CHAPTER 1

Introduction

In the *Museo del Prado* there hangs a masterful work by Francisco De Goya entitled "Duelo a Garrotazos," meaning "Duel with Clubs." This canvas is arresting and foreboding. Set in the context of a stark sunset, two men face one another, both buried knee high so as to preclude any hope of escape, armed with clubs that are being swung in each other's direction. Their inability to dodge blows or otherwise flee from the deadly contest is underscored by the sense of rigidity arising from being "planted." The menacing intuition in the spectator of lethal harm is eloquently spawned by the outstretched clubs that inevitably find their immovable, fixed targets. Pursuant to this methodology, the underlying dispute shall somehow be settled and the particular conflict resolved by agreement of the parties, without state intervention or furtherance of national social policies incident to otherwise dispositive judicial recourse.[1]

Domestic and international institutional arbitration in the United States, much like Goya's "alternative dispute resolution" depicted in "Duel with Clubs," was perceived by commentators, the judiciary, practitioners, and captains of industry as a blunt and imprecise methodology for dispute resolution.[2] In addition to finding

[1] Francisco de Goya, *Duelo a Garrotazos*, circa. 1820–1823, mural transposed to linen, 123 × 266 cm.: donation of Emile d' Erlanger.

[2] *See, e.g.*, Wilko v. Swan, et al., 346 U.S. 427 (1953) ("[I]t has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."); American Safety Equipment Corp. v. J.P. Maguire & Co., Inc., 391 F.2d 821 (2d Cir. 1968) ("in some situations Congress has allowed parties to obtain the advantages of arbitration if they 'are willing to accept less certainty of legally correct adjustment' but we do not think that this is one of them. In short we conclude that antitrust claims raised here are inappropriate for arbitration."); Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198, 203 (1956) ("for the remedy by arbitration, whatever its merits or shortcomings, substantially effects the cause of action created by the State.The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for the results; the record of their proceedings is not as complete as it is a court trial; and judicial review of an award is more limited than judicial review of a trial."); Barrentine, et al. v. Arkansas-Best Freight System, Inc., et al., 450 U.S. 728, 744 (1981) ("because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is

arbitral proceedings bereft of the expertise and procedural safeguards endemic to judicial processes, arbitrators also were viewed as wanting in authority to award liquidated damages, costs, punitive damages, or attorneys' fees under most statutorily crafted causes of action, if not pursuant to all claims irrespective of normative foundation.[3] In the United States, however, the pendulum now has swung to maximum apogee in the opposite direction.

Four specific factors have contributed to the recognition of arbitration *in pari materia* with judicial proceedings. First, the U.S. Supreme Court has interpreted the "international contract" as a normative basis for according special deference to arbitral proceedings in an international context.[4]

Second, in poignant contrast to the orthodox view of arbitration as a blunt and imprecise instrument inimical to the equitable administration of justice in specific complex judicial disciplines, a perceived need for specialization akin to the creation of unique subject matter tribunals has spawned a plethora of uniquely tailored institutional arbitral proceedings in domestic arbitration.[5]

Third, the beginning of the new millennium highlights and emphasizes a unique phenomenon in the history of private procedural international law. The absence of civil and commercial transnational courts is glaring.[6] Parties engaged in transnational commerce may (i) submit to the jurisdiction of foreign courts, (ii) refrain

inimical to the public policies underlying the FLSA [Fair Labor Standard Act], thus depriving an employee of protected statutory rights."); McDonald v. City of West Branch, Michigan, et al., 466 U.S. 284, 291–292 (1984) ("finally, arbitral fact finding is generally not equivalent to judicial fact finding. As we explained in *Gardner-Denver*, '[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable [citing to 415 U.S., at 57–58]. It is apparent, therefore, that in a §1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial. Consequently, accordingly preclusive effect to arbitration awards in §1983 actions with severely undermined protection of federal rights that the statute is designed to provide."); *and* Alexander v. Gardner-Denver Co., 415 U.S. 36, 56–57 (1974) ("arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate form for the final resolution of rights created by Title VII.").

3 *See, e.g.*, Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960).

4 M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

5 By way of example, the American Arbitration Association has propounded no less than twelve sets of arbitration rules each specialized in a particular industry: (i) Professional Accounting and Related Services Dispute Resolution Rules, (ii) Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), (iii) Home Construction Arbitration Rules and Mediation Procedures, (iv) Employment Arbitration Rules and Mediation Procedures, (v) Employee Benefit Plan Claims Arbitration Rules, (vi) Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes Supplementary Procedures, (vii) Resolution of Patent Disputes Supplementary Rules, (viii) AAA Arbitration Supplementary Procedures, (ix) AAA Domain Name Dispute Supplementary Rules; these rules are a supplement to the Rules for Uniform Domain Name Dispute Resolution Policy (The rules) adopted by the United States Department of Commerce, (x) The AAA of Olympic Sport Doping Disputes Supplementary, (xi) Real Estate Industry Arbitration Rules, (xii) Securities Arbitration Supplementary Procedures, (xiii) Wills and Trusts Arbitration Rules, and (xiv) Wireless Industry Arbitration Rules of the American Arbitration Association.

6 Indeed, the American Law Institute has undertaken laudable efforts in the daunting task of developing transnational rules of civil procedure. The consultative group charged with this effort has generated very serious, coherent, and virtually viable work product. Despite these gains, however, the requisite "hybrid" and "cross fertilization" of multiple legal cultures across the entire globe remains both strategically and tactically quite distant.

from engaging in cross-border commercial activities, or (iii) avail themselves of arbitration as a preferred methodology for international dispute resolution. From a pragmatic standpoint, the first two options are unavailing. Only international arbitration may serve as the conceptual historical dispute resolution bridge until international civil and commercial tribunals come into being to administer justice equitably in transnational disputes of this ilk.

Finally, the fourth and most recent historic revolution of international transcendence is economic globalization.[7] Porous borders in the ambit of international commerce find no historical economic precedent. The international community now experiences the virtually instantaneous flow of funds as part of the ordinary course of business attendant to transnational commercial activity. The complexities incident to multiple jurisdictions, different judicial and cultural backgrounds among business persons, increasingly intricate corporate and juridic entities serving diverse functions under the banner of "expediency and economic efficacy" all militate in favor of a methodology for dispute resolution that comports with the parties' expectations concerning the fair administration of justice as well as the application of respective judicial cultures. Only arbitration is capable of satisfying both prongs.

Arbitration in the United States has experienced vertical and horizontal proliferation. The verticality resides in a unique and rather inordinate degree of specialization generated by the rigors of particular industry and professional exigencies. The horizontality has been galvanized by the practically universal acceptance in the United States of arbitration as a flexible, reliable, and predictable methodology for domestic and international dispute resolution that fosters party-autonomy, uniformity, transparency of standard, and predictability, while preserving the parties' cultural and juridic expectations. The recognition of arbitration *in pari materia* with ordinary contracts, let alone judicial proceedings, however, was a gradual and somewhat painstaking process. To be sure, it is yet to find its perfect paradigm.

This analysis thus shall be divided into nine specific sections. The first part focuses on the formation and transformation of the status of arbitration (both domestic and international) in the United States. Here, emphasis shall be placed on what will be identified as the "historically conventional view of arbitration in the United States." The second section shall consist of an exegesis of shifting paradigms bottomed on sustained analysis of the United States Supreme Court's strictures in *Wilko v. Swan*,[8] *Scherk v. Alberto-Culver*,[9] and *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*[10] The third section shall address significant

[7] For purposes of this analysis five "revolutions" are material: (i) the Copernican Revolution, (ii) the Agrarian Revolution, (iii) the Industrial Revolution, (iv) the Technological Information Technology Revolution, and (v) Economic Globalization.

[8] Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) ("We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the deciding of business transactions. Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language and to correct a seriously erroneously interpretation of statutory language that would undermine congressional policy as expressed in other legislation [citation omitted]. Both purposes would be served here by overruling the *Wilko* decision.")

[9] Scherk v. Alberto-Culver, 417 U.S. 506 (1974).

[10] Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

and novel procedural changes in the conduct of arbitral proceedings. Specifically, "the taking or gathering of evidence" shall be compared and contrasted with "common law discovery." Emphasis will be placed on the construction of a new paradigm asserting that when submitted to reasoned examination, the taking or the gathering of evidence is replete with unresolved doctrinal concerns not present in common law discovery in the context of international commercial arbitration. In fact, it will be contended that American common law discovery is configured and organized *by the very fundamental tenets* that international commercial arbitration seeks to preserve and promote.

Indeed, it will be advanced that arbitral procedural law in the context of "taking of evidence" has undergone a revolutionary transformation such that it shall require continental law practitioners to master fundamental precepts of U.S. common law discovery. The "revolutionary trilogy" beginning with the U.S. Supreme Court's directive in *Intel Corporation v. Advanced Micro Devices, Inc.*,[11] *In Re: Application of Roz Trading Ltd.*,[12] and *In Re: Patricio Clerici*,[13] will be identified in support of this novel proposition.

The fourth part of the book will focus on the role of party-autonomy in the gathering of evidence and taking of discovery in international commercial arbitration. The fifth section consists of an "unorthodox" analysis of the International Bar Association ("IBA") Rules on the Taking of Evidence in International Arbitration, the Rules of Arbitration of the International Chamber of Commerce, the Rules of the International Center for Dispute Resolution, and the Rules of the London Court of International Arbitration. This section culminates with a synthesis of international arbitration rules analyzed through the prism of party-autonomy and some of the more salient features comprising the very fabric of common law. The sixth section primarily focuses on the need for doctrinal consistency and development in the formation and application of the common law doctrine of Manifest Disregard of the Law. The seventh part explores the issue of "perjury in arbitration" and grounds for vacatur. The eighth section examines developments in the apportionment of jurisdiction between arbitrators and courts concerning the validity of a contract containing an arbitration clause as well as developments addressing the Severability Doctrine.

The ninth and final section analyzes U.S. arbitration doctrinal developments and their dialogue with the New York Convention. Four discrete issues are studied: (i) the relationship between non-signatories to arbitration agreements and their obligation to arbitrate, (ii) jurisdiction over an arbitral award debtor as a predicate to enforcement, (iii) the interjection of *forum non conveniens* in arbitral enforcement proceedings, and (iv) the tensions between rendering states and secondary enforcing states with respect to annulled international arbitration awards.

These topics were selected because of their practical importance as well as their rather extraordinary features endemic to their respective common law development. Each topic shares the need to fashion doctrinal paradigms of development that promote the fundamental principles of uniformity, predictive value, party-autonomy,

[11] Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
[12] In Re Application of Roz Trading Ltd., 469 F.Supp. 2d 1221 (N.D. Ga. 2006).
[13] In re Clerici, 481 F.3d 1324 (11th Cir. 2007).

certainty, and transparency of standard. Each topic, it is here asserted, constitutes a part of a more comprehensive whole such that a single part cannot be modified without altering the entire construct. Scholars, judges, arbitrators, and captains of industry cannot help but detect a uniquely, or almost uniquely, American influence that doctrinal development in these discrete areas has exercised on international commercial arbitration. It is further advanced that as the anomaly between economic globalization and a fragmented global juridic framework becomes more salient, the influence of these doctrinal developments will grow to become evident and necessary.

CHAPTER 2

The Formation and Transformation of the Status of International and Domestic Arbitration in the United States

A. THE HISTORICALLY CONVENTIONAL VIEW OF ARBITRATION IN THE UNITED STATES

It is impossible to sever the U.S. judiciary's early bias against arbitration from the disdain of arbitral proceedings that pervaded English courts. A brief historical schematic is presented here.

After the 1687 enactment of the Statute of Fines and Penalties,[1] arbitration agreements were stripped of all juridic efficacy for many reasons. The primary reasons, however, were that they were not enforceable in equity, could not give rise to a cognizable cause of action, and did not constitute a viable ground for issuing a stay of a judicial proceeding based on the identical underlying cause of action between the same parties.[2] Significantly, the Act of 1854[3] vested courts with the discretion to stay a legal proceeding in deference to arbitration agreements, and such stays would be irrevocable but for leave of court. In this same vein, the Arbitration Act of 1889[4] rendered arbitration agreements irrevocable absent a court order to the contrary. Additionally, this Act provided that an arbitration agreement was endowed with the same effect as if issued by court order and bestowed courts with authority to review legal questions raised during the final arbitration hearing.[5] Notwithstanding these enactments, in the middle of the eighteenth century arbitration agreements were deemed to be against public policy for two rudimentary reasons. First, arbitration

[1] Statute of Fines and Penalties, 1687, 8 and 9 Will. III c. 11, § 8 (Eng.).

[2] The Statute of Fines basically provided that any action on a bond issued for purposes of guaranteeing performance of an agreement, would be limited only to the actual damages that the claimant sustained. *See e.g.* 9 C.J. 128, 129; 11 C.J.S. *Bonds* §120; WILLIAM HOLDSWORTH, 12 HISTORY OF ENGLISH LAW 519–520 (1938). Accordingly, this legislation in effect eviscerated Coke's landmark case styled *Vynoir's Case*, 8 Coke Rep. 81B, holding that the penal bond posted to ensure enforcement of an arbitration agreement would give rise to a judgment for damages in the bond's amount, i.e. the quantum of the actual penalty. Even though in 1698 parliament enacted a statute, 9 Will. III c.15 (Eng.), that sought to remedy this problem by providing that arbitration agreement could be reduced to a court order and, therefore, a breach would be susceptible to punishment for contempt of court, the statute proved to be of little moment. Courts narrowly construed it and strictly limited its scope.

[3] Act of 1854, 17 and 19 Vict. c. 125 (Eng.).

[4] Arbitration Act of 1889, 52 and 53 Vict. c. 49 (Eng.).

[5] *See* Paul Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 606–7 (1928); ZECHARIAH CHAFFEE, JR. & SIDNEY POST SIMPSON, CASES AND MATERIALS ON EQUITY (1934).

agreements were perceived as private contracts that "oust the jurisdiction" of otherwise courts of competent jurisdiction.[6]

Second, the majority view contended that, if left unsupervised by courts, arbitrations would not be welcome, and for this reason legislation providing for judicial supervision of arbitral proceedings was necessary. Remarkably, both arguments are belied by acts of the English Judiciary and Parliament. For example, it is somewhat anomalous to contend that arbitration agreements violate public policy because they "oust the jurisdiction" of courts and yet enforce arbitration awards both at law and equity. Equally asymmetrical and inconsistent is the strict enforcement of releases and covenants not to sue, both of which also arguably divest courts of otherwise competent jurisdiction. As to the perceived need to supervise judicial arbitrators, instead of devising methodologies to protect parties to arbitration agreements, the English courts consistently restricted the construction placed on numerous statutes intended to render arbitration agreements viable and legally binding.[7]

The English aversion to arbitration was largely reflected by the proclivity of U.S. courts in the nineteenth century against arbitral proceedings. In fact, the United States Supreme Court in *Hamilton v. Liverpool*[8] asserted three rudimentary precepts adverse to arbitration agreements. First, the argument said, an arbitration agreement does not constitute a sufficient basis on which to premise a stay of a judicial proceeding bottomed on the *same* causes of action arising out of or pertaining to the agreement itself. Second, specific performance is not a category of damages that can be awarded based upon an arbitration agreement, without more. Third, such an agreement would not be accorded effect as a plea at bar, "except in limited instances, i.e. in the case of an agreement expressly or impliedly making it a condition precedent to litigation that an award issue determining some preliminary questions of fact upon which any liability would be contingent."[9]

Though in the early twentieth century the Supreme Court in *dicta* fleetingly alluded to a possible new horizon that would construe arbitration agreements in a more favorable light with greater affinity toward judicial proceedings, the issue was not ripe in those few extraordinary proceedings.[10] The Supreme Court, however, in *Marine Transit Corp. v. Dreyfus*,[11] observed that, at least theoretically, the Federal Arbitration Act (the "Act") was crafted with the intent to substantially

[6] This phrase was turned into a term of art in the case of *Kill v. Hollister*, 1 Wils. 129 (1746). It has found some foundation because jurists sought analytical support for it by referring to *Coke on Littleton*, 53 v; "if a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbors, and not by sought or plea," nevertheless an "action of waste shall lye, for the place wasted cannot be recovered without a plea." See Creswell & Campbell, *Critical Comments*, *in* Scott *v. Avery*, 5 H.C.L. 811, 837, 853 (1855).

[7] *See* CHAFFEE & SIMPSON, *supra* note 18, at n.520; Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065) (Story, J.); 2 J. Story, EQUITY JURISPRUDENCE § 670.

[8] Hamilton v. Liverpool, London & Globe Ins. Co., 136 U.S. 242 (1890).

[9] *Id.*

[10] *See, e.g.*, The Atlanten, 252 U.S. 313, 315 (1920); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123–4 (1924).

[11] Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932).

and meaningfully alter the prevailing judicial penchant against arbitration.[12] Even though some of the 1925 language in the Congressional Archives is more than a shade anachronistic, it is emblematic because it constitutes the first formal and most forceful congressional pronouncement evincing that Congress rejected the judicial branch's derision of arbitration. Also, the Act marked a trend encouraging institutional arbitration. By way of example, the Federal Prison Industries Act of 1930 included an arbitration provision.[13] Another example is The Norris-La Guardia Act, which proscribed petitions for injunctive relief where a party had failed to meet the predicate of undertaking "a reasonable effort" to settle a labor dispute pursuant to arbitration.[14] Likewise, elaborate provisions providing for arbitration form part of the Railway Labor Act of 1926.[15]

B. HOMEGROWN SKEPTICISM OF ARBITRAL PROCEEDINGS

Engrafting upon a rich English common law tradition the fundamental premises accounting for the derisive attitude of U.S. courts towards arbitration would fall short of a complete and intellectually honest account. Indeed, the proposition that (i) arbitration agreements violate public policy because they divest courts of their otherwise competent jurisdiction, and (ii) arbitrators cannot be trusted to administer justice equitably absent a judicial tribunal do find their genesis in the English history of juridic development of arbitral proceedings.[16] The most pernicious tenets

[12] *See* H.R. Rep. No. 96 (1924):

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs. . . . the need for the law arises from the anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. . . . it is particularly appropriate that the action should be taken at this time where there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

[13] 18 U.S.C. § 744(g) (1930).

[14] 29 U.S.C. § 108 (1932).

[15] 45 U.S.C. § 157–159 (1926).

[16] The early history of English jurisprudence with respect to the recognition and enforcement of arbitration agreements remain mysterious and somewhat opaque. While it is somewhat established that medieval guilds and some very early maritime transactions availed themselves of arbitration as a dispute resolution methodology choice, substantial scholarship is now of a single voice in contending that its roots are formally embedded in Greek law. *See, e.g.*, Pedro J. Martinez-Fraga, The New Role of Comity in Private Procedural International Law 120 n.160 (2007), *citing to* Sheila Ager, Interstate Arbitration in Greece (1996); Thucydides, History of the Peloponnesian War, Chapter XXVIII, Lines 2 to 3; Sturges & Murphy, *Some Confusing Matters Relating To Arbitration Under the United States Arbitration Act*, 17 Law and Contemp. Probs. 580 (1952). *See also* Paul Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 597 (1927); Jones, *Development of Commercial Arbitration*, 21 Minn. L. Rev. 240, 243–244 (1927); Baum & Pressman, *The Enforcement of Commercial Arbitration*, 8 N.Y.U. L. Rev. 238, 239–249 (1930); *and* Bucklan, Textbook of Roman Law 527–528 (1921); Radin, Handbook of Roman Law 308 (1927).

of U.S. jurisprudence against arbitration, however, were cultivated in the petri dish of national legal culture and not imported from the other side of the Atlantic. These two propositions dominated judicial thinking and lawmaking (common law) until 1985. First, it was asserted that arbitration was confected to resolve simple contractual disputes between parties and not for the adjudication of complex commercial domestic or international disputes. Second, the majority view held that statutory causes of action aimed at providing a specific protected class of consumers or prospective plaintiffs with a remedy such that, unlike other claims resting upon legislatively created rights, prospective plaintiffs would serve as "private attorney-general[s] who protect the public interest."[17]

The Second Circuit Court of Appeals' analysis and holding in the seminal case *American Safety Equipment Corp. v. JT Maguire & Co., Inc*, is a paradigm illustrating these two propositions.[18]

Despite the procedural morass underlying *American Safety Equipment*, the facts are simple and didactically helpful. The licensee plaintiff, American Safety Equipment Corp. ("ASE"), filed an action in federal district court against defendant Hickok Manufacturing Co., Inc. ("Hickok") seeking declaratory relief and asserting that the license agreement entered into between the parties "was illegal and void *ab initio* and that no royalty obligations had or would accrue under it."[19] In addition, the complaint averred that the operative agreements "violated the Sherman Act because they unlawfully extended Hickok's trademark monopoly and unreasonably restricted ASE's business."[20]

Significantly, the license agreement upon which the complaint, in part, was premised[21] contained an arbitration clause.[22] Invoking this clause twelve days after the filing of the main action, defendant's assignee J.P. Maguire & Company, Inc. ("Maguire") invoked the arbitration clause seeking to arbitrate a claim for approximately $321,000 of purported royalties allegedly due under the license agreement. At that juncture, however, ASE filed a second declaratory judgment action, this time directed at Maguire, incorporating the identical claims averred against the defendant and adding a count seeking to enjoin Maguire's request for arbitration.[23] Maguire responded by petitioning the court for a stay of the declaratory judgment proceeding pursuant to the Federal Arbitration Act, 9 U.S.C. §§2–4, 6, pending complete adjudication of all arbitral issues. An identical stay was also filed as to

[17] *See, e.g.*, Waldron v. Cities Service Co., 351 F.2d 671, 673 (2d Cir. 1966). The rationale underlying this proposition is that specific statutes are tailor made to serve both private and public interests and, therefore, provide private rights for the general public that may be susceptible to certain earmarked statutory torts that transcend damages to just a single individual.

[18] *American Safety Equipment*, 391 F.2d at 821.

[19] *Id.* at 823.

[20] *Id.*

[21] *American Safety Equipment* also predicated claims on a Manufacturing Agreement entered into between the parties, which had extended their business relationship for seven years, from 1959 until 1966. *Id.* at 823.

[22] The arbitration clause in pertinent part reads:

> All controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration. *Id.* at 823.

[23] The complaint averred that: (i) the License Agreement was illegal because of the purported antitrust violations, (ii) the district court had exclusive jurisdiction to adjudicate the alleged illegality, and (iii) Maguire's request for arbitration was not viable if premised on the License Agreement because defendant's (Hickok) assignment was invalid. *Id.* at 823.

ASE's initial underlying cause against the defendant.[24] Upon formally abandoning all rights to enforce the challenged provisions of the license agreement, the defendant demanded that plaintiff arbitrate all issues pertaining to the license agreement and also moved to stay the plaintiff's declaratory relief proceeding pending the end of all arbitral labor in that arbitration. Not to be outdone, the plaintiff filed an additional motion seeking preliminary injunctive relief against this second arbitral demand as well.[25]

The district court held that the arbitration clause was broad enough to encompass all claims. It also found and ruled that arbitration of the antitrust causes of action did not violate public policy. Thus, "the judge stayed [plaintiff's] two declaratory judgment actions pending arbitration, and directed arbitration with respect to 'all claims, disputes and controversies between the parties relating to the License Agreement, including the issue as to the validity thereof.'"[26] On appeal the Second Circuit succinctly enunciated the issue before it as "whether the district court erred in staying ASE's actions and ordering arbitration of ASE's antitrust allegations."[27] The circuit court further crystallized the issue, adding a foreboding single-sentence observation after the query: "[t]he question before us is whether the statutory right ASE seeks to enforce is of a character inappropriate for enforcement by arbitration. This is a difficult issue, not often litigated."[28]

In reversing the district court's ruling and holding "that the antitrust claims raised here are inappropriate for arbitration," the Circuit Court rested its analysis on four fundamental observations.

First, it underscored that there was substantial and meaningful authority for the proposition that arbitration should not be stayed in deference to a judicial proceeding.[29] Second, the Second Circuit Court of Appeals highlighted that contrary to this plethora of authority, the case before it was distinguishable in fundamental ways. By way of example, the case at bar raised the issue of whether a claim predicated on a contract is void and, therefore, legally unsustainable because of a federal statute. Consequently, the case brought into high relief "the conflict between federal statutory protection of a large segment of the public, frequently in an inferior

[24] *Id.*
[25] *Id.*
[26] *Id.* at 823–824.
[27] *Id.* at 824.
[28] *Id.* Here the Second Circuit quoted the then seminal case *Wilko, supra* note 2. The *Wilko v. Swan* decision, which reached the Supreme Court from the Second Circuit (Wilko v. Swan, 201 F.2d 439 (2d Cir. 1953)), shall be analyzed in the next section of this analysis.
[29] Specifically, the Court underscored five cases: Fallick v. Kehr, 369 F.2d 899 (2d Cir. 1966) (holding that discharge and bankruptcy did not stay claims asserting misappropriation of partnership funds then invoked arbitration); Greenstein v. National Skirt and Sportswear Ass'n., 178 F.Supp. 681 (S.D.N.Y. 1959), appeal dismissed, 274 F.2d 430 (2d Cir. 1960) (holding that stay of arbitration proceeding pursuant to a collective bargaining agreement even where plaintiff averred that the agreement violated the Sherman Act); United States for Use and Benefit of Capolino Sons, Inc. v. Electronic and Missile Facilities, Inc., 364 F.2d 705 (2d Cir. 1966), dismissed under Rule 60, 385 U.S. 924 (1966) (holding that arbitration was appropriate in contention concerning Miller Act claim); Evans v. Hudson Cole Co., 165 F.2d 970 (3rd Cir. 1948) (approving arbitration of a claim predicated on the Fair Labor Standards Act); *and* Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967) (holding that despite averment that contract and painting arbitration clause was void *ab initio* based upon allegation of fraud in the inducement, the gravamen issue of whether the contact actually was the product of fraudulent inducement was within the ambit of an arbitration proceeding).