INTERNATIONAL ARBITRATION — COMMERCE — ARBITRABILITY OF ANTITRUST CLAIMS ARISING FROM INTERNATIONAL COMMERCIAL DISPUTES RECOGNIZED UNDER FEDERAL ARBITRATION ACT—*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985).

Although the English common law traditionally exhibited an antipathy to non-judicial resolution of disputes,[1] the recent trend in the United States has been to recognize and enforce these decisions and the resulting awards.[2] One illustration of this tendency is the increasingly popular use of arbitration[3] as a method of resolving international trade disputes. Resort to arbitration is due in part to the perceived speed, efficiency, and informality of the proceedings, as well as the growing reluctance among businesses to litigate in foreign courts.[4]

Notwithstanding a national policy encouraging arbitration of commercial disputes,[5] the federal judiciary maintains that certain public law issues must be resolved by the courts in order to protect the public interest involved.[6] Federal courts, for example, have held that domestic disputes involving the securities and an-

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[1] *See, e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983-84 (2d Cir. 1942) (arbitration agreements believed to be contrary to public policy because they "oust jurisdiction" of courts).

[2] *See* United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (1982)), which initiated a national public policy favoring arbitration. This position was strengthened further by the United States' ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (implemented at 9 U.S.C. §§ 201-208 (1982)). The United States Supreme Court in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), cited the enactment of the Federal Arbitration Act as "reversing centuries of judicial hostility to arbitration agreements." *Id.* at 510.

[3] Arbitration is defined as "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." BLACK'S LAW DICTIONARY 96 (5th ed. 1979) (citation omitted). *See generally* Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L.R. 155 (1970).

[4] *See* Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 INT'L L. & POL. 361, 378-80 (1986); Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1191-94 (1977).

[5] *See supra* note 2.

[6] *See* A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 359-82 (1981); Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097, 1104 (1969); Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085, 1089-91 (1969).

titrust laws are nonarbitrable.[7] In an international context, however, the enforcement of arbitration agreements have an added dimension. This area concerns whether domestic policies should be subordinated to both the national policy favoring transnational arbitration and the broader interest of bolstering world trade.[8] The United States Supreme Court recently confronted this question in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[9] In *Mitsubishi*, the Court held that an agreement to arbitrate international contractual disputes was enforceable despite the presence of antitrust claims.[10]

In October 1979, Soler Chrysler-Plymouth, Inc. (Soler)[11] entered into an agreement with Chrysler International, S.A. (CISA), a wholly owned subsidiary of Chrysler Corporation (Chrysler).[12] Pursuant to this agreement, Soler was granted the right to distribute, within the San Juan, Puerto Rico metropolitan area, certain vehicles manufactured by Mitsubishi Motors Corporation (Mitsubishi)[13] for Chrysler.[14] At the same time, Soler, Mitsubishi, and CISA executed a Sales Procedure Agreement (Agreement) designed to facilitate the sale of Mitsubishi manufactured vehicles to Soler.[15] Paragraph VI of the Agreement provided for arbitration in Japan of all disputes arising between Mitsubishi and Soler.[16] Arbitration was to be conducted in Japan according

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7 *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953) (section 14 of 1933 Securities Act negates arbitration agreement); Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978) (antitrust claims nonarbitrable); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) (antitrust issues nonarbitrable unless arbitration agreement negotiated after dispute arises); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (arbitration deemed inappropriate for antitrust claims).

8 *See generally* Johnson, *International Antitrust Litigation and Arbitration Clauses*, 3 J.L. & COM. 91 (1983); Ovington, *Arbitration and U.S. Antitrust Law: A Conflict of Policies*, 2 J. INT'L ARB. 53, 53-60 (1985).

9 105 S. Ct. 3346 (1985).

10 *See id.* at 3361.

11 Soler Chrysler-Plymouth, Inc. is a Puerto Rican corporation having its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico. *Id.* at 3349.

12 *Id.*

13 Mitsubishi Motors is a Japanese corporation with its principal place of business in Tokyo, Japan. *Id.* Mitsubishi Motors is the product of a joint venture between Chrysler International, S.A., a Swiss corporation, and Mitsubishi Heavy Industries, Inc., a Japanese corporation. *Id.*

14 *Id.*

15 *Id.* The agreement did not create a franchisor-franchisee relationship between Mitsubishi and Soler. Brief of Petitioner at 4, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 105 S. Ct. 3346 (1985) (Nos. 83-1569 and 83-1733) [hereinafter Brief of Petitioner].

16 *Mitsubishi*, 105 S. Ct. at 3349. Specifically, paragraph VI provided:

to the rules and regulations of the Japan Commercial Arbitration Association and to be governed by the laws of Switzerland.[17]

During the first year of its dealership, Soler sold a substantial amount of Mitsubishi manufactured vehicles.[18] One year later, in 1981, the automobile market declined and Soler found itself unable to sell its minimum sales commitment.[19] In an attempt to alleviate the problem, Soler requested permission to ship a number of vehicles to the continental United States and Latin America.[20] Chrysler and Mitsubishi refused to permit transshipment and, subsequently, Soler's financial position worsened.[21] Eventually, Mitsubishi was forced to withhold shipment in Japan

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> All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Article 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. (citation omitted).

Article 22 of the Distributorship Agreement between CISA and Soler was incorporated by reference into the Sales Procedure Agreement. Article 22 provides:

> This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein. . .[.] If it is found that any portion or portions of this Agreement violate in any particular any law of any government or governmental unit, division or subdivision having jurisdiction in the premises, and said violation would cause said authorities to consider this Agreement as void and without effect regardless of the present election of law, then within that political unit such portion or portions of this Agreement will be of no force and effect. . .[.]

Opinion and Order at B-2 to -3, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., No. 82-538 (D.P.R. Nov. 24, 1982) (order compelling arbitration), *aff'd in part and rev'd in part*, 723 F.2d 155 (1st Cir. 1983), *aff'd in part and rev'd in part*, 105 S. Ct. 3346 (1985) [hereinafter Order].

17 *Mitsubishi*, 105 S. Ct. at 3349.

18 *Id.* During 1980, the automobile market in Puerto Rico was very strong and Soler exceeded its targeted sales volume of 1992 vehicles. Brief of Respondent and Cross-Petitioner at 3, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985) (Nos. 83-1569 and 83-1733) [hereinafter Brief of Respondent]. For 1981, Mitsubishi increased Soler's minimum sales volume to 4750 vehicles. *Id.*

19 Brief of Respondent, *supra* note 18, at 4.

20 *Id.*

21 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 157 (1st Cir. 1983), *aff'd in part and rev'd in part*, 105 S. Ct. 3346 (1985). Mitsubishi stated in a telex of July 8, 1981 that transshipping vehicles to the U.S. mainland could trigger a control on exports by the Japanese government for the Puerto Rico market and involved both business and political considerations. Brief of Respondent, *supra* note 18, at 4-5. Mitsubishi also refused transshipment because the vehicles did not have heaters and defoggers, used only unleaded, high octane fuel unavailable in Latin America, adequate warranty service could not be ensured, and that diversion to the mainland would violate a contractual agreement between Chrysler and Mitsubishi. *Id.* at 4-7.

of nearly 1000 vehicles which Soler ordered but had not purchased.[22]

In February 1982, Soler formally denied responsibility for the vehicles and claimed that Mitsubishi's refusal to allow transshipment violated the antitrust laws of the United States and Puerto Rico.[23] The following month, Mitsubishi brought suit against Soler in the United States District Court for the District of Puerto Rico alleging breach of contract.[24] Mitsubishi moved for an order compelling arbitration under the Federal Arbitration Act[25] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[26] Soler denied the allegations and filed a counterclaim for alleged antitrust violations, asserting that both Mitsubishi and CISA divided markets and restrained trade.[27] In addition, Soler claimed that antitrust issues are nonarbitrable as a matter of law and, consequently, the district court must stay the arbitration pending adjudication of the antitrust counterclaims in federal court.[28]

The district court ordered Mitsubishi and Soler to arbitrate most of the claims and counterclaims, including Soler's federal antitrust counterclaim.[29] Although the court recognized that antitrust claims are nonarbitrable in a domestic setting[30] and that the relationship between Soler and Mitsubishi was truly international,[31] it nevertheless held that Chapter 2 of the Federal Arbi-

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22 *Mitsubishi*, 105 S. Ct. at 3350.

23 *Id.* at 3350-51.

24 *Mitsubishi*, 723 F.2d at 157. Mitsubishi also alleged that Soler failed to pay for the ordered vehicles and that its actions damaged Mitsubishi's warranties and goodwill. *Id.*

25 *See* 9 U.S.C. §§ 1-14 (1982).

26 *Mitsubishi*, 105 S. Ct. at 3350. *See* 9 U.S.C. §§ 201-08 (1982) (codification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

27 *Mitsubishi*, 105 S. Ct. at 3351. Soler specifically claimed violations of the Sherman Act, 15 U.S.C. §§ 1-7; the Federal Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-1225; and the Puerto Rico competition statute, P.R. LAWS ANN., tit. 10, § 278b (1978 and Supp. 1983). *Mitsubishi*, 105 S. Ct. at 3350. Soler further counterclaimed that Mitsubishi had defamed Soler's "good name and business reputation." *Id.* at 3350 n.6.

28 *Mitsubishi*, 723 F.2d at 158.

29 *Mitsubishi*, 105 S. Ct. at 3351. The district court held that Soler's defamation claim and allegations "concerning discriminatory treatment and the establishment of minimum-sales volumes" were not within the arbitration clause and, therefore, were not arbitrable. *Id.* at 3351 n.7.

30 *See* American Safety Equip. Corp. v. J.P. McGuire & Co., 391 F.2d 821, 825-26 (2d Cir. 1968). *See also infra* notes 78-91 and accompanying text (discussion of *American Safety*).

31 *Mitsubishi*, 105 S. Ct. at 3351.

tration Act[32] mandated arbitration in Japan of the parties' commercial disputes.[33]

On appeal, the First Circuit affirmed the district court's judgment that the antitrust disputes fell within the scope of the arbitration agreement.[34] The court, however, reversed the district court's holding that the antitrust claims be arbitrated.[35] Relying on *American Safety Equipment Corp. v. J.P. McGuire & Co.*,[36] which held that the Federal Arbitration Act does not mandate arbitration of antitrust claims arising in domestic disputes, the court reasoned that antitrust claims arising in international disputes are similarly nonarbitrable.[37] The court also distinguished *Scherk v. Alberto-Culver Co.*,[38] which held that claims arising under the federal securities laws are arbitrable in an international context.[39] The First Circuit reasoned that the public policy interests protected by private enforcement of the antitrust laws are more important than those protected by the securities laws.[40]

The parties appealed to the Supreme Court which reversed the court of appeals' decision and held that the antitrust dispute was subject to arbitration under the Federal Arbitration Act.[41] In refusing to extend the *American Safety* doctrine, the Court stressed the importance of the federal policy favoring arbitration agreements and the need to avoid parochial application of domestic law in an international context.[42]

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32 *See infra* notes 43-51 and accompanying text (discussion of Act).

33 *See* Order, *supra* note 16, at B-5 to -8.

34 *Mitsubishi*, 723 F.2d at 169. The First Circuit remanded the case to separate the antitrust issues from the issues that were arbitrable. *Id.* The court ordered the district court to determine whether the antitrust issues should be resolved before, after, or concurrently with the arbitration of the remainder of the dispute. *Id.*

35 *Id.* at 166.

36 391 F.2d 821 (2d Cir. 1968). *See also infra* notes 78-91 and accompanying text.

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

38 417 U.S. 506 (1974). *See also infra* notes 104-18 and accompanying text (discussion of *Scherk*).

39 *Scherk*, 417 U.S. at 519-20.

40 *Mitsubishi*, 723 F.2d at 168. The court reasoned that the policy underlying the securities laws is to protect investors while the policy behind antitrust laws "is not to protect individual companies, but to protect *competition*." *Id.* (emphasis in original). The court commented that antitrust laws "protect the general public by preserving a competitive atmosphere that keeps prices down in an entire industry or in a group of related industries." *Id.* An example of the importance of the public interest in private enforcement, in the court's view, is that successful antitrust plaintiffs recover treble damages, while securities plaintiffs only recover actual damages. *Id.*

41 *See Mitsubishi*, 105 S. Ct. at 3361.

42 *Id.* at 3356-57. The Court noted that the decisions in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) and Scherk v. Alberto-Culver Co., 417 U.S. 506

The Federal Arbitration Act (Act),[43] enacted in 1925, grants to United States courts the power to enforce arbitral agreements,[44] to stay litigation pending the outcome of arbitration,[45] and to confirm arbitral awards.[46] The Act's declaration that arbi-

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(1974) demonstrated a strong policy in favor of arbitration as a contractual dispute resolution mechanism and that United States accession to the Convention gives "special force" to arbitration in an international commercial context. *Mitsubishi*, 105 S. Ct. at 3357.

[43] 9 U.S.C. §§ 1-14 (1982).

[44] Section 4 of the Act reads in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

9 U.S.C. § 4 (1982).

[45] Section 3 of the Act 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 in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1982).

[46] Section 9 of the Act provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 9 (1982).

tration agreements are "valid, irrevocable and enforceable"[47] provides the basis by which a party aggrieved by the "failure, neglect, or refusal" of another to arbitrate may petition the federal court for an order compelling arbitration.[48] The Act reversed "centuries of judicial hostility to arbitration agreements"[49] and reflects the congressional desire that federal courts implement the arbitration process to the fullest extent possible.[50] Similar policies favoring arbitration have developed in other countries since arbitration has increasingly become recognized as the preferred method of resolving commercial disputes among the world's trading nations.[51]

In 1970, the United States ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).[52] This Convention creates a framework to facilitate and encourage international arbitration by providing uniform standards for the enforcement of arbitration agreements and awards.[53] In addition, the Convention governs arbitration agreements between United States citizens and citizens of foreign countries[54] and provides that a court of competent jurisdiction

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47 Section 2 of the Act 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 a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

48 *See supra* note 45.

49 *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974). *See also infra* notes 104-18 and accompanying text (discussing *Scherk*).

50 *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). In *Moses H. Cone*, the Supreme Court stated that "[t]he Arbitration Act establishes that, as matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.

51 *See* International Handbook on Commercial Arbitration (Supp. 5, 1986), Johan Steyn, Q.C., *England*, Arbitration Act 1979; Werner Melis, *Austria*, Federal Law of February 2, 1983; Albert Jan van den Berg, *Saudi Arabia*, Arbitration Regulation of Saudi Arabia.

52 *See supra* note 2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is enforced as Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1982).

53 *See* McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 736-46 (1971).

54 *See* 9 U.S.C. § 202 (1982). Section 202 provides:

may compel arbitration in accordance with the arbitration agreement whether or not the place of arbitration is within the United States.[55]

Article II of the Convention contains the provisions concerning the enforcement of arbitration agreements. Article II(1) requires that the courts of a contracting state recognize an arbitration agreement that "concern[s] a subject matter capable of settlement by arbitration."[56] Article II(3) requires that a court refer to arbitration any dispute subject to a recognized arbitration agreement unless the court determines that the agreement is "null and void, inoperative or incapable of being performed."[57] Article V of the Convention contains the grounds for nonenforcement of awards. Under article V(2), a court may deny recognition if the "subject matter of the difference is not capable of settlement by arbitration under the law of [the] country" in which enforcement is sought, or if "enforcement of the award would be

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> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Id.

55 *See* 9 U.S.C. § 206 (1982). Section 206 provides:

> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Id.

56 Article II(1) 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.

21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

57 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.

21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

contrary to the public policy of that country."[58]

Many parties to disputes have claimed nonarbitrability of an issue concerning domestic law by relying on article II(1) as a public policy exception.[59] The public policy defense, however, is only mentioned expressly in article V(2) as a ground for refusing arbitral awards.[60] Difficulties, therefore, have arisen in interpreting the drafters' intention to differentiate between actions to enforce the arbitration agreement and actions to enforce the ultimate award.[61] In attempting to reconcile article II(1) and V(2), courts have construed the phrase "capable of settlement by arbitration" in article II(1) as equivalent to the phrase "capable of settlement by arbitration under the law of that country" in article V(2)(a).[62] As a result, under article II analysis, courts have subjected arbitration agreements to considerations of national public policy.[63]

Despite the interest of trading nations in the use of arbitration as a means of promoting international commercial relations, arbitration of public law issues has resulted in controversy con-

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58 Article V(2) provides:

> 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:
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> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
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> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

59 *See* Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards under the New York Convention: A Modest Proposal*, 51 TEMP. L.Q. 832, 843-44 (1978); Ehrenhaft, *supra* note 4, at 1213-14.

60 *See supra* note 58.

61 *See* G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE May/June 1958, at 24-28 (discussing arbitral agreements), 66-71 (discussing arbitral awards).

62 *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *aff'd in part and rev'd in part*, 105 S. Ct. 3346 (1985). The court reasoned that inconsistent interpretations of articles II and V would mean that a matter could be referred to arbitration even though a court could refuse to enforce the award because it offends national public policy. *Id.* at 164. The court further opined that " 'capable' means legally capable—for any matter can theoretically be arbitrated or compromised, even if the decision be to divide an infant. 1 Kings 3:16-20." *Id.*

63 *Mitsubishi*, 723 F.2d at 164-65. The court noted that the courts of other nations have interpreted the Convention similarly. *See id.* at 165 n.10 (citing Belgium and Italian adjudications); *see also* Barry, *supra* note 59, at 835-37; 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, 1062-64 (1961).

cerning whether arbitration will adequately protect the public interest involved.[64] For example, in the United States, the public interest served by the private enforcement of securities and antitrust laws conflicts with the national policy favoring commercial arbitration.[65] The United States Supreme Court initially confronted this conflict between the goals of arbitration and those of the securities laws in *Wilko v. Swan*.[66] In *Wilko*, a customer brought suit under section 12(2) of the Securities Act of 1933[67] against a brokerage firm for alleged misrepresentation and omission of material facts in connection with a sale of stock.[68] The defendant moved to stay litigation and compel arbitration in accordance with the parties' arbitration agreement.[69] The Supreme Court determined that the strong policy underlying the Securities Act of 1933 of ensuring a free and orderly securities market was a necessary component of the free enterprise system.[70] As a result, the Court ruled that judicial settlement of securities claims supplants the policy of the Federal Arbitration Act.[71] Furthermore, the Court noted that section 14 of the Securities Act of 1933[72] specifies that any agreement purporting to waive compliance with the terms of the 1933 Act is void.[73] Thus, the Court held that the arbitration agreement was invalid since it would deprive the aggrieved investor of the right to sue in federal court.[74]

Lower courts have similarly found that the public policy in-

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64 *See* J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 531-65 (1978); A. VAN DEN BERG, *supra* note 6, at 359-82; Barry, *supra* note 59, at 838-50; Ehrenhaft, *supra* note 4, at 1200-19.

65 *See* Wilko v. Swan, 346 U.S. 427 (1953) (private enforcement of securities laws supplants national policy favoring arbitration of commercial disputes); *see also infra* notes 66-74 and accompanying text (discussion of *Wilko*); American Safety Equip. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir. 1968); *infra* notes 78-91 and accompanying text (discussion of *American Safety*).

66 346 U.S. 427 (1953).

67 The Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-bbbb (1982)). Section 12(2) prohibits fraud or misrepresentation of a material fact in the sale of a security. *See* 15 U.S.C. § 77*l*(2).

68 *Wilko*, 346 U.S. at 428-29.

69 *Id.* at 429.

70 *Id.* at 435.

71 *Id.* at 438.

72 15 U.S.C. § 77n (1982). Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." *Id.*

73 *Wilko*, 346 U.S. at 430 (citing 15 U.S.C. § 77n).

74 *Id.* at 438. The Court further reasoned that since the protective provisions of the Securities Act provide for judicial determination to assure their effectiveness,

terests protected by patent laws,[75] the Racketeer Influenced and Corrupt Organizations Act,[76] and the Bankruptcy Reform Act[77] outweigh the national policy favoring arbitration. In 1968, in *American Safety Equipment Corp. v. J.P. McGuire & Co.*,[78] the United States Court of Appeals for the Second Circuit held that litigation of domestic disputes arising under the Sherman Act superseded the policy enunciated by the Federal Arbitration Act.[79] In that case, American Safety entered into a trademark licensing agreement with Hickok Manufacturing Company which included a clause requiring arbitration of all future disputes.[80] American Safety later filed suit against Hickok and J.P. McGuire, the assignee of Hickok's royalty rights,[81] claiming that the licensing agreement violated the Sherman Act because it unlawfully extended Hickok's trademark monopoly and unreasonably restricted American Safety's business.[82] Hickok and J.P. McGuire demanded arbitration.[83] The United States District Court for the Southern District of New York stayed American Safety's claim pending arbitration.[84]

On appeal, the Second Circuit reversed the district court and held the claim nonarbitrable.[85] The court reasoned that the complex and diverse nature of antitrust claims and the public interest in proper enforcement of the antitrust laws required judicial determination of antitrust suits.[86] The court proffered four reasons

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the congressional intent behind § 14 creates a non-waivable right to sue in federal courts, which cannot be affected by an arbitration agreement. *Id.* at 437.

It is important to note that the *Wilko* Court was concerned with the *domestic* applications of the Securities Act of 1933 and with protecting the individual investor, who the Court believed was at a disadvantage compared to issuers and dealers. *Id.* at 435.

75 *See, e.g.*, N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976); Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970).

76 *See, e.g.*, S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc., 745 F.2d 190 (2d Cir. 1984).

77 *See, e.g.*, Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 699 (1984).

78 391 F.2d 821 (2d Cir. 1968).

79 *Id.* at 827-28.

80 *Id.* at 822.

81 *Id.* at 823. One provision of the agreement permitted assignment only with the other party's consent. *Id.* American Safety Equipment claimed that Hickok's assignment to J.P. McGuire was invalid under this provision. *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *See id.* at 828.

86 *Id.* at 826-27. The court stated that "[t]he Sherman Act is designed to pro-

to support its judgment that antitrust claims are exempt from arbitration. First, the court noted that the tremendous public interest in a competitive economy, and the embodiment of that interest in the antitrust laws, precluded arbitration.[87] Second, the *American Safety* court remarked that the possible existence of adhesion clauses in contracts requiring arbitration cautioned against arbitration.[88] Third, the court reasoned that the increasing complexity of antitrust litigation coupled with the diversity and extensiveness of the evidence warranted litigation.[89] Lastly, the court concluded that it is undesirable to entrust antitrust matters to commercial arbitrators drawn from the business community.[90] The *American Safety* court's reasons against arbitrating antitrust disputes have been embraced by other circuits, however, only when adjudicating disputes among *domestic* parties.[91]

Following the *American Safety* decision, a judicial trend emerged which recognized arbitration as a viable method of resolving international commercial disputes.[92] This movement began with the Supreme Court's 1972 decision in *The Bremen v. Zapata Off-Shore Co.*[93] In that case, Unterweser, a German company, contracted to tow an off-shore oil drilling rig owned by Zapata, an American company, from Louisiana to Italy.[94] After an accident occurred at sea, the drilling rig was brought to Tampa, Florida and Zapata brought suit against Unterweser for breach of contract.[95] Unterweser moved to stay or dismiss the

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mote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest." *Id.* at 826 (citation omitted).

87 *See id.* at 826-27.

88 *See id.* at 827.

89 *See id.*

90 *See id.*

91 *See, e.g.*, Applied Digital Technology, Inc. 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); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Buffler v. Electronic Computer Programming Inst., Inc., 466 F.2d 694 (6th Cir. 1972); Helfenbein v. International Indus., Inc., 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970).

92 *See* Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT. L.J. 33, 65-76 (1984). Professor Carbonneau notes that the United States accession to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1970 and its implementation through Chapter 2 of the Federal Arbitration Act initiated this trend.

93 407 U.S. 1 (1972).

94 *Id.* at 2.

95 *Id.* at 3-4.

action by invoking the forum selection clause of the towage contract which provided that "any dispute arising [under the contract] must be treated before the London Court of Justice."[96] Both the district court and the court of appeals declined to dismiss the suit and ordered litigation in a United States district court.[97]

On appeal, the Supreme Court vacated the court of appeals' judgment and remanded the case.[98] The Court held that a forum selection clause in a freely negotiated international commercial agreement should be enforced "absent a strong showing that it . . . be set aside."[99] In its analysis, the Court emphasized the importance of contract obligations and commercial interdependence.[100] The Court, therefore, rejected the parochial notion that United States courts should not be "ousted" of jurisdiction by parties to a commercial agreement.[101] Moreover, the Court recognized that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[102]

Two years later, in 1974, the Supreme Court faced the growing discord between the federal courts' commitment to public law issues and the commitment expressed in the Federal Arbitration Act of favoring arbitration in an international context.[103] In *Scherk v. Alberto-Culver Co.*,[104] a United States cosmetic company arranged to purchase several European cosmetic enterprises owned by Scherk, a German citizen.[105] The sales agreement between the parties contained a clause by which Scherk warranted that the trademarks for the cosmetics were unencumbered and that any future disputes were to be settled by arbitration in Paris

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96 *Id.* at 2.

97 *Id.* at 6-7. The district court relied on Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959), which held that forum selection clauses are presumptively unenforceable because their effect is to "oust the jurisdiction of the courts." *The Bremen*, 407 U.S. at 6 (quoting *Carbon Black Export*). The court of appeals affirmed and stated that a forum selection clause should not be enforced unless the contractually specified forum is clearly more convenient for the parties and witnesses. *Id.* at 7.

98 *The Bremen*, 407 U.S. at 20.

99 *Id.* at 15. According to the Court, the party challenging the clause must "show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.*

100 *Id.* at 8-9.

101 *Id.* at 9.

102 *Id.*

103 *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

104 *Id.*

105 *Id.* at 508.

before the International Chamber of Commerce.[106] Alberto-Culver subsequently discovered that the trademarks they acquired were in fact encumbered[107] and brought suit in federal district court to rescind the transaction.[108] In its complaint, Alberto-Culver alleged that it had been defrauded in violation of Section 10(b) of the Securities Exchange Act of 1934[109] and Securities Exchange Commission rule 10b-5.[110] Scherk, however, initiated arbitration proceedings and moved for dismissal or a stay of the lawsuit.[111] The district court and the Seventh Circuit Court of Appeals, relying on *Wilko*, held the dispute nonarbitrable.[112]

The Supreme Court reversed and held that agreements to arbitrate transnational commercial disputes must be respected and enforced by the judiciary in accordance with the Federal Arbitration Act, despite alleged violations of the securities laws.[113] The Court reasoned that the *Wilko* rationale did not apply to Scherk because the underlying agreement was "truly international" in character and as such involved "considerations and policies significantly different from those found controlling in *Wilko*."[114] The Court upheld the arbitration agreement despite the fact that the Securities Act provides for exclusive federal jurisdiction[115] and contains a clause prohibiting waiver of compliance with provisions of the Act.[116] The Court stated that, in an international context, the advantages these provisions might afford a party are chimerical because a "parochial refusal" to honor an international arbitration agreement "would invite unseemly and mutually destructive jockeying by the parties to se-

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106 *Id.*

107 *Id.* at 509.

108 *Id.*

109 *See* 15 U.S.C. § 78j(b) (1982) (prohibiting manipulative or deceptive conduct in connection with sale or purchase of securities).

110 *Scherk*, 417 U.S. at 509. For the text of rule 10b-5, see 17 C.F.R. § 240.10b-5 (1985).

111 *Scherk*, 417 U.S. at 509.

112 *Id.* at 510.

113 *See id.* at 519-21.

114 *Id.* at 515. The Court emphasized that there was no doubt in *Wilko* that United States law, and specifically federal securities law, would govern in a dispute involving a stock purchase agreement. *Id.* at 515-16. According to the Court, "[t]he parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise." *Id.*

115 *See* 15 U.S.C. § 78aa (1982) (providing courts of the United States with exclusive jurisdiction over securities violations).

116 *Scherk*, 417 U.S. at 514. *See* 15 U.S.C. § 78cc (1982) (prohibiting waiver of compliance with provisions of securities laws).

cure tactical litigation advantages."[117] Furthermore, the Court reasoned that allowing American standards of fairness to govern an international controversy would demean "the standards of justice elsewhere in the world, and unnecessarily exalt[] the primacy of the United States law over the laws of other countries."[118]

During the years following *Scherk*, the lower federal courts faced a growing number of cases involving arbitrability of transnational commercial disputes.[119] For example, in *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*,[120] the Second Circuit enforced an arbitration clause despite strong national concerns favoring adjudication of the dispute.[121] In *Parsons*, an American corporation entered into an agreement with RAKTA, an Egyptian corporation, to construct, supervise, and manage a mill in Egypt.[122] The contract contained both a *force majeure* clause[123] and a clause providing for arbitration of disputes before the International Chamber of Commerce.[124] During construction of the mill in 1967, Arab-Israeli hostilities led to a rift in relations between the United States and Egypt and all Americans were expelled from Egypt.[125] Parsons then sought to abandon the project by relying on the *force majeure* clause.[126] Subsequently, RAKTA commenced arbitration

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117 *Scherk*, 417 U.S. at 516-17. The Court reasoned that "if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration[,] he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States." *Id.* at 517.

118 *Id.* at 517 n.11. It is significant that the Court did not rely on the Convention or its implementing legislation in reconciling national public policy with international trade interests. The Court, however, did state 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." *Id.* at 520 n.15.

119 *See, e.g.*, Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982); Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); Antco Shipping Co. v. Sidermar S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977).

120 508 F.2d 969 (2d Cir. 1974).

121 *Id.* at 974.

122 *Id.* at 972.

123 A *force majeure* clause is defined as a superior or irresistable force which is "common in construction contracts to protect the parties in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

124 *Parsons*, 508 F.2d at 972.

125 *Id.*

126 *Id.*

proceedings claiming breach of contract.[127] The arbitration panel issued an award to RAKTA and ruled that Parsons could not use the defense of *force majeure*.[128]

After the arbitrators rendered their decision, Parsons filed suit in the United States District Court for the Southern District of New York alleging that the award was unenforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[129] Parsons claimed that under article V(2) of the Convention,[130] its performance of the contract would contravene United States public policy in light of the diplomatic problems between the United States and Egypt.[131] The district court rejected Parsons's defenses and confirmed the arbitration award.[132] The Court of Appeals for the Second Circuit affirmed the district court's decision and held that the public policy defense of the Convention must be construed narrowly.[133] A party invoking the defense, according to the Second Circuit, must prove that "enforcement [of a foreign arbitral award] would violate the forum state's most basic notion of morality and justice."[134] In the opinion of the court, Parsons had mistakenly equated national political interests with public policy.[135] The *Parsons* court determined that such a reading of the Convention would be detrimental to its mechanism for enforcement.[136]

Similarly, in the 1976 case of *Antco Shipping Co., Ltd. v. Sidermar S.p.A.*,[137] the United States District Court for the Southern District of New York held that a dispute concerning the breach of a shipping contract, which excluded Israel as a loading

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127 *Id.*

128 *Id.*

129 *Id.* at 971-72.

130 *See supra* note 58 (text of article V(2)).

131 *Parsons*, 508 F.2d at 974.

132 *Id.* at 972.

133 *Id.* at 974.

134 *Id.* The court criticized Parsons' interpretation of the public policy defense as "a parochial device protective of national political interests." *Id.* Instead, the court embraced the view that a "supranational emphasis" be placed on the public policy exception. *Id.*

135 *Id.*

136 *Id.* The court rejected Parsons's argument—that the article V(2)(a) language of "subject matter not capable of arbitration under the law of [the forum] country" as being similar to that of article V(2)(b)—by stating "[t]he 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 not arbitrable. Rather, certain *categories* of claims may be non-arbitrable because of the special national interest vested in their resolution." *Id.* at 975 (emphasis in original).

137 417 F. Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977).

port, was arbitrable despite the strong United States policy against restrictive trade practices.[138] Relying on *Parsons*, the court construed the Convention's public policy defense narrowly and concluded that the exclusion of Israel as a loading port did not "contravene the public policy of the United States."[139] The court emphasized the importance of international arbitration as demonstrated by the United States accession to the Convention and held that disputes must be referred to arbitration unless the "essence" of the undertaking or the remedy sought was expressly and entirely prohibited by either statute or by a public policy declaration.[140] Furthermore, the court reiterated the pronouncement of the *Parsons* court that United States national policy should not be equated with public policy if arbitration is to facilitate transnational trade transactions.[141]

A further example of the judiciary's evolving precept that international considerations may override national public policy when viewing arbitration agreements is found in the 1982 decision of *Ledee v. Ceramiche Ragno*.[142] In that case, the First Circuit held that an arbitration agreement negotiated between Puerto Rican and Italian companies was valid despite the Puerto Rican Dealers Act,[143] which declared arbitration agreements "null and void" in dealership contracts.[144] Relying on the policy favoring arbitration exhibited by the United States accession to the Convention, the court reasoned that the goal of the Convention was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts. . . ."[145] Therefore, the court held that enforcement of the Dealers Act would contravene the Convention.[146] Moreover, the court noted that

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138 *See id.* at 211, 217. For an enunciation of the United States policy against restrictive trade practices, see Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. §§ 2401-2420 (1982)).

139 *Antco Shipping*, 417 F. Supp. at 217. Antco, however, contended that the arbitration agreement was "null and void" under article II of the Convention. *Id.* at 211-12. The court did not view this provision of article II(3) as being symmetrical to the provision of article V which prohibits enforcement because of illegality, unless "enforcement would violate the forum state's most basic notions of morality and justice." *Id.* at 216 (citing *Parsons & Whittemore*, 508 F.2d at 974).

140 *Id.* at 215. The court stated that even if the exclusion of Israeli ports contravened the public policy of the Export Administration Act, it does not proscribe Antco's performance as provided for in the contract. *Id.* at 215-16.

141 *Id.* at 216-17.

142 684 F.2d 184 (1st Cir. 1982).

143 P.R. LAWS ANN. tit. 10, § 278b-2 (Supp. 1984).

144 *Ledee*, 684 F.2d at 187.

145 *Id.* (quoting *Scherk*, 417 U.S. at 517 n.10).

146 *Id.* The court stated that when faced with the question of referring a dispute

the "parochial interests" of a state are not sufficient to create a defense to arbitrability under the Convention.[147] Accordingly, the *Ledee* court determined that article II "must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale."[148]

It was against this background that the United States Supreme Court rendered its decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[149] Justice Blackmun, writing for the majority, refused to extend the *American Safety* rationale to antitrust disputes arising in an international context and held that international antitrust issues are arbitrable.[150] Justice Blackmun initially recognized that the parties intended to arbitrate all potential disputes, including the antitrust claims.[151] Despite Soler's contention that an arbitration agreement may not encompass statutory claims unless the parties expressly agreed in their contract to arbitrate them,[152] the Court reasoned that the congressional intent behind the Federal Arbitration Act was to favor enforcement of arbitration agreements involving statutory issues, unless the statute expressly stated that a waiver of the right to a judicial resolution would not be recognized.[153]

The Court next addressed the issue of whether antitrust claims between a foreign and domestic party may be arbitrated under United States law.[154] The Court recognized the concerns raised in *American Safety* against arbitrating antitrust disputes arising in a domestic context[155] and these concerns were weighed against the advantages of arbitration in resolving transnational commercial disputes and the commitment to enforcing freely ne-

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to arbitration under Chapter 2 of the Federal Arbitration Act, the court has a limited role of addressing four concerns: 1) whether there is a written agreement to arbitrate the dispute; 2) whether the agreement is for arbitration in a territory of a Convention signatory; 3) whether the agreement arises out of a commercial legal relationship; and 4) whether the agreement is an international one. *Id.* at 186-87. If these questions are answered affirmatively, the court "must order arbitration, unless it finds the agreement 'null, void, inoperative or incapable of being performed.' " *Id.* at 187 (quoting Convention, article II(3)).

147 *Id.* at 187.

148 *Id.* (citing I.T.A.D. Assoc., Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981)).

149 105 S. Ct. 3346.

150 *Id.* at 3353-61.

151 *Id.* at 3355.

152 *Id.*

153 *Id.*

154 *See id.* at 3354-55.

155 *Id.* at 3355.

gotiated clauses.[156] The Court disagreed with the finding that potential complexity of issues should preclude arbitration, reasoning that complexity alone should not hinder a tribunal's handling of an antitrust matter.[157] Similarly, the Court was not persuaded by the argument that arbitrators will not be familiar with the substance of the antitrust laws.[158] As Justice Blackmun noted, arbitrators are usually experts in their fields and, therefore, will be knowledgeable in the disputed area.[159] In fact, the Court noted that the arbitration panel selected to hear the instant dispute consisted of a former dean of a law school, a former judge, and a practicing attorney.[160] In addition, the Court rejected the argument that arbitration panels consisting of businessmen would be hostile to the constraints on business conduct imposed by antitrust law.[161] The Court reasoned that arbitrators are often selected from the legal community as well, thereby offsetting any bias exhibited by the business community.[162]

The Court then addressed the crux of the *American Safety* doctrine—"the fundamental importance to American democratic capitalism of the regime of the antitrust laws."[163] The Court accepted the contention that the private cause of action and the treble damages remedy form a central part of the enforcement mechanism of antitrust laws;[164] yet, the Court maintained that this does not compel the conclusion that a remedy can be sought only in a United States court.[165] The arbitrators, according to

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156 *Id.* at 3357. The Court summarized these concerns as first, the appropriateness of arbitration of antitrust claims in view of the important role played by the private treble damage actions in enforcement, *id.*; second, the likelihood that private antitrust disputes will arise from contracts of adhesion militating against forum selection clauses, *id.*; third, the complexity of antitrust issues comporting with the essential attributes of arbitration, namely, speed, efficiency, and use of common sense and equity, *id.*; and fourth, the choice of arbitrators from the business community argues against entrusting them with the implementation of business regulatory policy. *Id.*

157 *Id.*

158 *Id.* at 3357-58.

159 *Id.* at 3358.

160 *Id.* at 3358 n. 18. The practicing attorney, in addition to having American legal training, had published on Japanese antitrust laws. *Id.*

161 *Id.* at 3358.

162 *Id.* In fact, the arbitration panel selected for this dispute consisted of three Japanese lawyers. *See supra* note 160 and accompanying text.

163 *Id.*

164 *Id.*

165 *Id.* at 3358-59. The Court added that the parties will define the authority of the arbitrator or arbitration panel, and the arbitrators cannot fulfill their responsibilities without taking into consideration the pertinent legal principles that are involved. *Id.* at 3359.

the Court, are bound to carry out the intentions of the parties and, therefore, should be bound to apply the relevant national law in deciding the dispute.[166] As a result, arbitrating international antitrust disputes does not dispense with the concerns addressed by the existence of a private cause of action under the antitrust laws.[167]

The Court then examined the relevance of the Convention and the protection it offers to United States policy interests.[168] The Court reasoned that after the arbitration of a dispute has taken place, the national courts have the power under article V(2)(b) to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country."[169] Therefore, Justice Blackmun concluded that courts have the opportunity to ensure that the public interest served by enforcement of antitrust laws has been addressed.[170]

Lastly, the majority emphasized the importance of arbitration to the expansion of world trade.[171] While the diversity of issues presented to arbitral tribunals has increased, the Court opined that arbitration, as an alternate method of dispute resolution, has only begun to realize its potential.[172] In order to accomplish the goal of facilitating international commercial relationships, the Court reasoned that national courts must relinquish jurisdiction over issues of domestic law to foreign arbitral tribunals.[173] Therefore, the Court had no quarrel with the *American Safety* doctrine as it applied to domestic transactions but concluded that "concerns of international comity," respect for the abilities of transnational arbitral tribunals, and the need for predictability in the resolution of international commercial disputes require enforcement of international arbitration agreements.[174]

Justice Stevens, joined by Justices Brennan and Marshall, dissented from the majority opinion.[175] According to the dissent,

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166 *Id.* at 3360.

167 *Id.* at 3359. The Court noted that "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states. . . ." *Id.*

168 *See id.* at 3359-60.

169 *Id.* at 3360 (quoting article V(2)(b)).

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.* at 3355.

175 *See id.* at 3361 (Stevens, J., dissenting). Justice Powell did not participate in the decision. *Id.*

an arbitration clause cannot be construed to encompass a statutory claim that is not expressly identified in the contract.[176] Justice Stevens reasoned that contracting parties in drafting an arbitration clause would not presume it to cover a violation of federal law; rather, the parties would expect an arbitration clause to encompass only claims arising from a breach of the contract.[177] Therefore, in the dissent's view, a distinction must be drawn between contract claims and statutory claims when construing arbitration clauses.[178] According to Justice Stevens, a statutory claim must be expressed in the arbitration clause; otherwise, litigation is required to assure consistent application of statutory rights.[179]

Moreover, the dissent asserted that antitrust claims are not arbitrable under federal law.[180] Justice Stevens noted the importance of antitrust laws to a competitive economy and stressed the need for private enforcement of those laws.[181] Judicial resolution of antitrust claims, in the dissent's view, must be reserved in order to maintain consistent antitrust standards.[182] The dissent opined that arbitrating antitrust disputes would lead to inconsistent results because the arbitration proceeding may not address the complexity of antitrust law and the arbitrators' decision in most cases is not reviewable.[183]

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176 *Id.* at 3362 (Stevens, J., dissenting).

177 *Id.* at 3363-64 (Stevens, J., dissenting).

178 *Id.* at 3364-65 (Stevens, J., dissenting). The dissent cited the Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in which judicial resolution of a statutory claim was mandated despite the federal policy favoring arbitration to support their contention that it would be unreasonable to believe that Congress intended arbiters to implement federal statutes. *Mitsubishi*, 105 S. Ct. at 3365 (Stevens, J., dissenting).

179 *Id.* at 3365-66 (Stevens, J., dissenting). The dissent noted that "the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Id.* at 3365 n.14 (Stevens, J., dissenting). Furthermore, the dissent posited that the record of the arbitration proceedings is not as complete as judicial factfinding, the usual rules of evidence do not apply, and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. *Id.* (citing Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956)).

180 *Id.* at 3367-70 (Stevens, J., dissenting).

181 *Id.* The dissent stated that the interest in enforcing the antitrust laws has been protected so fervently because " 'every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress.' " *Id.* at 3368 (Stevens, J., dissenting) (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972)).

182 *Id.* at 3370 (Stevens, J., dissenting).

183 *Id.* The dissent commented "[t]he arbitration procedure. . .does not provide any right to evidentiary discovery or a written decision, and requires that all proceedings be closed to the public." *Id.* at 3370 n. 31.

Justice Stevens then addressed the majority's holding that the national policy favoring arbitration outweighed Congress's commitment to judicial resolution of antitrust disputes.[184] Relying on the language of *American Safety* and the history of antitrust law, Justice Stevens concluded that the majority placed undue weight on concerns for international comity.[185] The dissent also questioned the majority's interpretation of the Convention and reasoned that antitrust claims are nonarbitrable under article II of the Convention.[186]

The dissent adopted the court of appeals' reasoning that the Convention precludes arbitration in this case because article II excepts subject matter which is not capable of settlement through arbitration.[187] Relying on article V enforcement provisions that require the subject matter to be capable of settlement under the laws of the country where enforcement is being sought, the dissent reasoned that article II required that the agreement itself must be capable of resolution under those same laws.[188]

The dissent further reasoned that public policy concerns preclude arbitration of antitrust issues.[189] According to the dissent, article V(2)(b), which prevents enforcement of an award contrary to the public policy of the country where enforcement is sought, applies with equal force to article II.[190] Therefore, the dissent asserted that both domestic laws and public policy considerations may be invoked at the enforcement stage to render antitrust issues incapable of arbitration.[191] Thus, the dissent would have affirmed the court of appeals' holding that the antitrust issue must be resolved in United States courts.[192]

Although the *Mitsubishi* majority concluded that antitrust is-

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184 *See id.* at 3363, 3369 (Stevens, J., dissenting).

185 *Id.* at 3369-70 (Stevens, J., dissenting). Justice Stevens cited the fact that *American Safety* has been followed by five circuits. *See id.* Accordingly, Justice Stevens concluded that "[t]his Court would be well advised to endorse the collective wisdom of the distinguished judges of the Court of Appeals who have unanimously concluded that the statutory remedies fashioned by Congress for the enforcement of the antitrust laws render an agreement to arbitrate antitrust disputes unenforceable." *Id.* at 3370 (Stevens, J., dissenting).

186 *Id.* at 3371 (Stevens, J., dissenting).

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* The dissent further reasoned that this construction was supported by the legislative history of the United States Senate's consent to the Convention. *Id.* at 3371-72 (Stevens, J., dissenting).

192 *See id.* at 3361 (Stevens, J., dissenting).

sues are arbitrable, the Court nevertheless determined that article V(2)(b) affords United States courts a ground for refusing to enforce arbitral awards due to public policy concerns.[193] This apparent contradiction may be explained in part by the Court's recognition that arbitration would not be mandated if Congress expressly required judicial resolution of the dispute.[194] Moreover, the Court narrowly interpreted article II's provision for enforcing an arbitral agreement by choosing not to construe article II as encompassing the public policy exception of article V.[195] Article V's provisions, according to the Court, are limited to enforcing arbitral awards, not the agreement itself.[196] This strict interpretation comports with the language of the articles as well as the essence of the Convention favoring arbitration of disputes.[197]

It should be noted, however, that interpretations of the public policy defense have been the subject of controversy since the inception of the Convention.[198] In fact, the drafters of the Convention wrestled with the importance that national law and public policy should take in the actual language of the Convention.[199] Guidance, however, is available from a report issued by the members of the Conference.[200] The report stated that the intention of the drafters was to restrict the use of the public policy defense "to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award is invoked."[201] Furthermore, by placing the public policy exception in article V and not article II, it appears that the drafters purposefully created broad instructions on recognizing arbitral agreements so that the signatory states would not invoke domestic public policy

193 *See id.* at 3360 n.21. By doing so, the Court intimates that a joint reading of article II and article V mandates referral of disputes to arbitration.

194 *Id.* The majority wrote that "we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so." *Id.*

195 *See id.* at 3361 n.21.

196 *See id.* at 3360.

197 *Id.* at 3361 n.21.

198 *See generally* G. HAIGHT, *supra* note 61. *See also supra* notes 52-63 and accompanying text.

199 *See* G. HAIGHT, *supra* note 61, at 24-28. *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15.

200 *See* U.N. ESCOR, Report of the Committee on the Enforcement on International Arbitral Awards at 49, U.N. Doc. E/2704 and corr. 1, D/AC 42/4/Rev./28 (1955).

201 *Id.*

issues when parochial interests appeared threatened to prevent the enforcement of arbitration agreements.[202]

In its analysis, the *Mitsubishi* Court did not attempt to thoroughly discuss the Convention. The Court may have avoided a thorough interpretation of the Convention because of potential conjecture surrounding any pronouncement of the Convention's purpose. Had the Court delved into the complex language of the Convention, its opinion may have been seen as an explanation of those particular articles confronting the Court.[203] Rather, the Court concentrated on the United States' commitment to the spirit of the Convention to encourage arbitration of international commercial disputes. By doing so, the Court accomplished its objective of bolstering the trend to subordinate parochial national interests to the broader interest of increased world trade. As a result, the Court solidified the judicial history favoring the essence of the Convention rather than interpreting its intricacies.[204]

Mitsubishi marks an important movement toward internationalization of commercial transactions by adding renewed strength to arbitration's effectiveness in resolving transnational disputes. The Court's liberal interpretation of the Federal Arbitration Act, and specifically the Convention, reflects a growing judicial acceptance of arbitration as a suitable alternative to traditional commercial dispute resolution. The Court's holding may be seen

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202 *Compare* article V(2)(b) (permitting non-enforcement of arbitral awards when "[t]he recognition or enforcement of the award would be contrary to the public policy of [the country where enforcement is sought]") *with* article II(1) (public policy is not cited as a means of nonenforcement); *see generally* G. HAIGHT, *supra* note 61, at 24-28, 67-71; Quigley, *supra* note 63, at 1062-64, 1070-71. The ambiguity of the framer's intent concerning the application of the public policy defense has led some courts to employ article V(2)(b) to avoid enforcing arbitration agreements. *See* Barry, *supra* note 59, at 839; Ehrenhaft, *supra* note 4, at 1214-15.

203 *See* Allison, *supra* note 4, at 436. Professor Allison suggests that the Court avoided the express language of articles II and V because they present "an interpretive thicket." *Id.* In analyzing the Court's decision, Allison states his belief that the Court was "ready to subordinate national policy concerns in the interest of facilitating full U.S. participation in the world marketplace, regardless of the precise language of the Convention." *Id.* Moreover, Allison hypothesizes that "the Court may have furthered the development of an international commercial dispute resolution system to a greater degree than if the Court had waded into the language of the Convention." *Id.*

204 The decision in *Mitsubishi*, along with *The Bremen*, *Parsons*, and *Scherk*, form a solid progression of American case law in the direction of subordinating national public policy to the global interests of international commercial relations. *See supra* notes 93-102 and accompanying text (discussing *The Bremen*); *supra* notes 120-36 and accompanying text (discussing *Parsons*); *supra* notes 104-18 and accompanying text (discussing *Scherk*).

as a narrow one in the sense that it recognized the arbitrability of only international antitrust disputes;[205] yet, the Court delivered a strong message in favor of subordinating domestic interests in order that arbitration be employed as a mechanism to resolve international trade disputes. With this precedent, lower courts have shown that arbitration has the broad potential to resolve legal claims arising from commercial and financial transactions.[206]

Thus, although the *Mitsubishi* decision is a narrow one, it signifies a trend among the judiciary to further the goals of international commercial relations over the extraterritorial application of domestic laws.[207] By strengthening the enforcement mechanism of arbitration clauses through a liberal view of the Convention's pronouncements, the decision may instigate other nations to formulate broad policies favoring arbitration and eschew the enforcement of parochial policies. The *Mitsubishi* decision portends a policy favoring arbitration which will open the door to

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205 Domestic antitrust disputes remain nonarbitrable. *See* Stendig Int'l, Inc. v. B&B Italia, S.p.A., 633 F. Supp. 27 (S.D.N.Y. 1986) (antitrust claims in domestic context are nonarbitrable). The *Stendig* court noted that "*Mitsubishi* is explicitly limited to an *international context* involving multinational agreements calling for *international arbitration*." *Id.* at 28 n.1 (emphasis added).

206 Relying on *Mitsubishi*, the United States Court of Appeals for the Fifth Circuit in Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140 (5th Cir. 1985), held that it had jurisdiction over an appeal from a district court's order denying a stay pending arbitration in an admiralty dispute. *Id.* at 1143. The court stated that it had jurisdiction despite the contrary judicially created rule that arbitration stay orders in admiralty disputes were not appealable. *Id.* The court held that under *Mitsubishi*, it was obligated to enforce transnational arbitration agreements; therefore, any law or decision prior to the United States accession to the Convention "must be construed as consistent with the Convention or set aside by it." *Id.* at 1148. Thus, the court reasoned that since the parties agreed to arbitrate their disputes, article II of the Convention mandated arbitration. *Id.* at 1151.

Similarly, the United States District Court for the Southern District of New York in Development Bank of the Philippines v. Chemtex Fibers Inc., 617 F. Supp. 55 (S.D.N.Y. 1985), held that claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO) in an international context are arbitrable. *Id.* at 57. The court cited *Mitsubishi*'s enunciation of a policy favoring arbitration of international commercial disputes and reasoned that the interest of the domestic community in the enforcement of the federal anti-racketeering statute is no stronger than the interest in *Mitsubishi* of enforcing American antitrust principles. *Id.*

See also Practical Concepts, Inc. v. Republic of Bolivia, 615 F. Supp. 92 (D.D.C. 1985) (action by corporation against foreign sovereign was arbitrable); Good(e) Business Sys., Inc. v. Raytheon Co., 614 F. Supp. 428 (D.C. Wis. 1985) (Wisconsin Fair Dealership law prohibiting arbitration of fair dealership claims preempted by Federal Arbitration Act).

207 *See, e.g.*, Development Bank of the Philippines v. Chemtex Fibers Inc., 617 F. Supp. 55 (S.D.N.Y. 1985) (international RICO claims arbitrable).

increased international trade with American parties due to the certainty of enforcement of their arbitration agreements.

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