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## Recognition and Enforcement of Foreign Arbitral Awards in the United States: Defenses to Arbitrability

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# THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE UNITED STATES: DEFENSES TO ARBITRABILITY

## I. INTRODUCTION

For almost forty years the traditional judicial antipathy<sup>1</sup> toward arbitration of commercial disputes has been steadily eroding. This trend originated in 1947 with the enactment of the initial Federal Arbitration Act<sup>2</sup> and culminated in the recent Supreme Court decision in *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>3</sup> In that case the Court held that anti-trust claims arising from international transactions were arbitrable.<sup>4</sup>

One of the events that accelerated the courts' acceptance of arbitration, especially in international transactions, was the United States' accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention).<sup>5</sup> Although the United States participated in the 1958 New York conference that established the Convention, Congress did not ratify the Convention until 1970.<sup>6</sup> The enactment of legislation to implement the Convention reflected a conscious effort by the United States to foster international trade by ensuring the enforceability of agreements to arbitrate international disputes.

The contours of the Convention have yet to be precisely defined. Even now, for example, the federal judiciary is in the pro-

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1. See *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238, 1241-43 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, *reh'g denied*, 419 U.S. 885 (1974).

2. Pub. L. No. 282, 61 Stat. 669 (1947)(codified at 9 U.S.C. §§ 1-208 (1982)).

3. 105 S. Ct. 3346 (1985).

4. *Id.* at 3358-61. This case is discussed in detail *infra* notes 85-141 and accompanying text.

5. 9 U.S.C. §§ 201-08 (1982).

6. Pub. L. No. 91-368, 84 Stat. 692 (1970).

cess of determining in which situations an arbitration clause in an international agreement will *not* be enforced. These determinations are extremely important because the courts of a contracting state can withhold from arbitration only those issues not capable of settlement by arbitration. Further, recognition and enforcement of the award can be refused if the recognition would violate the public policy of the country where enforcement is sought.<sup>7</sup>

Domestic law is, of course, the yardstick for measuring the arbitrability of a specific issue.<sup>8</sup> In the United States a particularly troubling area has been the arbitrability of violations of securities laws<sup>9</sup> and antitrust laws.<sup>10</sup> The question of whether statutorily created rights can be submitted to international arbitration has presented to the federal judiciary complex issues of competing public policy concerns.

The antitrust area has been an especially problematical one, but the Supreme Court recently held that antitrust issues were indeed capable of arbitration in an international setting.<sup>11</sup> Beyond the evolving judicial trend favoring arbitration, as represented by *Mitsubishi*, the judicially created dichotomy between domestic and international arbitration agreements has created an unsettling inconsistency in antitrust law. The practical result of the *Mitsubishi* decision reflects the pragmatic attitude courts seem to have taken toward international arbitration.<sup>12</sup>

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7. See *infra* subpart III(B).

8. See *Mitsubishi*, 105 S. Ct. at 3360.

9. See *Wilko v. Swan*, 346 U.S. 427 (1953); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). These two cases are discussed *infra* notes 48-73.

10. See *Mitsubishi*, 105 S. Ct. 3346 (1985).

11. *Id.* at 3358-61.

12. Cf. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Oil Co.*, 407 U.S. 1 (1972). A similar distinction between domestic and international parties is made in the area of bankruptcy law. In *Fotochrome, Inc. v. Copol Co.*, 517 F.2d 512 (2d Cir. 1975), the court of appeals held that the automatic stay of bankruptcy did not preclude a foreign entity from continuing with an arbitration procedure begun before the debtor (*Fotochrome*) filed the petition in bankruptcy. The court relied on *Scherk*, 417 U.S. 506 (1974), and found that the treaty obligation under the Convention superseded the Bankruptcy Code. The court conceded that domestic claimants might be at a disadvantage because foreign litigants would not be stayed, but allowed Copol (the foreign litigant) to enforce its award. 417 F.2d at 519-20.

## II. THE FEDERAL ARBITRATION ACT AND THE UNITED NATIONS CONVENTION

### A. *The Federal Act*

The original Federal Arbitration Act (the Act) "establishe[d] by statute the desirability of arbitration as an alternative to the complications of litigation."<sup>13</sup> The Act's narrow scope, however, seriously undercut its effectiveness. As one example, the Act specifically excepted employment contracts from the ambit of its coverage.<sup>14</sup> Additionally, the Act lacked any streamlined procedure for the enforcement of awards. Arbitration agreements were required to specify the court in which an order confirming the award could be made,<sup>15</sup> and a successful foreign party was forced to bring a common-law action on the award, alleging an independent basis of jurisdiction such as diversity of citizenship.<sup>16</sup>

By far the most serious defect in the original Act was the problem of reciprocity. Because the United States was not initially a signatory to any agreement concerning the recognition and enforcement of foreign arbitral awards, American parties faced significant problems in enforcing awards in foreign countries.<sup>17</sup> Thus, in international transactions, the Act presented problems for parties both in the United States and abroad.

These problems contributed to a change in United States policy toward the procedure for recognition and enforcement of arbitrable awards. This change was reflected in the United States' participation in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, although Congress did not accede to the Convention at its inception in 1958.<sup>18</sup> In fact, it was not until 1970 that the United

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13. *Wilko v. Swan*, 346 U.S. 427, 431 (1953). See also *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

14. Specifically, the Act excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1982).

15. 9 U.S.C. § 9 (1982).

16. Cf. M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* 361 (1968).

17. See Domke, *American Arbitral Awards: Enforcement in Foreign Countries*, 1965 U. ILL. L.F. 399, 400-01.

18. See Quigley, *Accession by the United States to the United Nations Convention*

States finally acceded to the Convention by adding an entirely new chapter to the Federal Arbitration Act.

The 1970 amendment to the Act, Chapter II,<sup>19</sup> eliminated some of the practical impediments to enforcement of foreign awards in the United States, particularly the reciprocity problems. As a result, although troubling issues remain regarding the Convention and its implementing legislation, the Convention has succeeded in bringing increased certainty and predictability to international commercial transactions.

Chapter II also clarified and simplified the procedure for enforcing arbitration agreements and awards. The new chapter identifies which agreements and parties are covered under the Act.<sup>20</sup> In addition, the United States district courts now have original jurisdiction over proceedings under the Convention<sup>21</sup> so that litigants need not plead diversity to establish an independent basis for jurisdiction.<sup>22</sup> Chapter II also resolves a number of other procedural issues.<sup>23</sup>

Under the Act a court with jurisdiction now has the power, and the obligation, to order an arbitration reference in accordance with the agreement of the parties, whether within or without the United States.<sup>24</sup> Although the courts retain some discre-

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on the Recognition and Enforcement of Foreign Arbitral Awards, 70 YALE L.J. 1049, 1059-60, 1074-76 (1961).

19. Pub. L. No. 91-368, 84 Stat. 692 (1970)(codified at 9 U.S.C. §§ 201-208 (1982)). See S. EXEC. REP. No. 10, 90th Cong., 2d Sess. 6-7 (1968); S. REP. No. 702, 91st Cong., 2d Sess. 9-10 (1970).

20. Only agreements under the Convention are governed by the procedural provisions of Chapter II domestic litigants are relegated to Chapter I. In addition, only commercial relationships are subject to the Act's provisions at all. 9 U.S.C. § 202 (1986). Thus, only commercial transactions involving parties of U.S. citizenship and foreign parties may avail themselves of the Act. It was thought that exempting domestic litigants would benefit foreign commerce and prevent the effecting of any change in state law through the supremacy clause. See S. REP. No. 702, 91st Cong., 2d Sess. 6-7 (1970). See also U.C.C. § 1-105 (1977).

21. 9 U.S.C. § 203 (1982).

22. See S. REP. No. 702, 91st Cong., 2d Sess. 7 (1970).

23. 9 U.S.C. § 204 (1982) provides, *inter alia*, that venue is proper in the district where the parties agree to arbitrate their dispute. In addition, 9 U.S.C. § 205 (1982) provides for a clear right to remove a case under the Act to federal court. The original Act contained no specific provision governing removal to the federal courts. In *Prima Point Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967), the Supreme Court held that arbitration agreements concerning interstate and foreign commerce were within the bailiwick of federal law. *Id.* at 405-07. Section 205 of the amended Act codified this rule.

24. 9 U.S.C. § 206 (1982).

tion over the manner of exercising this power, a district court would rarely require that arbitration take place in the United States rather than in the location agreed upon by the parties.<sup>25</sup> The Act also provides a three-year statute of limitations to bring an action to enforce an award<sup>26</sup> and directs that the Convention control the grounds upon which a refusal to enforce or a deferral of an award can be made.<sup>27</sup> In the event of a conflict between the Convention and Chapter I of the Federal Arbitration Act, the Convention shall control.<sup>28</sup> Thus, it is the Convention itself that limits the obligation to recognize and enforce arbitration agreements and awards.

### B. *The Convention*<sup>29</sup>

The Convention applies to all "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and to awards "not considered as domestic awards in the State where their recognition and enforcement is sought."<sup>30</sup> The Convention, thus, establishes a distinction between "domestic" awards and all other awards. Article I(3) permits a signatory nation to limit the applicability of the Convention, "on the basis of reciprocity," to awards made in another contracting state and to disputes arising from commercial relationships.<sup>31</sup>

Article II provides bases for challenging a reference to arbitration. Article II(1) of the Convention requires the contracting state to refer arbitration agreements if they are in writing<sup>32</sup> and the subject matter of the dispute is "capable of settlement by arbitration."<sup>33</sup> Thus, a litigant wishing to avoid enforcement of

25. See H. REP. NO. 1181, 90th Cong., 2d Sess. 4 (1970).

26. 9 U.S.C. § 207 (1982). See also S. REP. NO. 702, *supra* note 22, at 8.

27. 9 U.S.C. § 207 (1982).

28. *Id.* § 208 (1982).

29. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (entered into force Dec. 29, 1970). For the text of selected articles of the Convention, see the appendix.

30. Art. I(1), 21 U.S.T. at 2519. Art. I(2) provides that awards made by permanent arbitral bodies are included in the definition of awards under the Convention. *Id.*

31. Art. I(3), *id.* A number of signatory nations have made both of these express declarations. See *id.* at 2561-66.

32. *Id.* at 2519.

33. *Id.*

the agreement's arbitration clause can assert the defense that under the domestic law of the state in which reference to arbitration is sought the subject matter of the dispute is not capable of settlement by arbitration. In addition, article II(3) provides that arbitration is not required if a court in the state where reference is sought determines that the agreement is "null and void, inoperative or incapable of being performed."<sup>34</sup> This condition permits a litigant to raise a defense based, for example, on fraud in the inducement, illegality, or other matters of public policy. This provision also gives rise to the defense of waiver.

Article III of the Convention requires all signatory nations to recognize foreign arbitral awards.<sup>35</sup> Each nation has discretion to determine the procedures to be used in enforcing the awards, but the Convention stipulates that foreign awards should not be discriminated against in favor of domestic awards.<sup>36</sup>

The enforcement of arbitration awards is subject to a number of defenses. Article V provides the losing party in arbitration with seven grounds on which to attack the award's validity.<sup>37</sup> Five of these defenses are mechanical in nature and can be resolved with a minimum of litigation at the enforcement stage. These basic defenses are (1) that the arbitration agreement was invalid, either under the law to which the parties subjected it or under the law of the country where the award was made;<sup>38</sup> (2) that the aggrieved party lacked notice and the opportunity to be heard;<sup>39</sup> (3) that one party did not agree to submit a particular issue to arbitration;<sup>40</sup> (4) that the arbitral procedure or the composition of the arbitral authority was improper;<sup>41</sup> and (5) that the award was suspended or is not yet binding.<sup>42</sup>

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34. *Id.*

35. Art. III, *id.*

36. *Id.* The specific documentation required to prove the foreign award is set out in art. IV of the Convention. *Id.* at 2519-20. If the art. IV requirements are satisfied, the burden of proof then shifts to the party against whom enforcement is sought to show the invalidity of the award under one of the grounds listed in art. V. See Art. V, *id.* at 2520.

37. *Id.* at 2520.

38. Art. V(1)(a), *id.* Art. VI authorizes a temporary stay, if adequate security is given, during the period the award is under attack in the country where it was made. *Id.*

39. Art. V(1)(b), *id.*

40. Art. V(1)(c), *id.* The parts of the award that the parties agreed to submit to arbitration may still be enforced if severable from the rest of the award. Art. V(1)(c), *id.*

41. Art. V(1)(d), *id.*

42. Art. V(1)(e), *id.*

Article V also provides for two additional enforcement defenses that have created more troublesome issues for the courts. The first of these is almost identical to the subject matter defense to arbitration reference established by article II(1). If a court or other competent authority in the country where enforcement is sought determines that the subject matter was "not capable of settlement by arbitration under the laws of that country," recognition of the award may be refused.<sup>43</sup> Under the second defense, if recognition would violate that nation's public policy, it can also be refused.<sup>44</sup> This second defense will, in many circumstances, function like the inoperability defense to arbitration reference created under article II(3).

Finally, article XIV provides that a signatory nation can bind other signatories "only to the extent that it is itself bound to apply the Convention."<sup>45</sup> This language, together with the reciprocity language in article I,<sup>46</sup> provides a defense based on lack of reciprocity.

### III. THE DEFENSES IN THE UNITED STATES

As a practical matter, the only serious litigation arising from the incorporation of the Convention is in the area of defenses to arbitration, either against the ordering of a reference to arbitration in accordance with the parties' agreement or against enforcement of a foreign arbitral award. In both areas the central issue is the application of the two defenses discussed above: the public policy and subject matter defenses. The primary focus of this Note, therefore, is on these defenses. A brief discussion will also be provided of the reciprocity and waiver defenses.

As a rule, each defense may be raised at either of two points in the arbitration process. The first is when an adverse party brings an action to compel arbitration under the Federal Arbi-

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43. Art. V(2)(a), *id.* This defense differs from the subject matter defense to arbitration reference because of the additional phrase "under the law of that country." A litigant challenging a reference could argue that arts. II(1) and V(2)(b) should be read together so that the art. V(2)(b) standard—subject matter not capable of settlement *under domestic law*—should also govern the art. II(1) defense. See *infra* text accompanying note 137.

44. Art. V(2)(b), *id.*

45. *Id.* at 2522.

46. See *supra* note 31 and accompanying text.



tration Act; the second is at the enforcement stage of the process. Differences may arise, however, both conceptually and practically, depending on the stage at which the defense is raised. To facilitate a discussion of the distinctions between asserting a successful defense *vel non* at the two stages, the contours of the substantive defenses are set out first.

### A. *The Public Policy and Subject Matter Defenses*

The ultimate inquiry of whether a dispute will be referred to arbitration or whether the foreign award will be enforced is a question of public policy.<sup>47</sup> Since the amenability of an issue to arbitration is generally determined by public policy considerations, the subject matter and public policy defenses are largely interchangeable. As a result, both the courts, and this Note, treat them as one defense.

#### 1. *Actions Brought Pursuant to Securities Laws*

Actions brought pursuant to statutory rights created by the Securities Act of 1933 (the 1933 Act)<sup>48</sup> are not arbitrable.<sup>49</sup> In *Wilko v. Swan*,<sup>50</sup> the plaintiff brought an action against a securities brokerage firm pursuant to section 12(2) of the 1933 Act<sup>51</sup> and alleged that the defendant induced him to purchase stock through false representations.<sup>52</sup> The defendants moved to stay the action pursuant to the original Federal Arbitration Act.<sup>53</sup> The district court denied the motion, but the Second Circuit Court of Appeals, by a divided vote, reversed and held that prospective agreements to arbitrate securities disputes were not prohibited by the 1933 Act.<sup>54</sup> The United States Supreme Court, however, reversed the Second Circuit.

The Supreme Court found that, although the Federal Arbi-

47. Cf. *Mitsubishi v. Soler Chrysler-Plymouth Inc.*, 105 S. Ct. 3346 (1985).

48. 15 U.S.C. §§ 77a-77bbbb (1982).

49. Causes of action implied under the 1934 Act may suffer a different fate. See *infra* notes 74-82 and accompanying text.

50. 346 U.S. 427 (1953).

51. 15 U.S.C. § 771(2) (1982).

52. 346 U.S. at 428-29.

53. Pub. L. No. 282, § 3, 61 Stat. 669, 670.

54. 346 U.S. at 429-30. See also *Wilko v. Swan*, 107 F. Supp. 75 (S.D.N.Y. 1952), *rev'd*, 201 F.2d 439 (2d Cir. 1953).

tration Act evidenced a congressional policy favoring arbitration, section 14 of the 1933 Act<sup>55</sup> prohibited the arbitration of disputes arising under the 1933 Act. The Court held that the arbitration agreement was a "stipulation" waiving compliance with a provision of the 1933 Act and, therefore, violated section 14 of that Act.<sup>56</sup> In the Court's view, section 14 prohibited the waiver of "the right to select the judicial forum"<sup>57</sup> and must have been intended to apply to waiver of the right to judicial trial and review.<sup>58</sup>

The Court in *Wilko* recognized that the Federal Arbitration Act and the Securities Act of 1933, as well as the policies underlying each, were in conflict. The Court held, however, that agreements to arbitrate securities disputes were void because the arbitration clause restricted access to a judicial forum, contrary to the intent of Congress in passing the 1933 Act.<sup>59</sup>

When confronted with an international dispute, the Supreme Court again balanced the policies behind the two acts, but reached a contrary conclusion. In *Scherk v. Alberto-Culver Co.*,<sup>60</sup> the Supreme Court held that an arbitration clause between an American company and a German citizen was valid even though the plaintiff, an American company, had brought an action under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act).<sup>61</sup>

In *Scherk* the plaintiff, Alberto-Culver, had purchased the defendant's business enterprises along with all the rights those enterprises held to trademarks in certain cosmetic goods. The contract of sale contained a number of express warranties by the defendant seller that he possessed the sole and unencumbered rights to the trademarks. The agreement also contained an arbitration clause that purported to cover "any controversy" arising

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55. 15 U.S.C. § 77(2) (1982).

56. Section 14 provides:

Any 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).

57. 346 U.S. at 434-35.

58. *Id.* at 437.

59. *Id.* at 438.

60. 417 U.S. 506 (1971).

61. *Id.* at 519-21. The Securities Exchange Act of 1934 is codified at 15 U.S.C. §§ 78(a)-78kk (1982). Section 10(b) of the Act is codified at 15 U.S.C. § 78j (1982).

out of the agreement and specified that arbitration would take place in Paris under the rules of the International Chamber of Commerce. The agreement also provided, however, that resolution of any dispute was to be governed by the law of Illinois, the plaintiff's principal place of business.<sup>62</sup>

After discovering that the trademarks in question were heavily encumbered, Alberto-Culver tendered the property back to the defendant and offered to rescind the contract. When Scherk refused, Alberto-Culver brought an action in a federal district court in Illinois. The complaint alleged that Scherk's misrepresentations of the trademarks' status violated section 10(b) of the 1934 Act.<sup>63</sup> The district court, relying on *Wilko v. Swan*, denied Scherk's motion to dismiss and enjoined him from proceeding with arbitration in Paris. The Court of Appeals for the Seventh Circuit affirmed the decision,<sup>64</sup> but the United States Supreme Court reversed.

The Supreme Court distinguished the facts of *Wilko* and held its reasoning inapplicable to the dispute at issue. First, the Court asserted that the plaintiff's theory rested not on any special statutory right, as was the case in *Wilko*, but only on the judicially created cause of action under section 10(b) of the 1934 Act.<sup>65</sup> Second, the Court characterized the agreement in *Scherk* as a "truly international" one, which required consideration of significantly different policies than had been applied in *Wilko*.<sup>66</sup> The Court found that the overwhelming policy favoring arbitration was determinative: "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [the purposes of certainty and order in international dispute resolution], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."<sup>67</sup>

Finally, the Court characterized the arbitration clause as "a

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62. 417 U.S. at 508.

63. *Id.* at 509.

64. *Id.* at 510.

65. *Id.* at 513-14.

66. *Id.* at 515-16.

67. *Id.* at 516-17. The Court also found *Wilko* inapposite because in the international context a foreign adversary could block a United States litigant from access to the courts by speedy resort to a foreign court. Thus, the danger of waiver does not seem as great. *Id.* at 518.

specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the suit." As a result, the Court held that the agreement should be respected and enforced.<sup>68</sup>

Justice Douglas took the majority to task for failing to provide any substantial analysis of the case in accordance with *Wilko*. Specifically, he argued that the majority failed to consider whether securities were involved in *Scherk* or whether section 10(b) was violated.<sup>69</sup> Further, Justice Douglas found no reason that the "'international contract' talisman"<sup>70</sup> should somehow dilute the protection offered American investors. Finally, Justice Douglas noted that foreign entities could take advantage of this international exception to the securities law and require aggrieved American investors to face the uncertainty of foreign arbitration, if they could even afford to avail themselves of that remedy.<sup>71</sup>

Although the *Scherk* majority made only brief mention of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Court clearly believed its decision was consistent with the congressional intent in acceding to that treaty.<sup>72</sup> The *Scherk* decision can be construed as a logical step in the evolving judicial trend favoring arbitration, especially in international disputes in which concerns for reciprocity and retaliation support recognition and enforcement. In *Wilko* no such countervailing concerns were present. Instead, the issue confronting the Court was one of conflicting congressional policies. As a result, the Court encountered little difficulty in asserting the priority of

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68. *Id.* at 519-20. See also *id.* at 514. In this analysis the Court relied heavily on *The Bremen v. Zapata Off-Shore Oil Co.*, 407 U.S. 1 (1972), in which the Court concluded that a forum selection clause "should control absent a strong showing that it should be set aside." *Id.* at 15. In *Bremen* the contract provided that all disputes arising under the contract take place in the High Court in London. Finding no infirmities in the agreement, the Court enforced the clause.

69. 417 U.S. at 525. Douglas' dissent focused in part on the definitional aspects of the case, which the majority overlooked.

70. *Id.* at 529.

71. *Id.* at 533. This final criticism of the *Scherk* opinion raises an interesting antitrust question that will be examined later: whether a foreign entity can protect itself from liability under the securities or antitrust laws of the United States merely through the use of an arbitration clause in its agreement with a United States entity? The *Scherk* opinion suggests an affirmative answer to this question. This issue will be discussed in subpart III(A)(2).

72. *Id.* at 520 n. 15.

the securities laws over the arbitration clause.

In *Scherk*, however, the Court could have held that violations of the securities laws were not issues capable of settlement by arbitration, despite the substantial international policy concerns on which it relied.<sup>73</sup> Article II(1) of the Convention, when read in conjunction with article V(2)(b), would surely have provided a sufficient basis for such a conclusion. That the Court declined to reach this result reflects a pragmatic attitude toward international arbitration. Although the international policy concerns were substantial, the Court could have decided the other way.

Recent district court cases have added an interesting wrinkle to the analysis of *Wilko* and *Scherk*. In *Land v. Dean Witter Reynolds, Inc.*,<sup>74</sup> for example, a district court in Virginia found that implied causes of action under the 1934 Act were capable of arbitration, at least under some circumstances. The court, relying upon the strong federal policy favoring arbitration, concluded that when the implied cause of action is intimately related to an arbitrable state claim, no benefit would accrue from severing the claims. As a result, the court held that the implied cause of action in that case, which arose under section 10(b) of the 1934 Act, should be submitted to arbitration.<sup>75</sup> This decision arguably cuts against the *Scherk* Court's emphasis on the importance of international obligations and comity. An argument could be made, however, based on the distinction made in *Scherk*,<sup>76</sup> that only statutory claims, and not implied causes of action, should be immune from arbitration.<sup>77</sup>

The Supreme Court opened the door for the *Land* court's treatment of related claims in *Dean Witter Reynolds, Inc. v.*

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73. It should be noted that *Scherk* was a 5-4 decision.

74. 617 F. Supp. 52 (E.D. Va. 1985).

75. *Id.* at 54. See also *Jarvis v. Dean Witter Reynolds, Inc.*, 614 F. Supp. 1146 (D. Vt. 1985); *Finn v. Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985); *Green v. Shearson Lehman/Am. Express, Inc.*, No. 85-1368 (E.D. Penn. Sept. 10, 1985). But see *Rojas Caranon v. Smith Barney, Harris Upham & Co.*, 612 F. Supp. 996 (S.D. Fla. 1985).

76. See *supra* note 65 and accompanying text.

77. After *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), it would seem that to preserve this immunity, the statute would have to contain a prohibition of the waiver of a judicial forum similar to the one in *Wilko*. In addition, the continued validity of the distinction between statutory and implied causes of action now appears uncertain. See *Finn v. Davis*, 610 F. Supp. 1079, 1082-83 (S.D. Fla. 1985) (holding that a statutory claim under RICO, 18 U.S.C. §§ 1961-60 (1982), was arbitrable).

*Byrd*.<sup>78</sup> In *Byrd* the Court held that state law causes of action must be submitted to arbitration even if the state law issues were intertwined with federal claims under the 1934 Act.<sup>79</sup> In so doing, the Court noted the strong Congressional policy in favor of arbitration. The district courts have read *Byrd* to support the conclusion that implied causes of action under the 1934 Act should be submitted to arbitration, at least when closely connected with state causes of action.<sup>80</sup> Justice White, concurring in *Byrd*, explicitly advanced this position on the ground that the language in the 1933 Act, which barred arbitration in *Wilko*, was "literally inapplicable"<sup>81</sup> to actions brought under the 1934 Act.

*Byrd* and its progeny seem to have narrowed the scope of securities law issues that cannot be subject to arbitration. Although Justice White's concurrence expressly supported the arbitrability of causes of action implied under the 1934 Act, the majority refused to go that far because the question was not before the Court.<sup>82</sup> Even limited to its disposition of the state law issues, however, *Byrd* is indicative of the continuing trend toward the judicial recognition of agreements to arbitrate disputes.

## 2. Antitrust Actions

As the Court of Appeals for the Second Circuit observed, "The public policy in favor of international arbitration is strong. . . . [and] the 'public policy' limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."<sup>83</sup> This policy, however, is in direct conflict with the purposes of the remedial provisions of the antitrust laws.<sup>84</sup> *Mit-*

78. 105 S. Ct. 1238 (1985).

79. *Id.* at 1241.

80. See cases cited *supra* notes 74-75.

81. 105 S. Ct. at 1244.

82. *Id.* at 1240 n. 1.

83. *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975). See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1971); *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969 (2d Cir. 1974); *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980).

84. See *Judice's Sunshine Pontiac, Inc. v. General Motors*, 418 F. Supp. 1212 (D.N.J. 1976). See also *Annot.*, 3 A.L.R. FED. 918 (1970).

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*<sup>85</sup> represents the Supreme Court's effort to balance these two policies. Because of its importance in the area of international arbitration, the *Mitsubishi* decision will be discussed in some detail.

Mitsubishi Motors Corp. was a Japanese corporation with its principal place of business in Japan. In 1970 Mitsubishi entered into a joint venture with Chrysler International, S.A., to sell certain vehicles made by Mitsubishi through Chrysler dealers outside the United States. Soler, a Puerto Rican corporation, became a Chrysler dealer in 1979 when it entered into separate distributor and sales agreements with Chrysler and Mitsubishi. Both sales agreements contained an arbitration clause that provided: "All disputes . . . in relation to . . . [the sales agreement] . . . or for breach thereof . . . shall be finally settled by arbitration in Japan."<sup>86</sup>

During 1981 Soler found it difficult to sell cars and decided it would be more profitable to "transship" cars from Puerto Rico to other markets. Mitsubishi and Chrysler, however, refused to assent to this proposal.<sup>87</sup> Mitsubishi eventually withheld shipment of vehicles to Soler, and in February 1982 Soler disclaimed responsibility for the vehicles. On March 15, 1982, Mitsubishi brought suit against Soler in federal district court in Puerto Rico for breach of the sales procedure agreement and petitioned for an order compelling arbitration pursuant to the Federal Arbitration Act and its incorporation of the Convention.<sup>88</sup>

Soler denied the allegations and filed a counterclaim alleging violations of the Sherman Act,<sup>89</sup> the Automobile Dealers' Day in Court Act,<sup>90</sup> the Puerto Rican Dealers' Act,<sup>91</sup> and the Pu-

85. 105 S. Ct. 3346 (1985), *modifying* 723 F.2d 155 (1st Cir. 1983).

86. 723 F.2d at 157. The agreement provided:

All disputes, controversies or differences which may arise between [Mitsubishi and Soler] out of or in relation to Articles I-B through V of [the sales procedure agreement] or for breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

*Id.* The sales procedure agreement was governed by Swiss law. *Id.* at 159 n. 3.

87. The two corporations refused to allow transshipment of the vehicles because they were unsuitable for either the United States or Latin America markets and because transshipment might possibly have interfered with voluntary import restraints by the Japanese. 105 S. Ct. at 3349 n. 1.

88. 723 F.2d at 157.

89. 15 U.S.C. §§ 1-7 (1982).

90. 15 U.S. §§ 1221-25 (1982).

erto Rican antitrust and unfair competition statute.<sup>92</sup> The district court ordered arbitration of the counterclaims<sup>93</sup> along with Mitsubishi's claims against Soler. Soler appealed this order on two separate grounds: first, that the statutory counterclaims were beyond the scope of the arbitration clause; and second, that, in any event, the Sherman Act claims were nonarbitrable as a matter of law.<sup>94</sup>

The First Circuit Court of Appeals readily concluded that the arbitration clause was valid<sup>95</sup> and that Soler's counterclaims were, in large part, within the scope of the clause.<sup>96</sup> The arbitrability of the antitrust claims, however, presented the court with a more complex issue.

To resolve this issue, the court considered the following three interrelated issues: (1) whether the antitrust exception to domestic arbitration applied to international disputes and comported with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (2) whether the *Scherk* doctrine proscribed the application of the antitrust exception; and (3) whether the district court should sever the action if the antitrust claims were held nonarbitrable.<sup>97</sup>

The court first noted that in the case of domestic contracts the unanimous judicial rule was that antitrust issues were not arbitrable.<sup>98</sup> As support for this proposition, the court cited *American Safety Equipment Corp. v. J.P. Maguire Co.*<sup>99</sup> and the four reasons that the Second Circuit had put forth in that case. First, antitrust law is vital to a free economy and private suits help to enforce this law; second, if arbitration clauses were enforceable, parties might employ contracts of adhesion to deny claimants a forum; third, the arbitration procedure is ill-equipped to handle the complexities of antitrust law; and fourth,

91. P.R. LAWS ANN. tit. 10, § 278 (1978).

92. P.R. LAWS ANN. tit. 10 § 257 (1978).

93. The district court ordered arbitration of all the counterclaims except for two and a portion of a third. See 105 S. Ct. at 3351 & n. 7.

94. 723 F.2d at 158.

95. *Id.* at 158-59.

96. *Id.* at 159-61. The court noted that in interpreting the arbitration clause, all doubt was to be resolved in favor of arbitration. *Id.* at 159.

97. *Id.* at 162.

98. See *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968); Annot., 3 A.L.R. FED. 918 (1970).

99. 391 F.2d 821 (2d Cir. 1968).



antitrust decisions are too important to entrust to businessmen.<sup>100</sup>

The court also dismissed the argument that enforcement of United States antitrust laws in the international community would be viewed as "parochial" by other nations. As the court noted, both the European Economic Community, under the treaty of Rome, and the Federal Republic of Germany have similar antitrust provisions.<sup>101</sup> The court then considered what it called "the obverse question": whether any policy considerations supported extension of the nonarbitrability rule to international transactions. The court concluded that because of the increasing international nature of business transactions, the nonarbitrability rule, if not extended, would be limited "to the most minor and insignificant of business dealings."<sup>102</sup> Having determined that the antitrust exception to arbitrability was still viable, even in an international context, the court turned its attention to the text of the Convention.

After an extensive analysis of articles II and V of the Convention,<sup>103</sup> the court concluded that "an agreement to arbitrate antitrust issues is not 'an agreement within the meaning of' Article II(3) of the Convention because such an agreement does not concern a 'subject matter capable of settlement by arbitration,' as required in Article II(1)."<sup>104</sup> Thus, any award would be unenforceable under article V(2)(a).<sup>105</sup>

The court of appeals recognized that the holding in *Scherk* posed a "considerable roadblock" to this analysis,<sup>106</sup> but justified

100. 723 F.2d at 162 (citing *American Safety*, 391 F.2d at 826-27).

101. *Id.* at 163. The court was attempting to distinguish *Mitsubishi* from *The Bremen v. Zapata Off-Shore Oil Co.*, 407 U.S. 1 (1972), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). As further support for its conclusion, the court quoted Douglas' dissent regarding the ability of foreign entities to insulate themselves from antitrust liability through the use of arbitration clauses.

102. *Id.* at 163.

103. *Id.* at 164-66.

104. *Id.* at 166.

105. The court noted that several commentators had predicted this construction, though not with unanimous approval. *Id.* at 165-66. See Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Arbitral Awards*, 3 Sw. U.L.R. 1, 8 (1971); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 753 n. 83 (1971); Quigley, *supra* note 18, at 1064.

106. 723 F.2d at 166.

its conclusion by distinguishing the policies and facts of *Scherk*. While in both *Wilko* and *Scherk* the Court had found that the policy goal behind the securities laws was the protection of investors, the purpose of the antitrust laws, according to the *Mitsubishi* court, was to protect competition and the public as a whole. This distinction was significant enough to mandate a different result. The court of appeals found that a *Scherk*-type balancing would be unreasonable and held that the antitrust claims at issue were indeed nonarbitrable.<sup>107</sup>

Finally, the court remanded the case to the district court to consider the possibility of severing the antitrust issues from the other claims in the case. This determination was left to the discretion of the trial court.<sup>108</sup>

The finding by the court of appeals that the antitrust claims were indeed nonarbitrable raises the most difficult issues in the opinion. Reliance on *American Safety* and upon the construction of the Convention were the cornerstones of the court's analysis. The Supreme Court, in a 5-3 decision, reversed the judgment of the court of appeals on the antitrust issues and affirmed the judgment on the other issues.<sup>109</sup> In doing so, the majority clearly rejected the analysis employed by the court of appeals.

The Court began with a careful examination of the prior proceedings and narrowed the issue to "whether an American Court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."<sup>110</sup>

Soler's first argument was that the statutory counterclaims raised in its answer were not within the scope of the arbitration agreement. The Court disagreed, however, and found that the Federal Arbitration Act, as amended, did not warrant a conclusive presumption against arbitration of statutory claims.<sup>111</sup> Indeed, the Court found that the Act manifested a liberal Congress-

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107. *Id.* at 168-69.

108. *Id.* at 169.

109. 105 S. Ct. at 3361 (Justice Powell not participating).

110. *Id.* at 3353. The Court only addressed the federal antitrust issues; the antitrust issues under Puerto Rican law were subsumed into federal law. In addition, because Soler did not preserve the Automobile Dealers' Day in Court Act issues, they were not addressed. *Id.* at 3352 nn. 10 & 11.

111. *Id.* at 3353.

sional policy in favor of arbitration agreements.<sup>112</sup>

The Court observed, however, that not all statutory claims would be subject to the Act. The Court stated that the text of a statute or its legislative history could evidence a congressional policy against arbitration of claims brought under that statute. As an example of such a case, the Court cited *Wilko v. Swan*<sup>113</sup> in which the Court had recognized a congressional policy to except certain statutory securities claims from arbitration.<sup>114</sup>

The Court then construed the arbitration clause at issue and determined that Soler's statutory Sherman Act counterclaims were within its scope. On this issue the Court affirmed the analysis that the court of appeals had employed.<sup>115</sup>

Having found that the statutory counterclaims were within the scope of the arbitration clause, the Court next considered whether the antitrust issues were nonarbitrable despite Soler's prior agreement to arbitration. The Court determined that these issues were arbitrable:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.<sup>116</sup>

The Court thus recognized the explicit dichotomy that had originated in *Scherk*.

In addition, the Court relied on *Scherk* and *The Bremen v. Zapata Off-Shore Oil Co.*<sup>117</sup> to establish two propositions: first, that forum-selection clauses are acceptable in international transactions and, second, that "'an agreement to arbitrate . . . is a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in

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112. *Id.* at 3353 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

113. 346 U.S. 427 (1953). See *supra* notes 50-59 and accompanying text.

114. The Court also noted that nothing in the Act prevents a party from specifically excluding certain claims from the operation of the arbitration agreement. 105 S. Ct. at 3355 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967)).

115. 105 S. Ct. at 3355.

116. *Id.* (citing *Scherk*, 417 U.S. 506 (1974)).

117. 407 U.S. 1 (1972).

resolving the dispute.'"<sup>118</sup> The Court also cited the accession to the Convention to support, with special force, the federal policy in favor of arbitration, especially in international contracts.

The Court next turned its attention to the *American Safety*<sup>119</sup> doctrine, under which agreements to arbitrate antitrust claims in domestic transactions are unenforceable. The Court proceeded to examine that doctrine's viability in the context of an international transaction.

The Court began its inquiry by rejecting the argument that the arbitration clause would be tainted by the unequal bargaining power of the parties. The Court concluded that without an affirmative showing that an arbitration clause is affected by unequal bargaining power or inequitable conduct or that it effectively denies the objecting party "his day in court," the agreement should not be invalidated as a contract of adhesion.<sup>120</sup>

The Court similarly dismissed the concern expressed in *American Safety* that the issues involved in an antitrust suit were too complex for the arbitral process. The Court observed that courts which have adopted the *American Safety* rule for prospective agreements allow the reference of antitrust cases to arbitration after the dispute has arisen.<sup>121</sup> In addition, the complexities of antitrust law could easily be handled if experts were enlisted to assist in the arbitration process.<sup>122</sup>

The Court next rejected yet another proposition of the *American Safety* court—that arbitrators would be innately hostile to laws aimed at imposing constraints on business. The Court declined to presume that impartial arbitrators could not be found to conduct the procedure.<sup>123</sup>

The Court then considered the "core of the *American Safety* doctrine": the fundamental importance of antitrust laws to the American form of capitalism and democracy. The Court acknowledged the effectiveness of private civil suits as a tool for

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118. 105 S. Ct. at 3356 (quoting *Scherk*, 417 U.S. at 519).

119. For a discussion of *American Safety*, see *supra* notes 98-100 and accompanying text.

120. 105 S. Ct. at 3357.

121. *Id.*

122. *Id.* at 3357-58.

123. *Id.* at 3358. The Court also noted that many other nations, including Japan, have developed antitrust laws. *Id.* n. 18.

enforcement of the antitrust laws,<sup>124</sup> but concluded that this function did not compel the conclusion that private suits could be brought only in American courts. First, the Court noted that the treble damages provisions of the Sherman Act were intended primarily to provide a remedy for individuals, not to police the business community. The Court further observed that an injured party is under no compulsion to bring a suit and needs no judicial permission to settle an antitrust suit.<sup>125</sup> Consequently, in international disputes a litigant may prefer, and should be free to choose, to resolve individual claims in an arbitral forum. Second, the Court found no reason to assume that United States law would not be applied when the arbitration agreement stipulated its use. Therefore, the enforcement of an arbitration clause would in no way deprive a litigant of a forum in which to vindicate his statutory cause of action.<sup>126</sup>

Finally, the Court noted that article V(2)(b) of the Convention allows a contracting state to refuse the recognition or enforcement of an award if it violates the public policy of that state. With the barest inquiry, the Court reasoned, a reviewing court could determine that the arbitral forum had not properly considered the antitrust claims and could refuse enforcement.<sup>127</sup> Thus, the Court rejected the court of appeals' analysis of the Convention language, which had equated the public policy issues of enforcement with those of reference. Any subject matter within the scope of an arbitration agreement must be referred to arbitration unless Congress has expressly directed otherwise. Accession to the Convention precluded the recognition of any "judicially implied exception."<sup>128</sup> Accordingly, the Court held that the agreement was enforceable and required Soler to "honor its

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124. *Id.* (citing *American Safety*, 391 F.2d at 826, in which the court noted the importance of the "private attorney-general" who protects the public interest while seeking damages).

125. In contrast, some causes of action require judicial permission for settlement. See, e.g., Fed. R. Civ. P. 23.1 (shareholder derivative suits).

126. 105 S. Ct. at 3358-59.

127. The Court noted that the Japanese arbitration rules provided that a record of the proceedings be made. *Id.* at 3358 n. 17.

128. *Id.* at 3360-61 n. 21. The Court agreed with the court of appeals that some subjects were not "capable of settlement by arbitration," but disagreed on which branch of the government should define these exceptions. The Supreme Court concluded that Congress should expressly set out any exceptions to the Act. *Id.*

bargain.”<sup>129</sup>

Justice Stevens, in a dissent joined by Justices Brennan and Marshall,<sup>130</sup> attacked the majority’s reasoning on two grounds. First, he contended that the clause itself did not encompass the statutory counterclaims. Second, he argued that Congress did not intend that either section 2 of the Federal Arbitration Act or the Convention apply to antitrust claims.

In addressing the first issue, the dissent argued that because Soler’s counterclaim added a third party to the dispute, it added a claim not encompassed by the arbitration agreement. The dissent also found that the antitrust claims did not fall within the language of the agreement. Justice Stevens disagreed with the majority’s view of the original Federal Arbitration Act. He asserted that nothing in the statute or in its legislative history suggested that Congress intended to include statutory claims within the purview of the Act.<sup>131</sup> Thus, he maintained, a presumption existed that the parties did not intend to include statutory claims within the scope of the arbitration clause.<sup>132</sup>

The dissent then turned to the more important question: whether the antitrust claims were arbitrable as a matter of law.<sup>133</sup> The dissent examined in detail the federal policy behind the antitrust laws and the laws’ importance to the public.<sup>134</sup> The dissent’s primary concern was that since arbitral awards were not reviewable except for manifest error, important decisions were often left without review.<sup>135</sup> The dissent believed that a judicial hearing of the antitrust claim would be more in the public interest than “muffling a grievance in the cloakroom of arbitration.”<sup>136</sup>

Finally, the dissent challenged the proposition that international obligations compelled the majority’s result. The dissent

129. *Id.* at 3361.

130. Justice Marshall joined the two other dissenters only in arguing that as a matter of law antitrust claims are not arbitrable. *Id.* at 3361.

131. *Id.* at 3364. This position is contrary to the majority’s view that all claims are included unless specifically excepted by Congress.

132. It should be noted that only Justices Stevens and Brennan joined this part of the dissent. *See supra* note 130.

133. *Id.* at 3366.

134. *Id.* at 3367-70.

135. *Id.* at 3370. The dissent noted that in the United States arbitrators can compel witnesses to attend, but that in Japan this procedure is unavailable. *Id.* at 3370 n. 31.

136. *Id.* at 3370.

adopted the court of appeals' construction of the Convention that articles II and V, when read together, clearly indicate that courts need not honor agreements to arbitrate disputes that are nonarbitrable under domestic law.<sup>137</sup>

The dissent also examined *Wilko* and *Scherk* and found *Mitsubishi* clearly distinguishable from *Scherk*.<sup>138</sup> In *Mitsubishi* Soler's antitrust counterclaims, like the plaintiff's claims in *Wilko*, would be governed by American law. In *Scherk*, on the other hand, Alberto-Culver's stock purchase contract was governed by foreign rules of law and nonenforcement of the arbitration clause would have given rise to "a host of international conflict of laws problems."<sup>139</sup> Justice Stevens found this distinction relevant not only to the antitrust law claims, but also to the claim based on the Automobile Dealers' Day in Court Act, which was enacted to equalize the bargaining power of automobile manufacturers and dealers.<sup>140</sup> The dissent concluded that these interests would better be served if the dispute were resolved by a jury trial rather than by arbitration.<sup>141</sup>

### C. Possible Consequences of *Mitsubishi*

The Supreme Court in *Mitsubishi* faced two divergent paths: it could either follow *Wilko* and extend the *American Safety* doctrine to international transactions or it could expand upon *Scherk* and find that agreements to arbitrate in international disputes can encompass antitrust claims. Although the Court chose the latter, the majority's analysis of the Convention and of the public policy exception's meaning still leaves some troubling issues in this area.

The distinction between *Scherk* and *Wilko*, based on the lack of a statutory cause of action, was not present in *Mitsubishi*. As the dissent noted in *Mitsubishi*, the statutory antitrust claims were intended to protect the public at large, not individual investors. Thus, a strong argument can be made that antitrust claims should have been held not "capable of settlement

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137. *Id.* at 3371.

138. *Id.* at 3372-74.

139. *Id.* at 3373.

140. *Id.* at 3374.

141. *Id.* at 3374-75.

by arbitration." The majority in *Mitsubishi*, however, did not adopt this reasoning; instead, it focused on the more practical concerns of international business transactions. Though unexpressed in the majority's opinion, one of the concerns in this area is the impact of extraterritorial application of American antitrust laws. International response to this extraterritorial application has often taken the form of defensive legislation limiting the ability of regulatory entities in the United States to acquire information on businesses overseas.<sup>142</sup>

The dissents in both *Scherk* and *Mitsubishi* presented a strong case in favor of a public policy exception to arbitration. Justice Douglas, in *Scherk*, pointed out the very real possibility that foreign entities could protect themselves from liability under the United States' securities laws through the use of arbitration clauses.<sup>143</sup> In addition, he noted that unequal bargaining power could often be used to force an arbitration clause on the weaker party.<sup>144</sup>

In *Mitsubishi* Justice Stevens raised these same concerns and argued that they should apply with even greater force when a litigant alleges violations of the antitrust laws, which were intended to protect the public as a whole, not only individual investors. He also observed that the Automobile Dealers' Day in Court Act was enacted specifically to equalize the disparate economic power of automobile manufacturers and dealers. Foreign entities could take advantage of arbitration to insulate themselves from this statutory liability, while domestic entities, under the *American Safety* doctrine, could not.

This situation could be more of a problem in a different context. What if the aggrieved party is a plaintiff alleging an injury due not only to the actions of the entity with which he contracted, but also to the actions of an unrelated third party? *Mitsubishi* leaves this question unanswered.<sup>145</sup> Logically the reasoning in *Mitsubishi* should lead to the conclusion that the

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142. See generally Petit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982).

143. *Scherk*, however, did not present this sort of situation.

144. 417 U.S. at 533.

145. Chrysler did not appeal the determination of the district court to retain jurisdiction because no agreement to arbitrate existed between Chrysler and Soler. 105 S. Ct. at 3351 n. 7.



contracting entity could enforce the agreement to arbitrate.<sup>146</sup> Because the Court distinguished between the grounds necessary to prevent a reference to arbitration and those required to defeat enforcement of an award, the plaintiff in this situation is left in an awkward position. Forced both to arbitrate his anti-trust claims against the contracting party and litigate against the third party, the plaintiff is faced with the very real possibility of inconsistent results.

In addition, the decision in *Mitsubishi* may have an adverse effect on the extraterritorial reach of American antitrust laws. Under the Convention a state must enforce an award made in the territory of another contracting state unless one of the defenses applies. Thus, an award made in Japan that disregarded United States antitrust law issues could be enforced in the territory of another contracting state even if unenforceable in the United States because of the Article V(2) defenses. The successful party could then avoid the United States' public policy inquiry because it would be irrelevant to the enforcing state. The unsuccessful litigant would indeed be hard pressed to argue that violation of the United States' public policy should prevent the award's enforcement in the territory of a third state. Although this situation did not actually present a problem in *Mitsubishi*, because the claimant was a local car dealer, it could easily arise if the claimant were a multinational corporation based in the United States. In that situation, there might be only one opportunity for an American court to consider the case, at the reference stage of the procedure. Thus, the regime in *Mitsubishi* could seriously impair enforcement of the United States' anti-trust laws in international transactions.

To remedy this problem, the United States' courts could attempt to induce foreign arbitrators to apply American antitrust law. Given the hostile reception to American antitrust laws abroad, however, this expectation seems unrealistic. Thus, the decision in *Mitsubishi* has limited the potential enforcement of the antitrust laws through "private attorneys general."<sup>147</sup> How the Supreme Court might resolve these problems remains to be seen.

The *Mitsubishi* majority's belief that Congress should pre-

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146. Art. III, 21 U.S.T. at 2519.

147. See *supra* note 124.

scribe those circumstances under which an arbitration agreement should not be enforced<sup>148</sup> produces the salutary effect of predictability in international arbitration for all the parties concerned. Implied judicial exceptions, on the other hand, would undercut this certainty and predictability. As the majority in *Mitsubishi* noted, when parties wish to except certain matters from the arbitration procedure, they can do so by agreement.<sup>149</sup>

*Mitsubishi*, then, seems to represent a balance between the practical exigencies of international business and the theoretical doctrines underlying antitrust law in the United States. The scales in this case tipped in favor of predictable international dispute resolution.

Another question that remains in the wake of the *Mitsubishi* decision is whether the exception to arbitration in *Wilko* will enjoy continued vitality, especially in the context of an international transaction. In dicta the majority seemed to indicate that *Wilko* would indeed remain viable after *Mitsubishi*.<sup>150</sup> The *Wilko* exception will apply, however, only within the narrow confines of the *Wilko* holding—when Congress has expressly prohibited the waiver of the right to a judicial forum for a statutory cause of action. Therefore, to avoid the rule in *Mitsubishi*, a litigant must be able to point to specific language in the text of a statute, or in its legislative history, that evidences a congressional intent to prohibit the waiver of the right to a judicial forum for a cause of action based on the statute. Although *Wilko* does retain some vitality, the scope of its exception to the general rule of arbitrability has certainly been narrowed.

### B. Reciprocity

The defense of reciprocity is based primarily on the explicit declarations in the Convention.<sup>151</sup> This right, however, is discretionary and may be refused recognition by the enforcing state.<sup>152</sup>

148. 105 S. Ct. at 3360-61 n. 21.

149. *Id.* at 3355. Of course, this statement ignores the dissent's argument that these clauses often arise in an adhesionary context.

150. *See id.*

151. *See supra* notes 45-46 and accompanying text.

152. *Id.* *See also* *La Societe Nationale Pour La Recherche La Production, Le Transport, La Transformation et La Commercialisation Des Hydrocarbures v. Shaheen Natural Resources Co.*, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 260 (2d Cir. 1984).

Litigants have argued that because recognition in another contracting state is limited to some degree, recognition in the United States should also be limited. These arguments, however, have met with little success.<sup>153</sup> In addition, "the Convention's mandate to refer parties to arbitration is not necessarily negated because an arbitral award would be unenforceable under a foreign forum's law."<sup>154</sup>

Thus, the reciprocity defense to reference, like the public policy defense to reference, will be narrowly construed. Enforcement can still be refused, but only if the party asserting the defense can demonstrate a genuine lack of reciprocity in the state where the award was made.

### C. Waiver

Waiver of the arbitration clause is also available as a defense to an arbitration reference.<sup>155</sup> In *I.T.A.D. Associates, Inc. v. Podar Brothers*,<sup>156</sup> the Fourth Circuit Court of Appeals held that "[a]rticle II(3) contemplates the possibility of waiver of the arbitration agreement by one or both of the parties."<sup>157</sup> *I.T.A.D.* had argued that Podar Brothers waived the arbitration clause by waiting nearly four years to move to compel arbitration pursuant to the Federal Arbitration Act, and the district court agreed. The court of appeals, however, reversed and held that while waiver is recognized under the Convention, Podar's actions did not amount to a waiver. The court stated that the mere passage of time, without a showing of resulting prejudice, could not constitute waiver. Since *I.T.A.D.* had not demonstrated that it had suffered any prejudice, no waiver had occurred, and the court ordered arbitration to be conducted.<sup>158</sup>

Waiver, therefore, will only be available under limited circumstances. It can occur when prejudice results to one party as

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153. See *Fertilizer Corp. of India v. IDI Management*, 517 F. Supp. 948 (S.D. Ohio 1981), *reh'g denied*, 530 F. Supp. 542 (S.D. Ohio 1982).

154. *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro*, 555 F. Supp. 481, 485 (D.V.I. 1982), *aff'd*, 712 F.2d 50 (3d Cir. 1983) (a quirk in Italian procedural law might have made the award unenforceable).

155. The defense of waiver is derived from art. II(3). See *supra* notes 33-34 and accompanying text.

156. 636 F.2d 75 (4th Cir. 1981).

157. *Id.* at 77.

158. *Id.* at 76-77.

a result of the other's actions or by mutual agreement. Like the other defenses to arbitrability, waiver is to be narrowly construed.

## V. CONCLUSION

American courts that have considered the issue of arbitrability of an international dispute have focused their discussions on amenability to reference under domestic law. Competing public policy concerns lay at the heart of the decisions in this area, as the reasoning in *Mitsubishi* and *Scherk* well illustrate. The tension that has developed between theoretical considerations of the policies behind the Sherman Act and the policies fostering international arbitration is evident from the dissent in *Mitsubishi*. Nevertheless, the pragmatic considerations of international comity and commerce prevailed in *Mitsubishi* over theoretical consistency with domestic law.

This does not mean that the *Mitsubishi* decision was not correct. The concerns expressed by the *Mitsubishi* majority are valid, especially given the inexorable rise in international trade and the interdependence of the world's developed economies. Certainty in business disputes fosters growth in international trade by reducing the risks and costs involved.

The decision in *Mitsubishi*, however, still leaves unanswered questions concerning which issues raised by litigants will preclude arbitration. The *Mitsubishi* majority severely undercut the vitality of *Wilko* and left the impression that no claims, save those within the narrow confines of *Wilko*, would be judged incapable of "settlement by arbitration" under the terms of the Convention. This regime leaves potential claimants only one option—to attack the validity of the arbitral award at the enforcement stage. A challenge at that stage could be difficult, particularly when records of the arbitral proceedings are sparse. A due process defense provides a final fall-back position,<sup>159</sup> but only in the most egregious cases would this argument succeed.

Although the decision in *Mitsubishi* clarifies some of the issues involved in international arbitration, it leaves troubling

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159. See *supra* note 39 and accompanying text.

questions about the efficacy of the antitrust laws in international transactions.

*Dennis J. Connolly*

## APPENDIX

SELECTED ARTICLES FROM THE CONVENTION ON THE RECOGNITION  
AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS<sup>160</sup>

## ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

## ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

## ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

## ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;

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160. June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (entered into force Dec. 29, 1970).

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

#### ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award had not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

#### ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

#### ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.