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INTERNATIONAL ARBITRATION-THE ARBITRABILITY OF ANTITRUST CLAIMS ARISING OUT OF INTERNATIONAL COMMERCIAL AGREEMENTSMitsubishi Motors Corp. v. Chrysler-Plymouth, Inc.: THE AFTERMATH

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COMMENT

INTERNATIONAL ARBITRATION—THE ARBITRABILITY OF ANTITRUST CLAIMS ARISING OUT OF INTERNATIONAL COMMERCIAL AGREEMENTS—*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*: THE AFTERMATH—The Supreme Court did not extend the judicial exception to arbitrability of antitrust issues in the landmark decision of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[1] The Court held that statutory antitrust issues resulting from an international transaction are arbitrable pursuant to the Federal Arbitration Act[2] (the "Arbitration Act") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[3] (the "Convention") despite the doctrine of *American Safety Equipment Corp. v. J.P. McGuire & Co.*,[4] which held that antitrust disputes are inappropriate for arbitration.[5] The Court's decision is significant in view of its impact on the conduct of international commerce.[6] Moreover, *Mitsubishi* recognizes the respect that arbitration commands in the international community.

I. BACKGROUND

Mitsubishi Motors Corporation ("Mitsubishi"), a Japanese corporation and a joint venture of Chrysler International S.A. ("CISA") and Mitsubishi Heavy Industries,[7] entered into a sales agreement in 1979[8]

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1. 473 U.S. 614 (1985).

2. 9 U.S.C. §§ 1-14, 201-208 (1982 & Supp. 1986).

3. June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (codified at 9 U.S.C. §§ 201-208 (1982 & Supp. 1986) [hereinafter Convention].

4. 391 F.2d 821 (2d Cir. 1968). This doctrine has been uniformly followed by several circuit courts. See *infra* note 64.

5. 391 F.2d at 828.

6. *See* Hollering, *Mitsubishi: Arbitrability and Antitrust Claims*, N.Y.L.J., Aug. 19, 1985, at 1, col. 1; Newman & Burrows, *Judicial Intervention in Arbitration of International Claims*, N.Y.L.J., Dec. 26, 1984, at 1, col. 1.

7. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 723 F.2d 155, 157 (1st Cir. 1983). Mitsubishi was formed as a joint venture between CISA, a Swiss corporation and wholly owned subsidiary of U.S. Chrysler Corporation, and Mitsubishi Heavy Industries, Inc., a Japanese corporation. This joint venture was designed to promote Mitsubishi manufactured vehicles for sale in certain territories outside the continental United States through Chrysler dealers. 473 U.S. at 616-17.

with Soler Chrysler-Plymouth, Inc. ("Soler"), a Puerto Rican corporation. The agreement provided for the sale of Mitsubishi automobiles to Soler[9] and contained an arbitration clause which presents the issue herein.[10]

In mid-1981, Soler could not maintain its minimum sales requirements and requested that Mitsubishi allow it to transship some of its volume elsewhere.[11] Mitsubishi, citing various reasons, denied Soler's request.[12] Eventually, Mitsubishi had to withhold a large shipment of vehicles to Soler. In February 1982, Soler disclaimed responsibility for payment of these vehicles.[13] Subsequently, Mitsubishi brought an action in the United States District Court for the District of Puerto Rico[14] seeking an order to compel arbitration of this dispute pursuant to the sales agreement,[15] the Federal Arbitration Act[16] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[17] In addition to denying Mitsubishi's allegations, Soler counterclaimed against both Mitsubishi and CISA alleging violations of several stat-

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8. 473 U.S. at 617. CISA was also a party to this agreement as it was part of the joint venture. On the same day, Soler entered into a separate distributorship agreement with CISA that provided for the sale of Mitsubishi vehicles by Soler within a designated area of Puerto Rico. *Id.*

9. *Id.*

10. Paragraph VI of the sales agreement, entitled "Arbitration of Certain Matters," provided: "All disputes controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to articles I-B through V of this Agreement or for the breach thereof shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.*

11. 723 F.2d at 157. For the first two years of the agreement, Soler maintained a strong sales record. In 1981, however, Soler fell victim to a lagging new car market. 473 U.S. at 617. Soler desired to transship these extra vehicles to Central and South America as well as the continental United States. 723 F.2d at 157.

12. 473 U.S. at 618 n.1. This denial was based on practical and policy rationale. These vehicles were not outfitted with heaters or defoggers because they were designed for Puerto Rico. In addition, they required unleaded high-octane fuel which was unavailable in Latin America. For these reasons, a warranty could not be ensured. There were also concerns that transshipment to the United States would violate agreements between CISA and Mitsubishi. Furthermose, a diversion of these autos would have had a negative effect on the Japanese trade policy of limiting imports to the United States. *Id.*

13. *Id.* Mitsubishi stored 966 vehicles in Japan which represented orders for May, June and July 1981. *Id.*

14. 723 F.2d at 157. The suit alleged nonpayment for the stored vehicles, nonpayment of contractual storage penalties and damage to Mitsubishi's warranties and goodwill, expiration of Soler's distributorship, and other breaches of the sales agreement.

15. *See supra* note 8.

16. 9 U.S.C. § 4 (1982).

17. *See supra* note 3.

utes,[18] including antitrust violations under the Sherman Act.[19]

The district court ordered arbitration of all the statutory issues.[20] Despite the rule of *American Safety* holding that causes of action under the antitrust laws are inappropriate for enforcement by arbitration, the district court held the antitrust claims arbitrable due to the international character of the Mitsubishi-Soler commercial relationship.[21] Soler appealed the district court's decision.

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18. 433 U.S. at 619. Soler asserted causes of action under the Federal Auto Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1226 (1982 & Supp. 1986). There were two counterclaims under this Act: Mitsubishi, (1) "acted in bad faith in establishing minimum sales volumes for Soler"; and (2) "attempted to coerce and intimidate Soler into accepting a proposal to replace Soler with its own subsidiary." 723 F.2d at 161. The Act states:

> An automobile dealer may bring suit against any automobile manufacturer . . . in any district court of the United States . . . by reason of the failure . . . [of] manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise or in terminating, cancelling or not renewing . . . provided that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

15 U.S.C. § 1222. Soler also asserted a cause of action under the Puerto Rican Competition Statute, P.R. LAWS ANN. tit. 10, §§ 257-259 (1978). These statutes forbid conspiracy in restraint of trade and unfair methods of competition. 723 F.2d at 161.

Another statute allegedly violated was the Puerto Rican Dealers' Contract Act. The Act provides that notwithstanding otherwise, "no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause." P.R. LAWS ANN. tit. 10, § 278 (1978 & Supp. 1983). Soler's counterclaim under this Act alleged that Mitsubishi refused to comply with the terms and conditions of the sales agreement regarding orders for products. 723 F.2d at 159-60. Soler also alleged that Mitsubishi had violated the sales agreement by refusing to ship ordered vehicles, by failing to pay for warranty work, and for bad faith in establishing minimum sales volumes. 473 U.S. at 619 n.5. In addition, Soler claimed that Mitsubishi defamed Soler's name and reputation. *Id.* at n.6.

19. 473 U.S. at 619-20. Pursuant to the Sherman [Antitrust] Act, 15 U.S.C. §§ 1-7 (1982), Soler claimed that Mitsubishi and CISA had conspired against Soler by precluding Soler from reselling autos in either North or South America. Soler further alleged that Mitsubishi and CISA prevented Soler from transshipping the vehicles by withholding necessary parts such as heaters and defoggers which would convert them into acceptable vehicles in other areas. Soler also asserted that Mitsubishi and CISA wanted to remove Soler as a distributor to install a wholly owned subsidiary as the exclusive distributor of Mitsubishi autos in Puerto Rico. *Id.* at 623-24. *See also* 723 F.2d at 173-74.

20. 473 U.S. at 620. The district court ruled that the arbitration clause did not cover the claims regarding defamation, discrimination or the establishment of minimum sales volumes. *Id.* at n.7. The district court opinion is unreported. For the text of the opinion, see Petitioner's Brief for Certiorari, Appendix B at B-10.

21. 473 U.S. at 621. The *American Safety* doctrine had been followed by several other circuit courts. *See infra* note 64. The district court, however, relied on Scherk v. Alberto-Culver, 417 U.S. 506 (1974), which held that arbitration of a claim under the Securities Exhange Act of 1934 was enforceable pursuant to a forum selection clause of an international agreement. *Id.; see also infra* note 94.

The United States Court of Appeals for the First Circuit reversed the district court's order to arbitrate all the statutory claims,[22] including those under the Sherman Act.[23] After determining that these statutory claims were encompassed in the arbitration clause,[24] the Court of Appeals opined that certain claims were nonarbitrable due to the judicially created policy set forth in *American Safety*.[25] The court re-

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22. 723 F.2d at 155. A unanimous panel of the Court of Appeals was not persuaded by Soler's reliance on Section b(2) of the Puerto Rican Dealers' Contract Act which reads: "any stipulation that obligates a dealer . . . to arbitrate . . . any controversy . . . regarding [the] dealer's contract outside of Puerto Rico or under foreign law . . . " is void. *See supra* note 18. The First Circuit declared this section preempted by federal law. The court noted that pursuant to 9 U.S.C. § 2 (1970) arbitration agreements are valid and enforceable. 723 F.2d at 158.

The court determined that Soler's counterclaim under the Puerto Rico Dealers' Contract Act, was "plainly within the arbitration clause." 723 F.2d at 160. This counterclaim was predicated on the premise that Mitsubishi refused to comply with the terms and conditions of the sales agreement. According to the court, these terms and conditions, however, were contained in article I of the sales agreement. 723 F.2d at 159-160. *See supra* note 10 for the text of the Sales agreement, paragraph VI.

The court held that Soler's counterclaim under the federal Auto Dealers' Day in Court Act, restated allegations under the Puerto Rico Dealers' Contract Act and the Sherman Act. The court, however, affirmed the district court's ruling that the allegations under the minimum sales agreement were outside the scope of the arbitration clause. 723 F.2d at 161.

Regarding the counterclaim brought under the Puerto Rican antitrust statute, the court ruled that it was within the arbitration clause as were the previous statutory counterclaims. It was not, however, within the scope of the clause "to the same extent as Soler's federal Dealers' Day in Court claim." *Id. See also supra* note 18.

23. The court determined that Soler's claims under the Sherman Act, were within the arbitration clause because they involved provisions of the sales agreement. The provisions included: art. I-D(1) (dealer's orders "firm"), art. I-E (penalties for nonshipment), art. I-F (payment obligations and payment procedure). 723 F.2d at 160.

Soler's counterclaim raised on the transshipment issue was deemed within the scope of the arbitration clause because it resulted in relevant Mitsubishi defenses (*e.g.*, Soler's inexperience with ocean shipping, overseas regulations and unsuitablity of specifications of vehicles for other countries) which implicated article IV of the sales agreement. Article IV states, the "manner in which [Soler] . . . shall use [Mitsubishi's] Trademarks is subject to prior approval by [Mitsubishi]. . . . In the event that [Mitsubishi] shall object to the manner in which BUYER or any Controlled Person is using or allowing Dealers to use any Trademark, . . . BUYER agrees promptly to remedy the situation to [Mitsubishi's] satisfaction." *Id.* at 161.

24. *Id.* at 159-61; *see also* 473 U.S. at 621-22 nn.8-9.

25. 723 F.2d at 162. The First Circuit arrived at this conclusion via a three-step analysis. *Id.* First, pursuant to *American Safety*, the court ascertained that the exception to arbitrability of antitrust claims applies not only to domestic, but also to international agrements, which, as in the instant case, governs the sales and distribution of vehicles in the United States. *Id.* at 163. The court found this in accordance with the Convention. Second, the court concluded that *Scherk*, did not compel arbitration of the antitrust claims in the instant case. 723 F.2d at 167. Third, the court found that, in view of its

manded the case to the district court to adjudicate the arbitrable and nonarbitrable matters.[26]

The Supreme Court granted certiorari[27] in *Mitsubishi* first to determine whether the parties' arbitration agreement included the statutory issues, and if so, to consider the primary issue of whether an American court should enforce an arbitration agreement that stems from an international transaction.[28] Several *amicus curiae* briefs were filed with the Court in addition to the briefs of Mitsubishi and Soler.[29]

In a five to three decision delivered by Justice Blackmun,[30] the Supreme Court confirmed the court of appeals ruling that Soler's statutory claims were within the arbitration clause.[31] The Court reversed the court of appeals,[32] however, holding that these antitrust claims were arbitrable pursuant to the Arbitration Act because the Act did not provide for "implying in every contract within its ken a presumption against arbitration of statutory claims."[33] Moreover, the Court found no reason to depart from the "liberal federal policy favoring arbitration agreements."[34] The Court further held that it was in the best interest of the international commercial system to prescribe enforcement of the arbitration clause.[35]

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holding of nonarbitrability, the district court could look at the permeation of the antitrust claims and their likelihood of success, and decide whether Soler's antitrust claims were separable. *Id.* at 169. If the claims were separable, the district court would have discretion to stay a determination of these claims pending arbitration. *Id.*

26. *Id. See also* 473 U.S. at 623-24 n.12. Soler argued that the arbitration proceedings should be stayed because the antitrust issues "permeated the claims in arbitration." *Id.*

27. 469 U.S. 916 (1984).

28. 473 U.S. at 624.

29. The International Chamber of Commerce and the American Arbitration Association were granted leave to file *amicus curiae* briefs. 469 U.S. 1102 (1984). These briefs supported the arbitrability of the antitrust claims. In addition, the Solicitor General was invited to express the views of the United States government which supported Soler. 104 S. Ct. 2677 (1984). The Commonwealth of Puerto Rico and the American Automobile Dealers Association also filed briefs in support of Soler.

30. 473 U.S. at 615. (Chief Justice Burger, Justices White, Rehnquist and O'Conner joined Justice Blackmun. Justice Powell took no part in the decision).

31. *Id.* at 624. Soler did not argue against the First Circuit's interpretation of paragraph VI of the sales agreement. Rather, Soler argued that, as a matter of law, a court may not "construe an arbitration agreement to encompass [statutory claims] . . . 'unless [that party] has expressly agreed.' " *Id.* Thus, the Supreme Court did not review the scope of the arbitration agreement as interpreted by the court of appeals. *Id.* at n.13.

32. *Id.* at 630.

33. *Id.* at 624.

34. *Id.* (*quoting* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)); *see also* Southland Corp. v. Keating, 465 U.S. 1 (1984); Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 402-404 (1967).

35. 473 U.S. at 627-630.

II. UNITED STATES ARBITRATION POLICY

A. *Federal Statutory Issues*

The Federal Arbitration Act was promulgated in 1925.[36] Section 2 of the Arbitration Act specifies the types of arbitrable agreements subject to the statute.[37] Section 3 requires a federal court to stay litigation on any issue within the arbitration clause and compel arbitration when demanded.[38] This provision demonstrates a federal policy favoring arbitration agreements.[39] It was Congress' intent in implementing the Arbitration Act "to enforce private agreements into which the parties had entered."[40] This intent created a duty for the courts to "rigorously enforce agreements to arbitrate."[41] Section 2, however, does not mention agreements for arbitration of statutory claims.[42] Prior to the instant case, enforcement of arbitration agreements under the Arbitration Act

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36. Pub. L. No. 401, 43 Stat. 883-86 (codified as amended at 9 U.S.C. §§ 1-14 (1982)). For a more detailed discussion of the Federal Arbitration Act, *see* Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223-24 (1982).

37. 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

38. 9 U.S.C. § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . upon being satisfied that the issue . . . is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had.

See also 9 U.S.C. §4 (regarding petition of district court for an order requiring arbitration).

39. 473 U.S. at 624; *see Moses Cone*, 460 U.S. at 1. *See also* 65 CONG. REC. 1931 (1924) ("[The Arbitration Act] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts."); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1926) (the Act places an arbitration agreement "upon the same footing as other contracts, where it belongs.") This policy had already been accepted by the courts when the Arbitration Act was approved. *See* Cohn & Dayton, *The New Federal Arbitration Act*, 12 VA. L. REV. 265, 283-84 (1926).

40. 473 U.S. at 625, *quoting* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

41. *Id.* The Court in *Byrd* added that these agreements should be enforced "even if the result is piecemeal litigation." 470 U.S. at 221.

42. United Steelworkers of America Inc. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960).

always involved contract claims.[43]

The Court first addressed the resolution of statutory claims pursuant to arbitration in *Wilko v. Swan.*[44] In *Wilko,* an arbitration agreement for claims arising under Section 12(2) of the Securities Act of 1933[45] was held unenforceable despite the Federal Arbitration Act.[46] The Court relied on Section 14 of the Securities Act of 1933 which voids any "stipulation" waiving compliance with any "provision" of the Securities Act of 1933.[47] The Court interpreted this section as voiding an arbitration agreement that waived the right to a remedy in a court of competent jurisdiction.[48] More importantly, the Court noted Congress' "hope for [the Arbitration Act's] usefulness both in controversies based on statutes or on standards otherwise created."[49] *Wilko* has since been interpreted as establishing a limited statutory claims exception to the Federal Arbitration Act.[50]

Since *Wilko,* the Court has held statutory claims to be nonarbitrable for certain types of disputes.[51] In *Alexander v. Gardner-Denver Co.,*[52] the Court held that arbitration of an employment discrimination claim would not preclude an employee's statutory right to damages under Title VII of the Civil Rights Act of 1964.[53] The Court distinguished statutory and contractual rights subject to an arbitration clause and concluded that arbitration is an inadequate forum for resolution of rights established by Title VII.[54]

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43. 473 U.S. at 646. *See* Levya v. Certified Grocers of California, Ltd., 593 F.2d 857, 863 (9th Cir.), *cert. denied,* 444 U.S. 827 (1979). In *Levya,* the Ninth Circuit determined "that despite the general rule that arbitration clauses should be broadly construed . . . contracts which provide for arbitration of contract disputes should not be read to require arbitration of statutory claims absent express provisions for such arbitration." 593 F.2d at 863.

44. 346 U.S. 427 (1953). In *Wilko,* a customer sued his brokerage firm under the Securities Act of 1933 for misrepresentation regarding the sale of stock.

45. 15 U.S.C. § 77l(2) (1982).

46. 346 U.S. at 435.

47. 15 U.S.C. § 77(n) (1982).

48. 346 U.S. at 435.

49. *Id.* at 431-32 (citations omitted).

50. *See* Newman & Burrows, *supra* note 6, at 22, col. 1.

51. The Second Circuit discussed this nonarbitrability in Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1953):

> We think that the remedy a statute provides for violation of the statutory right it creates may be sought not only in any "court of competent jurisdiction" but also in any other competent tribunal, such as arbitration, unless the right itself is of a character inappropriate for enforcement by arbitration. . . .

52. 415 U.S. 36 (1974).

53. *Id.* at 59-60.

54. *Id.* at 56. "This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted

A similar issue was decided in *Barrentine v. Arkansas-Best Freight System, Inc.*[55] which held that an arbitration agreement did not bar an employee's claim based on the Fair Labor Standards Act.[56] The Court questioned the authority of an arbitrator in granting relief for a violation of a statutory right.[57] Likewise, in *McDonald v. City of West Branch*,[58] the Court held that claims under the Ku Klux Klan Act of 1871 were nonarbitrable.[59] None of these cases, however, involved the arbitration of antitrust claims.[60]

B. Antitrust Claims

The leading case regarding arbitration of antitrust claims prior to the implementation of the Convention[61] by Congress was *American Safety Equipment Corp. v. J.P. McGuire & Co.*[62] In *American Safety*, an American licensee, attempting to relieve itself of royalty obligations, brought an action against an American licensor on grounds of antitrust violations under the Sherman Act. The assignee of the licensor's royalty rights attempted to invoke an arbitration clause within the license agreement. The Second Circuit held the agreement unenforceable thus establishing an antitrust exception to the federal policy favoring arbi-

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legislation . . . . [In addition,] the specialized competence of arbitrators pertains primarily to the law of the ship, not the law of the land." *Id.* at 56-57.

55. 450 U.S. 728 (1981).

56. *Id.*

57. *Id.* at 744-45. "Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA [statute] thus depriving the employees of protected statutory rights." *Id.* The Court determined that "[t]hese statutory questions must be revealed in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings." *Id.* at 743.

58. 466 U.S. 284 (1984).

59. *Id.* at 292. In *McDonald*, the Court declined to fashion a federal common law rule permitting a federal court to accord res judicata or collateral estoppel effect to an unappealable arbitration award brought under 42 U.S.C. § 1983. *Id.* at 1803. The Court reasoned that "although arbitration is well suited to resolve contract disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and onstitutional rights that § 1983 is designed to safeguard." *Id.* Moreover, the Court held that " '[t]he very purpose of § 1983 was to interpose the federal courts between the states and people, as guardians of the people's rights—to protect people from unconstitutional action under color of state law.' " *Id.* (*quoting* Mitchum v. Foster, 407 U.S. 255, 242 (1972)).

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

61. *See infra* notes 77-79 for applicable text of the Convention.

62. 391 F.2d 821 (2d Cir. 1968).

tration.[63] This doctrine of nonarbitrability has been affirmed by many other circuit courts.[64]

As diluted by the First Circuit in *Mitsubishi*,[65] the doctrine has four ingredients:[66] (1) private parties asserting antitrust claims play an instrumental role in the status of antitrust law. Such plaintiffs are like "private attorney general(s) who protect the public's interest;"[67] (2) "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract;"[68] (3) judicial, rather than arbitration proceedings are more beneficial to cases involving antitrust because such issues tend to be complicated;[69] (4) antitrust regulation decisions are too important to be left to arbitrators "chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our law and values."[70] The Second Circuit in *American Safety* concluded "that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases combine to make . . . antitrust claims inappropriate for arbitration."[71] Therefore, the court "did not believe that Congress

63. *Id.* at 828. The Second Circuit limited its holding four years later to future dispute clauses, holding post-dispute arbitration agreements invalid. Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972); *see also* Cobb v. Lewis, 488 F.2d 41, 49 (5th Cir. 1974) (rationale is that such a clause is similar to a settlement and is encouraged).

64. *See, e.g.*, Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473, 1477-80 (9th Cir. 1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983); Applied Digital Technology v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679 (5th Cir. 1976); Buffler v. Electronic Computer Programming Institute, Inc., 456 F.2d 694 (6th Cir. 1972); Helfenbein v. International Industries, Inc., 438 F.2d 1068, 1070 (8th Cir. 1971), *cert. denied*, 404 U.S. 872 (1971).

65. 723 F.2d at 162.

66. 391 F.2d at 826-27. Courts and commentators have supplemented the doctrine for several other reasons. *See* Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of the World Market*, 18 N.Y.U. J. INT'L. L. & POL. 361, 402-03 (1986), for a summary of these reasons.

67. 391 F.2d at 826. This public interest stems from the effect that antitrust violations can have on the economy. *Id.*

68. 723 F.2d at 162, *quoted in Mitsubishi*, 473 U.S. at 632. *See also* Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085, 1091 (1969).

69. 723 F.2d at 162. *See also* Loevinger *supra* note 68, at 1090; Pitofsky, *Arbitration & Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1077 (1969).

70. 723 F.2d at 162.

71. 391 F.2d at 827-28. The court's rationale was that a "claim under the antitrust law is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. [In addition,] [a]ntitrust violations can effect hundreds of thousands—perhaps millions—of

intended such claims to be resolved elsewhere than in the courts."[72]

C. *The Road to Mitsubishi*

In 1970, two years after the *American Safety* decision, the United States consented to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[73] an agreement to facilitate international arbitration. Since the implementation of the Convention under Section 201 of the Arbitration Act,[74] there has been little adjudication of its provisions.[75] The goal of the Convention and the principal purpose underlying American adoption and implementation of it, is to encourage the propagation 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 states.[76]

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people and inflict staggering economic damage." *Id.* at 826 (citations omitted).

72. 391 F.2d at 827.

73. Convention, *supra* note 3. The Convention is sometimes referred to as the "New York Convention" because it was drafted at the United Nations. The Convention's scope is defined in Article I (1) which states:

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

9 U.S.C. § 201 (1970 & 1986 Supp.). Nearly one-third of the world's states have ratified this treaty. Stein & Wotman, *International Commercial Arbitration in the 1980s: A Comparison of Major Arbitral Systems and Rules*, 38 BUS. LAW 1685, 1688 n.16 (1983). *See generally* Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW 269 (1979); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 S.W.U.L. REV. 1 (1971). *See* McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COMM. 735 (1971), for discussions on the Convention and its adoption by the United States. *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1059-1074 (1961) for a discussion of the background of the Convention before adoption by the United States.

74. 9 U.S.C. § 201 (1982) provides that "[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in the United States courts in accordance with this chapter."

75. 723 F.2d at 164, *see also* Saunders, *supra* note 73, at 270. A recent study of international arbitration cases in United States courts notes that many have ignored the Convention when it should have been applied. Allison, *supra* note 66, at 420.

76. *See* S. Exec. Doc. No. 10, 90th Cong., 2d Sess. 19 (1968). *See generally* Quigley, *supra* note 73, at 1059-60.

Nevertheless, the Convention provides several approaches to challenging or defending against arbitration. Article II provides that each signatory state shall recognize a written arbitration agreement "concerning a subject matter capable of settlement by arbitration."[77] If not "capable of arbitration," a court does not have to enforce the agreement. Courts in the signatory states are compelled to refer actions governed by arbitration agreements to arbitration unless they find that the agreement is "null and void, inoperative or incapable of being performed."[78] Article V(1) provides that arbitration awards may be refused enforcement if the party against whom the award is being enforced offers proof of a valid defense.[79] Furthermore, Article V(2)

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77. Convention, *supra* note 3, at art. I(1). The text of Article II (1)-(2) provides:

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

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

78. *Id.* art. II(3). The text of Article II(3) provides:

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

79. *Id.* art. V(1). The text of Article V(1) provides:

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

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

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

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

(d) the composition of the arbitral authority of the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country

allows a court to refuse enforcement of an award if it finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the laws of that country; or (b) the recognition or enforcement of the arbitral award would be contrary to public policy of that country.[80]

Articles II(3) and V(2)(b) have been interpreted as coextensive despite the fact that Article II refers to arbitration "agreements" and Article V refers to arbitral "awards."[81] Article II applies when a court action has been started regardless of a written arbitration agreement.[82] Article V applies when arbitration is complete and an award has been made but not enforced.[83] Since the ratification of the Convention, courts have liberally interpreted its provisions despite its drafting inconsistencies.[84]

Article V(2) has been the source of much debate.[85] It has been described as an "unfortunate provision" because of the conflict it has generated about the application of public policy.[86] Generally, however, the public policy exception has been narrowly interpreted.[87]

The adoption of the Convention into American statutory law displayed the recognition of forum selection clauses[88] for the resolution of international disputes.[89] In *Bremen v. Zapata Off-Shore Co.*,[90] the Su-

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where the arbitration took place; or

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

80. *Id.* art. V(2).

81. Ledee v. Cermiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982); *see also* Antco Shipping Co. v. Sidernar S.P.A., 417 F. Supp. 207, 215-16 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 931 (2d Cir. 1977).

82. Saunders, *supra* note 73, at 277.

83. *Id.*

84. Allison, *supra* note 66, at 385.

85. Aksen, *supra* note 73, at 13; Barry, *supra* note 73, at 838-43.

86. Aksen, *supra* note 73, at 13.

87. Saunders, *supra* note 73, at 271 (of 100 reported cases, enforcement disallowed three times for public policy reasons). *See Ledee*, 684 F.2d at 187 (Convention overrides a nation's parochial interests as a defense to arbitration).

88. *See* 9 U.S.C. §§ 201-208. A forum selection clause is an agreement to submit in advance to the jurisdiction of a given court for the resolution of a specified dispute. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 6 (1972).

89. One of the goals of the convention was to encourage the utilization of commercial arbitration agreements. *Scherk*, 417 U.S. at 520 n.15. *See* Quigley, *supra* note 73, at 1050-51.

90. 407 U.S. 1 (1972). In *Bremen*, a German corporation made an agreement to tow an American company's rig. The agreement contained a forum selection clause providing for litigation in London. Subsequently, the rig was damaged in a storm and the American company brought an action in a United States district court. The German company

preme Court noted that forum selection clauses "should be given full effect"[91] when "a freely negotiated private international agreement [is] unaffected by fraud."[92] *Bremen* established a well defined policy reason for acknowledging such agreements. The Court explained: [T]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist upon a parochial concept that all disputes must be resolved under our laws and in our courts.[93]

In *Scherk v. Alberto-Culver*,[94] the Court, following *Bremen*, found that an arbitration agreement was a "specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving this dispute."[95] The *Scherk* Court, reversing the Seventh Circuit,[96] in a five to four decision,[97] enforced the arbitration agreement for claims under the Securities Exchange Act of 1934.[98] Although the Court distinguished *Scherk* from *Wilko v. Swan*, it primarily relied on *Scherk's* international context to reach its decision.[99] *Wilko* could have been distinguished on the basis that the Securities Act of 1934 did not have a provision prohibiting waiver of rights similar to the provision under the Securities Act of 1933. While the 1933 Act contained an express cause of action, the 1934 Act's cause of action was implied.[100] Instead, the Court followed the policy reasoning of *Bremen*. The Court opined that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement

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sought to dismiss this suit and brought an action in London pursuant to the clause in the contract. The forum selection clause was held binding. *Id.*

91. *Id.* at 13.

92. *Id.* at 12.

93. *Id.* at 9.

94. 417 U.S. 506 (1974). In *Scherk*, an American manufacturer purchased several enterprises and trademarks from a German citizen. The sales contract, negotiated in the United States, England, and Germany, signed in Austria, and closed in Switzerland, contained an arbitration clause. The American manufacturer brought an action in district court under violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982). The Court held that the clause was valid. 417 U.S. at 519-20.

95. *Scherk*, 417 U.S. at 519.

96. *Id.* at 507, *rev'g*, 484 F.2d 611 (7th Cir. 1973). The Seventh Circuit relied on *Wilko* in reaching its decision. Judge John Paul Stevens dissented. Judge Stevens was later appointed to the United States Supreme Court and wrote the dissenting opinion in *Mitsubishi*.

97. 417 U.S. at 507. Justice Stewart authored the opinion and was joined by Justices Blackman, Powell, Burger, and Rehnquist. Justice Douglas authored the dissenting opinion and was joined by Justices Brennan, White, and Marshall.

98. *Id.* at 516-17.

99. *Id.* at 518-19.

100. Allison, *supra* note 66, at 434.

would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[101]

The Court, assuming that the claims would have been nonarbitrable had they arisen from a domestic transaction,[102] further distinguished *Scherk* from *Wilko*. *Scherk* differed from *Wilko* because it was uncertain if United States law would be applied to the dispute. This uncertainty would encourage forum shopping and "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[103] Finally, while the Court did not rely on the Convention for its decision, it did add that its decision was consistent with the recent adoption of the Convention by the United States.[104]

In his dissent, Justice Douglas argued that neither the Convention nor *Bremen* "justifie[d] abandonment of a national public policy that securities claims be heard by judicial forum simply because some international elements are involved in a contract."[105] Douglas condemned the majority's reliance on the international context of the case.[106] He reasoned that *Wilko* applied in all cases involving federal securities statutes.[107] Furthermore, he asserted that it was the role of Congress to establish an exception to the decision in *Wilko v. Swan*.[108]

Nevertheless, after *Scherk*, lower federal courts continued to hold antitrust cases nonarbitrable even in an international setting.[109] More-

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101. 417 U.S. 516-17.

102. *Id.* at 506.

103. *Id.* at 517.

104. *Id.* at 520 n.15.

105. *Id.* at 530 n.10 (Douglas J., dissenting). Douglas claimed that § 29(a) of the 1934 Act made arbitration agreements under § 10 of the Act "null and void" and "inoperative" under Article 11(3) of the Convention. *Id.* at 524. Section 29(b) of the 1934 Act provides: "any . . . stipulation or provision binding any person to waive compliance with any provision of this [Act] . . . shall be void." 15 U.S.C. § 78cc(a) (1982). Section 29 adds that, "[e]very contract" made in violation of the Act "shall be void." Douglas noted that no exception is made in the Act "for contracts which have an international character." *Id.* at 524. The *Scherk* Court concluded that Section 29 of the 1934 Act was similar to Section 14 of the 1933 Act but distinguished the jurisdictional provisions of the Acts. *Id.* at 514.

106. *Id.* at 529, 533 (Douglas, J., dissenting).

107. *Id.* at 533. Justice Douglas qualified this by stating that these laws "apply whether the defendant is foreign or American, and whether or not there are transnational elements in the dealing." *Id.*

108. *Id.* at 533.

109. *See, e.g., Lake Communication*, 738 F.2d at 1473; *Sem Reisfeld*, 530 F.2d at 679; Hunt v. Mobil Oil Corp., 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). *Cf.* Sauer-Getriebe, KG v. White Hydraulics, Inc., 714 F.2d 348 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984); La Societe Nationale v.

over, antitrust claims were not the only statutory issues excepted from arbitration. Claims arising out of international commercial transactions under the Racketeer Influenced and Corruption Organization Act (RICO) were analogized to antitrust claims and held nonarbitrable under the *American Safety* rationale.[110]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* however, the Supreme Court elevated the rationale underlying *Scherk* above that of the lower courts resulting in an affirmation of international arbitration.

III. THE MITSUBISHI DECISION

The Supreme Court in *Mitsubishi* was faced with an agreement to arbitrate antitrust claims resulting from an international transaction.[111] Justice Blackmun, writing for the majority, began by addressing Soler's contention that the arbitration clause must specifically mention whether claims arising under a certain statute may be arbitrated.[112] The Court's conclusion favoring arbitration was compelled by its recent holdings in *Moses H. Cone v. Mercury Construction Corp.*[113] and *Dean Witter Reynolds, Inc. v. Byrd.*[114] The Court, in rejecting

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Shaheen Natural Resources Co., 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd,* 733 F.2d 260 (2d Cir.), *cert. denied,* 105 S. Ct. 251 (1984).

110. S.A. Mineracao Da Trinidade—Samitri v. Utah International, Inc., 576 F. Supp. 566 (S.D.N.Y. 1983) *aff'd* 745 F.2d 190 (2d Cir. 1984). The district court reasoned that the "general public interest in the enforcement of RICO [18 U.S.C. §§ 1961-68 (1970),] is at least as great as the public interest in the enforcement of antitrust laws." 576 F. Supp. at 575. This public interest is more significant than that in the enforcement of ordinary securities fraud claims as in *Scherk. Id.* at 576. Arbitration issues apply to civil RICO actions. For example, if a party was a victim of fraud and the fraud was subject to the mail fraud statute, 18 U.S.C. § 1341, or the wire fraud statute, 18 U.S.C. § 1343, that party would have a civil claim. If the fraud was part of an international contract which included an arbitration clause, the victim would be able to seek treble damages under 18 U.S.C. § 1964(a) before a court if the clause was held unenforceable or before an arbitral tribunal if the clause was enforceable. Newman and Burrows, "*Will RICO Move Abroad Through International Arbitration?,*" N.Y.L.J., November 21, 1985, at 2, col. 1.

111. 473 U.S. at 624.

112. 473 U.S. at 624. Soler argued that because it was a member of a class for whose benefit the antitrust laws were passed, the arbitration clause can not be interpreted to include arbitration of these statutory claims. *Id.*

113. 460 U.S. 1 (1983). The Court stated that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration . . . . " 473 U.S. at 625 (*quoting Moses Cone,* 460 U.S. at 24).

114. 470 U.S. 213 (1985) ("passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation). *Id.* at 218.

Soler's contention, held that it had no reason to depart from such guidelines[115] and could not find any "basis [in the Arbitration Act] for disfavoring agreements to arbitrate statutory claims. . . . "[116] The Court felt this was especially true since Congress had not displayed any intent otherwise.[117]

Justice Blackmun then turned to the primary issue of *Mitsubishi:* the arbitrability of the antitrust claims.[118] Justice Blackmun displayed the Court's reliance on *Scherk* and *Bremen* in noting that these cases "establish[ed] a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."[119] Before evincing its rationale, however, the Court expressed its skepticism of the *American Safety* doctrine.[120] The Court did not agree that the presence of an antitrust dispute is *per se* nonarbitrable.[121] The Court also disagreed with *American Safety's* determination that arbitrators could not properly resolve an antitrust matter.[122] The complexity of antitrust issues was deemed insufficient to discourage arbitration.[123] The Court pro-

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115. 473 U.S. at 626.

116. *Id.* at 628.

117. *Id.* (no Congressional intent found in either the legislative history or text, unlike the protection against waiver provision found in the Securities Act of 1933). *See Wilko,* 346 U.S. at 434-35. *See also supra* note 47 and accompanying text.

118. 473 U.S. 628. Justice Blackmun acknowledged the correctness of the First Circuit's two-step inquiry of the issues. *Id.* That is, "first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding that it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* at 628.

119. *Id.* at 631. The Court added that this policy is enforced by the federal policy favoring arbitration and it is now extended to the arena of international commerce. *Id.* at 631-32.

120. *Id.* at 632. The Court illustrated the ingredients of the *American Safety* doctrine as had the First Circuit. *See supra* notes 65-72 and accompanying text. The Court, however, refused to assess the *American Safety* doctrine with respect to its application to arbitration agreements arising out of domestic transactions. *Id.* at 628-29.

121. *Id.* at 633. The Court did not dispute the fact, however, that a party may attack the validity of an agreement to arbitrate. *Id. See also* Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 406 (1967).

122. 473 U.S. at 634. The Court noted that the arbitration panel selected to hear the claims in the instant case was composed of three Japanese lawyers: a former law school dean, a former judge, and an attorney with American legal training who published works in Japanese antitrust law. *Id.* at 634 n.18. This conclusion is questionable. *See* Lipner, *International Antitrust Law: To Arbitrate or Not to Arbitrate,* 19 GEO. WASH. J. INT'L L. & ECON. 395, 425 (1985); Loevinger, *supra* note 68, at 1090; Pitofsky, *supra* note 69, at 1078. Such competent arbitral tribunals may not always be selected for such complicated issues. Lipner, *supra,* at 428.

123. 473 U.S. at 623. The Court "merely noted that sufficient complexity did not exist in [Mitsubishi]." Lipner, *supra* note 122 at 425. Thus, future challenges to Mitsubishi may be available. *Id.*

ceeded to discuss the crux of the *American Safety* doctrine: the public interest underlying the Sherman Act and the private cause of action provided by the statute.[124] This private cause of action includes the right to sue and recover treble damages.[125] Based on the freedom an individual has in bringing forth an antitrust claim, the Court reasoned that such a litigant is entitled to establish an accordable procedure in advance for the resolution of any disputes.[126] The Court found that international arbitration was an adequate mechanism for such resolution.[127]

Justice Blackmun concluded by commenting on the influence of international arbitration on the international commercial system[128] and the influence of a national policy favoring commercial arbitration.[129] The Court, observing that this policy did not include any exceptions, was hesitant to establish such an exception due to congressional silence on the issue.[130] The Court added that there should be no reason for international arbitration to be ineffectual since arbitrators will be bound to decide disputes "in accord with the national law giving rise to the claim."[131] Thus, the Court reasoned, "the [antitrust] statute will continue to serve both its remedial and deterrent function."[132] The protection of American public interest against inadequate arbitration, the Court explicated, would be provided for under the Convention so American federal courts would have the opportunity to refuse enforce-

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124. 473 U.S. at 634-35. *See American Safety Equip.*, 391 F.2d at 826-27.

125. 15 U.S.C. § 15(a) (1982 & Supp. 1986). This is the original Section 4 of the Clayton Act, 38 Stat. 731 (1914). The Court explained that the treble damages provision made available to an antitrust plaintiff "is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." 105 S. Ct. at 3358. *See* Perma Life Mufflers Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-39 (1968). The Court has been criticized for failing to recognize the importance of the treble damages remedy. Lipner, *supra* note 121, at 418, 424. Under the Act, a plaintiff is also entitled to seek injunctive relief. 15 U.S.C. § 26. Successful plaintiffs are entitled to reasonable attorney's fees. *Id.*

126. 473 U.S. at 636.

127. *Id.* The Court disregarded the fact that auto manufacturers have overwhelming bargaining power over dealers. Lipner, *supra* note 122, at 423-24.

128. 473 U.S. at 638. This will occur "[w]here the parties have agreed that the arbitral body is to decide a defined set of claims." *Id.*

129. *Id.* at 638-39.

130. *Id.* at 639-40 n.21. The Court was specifically addressing exceptions to arbitrability grounded in domestic law.

131. *Id.* at 638. This is because the tribunal is bound to effectuate the intention of the parties. *Id.* The Court reiterated the sentiment of the Second Circuit in 1942 that if arbitral tribunals are to have a role in the international community, national courts will need to "shake off the old judicial hostility to arbitration. . . . " *Id.* at 639 (*quoting* Kulukundis Shipping Co. v. Armtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

132. 473 U.S. at 637.

ment of arbitral awards if "recognition or enforcement of the award would be contrary to the public policy of that country."[133]

At the outset of his significant dissent, Justice Stevens[134] criticized the majority's concurrence with the First Circuit's interpretation of the scope of the arbitration clause on two grounds.[135] First, although the clause refers to two parties (Mitsubishi Motors Corp, ("MMC") and Buyer), Soler's counterclaim alleged antitrust violations against both MMC and CISA. In construing the clause very narrowly, Justice Stevens believed that only "by stretching the language of the arbitration clause far beyond its ordinary meaning could one possibly conclude that it encompasses this three-party dispute."[136] Second, finding that Soler's antitrust claims were not included in Articles I-B through V of the sales agreement, he was not persuaded by the First Circuit's rationale that "the relationship between the dispute and those Articles brought the arbitration clause into play."[137]

Justice Stevens turned next to the issue of whether an arbitration may include coverage of a statutory remedy not expressly stated in the clause.[138] Analyzing Section 2 of the Federal Arbitration Act, he found no support to suggest that the legislature intended to authorize arbitration of statutory claims.[139] He reasoned that Congress, in drafting the Act, could not have foreseen the Court's response to whether an arbitration clause referring to claims "arising out of or relating to a contract" could be construed to cover statutory claims "that have only an indirect relationship to the contract."[140]

The dissent noted the existence of cases which held that arbitration does not bar the assertion of a statutory right.[141] In *Alexander*[142]

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133. *Id.* (*quoting* Convention, *supra* note 3, at Art. V(2)(b)). The Court observed, however, that this substantive review should remain minimal. 473 U.S. at 638. This conclusion is undermined by the fact that any enforcement proceeding would have taken place in Japan, not the United States. Lipner, *supra* note 122, at 426. Even if an award was not enforced it would still have caused considerable time and expense. *Id.* at 430.

134. Justice Stevens filed a dissenting opinion in which Justice Brennan joined and in which Justice Marshall joined except as to part II. Justices Brennan and Marshall also dissented in *Scherk*, 417 U.S. 505 (1974).

135. 473 U.S. at 643 (Stevens, J., dissenting).

136. *Id.*

137. *Id.* at 644. Justice Stevens explained that the words "in relation to" connected claims arising under the contract and claims resulting from a breach of the contract. *Id.* He believed that "all three of the species of arbitrable claims must be predicated on contractual rights defined in Art. I-B through V." *Id.*

138. 473 U.S. at 646.

139. *Id.* at 645-46.

140. *Id.* at 646-47.

141. *Id.* These cases include McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Scherk v. Al-

and *Barrentine*,[143] the Court acknowledged the inability of arbitration to provide the best suited resolution of contractual disputes and recognized the judiciary as better suited to resolve statutory issues which rely on judicial construction.[144] Based on these cases, the dissent posited that arbitration clauses do not apply to federal statutory claims.[145]

The dissent persisted that Congress never intended enforcement of arbitration clauses for the resolution of antitrust violations because "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."[146] Justice Stevens emphasized the importance that has been attached to American antitrust law by both the Court and Congress: "Antitrust laws in general, and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to protection of our fundamental personal freedoms."[147]

The assertion was supported by citing the public's interest in antitrust litigation and the *American Safety* doctrine.[148] It was claimed that arbitration proceedings in this case would not allow for sufficient review of an arbitrator's decision if one was required.[149] The dissent purported that such proceedings are unacceptable because of the potential effect on American businesses.[150] Lastly, Justice Stevens criticized the majority's international concerns and its reliance on

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berto-Culver, 417 U.S. 506 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

142. 415 U.S. 36 (1974).

143. 420 U.S. 728 (1981).

144. 473 U.S. at 647-50. The *Barrentine* Court noted that "not only are arbitral procedures less protective of individual statutory rights than are judicial proceedings [citations omitted] but arbitrators are often powerless to grant the aggrieved employees as broad a range of relief." 450 U.S. at 744-45, *quoted in Mitsubishi*, 473 U.S. at 649. (Stevens, J., dissenting). *See supra* notes 54, 57.

145. 473 U.S. at 650 (Stevens, J., dissenting). Justice Stevens claimed that it was reasonable to assume that most lawyers and businessmen would not interpret this clause to include federal statutory claims. *Id.*

146. *Id.* at 654 (*quoting* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972)).

147. 473 U.S. at 651 (*quoting* United States v. Topco, Inc., 405 U.S. 596, 610 (1972)). The dissent also cited Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920), in which the Court held that antitrust actions seeking treble damages "can only be brought in a District Court of the United States." 473 U.S. at 656.

148. 473 U.S. at 655-56. The dissent recommended that the Court acknowledge the wisdom of the court of appeals' adherence to this doctrine. *Id.* at 656.

149. *Id.* at 656-57. The arbitration procedure did not provide any right to discovery or a written decision, and required that all proceedings be closed to the public. In addition, Japanese arbiters have no subpoena power. *Id.* at 657 n.31.

150. *Id.* at 657 n.32 and accompanying text. Especially, if an arbitrator condemned necessary business practices under the antitrust laws. *Id.*

Scherk.[151] Quoting the *amicus curiae* brief of the United States,[152] he noted the undisputed fact that the "Convention 'clearly contemplates' that signatory nations will enforce domestic laws prohibiting the arbitration of certain subject matters."[153] Construing Article II(1) of the Convention, he explained that this "clause suggests some subjects that are not capable of arbitration under domestic laws of the signatory nations, and that agreements to arbitrate such disputes need not be enforced."[154] Reading this clause with Article V(2) (a) and (b),[155] Justice Stevens interpreted the Convention as stating that agreements to arbitrate disputes, otherwise nonarbitrable under domestic law, are not required to be enforced.[156]

The dissent, while criticizing the *Scherk* Court, found its distinction of *Wilko* as a domestic application apposite in Mitsubishi.[157] Stevens explicated that in *Wilko* it was unquestionable that American federal securities law would apply.[158] Similarly, he asserted that it is "perfectly clear that the rules of American antitrust law must govern

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151. *Id.* at 658-665.

152. *Id.* at 658, *citing* Brief for the United States as *Amicus Curiae* at 28.

153. *Id.* at 658 (Stevens, J., dissenting).

154. *Id.* at 659. The majority did not reject this interpretation of the First Circuit. *Id.* at 641 n.21; *See* 723 F.2d at 162-66. For example, Belgium (statute limiting unilateral termination of exclusive distributorships) and Italy (labor disputes) have both deemed certain disputes nonarbitrable under the Convention. 473 U.S. at 660-61 n.35 (Stevens, J., dissenting).

155. 473 U.S. at 659 (Stevens, J., dissenting). *See supra* notes 78, 80 and accompanying text for the text of the Convention Art. II(3) and Art. V(2) respectively.

156. 473 U.S. at 659 (Stevens, J., dissenting). The majority's hesitancy to create an exception to the Convention must have been influenced by the number of countries that promote arbitration of antitrust disputes. These countries include: Australia, Austria, Canada, Denmark, Federal Republic of Germany, France, Italy, Netherlands, Pakistan, Peru and Switzerland. Hoellering, *supra* note 6, at note 18. However, arbitration is not always seen as the best solution. Western Europe, for instance, is broadening its antitrust statutes. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need For Reassessment*, 51 FORDHAM L. REV. 201, 207 (1982). The Federal Republic of Germany prohibits enforcement of pre-dispute agreements to arbitrate antitrust claims unless the agreement allows parties the alternative of resorting to state courts. Lipner, *supra* note 122, at 417, n.18. *See* Restrictive Trade Practices Law 27.7 at 1567, as amended, *reprinted in* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, Part D, 49 (1980) (*cited in* Mitsubishi, 473 U.S. at 661 n.36) (Stevens, J., dissenting)); Delaume, TRANSNATIONAL CONTRACTS, ch. XIII, § 13.06 n.3 (rev. ed. 1985) (noting German and French cases in which enforcement of arbitral awards was declined when enforcement would have violated the public policy of the forum) (*cited in Mitsubishi*, 473 U.S. at 661 n.36 (Stevens, J., dissenting)).

157. 473 U.S. at 662-663 (Stevens, J., dissenting).

158. *Id.* at 663. More specifically, Justice Stevens opined that when Mitsubishi enters the American market, it must comply with United States law. *Id.* at 664.

the claim of an American automobile dealer that he has been injured by an international conspiracy to restrain trade in an American auto market."[159] Moreover, he stated that the federal government's intent in protecting auto dealers from manufacturers is undermined by the Court's decision.[160]

The dissent concluded on a vehement note. Justice Stevens criticized the majority's view of arbitration as promoting "world unity" and as an institution "designed to implement a formula for world peace."[161] Most critical, however, was his assertion that arbitration in this case did not carry a guaranty of fair process or economic freedom[162]

IV. CONCLUSION

Despite several imperfections,[163] *Mitsubishi* has made a substantial impact on the international commercial system. The most evident is the requirement that parties to an international transaction adhere to their arbitration agreement rather than escape their obligations. Considering foreign hostility towards American antitrust enforcement,[164] *Mitsubishi* must be viewed as a sincere attempt by the United States to appease our allies in today's complex international commercial arena. As a result, the United States has become a more attractive forum for international arbitration agreements.

Despite this valiant effort, however, the Court has created another stepping stone in this area rather than a clear direction for the resolution of future disputes. This problem arises because *Mitsubishi's* reasoning was primarily based on notions of international comity. Indeed, *Mitsubishi* displays the Court's deference to the international community rather than the national goals proscribed by American antitrust laws. *Mitsubishi,* however, has as great an impact on the arbitrability of domestic arbitration disputes.

While the Court criticized certain elements of the *American Safety,* doctrine,[165] the Court admitted that it was not illegitimizing the doctrine but was only refusing to extend the *American Safety* rationale to *Mitsubishi.*[166] Rather than overrule *American Safety,* the

159. *Id.* at 663.
160. *Id.* at 665.
161. *Id.*
162. *Id.* at 666.
163. *See* Lipner, *supra* note 122, at 414-32 for criticism of *Mitsubishi.*
164. Hawk, *supra,* note 156 at 208-12; Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws,* 52 FORDHAM L. REV. 350, 354-56 (1983).
165. *Mitsubishi,* 473 U.S. at 632. *See supra* notes 65-72 and accompanying text.
166. 473 U.S. at 629. "We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions." *Id.*

Court applied a balancing of international and national interests. This approach will cause much confusion about the arbitrability of domestic antitrust claims. Nevertheless, this is surely an area which the Supreme Court shall be beckoned to address in the near future. Indeed, it is a decision that the American commercial system eagerly awaits. Although the *American Safety* doctrine has been weakened by *Mitsubishi,* it remains the law.[167]

It would seem illogical for domestic antitrust claims to remain nonarbitrable while international claims are arbitrable.[168] Conversely, it seems almost as illogical to hold domestic claims arbitrable based solely on the international comity rationale of *Mitsubishi.* The question of domestic arbitrability is not subject to international concerns or agreements but to the *American Safety* doctrine which had established a strong foothold in American jurisprudence. The *Mitsubishi* Court seemed reluctant to base its rationale on criticism of such a revered doctrine. Perhaps, the *American Safety* doctrine is not as endangered as has been perceived.[169] Of course, an affirmation of *American Safety* would cast *Mitsubishi,* as characterized by Justice Stevens, as part of a "formula for world peace."[170]

During the two years folowing *Mitsubishi,* lower federal court decisions regarding the arbitration of other statutory claims, notably those under the RICO statute, made it uncertain if *American Safety* would get caught in the preferential tide of arbitration.[171] While it

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167. *American Safety* is followed in at least six circuits. *See supra* note 64.

168. The Court has not envisioned this as illogical. The Court emphasized that the factors in *Mitsubishi* demand enforcement of the arbitration agreement "even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi,* 473 U.S. at 629.

169. Since *Mitsubishi,* one district court has held that domestic antitrust issues are arbitrable. *See* Genna v. Lady Foot International, Inc., No. 85-4372, slip. op. (E.D. Pa. Jan. 24, 1986). The district court determined that "[a]lthough [*Mitsubishi*] specifically limited its holding to the international context, its reasoning is more compelling in the domestic context." *Id. See also* Jacobsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1202 (3rd Cir. 1986) (criticizing a case that declined to enforce arbitration agreement for RICO claims because the court "paid too little deference to the Supreme Court's decision in *Mitsubishi*").

170. *Mitsubishi,* 473 U.S. at 665 (Stevens, J., dissenting).

171. The question whether private RICO claims may be arbitrated had been addressed by three circuit courts as of February, 1987. *See* McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. (1986) (holding private RICO claims nonarbitrable) *rev'd* 55 U.S.L.W. 4757 (U.S. June 9, 1987); Jacobsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197 (3d Cir. 1986) (holding that RICO claims may be arbitrated when the offenses predicate to the required pattern of racketeering are arbitrable); Mayaja, Inc. v. Bodkin, 803 F.2d 157 (5th Cir. 1986) (following neither *McMahon* nor *Jacobsen,* but holding RICO claims arbitrable because of no congressional intent otherwise).

would be unfortunate if *Mitsubishi* had created a carte blanche attitude favoring arbitration, this has been the result in view of the Court's recent decision in *Shearson/American Express, Inc. v. McMahon.*[172] *McMahon* resolved the confusion that has emanated from *Mit-*

The Fifth Circuit opined that *McMahon* "ignore[d] *Mitsubishi's* instruction that congressional intent governs the analysis of arbitrability of a statutory claim under the Arbitration Act." *Mayaja*, 803 F.2d at 162 n.6. Both *Mayaja* and *Jacobsen* stressed that "determining statutory claims to be be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Jacobsen*, 797 F.2d at 1202; *Mayaja*, 803 F.2d at 162 n.6. The *American Safety* public policy analysis has been applied to RICO claims because the RICO statute, like the antitrust statutes, contains a treble damages remedy and a no anti-waiver provision similar to the securities acts. *See Mayaja*, 803 F.2d at 164; 18 U.S.C. § 1964(c) (1982).

McMahon was authored by Judge Feinberg, the distinguished author of *American Safety*. Judge Feinberg protected *American Safety* by distinguishing *Mitsubishi* as a case involving "international" disputes. *McMahon*, 788 F.2d at 98. Judge Feinberg compared the policy concerns underlying the RICO statute as being similar to those underlying the antitrust statutes. *Id.* He ascertained that a judicial forum is appropriate for RICO claims because of these strong policy concerns. *Id.*

There is also much confusion amongst the lower courts on the arbitrability of RICO claims. *Compare* Fisher v. Prudential-Bache Securities, Inc., 635 F. Supp. 234, 237 (D. Md. 1986) (nonarbitrable); Witt v. Merrill, Lynch, Pierce, Fenner and Smith, Inc., 602 F. Supp. 867, 870 (W.D. Pa. 1985) (nonarbitrable); Universal Marine Insurance Co. v. Beacon Insurance Co., 588 F. Supp. 735, 738 (W.D.N.C. 1984) (nonarbitrable); Steinberg v. Illinois Company, Inc., 635 F. Supp. 615 (N.D.Ill. 1986) (arbitrable); Bob Ladd, Inc., v. Adcock, 633 F. Supp. 241, 243-44 (E.D. Ark. 1986) (arbitrable); Bale v. Dean Witter Reynolds, Inc., 627 F. Supp. 650 (D. Minn. 1986) (arbitrable).

Similar confusion exists amongst the courts regarding the arbitration of domestic claims under the 1934 Securities Act. *Compare McMahon*, 788 F.2d 94 (nonarbitrable); Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520 (9th Cir. 1986) (nonarbitrable); Miller v. Drexel Burnham Lambert, Inc., 791 F.2d 850, 854 (11th Cir.) *reh'g denied en banc*, 803 F.2d 1185 (1986) (nonarbitrable); Schriner v. Bear, Stearns & Co., 635 F. Supp. 373 (N.D. Cal. 1986) (arbitrable); Fisher v. Prudential-Bache Securities, Inc., 635 F. Supp. 234 (D. Md. 1986) (arbitrable); Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048 (N.D. Ga. 1986) (arbitrable). This confusion was sparked by the Court's decision in Dean Witter Reynolds, Inc., v. Byrd, 470 U.S. 213 (1985). Although the *Byrd* Court noted that the applicability of *Wilko* to claims under the 1934 Act was questioned in *Scherk*, the Court declined to address the issue. *Id.* at 1240.

Confusion concerning arbitration also exists in the bankruptcy field. Allison, *supra* note 66, at 399. Some courts have compelled arbitration of bankruptcy issues while others have declined to enforce agreements to arbitrate bankruptcy issues. *Compare* Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984) (nonarbitrable); *In re* Braniff Airways, Inc., 33 Bankr. 33 (N.D. Tex. 1983) (nonarbitrable); *In re* Morgan, 28 Bankr. 3 (9th Cir. 1983) (arbitrable); *In re* Hart Ski Mfg., 711 F.2d 845 (8th Cir. 1983) (arbitrable).

172. 55 U.S.L.W. 4757 (U.S. June 9, 1987) *rev'g* 788 F.2d 94 (2d Cir. 1986). In *McMahon*, the Court held that domestic claims under the Securities Exchange Act of 1934

subishi during the past two years.

Based on the Court's decision in *Mitsubishi* and several other recent decisions,[173] notably *McMahon*, arbitration will play an even more influential role in commercial agreements in the future. It is naive, however, to believe that arbitration will always resolve antitrust disputes.[174] Nevertheless, arbitration will continue its respected standing in the legal community. Consequently, counsel of parties to commercial agreements will have to examine such agreements very cautiously before determining which forum the agreements will expressly provide for in the event of a statutory dispute. Most importantly, counsel for such parties must advise their clients once " 'having made the bargain to arbitrate,' they will be held to their bargain."[175]

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domestic RICO claims are arbitrable. The Court reasoned that "[n]ot only does *Mitsubishi* support the arbitrability of RICO claims, but there is even more reason to suppose that arbitration will adequately serve the purposes of RICO than that it will adequately protect private enforcement of the antitrust laws." *Id.* at 4762.

The Court, however, did offer some hint of protection for the *American Safety* doctrine. While excluding RICO claims from nonarbitrable status, the Court stated that "[t]he private attorney general rule for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and the enforcement of the RICO Statute." *Id.* at 4763. With this statement, the Court has left open the "plausibility" that there is an irreconcilable conflict between arbitration and domestic claims under the antitrust statute. Indeed, this may be too broad an interpretation. If so, the *American Safety* doctrine has been so weakened that its days are numbered.

173. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, (1983).

174. Arbitration, for example, may inhibit business parties from bringing antitrust claims. Small corporations, unlike large corporations, may be discouraged from international transactions because of the expense of arbitration, which can be higher than litigation when in an international context. Rather than risk foreclosure from bringing possible antitrust claims, small corporations simply may avoid such international transactions. Lipner, *supra* note 122, at 423 n.234 and accompanying text; Allison, *supra* note 66, at 378; De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 61 (1982) (discussing reasons for higher expense); *see* Loevinger, *supra* note 68, at 1090-91; Pitofsky, *supra* note 69, at 1076-80 for a discussion of problems with arbitration generally.

175. 55 U.S.L.W. at 4763.