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A STATUTORY PROPOSAL TO DETERMINE ARBITRAL FORUMS FOR 10(b) DISPUTES

I. INTRODUCTION

In June of 1987, the United States Supreme Court handed down McMahon v. Shearson/American Express, Inc.\(^1\) McMahon overruled thirty-four years of judicial precedent\(^2\) by enforcing an arbitration provision found in a securities brokerage contract.\(^3\) This comment ventures beyond the holding of McMahon, addressing the validity of pre-dispute venue provisions imbedded within brokerage arbitration contracts.\(^4\)

\(^1\) 107 S. Ct. 2332 (1987).
\(^2\) Prior to McMahon v. Shearson American Express, 107 S. Ct. 2332 (1987), the validity of pre-dispute arbitration agreements between securities brokers and clients was governed by the seminal case of Wilko v. Swan, 346 U.S. 427 (1953). Wilko was widely hailed as barring arbitration of section 10(b) violations though its facts deal with section 12(2) of the 1933 Securities Act, rather than 12(2)'s counterpart, section 10(b) of the 1934 Securities Exchange Act.

The 1985 decision of Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985), cast doubt upon the "Wilko doctrine" and, in 1987, McMahon held "agreements to arbitrate Exchange Act claims 'enforceable'... in accord with the explicit provisions of the Arbitration Act." 107 S. Ct. at 2343 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974)). Consequently, McMahon makes it clear that brokers may rely upon pre-dispute arbitration agreements. However, a serious question arises as to how these agreements will be structured and interpreted by the courts.

\(^3\) A "brokerage contract" is defined as:
A contract of agency, whereby broker is employed to make contracts of kind agreed upon in name and on behalf of his principal, and for which he is paid an agreed commission. A unilateral contract wherein the principal makes an offer which is interpreted as promise to pay broker a commission in consideration of his producing a buyer ready, able, and willing to buy the property on the principal's terms.

BLACK'S LAW DICTIONARY 175 (5th ed. 1979).


This comment deals exclusively with 10(b) disputes. Section 10(b) provides:
At first blush, *McMahon* can be read as simply another step toward the judiciary's unqualified acceptance of arbitration as an alternative to adjudication. However, the ultimate impact of *McMahon* may be to inadvertently strike a crippling blow to Congress' and the United States Supreme Court's protectionist attitude toward plaintiffs who bring suit under section 10(b) of the 1934 Securities Exchange Act. Such an impact is possible not because of language included within the *McMahon* decision, but rather because of language that is excluded.

Limitations upon *McMahon's* impact stem from the fact that it presented the Court with but two issues: (1) whether 10(b) disputes are arbitrable; and (2) whether Rackateer Influenced and Corrupt Organizations Act (RICO) violations are arbitrable. Therefore, the impetus for granting *certiorari* to *McMahon* may have been to address the RICO issue and not because of the Court's interest in redefining the rights of 10(b) claimants. Consequently, Justice O'Connor's majority opinion is tailored to address RICO issues and begs more questions than it answers with regard to the rights of section 10(b) claimants. One of the questions *McMahon's* deficiencies pose is how to deal with pre-dispute venue agreements in the arbitral context.

This comment furnishes a brief description of: (1) the Federal Arbitration Act of 1925; (2) the Securities Exchange Act of 1934; and (3) the legal basis for venue provisions. Case analysis is limited to *McMahon*, which allowed arbitration of 10(b) disputes, and *The...*
Bremen v. Zapata Off-Shore Co., which reversed decades of judicial distrust of pre-dispute venue provisions. Addressed next are the dual issues of whether pre-arbitration venue agreements violate the 1934 Exchange Act’s anti-waiver provision, thus being rendered void as against public policy, and whether an amendment to the Federal Arbitration Act or the securities acts would effectively preserve Congress’ intent to protect investors.

It is concluded that McMahon fails to go beyond the traditional analysis espoused by its predecessor, Wilko v. Swan and provide meaningful guidance to 10(b) claimants. The McMahon opinion does little more than acknowledge each element of Wilko’s analysis and espouse an opposite conclusion. Consequently, McMahon gives brokers the opportunity to take advantage of investors because it fails to address the key issue of venue.

The following background section traces the development of each area of law which is applicable to this comment. These areas include The Federal Arbitration Act, the federal securities acts, and common law and statutory venue.

II. BACKGROUND

A. The Federal Arbitration Act

Arbitration has been called “the oldest known method of settlement of disputes between men.” King Solomon’s use of arbitration is discussed extensively in the Old Testament, and mythology abounds with decisions wrought from its colorful past. Even the Romans recognized and enforced arbitration agreements. However, for hundreds of years prior to enactment of the Federal Arbitration Act, British and American courts were hostile to the concept. Common law hostility was initially based upon both jealousy due to loss of judicial power and the fact that the English judiciary was fre-

11. See Emerson, supra note 9, at 156.
12. 5 R. POUND, JURISPRUDENCE 360 (1959).
14. Kulukundis, 126 F.2d at 983-84.
quently paid in proportion to its caseload.\textsuperscript{15}

Overbearing caseloads\textsuperscript{16} and pressure from the business community\textsuperscript{17} were the primary reasons why judicial hostility toward arbitration waned in America. Congress eventually recognized that this pressure had to be relieved. That realization, along with the pragmatic advantages of arbitration,\textsuperscript{18} resulted in congressional action. In 1925, Congress exercised its power under the commerce clause\textsuperscript{19} and enacted the Federal Arbitration Act.\textsuperscript{20} Since 1925, all arbitral disputes involving or affecting interstate and foreign commerce have been governed by the Act.\textsuperscript{21}

The Federal Arbitration Act has three major objectives. First, it binds the judiciary's hands by removing its power to refuse to submit disputes to arbitration.\textsuperscript{22} Second, arbitration agreements are placed

\begin{quotation}
15. \textit{Id.} at 983 n.14.
18. Traditionally recognized advantages of arbitration include: (1) a drastic reduction in time from complaint to resolution; (2) the ability of the parties to select their own mediator(s); and (3) significant savings in cost over court proceedings. \textit{See generally} M. Domke, \textit{Commercial Arbitration} §§ 1.01-03, 16.01-03, 25.01-06 (1968).
19. U.S. CONST. art. 1, § 8, cl. 3.

\begin{quote}
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.
\end{quote}

\textit{Id.} (emphasis added).

The fact that the Act's source of power is the supremacy clause removes any doubt that the Act controls over state law, regardless of what is stated in the text of the state code. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404-05 (2d Cir. 1959); \textit{see also} West Point-Pepperell, Inc. v. Multi-Line Industries, Inc., 231 Ga. 329, 331, 201 S.E.2d 452, 453 (1973) (wherein it was held that "the state law and policy with respect thereto [arbitration] must yield to the paramount federal law. . . . ").

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.

\textit{Id.}
on equal footing with other contracts.\textsuperscript{23} Third, any party to an arbitration agreement has the right to approach the judiciary to compel its enforcement.\textsuperscript{24} Broadly stated, the Act provides that any controversy capable of settlement by ordinary court proceedings may be arbitrated.\textsuperscript{25}

The net effect of the Act is to impose upon the judiciary a duty to encourage arbitration.\textsuperscript{26} Any ambiguity\textsuperscript{27} or doubt\textsuperscript{28} regarding the scope of arbitration is to be resolved in favor of applying the Act.\textsuperscript{29} In \textit{Prima Paint Corp v. Flood \& Conklin Manufacturing Co.},\textsuperscript{30} a case involving a commercial contract with an arbitration provision, the United States Supreme Court articulated Congress' intent behind the Act as follows:

\begin{quote}
We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts.\textsuperscript{31}
\end{quote}

Consequently, courts give strong deference to congressional intent behind the Act. They recognize that the sixty-eighth Congress carefully drafted the arbitration laws, creating a remedy to govern virtually any arbitral controversy.\textsuperscript{32} Due to the extraordinarily broad

\textsuperscript{23} See supra note 21 (providing that the possibility of revoking an arbitration contract is "as exists at law or in equity for the revocation of any contract").
\textsuperscript{24} The Arbitration Act, 9 U.S.C. § 4 (1982), provides in pertinent part:

\begin{quote}
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 an agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.
\end{quote}

\textit{Id.}

\textsuperscript{26} \textit{Kulukundis}, 126 F.2d at 984-85.
\textsuperscript{27} United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).
\textsuperscript{28} Cone, 460 U.S. at 24.
\textsuperscript{29} \textit{Robert Lawrence Co.}, 271 F.2d at 410; see also H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924) (supporting arbitration generally and advocating a liberal use of it as an alternative dispute resolution tool).
\textsuperscript{30} 388 U.S. 395 (1967).
\textsuperscript{31} \textit{Id.} at 404 (emphasis added).
\textsuperscript{32} The Federal Arbitration Act contains the following 14 separate sections:

1. "Maritime transactions" and "Commerce" defined; exception to operation of title.
2. Validity, irrevocability, and enforcement of agreements to arbitrate.
language in the Act, the only issues federal courts need determine are: (1) whether a valid arbitration agreement exists (a contract issue);88 and (2) whether the dispute to be arbitrated are within the purview of the broad congressional intent.84

The judiciary's commitment to carrying out congressional intent behind the Federal Arbitration Act has been solidified by a trilogy of cases which espouse a "presumption of arbitrability."35 A "presumption of arbitrability" is simply a catch-all phrase designed to embrace the plethora of claims the judiciary considers arbitral. This breadth includes finding arbitration applicable in almost every situation, except claims arising under section 12(2) of the 1933 Securities Act.86

4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
5. Appointment of arbitrators or umpire.
6. Application heard as motion.
7. Witnesses before arbitrators; fees; compelling attendance.
8. Proceedings begun by libel in admiralty and seizure of vessel or property.
9. Award of arbitrators; confirmation; jurisdiction; procedure.
10. Same; vacation; grounds; rehearing.
11. Same; modification or correction; grounds; order.
12. Notice of motions to vacate or modify; service; stay of proceedings.
13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.
33. See supra notes 22-25 and accompanying text.
34. This query is virtually always answered affirmatively. See National R.R. Passenger Corp. v. Missouri Pacific R.R., 501 F.2d 423, 427 (8th Cir. 1974) (Courts are limited to determining whether a claim is governed by the arbitration agreement); McAlister Bros. Inc. v. A & S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980) (mandating that courts make a "threshold inquiry" into whether the arbitration agreement covers the dispute.).
36. Section 12(2) states:
Any person who —

(2) offers or sells a security (whether or not exempted by the provisions of section 77e of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him...
The foundation of this exception is the *Wilko* decision, which undertakes to balance the congressional intent behind the Federal Arbitration Act and the Securities Acts. Therefore, to fully understand the potential impact of *McMahon*, one must also understand the policy considerations that motivated passage of both Federal Securities Acts.

**B. The Federal Securities Acts**

In response to the stock market crash of 1929, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. Congressional rationale for creating these acts was twofold. First and most importantly, Congress attempted to set the nation's economy on the road to recovery. Second, Congress sought to protect investors from fraudulent practices in the sale and trade of securities. These purposes are evinced by the 1933 act's preamble which states its purpose as follows: "To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof." Furthermore, "[t]he 1933 Act is intended to ensure that purchasers have complete information about publicly offered stocks and to protect the public from incomplete and misleading sales talk about a stock to be offered."

To obtain these objectives, the 1933 act requires securities dealers and underwriters to disclose all "material" facts when dealing with investors. Such extensive disclosure is considered crucial for
fair dealings between underwriter-dealers and investors. This sentiment is pronounced because Congress interpreted such negotiations as not possessing the crucial element of arm's length bargaining. Thus, it is clear that the 1933 act was designed to prevent fraud.

Congress again espoused the theme of fraud prevention and consumer protection one year later when it enacted the Securities Exchange Act of 1934. "The Securities Exchange Act of 1934 was intended to remedy the many abuses in connection with the trading markets which were described during the hearings which led to the securities laws. Among these abuses were massive trading by corporate insiders and the issuance of false press releases."

Congress passed the 1934 Act to protect investors, the general public and lending institutions that accept securities as collateral for loans. It extends federal regulation to securities transactions handled on all exchanges, over the counter markets and private transactions. The 1934 Act is also intended to encourage adherence to fi-

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Id.

TSC Industries, Inc. v. Northway, Inc., sets forth the test for "materiality" under rule 14a-9 as: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." 426 U.S 438, 449 (1976) (emphasis added). However, in Lyman v. Standard Brands, Inc., the court noted: "It is always extremely difficult for a court to determine with precision what effect a misstatement or omission might have on a reasonable shareholder in the process of deciding how to vote." 364 F. Supp. 794, 797 (E.D. Pa. 1973).

44. See S. REP. NO. 37, 73d Cong., 1st Sess. 1 (1933) (noting that complete disclosure is necessary to ensure the absence of "crooked promotion" and to "bring into productive channels of industry . . . capital which has grown timid to the point of hoarding. . . ."). The same argument serves as a foundation to this comment. One of this comment's contentions is that broker/investor agreements, which contain arbitration provisions, are typically negotiated at less than arm's length. See infra note 136.

45. Congress further discouraged fraud by impressing strict anti-waiver provisions into both acts. Section 14 of the 1933 Act provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1982) (emphasis added).

46. RIBSTEIN, supra note 42, at 10-1.


48. 15 U.S.C. § 78(b) (1982); see Carpenter v. Hall, 352 F. Supp. 806, 809 (S.D. Tex. 1972) (making the distinction that the 1933 Act relates to the distribution processes and the
duciary duties inherent in securities trading. Furthermore, it is strong evidence of Congress' attempts to discourage fraud and market manipulation, to control the amount of credit used in the securities market, and to protect national credit.

On its face, section 10(b) of the 1934 Act is singularly unspectacular, comprising only one short paragraph. However, the section significantly furthers consumer welfare by establishing disclosure requirements for all stock transfers. It is important to consider, therefore, that 10(b) embraces the transfer of all securities from General Motors stock, for example, traded over the New York Stock Exchange to exchanges of family stock between brothers and sisters. Since 10(b) addresses transactions involving millions of stock market investors, it is a topic which inevitably breeds misunderstandings. Consequently, 10(b) has been thoroughly litigated. Much of this litigation has centered upon express or implied waivers of 10(b)'s safeguards.

The anti-waiver provision of the 1934 Act (section 29(a)) is virtually identical to its counterpart in the 1933 Act (section 14). Section 29(a) of the 1934 Act provides that "[a]ny condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." There-
fore, to invoke section 29(a)'s protection, the plaintiff must: (1) identify a “condition, stipulation or provision,” and (2) determine that the same amounts to a waiver of statutory rights and remedies afforded securities purchasers under both securities acts.  

An attempt, by agreement, to annul an express provision of either securities act clearly amounts to a “waiver.” A more difficult characterization arises when an arbitration agreement merely restricts a right granted by the Acts. Due to of subtleties that distinguish “waivers” from mere “restrictions” it is important to keep in mind Congress’ protectionist motivation behind the securities’ acts when considering whether an agreement constitutes a “waiver.” An example of how the Court has distinguished between restrictions and waivers is McMahon.

1. McMahon v. Shearson/American Express, Inc.

The facts of McMahon are comparable to those of Wilko. In 1980-82, Eugen and Julia McMahon had various dealings with Shearson/American Express, Inc. (Shearson). During the course of these dealings, two “customer agreements” were signed. These agreements provided for the arbitration of any controversy relating to

security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

Id. (emphasis in original).

57. This comment takes the position that McMahon has created the potential for incredible abuse by securities brokers. These abuses will surface in the form of specific provisions imbedded within fine-print arbitration agreements. Potential areas of abuse include: (1) venue; (2) selection of arbitrators; and (3) the availability of punitive damages to name a few. One of this comment’s contentions is that such provisions amount to a “waiver” within the meaning of the Act and are thus void.
the McMahon's accounts. Subsequently, in October of 1984, the McMahons filed a complaint against a representative of Shearson alleging violations of 10(b) of the 1934 Securities Exchange Act. The McMahons alleged that the representative, with Shearson's knowledge, "engag[ed] in fraudulent, excessive trading on (the McMahon's) accounts" and made "false statements and omit[ed] material facts from the advice given to [the McMahons]." The complaint also alleged a RICO violation.

The district court held the arbitration agreement binding with regard to the 10(b) violation, but not binding upon the RICO claims "because of the important federal policies inherent in the enforcement of RICO by the federal courts." The second circuit affirmed the district court with regard to the RICO claims, but reversed with regard to the 10(b) controversy. The circuit court held that the "district court's decision that appellants' claims under § 10(b) and Rule 10b-5 are arbitrable is an unwarranted departure from the settled law of this Circuit and must be reversed."

The United States Supreme Court granted McMahon certiorari "to resolve the conflict among the courts of appeals regarding the arbitrability of § 10(b) and RICO claims." Justice O'Connor's majority opinion addressed each of McMahon's three arguments against arbitration: (1) that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue; (2) the arbitration agreement effects an impermissible waiver of 10(b)'s jurisdictional provisions; and (3) that arbitration weakens a plaintiff's ability to recover under the Securities Exchange Act.

The Court held, in order for the McMahon's to succeed in their

58. The arbitration provision within the McMahons's customer agreement provided:
Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc., and/or the American Stock Exchange, Inc. as I may elect.
60. Id.
61. The district court's decision was premised upon Justice White's concurrence in Byrd, 470 U.S at 224.
63. McMahon, 788 F.2d at 96.
64. 107 S. Ct. at 2336-37.
65. Id. at 2338.
66. Id. at 2339. This assertion was premised upon section 29(a) of the Exchange Act.
67. Id. at 2440.
first argument, they must show such congressional intent as "will be deducible from [the statute's] text or legislative history. . . ." The McMahons attempted to parallel Wilko's rationale by arguing that such congressional intent "can be deduced from § 29(a) of the Exchange Act" which declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the act]." The McMahon's syllogism was further premised by their reliance on section 27 of the Exchange Act which provides the district courts with exclusive jurisdiction over violations arising under the Act.70

Justice O'Connor's opinion distinguishes between the anti-waiver provisions of the 193371 and the 193472 acts. The Court noted that the 1933 Act's anti-waiver provision preserved many more rights to the investor than its counterpart in the 1934 Act.73 Consequently, the Court chose to conclude simply that:

§ 27 itself does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because section 27 does not impose any statutory duties, its waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a).74 Therefore, the McMahon's first argument failed due to the Court's decision to apply section 27 only to those provisions which create "substantive" duties.75

The Court summarily dismissed the McMahon's second argument. The Court simply quoted language from Mitsubishi Motors

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68. Id. at 2337 (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
69. Id. at 2338.
70. The McMahons argued that section 29(a), the anti-waiver provision of the Exchange Act, forbids waiver of section 27 of the Exchange Act. Section 27 provides in relevant part: "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." McMahon, 107 S. Ct. at 2338 (quoting section 27 of the Exchange Act, 15 U.S.C. § 78aa (1934)).
71. For the full text of section 14 (the anti-waiver provision of the 1933 Securities Act), see supra note 45.
72. 15 U.S.C. § 78cc(a) (1934). For the full text of section 29(a) (the anti-waiver provision of the 1934 Securities Exchange Act), see infra text accompanying note 130.
73. McMahon, 107 S. Ct. at 2338 (citing Wilko, 346 U.S. at 435).
74. Id. at 2338.
75. See infra notes 137-41 and accompanying text. (discussing McMahon's application only to "substantive" violations).
Corp. v. Soler Chrysler Plymouth, Inc.\textsuperscript{76} which clearly held that arbitration does not strip substantive rights, but rather is merely an alternative forum which will enforce those same rights.\textsuperscript{77}

The McMahon's third argument, the substance of their claim, closely paralleled a similar argument set forth in Wilko. They advanced three reasons why arbitration weakens a plaintiff's chances to recover.\textsuperscript{78} The Court dismissed each of these reasons. In doing so, the Court went as far as to admit that "the mistrust of Arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time."\textsuperscript{79} Consequently, the Court gave no credence to any of the McMahon's arguments. Justice O'Connor's majority opinion simply voided Wilko's applicability to 10(b) and removed all restraints which previously operated to curb abuse by brokers.

Therefore, it is virtually certain that the incredible breadth of McMahon will compel restructuring of brokerage arbitration agreements. Its impact will be felt most pointedly when it is seen how far these agreements are slanted to favor brokers. One area that will receive considerable attention by attorneys drafting these agreements is pre-dispute venue provisions. Consequently, one must first understand how the judiciary has dealt with pre-dispute venue provisions before their application to arbitration contracts can be fully understood. The leading case which develops the law in this area is Zapata.\textsuperscript{80}

2. The Breman v. Zapata

Prior to the Zapata decision in 1972, American courts disfavored pre-dispute forum selection clauses.\textsuperscript{81} The rationale for their

\textsuperscript{76} 473 U.S. 614 (1985).
\textsuperscript{77} 107 S. Ct. at 2339.
\textsuperscript{78} Exactly the same arguments were entertained by the Wilko court. They are: (1) "arbitration proceedings [are] not suited to cases requiring 'subjective findings on the purpose and knowledge of an alleged violator;' " (2) "arbitrators must make legal determinations 'without judicial instruction on the law,' and that an arbitration award 'may be made without explanation of [the arbitrator's] reasons and without a complete record of their proceedings;'' (3) the "[p]ower to vacate an award is limited," and that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation," McMahon, 107 S. Ct. at 2340 (citing Wilko, 346 U.S. at 435-37).
\textsuperscript{79} Id. at 2341.
\textsuperscript{80} 407 U.S. 1 (1972).
disfavor was that such clauses tended to "oust the jurisdiction" of the court or that they were simply "contrary to public policy." While many courts followed this antiquated view, a number elected to hold contra, resulting in a split in the circuits. Hence, the judicial atmosphere prior to 1972 was ripe for the United States Supreme Court to take a definitive stance and finally determine the validity of pre-dispute venue agreements.

Rather than directly decide whether pre-dispute venue provisions are viable, the Court chose to grant certiorari to Zapata. Zapata was a poor selection for two reasons: (1) it involved a case in admiralty; and (2) the subject venue provision was located within an international agreement.

Despite these impediments, the Zapata Court took bold steps designed to establish a new receptiveness toward pre-dispute venue provisions. In doing so, the Court held that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." The Court further stated that a pre-dispute venue clause should be set aside only if its opponent could make a "strong showing" that its enforcement "would be unreasonable and unjust, or the clause was invalid for such reasons as fraud or overreaching." By so holding,

84. The Court noted the agreement was "clearly a reasonable effort to bring vital security to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation." Id. at 17 (emphasis added). Furthermore, the Court also stated that its new receptiveness toward pre-dispute venue provisions "is the correct doctrine to be followed by federal district courts sitting in admiralty." Id. at 10 (emphasis added).
85. The Court noted that: "We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum." Id. at 17. The existence of an international agreement has often provided the Court with an opportunity to reverse prior law without setting precedent for courts involved with strictly inter-American fact patterns. See, e.g., Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (wherein the Court allowed arbitration of 10(b) disputes — as long as contained within an international agreement). The Scherk Court noted that: "In the context of an international contract, however, these advantages [choice of courts and venue] become chimerical since, as indicated above, an opposing party may by speedy resort to a foreign country block or hinder access to the American court of the purchaser's choice." Id. at 518.
87. Id. at 15; see also Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir. 1966). The court noted that the correct test for the validity of pre-dispute venue provisions is whether their enforcement "will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice." Zapata cited Central Contracting with approval. 407 U.S. at 10 n.11.
the Court failed to envision the extensive impact of its decision, but rather thought that it was "merely the other side of the proposition recognized by this Court in National Equipment Rental, Ltd. v. Szukhent [citation omitted], holding that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process. . . ."

The Court's newfound enthusiasm for pre-dispute venue provisions was based upon: (1) "ancient concepts of freedom of contract;" (2) pragmatics of modern, international business transactions; and (3) deference to the parties, rather than the Court's preferences. The only reason to void such an agreement would be the existence of fraud, undue influence or overweening bargaining power. Consequently, traditional concepts of venue, as discussed below, were modified by the Zapata Court only to the extent that a freely negotiated international contract, based in admiralty, could question their exclusive control.

C. Traditional Forum Selection

In the absence of a valid pre-dispute venue agreement, the issue of venue must be addressed within its statutory context. Venue is defined as: "The particular county or geographic area in which a court with jurisdiction may hear and determine a case." In short,

89. The Court appeared concerned that such provisions have the potential to be adhesive. However, the Court noted that in the instant fact pattern, the venue provision was not in the form of "boilerplate language that Zapata had no power to alter." Id. at 12-13 & n.14.
90. BLACK'S LAW DICTIONARY 1396 (5th ed. 1979). (emphasis added). Note that this comment addresses the issue of venue in contractual arbitration agreements and does not address formal judicial venue beyond analogy.

Jurisdiction has been defined as "the power and authority of a court to hear and determine a judicial proceeding." In re Estate of De Camillis, 66 Misc. 2d 882, 322 N.Y.S.2d 551, 556 (1971). The scope of jurisdiction for federal courts is governed by 28 U.S.C. section 1251 (1978). Section 1251 states:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.
(b) The Supreme Court shall have original but not exclusive jurisdiction of:
   (1) All actions or proceedings to which ambassadors, other public ministers, consuls or vice consuls of foreign states are parties;
   (2) All controversies between the United States and a State;
   (3) All actions or proceedings by a State against the citizens of another State or against aliens.

Id.

It is important to note at the outset that venue is distinct from the legal concept of "jurisdiction" which operates to empower a particular court to enter judgment. In fact, the two concepts work in conjunction to ensure that the court which ultimately adjudicates is both empowered to do so and is convenient for the parties.
the venue chosen by parties to a dispute will determine exactly where their dispute will be resolved. In strictly judicial proceedings, this decision is governed by either: (1) venue provisions imbedded within a governing statute, or (2) the general venue provisions of section 1391. However, in the context of arbitration, the issue of venue is apparently controlled by the terms of the arbitration agreement. Therefore, to determine the correct forum for an arbitral tribunal, it is important to appreciate the rationale behind judicial venue statutes.

Judicial venue has its roots firmly entwined with the earliest of English common law. Its evolution stems primarily from the fact that the duties of early juries extended beyond the interpretation of facts presented at trial. Indeed, early juries were usually comprised of witnesses and were expected to engage in their own discovery. Consequently, it was wise to have the jury originate from the same locality as the claim. Therefore, venue's purpose, from even the earliest of times, has been to provide for the convenience and efficacy of litigation.

Early American venue statutes first surfaced in 1789. These provisions were subsequently modified in 1875 to allow an action to

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91. "Judicial proceedings" are those which include no arbitration.
94. Technically, "venue" is an outright misnomer when used to designate the place of arbitration. Strictly construed, "venue" is a term which applies only to judicial forums. For purposes of this comment, "venue" is used in a broader sense, connoting that place where a dispute is finally resolved by either arbitration or the judiciary.
95. McMahon is not clear as to exactly what factors will determine the place of arbitration. Since McMahon did not address the issue, it can only be presumed that the parties will be left to decide the point for themselves.
96. Blume, Place of Trial in Civil Cases, 48 MICH. L. REV. 1 (1949). Professor Blume engages in an extensive discussion of the factors which influenced trial location from the tenth century to the present.
97. Id. at 20. Professor Blume makes this assertion at least with regard to actions involving real property. Thus, common law courts were apparently aware of the many ancillary considerations which formed the basis of modern venue statutes. At common law, these factors also included the nature of the particular claim. Id. at 20, 21, 25, 27.
98. Exactly whose convenience is another question. See 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 34 (6th ed. 1938), noting that the "convenience" element alluded to by the very early cases was often that of the King's Bench. Modern venue statutes, however, provide options for the convenience and protection of the defendant. FREIDENTHAL, KANE & MILLER, CIVIL PROCEDURE § 2.15 (1985).
99. Act of 1789, ch. 20, 1 Stat. 73, 78.
be brought in any judicial district wherein the defendant was an inhabitant or could be served.\textsuperscript{100} In 1887, Congress again acted to restrict venue by permitting suit to be brought in "any other district than that whereof [the defendant] is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the resident of either the plaintiff or the defendant."\textsuperscript{101}

Eventually, judicial pressure forced Congress to recognize that venue statutes were in dire need of overhaul. Congress responded by enacting 28 U.S.C. section 1391\textsuperscript{102} in 1948. Section 1391 provides an excellent example of how Congress (and modern courts) view the importance and rationale behind the concept of venue.\textsuperscript{103} The particular forum available to a litigant under section 1391 depends upon whether the federal court has jurisdiction solely because of diversity of citizenship;\textsuperscript{104} and whether the defendant is a corporation.\textsuperscript{108} Consequently, Congress' two primary concerns appeared to have been why the dispute was in federal court and the relative strengths of the parties.

\begin{itemize}
\item \textsuperscript{100} Act of March 3, 1875, ch. 137, 18 Stat. 470.
\item \textsuperscript{102} 28 U.S.C. §§ 1391(a)-1391(e). Section 1391 provides in pertinent part:
\begin{itemize}
\item (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.
\item (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
\item (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
\item (d) An alien may be sued in any district.
\end{itemize}
\item \textsuperscript{103} However, several commentators have indicated that the differences between venue and personal jurisdiction are either illusory or unnecessary. See Ehrenzweig, \textit{From State Jurisdiction to Interstate Venue}, 50 Or. L. Rev. 103, 113 (1971) (maintaining that venue is the functional equivalent of jurisdiction); Barrett, \textit{Venue and Service of Process in the Federal Courts — Suggestions for Reform}, 7 Vand. L. Rev. 608 (1954) (arguing that venue and personal jurisdiction should be one and the same . . . venue).
\item \textsuperscript{104} "Diversity of Citizenship" is defined as:
\begin{itemize}
\item A phrase used with reference to the jurisdiction of the federal courts, which, under U.S. Const. Art. III, § 2, extends to cases between citizens of different states, designating the condition existing when the party on one side of a lawsuit is a citizen of one state, and the party on the other side is a citizen of another state.
\end{itemize}
\item \textsuperscript{105} 28 U.S.C. § 1391(c) (1982); \textit{see also} Comment, \textit{Defining "Doing Business" to Determine Corporate Venue}, 65 Tex. L. Rev. 153 (1986) (addressing 1391(c)'s many shortcomings with respect to corporate defendants).
\end{itemize}
Under section 1391, if the plaintiff asserts federal jurisdiction based solely upon diversity, he may bring suit only in the judicial district: (1) where all defendants are located; or (2) where all plaintiffs are located; or (3) where the claim arose.\textsuperscript{106} Where the cause of action is not based solely upon diversity, the plaintiff may bring suit in the judicial district where all defendant's reside or where the claim arose.\textsuperscript{107} Furthermore, if the defendant is a corporation, section 1391(c) is applicable. Section 1391(c) allows the plaintiff to bring suit in the judicial district where the corporation is: (1) incorporated; (2) licensed to conduct business; or (3) actually conducting business. The plethora of venue options expressly provided by 1391 indicates that Congress went to great lengths to consider the relative strengths and needs of particular litigants.

Congress relied upon two recurring themes to ground their consideration of venue statutes. These themes are convenience\textsuperscript{108} and concern for the due process rights of defendants.\textsuperscript{109} Of the two concerns, a defendant's convenience receives much more discussion by both the courts and secondary authority. However, any statute which addresses venue, whether it be for the judiciary or arbitration, is best understood with these two concerns in mind.

Traditionally, the convenience concern of venue statutes has been for the defendant.\textsuperscript{110} However, there is some authority which recognizes that plaintiffs are also entitled to sympathy.\textsuperscript{111} Concern for the defendant's convenience has surfaced as protection against plaintiffs who: (1) select a distant forum to secure maximum bargaining power in settlement negotiations;\textsuperscript{112} (2) forum shop for


\textsuperscript{107} 28 U.S.C. § 1391(b) (1982).

\textsuperscript{108} Convenience is by far the most often cited rationale for venue statutes. See, e.g., Hutson v. Fehr Bros. Inc., 584 F.2d 833, 837 (8th Cir.), cert. denied, 439 U.S. 983 (1978).

\textsuperscript{109} The defendant's due process rights are guaranteed in both the judicial and arbitral context by the fifth amendment of the United States Constitution.

\textsuperscript{110} See C. Wright & A. Miller Federal Practice and Procedure § 1063 (1969) (wherein it is noted that venue statutes attempt "to insure that litigation is lodged in a convenient forum and to protect defendant against the possibility that plaintiff will select an arbitrary place in which to bring suit." (emphasis added)).

\textsuperscript{111} See Seidelson, Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions, 37 Geo. Wash. L. Rev. 82, 85 (1968). Professor Seidelson creates a syllogism to the effect that if: (1) plaintiffs usually do not frivolously file suit; and (2) defendants are, by definition, the wrong-doers; then "[i]f one must bear the inconvenience of a foreign forum . . . it should be the [wrong-doer] defendant." Id. See also Owens v. White, 342 F.2d 817, 819 (9th Cir. 1965), rev'd on other grounds on rehearing, 380 F.2d 310 (9th Cir. 1967) (There can be no presumption that a plaintiff's claims are wholly spurious.).

\textsuperscript{112} The plaintiff's bargaining power would increase by the additional cost of defending
“high verdict” juries, and (3) seek to alter applicable law by selecting forums with statutes supporting their claims.

In the context of arbitration, only the first of these concerns has merit. This is because only the first concern involves facts which have any possibility of arising during arbitration. The other two concerns are simply inapplicable.

The first concern is meritorious because it considers the possibility of a plaintiff purposely selecting a distant forum with the intent of coercing a weaker defendant into settlement. Unfortunately for brokerage house defendants, the facial appeal of this analysis falters when applied to 10(b) disputes. Its inapplicability is evinced by the fact that 10(b) actions are almost universally instituted by “weak” investors and defended by “strong” brokerage houses. Consequently, allowing the plaintiff to chose his forum would actually help promote the consumer protection theme espoused by the securities acts.

The second and third concerns of the aforementioned convenience analysis are inapplicable in the context of arbitration. “High verdict” juries are not a threat to arbitration’s efficacy because, by its very nature, arbitration has no jury. Furthermore, forum shopping is equally unlikely because a fundamental tenant of arbitration is that arbitrators must follow no law. Arbitrators are free to fashion judgments in accord with their own notions of fairness and equity.

The due process concern of venue statutes is not an area of prolific litigation. However, there is conflicting secondary authority on whether the fifth amendment establishes a minimum standard of protection for defendants below which the construction of venue statutes may not fall. As a rule of thumb, it appears that if a general

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113. A “high verdict” jury is a relative term. For example, a “high verdict” would more probably be handed in more frequently by a jury comprised of Los Angeles residents than by a jury comprised of more frugal Midwest farm workers.

114. It is beyond the scope of this comment to grapple with the issues presented by Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). Furthermore, the entire Erie issue is moot when couched in terms of arbitration analysis due to the fact that arbitrators are not bound by any body of substantive law (unless so stipulated by the parties), but rather their own notions of equity and justice. Wilko, 346 U.S. at 436.

115. See, e.g., Wilko, 346 U.S. at 436 (“[a]s their [the arbitrator's] award may be made without explanation of their reasons and without a complete record of their proceedings. . .”).

116. See Seidelson, supra note 111, at 88. (wherein it is argued that venue provisions are the result of “Congressional grace” more than constitutional mandate); c.f., Clermont, Restating Territorial Jurisdiction and Venue for State and Federal Courts, 66 CORNELL L.
arbitration venue statute grants a breadth of forum equal to that available through the judiciary, such a statute would be upheld as being within the purview of Congress’ power.

In such an instance, there would be no basis for challenging the general provision since it forges no new ground. Rather, the provision merely ensures that parties to an arbitration proceeding receive the same venue safeguards as parties to a judicial proceeding. Therefore, the key to effectively analyzing the validity of a specific arbitration venue statute is to address both the factors for and against its application and the extent by which it exceeds its judicial counterpart.

III. Analysis

The law governing venue abuse by brokers in a judicial context is unclear. Moreover, the issue of whether the courts will uphold pre-dispute venue provisions in the arbitration context is virtually unaddressed. The slight authority on point predates McMahon and hence does not consider its likely impact. This definitive lack of concrete authority begs a thorough analysis of the validity of brokerage houses’ pre-dispute venue provisions in the context of 10(b) arbitration.

Two opposing considerations should be balanced when examining the legitimacy of such provisions. These are: (1) the securities acts were designed to protect investors from unscrupulous securities dealers; and (2) arbitration agreements rightfully enjoy a strong presumption of validity. Upon these premises, two assertions may be made: (1) pre-dispute venue provisions which purport to force arbitration at a forum convenient to the broker, and not the investor, fail to uphold Congress’s protectionist intent and therefore are “unrea-
sonable" within the context of Zapata; and (2) pre-dispute venue provisions which strip 10(b) claimants of rights explicitly guaranteed by the Securities Exchange Act are voided by the Act's anti-waiver provision. These two assertions are addressed in turn.

A. Contractual Venue Provisions Must be Considered in Conjunction with Congressional Intent Behind the Securities Acts to Determine Their "Reasonableness."

There is no question that Congress created the Securities Acts in reaction to the stock market crash of 1929. It was this tremendous crash, caused in part by the hype and disingenuous conduct of brokers, which instilled in Congress a fervent desire to protect investors. Consequently, a provision which strips an investor of the securities acts' protection frustrates Congress' intent. It is asserted that such a provision is thus "unreasonable," and falls within the exception to Zapata. To support this contention, the question of "unreasonableness," as a caveat of Zapata, must be explored. One case which has done exactly this is Copperweld Steel Co. v. Demag-Mannesmann-Bohler.

Copperweld is a Third Circuit Court of Appeals case handed down in 1978, six years after Zapata. The facts of Copperweld involve a sales contract for the purchase of steel casters. The parties were Copperweld Steel Company of Ohio (plaintiff) and Demag-Mannesmann-Bohler of Germany (defendant). A purchase agreement between the parties provided that any dispute arising from the terms of their agreement would be settled by a German court. The third circuit found the pre-dispute venue provision unreasonable and unenforceable because: (1) the dispute arose in America; (2) all evidence was in America; and (3) all the witnesses were in America.

The specific test of "reasonableness" laid out by Copperweld

121. See infra text accompanying note 130 for the language of section 29, the Securities Exchange Acts' anti-waiver provision. 28 U.S.C. § 77cc(a) & (b).
122. See supra note 37-42 and accompanying text; see also Wilko, 346 U.S. at 435 (noting "it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor.").
123. 407 U.S. at 10 ("Such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."). See McMahon, 107 S. Ct. at 2339 (Justice O'Connor indicates that the anti-waiver provision of the Exchange Act is not contingent upon a showing of voluntariness by the investor, but rather whether the brokerage agreement "weaken[s] their ability to recover under the [Exchange] Act." (citing Wilko, 346 U.S. at 432)).
124. 578 F.2d 953 (3d Cir. 1978).
125. Id. at 964-66.
was whether enforcement of the venue provision "will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice." To make this determination, the court in Copperweld balanced each party's benefit and detriment in the event the venue provision was upheld. The court's analysis led it to believe that the rights of Copperweld would be impinged since they "might well have been prevented from receiving a 'fair and complete hearing. . . .'" 

Copperweld is an excellent example of how an informed court will look beyond Zapata's blind enthusiasm to consider the facts that ground a particular case. To the extent that the facts of a 10(b) arbitration proceeding are analogous to the facts of Copperweld, there is reason to believe that pre-dispute arbitral venue provisions are "unreasonable" and therefore void. The facts of Copperweld can be read to virtually parallel the facts of a 10(b) claimant.

The facts which attend a 10(b) cause of action are clear only when considered in light of the dilemma of a typical 10(b) claimant. Such an investor is usually the victim of "churning" by his broker. One of the characteristics which tip an investor to broker churning is a disproportionately high number of expensive trades. An additional component of churning which spurs an investor to seek redress is a dramatic reduction in the value of his portfolio. In either instance, it is fair to assume that many investors who are seeking 10(b) redress will be pursuing their claims while amidst severe financial chaos or possibly, bankruptcy.

Unfortunately, it is at precisely this tumultuous juncture in an investor's career that the broker's pre-dispute venue provision will be given effect. It is at this time that the investor will be forced to argue his case not before a sympathetic jury, nor before a convenient local arbitrator, but rather in a distant and prohibitively expensive arbitral forum. Consequently, a pre-dispute venue provision carries with it more than the mere possibility of injustice. Pre-dispute venue agreements carry with them an extreme likelihood that they will operate against the best interests of an investor. Therefore, it is against public policy - and the manifest intent of the securities acts - to en-
force pre-dispute venue agreements which operate to the detriment of the investor.

B. Pre-dispute Venue Agreements Which Dictate the Locus of Arbitration are Void Due to the 1934 Exchange Act’s Anti-waiver Provision.

Like section 14 of the 1933 Act, section 29(a) of the 1934 Act voids any contractual provision which purports to waive any right granted by the Act. Section 29(a) [the anti-waiver provision] states: “Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.” Therefore, to understand section 29(a)’s effect upon section 27, one must first determine if the Exchange Act’s grant of venue amounts to a provision within the meaning of section 29(a) and then consider whether a pre-dispute venue agreement amounts to a waiver thereto. These considerations are addressed in turn.

To determine if section 27 is a “provision” worthy of protection by section 29(a), it is important to ascertain the impact of section 27 upon a 10(b) cause of action. Section 27 dictates three important elements of a 10(b) claim: (1) jurisdiction; (2) venue; and (3) service of process. While jurisdiction and service of process are beyond the scope of this comment, section 27’s treatment of venue is certainly on point.

Section 27’s venue element provides that a 10(b) claimant may bring suit where: (1) the violation occurred; (2) the defendant is found; (3) the defendant is an inhabitant; or (4) the defendant transacts business. Absent section 27, a 10(b) plaintiff would be subject to the general venue provisions of section 1391(c). Section 1391(c) would provide the plaintiff with three choices of venue. These choices are: (1) where the broker is incorporated; (2) where the broker is licensed to do business; or (3) where the broker is actually

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131. McMahon directly addressed the question of section 27’s jurisdictional language. It held that section 27’s grant of jurisdiction to the federal courts was not “substantive” and therefore may be replaced by arbitration. The Court’s rationale was that arbitration was not an offensive forum, but merely an alternative forum for the enforcement of the Exchange Act’s remedies. McMahon, 107 S. Ct. at 2339-41.
132. This assertion assumes that the defendant is a corporation. If the broker is named individually, respondeat superior would probably result in the corporate brokerage house’s ultimate liability in any event.
doing business. Consequently, section 27 grants 10(b) plaintiffs much wider venue selection than is available in its absence. It appears, therefore, that when a specific provision of the consumer oriented Exchange Act significantly expands a claimant’s pre-existing rights, it is exactly the type of provision which should be protected by section 29(a).

Having determined that section 27 grants rights worthy of protection, the issue becomes: what constitutes a “waiver” of these rights. A “waiver” is defined as “an intentional and voluntary giving up, relinquishment, or surrender of some known right.” Specifically, a 10(b) claimant would have given an executory waiver. An executory waiver is “one that affects a still unperformed duty of a contracting party, as in the excuse by A of performance by B of something that A has a right to exact.” Therefore, to claim that a pre-dispute arbitral venue provision amounts to a waiver, a 10(b) claimant must prove: (1) that he knowingly relinquished venue rights provided by section 27; and (2) that such rights were of such a nature that he had the right to exact or rely upon them.

The first prong, that of knowledge, would be difficult for most investors to prove because waiver provisions are typically buried within pages of fine-print brokerage agreements. However, the requirement that a claimant know what he is relinquishing exists for the benefit of the investor and certainly not for the broker. Consequently, if the investor was unaware of the pre-dispute venue provision at its execution, a strong argument could be made that the provision is adhesionary. In such a case, the entire issue of whether section 27 may be waived would be moot as the provision would be struck from the contract.

133. S. Gifis, supra note 43, at 511-12.
135. It has been held that buyers of securities cannot contract to waive compliance with securities laws, regardless of whether the waiver was conscious or inadvertent. See Special Transp. Serv., Inc. v. Balto, 325 F. Supp. 1185 (D. Minn. 1971).
136. A full development of the question of adhesion is beyond the scope of this comment. However, the issue is aptly discussed in J. Marks, E. Johnson, Jr. & P. Szanton, Dispute Resolution in America: Process in Evolution 47 (1984) (Wherein the authors note that adhesionary contracts are often used in the real property and service industry). Additionally, such contracts may be “unconscionable” within the meaning of the Uniform Commercial Code. See 1 R. Alderman, A Transactional Guide to the Uniform Commercial Code 60-67 (1983); see also U.C.C. § 2-302 (1978): “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause at to avoid an unconscionable result.” Id.
The second prong would be much easier for 10(b) claimants to address. There is simply no question that, in the absence of a pre-dispute arbitration agreement, a 10(b) claimant has a right to rely upon section 27's venue provisions. There is no authority raising the slightest hint that section 27 may grant rights to only a particular class of 10(b) claimants. Objectively, therefore, it is evident that section 29(a) operates to void pre-dispute venue agreements.

While objective analysis appears to support section 29(a)'s application to pre-dispute venue agreements, an additional consideration was interjected by the McMahon Court. This consideration deals with the Court's curious posture with regard to section 29(a) and its effect upon substantive rights granted by the Exchange Act. McMahon addresses the issue of waiver by deciding that section 29(a) only prohibits the waiver of "substantive obligations imposed by the Act." Furthermore, section 27, was found "not [to] impose any statutory duties" and was therefore subject to waiver. Consequently, to the extent that section 27 addresses the exclusive jurisdiction of the federal courts, McMahon definitively held that it may be validly waived without concern for the impact of section 29(a).

However, as noted above, section 27 addresses more than mere jurisdiction. Section 27 also addresses the question of venue. It is through this crucial distinction, and its application in a strictly arbitral context that McMahon may be distinguished from the case at bar, and Wilko's rationale becomes more compelling.

Before distinguishing McMahon, it is important to consider the breadth of its impact and its relation to Wilko. McMahon did not completely overrule Wilko. Rather, McMahon only limited Wilko to its facts — 12(2) disputes arising under the 1933 Securities Act. In fact, McMahon interpreted Wilko's impact upon 12(2) as viable, and best understood "in the context of the Court's ensuing discussion explaining why arbitration was inadequate as a means of enforcing 'the provisions of the Securities Act, advantageous to the buyer.'" Furthermore, the Court noted that: "Scherk supports our understanding that Wilko must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue."

137. 107 S. Ct. at 2338. See supra text accompanying notes 74-77.
138. McMahon, 107 S. Ct. at 2338. Note that the facts before the court, which gave rise to this assertion, addressed only the jurisdictional element of section 27 and not its venue element.
139. Id. (quoting Wilko, 346 U.S. at 435).
140. Id. at 2339 (citing Scherk, 417 U.S. at 506).
Therefore, there are two compelling reasons to believe that McMahon’s holding with regard to section 27 is inapplicable in the context of arbitration: (1) McMahon dealt solely with the jurisdictional language of section 27; and (2) pre-dispute venue provisions are sufficiently unique — as were the facts of Wilko and its application to section 12(2) — to compel an independent evaluation of whether their enforcement would strip an investor of a “provision of the Securities [Exchange] Act, advantageous to the buyer.” Consideration of these two factors, and the fact that arbitration’s location can be far more damaging than its mere use, compels a conclusion apposite to that of McMahon. Consequently, action must be taken to address the issue of pre-dispute arbitration agreements which purport to lay venue where it is convenient to the broker and not the investor.

IV. PROPOSAL: ENSURE SECTION 27 FORUM SELECTION PRIVILEGES TO 10(b) ARBITRATION CLAIMANTS

Notwithstanding the above analysis, an equally plausible argument can be made that McMahon’s rationale with regard to jurisdiction may be extended to cover venue. Consequently, additional safeguards are necessary to preserve the venue provisions of section 27. One such safeguard is to specifically provide all 10(b) arbitration claimants with the benefits of section 27 venue. Section 10(b) claimants may benefit from section 27 by virtue of either an amendment to the Federal Arbitration Act or amendment to the 1934 Exchange Act.

Such an amendment must closely parallel the language and function of section 27 with one crucial exception. The amendment must stand on its own. It should be recognized as an independent manifestation of congressional intent. By carefully providing such status, there will be no question that compliance is mandatory. This confidence is legitimate because: (1) traditional rules of statutory construction will apply to ensure adherence to controlling stat-

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141. Id. at 2338 (quoting Wilko, 346 U.S. at 435).
142. The appropriate amendment to the Federal Arbitration Act would be to create 9 U.S.C. § 15.
143. The appropriate amendment to the Exchange Act would be to create 15 U.S.C. § 78aa(b). Note that the existing section 78aa addresses the venue of 10(b) suits filed in court. The existing text would be designated subsection (a) to accommodate subsection (b).
144. While it is true that arbitrators need not comply with laws governing the dispute before them unless directed to do so in the arbitration agreement, in the case at bar the proposed amendment will take effect before the dispute is submitted to arbitration. Consequently, there is no possibility of an arbitrator ignoring the proposed amendment’s mandate.
utes prior to submitting the dispute to arbitration; and (2) section 29(a) will remove any doubt that both the broker and investor must comply with the proposed amendment.

Therefore, to ensure 10(b) arbitration claimants receive venue protection equal to their 10(b) judicial counterparts, the following statute should be adopted:

* * * * *

LOCATION OF 10(b) ARBITRATION PROCEEDINGS

Arbitration proceedings, based upon an alleged violation of section 10(b), shall be instituted:

1. Where the defendant is found;
2. Where the defendant is an inhabitant;
3. Where the defendant transacts business;

at the discretion of the party initiating arbitration. In no instance shall forum selection be made prior to filing for arbitration.

* * * * *

Enactment of this statute would prove beneficial to investors in three crucial ways. First, it would ensure that the consumer protection attitude of the Exchange Act was not inadvertently muted by the McMahon decision. Second, it would remove any doubt as to whether brokers may fashion pre-dispute arbitration agreements to suit only the broker’s needs. Third, it would be preserved by section 29(a) (the anti-waiver provision) and withstand challenge on due process grounds.145 Most importantly, however, the proposed statute would further the single most important reason for venue statutes: convenience.146

V. CONCLUSION

The 1987 United States Supreme Court case of McMahon v. Shearson/American Express, Inc. held that brokerage houses may include arbitration provisions within client agreements. Unfortunately, the McMahon Court simply condoned section 10(b) arbitration without considering the possible repercussions of its en mass

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145. See supra notes 116-18 and accompanying text. (As the proposed statute merely ensures arbitral claimants the same venue opportunities as their judicial counterparts, there would be no basis for a due process challenge.)

146. Convenience of arbitration claimants would also be furthered to the extent that the proposed statute avoids litigation. The proposed statue clearly defines the venue rights of 10(b) arbitration claimants in light of McMahon, obviating the need for further judicial determination.
implementation. One such repercussion, which may be exploited by brokers, is the use of one-sided venue provisions.

A pre-dispute venue provision purporting to lay venue in a distant forum is particularly likely to frustrate a 10(b) claimant because such a claimant is typically insolvent. By virtue of the fact that an investor files a 10(b) claim, one may presume that he has been the victim of conduct by his broker which resulted in substantial financial losses. It would be completely inequitable, therefore, to force such an aggrieved claimant to defend his claim at a forum chosen to suit the broker's best interests. Consequently, the consumer protection rationale of the securities acts is completely circumvented by giving brokers a carte blanche mandate to fashion arbitration agreements to further only their interests.

A possible solution to abusive venue provisions is to amend either the Securities Exchange Act of 1934 or the Federal Arbitration Act. This amendment should provide an arbitration claimant with the identical choice of forums as section 27 of the Exchange Act. If such an amendment were carefully drafted to exhibit independent Congressional support, its intent would be protected by both traditional statutory interpretation and the anti-waiver provision of the Exchange Act. Hence, McMahon's worthy support for arbitration would not be tainted by brokers who may seize it as an opportunity to circumvent Congress' most fundamental intent behind the securities acts: consumer protection.

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