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Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

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Abstract

This Note examines the arbitrability of antitrust claims raised by a United States party against a foreign party and attempts to reconcile a domestic public policy against the arbitrability of antitrust claims with the mandate of the Convention. It focuses on the case law relating to this policy, as well as the Convention, and applies it to Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

APPLICATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: *MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH, INC.*

INTRODUCTION

The Anglo-Saxon judicial tradition has been one of antipathy to arbitration.[1] However, the recent trend in the United States is to uphold the validity of arbitration clauses and to enforce resulting awards.[2] Within the context of international commercial transactions, this tendency is the result of the ex-

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1. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983-84 (2d Cir. 1942). This notion is based on the judicially provincial ground that such private settlement mechanisms tend to "oust" the jurisdiction of the courts. Kill v. Hollister, 95 Eng. Rep. 532 (1746).

2. The United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1982)), enacted in 1925, marked the beginning of Congressional adherence to a national policy favoring arbitration. In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Supreme Court, in upholding the arbitrability of a dispute which concerned a violation of the federal securities laws, cited the enactment of the United States Arbitration Act, 9 U.S.C. § 1 (1982), as reversing "centuries of judicial hostility to arbitration agreements." *Scherk*, 417 U.S. at 510. Justice Stewart stated:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
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> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

Id. at 516-17 (footnote omitted). The traditional hostility of courts to contractual instruments which deprive them of the authority to decide disputes was recounted and rejected in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1971). The Court stated that " [t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigal legal fiction." *Id.* at 12. This fiction stems from "historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets." *Id.; see* Southland Corp. v. Keating, 104 S. Ct. 852, 858 (1984); Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). For a discussion of international commercial arbitration, see generally Carbonneau, *Arbitral Adjudication: A Comparative As-*

pansion of international trade and the concomitant judicial recognition of the business world's increasing reluctance to litigate differences in foreign courts of law.[3]

The United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[4] (Convention) on September 30, 1970.[5] The Convention is intended

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sessment of its Remedial and Substantive Status in Transnational Commerce, 19 TEX. INT'L L.J. 33 (1984).

3. *See* Ishizumi, *International Commercial Arbitration and Federal Securities Regulation: Reconciling Two Conflicting Policies*, 6 J. COMP. BUS. & CAP. MKT. L. 81, 81 (1984); Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 218-27 (1983); *see also* Carbonneau, *Law Making Through Arbitration: The Rendering of Awards with Reasons and the Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 579 (1985) ("[w]ith the growth of international trade, arbitration has emerged as the preferred remedy for resolving international commercial disputes."); Note, *The Validity of Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 FORDHAM INT'L L.J. 321, 321 (1984) ("[c]ommercial arbitration has become an indispensable method of dispute resolution in the international business community . . . [while avoiding] the complex, time-consuming and expensive process of litigation.").

4. *Opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1958) (effective Dec. 29, 1970) [hereinafter cited as Convention]. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is also referred to as the New York Convention of 1958. As of January 1, 1983, 61 states have acceded to the Convention. U.S. DEP'T OF STATE, TREATIES IN FORCE 201-02 (1983).

5. The United States participated in the 1958 negotiations of the Convention but did not become a signatory at that time. *See* MESSAGE FROM THE PRESIDENT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, S. EXEC. DOC. NO. E. 90th Cong., 2d Sess. 3 (1968) [hereinafter cited as S. EXEC. DOC. NO. E.]; *Excerpts from Report of United States Delegation to United Nations Conference on International Commercial Arbitration, Report of the Committee on International Unification of Private Law*, in PROCEEDINGS ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW 253 (1960) [hereinafter cited as *ABA Report*]; Ishizumi, *supra* note 3, at 86-87. *See generally* Czyzak & Sullivan, *American Arbitration Law and the U.N. Convention*, 13 ARB. J. 197 (1958) (discussing the reasons why the United States did not become a signatory of the Convention when it was originally opened for signature). The delegation recommended against signing the Convention because the agreement was not compatible with United States law. *See* H.R. REP. NO. 1181, 91st Cong., 2d Sess. 1 (1970) [hereinafter cited as H.R. REP. NO. 1181]; S. EXEC. REP. NO. 10, 90th Cong., 2d Sess. 6-8 (1968) [hereinafter cited as S. EXEC. REP. NO. 10]; *ABA Report*, *supra*, at 210. However, much support for the Convention from private groups prompted President Lyndon Johnson, in 1968, to submit the Convention to the Senate for advice and consent. *See* S. EXEC. DOC. NO. E., *supra*, at 3; S. EXEC. REP. NO. 10, *supra*, at 6-7. Senate advice and ratification was concluded on October 4, 1968. 114 CONG. REC. 29,605 (1968); *see* S. REP. NO. 702, 91st Cong., 2d Sess. 1 (1970). The Administration introduced the appropriate bills to implement the legislation which were passed and approved on July 31, 1970. Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (codified at 9 U.S.C. § 201 (1982)). The United States filed its instrument of accession on September 30, 1970, and chapter 2 of the United States Arbitration Act,

to provide a uniform means to ensure that the advantages of arbitration are achieved in the international sphere.[6] The goal

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9 U.S.C. § 201 (1982), which expressly implements the Convention, entered into force on December 29, 1970. *Id.* § 210.

Section 201 provides for the enforcement of the Convention in the United States courts "in accordance with this chapter." *Id.* Section 202 proscribes the types of agreements and awards that fall under the Convention and is intended to make it clear that an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in United States courts unless it has a reasonable relation with a foreign state. *Id.* § 202; *see also* Bergesen v. Joseph Muller Corp., 710 F.2d 928, 929 (2d Cir. 1983); Note, *Enforcement of Foreign Arbitral Awards—The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 14 GA. J. INT'L & COMP. L. 217, 230 (1984) (discussing the enforcement of foreign arbitral awards in the United States). *See generally* Bergeson v. Joseph Muller Corp., 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928, 929 (2d Cir. 1983) (the Convention does allow enforcement in the United States courts of an award rendered in the United States). Section 203 gives the United States district courts jurisdiction over proceedings falling under the Convention regardless of the amount in controversy. 9 U.S.C. § 203. Section 204 establishes venue with respect to such action or proceeding. *Id.* § 204. Section 205 permits removal of cases from state to federal courts. *Id.* § 205. Section 206 permits a court to compel arbitration at the place provided for in the arbitration agreement. *Id.* § 206. This section is, however, permissive rather than mandatory, since there may be circumstances in which it would be desirable to direct arbitration within the district in which the action is brought but inappropriate to direct arbitration abroad. *See* H.R. REP. No. 1181, *supra*, at 3604. Section 207 deals with confirmation of awards made under the Convention. 9 U.S.C. § 207. A similar provision is included in § 9 of the United States Arbitration Act. United States Arbitration Act, ch. 213, § 9, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 9 (1982)). Section 208 makes the provisions of the Arbitration Act applicable to actions brought under the Convention to the extent that such provisions are not in conflict with the implementing legislation or the Convention as ratified by the United States. 9 U.S.C. § 208; *see* H.R. REP. No. 1181, *supra*, at 3604. For a discussion of the provisions of the Convention and the federal implementing legislation, as well as potential discrepancies between the Convention and the implementing legislation, see Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. L. REV. 1 (1971); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735 (1971); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

6. Newman & Burrows, *International Litigation: Judicial Intervention in Arbitrability of Int'l Claims*, N.Y.L.J., Dec. 26, 1984, at 1, col. 1 ("[t]he Convention . . . was enacted to foster arbitration of disputes by international contracting parties."). "Arbitration is a faster, less costly and more private, informal and confidential means to settle commercial disputes than litigation." Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 79 (1985). For a discussion of the advantages and disadvantages of international commercial arbitration as compared to litigation, see Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097, 1099-1104; Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW. & POL'Y INT'L BUS. 1191 (1977); Kawakami & Henderson, *Arbitration in U.S./Japanese Sales Disputes*, 42 WASH. L. REV.

of the Convention, and the principal purpose underlying its implementation by the United States, is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts,[7] to unify the standards for observing agreements to arbitrate,[8] and to enforce arbitral awards in the signatory states.[9]

Despite the advantages offered by commercial arbitration, it is not always a satisfactory dispute resolution mechanism.[10] Although the parties to an international commercial contract may include clauses providing for choice-of-law[11] and choice-of-forum,[12] and for arbitration as the exclusive remedy of disputes arising from the contract,[13] there is no guarantee that a

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541 (1967); Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085, 1089-91 (1969); Perlman & Nelson, *supra* note 3, at 218-27.

7. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

8. *Id.; see* Ishizumi, *supra* note 3, at 84-85; Quigley, *supra* note 5, at 1060.

9. *Scherk*, 417 U.S. at 520 n.15.

10. *See* Ehrenhaft, *supra* note 6, at 1193-95; Loevinger, *supra* note 6, at 1090-91. *Compare* Aksen, *supra* note 6, at 1099-1104 *with* Loevinger, *supra* note 6, at 1089-91 (comparison of arguments regarding the arbitrability of antitrust claims).

11. *See Scherk*, 417 U.S. at 516. A choice-of-law clause is intended to provide certainty so as to protect the expectations of parties, regardless of where suit is brought. 1 V. NANDA, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 8.03[1] (1982).

12. *See Scherk*, 417 U.S. at 516; *Bremen*, 407 U.S. at 15. A choice-of-forum clause is designed to eliminate the uncertainties regarding the place of suit by selection of the forum in advance. 1 V. NANDA, *supra* note 11, § 8.02[1](a). The Supreme Court has held that "such clauses are prima facie valid and should be enforced unless enforcement is shown . . . to be 'unreasonable' under the circumstances." *Bremen*, 407 U.S. at 10 (footnote omitted).

13. *See Scherk*, 417 U.S. at 508; *see also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (holding that enforcement of foreign arbitral awards may be denied on the basis of the public policy defense of the Convention only where enforcement would violate the forum state's most basic notions of morality and justice); Helfenbein v. International Industries, Inc., 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971) (sublessee's claim against lessor to recover treble damages for violation of Sherman and Clayton Acts was held nonarbitrable even though the lease provided for arbitration of all claims and controversies); American Safety Equip. Corp. v. J.P. MaGuire & Co., 391 F.2d 821 (2d Cir. 1968) (providing that a clause for arbitration of all controversies, disputes, and claims was unenforceable); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968) (holding that it was an abuse of the lower court's discretion to make an antitrust claim available for arbitration even though the parties' contract called for arbitration of all claims and controversies); Ehrenhaft, *supra* note 6, at 1216-17 (discussing the practices of other nations in determining whether or not to uphold an arbitration clause). *But cf.* Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982) (an agreement to arbitrate must be enforced unless the agreement is found null and void, inoperative or incapable of being per-

court will not treat a given dispute as nonarbitrable, particularly when the issue is highly charged with competing public policy concerns.[14] The subject of the United States public policy exception to the arbitrability of international commercial disputes has received widespread attention.[15]

This Note examines the arbitrability of antitrust claims raised by a United States party against a foreign party and attempts to reconcile a domestic public policy against the arbitrability of antitrust claims with the mandate of the Convention.[16] It focuses on the case law relating to this policy, as well as the Convention, and applies it to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[17] a case presently before the United States Supreme Court. Part I provides an overview of the United States case law concerning the arbitration of securities and antitrust disputes, both domestic and international. Part II examines *Mitsubishi* and compares and contrasts the interpretation of the case law and Convention by the district court and court of appeals. Finally, Part III analyzes the case law and the Convention and offers a framework for deciding the arbitrability of international antitrust claims. This Note concludes that antitrust claims raised by a party to an international contract are arbitrable as mandated by the Convention.

I. *BACKGROUND ON THE ISSUE*

The arbitrability of claims involving the United States se-

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formed); McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032 (3rd Cir. 1974) (holding that the district court was bound by the terms of the Convention and by the request of one of the parties to the agreement to refer the parties to arbitration).

14. *See* J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 541-65 (1978); A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 359-82 (1981); Aksen, *supra* note 6, at 1104; Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal*, 51 TEMP. L.Q. 832 (1978); Ehrenhaft, *supra* note 6, at 1200-19; Loevinger, *supra* note 6, at 1088, 1090-91; McMahon, *supra* note 5, at 757-58; Comment, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 CAL. W. INT'L L.J. 228 (1977).

15. *See* A. VAN DEN BERG, *supra* note 14, at 359-82; Aksen, *supra* note 6, at 1104; Barry, *supra* note 14, at 838-50; Ishizumi, *supra* note 3, at 92-99; Loevinger, *supra* note 6, at 1088; Perlman & Nelson, *supra* note 3, at 228; Comment, *supra* note 14, at 239-50; *see also* J. LEW, *supra* note 14, at 531-91 (discussing international public policy).

16. *See infra* notes 133-207 and accompanying text.

17. 723 F.2d 155 (1983), *cert. granted*, 105 S. Ct. 291 (1984).

curities laws or antitrust laws is a subject of dispute.[18] The resolution of these issues hinges on whether such cases involve solely domestic parties or include international parties.[19] On a domestic level, federal courts decline to permit the arbitration of securities disputes in the interest of protecting investors' rights under the United States securities laws.[20] A similar rationale applies to the sanctions against arbitration of domestic antitrust disputes. The Supreme Court has recognized that private antitrust actions provide an important public enforcement purpose in that "[a]ntitrust laws in general, and the Sherman Act in particular, . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[21]

Conversely, in an international context, United States courts have sanctioned the arbitration of securities claims,[22] reasoning that private dispute settlement of securities claims presents less danger to the public good than does nonjudicial resolution of antitrust issues.[23] Further, these courts have found that international parties' diminished expectations of judicial settlement bolster such holdings.[24]

A. *Arbitrability of Securities Claims*

1. Claims Raised in a Domestic Context: *Wilko v. Swan*

It is well established that claims arising under the Securities Act of 1933[25] (Securities Act) are nonarbitrable in a domestic context by virtue of *Wilko v. Swan*.[26] In that case, the United States Supreme Court held that an agreement provid-

18. *See generally* Ishizumi, *supra* note 3, at 87-97 ("[t]he reach of U.S. securities laws is a subject of dispute, within the U.S. judicial system, as well as in the international community." *Id.* at 87).

19. *Compare* American Safety Equip. Corp. v. J.P. MaGuire & Co., 391 F.2d 821 (2d Cir. 1968) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1983), *cert. granted*, 105 S. Ct. 291 (1984) *with* Wilko v. Swan, 346 U.S. 427 (1953) and Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

20. *See infra* text accompanying notes 25-38.

21. United States v. Topco, 405 U.S. 596, 610 (1972); *see infra* note 49.

22. *See Scherk*, 417 U.S. 506 (1974).

23. *See infra* notes 39-47 and accompanying text.

24. *See supra* note 3.

25. 15 U.S.C. § 77a (1976).

26. 346 U.S. 427 (1953). *Wilko* concerned an action raised by a customer against the partners in a securities brokerage firm to recover damages under § 12(2) of the

ing for the arbitration of securities disputes arising between two domestic parties was void under section 14 of the Securities Act, notwithstanding the provisions of the United States Arbitration Act.[27] The Supreme Court granted certiorari to decide whether an agreement to arbitrate a future controversy was void under section 14 of the Securities Act as a stipulation binding any person acquiring any security to waive compliance with the statutory requirement that the aggrieved party be permitted to select the judicial forum of his choice.[28] An agreement to arbitrate securities issues is considered to be a waiver of an investor's right to trial.[29]

Wilko sought to harmonize Congressional support for arbitration as evidenced by the Federal Arbitration Act,[30] with the Securities Act,[31] which Congress enacted to protect the rights of investors.[32] The Court ruled in favor of invalidating agreements for arbitration of issues arising under the Securities Act,[33] which in effect favored the Securities Act over the

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Securities Act, 15 U.S.C. § 77a, for an alleged misrepresentation in the sale of securities. *Wilko*, 346 U.S. at 428-38.

27. *Wilko*, 346 U.S. at 434-38. The basis of the Court's decision was threefold: 1) An agreement to arbitrate future controversies was void under § 14 of the Securities Act as a stipulation to waive compliance with the provisions of the Act; 2) The right of an aggrieved party under § 22(a) to select the judicial forum is a provision of the Securities Act that cannot be waived under § 14; and 3) As the protective provision of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness, Congress must have intended § 14 to apply to waiver of judicial trial and review. *Id.* at 432-37.

28. *Id.* at 434-35. The statutory requirements in issue are laid out in § 14 of the Securities Act, 15 U.S.C. § 77n. This section 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." *Id.*

29. *Wilko*, 346 U.S. at 435; *see* Ishizumi, *supra* note 3, at 90-94.

30. United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1982)). The Supreme Court recently held that the Federal Arbitration Act, 9 U.S.C. § 1 (1982), "requires that the courts compel arbitration of arbitrable claims, when asked to do so . . . [and] requires courts to enforce the bargain of the parties to arbitrate . . . ." Dean Witter Reynolds Inc. v. Byrd, No. 83-1708, slip op. at 4 (9th Cir. Mar. 4, 1985).

31. 15 U.S.C. § 77a (1976).

32. *Wilko*, 346 U.S. at 430-31; *see* Fedders, Wade, Mann & Beizer, *Waiver By Conduct—A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MKT. L. 1, 5-6 (1984) [hereinafter cited as Fedders].

33. *Wilko*, 346 U.S. at 435, 438.

Federal Arbitration Act.[34]

It is important to understand two things about *Wilko*. First, the holding in *Wilko* was applied within a domestic context.[35] Second, the Court was concerned with protecting the rights of an individual investor[36] who is likely not to be familiar with his rights either before or after a dispute arises.[37] However, this reasoning would not hold true where an international claim is raised by a large corporation against another corporation because both are likely to be familiar with their rights.[38]

2. Claims Raised in an International Context: *Scherk v. Alberto-Culver Co.*

In the area of international securities claims, an exception to *Wilko* has been made and these disputes are arbitrable.[39] In *Scherk v. Alberto-Culver Co.*,[40] the Supreme Court found that an arbitration clause in a contract between a United States company and a German citizen for the sale of European trademarks was enforceable under the Federal Arbitration Act.[41]

In declining to extend the holding in *Wilko v. Swan*, the Supreme Court held that because the underlying agreement was truly international in character[42] and contained a clause providing for arbitration,[43] judicial intervention was precluded.[44] The Court based its decision on three reasons: 1) The provision for arbitration in the agreement contained a choice-of-law clause that solved the problem of which nation's

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34. *Id.* at 435 (holding that the right to select a judicial forum is a " 'provision' that cannot be waived under § 14 of the Securities Act.").

35. *Id.* at 428-29.

36. *Id.* at 435. A primary concern when deciding whether certain claims are arbitrable is the possibility of contracts of adhesion. For a recent discussion, see Ishizumi, *supra* note 3 at 93.

37. *See Wilko*, 346 U.S. at 435.

38. *See* Ishizumi, *supra* note 3, at 103 ("[o]verweening bargaining power is most likely where the American party is an unsophisticated individual and the foreign party is a large corporation . . .").

39. Scherk v. Alberto-Culver Co., 417 U.S. 506, 513 (1974) (holding that international securities claims are arbitrable); *see infra* text accompanying notes 40-47.

40. 417 U.S. 506 (1974).

41. *Id.* at 519-20.

42. *Id.*

43. *Id.* at 508.

44. *Id.* at 514-20.

substantive law should apply to the dispute;[45] 2) A refusal by one country to grant arbitration would "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages";[46] and 3) The advantages of choosing from a wider choice of courts and venue which is offered to a plaintiff in a domestic securities dispute, could well be illusory because a foreign party could obtain a foreign court order nullifying the advantage.[47]

B. *Arbitrability of Antitrust Claims*

1. Claims Raised in a Domestic Context: *American Safety Equipment Corp. v. J.P. Maguire & Co.*

In *American Safety Equipment Corp. v. J.P. Maguire & Co.*,[48] the United States Court of Appeals for the Second Circuit held that a claim of a domestic licensee alleging violations of the Sherman Antitrust Act[49] by a United States company, was inap-

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45. *Id.* at 516. The contract contained an arbitration clause providing for arbitration of any claim arising out of the contract before the International Chamber of Commerce in Paris, France, and that "[t]he laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance." *Id.* at 508. In *Bremen*, 407 U.S. 1 (1971), the Court ruled that "in the light of present day commercial realities and expanding international trade . . . the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15; *see Scherk*, 417 U.S. at 516. *But cf. Wilko*, 346 U.S. 427 (1953), where there was no question that the United States law generally, and the federal securities law specifically, would govern disputes arising out of the stock-purchase agreement. *Id.* at 438. The parties, the negotiations, and the subject matter of the contract were all situated in the United States, *id.* at 428-29, thereby removing any doubt that a conflict-of-law claim would ever arise.

46. *Scherk*, 417 U.S. at 516-17. The parties may attempt forum shopping in that each will seek to resort to the court which offers him the most favorable litigation advantages. For example, in *Scherk*, it is conceivable that if Scherk had anticipated that Alberto-Culver would be able to enjoin resort to arbitration in the United States he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. *Id.* at 517; *see* Perlman & Nelson, *supra* note 3, at 219-20.

47. *Scherk*, 417 U.S. at 517-18. A securities buyer has a wider choice of courts and venue in a domestic securities contract and thus gives up more than would a participant in an international business transactions when surrendering his right to sue in courts by agreeing to arbitrate all claims arising out of the contract. *Id.* However, in the context of an international contract, "an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice." *Id.* at 518.

48. 391 F.2d 821 (2d Cir. 1968).

49. 15 U.S.C. § 1 (1982). The antitrust laws, including of the Sherman Act, have rested "on the premise that the unrestrained interaction of competitive forces will

propraite for arbitration.[50] The court concluded that a claim under the antitrust laws is not merely a private matter, based in part on the notion that a "plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest."[51]

The court cites four reasons as the basis for the exception of domestic antitrust claims from arbitration. First, the implementation of antitrust laws, so vital to the successful functioning of a free economy, is delegated by statute to both governmental and private parties.[52] Second, the strong possibility that contracts generating antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract.[53] Third, antitrust issues are complicated, and the evidence extensive and complex.[54] Finally, the court did not think it proper to allow businessmen to make decisions which regulate the business community in which they operate.[55]

As the court did not consider agreements to arbitrate made after a dispute arises,[56] the *American Safety* doctrine is properly limited to predispute agreements to arbitrate. In effect, however, the *American Safety* doctrine represents a "rarity in our jurisprudence"[57] because of the otherwise strong policy in favor of arbitration, as evidenced by the Federal Arbitration Act.[58] While the circuit courts that have had occasion to consider the *American Safety* doctrine have embraced it, each of these courts' cases have been decided in a strictly domestic context.[59] There is no suggestion that *American Safety* pre-

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yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institution." Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958); *see supra* note 21 and accompanying text.

50. *American Safety*, 391 F.2d at 828.

51. *Id.* at 826; *see* Waldron v. Cities Service Co., 361 F.2d 671, 673 (2d Cir. 1966), *cert. granted*, 385 U.S. 1024 (1967).

52. *American Safety*, 391 F.2d at 826.

53. *Id.* at 827.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Mitsubishi*, 723 F.2d at 162.

58. United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1982)).

59. *See, e.g.*, Applied Digital Technology Inc. v. Continental Casualty Co., 576 F.2d 116, 117 (7th Cir. 1978); Cobb v. Lewis, 488 F.2d 41, 43 (5th Cir. 1974); Helf-

cludes the arbitration of international antitrust disputes.

2. Claims Raised in an International Context: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*

On October 15, 1984, the Supreme Court granted certiorari in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[60] in order to decide the issue of whether antitrust claims asserted under the Sherman Antitrust Act are arbitrable pursuant to the Convention, and the Federal Arbitration Act.[61] Thus, the Court must choose between extending *Scherk*,[62] thereby providing for the arbitration of antitrust claims in an international context,[63] or extending *American Safety*,[64] thereby making antitrust claims nonarbitrable in an international context.[65]

II. MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH, INC.

A. *Facts of the Case*

Soler Chrysler-Plymouth, Inc. (SCP), a Puerto Rican company with its principal place of business in San Juan,[66] entered into a Distributor Agreement in 1979 with Chrysler International, S.A. (CISA), a wholly owned subsidiary of the United States Chrysler Corp.[67] SCP was to act as a dealer of cars and trucks manufactured in Japan for Chrysler Corp. by Mitsubishi

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enbein v. International Industries, Inc., 438 F.2d 1068, 1070 (8th Cir. 1971); Power Replacements Inc. v. Air Preheater Co., 426 F.2d 980, 983-84 (9th Cir. 1970); A.& E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 716 (9th Cir. 1968).

In Silvercup Bakers, Inc. v. Fink Baking Corp., 273 F. Supp. 159 (S.D.N.Y. 1967), the question of the arbitrability of antitrust issues was first raised. The court held that absent an explicit statement to the contrary the parties to a collective bargaining agreement did not intend to forego their rights to press tort damage claims and accordingly, the antitrust claim was not subject to arbitration under the contract. *Id.* at 163-64. *American Safety*, 391 F.2d 821 (1968), extended the reasoning of *Silvercup Bakers* and held that antitrust claims are not a private matter and are therefore nonarbitrable. *Id.* at 827-28. The court stated that the "Sherman Act is designed to promote the national interest in a competitive economy . . . ." *Id.* at 826.

60. 723 F.2d 155 (1983), *cert. granted*, 105 S. Ct. 291 (1984).

61. Brief for Appellant at i, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983) [hereinafter cited as Brief].

62. 417 U.S. 506 (1974).

63. *See supra* text accompanying notes 40-44.

64. 391 F.2d 821 (2d Cir. 1968).

65. *See supra* text accompanying notes 48-59.

66. Brief, *supra* note 61, at 4.

67. *Mitsubishi*, 723 F.2d at 157.

Motors Corp. (MMC), a Japanese company with its principal place of business in Tokyo.[68] The vehicles provided by MMC were manufactured to SCP's order and were designed especially for Puerto Rico.[69] SCP simultaneously entered into a Sales Procedure Agreement[70] (Agreement) with CISA to which MMC was also a party.[71] Article VI of the Agreement provided for arbitration of certain future disputes that might arise between MMC and SCP. Arbitration was to be in accordance with the rules of the Japan Commercial Arbitration Association,[72] and the laws of Switzerland were to be applied to the contract.[73]

SCP's business initially prospered, but throughout 1980

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68. Brief, *supra* note 61, at 2.

69. Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 3, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983) [hereinafter cited as Petition].

70. The Sales Procedure Agreement (Agreement) established procedures for the sale and delivery of MMC-built vehicles to SCP. Petition, *supra* note 69, at 3. The Agreement specifically provided that it did not create a franchisor-franchisee relationship between MMC and SCP. Brief, *supra* note 61, at 4.

71. *Mitsubishi*, 723 F.2d at 157.

72. *Id.* The Agreement provided that disputes arising out of articles I-B through V or for the breach thereof "shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.* (quoting article VI of the Agreement). Under the rules of the Japan Commercial Arbitration Association, the arbitral tribunal is required to include in its award a statement of the reason for the award unless the parties have agreed that no such statement is necessary. JAPAN COM. ARB. R. 36(4); *see* Kitagawa & Fukushima, *Japan: The Japan Commercial Arbitration Association*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 115, 127-28 (1977). In the United States, an arbitral tribunal's award may be rendered without explanation of the reasons and without a complete record of their proceedings. *Wilko*, 346 U.S. at 436. An award may be vacated pursuant to § 10 of the United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1982)), but the reasons for vacating must be clear. Therefore, under the Japan Commercial Arbitration Rules there would always be a clear record of the arbitrators' decision in the event that a party sought to have the award vacated. Under the United States Arbitration Act, however, there would not necessarily be a record and therefore, no grounds to vacate. *Id.*

73. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538, at 2 (D.P.R. Nov. 24, 1982) (order compelling arbitration). Article 22 of the Distributorship Agreement provided that "[t]his Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein . . . ." *Id.* (quoting article 22 of the Agreement). The court of appeals noted that although the Agreement states that it is to be governed by Swiss law, the scope of the arbitration agreement is an issue of federal law. *Mitsubishi*, 723 F.2d at 159 n.3; *see* Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 616 (1st Cir. 1975).

and 1981 the automobile market in Puerto Rico declined.[74] SCP became unable to meet minimum sales commitments in its territory, and MMC and CISA forbid SCP to reexport vehicles to Central and South America and the continental United States.[75] SCP became insolvent and unable to arrange any form of financing for vehicles it had ordered.[76] MMC withheld shipment of additional new vehicles to SCP, eventually storing 966 vehicles in Japan[77] for which SCP owed MMC in excess of U.S.$300 million.[78] In February 1982, following unsuccessful negotiations between MMC and SCP,[79] SCP disclaimed responsibility for the 966 vehicles stored in Japan.[80] SCP stated that it would not honor its obligations to MMC. It broke off further negotiations and any further relationship with MMC, and threatened to commence litigation to enjoin MMC from seeking alternative distribution arrangements in Puerto Rico.[81]

On March 15, 1982, MMC commenced an action in the United States District Court for the District of Puerto Rico against SCP, alleging nonpayment for the stored vehicles, nonpayment of contractual storage penalties, damage to Mitsubishi's warranties and goodwill, expiration of SCP's distributorship, and other breaches of the Agreement.[82] MMC petitioned for an Order compelling arbitration in Japan under the Federal Arbitration Act and the Convention.[83]

On May 7, 1982, SCP answered and counterclaimed against both MMC and CISA.[84] It sought actual and punitive damages exceeding U.S.$360 million for alleged antitrust and unfair trade violations,[85] as well as claims for common law

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74. Petition, *supra* note 69, at 3.
75. *Mitsubishi*, 723 F.2d at 157.
76. Petition, *supra* note 69, at 3.
77. *Mitsubishi*, 723 F.2d at 157.
78. Petition, *supra* note 69, at 3.
79. *Id.*
80. *Mitsubishi*, 723 F.2d at 157.
81. Petition, *supra* note 69, at 3-4.
82. *Mitsubishi*, 723 F.2d at 157.
83. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538 (D.P.R. Nov. 24, 1982) (order compelling arbitration).
84. Petition, *supra* note 69, at 4.
85. Brief, *supra* note 61, at 8. SCP counterclaimed that MMC allegedly violated the Sherman Act, 15 U.S.C. § 1 (1982), the Puerto Rican antitrust and unfair competition statute, P.R. LAWS ANN. tit. X, § 257 (1976), the Federal Arbitration Automobile Dealer's Day in Court Act, 15 U.S.C. § 1221 (1976), and the Puerto Rico Dealer's

fraud, breach of contract, libel, and interference with contractual relations.[86] Further, SCP contended that as a matter of public policy antitrust issues could not be resolved by arbitration.[87] SCP claimed that MMC's contract claims were "inextricably interwoven with the antitrust claims advanced by SCP."[88] It therefore asked the district court to resolve both the antitrust and the contract claims, or stay the arbitration of any arbitrable claims pending adjudication of any counterclaims that it might deem nonarbitrable.[89] Finally, on May 27, 1982, MMC filed a Supplemental Motion[90] to compel arbitration of SCP's counterclaims and for a stay, pending arbitration, of any nonarbitrable counterclaims.[91]

B. *The Ruling of the District Court*

The United States District Court for the District of Puerto Rico entered its Opinion and Order on November 24, 1982,[92] holding that SCP's Sherman Act counterclaim explicitly fell within the parties' agreement and was therefore arbitrable.[93]

Act, P.R. LAWS ANN. tit. X, § 258 (1976). *Mitsubishi*, 723 F.2d at 157. SCP alleged that MMC and CISA unlawfully divided markets, and in furtherance of this action, refused to allow transshipment of vehicles throughout the Americas. *Id.* at 160. SCP also alleged that MMC engaged in a boycott and other predatory practices intended to drive SCP out of business. *Id.*

86. Brief, *supra* note 61, at 8.

87. Petition, *supra* note 69, at 5; *see* American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968). For cases holding antitrust issues as nonarbitrable, see *supra* note 59.

88. Brief for the United States as Amicus Curiae at 4, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983).

89. *Id.* SCP averred that arbitration should be stayed pursuant to the Dealer's Act of Puerto Rico (Law No. 75), P.R. LAWS ANN. tit. X, § 278b-2 (Supp. 1980), which provides that dealers' contracts shall be interpreted pursuant to the laws of the Commonwealth of Puerto Rico and that any stipulation to the contrary shall be void. *Mitsubishi*, 723 F.2d at 158. It also provides that any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that arises regarding a dealer's contract outside of Puerto Rico, or under foreign law, is likewise considered as violating the public policy of the Act and is therefore null and void. *Id.*

90. This supplemental motion was filed pursuant to 9 U.S.C. §§ 4, 201 (1982). Brief, *supra* note 61, at 8.

91. Brief, *supra* note 61, at 8.

92. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538 (D.P.R. Nov. 24, 1982) (order compelling arbitration).

93. *Id.* at 10-11; *see Mitsubishi*, 723 F.2d at 158. The district court also held that all of MMC's claims and all but two, and part of a third, of SCP's counterclaims were within the scope of the parties' arbitration agreement. *Id.* The excluded counterclaims were for an alleged libel set forth in MMC's moving papers in this action,

In rejecting SCP's claim that, as a matter of law and policy, antitrust issues could not be referred to arbitration, the district court concluded that the Federal Arbitration Act clearly applied to the dispute.[94] The court reasoned that the contractual relationship between MMC and SCP was truly international[95] and that arbitration of the parties' commercial disputes, whether arising under the antitrust laws or otherwise, was therefore mandated by chapter 2 of the Federal Arbitration Act.[96]

The court also referred to the strong judicial policy favoring the submission of contractual disputes to arbitration as mandated by the Convention.[97] It focused on article II(3) of the Convention to determine whether the parties' agreement was "null and void, inoperative or incapable of being performed,"[98] and therefore incapable of being arbitrated.[99] The

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another alleged libel, and a claim that MMC had coerced SCP into agreeing to an improper minimum sales volume. Petition, *supra* note 69, at 5.

94. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. No. 82-538, at 8 (D.P.R. Nov. 24, 1982) (order compelling arbitration). The United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1982)), applies to a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . ." *Id.* § 2. When a contract involves "commerce" as defined in 9 U.S.C. § 1, "whether a 'suit or proceeding is referable to arbitration . . . under an agreement [to arbitrate]' pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, or to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II ¶ 3 and 9 U.S.C. § 206, is clearly a matter of federal substantive law." Becker Autoradio v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3d Cir. 1978). The Act supplants only that state law inconsistent with its express provisions. Societe Generale v. Raytheon, 643 F.2d at 863, 867 (1st Cir. 1981).

95. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. No. 82-538, at 7 (D.P.R. Nov. 24, 1982) (order compelling arbitration).

96. *Id.* at 9-11.

97. *Id.* at 5. Chapter 2 of the United States Arbitration Act, 9 U.S.C. § 201 (1982), was passed by Congress in order to implement the Convention. *See supra* note 5. Section 201 of this chapter provides unequivocally that the Convention "shall be enforced in the United States courts in accordance with this chapter." 9 U.S.C. § 201.

98. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538 at 6-7 (D.P.R. Nov. 24, 1982) (order compelling arbitration). Article II of the Convention provides:

> 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

court concluded that the agreement of the parties to arbitrate certain disputes arising out of their international commercial transaction should be protected and enforced by the federal courts in accordance with the express provisions of the Federal Arbitration Act.[100]

C. *The Ruling of the Court of Appeals*

On appeal, SCP argued that MMC had waived its rights to arbitrate; that the arbitration agreement was not broad enough to encompass its Sherman Act claims; and that arbitration of Sherman Act claims may not be compelled as a matter of law, even in international cases.[101] The United States Court of Appeals for the First Circuit reversed the judgment of the district court regarding SCP's antitrust counterclaims, and affirmed the judgment as to all other issues.[102] The court held that litigation, not arbitration, was the only appropriate means for the

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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.*

Convention, *supra* note 4, art. II (emphasis added).

99. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538, at 6-7 (D.P.R. Nov. 24, 1982) (order compelling arbitration). The court followed the reasoning of Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982), which stated that:

> The parochial interests of the Commonwealth, or of any state, cannot be the measure of how the "null and void" clause is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation. Rather, the clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale.

Id. at 187 (footnote omitted); *see* I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981); Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973-74 (2d Cir. 1974) (construing narrowly the "public policy" defense against enforcement of awards under article V(2)(b)); McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032, 1037 (3d Cir. 1974) (observing that there is "nothing discretionary" about article II(3) of the Convention).

100. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538, at 8 (D.P.R. Nov. 24, 1982) (order compelling arbitration).

101. Petition, *supra* note 69, at 5.

102. *Mitsubishi*, 723 F.2d at 169.

resolution of the antitrust counterclaim.[103]

1. Application of the Case Law to the Dispute

The court of appeals focused its analysis on three areas: 1) Whether prohibiting the arbitration of international antitrust claims is compatible with the Convention;[104] 2) Whether *Scherk v. Alberto-Culver Co.*[105] precludes the application of the *American Safety* doctrine[106] to *Mitsubishi*;[107] and 3) Whether all arbitration should be stayed pending a judicial decision because SCP's antitrust counterclaim must be decided by a court.[108] The court stated that the nonarbitrability of antitrust issues in domestic contract claims is a well-founded and established doctrine.[109] It concluded that antitrust laws express a policy important enough to overcome the mandate of the Federal Arbitration Act and the Convention that predispute agreements to arbitrate are valid and binding.[110]

The First Circuit declined to analogize international antitrust claims to international securities claims.[111] Instead, the court of appeals relied on the *American Safety* doctrine, which excepts domestic antitrust claims from arbitration,[112] and decided that antitrust claims are not arbitrable in an international context.[113]

2. Application of the Convention to the Dispute

The court of appeals directed its attention to article II of the Convention, which concerns the recognition of an arbitra-

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103. *Id.*

104. *Id.* at 163-66; *see supra* notes 48-59 and accompanying text.

105. 417 U.S. 506 (1974).

106. 391 F.2d 821 (2d Cir. 1968).

107. *Mitsubishi*, 723 F.2d at 166-68.

108. *Id.* at 169.

109. *Id.* at 163.

110. *Id.* at 169.

111. *Id.* at 168. The court did not feel *Scherk*, 417 U.S. 506 (1974), mandated the conclusion that international antitrust claims are arbitrable. *Mitsubishi*, 723 F.2d at 166-68. The court held that a "*Scherk*-type balancing . . . can have only one result: to enforce the private arbitration clause at the expense of public policy would be 'unreasonable.'" *Id.* at 168.

112. *American Safety*, 391 F.2d 821 (2d Cir. 1968); *see supra* text accompanying notes 48-59.

113. *Mitsubishi*, 723 F.2d at 169.

tion agreement,[114] and held that, due to the great public interest in fostering competition, antitrust claims are not capable of settlement by arbitration.[115] The extent to which the Court relied on the Convention is unclear because article II contains no specific public policy exception to the enforcement of agreements to arbitrate.[116] Article II provides for the enforcement of arbitration agreements by referring the parties to arbitration whenever a claim arises and they have agreed to arbitrate.[117] The only limitations on enforceability concern subject matter not capable of settlement by arbitration, as provided by article II(1),[118] or those agreements that are "null and void, inoperative or incapable of being performed," as provided by article II(3).[119]

D. *Comparison of Approaches Used by the District Court and the Court of Appeals*

The district court and the court of appeals both agreed that SCP's antitrust counterclaim was within the scope of the parties' arbitration agreement.[120] The district court recognized that "[a]s a general rule, claims under the antitrust laws are 'of a character inappropriate for enforcement by arbitration' "[121] but also reasoned that the *American Safety* doctrine does not govern antitrust claims arising from international transactions.[122] The district court concluded that the decision in *Scherk* should be analogized to international antitrust claims.[123]

The court of appeals, on the other hand, ruled that be-

114. Convention, *supra* note 4, art. II; *see supra* note 98 (for the text of article II).

115. *Mitsubishi*, 723 F.2d at 166.

116. *See supra* note 98.

117. Convention, *supra* note 4, art. II.

118. *Id.*

119. *Id.*

120. Petition, *supra* note 69, at 5. The court of appeals affirmed the district court's holding that each of the claims and counterclaims which had been referred to arbitration, including SCP's Sherman Act counterclaim, was within the scope of the arbitration agreement of the parties, but that the arbitration clause was "not unlimited in scope." *Mitsubishi*, 723 F.2d at 159; *see supra* notes 93-104 and accompanying text.

121. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538, at 9 (D.P.R. Nov. 24, 1982) (order compelling arbitration) (quoting *American Safety*, 391 F.2d at 825-27).

122. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538, at 10 (D.P.R. Nov. 24, 1982) (order compelling arbitration).

123. *Id.*

cause of the differing purposes of the securities and antitrust laws, an analogy to *Scherk* does not mandate the conclusion that SCP's antitrust counterclaim is arbitrable.[124] The Federal Arbitration Act does not mandate arbitration of antitrust claims arising in domestic disputes because arbitration of such disputes could pose unacceptable dangers to private enforcement of the antitrust laws.[125] The court found that the same reasoning precludes arbitration of antitrust claims arising in international disputes, at least when the international agreement involves the sale and distribution of products in the United States.[126]

The court of appeals weighed the policy considerations regarding the arbitration of a private party's international contract disputes against the public's interest in the preservation of economic order in the United States.[127] This balancing test was also applied in *Scherk* where the Court weighed the policy considerations of giving the securities investors the full protection of the securities laws against the policy considerations of giving the investor the certainty of an arbitration clause.[128] The *Scherk* court decided that the individual investor would best be served by enforcement of the arbitration clause.[129] The court of appeals in *Mitsubishi*, on the other hand, compared the policy considerations underlying the securities laws and the antitrust laws and concluded that the protection provided by the securities laws benefits only a small segment of society.[130] The court of appeals reasoned that the antitrust laws have an industry-wide effect in that they regulate an entire industry or a group of related industries to ensure competition and thereby protect the general public from high prices.[131] The court concluded that to enforce the private arbitration clause at the expense of public policy would be unrea-

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124. *Mitsubishi*, 723 F.2d at 167-68.

125. *Id.* at 163; *see American Safety*, 361 F.2d at 826.

126. *Mitsubishi*, 723 F.2d at 163, 167.

127. *Id.* at 168.

128. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-18 (1974).

129. *Id.*

130. *Mitsubishi*, 723 F.2d at 168. The court of appeals concluded that the securities laws "are designed primarily to protect a fairly small 'special interest' group: those investors in a particular security who read and are influenced by information in the company's prospectuses or financial reports." *Id.*

131. *Id.; see American Safety*, 391 F.2d at 826-27.

sonable.[132]

There are two possible approaches in deciding *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* The Supreme Court could affirm the court of appeals decision and extend the *American Safety* doctrine to an international commercial dispute, thereby concluding that because domestic antitrust claims may not be arbitrated, international antitrust claims are also nonarbitrable. Conversely, the Court could apply the reasoning of *Scherk v. Alberto-Culver Co.* to permit arbitration of antitrust claims in an international context.

III. *ANALYSIS*

A. *Arbitrability of Antitrust Claims*

It has been suggested that private antitrust actions vindicate important public interests by helping to preserve a competitive economy and that therefore, arbitration of private antitrust claims ill-serves the public welfare.[133] However, lower courts have recognized that antitrust claims arising in contractual disputes are often frivolous.[134] Antitrust claims may be raised in an attempt to remove the dispute to a forum perceived by the antitrust claimant to be more favorable.[135] Often

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132. *Mitsubishi*, 723 F.2d at 168. *But cf. Bremen*, 407 U.S. at 10 (upholding the enforceability of a forum selection clause requiring that disputes arising out of international transactions be brought before a special English court).

The notion of unreasonableness referred to by the court of appeals in *Mitsubishi* is, in part, based on the fact that successful antitrust plaintiffs are awarded treble damages in a court action, 15 U.S.C. § 15; *see* Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1073 (1969), but the general attitude toward award of punitive damages in arbitration is that the punitive damage remedy is reserved to the judiciary for reasons of public policy. *See* AM. ARB. ASSOC., REMEDIES IN ARBITRATION, 8 LAW ARB. LETTER 1, 3-4 (1984). However, a number of recent cases have upheld punitive damages as within the authority of the arbitrator under the broad arbitration clause. Willoughby Roofing & Supply Co., Inc. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984); Willis v. Shearson/American Express Inc., 569 F. Supp. 821 (M.D.N.C. 1983); Baker v. Sadick, — Cal. App. 3d —, 208 Cal. Rptr. 676 (1984).

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

134. *See, e.g.*, Reisner v. General Motors Corp., 511 F. Supp. 1167, 1178 n.25 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982) ("[n]umerous cases are filed in the federal district courts attempting to make antitrust claims out of what are, at most, contract claims or fraud claims involving conduct between two parties. . . . Such claims are regularly dismissed, however, after taking up considerable amounts of judicial time.").

135. *See* Perlman & Nelson, *supra* note 3, at 217-19. These commentators sug-

such claims are used to turn a simple contract dispute into a claim entitled to treble damages and attorney's fees,[136] or as a means to delay or increase the costs to the opposing party pursuing a bona fide contract action.[137]

A concern of courts that further supports their decisions holding antitrust claims nonarbitrable is the possibility that contracts of adhesion between a monopolist and its customers will determine the forum for trying antitrust violations.[138] This reasoning presumes that the defendant has violated the Sherman Act.[139] This may not always be true because many antitrust claims are found to be frivolous.[140]

The *American Safety* court also based its decision on the notion that antitrust cases are likely to be complex and time consuming, and are therefore more amenable to judicial rather than to arbitration procedures.[141] However, attorneys, scientists, and business people are frequently appointed to serve as arbitrators.[142] Consequently, the assertion of judicial superiority is merely a reassertion of the common law's hostility toward arbitration that Congress sought to eliminate by enacting the Federal Arbitration Act.[143]

The court of appeals in *Mitsubishi* has extended the *American Safety* doctrine from a purely domestic context to an international context.[144] This rationale is at odds with both the

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gest that differences in substantive law, public policies, and procedures may encourage some perceived material advantage. They conclude that as a result, international commercial arbitration provides a useful means of minimizing the opportunity for certain kinds of procedural maneuvering that are often found in international judicial procedures. *Id.; see* 28 U.S.C. § 1337 (1976) (providing federal courts with original jurisdiction over federal antitrust actions).

136. *See* Note, *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1062 (1952).

137. *See id.*

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

139. *See id.*

140. *See supra* notes 134-37 and accompanying text.

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

142. *See* Meyerowitz, *supra* note 6, at 79-80; *see also American Safety*, 391 F.2d at 827 ("commercial arbitrators are frequently men drawn for their business expertise . . .").

143. 9 U.S.C. § 1 (1982); *see* Southland Corp. v. Keating, 104 S. Ct. 852, 858 (1984); Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

144. *Mitsubishi*, 723 F.2d at 162, 165, 167-68.

Convention and the Arbitration Act. The comparison of a domestic antitrust claim with an international antitrust claim fails to address the policy considerations underlying both the Congressional mandate in favor of arbitrating international disputes[145] and the Supreme Court's decision in *Scherk v. Alberto-Culver Co.*[146]

In *Mitsubishi*, the court of appeals also reasoned that antitrust claims are nonarbitrable due to the great public interest in their judicial resolution.[147] However, the court did note that in the views of other circuit courts a post-dispute agreement to arbitrate an antitrust claim may be valid and binding.[148] This acknowledgment appears to negate the court of appeals rationale in *Mitsubishi* regarding the great public policy in a judicial resolution of antitrust claims. Since arbitration proceedings are private,[149] if antitrust claims may be arbitrated by a post-dispute agreement, the public interest would not be served.[150] Furthermore, the *American Safety* court was concerned with the

145. *See* Federal Arbitration Act, 9 U.S.C. § 201 (1982). The Act mandates that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2.

146. 417 U.S. 506 (1974). In *Bremen*, 407 U.S. 1 (1971), the Supreme Court held that a choice-of-forum clause in an arm's length, freely negotiated international commercial contract should be recognized and enforced, absent a compelling showing that it should be set aside. *Id.* at 15. For a discussion of choice-of-laws rules problems, see generally Collins, *Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England*, 2 J. MAR. L. & COM. 363 (1971); Sassoon, *Choice of Tribunal and the Proper Law of the Contract*, 1964 J. BUS. L. 18 (1964). The Supreme Court disregarded the notion that the United States courts should not be ousted of jurisdiction by parties to a commercial contract and stated that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen*, 407 U.S. at 9.

147. *Mitsubishi*, 723 F.2d at 168.

148. *See id.* at 168 n.12; Nissen, *Antitrust and Arbitration in International Commerce*, 17 HARV. INT'L L.J. 110, 119 (1976) ("an arbitration agreement entered into after an antitrust claim arises is enforceable.").

149. COM. ARB. R. 25 (1984); Coulson, *Survey of International Arbitration Procedures*, in INTERNATIONAL ARBITRATION KIT: A COMPILATION OF BASIC AND FREQUENTLY REQUESTED DOCUMENTS 169, 183 (ed. Brown 1982); Holtzman, *The Importance of Choosing the Right Place to Arbitrate an International Case*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 183, 184 (ed. V. Cameron 1977).

150. Loevinger, *supra* note 6, at 1091 ("[a]ntitrust claims . . . involve the public interest. The enforcement of important public policies is the basic business of the courts which should not be abdicated to other agencies or processes.").

possibility of a contract of adhesion containing an arbitration clause rather than the public interest in judicial resolution of antitrust claims.[151] There is, therefore, no per se rule against the arbitrability of antitrust claims, but rather, a United States doctrine that domestic antitrust claims should not be arbitrated. The rationale of *American Safety* has little or no force in an international context.[152]

B. *Arbitrability of Securities Claims*

The rationale of *Scherk* providing for the arbitration of international securities claims should, by analogy, apply to *Mitsubishi*. International antitrust claims require the same treatment as international securities claims.[153] Although *Scherk* involved a securities issue, the court's reasoning compels the same result in an international dispute concerning statutes designed primarily to protect the public interest rather than to regulate relationships between commercial partners.[154]

The court of appeals attempts to distinguish *Mitsubishi* from *Scherk* by suggesting that because the antitrust laws affect far more people than the securities laws, the public interest in the judicial enforcement of the antitrust laws is far greater than that of the securities regulations.[155] The validity of this reasoning is highly questionable. The purpose of the securities laws is to preserve the fair and efficient functioning of the nation's securities markets, which is of considerable importance to the overall health of the economy.[156] Billions of dollars are invested in the securities markets[157] by United States citizens

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151. *American Safety*, 391 F.2d at 827; *see* Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1213, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972). The *Coenen* court held that agreements to arbitrate antitrust issues made after the dispute has arisen are enforceable. 453 F.2d at 1215. The rationale was based on the fact the parties are free to settle their antitrust disputes without court intervention. *Id.; accord* Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974).

152. *See, e.g.*, Allegaert v. Perot, 548 F.2d 432, 436-37 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977); Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 27 n.59 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

153. *See infra* text accompanying notes 155-63.

154. *See* Ehrenhaft, *supra* note 6, at 1199-1200.

155. *Mitsubishi*, 723 F.2d at 168.

156. *See* S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

157. Fedders, *supra* note 32, at 2.

as well as foreigners.[158] The securities laws are important guarantors of the free flow of accurate and adequate information in the financial markets and are essential to its proper functioning.[159]

Furthermore, the court of appeals' reliance on the public interest notion is inappropriate in that Congress has not sought to guarantee that the public interest is represented by or even a concern in the enforcement of antitrust cases by private plaintiffs.[160] To illustrate: A private antitrust plaintiff may settle his lawsuit pursuant to a settlement agreement without the approval of either the court or other governmental agency, and regardless of whether the settlement agreement advances or subverts the public interest.[161] While Congress requires an analysis of the competitive effect of the settlement and approval by the courts as a condition to the entry of consent settlements in government antitrust actions, it does not do so in private antitrust cases.[162] The court of appeals' distinction in *Mitsubishi* between the relative importance of the securities laws and the antitrust laws is unpersuasive. The line of reasoning in support of the arbitrability of securities claims on an international level can, by analogy, be applied to support the arbitrability of antitrust claims on an international level.[163]

C. *Application of the Convention to the Dispute*

When a court is presented with a request to refer a dispute to arbitration four preliminary questions must be resolved

158. *See id.* Between 1978 and 1982, purchases of stock in the United States by foreign persons and institutions increased from U.S.$20.1 billion to U.S. $41.8 billion. *Id.*

159. *See* Oklahoma-Texas Trust v. S.E.C., 100 F.2d 888, 891 (10th Cir. 1939); S. REP. No. 47, 73rd Cong., 1st Sess. 1 (1933).

160. *See infra* notes 161-62 and accompanying text.

161. *See* FED. R. CIV. P. 41(a)(1); *cf.* FED. R. CIV. P. 23(e) (requiring court approval for the settlement of class actions).

162. *See* Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(b)-16(h) (1976); *see also* Aksen, *supra* note 6, at 1106-07 (1969) (the parties' voluntary abandonment of a pending antitrust litigation would be impermissible if Congress intended private antitrust claims to be exclusively resolved by courts).

163. To assume that antitrust claims are arbitrable on an international level does not presuppose an automatic enforcement of an arbitral award rendered in such a proceeding. On the contrary, the Convention provides that the recognition and enforcement of an arbitral award may be denied by a signatory state if the recognition and enforcement is contrary to that state's public policy. *See* Convention, *supra* note 4, arts. II, V.

before the agreement is deemed to fall within the Convention: 1) Whether there is a written agreement to arbitrate the subject matter of the dispute;[164] 2) Whether the agreement provides for arbitration in a territory of a signatory state;[165] 3) Whether the agreement arises out of a commercial relationship;[166] and 4) Whether the commercial relationship has some reasonable relationship with a foreign state.[167] In *Mitsubishi*, all of these conditions are met.[168] The remaining issues to be dealt with concern the application of articles II and V to the parties' dispute.

1. Article II

Article II, which refers to the recognition and enforcement of an arbitral agreement has two requirements. The agreement must involve a "subject matter capable of settlement by arbitration"[169] and it must not be "null and void, inoperative or incapable of being performed."[170] If these prerequisites are satisfied, the Convention unambiguously provides that an agreement shall be recognized by the signatory states and that parties to the agreement shall be referred to arbitration.[171]

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164. *Id.* art. II; *see supra* note 98 (for text of article II).

165. Convention, *supra* note 4, art. I. This article provides, in pertinent part:

> 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.
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> . . . .
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> 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 . . . 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.

Id.

166. *See* Federal Arbitration Act, 9 U.S.C. § 202 (1982).

167. *Id.*; Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982).

168. *Mitsubishi*, 723 F.2d at 157.

169. Convention, *supra* note 4, art. II; *see supra* note 98 (for the text of article II).

170. Convention, *supra* note 4, art. II. The grounds upon which an agreement can be found null and void, inoperative or incapable of being performed are fraud, mistake, duress and waiver. *See Ledee*, 684 F.2d at 187; *infra* note 179 and accompanying text.

171. Convention, *supra* note 4, art. II. In McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3rd Cir. 1974), the Court stated:

A United States court must first decide whether the matter is capable of settlement by arbitration.[172] The court has three options: 1) The court can refer to the federal law on the subject;[173] 2) The court can apply the choice-of-laws rules[174] to determine what law is applicable and then determine the arbitrability by reference to that law; or 3) The court can apply the law that would govern under article V of the Convention where recognition and enforcement of the award is at issue.[175] This last course of action may be the most appropriate[176] in that by allowing the court to deny recognition of an arbitration award if its subject matter is incapable of settlement by arbitration under federal law, article V(2)(b) effectively accommodates the first option.[177] Article V(1)(a) permits the parties' choice of applicable law to be taken into account.[178]

There is nothing discretionary about article II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration. The enactment of Pub. L. 91-368, providing a federal remedy for the enforcement of the Convention, including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context.

Id. at 1037; *see also* I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981) ("[o]ur interpretation of the Article II(3) proviso must not only observe the strong policy favoring arbitration, but must also foster the adoption of standards which can be uniformly applied on an international scale.").

172. *See* Convention, *supra* note 4, art. V; *infra* note 175.

173. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. § 201 (1982); United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1982)).

174. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 117 (1971). Section 117 explains that "a valid judgment rendered in one State . . . will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim." *Id.*

175. Convention, *supra* note 4. Article V provides in pertinent part:

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*.

Id. (emphasis added); *see* S. EXEC. DOC. NO. E., *supra* note 5, at 4, 8; *ABA Report, supra* note 5, at 254-55.

176. McMahon, *supra* note 5, at 757.

177. *Id.*

178. Convention, *supra* note 4, art. V. The Agreement provided for Swiss law to apply as if the contract had been entirely performed therein, and for the application

The "null and void" clause of the Convention has been scrutinized by the United States.[179] Although the exact meaning of article II(3) is unclear, there are two possible interpretations.[180] Under the first interpretation, article II(3) provides few grounds for disregarding an arbitral agreement[181] because article V lists various grounds on which a court may ignore arbitration.[182] Thus, a party may have to proceed through an arbitration before it is able to challenge the award and the underlying agreement.[183] Article II is, in effect, being properly construed to apply only to agreements to arbitrate and not to arbitral awards. The second interpretation suggests that the public policy defenses of article V, allowing a court to deny recognition and enforcement of *arbitral awards*, are applicable to the recognition and enforcement of *arbitral agreements* by virtue of article II(3).[184] This clause states that a court need not enforce an *arbitral agreement* if it finds the agreement "null and

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of Japanese Commercial Arbitration Rules. *See supra* notes 67-73 and accompanying text.

179. In Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982), the First Circuit was confronted with the issue of the relationship between the Federal Arbitration Act and a Puerto Rican statute that prohibits arbitration outside the Commonwealth of Puerto Rico. *Id.* at 186. The appellants, distributors of ceramic tiles who alleged that the manufacturer had wrongfully terminated their distributorship, argued that under a Puerto Rican statute, P.R. LAWS ANN. tit. X, § 3372 (1976), contracting parties may not agree to clauses or conditions in contravention of law, morals, or public order. *Ledee*, 684 F.2d at 186. The court of appeals ordered arbitration and dismissed the complaint, basing their decision on the fact that the agreement fell within the Convention. *Id.* at 187. Further, the court said that the "null and void" clause of the Convention encompasses only those situations such as fraud, mistake, duress and waiver that can be applied neutrally on an international scale. *Id.* As a result, the "null and void" clause of the Convention did not incorporate the Puerto Rico Dealer's Act, P.R. LAWS ANN. tit. X, § 258 (1976) which prohibits certain disputes from being arbitrated outside of Puerto Rico. *Ledee*, 684 F.2d at 185; *see* I.T.A.D. Assoc., Inc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981); McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037 (3d Cir. 1974). The notion that an arbitration agreement "shall" be recognized by the signatories and that parties to an agreement "shall" be referred to arbitration has been interpreted by other signatory countries. *See, e.g.*, Paczy v. Haendler & Natermann GmbH, 1 LLOYD'S L.R. 302 (C.A. 1981), *reported in* 9 Y.B. COM. ARB. 445 (1984) (United Kingdom); Louis Dreyfus Corp. of New York v. Oriana Soc. di Navigazione S.p.A., Foro It. I 1051 (Corte cass. 1970), *reported in* 1 Y.B. COM. ARB. 189 (1976) (Italy).

180. *See* Ehrenhaft, *supra* note 6, at 1213.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Compare* Convention, *supra* note 4, art. II *with id.* art. V. (emphasis added).

void, inoperative or incapable of being performed."[185] If the arbitration agreement presupposes the enforcement of an eventual arbitral award, the agreement cannot be fully performed if the final award will not be enforced. A final award need not be enforced due to the public policy defense of article V.[186] This interpretation also relies on the notion that the court would consider many of the article V defenses, notwithstanding the fact that article V refers solely to the recognition and enforcement of arbitral awards, when deciding whether to retain jurisdiction over the dispute.[187] Under this interpretation, article II is, in effect, being loosely construed. The public policy defenses in article V which refer to the recognition and enforcement of arbitral awards, conspicuously absent from article II, are being improperly imposed on article II.

In its strictest reading, article II of the Convention clearly calls for all agreements to arbitrate between signatory states to be recognized and enforced.[188] Since the Supreme Court has held that the interpretation of a treaty begins with the language of the treaty itself,[189] the Court should look first to the language of the Convention and its implementing legislation. The question is not whether agreements to arbitrate should be enforced; it is whether the resulting award should be recognized and enforced.

2. Article V

Article V of the Convention refers to the recognition and enforcement of arbitral awards.[190] According to article V, an award may not be recognized or enforced by a signatory state if it would be contrary to the public policy of that state.[191] Theoretically, there could be a duty to refer a matter to arbi-

185. *Id.* art. II; *see Scherk*, 417 U.S. at 530-31 n.10 (Douglas, J., dissenting).

186. *See* Ehrenhaft, *supra* note 6, at 1214.

187. *See* 2 E. COHN, MANUAL OF GERMAN LAW, para. 9.139 (2d rev. ed. 1971); Ehrenhaft, *supra* note 6, at 1214.

188. Convention, *supra* note 4, art. II.

189. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982). "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " *Id.* (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)).

190. Convention, *supra* note 4, art. V.

191. *Id.*

tration under article II even though it may be so offensive to a nation's public policy that it could not later be enforced under article V. Arguments contravening public policy would have to be made at this later stage in challenges to arbitral awards.[192]

Article V(2)(a) of the Convention permits a signatory state to deny recognition and enforcement of an arbitral award if the "subject matter . . . is not capable of settlement by arbitration under the law of that country."[193] This provision is troublesome[194] because a number of signatory states to the Convention have antitrust or other restrictive business practice laws and the type of conduct these laws prohibit, and the attendant public policy concerns, can vary substantially from state to state.[195] The public policy exception to the enforcement of awards contained in article V(2)(b) has been referred to as a loophole in the Convention.[196] Hence, a party seeking to avoid recognition or enforcement of an award under the Con-

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192. Newman & Burrows, *supra* note 6, at 22, col. 2.

193. Convention, *supra* note 4, art. V.

194. Aksen, *supra* note 5, at 8. Although personally hoping that the arbitrability of a claim would be decided by the arbitrator, this commentator concluded that article V(2)(b) of the Convention "makes such a desirable result unlikely." *Id.* at 9. Consequently, the application of domestic standards of arbitrability "poses unduly complicated legal questions," *id.* at 13, because the public policy language of article V(2)(b) would be utilized to refuse enforcement of an award involving, for example, a question of antitrust law. *Id.; see* McMahon, *supra* note 5, at 753 n.83. Article V(2)(a) would "permit the court to refuse to recognize the agreement if its subject matter is incapable of settlement by arbitration under federal law." *Id.* at 757. "These provisions permit the court, where enforcement . . . is sought, to apply the laws of the forum, presumably including its conflict rules, to determine arbitrability." Barry, *supra* note 14, at 835 n.14. "The Convention's failure to state what law governs the determination of whether the dispute is 'capable of settlement by arbitration' and whether the agreement is 'null and void, inoperative or incapable of being performed' is a significant inadequacy in a document dealing with international commercial transactions." McMahon, *supra* note 5, at 753 n.83; *see also* G. GAJA, INTERNATIONAL COMMERCIAL ARBITRATION part I, at I.B.2:

> The similarity in the tests of Article II(1) and Article V(2)(a) and the fact that Article II was introduced in the Convention only at the late stage of the drafting indicate that also according to Article II the arbitrability of the dispute must be tested under the *lex fori*—the law of the State where effects of the arbitration agreements are sought.

Id. (footnote omitted).

195. *See* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4.02 (2d ed. 1981).

196. *See* Ehrenhaft, *supra* note 6, at 1214; Kitagawa, *Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective*, in INTERNATIONAL LIBER AMICORUM FOR MARTIN DOMKE 133, 139 (P. Sanders ed. 1967).

vention may assert that the facts of his particular case invoke the application of the public policy exception, thereby avoiding enforcement of an award and perhaps even arbitration.[197]

The original interpretation of the public policy defense was very broad.[198] Although its definition has undergone various changes, always with an eye toward limiting its application,[199] it still appears to serve as a catchall provision permitting varied applications of the public policy defense.[200] The public policy defense has been referred to as a catchall because it encompasses those arbitration situations where the "basic notions of morality and justice have not yet been specifically delineated."[201] However, a conflict with a domestic law is not a per se violation of public policy.[202] The success of a public

197. *See* Barry, *supra* note 14, at 843.

198. *See infra* notes 199-202.

199. The first important multilateral definition of the public policy defense is found in the formal rules governing international commercial arbitration set forth in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, *opened for signature* Sept. 24, 1923, 92 L.N.T.S. 301 [hereinafter cited as Geneva Convention]. The post-World War II bilateral Treaties of Friendship, Commerce and Navigation give only a rather ambiguous statement that arbitral awards will be enforced between two states "except where found to be contrary to public policy." *See, e.g.*, Treaty of Friendship, Commerce and Navigation, July 14, 1956, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1954, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Oct. 30, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863. The Geneva Convention, *supra*, states that arbitral awards will be enforced only if "not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon." *Id.* art. I(e). This definition was adopted by the Ad Hoc Committee of the Economic and Social Council of the United Nations in 1955. Committee on the Enforcement of International Arbitral Awards, U.N. Doc. No. E/AC.42/SR.12/7, at 3-10 (1955). For a discussion of the New York Conference, see generally G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958). This definition was later modified for the final draft of the Convention. 2 P. SANDERS, INTERNATIONAL COMMERCIAL ARBITRATION 293, 323 (1960); Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 304 (1959); *see also* Quigley, *supra* note 5, at 1070-71 (phrase "or with fundamental principles of the law (ordre public)" was not added to article V because it may be read as broadening the definition of public policy); Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67, 81 (1971) (possibility remains open that the public policy clause of article V may be used discriminately).

200. *See* Aksen, *supra* note 5, at 13; Quigley, *supra* note 5, at 1071 n.93; Comment, *supra* note 14, at 229.

201. Comment, *supra* note 14, at 245.

202. *See* Bitronik Mess-und Therapiegerate v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976). Although the court did consider whether the public policy defense attempted to apply domestic arbitration law to foreign arbitration

policy defense to the recognition and enforcement of an arbitral award, where its enforcement is in conflict with a domestic statute, appears uncertain.

In effect, it is unclear whether an arbitral award rendered in an antitrust action will be recognized and/or enforced in the United States. However, from the language of articles II and V it is clear that under the Convention parties should be referred to arbitration in all cases;[203] arguments in contravention of public policy are to be raised after the award has been rendered.[204] In light of the fact that parties may have a post-dispute agreement to arbitrate an antitrust claim[205] and the resulting award will be enforced, the public policy exception to arbitration of antitrust claims is weak.[206] There may be other bases for denying recognition of an arbitral award and they may well be valid in that article V(2)(b) acts as a safety valve allowing consideration of the national policies of the Convention's signatories. These defenses should not, however, be applied to article II, referring to the recognition and enforcement of an arbitral agreement.[207] To interpret the Convention in any other manner would deny the consistency in international trade relations that its makers sought to create and would demonstrate a readiness on the part of the United States to abandon its treaty commitments whenever they are found contrary to some perceived public interest.

CONCLUSION

Article II of the Convention unambiguously mandates that all agreements to arbitrate shall be recognized and enforced by its signatory states. This article should be the sole determinant

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awards by equating a specific statute with a public policy, it is clear that the court believed a statutory violation would be insufficient to invoke the public policy defense without considering basic notions of morality and justice. Comment, *supra* note 14, at 240-41. This reinforces the principle set down in *Scherk*, 417 U.S. 506 (1974), that the emphasis given to a statute because it is domestic will not automatically support nonrecognition of a foreign arbitral award. *Id.* at 513-14.

203. *See* Convention, *supra* note 4, arts. II, V; *supra* notes 169-97 and accompanying text.

204. *See supra* text accompanying notes 190-92.

205. *American Safety*, 391 F.2d at 827; *Coenen*, 453 F.2d at 1213; *see supra* note 151 and accompanying text.

206. *See supra* note 156-61 and accompanying text.

207. *See supra* notes 189-200 and accompanying text.

of whether arbitration agreements should be enforced, regardless of the issue at stake. Article V of the Convention provides for the denial of the recognition and enforcement of an arbitral award if its enforcement would be contrary to the public policy of the country where its enforcement is sought. The public policy exception to the enforcement of arbitral awards does not apply to the enforcement of arbitral agreements. The mandate of the Convention, coupled with the holding in *Scherk*, supports the conclusion that international antitrust disputes are arbitrable. International commercial arbitration is an indispensable dispute resolution mechanism. The Convention provides an internationally neutral means of resolving transnational disputes and will be most effective if the courts of its signatory states interpret its provisions consistently, apply them broadly, and construe its defenses narrowly. International commercial trade and transactions can only be enhanced if parties to an arbitral agreement can be assured that their agreement will be upheld and their disputes resolved as anticipated and mandated by the Convention.

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