligned with those of the general public than does a party with greater economic power.

2. Incentives

Assuming that the private interest of an antitrust claimant is aligned with that of the public, adequate incentives for the private party to pursue a course of action that serves this common interest still must be present. In implementing a regime of private antitrust enforcement, Congress saw the necessity of incorporating incentives and did so in several ways.²⁶⁸ The most powerful incentive is the prospect of treble damages.²⁶⁹ Of significance, too, are the statutory provision for an award of reasonable attorney fees to the successful antitrust plaintiff²⁷⁰ and the availability of rather liberal venue selection.²⁷¹ In addition, Congress has provided that a finding of liability in a prior civil or criminal suit brought by the Justice Department constitutes prima facie proof of liability in a subsequent private suit brought against the same defendant and based on the same conduct.²⁷² Apart from legislatively created incentives, the Supreme Court has also given some advantage to the private plaintiff by holding that the defenses of *in pari delicto* and passing-on cannot be used to fend off antitrust claims.²⁷³

Although it has been expressed in a variety of ways, the question of incentives has been at the heart of the most persuasive arguments against arbitration

268. See *supra* text accompanying notes 83-90.

269. Clayton Act, § 4, 15 U.S.C. § 15 (1982).

270. *Id.*

271. Clayton Act § 12, 15 U.S.C. § 22 (1982).

272. Clayton Act § 5(a), 15 U.S.C. § 16(a) (1982).

273. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the Supreme Court held that a defendant in a private antitrust action may not raise the defense of *in pari delicto* ("in equal fault"). Consequently, a plaintiff who also was a party to the illegal restraint of trade may pursue a treble damage claim against a coparticipant. The only possible exception to the nonavailability of the *in pari delicto* defense is found in the situation in which plaintiff was a co-initiator of the illegal conduct. One court held that the *in pari delicto* defense may be raised when the plaintiff was "present at the creation" of the scheme and when the "illegal conspiracy would not have been formed but for the plaintiff's participation." *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977).

In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 487-90 (1968), the Supreme Court rejected defendant's argument that plaintiff had suffered no damage because it had passed on any illegal overcharges to its own customers in the form of higher prices. Rejection of the passing-on concept has turned out to be a two-edged sword, however. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court ruled that passing-on also could not be used offensively. The result of the latter holding is that "indirect purchasers," those with at least one distribution level between themselves and the defendant, cannot receive damages based on the passing on of an illegal overcharge from an intermediate party who purchased directly from the defendant.

by both courts and researchers.²⁷⁴ If use of the arbitration process substantially reduces the incentives for private antitrust enforcement, then the existing rule against arbitration is probably correct because significant social costs from diminished competition might eventuate from a contrary rule.²⁷⁵ It should be kept in mind, however, that these costs would be offset to some extent by the savings of societal resources that normally result from the use of extrajudicial dispute resolution mechanisms.²⁷⁶ Litigation consumes an extraordinary amount of resources in a fundamentally nonproductive endeavor.²⁷⁷ Any reduction in the amount of resources allocated to dispute resolution is to be encouraged so long as other important public interests are not unduly harmed. At this juncture, it obviously is impossible to know whether the savings to society through the increased use of arbitration would be of sufficient magnitude to offset the costs of diminished antitrust enforcement. In any event, this question involves a balancing of critical social policies that would necessitate congressional action. Thus, in the absence of legislation specifically weighing these concerns, we must operate from the premise that significantly reduced private enforcement of the antitrust laws would not be acceptable.

It is far from clear, however, that a rule permitting arbitration of antitrust claims would substantially diminish the incentives for private enforcement. It is true that an arbitrator, or arbitration panel, normally is not required to follow legal rules, such as those providing for treble damages and attorney fees, precisely.²⁷⁸ An arbitrator cannot fulfill the responsibility to do justice between the parties, however, without giving full consideration to the legal principles argued by each side.²⁷⁹ These principles would include treble damages and attorney fees. Moreover, relatively minimal judicial supervision of the arbitrator selec-

274. See *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968) (indicating that although arbitration will generally provide a business solution, it will not necessarily do so in accord with the principles of the Sherman Act because arbitrators are not likely to give a sympathetic hearing to antitrust claims); Farber, *supra* note 144, at 91-93 (Congress enacted § 12 of Clayton Act for purpose of encouraging antitrust litigation); Loevinger, *supra* note 144, at 1090 (arbitrators do not have independence of judges and are more likely to be unsympathetic to antitrust rules); Pitofsky, *supra* note 144, at 1079 (Clayton Act designed to encourage private antitrust litigation; statutory provisions not binding on the arbitrator); Sterk, *supra* note 116, at 507 ("The knowledge that an antitrust plaintiff will receive fair compensation [through arbitration] is not likely to have the same deterrent effect as the prospect that an undeserving plaintiff will receive a treble damage award."); Comment, *supra* note 144, at 415-18 (arbitration is "shield" from antitrust laws).

275. *But cf.* Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 335 (1974) (sets forth the proposition that the treble damage remedy creates "perverse incentives" which ultimately produce additional social costs).

276. See *supra* text accompanying notes 14-20.

277. This statement certainly is not intended to convey the idea that dispute resolution is a noneconomic activity. Quite to the contrary, the process of resolving disputes is an integral part of a market-based economy. Dispute resolution is essentially a cost—an element of the labor cost involved in producing goods and services. In addition, basic economic principles are applicable to many aspects of the dispute resolution mechanisms themselves. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 19.1, 21.1, 21.4 (2d ed. 1977).

278. See M. DOMKE, *THE LAW & PRACTICE OF COMMERCIAL ARBITRATION* § 30.02 (1968) ("The extent of the arbitrators' authority to award damages may be stated expressly by the parties or by their reference to rules of an agency which specifically provide the measure of damages.").

279. See *supra* text accompanying notes 183-84.

tion process and the arbitration hearing could provide a high degree of assurance that fundamental antitrust principles would be followed.²⁸⁰

The same arguments can be made with respect to the prima facie effect of a judicial finding of liability in a prior government suit. This positive principle of antitrust law must be fully weighed by an arbitrator to perform his or her basic task. One commentator has observed that questions concerning the scope of a prior decree and its effect on subsequent private litigation often prove vexatious for the courts and probably would be virtually impossible for an arbitrator.²⁸¹ This position again assumes arbitration to be a steady-state process when, in fact, it is best known for its flexibility. Some judicial oversight of arbitrator selection would greatly increase the likelihood that private enforcement incentives, such as the prima facie effect of prior government suits, would be accorded sufficient deference in the arbitration process.²⁸² Moreover, if deemed necessary to ensure that this and other incentives are given appropriate consideration, relevant judicial instructions to the arbitrator could be employed, coupled with subsequent limited review.²⁸³

The argument that an arbitrator is likely to consider defenses that cannot be considered in litigation, such as *in pari delecto* and passing-on, is of precisely the same character as those arguments just discussed and can be dealt with in the same way. On the other hand, even if there exists a real possibility that an arbitrator will give weight to impermissible defenses and even if this prospect cannot be forestalled adequately, this action by an arbitrator would not necessarily affect the incentive of the private claimant. If such a defense could be asserted, its existence and ultimate chance of even partial success would be very difficult to predict ahead of time. This is true of many legal theories but seems particularly true of a theory such as *in pari delecto*. When *in pari delecto* is a permissible defense, as in the case of some questions of contract enforceability, its inherently nebulous character is such that predictability of outcome is quite low.²⁸⁴ Therefore, even if there were no safeguards to lessen the likelihood of impermissible defenses being introduced into the arbitration process, the chance of these defenses actually being raised *and* significantly affecting the resolution of any given antitrust claim is sufficiently small that an antitrust claimant will not be dissuaded from pursuing a claim. It must always be kept in mind that the concern here is whether private enforcement might be deterred substantially by permitting arbitration, not whether the outcome of a particular antitrust dispute would always be precisely the same in the arbitral forum as in the judicial forum.

Concern has also been voiced that because arbitration agreements sometimes specify the location of the arbitration hearing, allowing arbitration of antitrust claims might deprive the antitrust claimant of the relatively liberal venue

280. See *infra* text accompanying notes 348-64.

281. Pitofsky, *supra* note 144, at 1077-79.

282. See *infra* text accompanying notes 348-64.

283. *Id.*

284. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 22-12 (2d ed. 1977).

selection normally available under antitrust law.²⁸⁵ This result does not appear likely. Under the Federal Arbitration Act, a district court which finds that a valid written arbitration agreement has been made *must* order the dispute arbitrated within the district where the petition was filed seeking the order.²⁸⁶ Thus, the location of the arbitration hearing will sometimes be determined not by the specification in the agreement but by the location of the district court where an order compelling arbitration is sought. If a lawsuit has already been filed by the antitrust claimant in connection with the dispute, the defendant will seek such an order in the same court in which the suit is pending. In such a case, the contractual provision regarding location of the arbitration hearing will have no effect. Thus, the antitrust claimant will have the same opportunity to select among several possible venues that such a claimant would have had if there had been no arbitration agreement. If the party seeking arbitration initiates the dispute resolution process by seeking an order compelling arbitration, it is likely that he or she will choose to do so in the district specified in the arbitration agreement. In this situation the contractual selection of venue will be effective. The result of all of this is that when several possible venues exist the party that initiates the dispute resolution process enjoys the advantage in making the selection. This is normally the result regardless of the existence of an arbitration clause; therefore, the presence of such a clause may have no measurable impact on site selection. In addition, venue selection agreements can be made whether or not there is any provision for arbitration, and such agreements normally are enforceable unless unreasonable.²⁸⁷ Arbitration, therefore, has little bearing on site selection opportunities for the antitrust claimant.

Perhaps the most important fact relating to the question of private enforcement incentives is that the perceived conflict between antitrust law and arbitration almost never arises in the stereotypical context of a "pure" antitrust claim. In practically every case in which the question of antitrust claim arbitrability has arisen, there has existed a broad dispute between the parties concerning their ongoing contractual relationship.²⁸⁸ Many of these cases involve either a pure breach of contract claim or some variation thereof, the defendant raising the antitrust claim with the objective of either invalidating a contract provision on the ground of illegality or simply introducing a complicating factor into an essentially private commercial dispute.²⁸⁹ Even when the antitrust claim is asserted by the plaintiff, it generally is inextricably entwined with a variety of

285. Clayton Act § 12, 15 U.S.C. § 22 (1982), provides:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

286. 9 U.S.C. § 4 (1982).

287. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (established the right of parties to agree on forum and held that forum selection clause will be upheld unless unreasonable). For an application of this rule to a forum-selection clause in an antitrust case, see *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982).

288. See *supra* notes 161-163 and accompanying text.

289. See e.g., *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546 (7th Cir.

other contract or tort claims and, again, is essentially a private commercial dispute.²⁹⁰ Only in the exceptional case has the dispute been grounded fundamentally in antitrust law.²⁹¹ Thus, the dispute in most of these cases would have arisen regardless of the presence or absence of an antitrust claim. In fact, because these disputes normally involve a plethora of nonantitrust issues asserted by both parties, it is probable that the dispute would have arisen because of a rupture in an ongoing contractual relationship, irrespective of which party happened to be the plaintiff. If the dispute would have arisen in any event, the antitrust claims probably would have found their way into the dispute regardless of the nature of the forum. Therefore, whether the law permits arbitration of the antitrust issues arguably has very little to do with the probability that these issues will be asserted and will receive a hearing. The effect on incentives for private antitrust claim assertion, as a consequence, appears to be minimal or nonexistent.

Finally, it must be remembered that from the businessperson's perspective arbitration normally is both less expensive and less foreboding than litigation.²⁹² Even if permitting the arbitration of antitrust claims might negatively influence certain private enforcement incentives, it is likely that the businessperson's perception of arbitration would offset the reduction of any other enforcement incentives and would actually increase the incidence of antitrust claim assertions.

V. THE ANOMALY OF PERMITTING POST-DISPUTE ARBITRATION AGREEMENTS AND SETTLEMENTS

Reference has been made to the exceptional treatment given by the courts to post-dispute arbitration agreements.²⁹³ Arbitration agreements have been held enforceable with respect to antitrust claims already in existence when the agreement is made because the arbitration provision is viewed as simply another form of settlement and the right of disputants to pursue an agreed settlement is a

1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

290. See *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984); *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); *NPS Communications, Inc. v. Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); *Andriot v. Quickprint of Am., Inc.* 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Black v. Econo-Car Int'l, Inc.*, 404 F. Supp. 600 (D. Mass. 1975); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

291. *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); see *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974).

292. A.M.A., *supra* note 15, at 45-47.

293. See *supra* text accompanying notes 140-41.

deeply embedded attribute of freedom of contract.²⁹⁴

Settlement without adjudication plays a crucial role in dispute resolution, even in the case of private claims to which a public interest attaches. In antitrust the importance of this role can be seen in the large percentage of private treble damage and injunctive actions that are terminated by agreement prior to trial.²⁹⁵ It no doubt would be incongruous to encourage the resolution of private antitrust claims through agreed settlement, as the law does now, but prohibit resolution through post-dispute arbitration. There is clear logical consistency in viewing this type of arbitration agreement as tantamount to contractual settlement and enforcing it accordingly. The question immediately apparent, however, is whether it is also logically consistent to treat post-dispute arbitration clauses differently than future-disputes arbitration provisions.

Upon close scrutiny, most of the rationales for denying enforceable status to future-disputes arbitration agreements apply with equal force to post-dispute arbitration clauses. The rebuttal to these arguments is also the same. What has been said, for example, about method of decisionmaking and lack of review,²⁹⁶ arbitrator expertise and evidentiary complexity,²⁹⁷ and procedures for discovery²⁹⁸ can be said about the arbitration process regardless of whether the antitrust claims already had been asserted when the agreement was made.

Some differences exist between the two types of arbitration agreements, but it is not clear that these distinctions justify different legal treatment. When the various rationales are considered, it becomes apparent that the fundamental distinction between future-disputes arbitration agreements on the one hand and post-dispute arbitration or settlement agreements on the other lies in the parties' awareness of possible antitrust claims and the effect that this awareness might have on the parties' incentives. It is important to recognize that the distinction relating to the parties' awareness of antitrust claims is not really based on contractual intent. As previously noted, in the typical contract containing a relatively broad arbitration clause, the objectively ascertainable intent of the parties probably is to employ the arbitral forum for resolution of *any* disputes that might arise from their relationship.²⁹⁹ This probable intent of the parties, coupled with a judicial presumption of arbitrability,³⁰⁰ leads to the conclusion that antitrust claims are usually within the scope of a future-disputes arbitration clause.³⁰¹ Instead of contractual intent, the arguable distinction between future-disputes and post-dispute agreements is based on the effect that the parties'

294. See A. CORBIN, *supra* note 43, § 1268, at 1025-27.

295. During a representative period, 1964-69, over 3,000 private antitrust cases were dismissed by agreement of the parties, while only 554 continued to judgment. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 382-83 (1970).

296. See *supra* text accompanying notes 172-89.

297. See *supra* text accompanying notes 190-207.

298. See *supra* text accompanying notes 208-20.

299. See *supra* text accompanying notes 153-63.

300. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); see also *supra* text accompanying notes 164-71 (arbitration clauses interpreted with great liberality).

301. See *supra* text accompanying notes 153-71.

awareness of antitrust claims might have on their respective incentives regarding claim assertion and defense.

A claimant surrenders the special incentives for private enforcement, such as the prospect of treble damages, as surely in a settlement or post-dispute arbitration agreement as in a future-disputes arbitration agreement. On the other hand, the awareness of a possible treble damage award has an undeniable effect on the bargaining position of the parties when they negotiate an extrajudicial resolution of their dispute. It is probably true that this awareness is greater when a dispute has already arisen and an antitrust claim has already been asserted. If so, although the alignment of the claimant's interest with that of the public clearly does not change, the incentive to pursue that interest could possibly change. If the claimant's incentives to engage in private enforcement are substantially diminished by virtue of the arbitration provision, the existing rule prohibiting arbitration of antitrust claims under future disputes clauses is probably correct.³⁰²

However, as previously noted, it is not readily apparent that these incentives are diminished. Despite the public interest overtones created by the antitrust claims, the antitrust-arbitration cases are primarily private disputes between parties with an ongoing commercial relationship. The disputes themselves almost always involve a variety of nonantitrust issues. As a result, it is clear that the rupture in the parties' relationship would have required some mechanism for resolution in any event, and the antitrust claims would have been raised regardless of any special antitrust enforcement incentives. Furthermore, if special incentives such as treble damages do need to be preserved to ensure that parties will pursue private antitrust claims, minimal judicial supervision of the arbitrator selection process and the arbitration hearing will accomplish this objective.³⁰³

The inconsistency in permitting post-dispute arbitration and settlement agreements but prohibiting future-disputes arbitration clauses in the antitrust field has been recognized elsewhere in the literature.³⁰⁴ It has been suggested, however, that whatever inconsistency exists is found in permitting the private settlement of antitrust claims, not in prohibiting future-disputes arbitration agreements.³⁰⁵ Any privately assertable right, however, is subject to agreed resolution outside the judicial process because there is no effective way to prevent agreed settlement of private claims even if a great degree of public interest attaches to the particular claim. If the law permits private assertion of claims at all, it is ultimately not feasible to be selective regarding the forum the parties are allowed to use in resolving the claims. This conclusion is no less true in antitrust cases. If private enforcement is expected to play a role in implementing national antitrust policy, the parties to these private disputes must be left to choose their forum.

302. See *supra* text accompanying notes 274-78.

303. See *supra* text accompanying notes 280-83, 288-91.

304. Sterk, *supra* note 116, at 507-08.

305. *Id.* at 508.

VI. JUDICIAL ATTEMPTS TO ACCOMMODATE ARBITRATION AND ANTITRUST POLICIES

The courts have attempted a limited accommodation of arbitration and antitrust policies. An examination of these attempts reveals that they revolve around the concepts of severability, permeation, and collateral estoppel.

A. *Severability, Permeation, and Collateral Estoppel*

When faced with the dilemma of a multifaceted dispute involving nonarbitrable antitrust claims as well as arbitrable nonantitrust claims, the courts normally have treated the claims as severable. Enforcement of the arbitration agreement has been ordered with regard to the nonantitrust claims, but denied on the antitrust claims.

The problem that then arises is whether to permit the arbitration hearing and the antitrust litigation to proceed simultaneously or to require sequential proceedings. On occasion, simultaneous proceedings have been permitted when the court has concluded that there would be no substantial overlap between the factual issues involved in trying the two sets of claims.³⁰⁶ Usually, however, courts have either stayed arbitration pending the outcome of the antitrust litigation or stayed the antitrust litigation pending completion of court-ordered arbitration.³⁰⁷ The standard employed in determining which proceeding to stay can be summarized as follows: If antitrust issues appear to "permeate" the entire dispute and the antitrust claims appear on the surface to be fairly strong, then litigation of these claims will proceed and arbitration of nonantitrust claims will be stayed.³⁰⁸ On the other hand, if the court does not view the antitrust issues as

306. *Sam Reinfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971). In *Helfenbein*, however, after it became apparent to the parties that neither proceeding would be stayed and that the two proceedings might take place simultaneously, the party against whom the antitrust claim had been asserted stipulated during oral argument that it waived its right to arbitrate the nonantitrust claims. *Helfenbein*, 438 F.2d at 1070 n.1.

307. Cases in which arbitration has been stayed pending antitrust litigation include: *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

Cases in which antitrust litigation has been stayed pending arbitration include: *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (*per curiam*); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976); *Buffer v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *NPS Communications, Inc. v. Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); *Andriot v. Quickprint of Am., Inc.* 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979); *Black v. Econo-Car Int'l, Inc.*, 404 F. Supp. 600 (D. Mass. 1975).

In two cases, the courts of appeals remanded for a district court determination of the proper sequence of arbitration and litigation: *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

308. *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974); *Cobb v. Lewis*, 488

permeating the entire dispute, or if the court perceives the antitrust claims as being rather weak, the litigation will be stayed and arbitration of the nonantitrust issues will be ordered.³⁰⁹

Regarding the first aspect of this standard, no analytical framework has been provided for determining whether antitrust claims permeate a given dispute. The permeation doctrine essentially consists of the judge's visceral response to the question whether the dispute is basically an antitrust or a nonantitrust case. The second aspect of the standard involves a rough preliminary weighing of the merits of the antitrust claim and inevitably shades into the permeation question.

Collateral estoppel has also played a minor role in courts' efforts to accommodate arbitration and antitrust policies. The doctrine of collateral estoppel provides that a particular issue resolved before one tribunal or in one dispute generally may not be relitigated before another tribunal or in another dispute between the same or similarly situated parties.³¹⁰ Collateral estoppel has several potential applications to the problem at hand because there usually are factual issues common to both the antitrust and nonantitrust claims. Thus, if such a common factual issue is determined initially in either arbitration or litigation, a question arises whether the parties are collaterally estopped from subsequently retrying that issue in the other forum.

The Supreme Court has held that federal courts are not statutorily required to apply the doctrine of collateral estoppel to all issues determined by an arbitrator.³¹¹ This conclusion has led to the result that certain civil rights questions determined in the course of labor arbitration may be relitigated in federal court.³¹² The Court's refusal to treat previous arbitral findings as binding on the federal courts, however, is applicable only to those issues involving statutorily created rights to which a paramount public interest attaches. To give any meaningful effect to the congressionally mandated enforceability of arbitration agreements, collateral estoppel must be applied to those issues not characterized by a predominant public interest.³¹³

Applying these collateral estoppel principles to cases involving antitrust

F.2d 41 (5th Cir. 1974). It is logical to assume that such a decision would effectively kill arbitration because of the time involved in litigating an antitrust claim.

309. *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (per curiam); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *NPS Communications, Inc. v. Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); *Andriot v. Quickprint of Am., Inc.* 563 F. Supp. 48 (S.D. Ohio 1983); *Hannah Furniture Co. v. Workbench, Inc.*, 561 F. Supp. 1243 (W.D. Pa. 1983); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282 (E.D.N.Y. 1979); *Black v. Econo-Car Int'l, Inc.*, 404 F. Supp. 600 (D. Mass. 1975).

310. *See Mercoind Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944); *G. & C. Merriam Co. v. Saalfeld*, 241 U.S. 22 (1916); *Southern Pac. R.R. v. United States*, 168 U.S. 1 (1897).

311. *McDonald v. West Branch*, 104 S. Ct. 1799 (1984).

312. *Id.*; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

313. *See, e.g., Bower v. Eastern Airlines*, 214 F.2d 623 (3d Cir. 1954); *Goldstein v. Dofit*, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966).

claims, courts have held that if a nonantitrust dispute proceeds to arbitration, any determination by the arbitrator that directly involves an antitrust claim or that involves a factual issue central to an antitrust claim is not subject to collateral estoppel.³¹⁴ Consequently, such determinations may be retried in subsequent antitrust litigation.³¹⁵ Those issues unrelated to an antitrust claim, however, may not be relitigated.³¹⁶

B. *Problems with Existing Accommodation Attempts*

If we accept, as is, the existing rule of total nonarbitrability for antitrust claims under future-disputes arbitration clauses, the courts probably have done about as well as can be expected in attempting to accommodate arbitration and private antitrust enforcement policies. There are, however, some significant problems with the present accommodation structure that are inherent in the treatment of antitrust claims as nonarbitrable and in the view that arbitration and litigation must be separate universes.

1. *Prejudgment of the Merits of Antitrust Claims*

As discussed above, when a court applies the severability and permeation rules, one aspect of the analysis involves a rough weighing of the strength of the antitrust claim. This process forces the court to prejudge the surface merit of an antitrust claim at an unusually early stage.³¹⁷ This determination is not a decision on the merits of the antitrust claim, which still may be litigated either before or after arbitration of the nonantitrust claims, depending on the sequence ordered by the court.³¹⁸ However, it seems quite probable that this preliminary surface weighing will influence any subsequent decision by the court on the merits. For instance, if in ruling on the permeation question the court has decided that the antitrust claim is weak, it is not illogical to suppose that the court might feel somewhat committed to that proposition. Such a commitment, although nonbinding and essentially unofficial, is likely to affect the court's later rulings on summary judgment motions or other aspects of the litigation.³¹⁹ Such a deci-

314. *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 518 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

315. *Id.*

316. *Id.* at 518-20.

317. For purposes of this discussion, it is assumed that the antitrust claim does state a cause of action and therefore would survive a motion to dismiss under FED. R. CIV. P. 12(b).

318. In several of these cases, the courts have made substantive comments about the perceived merits of the antitrust claims despite disclaimers of any intent to rule on the merits. *See, e.g.*, *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874, 876-77 (2d Cir. 1976); *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103, 1104 (9th Cir. 1974); *NPS Communications, Inc. v. Continental Group, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875 (N.D. Ill. 1982).

319. No expression of disrespect for, or lack of confidence in the federal courts is intended by these comments. The comments are based simply on the knowledge that the judicial process cannot be purged of human nature; indeed, such dehumanization should not even be desired. *See, e.g.*, B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20-21, 88-89 (1921); F. COFFIN, *THE WAYS OF A JUDGE* 139-40 (1980); L. FULLER, *THE MORALITY OF LAW* 229-30 (rev. ed. 1969).

sion is also likely to influence the bargaining posture of the parties in settlement negotiations.

The effects of prejudgment are not necessarily bad; they are simply unpredictable and overly susceptible to caprice. The fundamental problem with the rough weighing of an antitrust claim's facial strength at this stage is that very little, if any, evidence is likely to have been generated when the arbitrability question is presented. Indeed, it would be inappropriate and inefficient to have an evidentiary hearing on the question at this point because the assertion of a marginal antitrust claim to hinder and delay arbitration would become a much more effective weapon. In the end, the court is forced into what must be the uncomfortable position of drawing conclusions about the strength of a claim primarily from the pleadings.

The United States Supreme Court has recognized the extremely fact-sensitive nature of antitrust claims and has cautioned lower courts to be especially careful in granting summary judgment in antitrust cases.³²⁰ When ruling on a motion for summary judgment, the court normally has substantial evidence before it.³²¹ Because summary judgment is a final determination on the merits, it obviously cannot be viewed as an analog of the court's ruling on the permeation question. Nevertheless, the permeation ruling is quite likely to have a substantive effect. If courts in antitrust cases are to be extremely cautious about granting summary judgments, for which there usually is quite a bit of evidence, it is disquieting to find the type of superficial prejudgment that characterizes rulings on permeation.

2. Encouragement of Frivolous Antitrust Claims

The rule of nonarbitrability probably encourages assertion of frivolous antitrust claims. If a party to the dispute wishes to impede arbitration, one of the first strategies likely to suggest itself is the introduction of a nonarbitrable claim.

The courts attempt to deal with this problem in rulings on the permeation question. Indeed, the likelihood of frivolous antitrust claims appears to lie at the very heart of the permeation doctrine.³²² However, at the stage at which this

320. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 505 (1969); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962). It must be recognized, however, that courts *do* grant summary judgment in antitrust cases when truly convinced that no issues of fact exist. Despite the admonitions of the Supreme Court concerning the need for great caution in granting summary judgment, the incidence of such action seems to have increased in recent years. This trend is most discernible in antitrust cases brought by terminated distributors; the defendants in such cases are often granted summary judgment. See P. MARCUS, *supra* note 204, § 78.

321. Although summary judgment can be granted solely on the pleadings under FED. R. CIV. P. 56, affidavits and documentary evidence generated by discovery are usually involved. This is especially true with respect to antitrust claims, on which courts normally will not grant summary judgment prior to discovery. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); *Mannington Mills v. Congoleum Indus., Inc.*, 610 F.2d 1059 (3d Cir. 1979); *Bogasian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Umdenstock v. American Mortgage & Inv. Co.*, 495 F.2d 589 (10th Cir. 1974).

322. Judges have expressed concern about the temptation to interpose a frivolous antitrust claim for the purpose of hindering or delaying arbitration. See, e.g., *D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc.*, 558 F. Supp. 875, 880-82 (N.D. Ill. 1982).

ruling must be made, it might be very difficult to filter out baseless claims with any substantial degree of accuracy. The resulting lack of predictability may actually encourage the use of antitrust claims to hinder and delay arbitration.

3. Employment of Multiple Forums

Treating antitrust and nonantitrust claims as severable for arbitration purposes produces the obvious result of multiple-forum dispute resolution. In our legal system, there is a strong policy against the use of multiple forums for resolving the same dispute, different aspects of the same dispute, or even substantially similar disputes. Manifestations of this policy are numerous, including the federal rules on unified administration of multidistrict litigation,³²³ class actions,³²⁴ consolidation of actions,³²⁵ abatement of related proceedings,³²⁶ and the liberal pleading rules for assertion of counterclaims³²⁷ and third-party joinder.³²⁸

The employment of two different forums for antitrust and nonantitrust issues would cause far less concern if cases generating both kinds of issues normally involved two separate disputes. But they do not. As observed earlier, the cases in which antitrust claims and arbitration agreements are both present usually involve the rupture of an ongoing commercial relationship and consequent assertion of several related claims and counterclaims.³²⁹ There generally is one basic dispute underlying the case, even though various legal theories often are intermingled.³³⁰

When different aspects of the same dispute are resolved in different forums, duplication, confusion, and significant inefficiency are inevitable. Although the courts pay heed to the existence of common issues and attempt to withhold from

323. 28 U.S.C. § 1407 (1982).

324. FED. R. CIV. P. 23.

325. *Id.* 42.

326. *See, e.g.*, Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952) (federal court can stay an action when the same issues are presented in an action pending in another federal court).

327. FED. R. CIV. P. 13.

328. *Id.* 14 & 18-22.

329. *See supra* text accompanying notes 161-63.

330. *See, e.g.*, Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 1984-2 Trade Cas. (CCH) ¶ 66,296 (2d Cir. 1984) (per curiam); Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976); Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679 (5th Cir. 1976); Varo v. Comprehensive Designers, Inc., 504 F.2d 1103 (9th Cir. 1974); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Buffler v. Electronic Computer Programming Inst., Inc., 466 F.2d 694 (6th Cir. 1972); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); Helfenbein v. International Indus., Inc., 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); NPS Communications, Inc. v. Continental Group, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,297 (S.D.N.Y. 1984); Andriot v. Quickprint of Am., Inc. 563 F. Supp. 48 (S.D. Ohio 1983); Hannah Furniture Co. v. Workbench, Inc., 561 F. Supp. 1243 (W.D. Pa. 1983); D.C. Taylor, Co. v. Dynamit Nobel of Am., Inc., 558 F. Supp. 875 (N.D. Ill. 1982); Janmort Leasing, Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282 (E.D.N.Y. 1979); Hunt v. Mobil Oil Corp., 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Black v. Econo-Car Int'l, Inc., 404 F. Supp. 600 (D. Mass. 1975); Overseas Motors, Inc., v. Import Motors Ltd., 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

the arbitration process those factual issues that are central to the antitrust claims,³³¹ redundancy simply cannot be avoided. In disputes of this nature, there are usually many factual questions that have a direct bearing on both antitrust and nonantitrust claims. At the very early stage when the court must attempt to parcel out these issues, it is impossible to predict the variety of factual questions that will develop later.

Dealer termination cases provide an apt illustration of this overlap of factual issues. The illustration is even more on point because distribution arrangements commonly incorporate arbitration agreements. A great many of the private antitrust cases filed each year arise out of a supplier's termination of a dealer or distributor.³³² It is very common in these cases for several antitrust claims and a variety of nonantitrust claims to be asserted.³³³ A typical scenario finds the terminated dealer claiming that the termination resulted from the supplier's implementation of an unlawful scheme such as vertical price fixing and the dealer's refusal to comply with the arrangement.³³⁴ The supplier, on the other hand, normally contends that the termination was based on other, legitimate reasons such as breach of the distribution contract, fraud, or the like.³³⁵ Usually the dealer asserts the antitrust claims as a plaintiff, the nonantitrust issues being raised by the supplier as counterclaims or merely as matters of inferential rebuttal, although the supplier can initiate the action, in which case the antitrust claims are raised by the dealer.³³⁶

The setting just described usually presents antitrust and nonantitrust issues that are very similar in some aspects of their factual foundations. For instance, when the dealer alleges that the termination was part of a conspiracy among the

331. See, e.g., *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 716 (9th Cir. 1968).

332. See S. OPPENHEIM, G. WESTON & J. MCCARTHY, *FEDERAL ANTITRUST LAWS: CASES, TEXT & COMMENTARY* 621 n.7 (4th ed. 1981); Bohling, *supra* note 262, at 1212; Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 CORNELL L. REV. 297 (1982).

333. See, e.g., *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 104 S. Ct. 242 (1983); *Zell-Aire of New England, Inc. v. Zell-Aire Corp.*, 684 F.2d 174 (1st Cir. 1982); *Contractor Util. Sales Co. v. Certain-Teed Prods. Corp.*, 638 F.2d 1061 (7th Cir. 1981); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Lafayette Beverage Distribs., Inc. v. Anheuser-Busch, Inc.*, 545 F. Supp. 1137 (N.D. Ind. 1982).

334. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464 (1984); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960).

335. See, e.g., *Roesch v. Star Cooler Corp.*, 712 F.2d 1235 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984) (supplier claimed that dealer breached distribution contract); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.) (supplier contended that termination was due to dealer's lack of service facilities), *cert. denied*, 104 S. Ct. 242 (1983); *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982) (personality conflict with dealer); *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946 (2d Cir. 1982) (dealer's fraudulent conduct); *Sports Center, Inc. v. Riddell, Inc.*, 673 F.2d 786 (5th Cir. 1982) (breach of distribution agreement); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980) (breach of distribution agreement), *cert. denied*, 451 U.S. 911 (1981); *Lafayette Beverage Distribs., Inc. v. Anheuser-Busch, Inc.*, 545 F. Supp. 1137 (N.D. Ind. 1982) (dealer's fraudulent conduct); *Carr Elecs. Corp. v. Sony Corp. of Am.*, 472 F. Supp. 9 (N.D. Cal. 1979) (dealer's practice of secretly recording phone conversations).

336. This latter situation seems to occur most often when the dealer's open account had a significant balance at the time of the termination. See Bartlit, *Practical Problems in Terminating Distributors and Dealers*, 42 ANTITRUST L.J. 317, 318 (1974); Panel Discussion, *Refusals to Deal*, 42 ANTITRUST L.J. 325, 333 (1974).

supplier and other dealers to limit price competition at the dealer level, much of the relevant evidence will focus on the supplier's motives.³³⁷ In considering whether the supplier was motivated by a desire to fix resale prices, the court at the same time must balance carefully the supplier's evidence pointing to a legitimate business justification for the termination.³³⁸ This justification evidence will also bear directly on nonantitrust issues such as the dealer's fraud or breach of contract.³³⁹

Although dealer termination cases provide an excellent illustration, other situations in which antitrust and arbitration policies collide similarly involve substantial overlap and redundancy among the antitrust and nonantitrust issues.³⁴⁰ Consequently, severance of these claims unavoidably produces inefficient dispute resolution.

C. *The Effect of Dean Witter*

Very recently, in *Dean Witter Reynolds v. Byrd*,³⁴¹ the United States Supreme Court held that when a future-disputes arbitration clause encompasses nonarbitrable securities law claims as well as arbitrable pendent state law claims, the arbitrable claims *must* be severed and submitted to arbitration. According to the Court, under the Federal Arbitration Act courts have no discretion to stay arbitration of the arbitrable claims pending litigation of the securities claims. The Court did not expressly review the fundamental rule of nonarbitrability for securities claims because the issue was not presented.

The language of *Dean Witter* clearly is broad enough to be applied to a case involving antitrust claims.³⁴² If the decision is applied in the antitrust context, the result will be that a court cannot stay arbitration of the arbitrable contract or tort claims pending litigation of the antitrust claims. Either the antitrust litigation will be stayed pending arbitration or the antitrust litigation and the arbitration will proceed simultaneously. It is probable that the permeation doctrine will continue to be employed in making the choice between these two alternatives; if the antitrust claims are viewed as permeating the dispute and as facially strong, the antitrust litigation will proceed alongside the arbitration.

Although *Dean Witter* assumes a strong pro-arbitration posture and clearly

337. See, e.g., *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 113 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); *Alloy Int'l Co. v. Hooker-NSK Bearing Co.*, 635 F.2d 1222, 1225 (7th Cir. 1980); *Girardi v. Gates Rubber Co.*, 325 F.2d 196, 200 (9th Cir. 1963).

338. See, e.g., *Bostock Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), cert. denied, 104 S. Ct. 242 (1983); *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982); *Sports Center, Inc. v. Riddell, Inc.*, 673 F.2d 786 (5th Cir. 1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981).

339. See, e.g., *Lafayette Beverage Distribs., Inc. v. Anheuser-Busch, Inc.*, 545 F. Supp. 1137, 1149 (N.D. Ind. 1982); *Roesch, Inc. v. Star Cooler Corp.*, 514 F. Supp. 890 (E.D. Mo. 1981), aff'd, 712 F.2d 1235 (8th Cir. 1983), cert. denied, 104 S. Ct. 1707 (1984); *Schwimmer v. Sony Corp. of Am.*, 471 F. Supp. 793 (E.D.N.Y. 1979), rev'd, 677 F.2d 946 (2d Cir. 1982); *Carr Elecs. Corp. v. Sony Corp. of Am.*, 472 F. Supp. 9 (N.D. Cal. 1979).

340. See *supra* text accompanying notes 288-91.

341. 105 S. Ct. 1238 (1985).

342. *Id.* at 1241-43.

is a step in the right direction, it just as clearly does not go far enough. In the antitrust context, severing the arbitrable nonantitrust claims from the nonarbitrable antitrust claims will cause the same problems of antitrust claim prejudgment and multiple forum usage that currently exist.

VII. POTENTIAL FOR FURTHER ACCOMMODATION

A. *The Impracticability of Resolving the Conflict by Completely Precluding Arbitration*

The problems inherent in existing accommodation attempts could be avoided if the courts simply refused to permit arbitration of *any* of the claims in cases involving antitrust issues. An argument can be formulated for refusing to sever and for holding the arbitration agreement completely unenforceable. The public interest in private antitrust enforcement, the strong public policy against employing multiple tribunals in the same dispute, and the inherent difficulties encountered in severing antitrust and nonantitrust claims could be combined to support the conclusion that an arbitration agreement, if applied to cases involving antitrust issues, violates public policy and is void under section 2 of the Federal Arbitration Act.

There are obvious problems with this argument. First, *Dean Witter* probably would not permit such a result given the Court's holding that arbitrable claims must be arbitrated.³⁴³ Second, even if legally possible, such a proposition is conceptually flawed: the strong policy in favor of arbitration can just as easily be combined with the policy against multiple forums and the difficulties of severance to support precisely the opposite conclusion. In other words, it is just as plausible to argue that the policy in favor of private antitrust enforcement is outweighed in these circumstances by several other policies, and that *all* of the claims should be arbitrated.

B. *The Need for Enhanced Accommodation*

There can be no perfect reconciliation of the policy in favor of arbitration and the policy in favor of private antitrust enforcement. Several factors, however, support the conclusion that arbitration policy outweighs private antitrust enforcement policy in the types of cases in which the conflict normally arises. Almost all of the rationales for denying arbitrable status to antitrust claims are subject to substantial refutation.³⁴⁴ Even the rationale that is most durable under criticism—the effect of future-disputes arbitration agreements on private enforcement incentives—can be refuted, although possibly not so thoroughly as other rationales.³⁴⁵ If any incentive-related concerns still remain after close scrutiny, they can be satisfied with little intrusion into the arbitral process.³⁴⁶ Because of these factors, an effort should be made, either judicially or legisla-

343. See *supra* text accompanying notes 341-42.

344. See *supra* text accompanying notes 152-292.

345. See *supra* text accompanying notes 246-92.

346. See *infra* text accompanying notes 348-64.

tively, to achieve greater accommodation between arbitration and antitrust policies by changing the present rule and permitting all of the issues, antitrust and nonantitrust alike, to be resolved in the arbitration process.

The arguments presented in this Article demonstrate the high probability that private antitrust enforcement policy will not be adversely affected by allowing antitrust issues to go to arbitration in accordance with the parties' contract.³⁴⁷ If necessary to assuage fears that arbitration may reduce private enforcement incentives, the court can ensure that these incentives remain by imposing limited judicial supervision over the arbitration process.

1. Forms of Judicial Intervention

All that may be necessary to protect against the remote possibility of diminished antitrust enforcement incentives is limited judicial supervision of the arbitrator selection process. This could be accomplished in a variety of ways, and the parties themselves should always have as much latitude as possible in making the selection. The court's involvement could begin with a condition attached to its order compelling arbitration under section 4 of the Act.³⁴⁸ This proviso would make judicial approval of the arbitrator or arbitration panel selected by the parties a condition precedent to the effectiveness of the order. The court could impose time limits and employ its contempt power to prevent lack of cooperation by one party from hindering or delaying arbitration. In this way, the court could ensure the ultimate selection of arbitrators who have the kind of backgrounds that would make them sensitive to antitrust policy and more likely to apply the relevant antitrust principles presented and argued by the parties. Typically, courts would require the appointment of attorneys or law teachers with antitrust expertise, industrial organization economists, or retired judges.³⁴⁹

The court could also provide brief instructions to the arbitrators relating to critical incentive-affecting issues such as treble damages and the prima facie effect of a relevant prior decree in a government antitrust suit.³⁵⁰ The court could exercise an extremely limited review at a later point solely for the purpose of determining whether the arbitrator gave consideration to these legal doctrines. The instructions and possible subsequent review normally should not go beyond issues such as these because the natural advantages of the arbitration process probably vary inversely with the degree of judicial intervention. Moreover, the court's directives on these matters should do no more than outline the applicable law and emphasize the arbitrator's responsibility to follow it. The court should not become involved in any factual determinations or indicate how particular principles should be applied in a given case. Thus, something far less encompassing than jury instructions is envisioned. Anything beyond a simple adumbration of the pertinent incentive-related legal principles must be left to the arbitrator and opposing counsel.

347. See *supra* text accompanying notes 246-92.

348. 9 U.S.C. § 4 (1982).

349. See *supra* text accompanying notes 196-203.

350. See *supra* text accompanying notes 268-83.

The court also ought to avoid becoming involved in the discovery process unless convinced that the antitrust claims cannot receive a hearing without court-ordered discovery. This situation would rarely occur, and in those unusual cases in which court intervention is deemed necessary, the court's involvement should be minimal. Any discovery ordered by the court must have the limited objective of placing the essential core of the antitrust claim before the arbitrator and ensuring that the arbitration proceeding does not simultaneously develop the ills which characterize discovery in most antitrust litigation.³⁵¹ Turning arbitration into a facsimile of antitrust litigation is the last thing that should result from enhanced accommodation.

2. Legal Authority for Judicial Intervention

The persisting notion that the arbitral and judicial forums are mutually exclusive institutions is grounded not so much in the absence of judicial authority to supervise arbitration as it is in convention and stereotype.³⁵² Legal authority presently exists for courts to undertake any supervision of the arbitration process necessary to accommodate the perceived conflict between arbitration and antitrust policies.

The authority of a federal court to oversee the arbitrator selection process, provide limited instructions to the arbitrator, conduct a skeletal form of judicial review, and possibly grant minimal assistance in discovery can be derived readily from several sources. For example, the court's power to appoint special masters under rule 53 could be employed.³⁵³ Although this power is to be exercised

351. See *supra* text accompanying notes 210-20.

352. See Note, *supra* note 243, at 1452-55.

353. FED. R. CIV. P. 53. The text of rule 53, as amended in 1983, is as follows:

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. . . .

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same

only in "exceptional circumstances,"³⁵⁴ a conflict between two preeminent public policies certainly seems to qualify as such a circumstance. In the past, there has been substantial dissatisfaction with the use of special masters,³⁵⁵ but this dissatisfaction seems to have stemmed largely from improper selection and inadequate supervision.³⁵⁶ In recent years federal courts have been making increasing and innovative use of special masters in various types of litigation,³⁵⁷ and the possibility of an expanding role for masters has been given substantial scholarly attention.³⁵⁸ The United States Supreme Court has indicated that special masters normally should not render decisions on the merits and, consequently,

manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

. . . .

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. . . .

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. . . .

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

. . . .

(f) A magistrate is subject to this rule only when the order referring a matter to the magistrate expressly provides that the reference is made under this Rule.

Id.

354. *Id.* 53(b). See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (court congestion and complexity of case was not an exceptional condition warranting reference of entire trial to a special master).

355. See C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 97, at 656 (4th ed. 1983).

356. See, e.g., *Cheramie v. Oregon*, 434 F.2d 721 (5th Cir. 1970).

357. See, e.g., *Mathews v. Weber*, 423 U.S. 261 (1976) (reference of all social security benefit cases to magistrate, serving as master, was upheld); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (master given extremely broad powers to monitor compliance with prison reform decree); *Gary W. v. Louisiana*, 601 F.2d 240 (5th Cir. 1979) (use of master to aid implementation of decree in prison reform case); *Cruz v. Hauck*, 515 F.2d 322 (5th Cir. 1975) (use of master to conduct evidentiary hearings and file proposed findings of fact and conclusions of law); *Hart v. Community School Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974) (use of master to aid implementation of decree in school desegregation case).

358. See, e.g., Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739 (1980); Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RESEARCH J. 543; Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 AM. B. FOUND. RESEARCH J. 143; Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RESEARCH J. 287; Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581 (1982); Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RESEARCH J. 375; Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981); Silberman, *Masters and Magistrates* (pts. 1 & 2), 50 N.Y.U. L. REV. 1070, 1297 (1975).

should not perform arbitrator-like functions.³⁵⁹ The context in which these views have been expressed, however, is entirely different than the one at hand. Those situations in which courts have expressed reservations about the use of special masters to serve in decision-making roles have not involved agreements by the parties to submit their disputes to arbitration.³⁶⁰ Instead, any decision-making role played by the special master would have been imposed on the parties without their agreement. When there is an arbitration agreement, however, the parties already have agreed to employ a parajudicial decision maker.

If the court chose to supervise the selection of an arbitrator by molding its power of special master appointment, it could accomplish any oversight of the arbitration process deemed necessary in much the same way. The order of reference employed under rule 53 to appoint a special master similarly could be molded to provide necessary instructions, and the power of review over the master's findings inheres in the court's appointment power.³⁶¹

Although legally feasible, the court's use of rule 53 to supervise arbitrator selection might not be wise. Despite the fact that the traditional stigma attached to the use of special masters appears to be fading, there remains substantial antagonism toward the practice. Moreover, as will be seen shortly, federal courts have ample power to supervise arbitrator selection aside from rule 53 or other special dispensation.

It would also be legally feasible for the court to use a federal magistrate, acting as a master,³⁶² although this course probably would not be desirable for at least two reasons. First, the parties would lose their role in the selection process, as the magistrate is already identified and on the federal payroll. Second, because the magistrate has a close and continuing relationship with the federal court, he or she probably would have difficulty conducting the proceeding as an arbitration hearing. Thus, a proceeding conducted before the magistrate likely would take on the character of litigation and lose many of the positive traits of arbitration.

It really is not necessary for the court to employ either its power of special master appointment or its authority to use the magistrate as a master in order to oversee the arbitration process. By interpreting the Federal Arbitration Act as not permitting arbitration of antitrust claims under future-disputes clauses, the federal courts have clearly exhibited sufficient judicial power to accommodate

359. See *Vermont v. New York*, 417 U.S. 270 (1974).

360. The courts traditionally have shown antagonism toward the employment of masters to perform a decision-making function even when the parties have so stipulated. See *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967); *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546 (10th Cir. 1967). In these cases, however, there have not been agreements to arbitrate, and, consequently, the strong federal policy in favor of arbitration has not provided a countervailing consideration.

361. FED. R. CIV. P. 53(b), (e)(2).

362. 28 U.S.C. § 636(b)(2) (1982) (authorizes judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure"). A 1983 amendment to rule 53 abolished the authority of the district courts to appoint "standing masters" because the creation of full-time magistrates eliminated the need for standing masters. See Comment, *An Expanding Civil Role for United States Magistrates*, 26 AM. U.L. REV. 66 (1976); Note, *United States Magistrates: Additional Duties in Civil Proceedings*, 27 CASE W. RES. L. REV. 542 (1977).

the policies of the Act with other public policies in virtually any way they see fit. If the courts have the power to completely deny arbitrable status to antitrust claims, they certainly have the power to do *less* by permitting arbitration with a degree of supervision. Allowing arbitration with minimal oversight clearly involves the exercise of less judicial power than does the exclusion of an entire category of disputes from the legislatively expressed rule of enforceability for arbitration agreements. By formulating the doctrines of severability and permeation,³⁶³ the courts have also recognized that their inherent equity powers are quite extensive. The inherent equity powers of the federal courts could be similarly employed to accomplish reasonable supervision of both the arbitrator selection process and the arbitration hearing.³⁶⁴

3. Experience with Judicially Supervised Arbitration

Much of the conceptual underpinning for the rule that antitrust and other claims to which a public interest attaches should not be submitted to arbitration is found in the view that arbitration and litigation are irreconcilably separate institutions.³⁶⁵ There has been sufficient past experience with the integration of these institutions, however, to indicate that such integration could help resolve the conflict between arbitration and antitrust policies. Several states, including Pennsylvania and California,³⁶⁶ and also some federal districts,³⁶⁷ have employed court-annexed arbitration with some success. In some ways these experiences are clearly different from judicially supervised arbitration of antitrust disputes. Existing uses of court-annexed arbitration involve mandatory, non-consensual arbitration for designated types of claims, and because of the absence of an arbitration agreement, the parties must be given meaningful rights of appeal.³⁶⁸ The types of claims heretofore involved in court-annexed arbitration are rather different from antitrust claims, normally being contract and tort claims below a specified dollar amount.³⁶⁹ But these experiences show that arbi-

363. See *supra* text accompanying notes 306-10.

364. Federal courts have full equity powers under the Constitution. U.S. CONST. art. III, § 2, cl. 1. See *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294 (1955); C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 356, 436-38, 610-16 (4th ed. 1983).

365. See *supra* text accompanying notes 181-82, 192-203.

366. See D. HENSLER, A. LIPSON & E. ROLPH, *JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR* (1981); Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537 (1983); Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961). Other states that have adopted mandatory arbitration systems include Alaska, Arizona, Nevada, New Hampshire, New York, Ohio, and Washington. See D. HENSLER, A. LIPSON & E. ROLPH, *supra*, at vii n.1.

367. See A. LIND & J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1981); Nejeleski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983).

368. In actuality, the "appeal" normally provided is a trial de novo, with sanctions imposed on the party who obtains the trial de novo but does not thereby improve his or her position. See D. HENSLER, A. LIPSON & E. ROLPH, *supra* note 366, at viii; Levin, *supra* note 366, at 539.

369. Levin, *supra* note 366, at 538. Mandatory arbitration originally was employed for relatively small claims, but in several programs the dollar limits have been increased in recent years to such an extent that the claims subject to mandatory arbitration no longer can be characterized as small. The dollar limit in the Pennsylvania program has climbed from \$1,000 to \$20,000. *Id.* The dollar limit

tral and judicial processes can work together. Along the same lines, arbitration has been used as an adjunct to litigation in carrying out the terms of antitrust consent decrees in the film industry³⁷⁰ and in implementing the provisions of administrative consent orders in several Federal Trade Commission proceedings.³⁷¹ Although this use of arbitration is also not perfectly analogous to the use proposed in this Article, it does indicate that adjudicatory and arbitral processes can augment one another.

VIII. CONCLUSION

With almost complete unanimity, courts and commentators have viewed antitrust claims as nonarbitrable under future-disputes arbitration clauses. This conclusion has been reached despite strong congressional expression of a policy in favor of arbitration. Several rationales have been provided for the nonarbitrability rule, most of which break down rather quickly upon close analysis. The one rationale that best endures challenge is that incentives for private antitrust enforcement are likely to be reduced if antitrust claims are treated as arbitrable under future-disputes clauses. This argument, however, is subject to refutation as well. In the types of disputes in which the question almost always arises, private antitrust enforcement incentives are not likely to be affected significantly by permitting arbitration.

Minimal judicial supervision will suffice to satisfy any apprehension that antitrust policy will be affected adversely by the arbitration of antitrust claims. That supervision can be accomplished in a variety of ways, and there is ample legal authority for any necessary oversight by the courts.

All that is probably necessary to ensure that private antitrust enforcement incentives are not diminished is minimal judicial supervision of the arbitrator selection process. Although other forms of judicial intervention are legally authorized and are probably feasible, they should not be employed unless particular circumstances convince the court that the antitrust claims and legal principles relevant thereto will not receive a hearing otherwise. Judicial oversight should never be permitted to such a degree that it substantially diminishes the positive characteristics of arbitration; intervention of such a degree is just not required to protect antitrust policy adequately.

There is, moreover, some experience to indicate that the arbitral and judicial institutions are not mutually exclusive but complement one another to a greater degree than generally has been realized. In the end, the perception of these institutions as irreconcilably disjointed probably lies at the core of the unsatisfactory accommodation efforts currently practiced. Such a perception does not seem to be what Congress had in mind when it provided for various types of

in the mandatory arbitration program in the United States District Court for the Northern District of California is \$100,000; in the Eastern District of Pennsylvania it is \$50,000. *Id.* at 538, 539 n.9.

370. See Hayes, *Arbitration as an Aid in the Enforcement of the Antitrust Laws*, 17 *LAW. & CONTEMP. PROBS.* 504 (1952).

371. See Halverson, *Arbitration and Antitrust Remedies*, 30 *ARB. J.* 25 (1975).

judicial action to implement the federal policy in favor of arbitration.³⁷² Furthermore, the relationship between the arbitral and judicial systems is symbiotic—the courts provide implementation and enforcement mechanisms for arbitration, and arbitration presents great opportunities for relieving court congestion and delay.

Dean Pound observed long ago that the success of various extrajudicial dispute resolution mechanisms such as equity and the law merchant ultimately depends on the extent to which these institutions are reconciled with the judicial system.³⁷³ This observation seems no less applicable to arbitration.

Finally, those who emphasize the disparateness of arbitration and litigation would do well to keep in mind the words of Jerome Frank:

The judge, at his best, is an arbitrator, a "sound man" who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. . . . The bench and bar usually try to conceal the arbitral function of the judge. . . . But although fear of legal uncertainty leads to this concealment, the arbitral function is the central fact in the administration of justice. The concealment has merely made the labor of judges less effective.³⁷⁴

372. See *supra* text accompanying notes 64-68.

373. Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 18 (1914).

374. J. FRANK, *LAW AND THE MODERN MIND* 157 (1930).