

INTERNATIONAL COMMERCIAL ARBITRATION AND FEDERAL SECURITIES REGULATION: RECONCILING TWO CONFLICTING POLICIES

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1. Introduction

The recent dramatic increase in international investment transactions involving U.S. citizens [1] has exposed a clash of two national policies regarding dispute resolution. The U.S. securities laws contain certain provisions which prohibit the waiver of their protections [2]. At the same time, the U.S. Congress [3] and courts [4] have recognized the benefits of international commercial arbitration, even though its use may interfere with, or create results different from, potential resolutions under the aforementioned securities laws. This article explores developments in and current problems of the implementation and reconciliation of these two policies.

2. Policy for international commercial arbitration

2.1. *Development of international commercial arbitration*

To bring suit and obtain judgment in a foreign country is expensive, time-consuming, and complicated. By contrast, international commercial arbitration can be a straightforward, economical, informal, and impartial means of resolving international business disputes. Arbitration offers benefits to businesspersons and taxpayers alike. “Not only does [arbitration] relieve the congestion in the courts, but it relieves the taxpayer from assessment for additional facilities. In other words, business taxes itself to pay the cost of keeping commercial peace” [5]. Those engaging in international commerce generally prefer arbitration over litigation [6]. Indeed, arbitration has been considered virtually indispensable for multinational corporations [7].

Arbitration systems have advanced remarkably during the last half century. Almost every developed nation has established some kind of arbitral body for

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commercial disputes [8]. In addition, private organizations such as trade associations and commodity exchanges have offered facilities for arbitration of commercial disputes relating to specific commodities [9]. International efforts to increase the use of arbitration have resulted in mechanisms such as inter-governmental agreements and private international organizations, through which international commercial arbitration has acquired a more solid legal standing [10].

Early significant developments in multilateral mechanisms were the 1923 Geneva Protocol on Arbitration Clauses [11] and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards [12]. Although these two Geneva treaties “did not live up to the expectations of those who had viewed them as a decisive step in the progress of the international commercial arbitration” [13], they were obviously a positive step.

More recent multilateral efforts promoting international arbitration have included the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (CSID) [14], the General Agreement on Tariffs and Trade (GATT) [15], the European Convention for the Peaceful Settlement of Disputes [16], the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (U.N. Convention) [17], the European Convention on International Commercial Arbitration of 1961 [18], and the Arbitration Rules of the United Nations Commission in International Trade Law (UNCITRAL) [19].

Along with these governmental efforts, the international business community has set up its own private organizations for dispute settlement. The International Chamber of Commerce with its Court of Arbitration is the most successful of these [20]. Founded in 1919, the International Chamber of Commerce (ICC) has stated that “the advantages to the business world of an international organization for the settlement of business disputes of an international character without recourse to the formalities of court proceedings, are such that the International Chamber of Commerce feels in duty bound to do everything in its power to encourage conciliation and arbitration [*sic*]” [21].

Since the ICC’s inception, over 2,000 disputes have been submitted to it [22]. In order to realize fair and equitable dispute resolution, the ICC’s Court of Arbitration has undertaken to ensure that proper arbitrators are chosen for each case. The Court does not itself appoint individual arbitrators, but rather selects “a national committee or committees which it considers strategically located for making the best arbitration proposal in the case concerned” [23]. The Court has approved of arbitrators selected from the ranks of diplomats, high level public servants, engineers, university professors, bankers, and industrialists, in addition to members of the legal profession. Further, the ICC adopts reasonable and careful procedures in choosing the place of arbitration [24]. Thus, as far as international commercial disputes are concerned, the ICC

may be considered no less capable than a domestic judicial system in its ability to arrive at a fair and equitable award which is based on the realities of international commerce [25].

In most cases the ICC arbitration awards have been voluntarily carried out [26]. In the event of non-compliance, the party seeking the enforcement has recourse to the courts of any nation in which the losing party has assets. In most cases, judgment can be obtained without a rehearing of the merits of the dispute [27].

2.2. The United States' attitude toward international efforts for utilizing international commercial arbitration – before ratification of the U.N. Convention

Early common law doctrine in England and the United States was antagonistic toward commercial arbitration [28]. U.S. legislators overturned that doctrine, and recognized arbitration as a dispute settlement system equal to the judicial system, by enacting the Federal Arbitration Act of 1925 (FAA) [29] and various state laws dating as far back as 1921 [30]. The FAA declares that agreements to arbitrate are valid, enforceable, and irrevocable. The FAA also provides for the stay of court proceedings pending arbitration and the enforcement of arbitration agreements in the federal courts [31].

The United States originally shunned multilateral efforts to establish international commercial arbitration, preferring to move more cautiously through limited arbitration clauses in bilateral Treaties of Friendship, Commerce, and Navigation (TFCN) [32]. The United States did not join in the multilateral Geneva treaties of 1923 and 1927 and it was not until 1946 that the United States launched its first bilateral effort, a TFCN with China [33]. Far from liberal in its endorsement of commercial arbitration, the arbitration clause provided that an agreement to arbitrate would be given full faith and credit, but that an award would be recognized only in the territory in which it was rendered [34]. The TFCN with Ireland in 1950 [35] was only slightly more progressive: it prohibited a state from denying effect to an award solely on the basis that it was rendered outside the territory of that state, but allowed that other factors could defeat its enforcement [36]. TFCNs with Colombia, Denmark, Haiti, Israel, and Korea followed [37]. TFCNs concluded with Japan [38] and West Germany [39] in the early 1950s contained considerably liberalized arbitration clauses, but it was not until 1956, in its TFCN with the Netherlands [40], that the United States had a full-fledged arbitration clause. The TFCN with the Netherlands goes beyond “the principle of non-discrimination” and makes foreign awards “conclusive” in enforcement proceedings before the courts of either party. Thus, it imposes a duty to enforce such awards [41].

In support of the United States' bilateral approach, commentators have stated that “bilateral treaties can handle problems peculiar to two trading

partners better than broad multilateral agreements in which various states have differing problems and in which a least common denominator approach must be utilized” [42]. Whatever the United States’ reasons for pursuing bilateral arbitration clauses and eschewing multilateral agreements, U.S. courts have not hesitated to recognize and enforce foreign awards under, and even beyond, the coverage of TFCN arbitration clauses [43].

2.3. The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards: A broad change in U.S. national policy

2.3.1. The adoption of the U.N. Convention

As international business transactions increased after World War II, the international community urgently needed a new multilateral convention on international arbitration. The 1958 United Nations Conference on International Commercial Arbitration, in which the United States and forty-four other nations participated, adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was signed by twenty-five of the participants, and entered into force on June 7, 1959 [44].

The international community clearly established, in the form of a legal agreement, its approval of arbitration. The United States, however, “[d]ue to an obsolete misunderstanding of arbitration ... remained largely in the background” [45] and for twelve years refused to join the U.N. Convention. Among the reasons offered for the United States’ recalcitrance were: “(1) The [U.N.] convention embodies principles of arbitration law which would not be desirable for the United States to endorse; and (2) The United States lacks a sufficient legal basis for acceptance of an advanced international convention on this subject matter” [46]. The fact that the United States accepted arbitration agreements only through reciprocal bilateral TFCNs suggests that the self-defensive instinct rooted in the common law’s hostility to arbitration was an underlying element of its refusal to add its support to that of the international community.

2.3.2. The U.N. Convention

The U.N. Convention improves upon the 1927 Geneva Convention in many respects. Article I of the U.N. Convention has a wider definition of enforceable awards [47]. Article II precludes the courts of Contracting States from deciding a controversy covered by a valid arbitration clause, whether it is an agreement to arbitrate existing disputes or future controversies, unless the agreement concerns a subject matter incapable of settlement by arbitration [48]. Article V 2(a) establishes that such incapacity is to be determined by the competent authority in the country where recognition and enforcement is sought, under the law of that country. To promote international uniformity and encourage

arbitration, it is expected that each country's authority will adopt similar standards of arbitrability [49].

Article II(3) deals with the "Stay of Litigation". The most crucial issue here is which law decides whether the arbitration agreement is "null and void, inoperative or incapable of being performed". The first choice appropriately is given to the parties who can specify the governing law. Absent such a specification, the court of the forum state will decide the issue on the basis of its own law and policy, including its own rules on conflict of laws [50].

Article III is the most basic provision of the U.N. Convention. It states:

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

The second sentence of this Article simplifies the requirements with which the party seeking recognition of an award would have had to comply under the Geneva Convention [51].

Article V is the most controversial provision. It provides the ground for the refusal to recognize and enforce foreign arbitral awards. By placing the burden of proof on the party against whom recognition or enforcement is invoked, Article V departs from the Geneva Convention provision under which the plaintiff had to bear the burden. A further difference (from the Geneva Convention is that the U.N. Convention allows a court to refuse enforcement only on one of the grounds specified in the Convention. Article V provides seven grounds for refusal, including: (1) incapacity of the parties or invalidity of the arbitration agreement (validity of an agreement is examined under the law which the parties have specified, and the law of the country where the award was made governs when there is no such indication by the parties); (2) the lack of proper notice; (3) awards exceeding the scope of arbitration agreements; (4) inproprieties in the arbitral procedure or composition of the arbitral authority; and (5) awards not binding or set aside or suspended by a competent authority.

The sixth and seventh grounds for refusal are stated in Article V(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.

It has been pointed out that applying domestic standards of arbitrability on international awards poses unduly complicated legal questions [52] and dis-

courages the use of international arbitration. In addition, as one commentator concisely suggested: “provision [(a)] is unnecessary because, if the matter under dispute sharply conflicts with strong local policies it could better be handled under the ‘public policy’ language of this section” [53].

Paragraph (b) effectively relegates final authority over the reach of the U.N. Convention to the good faith of the Contracting States. Obviously, it is expected that Contracting States will not abuse the public policy defense. To give a broad definition to “public policy” in order to protect national interests would eviscerate the Convention.

The remaining sixteen articles in the U.N. Convention deal mainly with procedural matters.

2.3.3. United States’ accession and implementing legislation

As international transactions increased, support for accession to the U.N. Convention began to grow in the United States. This support was voiced by private organizations such as the American Bar Association, the American Arbitration Association, and the United States Council of the International Chamber of Commerce, as well as by the American business community.

Influenced by the growing support, President Lyndon Johnson urged the Senate to reconsider the U.N. Convention [54]. On October 4, 1968, the Senate consented to accession, by a vote of 57–0. When the implementing legislation was signed into law on July 31, 1970, the United States became the Convention’s thirty-seventh Contracting State.

That implementing legislation is the new Chapter 2 of the FAA, which is entitled “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” [55]. Its provisions are briefly summarized below.

Section 201 declares that the United States is under an obligation to enforce the U.N. Convention, while section 202 defines the agreements or awards which fall within the Convention. Basically, section 202 provides that any arbitration agreement or arbitral award arising out of foreign commerce falls under the Convention. It should be noted that even “[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States” [56] falls under the Convention, provided that the legal relationship “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states” [57]. The philosophy of the section is to apply the Convention as broadly as possible. The “reasonable relationship” criteria should be decided pursuant to this philosophy [58].

Sections 203 to 205 deal with procedural matters, such as jurisdiction and venue [59]. Section 207 provides that a court may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether the place is within or without the United States. The court may also appoint arbitrators and has discretion to order arbitration in the United States.

(The spirit of the Convention requires that the scope of this discretion should be narrowly construed.) Section 207 also contains provisions relating to orders confirming an award.

2.3.4. Change of national policy

The U.S. accession to the U.N. Convention signified a fundamental departure from the predominantly negative view of international commercial arbitration which had prevailed in federal courts. The nation finally viewed the benefits of predictability and uniformity of award enforcement throughout the world as outweighing its traditional reluctance to enforce decisions made beyond its territory. The Supreme Court viewed the principal purpose underlying the United States' accession to the U.N. Convention as one:

To encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries [60].

The Court also made it clear that federal courts are to recognize this policy in their judgments:

Courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements [61].

3. Policy for federal securities regulation

In the interest of preserving investors' rights under U.S. law, federal courts have extended the extraterritorial applicability of U.S. securities laws and have developed a policy disfavoring the arbitration of securities disputes. This obviously clashes with the federal policy which now favors commercial arbitration.

3.1. Extraterritorial applicability of federal securities laws

The reach of U.S. securities laws is a subject of dispute, within the U.S. judicial system, as well as in the international community. Section 30(b) of the Securities Exchange Act states:

The provisions of this chapter or any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

In the first case dealing with extraterritorial application of the Exchange Act, *Kook v. Crang* (1960), the district court took a narrow view of its

jurisdiction: “It is a canon of construction that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” [62]. Later courts have taken a somewhat less narrow view and found jurisdiction where the substantial course of the conduct alleged to be a violation of the securities laws occurred within the territory of the United States [63].

Some courts, however, have expanded the extraterritorial application of U.S. securities laws by employing what may be called the “adverse impact test”. This test allows courts to find jurisdiction if there is an adverse impact on U.S. investors or markets, regardless of whether the substantial course of the conduct at issue occurred within the territory of the United States [64]. It may be noted that this test ignores the adverse effect on the citizens and markets of other nations caused by such findings of jurisdiction and extraterritorial applications of U.S. laws.

The Second Circuit Court of Appeals relied upon the “adverse impact test” in its decision in *Schoenbaum v. Firstbrook* (1969) [65], a derivative action brought by a U.S. shareholder of a Canadian corporation listed on the American Stock Exchange. The court found that sales of the Canadian corporation’s treasury stock made in Canada to the defendant Canadian corporation were in violation of the Securities Exchange Act section 19(b) and SEC Rule 10b-5. The court explained:

We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American Exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities [66].

The court did not consider that “[u]nlimited reach of American securities law would lead to ‘inconsistent obligation, multiple liability, and unpredictability’ and would be an affront to foreign countries” [67]. Subsequent courts, even when finding jurisdiction based upon the existence of acts committed within the territorial boundaries of the United States, have continued to refer to and affirm the validity of “the adverse impact test” [68].

Courts have applied securities laws extraterritorially even where the acts occurring within the United States were insignificant or non-essential to the violation and where the impact of the defendant’s action or omissions has been insubstantial. One court has held that the adverse impact need be to a particular protected individual and not generally to the American market or investor [69]. In *Travis v. Anthes Imperial, Ltd.* (1973) [70], the court found extraterritorial application appropriate because there was an “impact”, however slight, on U.S. investors or markets. Subject matter jurisdiction was based upon the foreign defendant’s use of interstate communication facilities of the United States, although he was not physically present in the country. The court stated that jurisdiction was not lost even where “some significant steps in the

fraudulent scheme took place in Canada” and even when “the securities were foreign securities neither registered nor traded on an organized United States market” [71].

In light of the frequent and active business relationship between the United States and Canada, it may be concluded that, under the *Travis* test, Canadian corporations and citizens are generally subject to the jurisdiction of U.S. courts. The *Travis* court did not consider whether Canada could tolerate such parochial extension of U.S. jurisdiction and not all commentators share the court’s view that this extension was indeed intended by Congress [72]. By adopting the “adverse impact test”, the courts have extended their jurisdiction only for the purpose of protecting U.S. investors and markets. This nationalism appears clearly in the cases where plaintiffs are non-resident foreigners. In *Bersch v. Drexel Firestone, Inc.* [73] a class action was brought by U.S. citizens resident in the United States and abroad and by foreigners residing abroad. The court denied jurisdiction only as to the foreign plaintiffs. The court found that as to the resident Americans, “the dispatch from abroad of misleading statements to the United States” is sufficient to uphold jurisdiction [74], whereas for the foreigners residing abroad such activities are not sufficient. The court’s opinion also states: “While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident” [75].

Through its laws a nation attempts to extend its reach as far as possible, even beyond its territorial limits, in order to protect itself from unwanted influence from abroad and to complete its capacity to enforce laws and policies binding within its own domain [76]. This attempt is quite understandable in light of the fact that domestic lawmaking is the exercise of a nation’s sovereignty necessary to the attainment of security, integrity, and independence. This is particularly true of federal laws which are promulgated to realize basic policies of a nation. To this end laws often involve: (1) prohibition of forum selection, (2) prohibition of the choice of applicable law, (3) prohibition of arbitration (nonarbitrability), and (4) extraterritorial application. In the area of international business disputes nonarbitrability, in particular, has served to bolster the protections of U.S. citizens and policies inherent in the other three categories.

It should be borne in mind, however, that, despite their self-protective advantages, overzealous pursuit of the benefits of extraterritorial application of domestic law and refusal to enforce foreign judicial or extrajudicial awards also brings disadvantages. No nation can “have trade and commerce in world markets and international waters exclusively on her terms, governed by her laws, and resolved in her courts” [77]. In the words of Justice Frankfurter in *Lauritzen v. Larsen*:

[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction [78].

3.2. *Nonarbitrability of federal securities issues: The Wilko doctrine*

Arguments favoring the nonarbitrability of federal securities disputes arise from concern that an agreement to arbitrate made at the beginning of a securities transaction may dilute the effectiveness of the substantive and procedural protections created by the federal securities laws. These laws provide virtually absolute liability in some cases and limit available defenses in others [79]. Some provisions substantially reduce the burden on the plaintiff [80]. In addition, federal courts have developed implied remedies, such as the private right of action under section 10(b), for violations of federal statutes. In addition, procedural advantages available to plaintiffs in federal courts may not be available in arbitral tribunals. The extensive pretrial discovery privileges under the Federal Rules of Civil Procedure and the wide choice of venue and nationwide service of process provided by the Securities Exchange Act are examples of procedural benefits not available to parties in arbitration.

Furthermore, it may be argued that foreign arbitrators are not familiar with the complicated system of U.S. securities regulation and may improperly interpret relevant sections and protections of the federal statutes. In addition, as arbitrators are not required to follow precedents and because an arbitral award may be made without a complete record of proceedings, the arbitrators' application of legal concepts such as "burden of proof", "reasonable care", or "material fact" cannot be re-examined and reviewed.

Wilko v. Swan [81] is the leading Supreme Court case affirming the nonarbitrability of securities disputes. The Court's decision was based on the balancing of two conflicting Congressional policies: the policy favoring international commercial arbitration, demonstrated in the enactment of the FAA, and the policy favoring extraordinarily strong investor protection, embodied in the Securities Act of 1933.

First, the Court recognized that the FAA established the desirability of arbitration as an alternative to the complexities of litigation, "if the parties are willing to accept less certainty of legally correct adjustment" [82]. Then the Court discussed the Congressional policy behind the Securities Act, finding that in order to protect investors, Congress had adopted disclosure as the Act's major underpinning. To effect this approach, section 12 created a special right to recover for misrepresentation which differs substantially from the common law action in that the seller is made to assume the "burden of proving lack of scienter" [83]. Congress deemed the disparity of access to information between securities investors and issuers and dealers to be much greater than that

between ordinary contracting parties. “When the securities buyer, prior to any violation of the Securities Act, waives his right to sue in court, he gives up more than would a participant in other business transactions” [84] he surrenders one of the privileges the Act gives him at “a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary” [85]. Finally, the Court pointed out the inappropriateness of the arbitration process for securities disputes, expressing concern that the arbitrators’ decisions may be arbitrary in examining the subjective aspects of the case [86]. From this reasoning the Court found that the policy of the federal securities laws outweighs that of the FAA and concluded that the arbitration agreement was a “stipulation” waiving “compliance with” the provision of the Securities Act, contrary to section 14 of the Act, and was, therefore, void [87].

The influence of the Supreme Court’s holding in *Wilko* has been substantial. The *Wilko* doctrine has been applied to suits under the Securities Exchange Act of 1934 [88]. In *Starkman v. Seroussi*, the customer of a securities broker–dealer commenced an action to recover damages for violations of the 1933 and 1934 Acts. The defendant demanded that the claims be arbitrated in accordance with the margin agreement. The district court, in granting plaintiff’s motion for a stay of arbitration, held: “Plaintiff ... has ‘the right to select the judicial forum’ in which to prosecute his suit and, in view of section 29 of the Exchange Act, cannot be compelled to submit his claim to arbitration” [89]. The Second Circuit in *Laupheimer v. McDonnell & Co.* made a similar decision [90]. In 1976, the Third Circuit, in *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, applied *Wilko* to a Rule 10b-5 dispute [91], as did the Seventh Circuit in *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*

The Fifth and Seventh Circuits have emphasized the preeminent role of the federal courts in securities disputes [92]. Recently, for example, the Seventh Circuit in *Dickinson v. Heinold Securities, Inc.* reiterated that “a federal court has the sole right to decide the ultimate issues essential to a federal securities law claim” [93]. Both courts, however, along with a number of others, have continued to keep in mind that the *Wilko* doctrine is a balancing test. The *Weissbuch* opinion affirmed the *Wilko* doctrine while accenting its balancing test foundation, saying: “We ... continue to adhere to our belief that policy considerations mandate the application of *Wilko* to Rule 10b-5 situations absent the presence of international concerns” [94]. The Fifth Circuit in *Sawyer v. Raymond, James and Associates, Inc.* (securities brokerage firm moving for stay pending arbitration) stated: “With only a minor exception of international securities transactions, the *Wilko* rule remains the law” [95]. In *Mansbach v. Prescott, Ball and Turben*, the Sixth Circuit held that the “arbitration agreement is overridden by the anti-waiver provisions of the federal securities laws”, pointing out that domestic securities issues do “not come within the narrow exception to *Wilko* for cases concerning international securities transactions” [96]. A number of other federal statutory claims have

been exempted from pre-dispute arbitration agreements and have proceeded through the judicial system on the basis of the *Wilko* doctrine [97].

3.3. Should the *Wilko* doctrine be upheld?

3.3.1. Doubts about the *Wilko* doctrine

Whether continued adherence to the *Wilko* doctrine is reasonable should be critically examined. Its rationale is questionable in light of the federal policy for arbitration. In the *Wilko* case itself two Justices dissented, stating: “advantages [provided by the FAA] should be assumed to be denied in controversies ... arising under the Securities Act, in the absence of any showing that settlement by arbitration would jeopardize the rights of the plaintiff” [98]. Arbitration agreements can be void only when “the plaintiff in opening an account had no choice but to accept the arbitration stipulation, thereby making the stipulation an *unconscionable* and unenforceable provision in a business transaction” [99]. They clearly concluded that the anti-waiver provision of the Securities Act is not a general limitation on the FAA. The voidability of an arbitration agreement should be decided on a case-by-case scrutiny under the contract law prohibition of unconscionability, thus significantly increasing the possibility that an arbitration agreement would be held enforceable.

For the purpose of deterrent effect, there is little difference between an arbitral award and a court’s judgment. Had Congress intended to foreclose the option of arbitration, it could have been more explicit in its opposition toward it in the securities laws. Counterweighting this silence, Congress has expressly embraced the desirability of delegating some measure of the judicial system’s deterrent function to private citizens by enacting the FAA. To be consistent with this shift in policy, federal courts should admit whatever dispute settlement mechanism citizens may choose: mediation conciliation, arbitration, or direct negotiation.

Why is a private party not free to surrender an advantage established by federal securities law? The *Wilko* court states: “He ... surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary” [100]. This is, however, a fictitious assumption. The parties can at least approximately predict the amount of damage which may be caused in relation to that transaction and the statutes clearly indicate what the handicap upon one’s adversary is. It is also clear that no provision in the federal securities law requires a defrauded party to *sue*. Does the *Wilko* doctrine go too far, reading in a policy argument, without express statutory language supporting it, which overrides the clearly established policy of the FAA?

3.3.2. Erosion of the *Wilko* doctrine

The *Wilko* doctrine has been eroded by cases in which courts have been receptive to stock exchange arbitration, where stock exchange members are deemed to have equal bargaining power. Arbitration agreements under the authority of a constitution of a stock exchange have been held enforceable. The Second Circuit in *Axelrod v. Kordich, Victor & Neufeld*, in which a non-member broker-dealer argued that he could compel a member of the New York Stock Exchange to submit to the arbitration required by the NYSE rules, states: “[T]he policy considerations relied on by the Supreme Court in *Wilko* are inapposite here. ... [T]he legislative policy of protecting investors will not be thwarted by compelling an exchange member to arbitrate ...” [101]. The district court in *Brown v. Gilligan* explained that “it was assumed that dealers could fend for themselves ...” [102]. Similarly, when the officers of a broker-dealer claimed that they had been defrauded in their purchase of a stock in the brokerage house, the New York Appellate Division in *McDonnell & Co. v. Cohig* [103] held that the claims were subject to compulsory arbitration in accordance with the constitution of the NYSE. The Second Circuit in *Coenen v. R.W. Pressprich & Co.* further eroded the *Wilko* doctrine by granting a motion to stay pending arbitration of a claim based on section 10(b) of the Securities Act [104]. More recently, the Fifth Circuit in *Tullis v. Kohlmeyer & Co.* [105] applied *Coenen* to an action based on sections 12(2) and 17(a) of the Securities Act and sections 10(b) and 15(c) of the Securities Exchange Act.

“[T]here have been important developments ... since ... *Wilko v. Swan*. ... One is the ‘increasingly strong endorsement’ which the policy of encouraging the settlement of disputes by arbitration has received” [106]. It is now generally understood that “*Wilko* ... does not create a flat proscription against the resolution of *all* securities laws claims by arbitration” [107].

Erosion of the *Wilko* doctrine in another context has also been based on “bargaining power” considerations. In *Alco Standard Corp. v. Benalal*, an action for rescission of a purchase agreement and damages against corporations and individuals mainly on the basis of Rule 10b-5, the court in dictum questioned the applicability of the *Wilko* doctrine when parties have equal bargaining power. First, the court interpreted the *Wilko* doctrine [108].

Wilko v. Swan ... involved individual customers suing large brokerage houses. [N]one of these transactions was conducted at arm’s length; rather, the customer had no choice but to sign the forms in order to effectuate a purchase. Undoubtedly Congress intended to protect these investors against the misuse of such uneven bargaining power.

The court concluded that the instant plaintiff and defendants were “both sophisticated parties” and, under these circumstances, it was not convinced that the arbitration provision was void [109].

Because arbitration procedures are no less effective in protecting weak investors, only an imbalance of bargaining power so great as to make the agreement unconscionable should be considered reason to declare an arbitration agreement void and unenforceable.

4. Balancing two conflicting federal policies

4.1. *The impact of Scherk v. Alberto-Culver*

In *Scherk v. Alberto-Culver Co.* [111], the Supreme Court reconciled two conflicting federal policies: the principle, embodied in *Wilko*, of protecting investors by preserving their litigation rights, and the policy in favor of arbitration of international commercial disputes. The reasoning and result of *Scherk* recognized the negative consequences of voiding arbitration clauses, but the Court's failure to rely upon the Convention has unfortunately set a lasting precedent for cases which should be governed by the Convention. The Court merely weighed the conflicting U.S. policies in the specific factual context of the case to reach its conclusions that the arbitration clause was enforceable, even though the contract concerned securities.

The *Scherk* case arose when Alberto-Culver, an American corporation, initiated a Rule 10b-5 action in Illinois federal district court. Alberto-Culver had purchased trademark rights and foreign corporations organized under the laws of Germany and Liechtenstein and owned by Scherk, a German citizen. The contract provided that "any controversy or claim" would be referred to arbitration before the International Chamber of Commerce in Paris and selected Illinois law as the governing law [112]. When Alberto-Culver discovered that the trademarks were subject to substantial encumbrances, it commenced a 10b-5 action, relying on the *Wilko* doctrine to void the arbitration agreement. Pursuant to the agreement and citing the Convention, Scherk moved for a stay pending arbitration, which the Supreme Court eventually granted [113].

In *Scherk*, the Court found support in its earlier decision enforcing a choice-of-forum clause in *The Bremen v. Zapata Off-Shore Company* [114]. The *Scherk* majority reasoned that an agreement to arbitrate before a specified tribunal is, in effect, "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute" [115].

In *The Bremen*, Zapata Off-Shore Company, an American corporation, had initiated a suit in admiralty in federal district court despite the parties' earlier agreement upon a choice-of-forum clause which specified that disputes would be litigated in London. The Fifth Circuit affirmed the district court's finding that the forum selection clause was unenforceable [116]. Both courts relied upon the traditional doctrine that a forum-selection clause will be respected

only if the designated state is a more convenient forum than the state where suit is brought.

The Supreme Court enforced the clause, stating that the growing involvement of Americans in international commerce mandated the abandonment of the concept that all disputes must be resolved under American laws and in American courts [117]. The *The Bremen* opinion concluded: “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” [118]. The Court reasoned:

[Manifestly] much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where [personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreement in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting [119].

The parties in *The Bremen* had not designated the law to be applied, though choice-of-forum clauses are often accompanied by choice-of-law provisions. The Supreme Court found that British conflict of laws rules would determine what law to apply [120], and that “it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law” [121]. This view of the forum clause as a tacit designation of the rules and procedures to be applied to the dispute supported the *Scherk* conclusion that an arbitration clause is a specialized form of forum-selection clause [122].

To balance the arbitration policy with that of protection for the securities investor, the *Scherk* Court considered the number of “international elements” involved in the case. If the contract is sufficiently “international”, the policy for international commercial arbitration will dominate and the *Wilko* doctrine will not be invoked. The Court found important international elements in the *Scherk* case. *Scherk* was a German citizen; the negotiation and closing of the contract were principally in Europe; and “most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets” [123]. These international elements were sufficient to justify an exception to *Wilko*.

The *Wilko* case was distinguished further: while that decision had treated choice of forum as a valuable protection for the securities purchaser, in the international context this advantage is illusory because “an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser’s choice” [124]. Furthermore, “[a] parochial refusal by the courts of one country to enforce an international arbitration agreement ... [invites] unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. ... [S]uch a legal no-man’s-land

would surely damage the fabric of international commerce and trade ...” [125]. In an international contract, the Court concluded, “[t]o determine that ‘American standards of fairness’ [citation omitted] must nonetheless govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of the United States law over the laws of other countries” [126].

4.2. Criticism of the *Scherk* approach

The *Scherk* approach is inappropriate in two ways. First, its “international elements” test could allow courts to refuse enforcement of international arbitration agreements which are not sufficiently international to be exempted from the *Wilko* doctrine. Second, the Court did not discuss the U.N. Convention.

4.2.1. The sufficiency of international elements

The *Scherk* Court thought that predictability was a desirable element in international transactions. The Court states that an agreement on choice of forum and governing law is “an almost indispensable precondition to achievement of the orderliness and predictability essential to international business transactions” [127]. The *Scherk* approach itself, however, could create unpredictability in international commerce. Both foreign and American businessmen find it difficult to predict with confidence the weight or proportion of international elements which render an arbitration agreement enforceable, since the scale of “international elements” is not a well-defined criterion.

The *Wilko* doctrine could be invoked despite the existence of an international arbitration agreement if the American court found international elements so minimal that the policy for protection of the securities purchasers would apply, rather than the policy for international commercial arbitration. As the *Scherk* opinion noted, “situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in *Wilko* would meaningfully apply” [128]. Due to the importance of the matter, the Court continued, a clearer criterion of judgment “should await future litigation in concrete cases” [129].

The “concrete cases” decided in the years since *Scherk* reveal a fairly consistent interpretation of this exception to the *Wilko* doctrine. In 1974, a Texas district court characterized *Scherk*: “That case simply carved out a narrow exception to the *Wilko* holding, and is applicable only to international transactions” [130]. Three years later, the Seventh Circuit distinguished *Scherk* as an exception to *Wilko* dependent upon the presence of international elements [131]. In 1979, the Sixth Circuit described *Scherk* as a “narrow exception to *Wilko* for cases concerning international securities transactions” [132], and the Fifth Circuit recently termed it “only a minor exception [to

Wilko] for international securities transactions” [133]. Although it remains open, the *Scherk* loophole for “insignificant” foreign contacts in securities cases does not yet appear to have been utilized.

4.2.2. *The role of the Convention*

The *Scherk* Court expressly refrained from reaching the issue of the Convention’s impact on the case, despite the fact that the Convention provides the internationally agreed criteria for the enforceability of arbitration agreements. The majority opinion refers to the Convention in two footnotes, while the minority discusses it at some length [134]. The Court’s majority found support for its opinion in the Convention’s ratification rather than in its text:

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country’s adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today [135].

Why did the Court avoid giving an active role to the Convention, when “the result in *Scherk* could have been reached more straightforwardly by applying the terms of the Convention or the [FAA] than by balancing policies” [136]?

The “straightforward” results of the Convention may be precisely why the Court declined to rely on it in *Scherk*, though the American Arbitration Association’s *amicus* brief urged the Court to construe the agreement [137] and the *Scherk* dissenters suggested that the agreement was not enforceable under the Convention [138]. (The dissenters reasoned that since the arbitration agreement was null and void under section 29(a) of the 1934 Securities Exchange Act, the agreement would fall under the Convention’s Article II(3) exception for “null and void” agreements [139].) The Court’s reluctance to rely on the Convention seems to reflect a desire to retain flexibility in the securities arbitration context rather than completely overruling *Wilko*, as well as to reflect uncertainty concerning the Convention’s retroactive effect and reluctance or inability to refute the minority’s Article II(3) argument.

One commentator suggests that “[t]he Court’s minimal reference to the Convention and the Arbitration Act indicates that it intended to develop a complex rule for securities transactions with international elements” [140]. The application of the Convention could otherwise have resulted in the sudden destruction of the *Wilko* doctrine and with it the extraterritorial applicability of the American securities law which the courts had assiduously fostered.

The “international elements” test allows a court to consider a transaction’s adverse impact upon U.S. investors and markets, rather than allowing the “talisman” of an international contract to excuse “parties to transactions with many more direct contact with this country than in [*Scherk*’s] case” [141]. The opinion could be read as an implicit warning that the *Wilko* doctrine could be

applied whenever it becomes necessary to protect U.S. investors and markets. Furthermore, those Justices reluctant to abandon the *Wilko* policy of protecting securities investors may have argued the balancing test as a compromise measure in this 5–4 decision.

The events in the *Scherk* litigation took place before American ratification of the Convention, and the Court may have doubted its retroactive validity [142]. Alberto-Culver's brief in *Scherk* stressed that the intent of Congress was unclear on the retroactive effect of the Convention's adoption [143]. The *amicus* brief filed by the American Arbitration Association, however, asserted that the Convention was intended to apply retroactively [144]. Recent court decisions [145] and an authoritative scholar [146] have since affirmed a retroactive application of the Convention.

The *Scherk* dissenters' contention that the 1934 Act's statutory conflict with the arbitration clause renders it unenforceable under Article II(3) of the Convention was not expressly refuted by the *Scherk* majority, but the reasoning of subsequent cases construing Article II(3) suggests that the argument has yet to find a receptive audience [147]. The Convention's defenses are to be construed narrowly [148] and, even where the agreement conflicts with American federal or state statutes, the arbitration agreement is to be enforced unless enforcement would contravene the forum's "most basic notions of morality and justice" [149]. Statutes of the federal government [150] and the Commonwealth of Puerto Rico [151] have recently failed to satisfy this rigorous standard, and the disputed arbitration agreements were enforced despite the conflict [152].

4.3. Consequences of the *Scherk* reasoning

The *Scherk* balancing test was intended to provide a flexible rule for enforcing arbitration in international securities agreements. While one expected problem – unpredictability in the number of "international elements" required to exempt an arbitration agreement from *Wilko* – has not yet appeared, three unexpected results may be noted.

First, the "international elements" emphasis of *Scherk* has been viewed as evidencing a strong federal policy in favor of international commercial arbitration in fields other than securities [153].

Second, while *Scherk* itself did not rely on the Convention, the court's two footnotes on the Convention have been cited many times in support of applications of the Convention to non-securities fields [154].

The third consequence of the *Scherk* reasoning derives from the court's failure to apply the U.N. Convention to the securities area. Securities arbitration seems to have been tacitly removed from the scope of the Convention by the *Scherk* decision. After terming *Scherk* a "minor exception" to the *Wilko* rule, the Fifth Circuit recently explained that the United States Arbitration Act

provides “express statutory authorization for arbitration of legal disputes other than federal securities claims” [155]. The court did not mention that the provisions in Chapter 2 of the FAA, implementing the Convention, could be considered “authorization” for securities arbitration in the international context. In *Tamari v. Bache & Co. (Lebanon)*, the Seventh Circuit considered an arbitration agreement under Chapter 1 of the FAA, apparently because the parties did not raise the contention that their securities agreement was an international one [156]. The court noted that the international elements of the case supported enforcement of the agreement under *Scherk*, but did not mention the Convention [157]. These omissions are comprehensible in the factual context of these decisions, but in light of the consistent applications of the Convention to fields other than securities, the hypothesis seems inescapable that *Scherk* has effectively removed international securities arbitration from the scope of the Convention. The result achieved by applying *Scherk* case law rather than the Convention may be similar, in that arbitration clauses will usually be enforced under either approach, but a pure case law approach violates the obligations of the United States under the Convention.

4.4. *The U.N. Convention: The sole test for reconciling two policies*

The *Scherk* approach is one attempt to reconcile two conflicting policies. The propriety of the *Scherk* approach, however, is quite questionable in the era of the Convention. The Convention itself should pose the legal restraints on the application of the *Wilko* doctrine in international securities transactions and the extraterritorial applicability of the federal securities laws [158]. Restraint in the application of domestic laws to international transactions is the goal of the Convention and the duty of the United States as a Contracting State.

4.4.1. *The meaning of the Convention*

The Convention should be the sole and mandatory test for judging enforceability of an arbitration agreement. Once an agreement to arbitrate falls within the scope of section 202 of the FAA, Article II of the Convention requires the courts of the United States to effectuate the policies of the Act and recognize and enforce the agreement [159].

Courts of a Contracting State may not refuse enforcement on grounds other than those specified in Article V of the Convention. Article II of the Convention, which declares that to enforce an arbitration agreement is the principal duty of each contracting state, prohibits Contracting States from hunting for new grounds for refusal. The listed grounds for refusal to enforce an arbitral award can, when appropriate, be grounds for refusal to enforce an agreement to arbitrate as well, since the only justification for the enforcement of an

agreement to arbitrate is the necessity of protecting the development of awards capable of enforcement [160].

Recent court decisions [161] have relied upon the Convention as the sole and mandatory test for judging enforceability of an agreement to arbitrate and of an award. In *Fotochrome v. Copal, Limited*, the district and appellate courts' judgments reversing a decision of a bankruptcy judge were rendered pursuant to the terms of the Convention. The Second Circuit's decision reconciled the policies embodied in the federal Bankruptcy Act [162] with the policy favoring international commercial arbitration. Fotochrome, a New York corporation, fell into dispute with Copal, a Japanese corporation, and the two parties proceeded to arbitration in Tokyo. Fotochrome filed a Chapter XI arrangement in a United States court before the Tokyo arbitration was completed. The bankruptcy judge issued the usual order staying all proceedings by creditors, including pending arbitrations, but the Arbitration Association in Tokyo issued an award in favor of Copal. The bankruptcy judge refused to recognize the award and ruled that he had power to rehear the issues of liability *de novo*. The district court found that the Convention compelled it to conclude that "American corporations facing imminently unfavorable arbitrations abroad may not file for chapter XI arrangements here to avoid final and binding arbitral judgment abroad", even though "the result might somewhat disturb the draftsmen of the Bankruptcy Act" [163]. The Second Circuit in *Fotochrome, Inc. v. Copal Company Limited* affirmed the district court's decision on the basis of the Convention, but did not agree that the Bankruptcy Act conflicted with the Convention [164].

The Third Circuit in *McCreary Tire & Rubber Co. v. Ceat S.p.A.*, reversed the lower court: "It was error to deny the motion for a stay [of foreign attachment pending arbitration] in disregard of the [C]onvention" [165]. Relying on Article II of the Convention, the court reasoned, "There is nothing discretionary about [A]rticle II(3) of the Convention. It states that district courts shall ... refer the parties to arbitration" [166]. In *Antco Shipping Co. v. Sidermar S.p.A.* [167], the court granted the petition to compel arbitration on the basis of the Convention. The court stated that "[w]hile the court in *Scherk* did not base its decision squarely on the Convention" [168], the defendant's direct reliance upon the Convention and Chapter 2 of the FAA "is well founded" [169].

The Convention should establish a restraint on the *Wilko* doctrine and the extraterritorial applicability of the federal securities laws. Although the *Wilko* doctrine has some rationale, the ambit of the non-waiverability provisions in federal securities acts has been retrenched by the Convention. Once an agreement to arbitrate-securities disputes falls within the Convention, it should not be subject to those provisions.

The Convention formulates a restriction on extraterritorial applicability. In so doing, the Convention rejected the "adverse impact test". The mere ex-

istence of harmful consequences for American citizens is not a ground under the Convention to fail to enforce an arbitration agreement. The Convention codifies the points of compromise of conflicting interests of each contracting state, and balances their interests.

4.2.2. *The tests of the Convention*

The Convention should be applied broadly, and its defenses should be construed narrowly. In *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)* [170], the Second Circuit found no merit in the defendant's contention that enforcement of the award would violate the public policy of the United States and concluded that "the Convention's public policy defense should be construed narrowly" [171]. The court urged reasons for a narrow reading of the Convention's exceptions: its "enforcement-facilitating thrust" [172], and "the case law under the similar provisions of the Federal Arbitration Act" [173]. "[E]very indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis" [174].

The narrow construction doctrine of *Parsons* has been supported by subsequent cases [175]. For example, the New Jersey district court in *Biotronik v. Medford Medical Instrument Company*, in applying the narrow construction doctrine, commented that "considerations of international reciprocity furnish an additional reason to construe defenses narrowly" [176].

Once an agreement falls within the Convention, it should in principle, escape the *Wilko* doctrine and the extraterritorial application of federal securities laws. The determination of whether an agreement falls under the convention is therefore the first test for circumscribing the *Wilko* doctrine.

Section 202 of the FAA provides the test [177]. First, any arbitration agreement arising out of a legal relationship which is between a citizen or a corporation of the United States and a citizen or corporation of a foreign state falls under the Convention. The test is straightforward and no discretionary element exists in securities transactions [178]. Thus, the *Scherk* agreement automatically would fall under the Convention. Second, even an agreement arising out of a relationship which is entirely between citizens of the United States falls under the Convention if it involves a "reasonable relation with ... foreign states" [179]. If a securities contract between two Americans involved a "reasonable relationship with foreign states", the contract could fall under the Convention and avoid the *Wilko* doctrine. An arbitral award must be a foreign award, however, if it is to be enforced in the United States under the Convention [180]. Thus, an agreement to arbitrate in the United States would not fall under the Convention if enforcement were sought in the United States.

Articles II(1) and V(2) (a) provide the nonarbitrability defense [181]. The narrow construction doctrine must also govern in determining "a subject matter incapable of settlement by arbitration". The Second Circuit stated in

Parsons:

The mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute nonarbitrable. Rather, certain *categories* of claims may be nonarbitrable because of the special national interest vested in their resolution [182].

The court's opinion is, in other words, that the test for nonarbitrability is *not of an ad hoc nature*. The *Scherk* approach, which is based on an ad hoc examination of "international elements", may be an improper test under the Convention.

The structure of Article II(1) indicates that *categories* of claims are non-arbitrable. Valid agreements to arbitrate present and future disputes are enforceable under the Article, subject to the defense of nonarbitrability. If a subject-matter is incapable of settlement by arbitration, then it must be nonarbitrable both as to present and future disputes. It is the intrinsic suitability for settlement by arbitration of categories of claims which determines the availability of the nonarbitrability defense. Because the parties to a securities transaction may appropriately agree to arbitrate a present dispute, this defense may not properly be asserted in any securities dispute.

Articles II(3) and V(1) (a) provide the defense of invalidity, which may be invoked when the agreement is null and void, inoperative or incapable of being performed, or when the agreement is not valid. The governing law and the burden of proof provide procedural limitations on this defense. The Article V defense defines the governing law as "the law to which the parties have subjected it or, failing any indication thereon, ... the law of the country where the award was made ..." [183] and places the burden of proof on the party against whom the award is invoked. The same rules have been deemed applicable in the Article II defense [184]. For example, in an international arbitration agreement where the parties are from nations other than the forum state and the forum's law governs, neither party can raise the defense that the agreement is invalid under this country's law [185].

The narrow construction doctrine should guide the definition of "invalidity" of an agreement. The court in *Antco Shipping Co.* found that the party resisting enforcement must show that "*the essence* of the obligation or remedy is prohibited by a pertinent statute or other declaration of public policy" [186]. In other words, invalidity means that "public policy as embodied in a statute *forbids the performance* which is the subject of dispute ..." [187]. Under this reasoning one could conclude that an allegation of fraud, undue influence, overweening bargaining power, or coercion does not constitute a defense, since such an allegation attacks the process of agreement between the parties on the obligation, not the obligation itself. An example of successful exercise of this defense could be where the parties knowingly concluded a contract "in restraint of trade or commerce" [188], and upon the breach of the contract by

one party, the other party asked for the performance of the contract in arbitration.

The public policy defense provided in Article V(2) is perhaps the Convention's most controversial. The court may refuse enforcement on the basis of an arbitrary test of "public policy". The *Parsons* decision circumscribed this defense and has been consistently upheld by subsequent court decisions. The *Parsons* court also noted that adherence to the Convention is itself a significant public policy of the United States [189].

The Second Circuit in *Parsons* held that "[e]nforcement of foreign arbitral awards may be denied ... only where enforcement would violate the forum state's most basic notions of morality and justice" [190]. The court indicated its firm intention to confine "the public policy" to the fundamental public policies of a state. The economic aspect of "the most basic morality and justice" would presumably constitute the most fundamental philosophy underlying a state's economic structure. Nonarbitrability and nonwaiverability of 10b-5 claims in federal securities issues should not be considered to constitute "the most basic morality and justice" [191].

One commentator suggests that a difference of bargaining power of the parties could be an effective public policy defense [192]. Some differential in bargaining power is usual in international transactions [193]. Furthermore, the unlimited affirmance of this defense would be detrimental to the Convention. For a "difference of bargaining power" to become the defense of "the most basic morality and justice", mere superior bargaining power is of itself insufficient. As the dissenting opinion in *Wilko* suggested [194], a difference in bargaining power can be the defense only when it reaches the level of "unconscionability" [195]. Overweening bargaining power is most likely where the American party is an unsophisticated individual and the foreign party is a large corporation, a situation that might invoke the *Wilko* doctrine.

An allegation of fraud or coercion may constitute a public policy defense. The Supreme Court in dictum in *Scherk* stated that "presumably the type of fraud alleged here could be raised, under Art. V of the Convention, in challenging the enforcement of an arbitral award ..." [196]. The Court noted that the defense should be allowed only if "the inclusion of [the arbitration] clause in the contract was the product of fraud or coercion" [197]. Two circuit courts have recently built upon a *Scherk* footnote encouraging unified standards in the enforcement of awards [198], and concluded that the "null and void" 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" [199].

5. Conclusion

It has been twelve years since the United States' accession to the U.N. Convention. United States courts should abandon the vestiges of the common law's distrust of arbitration and end the zealous extraterritorial application of U.S. securities laws. International commercial arbitration is an indispensable mechanism in modern international transactions.

The Convention has presented the best method of reconciling the conflict between national policies in favor of protecting a country's own citizens and markets and the international accord as to the desirability of commercial arbitration. The U.S. courts should leave behind the *Wilko* doctrine and the *Scherk* test, and adopt the Convention as the sole test of the enforceability of arbitration agreements.

The Convention will be most effective if the courts of all Contracting States apply it broadly, and construe its defenses narrowly. To further effect a smooth internationalization of capital markets and a harmonious operation of transnational securities transactions, perhaps the international community should study and develop a supranational regulatory scheme for international securities transactions.

Notes

[1] See, e.g., 6 Loy. Chi. L.J. 738, 749 (1975); 1974 Int'l Economic Report of the President 15 & 62; Bureau of Census, Dept. of Commerce, Statistical Abstracts of the United States 782 (1974); National Association of Manufacturers, Comments on the Int'l Activities of U.S. Multinational Corporations 8 (1973); A Lawyer's Guide to Int'l Business Transactions xxv (W.S. Surey & C. Shaw ed. 1963).

[2] Section 29(a) of the Securities Exchange Act of 1934 provides: Any condition, stipulation, or provision of this chapter or of rule or regulation thereunder, or of any rule of an exchange required thereby shall be void. 15 U.S.C. §78cc(a) (1970). Furthermore, Section 29(b) provides that every contract made in violation of the Act shall be void. 15 U.S.C. §78cc(b) (1970). The Securities Act of 1933 has a similar provision in Section 14. 15 U.S.C. §77n (1970). Furthermore, Section 27 of the 1934 Act provides for exclusive jurisdiction of the district courts of the United States. 15 U.S.C. §78aa (1970).

[3] See, e.g., Federal Arbitration Act, 9 USCA §§1–14 (1976); convention on the Recognition and Enforcement of Foreign Arbitral Awards; U.N. Doc. E/AC.42/SR.10/3 (1955). 9 USCA §§201–208 (1976).

[4] See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk*, 585 F.2d 39 (3d Cir. 1978) (arbitration in Germany); *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co.*, 572 F.2d 1328 (9th Cir. 1978) (arbitration in Japan); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos*, 553 F.2d 842 (2d Cir. 1977) (arbitration in N.Y.).

[5] Foreword to American Arbitration Association, Yearbook of Commercial Arbitration in the United States at vii (1972); Contini, *International Commercial Arbitration*, 8 Am. J. Comp. L. 282, & n.3 (1959); Mirabito, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 Ga. J. Int'l & Comp. L. 471 & n.2 (1975).

[6] The advantages of international arbitration are well explained in Tindall, *International Commercial Arbitration*, 7 Am. Bus. L.J. 65, 67–68 (1969–70).

[7] *Arbitration: An Indispensable Aid to Multinational Enterprise*, 10 J. Int'l L. & Econ. 337 (1975).

[8] A thorough collection of arbitration legislation of Sweden, Finland, Germany, England, Netherlands, France, Austria, U.S.S.R., Poland, Czechoslovakia, Hungary, Romania, Yugoslavia, Bulgaria, Canada (Ontario), the United States (the Federal Arbitration Act, New York and American Arbitration Association), Mongolia, the People's Republic of China, the Republic of China, Korea, Philippines, Singapore, Malaysia, Thailand, India, Pakistan and Japan can be found in K. Morii, *Kokusaishojichusai* 333–568 app. (1970).

[9] Contini, *supra* note 5, at 284. For a detailed study of arbitration systems of world nations, see K. Morii, *Kokusaishojichusai*, *supra* note 8, at 123–242.

[10] Contini, *supra* note 5, at 285.

[11] Geneva [rptcp; pm Arbitratopm Clauses, done Sept. 24, 1923, 27 L.N.T.S. 157 (effective July 28, 1924) (concerned mostly with the validity of agreements to arbitrate future disputes between the parties to the contract). The United States did not join the 32 nations ratifying the Treaty.

[12] Geneva Convention on the Execution of Foreign Arbitral Awards, done Sept. 26, 1927, 92 L.N.T.S. 301 (effective July 25, 1929) (requiring that an arbitral award be recognized as binding and enforceable in accordance with the national law agreed to by the parties instead of the law of the forum state).

[13] Contini, *supra* note 5, at 290. For the exhaustive analysis of the reasons for the failure of these two Geneva treaties, see Nussbaum, *Treaties on Commercial Arbitration – A Test of International Private-Law Legislation*, 56 Harv. L. Rev. 219, 234–244 (1942). See also Lorenzen,

Commercial Arbitration – Enforcement of Foreign Awards, 45 Yale L.J. 39 (1935).

[14] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 27, 1965, [1966] 1 U.S.T. 1271, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter cited as CSID]. 68 nations including the United States have ratified CSID. It has been said that CSID is aimed at Latin America which has been antagonistic to the use of international commercial arbitration. Mirabito, *supra* note 5, at 484. For a study of CSID based on an actual court decision, see *Arbitration Under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 Hav. Int'l L.J. 90 (1976). The purpose and background of CSID are well explained in its preamble: "Considering the need for international cooperation for economic development, and the role of private international investment..." and "recognizing that while ... disputes [in connection with such investment] would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases ...," the contracting states have attached "particular importance to the availability of facilities for international conciliation or arbitration..." 575 U.N.T.S. 159, 160. CSID has established the International Centre for Settlement of Investment Disputes under the auspices of the International Bank for Reconstruction and Development (the World Bank). Articles 1 and 2 of CSID. *Id.* As to recognition and enforcement of awards in a contracting state, CSID states that "[e]ach Contracting State shall recognize an award ... as binding and enforce the pecuniary obligations imposed by that award ... as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state." Article 54. *Id.* at 194. Thus, it is required that an award have the same effect as a final judgment in a contracting state.

[15] The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. (5) & (6) (1947), T.I.A.S. No. 1700, 55-61 U.N.T.S. (effective Jan. 1, 1948). GATT adopts the conciliation mechanism as a means for dispute settlement between the contracting states. Mirabito, *supra* note 5, at 484-485.

[16] European Convention for the Peaceful Settlement of Disputes, *adopted* April 30, 1958, Europ. T.S. No. 23. Unfortunately, this Convention has loose enforcement rules. "Failure to comply with a judgment of the International Court of Justice or an Arbitral Tribunal may be appealed to the Committee of Ministers of the Council of Europe, which may then, by a two-thirds majority of the representatives, make recommendations to ensure compliance." *A Dictionary of Arbitration and its Terms* 88 (K. Seide, ed. 1970).

[17] The Convention, *supra* note 3, was adopted in 1958 with 25 nations signing that year. The United States signed in 1970.

[18] European Convention on International Commercial Arbitration, *done* April 21, 1961, 484 U.N.T.S. 349 [hereinafter cited as ECICA]. ECICA applies to arbitration agreements in relation to international trade between European contracting countries. Article I. *Id.* ECICA includes provisions for organization of arbitration (Article IV. *Id.* at 366), the choice of law applicable to the arbitration (Article VII. *Id.* at 374), the setting aside of an arbitral award (Article IX. *Id.* at 374) and other procedural rules such as rules of governing the place of arbitration and the appointment of arbitrators.

[19] Resolution 31/98, adopted by the General Assembly on 15 December 1976; United Nations, *Uncitral Arbitration Rules (1977)* 31 U.N. Gaor, supp. (No. 17) 32-50, U.N. Doc. A/31/17 (1976). The text of the Rules can be found in 31 U.N. GAOR, *Id.*, at 34-50. The preamble of the Rules states:

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations; Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations;

...

1. Recommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts;

2. Requests the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules. *Id.* at 5.

The Rules will be invoked when the parties to a contract have agreed that disputes shall be referred to arbitration under the Rules. *Id.* Article 1, at 6. The Rules mainly deal with procedural aspects of arbitration.

[20] ICC clauses have been “inserted in literally thousands of agreements – far more frequently so than the number of actually conducted arbitrations would allow the uninitiated to assume” (footnotes omitted). Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 *Int'l & Com. L. Q.* 132, 171 (1965).

[21] Tindall, *supra* note 6, at 69.

[22] Mirabito, *supra* note 5, at 480; Tindall, *supra* note 6, at 71.

To have the ICC take jurisdiction of a dispute, the parties should provide an arbitration clause in their original contract. Even after a dispute has arisen, business parties with no arbitration clause can still select arbitration under the ICC rules. Tindall, *supra* note 6, at 69.

[23] Tindall, *supra* note 6, at 70.

[24] See Mirabito, *supra* note 5, at 482. For a study of the procedural aspects of the ICC, see Cohn, *supra* note 20.

[25] Laymen often doubt whether arbitrators have the ability to handle specific technical fields. This doubt, however, is groundless. “At the hearings the arbitrator will listen to the parties’ positions, then the witnesses, and can himself appoint technical experts to investigate and report upon complicated issues.” Furthermore, there is a double-checking system: “When the arbitrator or arbitrators have reached a conclusion, their ruling, an ‘award’ must then be approved by the Court of Arbitration.” Tindall, *supra* note 6, at 70. Of course, arbitration will not be stopped by the defaulting non-appearance of one party. Once the arbitration has commenced, an award will be rendered even if one party does not participate. In this sense, “arbitration is [a] compulsory” procedure. Mirabito, *supra* note 5, at 482.

[26] Eisemann, *Arbitration under the International Chamber of Commerce Rules*, 15 *Int'l & Comp. L.Q.* 726, 734–35 (1966).

[27] *Id.* at 735; Tindall, *supra* note 6, at 71; Mirabito, *supra* note 5, at 482.

[28] For the English common law doctrine, see, e.g., *Kill v. Hollister*, 1 *Wilson* 129, 95 *Eng. Rep.* 532 (K.B. 1746). See also Mirabito, *supra* note 5, at 472; Corbin, *Enforceability of Contractual Agreements for Dispute Settlement Abroad*, *International Trade Arbitration: A Road to Worldwide Cooperation* 251, 253 & n. 18; Lorenzen, *Commercial Arbitration – International and Interstate Aspects*, 43 *Yale L.J.* 716 (1934). For the U.S. common law doctrine see, e.g., *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 *F.2d* 508 (6th Cir. 1897); *Kuhnhold v. Compagnie Générale Transatlantique*, 251 *F.* 387 (S.D.N.Y. 1918).

[29] Federal Arbitration Act, 9 *U.S.C.* §§1–14 (1976).

[30] In 1921 New York adopted an arbitration statute. *N.Y. Civ. Prac.* §§1448–69 (McKinney 1963). By 1967, 22 states had followed New York’s lead, with arbitration statutes of their own. Comment, *International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 *Wash. L. Rev.* 441, 444 n. 8 (1972).

[31] 9 U.S.C. §§2–4. *See also* 9 U.S.C. §9.

[32] *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1051 (1961). By 1975 the United States had concluded an arbitration clause with the following countries: Japan, Korea, the Republic of China, Iran, Israel, Haiti, Colombia, Ireland, Greece, Portugal, the Federal Republic of Germany, Denmark, and the Netherlands. Mirabito *supra* note 5, at 479 n. 56.

[33] Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States–the Republic of China 63 Stat. 1299 (1949), T.I.A.S. No. 1871 (effective Nov. 30, 1948).

[34] *Id.* at Article VI, para. 4, 63 Stat. 1306.

[35] Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States–Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155 (effective Sept. 14, 1950).

[36] *Id.* at Article X, at 1 U.S.T. 785, 794.

[37] Quigley *supra* note 32, at 1052 & n. 22.

[38] Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States–Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (effective Oct. 30, 1953). *See* Article IV, para. 2, 4 U.S.T. at 2067–68.

[39] Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States–Federal Republic of Germany. 7 U.S.T. 1839, T.I.A.S. No. 3593 (effective July 14, 1956). *See, id.* at Article VI.

[40] Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States–The Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (effective Dec. 5, 1957).

[41] *Id.* at Article V, para. 2; 8 U.S.T. at 2049–50.

[42] Mirabito, *supra* note 5, at 479, 481. *See also* Quigley, *supra* note 32, at 1053–54.

[43] *See, e.g., Landegger v. Bayerische Hypotheken und Wechsel Bank*, 357 F. Supp. 692 (S.D.N.Y. 1972); *Von Engelbrechten v. Galvanoï & Nevy Bros.*, 59 Misc. 2d 721, 300 N.Y.S. 2d 239 (N.Y. City Civ. Ct. 1969), *aff'd*, 61 Misc. 2d 959, 307 N.Y.S. (2d 381) (Sup. Ct. 1970).

[44] Contini, *supra* note 5, at 291.

[45] Aksén, *American Arbitration Association Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U.L. Rev. 1, 4 (1971).

[46] Mirabito, *supra* note 5, at 485–86 n. 100.

[47] Article I 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 States where their recognition and enforcement are sought.

[48] Article II, which deals with agreements to arbitrate, provides in pertinent part:

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 court of a Contracting State ... 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.

[49] Quigley, *supra* note 32, at 1060.

[50] Contini, *supra* note 5, at 296. *See also* Quigley, *supra* note 32, at 1064.

[51] Quigley, *supra* note 2, at 1060.

[52] 3 Sw. U.L. Rev., *supra* note 45, at 13.

[53] *Id.*

[54] ABA proposed amendments to Titles 9 and 28 U.S.C., S. Exec. E., 90th Cong. 2d Sess. at 1 (1968).

[55] 9 U.S.C. §§201–08 (1970).

[56] *Id.* §202.

[57] *Id.*

[58] See U.C.C. §1-501(1) & Official Comment.

[59] Section 203 gives original jurisdiction over an action or proceeding falling under the Convention to the federal district court. 9 U.S.C. §203 (1970). Section 204 deals with venue. 9 U.S.C. §204 (1970). Section 205 provides that “[W]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award . . . , the defendant . . . may . . . remove such action or proceeding to” a federal district court. 9 U.S.C. §205 (1970).

[60] *Scherk v. Alberto-Culver Co.*, 417 U.S. at 520 n. 15.

[61] *Id.*

[62] 182 F. Supp. 388, 390 (S.D.N.Y. 1960).

[63] See, e.g., 592 F.2d 414; 573 F.2d 283; 548 F.2d 112.

[64] The Restatement of Foreign Relations Law of the United States supplies one basis for “the adverse impact test”. Section 18 of the Restatement states:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Restatement (Second) of Foreign Relations Law of the United States §18 (1965).

[65] 405 F.2d 200, *aff’d in part, rev’d in part on other grounds*, 405 F.2d 215 (2d Cir. 1968), *cert.denied*, 395 U.S. 906 (1969).

[66] *Id.* at 206.

[67] *Arbitration Clauses in International Contracts and the Extraterritorial Reach of the Securities Exchange Act of 1934 in Light of Scherk v. Alberto-Culver Co.*, 26 Syracuse L. Rev. 995, 1005 (1975).

[68] See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), *cert. denied sub nom. Bersch v. Anderson*, 423 U.S. 1018 (1975); *S.E.C. v. United Financial Group*, 474 F.2d 354 (9th Cir. 1973); *Travis v. Anthes Imperial, Inc.*, 473 F.2d 515 (8th Cir. 1973).

[69] *Bersch*, 423 U.S. 1018.

[70] 473 F.2d 515 (8th Cir. 1973).

[71] *Id.* at 526.

[72] “It is indeed questionable whether Congress intended the Exchange Act to apply to a foreign transaction involving an American plaintiff, where the only ties to the United States are a few letters and telephone calls.” 26 Syracuse L. Rev., *supra* note 67, at 10008.

[73] *Bersch*. 519 F.2d 974.

[74] *Id.* at 991.

[75] *Id.* at 992.

- [76] Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 Yale L.J. 639 (1954).
- [77] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).
- [78] 345 U.S. 571, 582 (1953).
- [79] See, e.g., Section 12(1) of the Securities Act, 15 U.S.C. §771(1) (1970); Section 11 of the Securities Act, 15 U.S.C. §77k (1970).
- [80] See, e.g., Section 12(2) of the Securities Act, 16 U.S.C. §771(2) (1970).
- [81] 346 U.S. 427 (1953).
- [82] *Id.* at 438.
- [83] *Id.* at 431.
- [84] *Id.* at 435.
- [85] *Id.*
- [86] *Id.* at 436.
- [87] 15 U.S.C. §77n, *supra* note 2.
- [88] *Reader v. Hirsch & Co.*, 197 F. Supp. 111 (S.D.N.Y. 1961); *Starkman v. Seroussi*, 377 F. Supp. 518 (S.D.N.Y. 1974); *Laupheimer v. McDonnell & Co.*, 500 F.2d 24 (2d Cir. 1974); *Fischer v. New York Stock Exchange*, [1975–1976 Transfer Binder] CCH Fed. Sec. L. Rep: ¶95,416, (S.D.N.Y. 1975).
- [89] 377 F. Supp. at 524.
- [90] 500 F.2d at 26.
- [91] 538 F.2d 532, 536–37 (3d Cir. 1976).
- [92] *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Miley v. Oppenheimer and Co.*, 637 F.2d 318, 334–37 (5th Cir. 1981); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981).
- [93] 661 F.2d at 644.
- [94] 558 F.2d 831 (7th Cir. 1977).
- [95] 642 F.2d 791, 792 (5th Cir. 1981).
- [96] 598 F.2d 1017, 1030 (6th Cir. 1979).
- [97] *Beckman Instruments, Inc. v. Technical Development Corp.*, 433 F.2d 55 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) (patent claims); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271, 275–78 (E.D. Pa. 1977) (fiduciary claims); *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978) (antitrust claims); *Allegaert v. Perot*, 548 F.2d 432 (2d Cir. 1977), *cert. denied*, 432 U.S. 910 (1978) (bankruptcy claims).
- [98] 346 U.S. at 440.
- [99] *Id.* (emphasis added).
- [100] *Id.* at 435.
- [101] 451 F.2d 838, 843 (2d Cir. 1971).
- [102] 287 F. Supp. 766, 772 (S.D.N.Y. 1968).
- [103] [1970–1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,886, *aff'd mem.*, 36 App. Div. 2d 1036, 321 N.Y.S.2d 324 (1971).
- [104] 453 F.2d 1209, 1212–14 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1973).
- [105] 551 F.2d 632, 636 (5th Cir. 1977).
- [106] *Id.* at 636 n. 13.
- [107] *Fischer v. New York Stock Exchange*, [1975–1976 Transfer Binder] CCH Fed. Sec. L. Rep. at ¶99,102. See also *Himebaugh v. Smith*, 476 F. Supp. 502, 509 (C.D. Cal. 1978).
- [108] 345 F. Supp. 14, 24 (E.D. Pa. 1972).
- [109] *Id.*
- [110] See *supra* section 2.3.
- [111] *Scherk*, 417 U.S. at 506.
- [112] *Id.* at 508.
- [113] The ICC eventually issued an award in favor of Alberto-Culver, which was enforced by

the Eastern District of Illinois in 1978. *Alberto-Culver v. Fritz Scherk*, No. 71-144, slip op. (N.D. Ill. July 12, 1978).

[114] 407 U.S. at 1.

[115] 417 U.S. at 519.

[116] *Zapata Off-Shore Company v. m/s Bremen*, 428 F.2d 888, 894 (5th Cir. 1970), *aff'd on rehearing* 446 F. 2d 907 (5th Cir. 1971).

[117] *The Bremen*, 407 U.S. at 9.

[118] *Id.*

[119] *Id.* at 13–14.

[120] *Id.* at 13 n. 15; *cf. Intertrade v. m/t Stolt Pride*, No. 81-6954, slip op. (S.D.N.Y. June 22, 1982) (where site of arbitration is designated but agreement is silent on governing law, arbitrators must determine what law applies and need not apply law of situs of arbitration).

[121] 407 U.S. at 13 n. 15.

[122] Justice Douglas criticized this analogy in his dissent, 417 F.2d at 532 n. 11, as follows: “The enforcement of arbitration clauses effectively deprives a party of procedural safeguards such as due process and judicial review, while enforcement of a forum-selection clause leaves such rights whole.”

[123] 417 U.S. at 515.

[124] *Id.* at 518.

[125] *Id.* at 516–17.

[126] *Id.* at n. 11.

[127] *Id.* at 516.

[128] *Id.* at 517 n. 11.

[129] *Id.*

[130] *Newman v. Shearson, Hammill & Co., Inc.*, 383 F. Supp. 265, 268 (W.D. Tx. 1974).

[131] *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 at 834 (domestic, so *Scherk* did not apply); *cf. Wahbe Tamari & Sons Co. v. Bache & Co. (Lebanon)*, 565 F.2d 1194, 1200 (7th Cir. 1977), *cert. denied*, 535 U.S. 905 (1978) (given international elements, *Scherk* is relevant).

[132] *Manscott v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979).

[133] *Sawyer v. Raymond, James & Associates, Inc.*, 642 F.2d 791, 792 (5th Cir. 1981).

[134] 417 U.S. at 519 n. 14, 520 n. 15, 529.

[135] *Id.* at 520 n. 15.

[136] *International Arbitration*, 16 Harv. Int'l L.J. 705, 717 (1975).

[137] *Amicus Curiae* Brief of the American Arbitration Association, *Scherk v. Alberto-Culver*, 417 U.S. 520 (1974).

[138] 417 U.S. at 527 (Douglas, J., dissenting).

[139] *Id.*; *see infra* text accompanying notes 146–151.

[140] 16 Harv. Int'l L.J., *supra* note 135, at 717 (footnotes omitted).

[141] 417 U.S. at 529 (Douglas, J., dissenting).

[142] 26 Syracuse L. Rev., *supra* note 67, at 1012.

[143] Opposition Brief, *Scherk v. Alberto-Culver*, at 21 n. 10.

[144] *Amicus Curiae* Brief of the American Arbitration Association at 14 n. 6., *Scherk v. Alberto-Culver*, 417 U.S. at 520.

[145] In *Fertilizer Corporation of India v. I.D.I. Management, Inc.*, 517 F. Supp. 948, 952 (S.D. Ohio 1981), the court suggested that if the arbitral award itself is issued after 1970, even if the agreement date is earlier, the Convention applies. This suggests that where the action is brought to enforce the agreement to arbitrate, rather than the award itself, the first date of attempted enforcement should determine the applicability of the convention. *See also Fotochrome, Inc. v. Copal Company, Limited*, 517 F.2d 512, 515 n. 3 (2d Cir. 1975) (agreed with lower court that the Convention controls arbitration agreements and enforcement actions commenced after its effective date).

[146] Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821, 822 (1972).

[147] See *infra* notes 169–175, 182–187 and accompanying texts.

[148] *Parsons*, 508 F.2d at 974.

[149] *Id.* While *Parsons* construed section V, on enforcement of an arbitral award, it has been applied also to enforcement of agreements to arbitrate under section II(3). *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); *Intertrade v. m/t Stolt Pride*, No. 81-6954, slip op. n. 4 (S.D.N.Y. June 22, 1982).

[150] *Intertrade*, No. 81-6954, slip op. (since federal statute was subsequently limited in duration by Congress, it cannot be deemed “most basic notion of morality and justice”).

[151] *Ledee*, 684 F.2d at 187 (Puerto Rican statute prohibiting arbitration of subject matter outside the Commonwealth did not make agreement void).

[152] See also *Fotochrome, Inc.*, 377 F. Supp. at 31 (conflict between enforcement of award and Bankruptcy Act would not void award under Convention), *aff’d on other grounds*. 517 F.2d at 517.

[153] See, e.g., *Becker Autoradio USA, Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 44 (3d Cir. 1978); *Fertilizer Corporation of India*, 517 F. Supp. at 955.

[154] See, e.g., *I.T.A.D. Associates, Inc. v. Podar Brothers*, 636 F.2d 75, 77 (4th Cir. 1981); *Becker Autoradio USA, Inc.*, 585 F.2d at 43; *Hanes Corporation v. Millard*, 531 F.2d 585, 597 (D.C. Cir. 1976).

[155] *Sawyer v. Raymond, James & Associates, Inc.*, 642 F.2d at 792.

[156] *Tamari v. Bache & Co. (Lebanon)*, 565 F.2d at 1197, 1200 n. 11.

[157] *Id.*

[158] For example, had an arbitration agreement been in effect in *Schoenbaum*, 405 F.2d 215, *Leasco*, 468 F.2d 1326, or *Travis*, 473 F.2d 513, the courts would almost have been unable to find jurisdiction to reach the merits because in the context of these cases such agreements to arbitrate fall squarely within the scope of the Convention. See also 16 Harv. Int’l L.J., *supra* note 134, at 719.

[159] See *I.T.A.D. Associates, Inc.*, 636 F.2d at 77 (reversing district court’s finding that the FAA confers discretion in compelling international arbitration).

[160] Quigley, *supra* note 32, at 1064.

[161] See *supra* note 152.

[162] 11 U.S.C. §1, *et. seq.* (1970).

[163] 377 F.Supp. at 31.

[164] 517 F.2d at 517.

[165] 501 F.2d 1032, 1037 (3d Cir. 1974).

[166] *Id.*

[167] 417 F.Supp. at 207.

[168] *Id.* at 214.

[169] *Id.* at 215; see *supra* note 153.

[170] 508 F.2d 969 (2d Cir. 1974).

[171] *Id.* at 974.

[172] *Id.* at 976.

[173] *Id.*

[174] *Id.*

[175] *Ledee*, 684 F.2d 184; *Fotochrome, Inc.*, 517 F.2d at 516; *Intertrade*, No. 81-6954, slip op.; *Antoco Shipping Co.*, 417 F. Supp. at 216, 217; *Biotronik v. Medford Medical Instrument Co.*, 415 F.Supp. 133 (D.N.J. 1976).

[176] 415 F.Supp. at 139.

[177] See *supra* notes 55–58 and accompanying text.

[178] While courts have discretion to determine whether a relationship is considered “commercial”, a contract involving a securities transaction is deemed “commercial”.

[179] See *supra* notes 55–58 and accompanying text.

- [180] Article I(1) of the Convention. *See supra* note 47.
- [181] *See supra* text accompanying notes 47, 51 and 52.
- [182] 508 F.2d at 975 (emphasis in original).
- [183] Article V(I)(a) of the Convention.
- [184] *Antco Shipping Co.*, 417 F.Supp. at 215 (in Article II proceeding, burden of proof is on the party resisting enforcement).
- [185] *Cf. Intertrade*, No. 81-6954, slip op. (where agreement designated New York as arbitration forum but was silent on choice of law, and arbitrators found that U.S. law did not govern, claim of conflict between U.S. law and the agreement's payment clause would not constitute a void-for-public-policy defense).
- [186] 417 F.Supp. at 215 (emphasis added).
- [187] *Island Territory of Curaçao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1320 (2d Cir. 1973).
- [188] *See* section 1 of the Sherman Act, 15 U.S.C. §1 (1970).
- [189] *See supra* note 175 and accompanying text.
- [190] 508 F.2d at 974 (emphasis added).
- [191] *See supra* note 146-151 and accompanying text.
- [192] *See* 16 Harv. Int'l L.J., *supra* 134 at 719.
- [193] *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d at 834 (*Scherk* exception to *Wilko* was partially based on the lack of "disparity in leverage" in the international transaction).
- [194] 346 U.S. at 440.
- [195] According to the majority in *The Bremen*, while overweening bargaining power can be a reason for invalidating a forum selection clause, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a *strong* public policy of the forum...." 407 U.S. at 15 (emphasis added).
- [196] 417 U.S. at 519 n. 14.
- [197] *Id.*
- [198] *Scherk*, 417 U.S. at 506 n. 10; *I.T.A.D. Associates, Inc.*, 636 F.2d at 77; *Ledee*, 684 F.2d at 187.
- [199] *Ledee*, 684 F.2d at 187.

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