Northwestern Journal of International Law & Business

Volume 7
Issue 3 *Spring*

Spring 1986

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc: International Arbitration and Antitrust Claims

Lisa Sopata

NOTE

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.: International Arbitration and Antitrust Claims

I. INTRODUCTION

Arbitration is an attractive alternative for parties entering into commercial transactions. Parties to international contracts often include arbitration clauses in an attempt to protect their rights and to eliminate uncertainties in the event of a dispute. A court may nevertheless treat a given dispute as nonarbitrable if the issue is highly charged with conflicting public policy concerns.[1]

The Federal Arbitration Act ("FAA") allows for the arbitration of international contract disputes under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention")[2] when an agreement between two signatory parties is capable of arbitration and enforcement is not contrary to the public policy.[3] Conflicts have arisen under the Convention with respect to the enforcement of arbitration clauses by signatory countries and the scope of the "public policy exception."

The United States Supreme Court in the recent landmark decision, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, held that private antitrust claims are arbitrable in a transaction arising in interna-

---

[1] Note, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards:* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 8 FORDHAM INT'L L. J. 194, 197-98 (1984)[hereinafter Note, *Application*].

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter Convention on Recognition].

[3] 9 U.S.C. § 201 (1982). For a detailed discussion of the applicability of the Arbitration Act and the Convention to the Mitsubishi case, see *infra* text accompanying notes 15-43.

tional commerce.[4] The court ruled in a five-to-three decision that if an international contract contains a broad arbitration agreement, policy favoring arbitration overrides the domestic public policy against arbitration of antitrust claims.[5] The majority stated that an arbitration clause need not specifically mention a given statute in order to require the arbitration of claims arising under the statute.[6]

This Note will first discuss the background of antitrust claims in the international context, including the statuatory provisions and treaties involved in such disputes. Second, it will analyze the procedural history of the *Mitsubishi* case. The Note will then analyze the Supreme Court's decision in light of the legislative intent underlying the statutes involved, previous judicial authority, and alternative public policy concerns. The Note concludes that the Supreme Court failed to properly evaluate the countervailing public interest in the nonarbitration of antitrust claims by holding the Mitsubishi-Soler agreement enforceable.

II. Arbitration of Antitrust Claims in the International Context

A. Statutory Provisions and the United Nations Convention

1. Antitrust Laws in the United States

United States antitrust laws are designed to promote the national interest by outlawing anticompetitive practices. The principle underlying the antitrust policy is that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institution."[7] When claims affecting the public are brought before an arbitrator, competing interests arise. On a domestic level, federal courts do not permit the arbitration of securities disputes because waiver of the right to litigate in federal court is not allowed under the Securities Act of 1933. The courts' rationale is that an arbitrator cannot be entrusted to preserve investors' rights under the Securities Act.[8]

The strong public policy behind antitrust regulation raises similar

---

[4] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985).

[5] *Id. See infra* text accompanying notes 100-15.

[6] *Id.* The "antitrust laws" include the Sherman Act, 15 U.S.C. §§ 1-7 (1982), the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1982), the Clayton Act, 15 U.S.C. §§ 12-27 (1982), and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982).

[7] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

[8] *See* Wilko v. Swan, 346 U.S. 427 (1953).

concerns if an antitrust issue is to come before an arbitrator. Antitrust issues are complicated and the evidence offered is usually substantial.[9] Courts have therefore ruled that judges and juries are better suited than commercial arbitrators to decide antitrust disputes. Antitrust violations frequently affect a large segment of the public and may cause great economic damage. A private plaintiff bringing an antitrust claim serves as a private attorney general seeking to protect the public interest.[10]

The antitrust laws provide an incentive for self-regulation by the business community in that they provide treble damages and injunctive relief for successful plaintiffs.[11] Courts have deemed it improper to allow arbitrators drawn from the business community to make decisions regulating their own behavior.[12] One reason is that it might be difficult to obtain market share evidence from competitors without the compulsory discovery procedures afforded by litigation. There also is a strong possibility that contracts generating antitrust disputes may be contracts of adhesion. Such contracts should not determine the forum for trying antitrust violations between monopolists and their customers. These considerations militate against contractual agreements to arbitrate.[13]

The Federal Arbitration Act did not signal a change in policy with respect to the arbitration of antitrust disputes. In subscribing to the Convention in 1970, Congress did not controvert the principles of domestic antitrust policy.[14]

2. *The United Nations Convention*

Foreign arbitral awards were traditionally enforced in accordance with the domestic law of the jurisdiction of enforcement.[15] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was intended to alleviate the often irregular results of a system lacking uniform standards for the enforcement of arbitration agreements.

The United States became a signatory to the Convention in 1970.[16] This action was taken in response to the widespread inclusion of arbitra-

---

9 American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968).

10 *Id.* at 827.

11 15 U.S.C. §§ 4, 16.

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

13 *Id.* For a detailed discussion of policy concerns disfavoring automatic forum determination, see *infra* notes 145-49 and accompanying text.

14 *See* Brief for the United States as *Amicus Curiae*, *Mitsubishi Motors*, 105 S. Ct. at 3346 (1985).

15 Note, *Enforcement of Foreign Arbitral Awards—The United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards*, 14 GA. J. INT'L & COMP. L. 217, 218 (1984)[hereinafter Note, *Enforcement*].

16 Convention on the Recognition, *supra* note 2. The United States did not accede to the Con-

tion clauses as standard dispute resolution mechanisms in international commercial contracts.[17] Chapter 2 of the Arbitration Act, which expressly implements the Convention, became effective the same year.[18] The goal of the Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to "unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[19] Congress made explicit that the Act renounces courts' traditional hesitancy to bind parties to contractual arbitration agreements.[20] The Convention regulates two phases of the arbitration procedure: the determination that an agreement is legally binding and the enforcement of the arbitral award.[21] The Convention applies both to the administration of "awards made in the territory of a State other than the State where the recognition and enforcement of such claims are sought" and to awards "not considered as domestic awards in the State where their recognition and enforcement is sought."[22]

The Convention provides exceptions to the enforcement of arbitration clauses in international commercial contracts. Under Article II(1), each contracting state must recognize an agreement concerning a subject matter "capable of settlement by arbitration."[23] Article II(3) excludes agreements which the courts determine to be "null and void, inoperative, or incapable of being performed."[24] Most controversial is Article V(2), under which the Convention allows a court to refuse recognition and enforcement of an arbitral award if: "(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that

---

vention subsequent to the 1958 negotiations, in which it did participate, because the agreement was not compatible with United States law. H.R. REP. NO. 1181, 91st Cong., 2d Sess. 1 (1970).

17 Note, *Transnational Claims are Nonarbitrable under the Federal Arbitration Act and Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 17 VAND. J. TRANSNAT'L L. 741, 743 (1984)[hereinafter Note, *Transnational*].

18 9 U.S.C. § 201 (1982).

19 Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 n.10, *reh'g denied*, 419 U.S. 855 (1974).

20 Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238,1242 (1985).

21 Contini, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 286 (1959).

22 Convention on Recognition, art. I, ¶ 1.

23 Convention on Recognition, art. II, ¶ 1, provides in pertinent part:

> 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.

24 Convention on Recognition, art. II, ¶ 3, provides in pertinent part:

> 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.

country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."[25] Consequently, under the Convention, the party against whom an award is sought to be enforced bears the burden of proof.[26]

In the past, the exceptions to arbitration provided in the treaty have been narrowly interpreted to preserve the principles and purposes of the Convention. United States courts have not set forth the meaning of Article II(1) and have ruled only on whether a given claim is encompassed by an arbitration clause.[27] The inclusion of Article II(1) is intended to prevent a court from refusing to enforce an arbitral award by deeming invalid the agreement on which the award was based and thereby contravening the aims of the Convention.[28]

The members of the conference concluded that the court of enforcement should have power to decide whether compulsory execution of an award would be adverse to public policy or whether a dispute could be resolved under domestic laws by arbitration.[29] United States courts have interpreted the public policy defense narrowly, however, applying it only to contracts involving fraud, mistake or duress—standards that may be applied neutrally to render an international contract void.[30] In fact, the public policy defense has been allowed by the courts in only three or four cases out of approximately 100 internationally reported cases governed by the Convention.[31] Nonetheless, the Supreme Court has disallowed arbitration under Article II by extending a judicially-created exception to arbitrability to international contracts.[32]

3. *The Federal Arbitration Act*

The Federal Arbitration Act marked the beginning of a national

---

25 Convention on Recognition, art. V, ¶ 2(a)-(b), provides in pertinent part:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

26 Under the Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 157, the plaintiff in the enforcement proceeding had the burden to show that the conditions for enforcing an award had been fulfilled. The Convention on Recognition in this and other ways liberalizes the enforcement conditions of the Geneva Convention. Contini, *supra* note 21, at 299.

27 Note, *Transnational*, *supra* note 17, at 747 n.30.

28 *Id.*

29 Contini, *supra* note 21, at 304.

30 Note, *Transnational*, *supra* note 17, at 745-46 n.28 (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982)).

31 Note, *Transnational*, *supra* note 17, at 745 n.24.

32 *Mitsubishi Motors*, 105 S.Ct. 3346.

policy favoring arbitration.[33] The language of the statute and judicial implementation of its provisions reflect that the United States position favoring commercial arbitration is among the strongest and most clearly-expressed public policies of this century.[34] The Act declares that parties to a transaction shall be bound to agreements submitting disputes to arbitration and that judicial review of arbitral awards will be limited.[35] The Act provides that a stay of litigation will be ordered concerning any issue within the scope of the arbitration clause and provides for specific performance of arbitration upon request of either party.[36]

The Federal Arbitration Act implements the United Nations Convention.[37] Chapter 2 of Title 9 addresses the Convention and Congress' enabling legislation. Section 201 provides for enforcement of the Convention by United States courts.[38] The body of the Convention resembles the Federal Arbitration Act, and all of the Convention is incorporated into Chapter 1 of Title 9.[39] Thus, the Federal Arbitration Act applies to proceedings brought under the 1970 legislation to the extent that Chapter 1 does not conflict with Chapter 2 or the Convention as ratified by the United States.[40]

The Convention orders United States courts to enforce arbitration clauses in accordance with procedures similar to those stipulated in the Arbitration Act. The Convention provides courts with great latitude. Both the Act and the Convention provide that if a dispute is subject to arbitration, the district court "shall make an order directing the parties to proceed to arbitration" when the site for arbitration is within the district.[41] Section 206 further empowers district courts to direct parties to proceed to arbitration under the Convention even outside the United States.[42] However, "[s]ince there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad § 206 is permissive rather than mandatory."[43]

---

33 Ch. 213, § 1, 43 Stat. 883 (1925)(current version at 9 U.S.C. § 1 (1982)). *See also* H.R. REP. No. 96, 98th Cong., 1st Sess. 1 (1924).

34 Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N. CAR. L. REV. 219, 231 (1986).

35 9 U.S.C. §§ 2,3.

36 9 U.S.C. § 4.

37 9 U.S.C. §§ 1-14.

38 9 U.S.C. § 201.

39 9 U.S.C. § 208.

40 *See* Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471, 492 (1975).

41 9 U.S.C. § 4.

42 9 U.S.C. § 206.

43 *See* H.R. REP. No. 1181, *supra* note 16.

B. Previous Attempts at Arbitration

District courts have enforced arbitration clauses except in those limited areas affecting the public interest, particularly the securities and antitrust laws.[44] If a party alleges several causes of action, one of which falls within what Congress has deemed to be the exclusive jurisdiction of the federal courts, then the entire dispute must remain in federal court despite the existence of an arbitration clause.[45]

The validity of arbitration clauses in domestic contracts has been explored by United States district courts in several major cases. (The Supreme Court had not confronted the antitrust exception in either an international or domestic context before *Mitsubishi.*)[46] The judicially-created antitrust exception to arbitrability was first established by the Second Circuit decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[47] This case analyzed the policy considerations present in arbitrating a domestic antitrust claim. The court held that a claim of a trademark licensee alleging violations of the Sherman Act by a United States company was inappropriate for arbitration.[48] The Second Circuit ruled that antitrust matters were far too important to the nation's public policy to allow their disposition by arbitration.[49] The court cited the potential complexity of antitrust claims and questioned the propriety of entrusting antitrust matters to commercial arbitrators drawn from the business community.[50]

The *American Safety* court recognized the inherent conflicts of interest in allowing arbitrators from the business community to enforce arbitration clauses in contracts of adhesion between monopolists and their customers. Federal law must protect the party situated in an inferior bargaining position.[51] The *American Safety* decision had its basis in *Wilko v. Swan*,[52] which held that an arbitration clause could not deprive

---

44 *See* Tai Ping Insurance Co. v. M/V Warschau, 731 F.2d 1141 (5th Cir. 1984).

45 *Id.*

46 Note, *Arbitrability and Antitrust:* Mitsubishi Motors v. Soler Chrysler-Plymouth, 23 COLUM. J. TRANSNAT'L L. 655, 665 n.59 (1985).

47 *American Safety*, 391 F.2d 821.

48 *Id.* at 828.

49 *Id.* at 826.

50 *Id.* at 827.

51 *Id.*

52 *Wilko*, 346 U.S. 427. The *American Safety* court analogized the *Wilko* case as a "similar collision of public policies." *American Safety*, 391 F.2d at 826. However, antitrust claims differ from securities claims because the development of a nonarbitrability rule for security claims was based on a specific statutory nonwaiver provision. Although the Sherman Act does not render void any waiver of a party's right to sue in federal court, both policies are based on the public interest nature of the laws. *See generally Symposium on Antitrust and Arbitration*, 44 N.Y.U. L. REV. 1069 (1969).

a securities buyer of remedies under the Securities Act. The Second Circuit's holding that arbitration of antitrust claims may not be compelled has been adopted by the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits.[53]

The courts have also spoken on arbitration agreements in securities transactions. *Wilko v. Swan* involved a domestic securities customer's suit against a brokerage firm for alleged misrepresentation under the Securities Act of 1933. Although the sales agreement provided for arbitration, the Supreme Court held that arbitration of a securities claim could not be compelled under the Federal Arbitration Act.[54] Section 14 of the Act forbids parties from waiving compliance with any provision of the Act through a provision in their private contract. The Court interpreted the arbitration agreement as a stipulation waiving the purchaser's right to bring suit in federal court under another section of the Act.[55] The Court recognized that the provisions of the Securities Act would have been applied in any arbitration of the claim, but ruled that arbitration would not ensure that investors' rights were protected—a concern vital to the public interest. Moreover, arbitration would not provide the opportunity for a reviewing court to vacate the arbitration award, a protection required by the Securities Act.[56] *Wilko* was the controlling case for purely domestic transactions in the federal courts prior to the Supreme Court's ruling in *Mitsubishi*.[57]

Although the United States Supreme Court had not spoken explicitly on the issue of arbitrability of international antitrust claims prior to *Mitsubishi*, the Court had remarked upon the Convention in *Scherk v. Alberto-Culver Co.*[58] This case involved a United States corporation with operations in the United States and abroad, which acquired the stock of three German manufacturing companies.[59] The negotiations, signing of the sales contract, and closing had taken place in Europe. The written contract between a United States company and a German citizen provided for arbitration of any dispute in Paris.[60] The plaintiff subsequently discovered that critical trademarks, which the defendant had represented as unencumbered, were substantially encumbered. The plaintiff brought suit in federal court, alleging that defendant had misrepresented the sta-

53 Allison, *supra* note 34, at 236.
54 *Wilko*, 346 U.S. at 434, 435, 437.
55 *Id.* at 434-35.
56 *Id.* at 435-36.
57 Allison, *supra* note 34, at 234.
58 *Scherk*, 417 U.S. 506.
59 *Id.* at 506.
60 *Id.* at 508.

tus of the trademarks in violation of the Securities Exchange Act of 1934.[61] A clause in the contract provided for arbitration of "any controversy or claim . . . [that] shall arise out of this agreement or a breach thereof."[62] Relying on *Wilko v. Swan*, the defendant claimed that such a clause was inapplicable to its securities claim. The Court of Appeals in *Scherk* had relied on *Wilko* as authority rendering any arbitration clause unenforceable against a claim based on United States securities laws.[63]

The Supreme Court's decision in *Scherk* limited the *Wilko* holding. The Court found crucial differences between the *Wilko* agreement and the one in *Scherk*, resulting in different policy considerations. The *Scherk* facts raised important international business concerns.[64] The Supreme Court distinguished the *Wilko* holding because it arose in a purely domestic context in which United States laws would undoubtedly apply. In international transactions, however, an arbitration clause promotes orderliness and predictability by establishing in the agreement the law to be applied in the resolution of any controversy. The Court found the arbitration clause to be a specialized kind of forum selection clause, an "almost indispensible precondition" to international contracts.[65]

Moreover, repudiation of an international arbitration agreement would constitute a parochial exercise of United States domestic policy in an international forum.[66] The Court noted that arguments against allowing a purchaser of securities to waive his or her right to sue in federal court, relied upon in *Wilko*, were inapplicable to *Scherk* because claims of a buyer's choice of forum become merely "chimerical" in international situations in which a party can seek an order in a foreign court enjoining litigation in the United States.[67] The Court in *Scherk* did not reach a decision under the United Nations Convention. Instead, the *Scherk* panel enforced its award under the provisions of the Federal Arbitration Act which apply solely to domestic awards.[68] The Court did, however, cite to Article II(1) and to the United States' adoption and implementation of the Convention in support of the Court's decision to enforce arbitral awards.[69] The *Scherk* decision did not directly address the issue of whether awards rendered in the United States are enforceable in the

---

61 *Id.* at 508-09.
62 *Id.* at 508.
63 *Id.* at 510.
64 *Id.* at 515.
65 *Id.* at 516.
66 *Id.* at 519.
67 *Id.* at 517-18.
68 *Id.* at 520.
69 *Id.* at 520 n.15.

United States under the Convention.[70]

The *Scherk* decision demonstrated that domestic policy concerns may become moot in an international context. The *Scherk* court balanced the demand for predictability in international contracts against the compelling necessity of protecting the securities markets and decided that the *Wilko* policy should not extend to international securities claims.[71]

III. THE *MITSUBISHI* DECISION

A. Factual Background

Petitioner and cross-respondent Mitsubishi Motors ("Mitsubishi"), a Japanese corporation and manufacturer of automobiles, was the result of a joint venture between Mitsubishi Heavy Industries, Inc., another Japanese corporation, and Chrysler International, S.A. ("CISA"), a Swiss corporation wholly owned by the Chrysler Corporation.[72] The purpose of the joint venture was the distribution outside the continental United States through Chrysler of vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks. Respondent and cross-petitioner Soler Chrysler-Plymouth, Inc. ("Soler") was a Puerto Rican corporation which had its principal place of business in Puerto Rico. Soler entered into a distribution agreement with CISA for the sale in Puerto Rico of automobiles manufactured by Mitsubishi and into a sales procedure agreement with both Mitsubishi and CISA.[73] The contract called for arbitration of any future disputes in Japan under the rules of the Japanese Commercial Arbitration Association.[74]

When the new-car market slackened, Soler encountered difficulties in meeting the expected sales volume and requested that Mitsubishi delay or cancel the scheduled shipment of orders.[75] Mitsubishi and CISA refused permission.[76] Soler also requested permission for transshipment of some of the vehicles to the continental United States and Latin America.

---

70 *Id.*

71 *Id.* at 519-20.

72 *Mitsubishi Motors*, 105 S. Ct. at 3347.

73 *Id.*

74 *Id.* In the words of the Supreme Court:

> 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.

75 *Id.*

76 The reasons advanced included concerns that such diversion would interfere with the Japanese policy of voluntarily limiting imports to the United States—that the Soler-ordered vehicles

This was also refused.[77] Attempts to resolve these difficulties failed.[78]

Mitsubishi commenced an action against Soler in March 1982 in federal district court under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[79] Mitsubishi alleged breach of contract and sought to compel arbitration under the sales agreement.[80] Mitsubishi also "filed a request for arbitration before the Japan Commercial Arbitration Association."[81] "Soler denied the allegations and counterclaimed against Mitsubishi and CISA," under the Sherman Act and federal and Puerto Rican dealers' contract statutes.[82] Finally, Soler claimed that Mitsubishi and CISA had conspired to divide the markets in restraint of trade.[83]

B. The District Court Decision

The United States District Court for the District of Puerto Rico ordered arbitration of the dispute, holding that Soler's Sherman Act antitrust claim fell within the parties' agreement.[84] While recognizing that domestic antitrust issues are not meant to be arbitrated, the court ruled that the international nature of the contract brought overiding policy concerns into play.[85] The court, citing *Scherk*, reasoned that the contractual relationship between Mitsubishi and Soler was truly international in character and that the Arbitration Act mandated arbitration between the parties.[86] The court applied the language of Article II(3) of the Convention to find that the agreement was not "null and void, inoperative or incapable of being performed," and consequently removable

---

would be unsuitable for use in certain proposed destinations because of their manufacture (without heaters and defoggers, lack of high octane fuel in Puerto Rico, etc.) *Id.* at 3349-50.

77 *Id.* at 3350.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 Soler alleged numerous breaches by Mitsubishi of the sales agreement, including "wrongful refusal to ship ordered vehicles and parts, failure to make payment for warranty work and authorized rebates, and bad faith in establishing minimum sales volumes." Soler made two defamation claims, and asserted causes of action under the Sherman Act, 15 U.S.C. §§ 1-7, the federal Automobile Dealer's Day in Court Act, 70 Stat. 1125, as amended, 15 U.S.C. 1221-25, the Puerto Rican competition statute, P.R. Laws Ann., Tit 10, §§ 257-76 (1978 & Supp. 1983). *Mitsubishi Motors*, 105 S. Ct. at 3350.

83 *Mitsubishi Motors*, 105 S. Ct. at 3350.

84 Note, *Application*, *supra* note 1, at 207 n.92 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., No. 82-538, 10-11 (D.P.R. Nov. 24, 1982)(order compelling arbitration)).

85 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 723 F.2d at 158.

86 Note, *Application*, *supra* note 1, at 208 nn. 95-96 (citing *Mitsubishi Motors*, No. 82-538 at 9-11).

from arbitration.[87] The court dismissed Soler's claims raised under Puerto Rican law, finding that the Arbitration Act preempted the applicability of the Puerto Rican law to the dispute.[88]

C. The Court of Appeals Decision

The Court of Appeals reversed the district court's opinion in part, finding that the antitrust counterclaims were not arbitrable as a matter of law.[89] The court ruled that neither the United Nations Convention nor prior case law required the United States to overlook its own domestic policy and order arbitration.[90] The court applied the *American Safety* doctrine and held that arbitration was an inappropriate mechanism for the resolution of antitrust claims.[91]

The court held that the antitrust exception was arbitrable under Article II(1) of the Convention rather than nonarbitrable under Article II(3).[92] The court reasoned that the inclusion of Article II(1) apart from Article II(3) indicated an intent on the part of the drafters to allow exclusion of a claim from arbitration when important domestic policy issues are involved.[93] The court distinguished *Scherk* as that case had not analyzed the language of the Convention.[94] The court found a further distinction in the manner in which the securities and antitrust laws affect the public.[95] The court reasoned that, because many nations support domestic antitrust policies, the United States imposition of the *American Safety* doctrine was not improper.[96] Moreover, a refusal to enforce domestic antitrust laws in the international context would frustrate United States domestic policy.[97]

The case was remanded to the district court for further proceedings to determine whether the antitrust issues "permeated" the contractual disputes or whether bifurcation was appropriate.[98] The district court was also to decide how parallel actions would proceed; if the lower court found that arbitration would proceed first, the court would have no need

87 *Id.* at 6-7.
88 *Id.*
89 *Mitsubishi Motors*, 723 F.2d at 163.
90 *Id.* at 163-64, 166.
91 *Id.* at 168-69.
92 *Id.* at 164.
93 *Id.* at 164-68.
94 *Id.* at 167.
95 *Id.* at 168.
96 *Id.* at 163.
97 *Id.*
98 *Id.* at 169.

to reach the antitrust issue.[99]

D. The Supreme Court Decision

Both parties appealed the First Circuit's decision. The United States Supreme Court granted certiorari "primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises out of an international transaction."[100]

Several parties filed amicus curiae briefs with the Supreme Court. The American Arbitration Association ("AAA") argued that accepting antitrust claims from international arbitration "injects substantial uncertainty into the process to the detriment of United States trading interests."[101] The AAA pointed out that the nonarbitrability of antitrust disputes was "without support in the legislative history of the U.N. Convention and its implementing decisions or in the decisions of Court," and that arbitration would not endanger the United States' competitive economy.[102] The International Chamber of Commerce also filed a brief in favor of international arbitration of antitrust claims.[103] In contrast, the brief for the United States argued that Congress never indicated its intent that antitrust disputes be settled by arbitration.[104]

The Court first ruled that the broad arbitration clause encompassed the antitrust dispute. Although the arbitration clause in the contract did not specifically mention the statute giving rise to the claim, the Court held there is "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."[105] The Court further stated that, as with any other contract, the parties' intentions control, but that those intentions are to be generously construed as to issues of arbitrability.[106]

---

99 *Id.*

100 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3353 (1985).

101 Brief for the American Arbitration Association as *Amicus Curiae*, at 20, *Mitsubishi Motors*, 105 S. Ct. at 3346.

102 *Id.*

103 *See generally* Brief for the International Chamber of Commerce as *Amicus Curiae*, at 25, *Mitsubishi Motors*, 105 S. Ct. at 3346.

104 Brief for the United States, as *Amicus Curiae*, at 21, *Mitsubishi Motors*, 105 S. Ct. at 3346.

105 *Mitsubishi Motors*, 105 S. Ct. at 3353.

106 *Id.* at 3354. This is a question of presumption as the Congress' recognition of the status of antitrust arbitrability at the time of the Federal Arbitration Act. Although it appears that before acceding to the Convention the Senate was advised by a State Department Memorandum that the Convention provided for exceptions to arbitrability grounded in domestic law, *see* S. Exec. Doc. E, 90th Cong., 2d Sess. (1968), in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope. *See Mitsubishi Motors*, 105 S. Ct. at 3360 n.21.

The Court then addressed the issue of whether Soler's antitrust claims were nonarbitrable, even though the parties had agreed to arbitration. The Court found it "unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions."[107] The Court reasoned that the policy questions brought out in the *American Safety* doctrine did not apply to international disputes. The Court held that there is no basis for assuming that the arbitration forum would be inadequate or its selection unfair. The Court pointed out that complexity alone should not lead to the conclusion that a decision by an arbitral panel will constitute a threat to the constraints on business conduct already imposed by antitrust laws.[108]

The Court then examined the main tenet of the *American Safety* doctrine—"the fundamental importance to American democratic capitalism of the regime of the antitrust laws."[109] The Court's logic centered around the fact that antitrust laws protect the interest of the public, not the private party, and that provisions for damages are important as a deterrent to violators and to preserve the competitive economy. The Supreme Court held that the importance of the private damages remedy does not compel the conclusion that such a remedy may not be sought outside a United States court.[110] A prospective litigant may provide for a mutually agreeable procedure in advance whereby the party would seek an antitrust recovery if the international cast of a problem would lead to uncertainty in dispute resolution.[111]

The Court's decision stated that, when parties have agreed to decide a set of claims by an arbitral body, the tribunal should be bound to decide that dispute in accordance with the national law giving rise to that claim. United States courts would have the opportunity to protect the public policy interests when reviewing the award at the enforcement stage.[112] The Convention reserves to each country the right to refuse enforcement of an award if the recognition or enforcement of that award would be contrary to the public policy of that country.[113]

Finally, the Court stated that it was necessary for federal courts to subordinate domestic notions of arbitrability to the international policy favoring arbitration if the international tribunals were ever to be tested so

---

107 *Id.* at 3355.

108 *Id.* at 3357-58.

109 *Id.* at 3357. ("The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted.")

110 *Id.* at 3358.

111 *Id.* at 3359. *See infra* text accompanying notes 154-55.

112 *Id.* at 3359-60.

113 *Id.* at 3360.

as to take their place in the international legal order.[114] Thus, "concerns for international comity, respect for the capacity of international tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" required enforcement of the agreement, "even assuming that a contrary result would be forthcoming in a domestic context."[115]

The dissent disagreed with the majority opinion on several issues. First, the dissent stated that the arbitration clause did not encompass the claim. The dissenting justices reasoned that the clause applied only to two-party disputes between Soler and Mitsubishi and that the antitrust violation alleged in Soler's counterclaim was a three-party suit.[116] Also, the clause applied only to disputes relating to five out of a total of fifteen articles in the sales procedure agreement. Here, the dissent construed the arbitration clause narrowly. An arbitration clause, Justice Stevens stated, cannot be construed to cover a statuatory remedy that it does not expressly identify.[117]

In a second area, the dissent stated that Congress did not intend § 2 of the Federal Arbitration Act to apply to antitrust claims. The dissenting justices found nothing in the text of the Act nor in its legislative history to support such an application.[118] The dissent declared that Congress did not intend the Convention to apply to disputes that are not arbitrable under the Federal Arbitration Act. The opinion went on to cite the public policy defense in the Convention and summed up that: "it is equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute."[119]

The dissent also refuted the majority's statement that the statutory remedies fashioned by Congress for the enforcement of the antitrust laws will provide adequate review of arbitrators' decisions. As arbitration awards may only be reviewed for manifest disregard of the law, and the record is often inadequate for appellate review, the dissent found this safeguard to be insufficient.[120]

Finally, the dissent criticized the Court's "obtuse application" of

---

114 *Id.*

115 *Id.* at 3355.

116 *Id.* at 3363. ("Only by stretching the language of the arbitration clause far beyond its ordinary meaning could one possibly conclude that it encompasses this three-party suit.")

117 *Id.* at 3362-63.

118 *Id.* at 3364. Again, this is a question of presumption which should be resolved according to policy dictates and the congressional intent at the time of enactment. *See supra* note 103 and accompanying text.

119 *Id.* at 3374.

120 *Id.* at 3370.

Scherk.[121] The dissenters stated that the logic the Supreme Court applied in *Scherk,* by distinguishing *Wilko,* also applied in *Mitsubishi*: there was no credible claim that any international conflicts of law problems would arise.[122] The dissenting opinion stated that it was perfectly clear that the rules of United States antitrust law must govern the contention that a United States auto dealer had been injured by an international conspiricy to restrain trade in the United States automobile market.[123] The dissenting justices found the reasoning in *Scherk* to be wholly inapplicable to Soler's claims because the merits of Soler's claims were controlled entirely by United States law. "When Mitsubishi enters the American market and plans to engage in business over a period of years, it must recognize its obligation to comply with American law and to be subject to the remedial provisions of American statutes."[124] "The fraud claimed in *Scherk* was virtually identical to the breach of warranty claim [in *Mitsubishi*]; arbitration of such claims arising out of an agreement between parties of equal bargaining strength does not conflict with any significant federal policy."[125] The dissent noted that Soler's claim implicated fundamental antitrust policies and should be evaluated in light of an explicit congressional finding concerning the disparity in bargaining power between automobile manufacturers and their franchised dealers. The opinion cited the Automobile Dealer's Day in Court Act as evidence of the federal government's interest in protecting automobile dealers from overreaching by car manufacturers.[126] For these reasons, the dissenting opinion recognized that "international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well. . . . [E]ven the [multinational] Convention recognizes that private international arbitration is incapable of achieving satisfactory results when matters involve the political passions and the fundamental interests of nations."[127]

IV. *MITSUBISHI* AND ANTITRUST CLAIMS IN THE INTERNATIONAL CONTEXT

A. Support for the Nonarbitration of International Antitrust Claims

The history of the Federal Arbitration Act and the purposes of the

121 *Id.* at 3372.
122 *Id.* at 3373.
123 *Id.*
124 *Id.*
125 *Id.* at 3374.
126 *Id.* (citing Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-25 (1982)).
127 *Id.*

United States Convention support the dissent's view that the antitrust issue in *Mitsubishi* should not have been resolved by arbitration. There exists a minimum of legislative history on the Convention, none of which is dispositive of any interpretation of the public policy considerations of Articles II and V. Neither the Court of Appeals nor the Supreme Court attempted to analyze this history in reaching a decision in the *Mitsubishi* case.[128] The language of the Convention and its expressed purpose, however, lead to a logical conclusion as to the intentions of Congress.

If all antitrust claims arising from international contracts were found to be arbitrable, the Convention's language, "not capable of settlement by arbitration," would have little or no meaning. In deciding whether a matter is capable of settlement by arbitration, a court may apply federal law, choice-of-law rules, or, where recognition and enforcement of an award is sought, the law that would govern under Article V of the Convention.[129] The Supreme Court in *Mitsubishi* attempted to interpret Article V of the Convention.

There are two interpretations of the exceptions clauses to the Convention. One is that the policy concerns of Article V apply when determining whether an agreement is "null and void" or "capable of settlement by arbitration."[130] The second is that considerations of domestic public policy are to be taken into account only in the decision as to whether an arbitral award should be enforced. The Supreme Court reasoned that having ordered arbitration (under Article II), United States courts could have the opportunity at the enforcement stage to refuse to honor that decision. The Court's decision thus defers to judicial review of the award.[131]

Such a ruling by the Court, however, reduces the predictability of international transactions because a party will not know if its arbitration attempt was successful until the party attempts to enforce the agreement. In some cases, of course, such an approach would avoid the problem of a court's hostility to arbitration because the court would never reach the issue of the intertwining doctrine.

The Supreme Court has ruled that in interpreting the Convention, the clear language of the treaty should control unless the result is inconsistent with the intent of the signatories.[132] The public policy defense

128 723 F.2d at 164.

129 *See* Note, *Application*, *supra* note 1, at 219.

130 *See id.* at 220 n.179, for a history of the Court's treatment of "null and void."

131 *Mitsubishi Motors*, 105 S. Ct. at 3360.

132 *See* Note, *Application*, *supra* note 1, at 223 n.189 (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)).

was originally interpreted to be quite broad.[133] Thus, the Court should analyze the words of the Convention and its implementing legislation. Such an analysis should clearly lead to the result that the claim need not be arbitrated under the Convention.

The Court ruled that having made the bargain to arbitrate, a party should be held to that bargain unless Congress has evinced an intention otherwise. However, the congressional intent for removing antitrust claims from arbitration is present in the public policy exception to the Convention. Few policies are more clearly established than the importance of the antitrust regulations to the United States economy. The Court, instead, relied on the judicial doctrine of *American Safety* and subsequent cases.

Even under a very narrow interpretation of Article II (calling for the enforcement of all arbitration agreements), a court would have to refuse to enforce the award under Article V. There is no need for a court to take the extra step. Congress can be presumed to have passed the Arbitration Act with the exclusion of antitrust claims in mind because the policy against arbitration of such claims has been well established by the courts.[134] Arbitration of antitrust claims should be allowed only if Congress so declares. The dissenting opinion reaffirms that the federal legislature has recognized the problems which arise when arbitration clauses are enforced in commercial contracts, not the least of which is the danger of the courts enforcing a contract of adhesion.[135]

Thus, the language of the Convention and the policy underlying the Federal Arbitration Act provide that the public policy exception applies to antitrust claims in the Mitsubishi-Soler dispute.

B. Precedent and Public Policy

The conclusion in the *Mitsubishi* case, that an agreement to arbitrate disputes arising from the sales agreement includes claims of restraint of trade by the manufacturer, is unfounded.[136] A concern which has been stressed in *American Safety* and subsequent decisions is that unconscionable contracts should not determine the forum for the trial of antitrust violations.[137] An agreement to arbitrate claims arising from a sales contract cannot be read to encompass claims that the contract itself was in restraint of trade.

---

133 Note, *Application*, *supra* note 1 at 221 n.184.

134 *See American Safety*, 391 F.2d at 827-28.

135 *See Mitsubishi Motors*, 105 S. Ct. at 3357.

136 *Id.* at 3363.

137 *American Safety*, 391 F.2d at 827. *See supra* notes 47-53 and accompanying text.

The *Scherk* doctrine was rightly rejected by the Court of Appeals. First, the *Scherk* case dealt with a securities claim. Public policy is of greater concern in antitrust claims because such claims affect a larger segment of the public, not only the purchasers of stock.[138] Moreover, the contract agreement in *Scherk* was far more international in character than the sales agreement in *Mitsubishi*, implicating different policy concerns.[139]

Prior case law also recognizes the policy concerns that demand claims, such as those in *Mitsubishi*, not be arbitrated. The *American Safety* doctrine embodies policy questions that apply to international as well as domestic disputes.[140] Certainly there are some policy concerns against arbitration that are even stronger in the international context.[141] The United States cannot forego regulation of its free market economy to promote "international comity."[142] As the Court of Appeals pointed out, other countries are aware of the primacy which the United States accords to its antitrust law. Moreover, antitrust laws are common elsewhere.[143] Signatories would expect the United States to protect its economic interests; impositions of domestic policy would not be parochial in this instance.[144] The *Mitsubishi* conflict is a rare example of a dispute in which the public policy defense was meant to be employed.

C. Policy Considerations

The arbitration of antitrust claims would be undesirable as a matter of policy. Antitrust claims are often frivolous, raised in an attempt to remove a dispute to a more favorable forum. Parties may attempt to delay or avoid arbitration by asserting restraint of trade claims.[145]

Moreover, it is well known that antitrust claims often concern complex economic issues which require the type of compulsory discovery procedures assured by a judicial trial. The judicial trial would also provide a written opinion and detailed findings of fact necessary for possible

---

138 *See supra* notes 58-71 and accompanying text. Those who argue that the 1933 and 1934 Acts improve integrity of markets might disagree.

139 *Mitsubishi Motors*, 723 F.2d at 167.

140 *See supra* notes 47-53 and accompanying text.

141 *See infra* notes 145-51 and accompanying text.

142 *Id.*

143 *See Mitsubishi Motors*, 723 F.2d at 163; Hoellering, *Mitsubishi: Arbitrability and Antitrust Claims*, 194 N.Y.L.J. 1, 2 (Aug. 18, 1985).

144 *See Mitsubishi Motors*, 723 F.2d at 163; Hoellering, *supra* note 143, at 2.

145 *Id.* This concern may seem to militate toward increased arbitrability by reasoning that, if antitrust claims were arbitrable, then parties could not use them as removal devices. However, courts could eliminate this concern by ascertaining whether the antitrust claims were bona fide or frivolous in deciding whether to order arbitration.

review.[146] The *Mitsubishi* Court's deference to judicial review of the award provides inadequate protection of the important interests involved. The interest of maintaining economic competition is jeopardized when the judiciary does not retain jurisdiction over antitrust disputes. Placing power in the hands of arbitrators not restrained by formal legal procedures in their decisionmaking is inappropriate.

If antitrust claims were to be sent to arbitration, it would be imperative that sophisticated, trustworthy, and predictable arbitrators be found.[147] Judicial supervision and the legal authority to provide for such selection would be necessary.[148] However, arbitrators are often chosen for their commercial expertise, and they are not required to follow pertinent legal rules. The competency of arbitrators is a vital concern. When an antitrust claim is prosecuted, the decision will have a considerable impact on the general public and not only the parties to the instant case.[149]

The *Mitsubishi* decision has far-reaching effects. The implications for international business as well as domestic arbitration are considerable. *Mitsubishi* does not hold that arbitral tribunals are inherently capable of deciding antitrust disputes, but affirms that these bodies are not inherently incapable. Arbitration of the *Mitsubishi* dispute and other international antitrust claims might make the laws of certain jurisdictions more predictable and thus more attractive to international trade. However, allowing the arbitration of claims that go against United States public policy would make the United States the most progressive nation in this regard.[150] Such a change would threaten the existing competitive economic structure. The Supreme Court based the support for its decision to arbitrate the *Mitsubishi* antitrust claim on the fact that international tribunals have not yet been tested and cannot be assumed to be incapable of handling the matter.[151] The implications for antitrust law are far too important to allow the case to be used as a test.

The majority's final word is based on the need for international comity. The goal could best be fostered by refusing the arbitration of claims with clear domestic policy implications. The signatories to the Convention expect no less, as the treaty expressly reserves this right to each country.

---

146 *See infra* notes 154-55 and accompanying text.

147 *See generally* Allison, *supra* note 34, at 274. Several states and some federal districts have employed court-annexed arbitration with success.

148 *See Mitsubishi Motors*, 105 S. Ct. at 3368-69.

149 *See supra* notes 7-8 and accompanying text.

150 *See* Hoellering, *supra* note 143, at 2.

151 *Mitsubishi Motors*, 105 S. Ct. at 3360.

D. Recommended Alternatives

The decision in *Mitsubishi* is a landmark in United States case law. There are several alternatives which the Court could have adopted instead of applying a blanket rule of allowing arbitration of antitrust claims.

Arbitration of antitrust claims could be made permissible only if an arbitration clause is expressly included in the agreement.[152] This rule would be predictable, and would help to ensure that public policy is protected. The provision would be tied in with a requirement that a particular arbitrator be selected—one who would be familiar with United States law and policy.[153] Courts would need to guard against enforcing such clauses against parties with little bargaining power.

Moreover, a different standard of judicial review and supervision could apply to arbitrated awards of antitrust claims. The court could provide that, where the domestic policy is not so strong as to invoke a refusal to enforce under Article V of the Convention, a court may conduct an extensive review of the arbitration proceedings to ensure that the substantial domestic policy interest is upheld by the arbitrator's decision and that legal principles are followed. If there is an insufficient record of the arbitral proceedings to allow for such review, the court may then refuse to enforce the decision. This procedure could be amended to the Federal Arbitration Act. This policy would ensure that only qualified and competent arbitrators would hear important cases and that an adequate record would be maintained.[154] It is important to note that the language of the Convention allows for such a refusal to arbitrate and for the dispute to be sent to a special arbitral commission.[155]

A common ground could be reached between the majority and dissenting opinions in *Mitsubishi* if more thorough judicial review of some arbitration decisions were permitted and stricter record keeping requirements were employed. More effective judicial review would make the Court's conclusion, that international arbitrators should be tested, more reasonable.

Thus, the issue of arbitration of international antitrust suits could be resolved by reading the Convention to allow broader review of arbitral

---

152 Parties to a contract are free to exclude statutory claims from arbitration. *Mitsubishi Motors*, 105 S. Ct. at 3355. The parties, of course, might not know what statutory claims may arise later.

153 It is often argued that arbitration removes the incentives for private enforcement of the law when arbitrators fail to follow statutory provisions for the award of treble damages, attorney fees, and the like.

154 *See supra* notes 11-12 and accompanying text.

155 *See supra* note 29 and accompanying text.

decisions involving strong domestic public policy, as opposed to excluding such claims altogether. Such a reading would be justified by domestic policy and would be in keeping with the spirit of the Convention.

V. CONCLUSION

The *Mitsubishi* holding has produced a trend by the federal courts to permit the arbitration of a wide variety of statutory claims. Numerous federal courts have held that *Mitsubishi* requires arbitration of statutory claims unless the statute evidences congressional intent to be exempt from arbitration.[156] Thus, several circuits have reinterpreted the *Wilko* rule in light of *Mitsubishi*, compelling the arbitration of claims.[157] Consequently, although *Mitsubishi* did not directly address the issue of the arbitrability of domestic antitrust or securities claims, the holding is far-reaching. "Until Congress explicitly states its intent to bar arbitration in certain statutory litigation, the court must adhere to the *Mitsubishi* ruling and require arbitration."[158]

The Supreme Court's decision in *Mitsubishi Motors v. Soler Chrysler-Plymouth Inc.*, enforcing an arbitration agreement between two parties to an international commercial contract, is not in keeping with the public policy of the United States. The Convention of the United Nations and established case law allow for such a dispute to be kept from the arbitral tribunals.

The United Nations Convention, as implemented by the Federal Arbitration Act, provides for the refusal of recognizing and enforcing foreign arbitral awards if the subject matter of the dispute is not capable of settlement by arbitration under the law of the party or the recognition and enforcement of the award would be contrary to the public policy of the country. As antitrust claims involve significant questions of public policy, the United States has a particular interest in keeping these claims from arbitration when there is no assurance of a competent, disinterested arbitrator or an adequate record for judicial review. The presence of international business concerns in the arbitration do not outweigh the importance of this fundamental domestic policy.

A different standard of judicial review might be applied to awards of antitrust damages. The courts might then allow arbitration of antitrust claims if a clause expressly provides such review and the clause is not

156 *See, e.g.*, Ross v. Mathis, 624 F. Supp. 110, 115 (N.D.Ga. 1985).

157 *See, e.g.*, Prawer v. Dean Witter Reynolds, 626 F. Supp. 642 (D.Mass. 1985); Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (C.D.N.Y. 1985); Intre Sport v. Kidder, Peabody Customer's Agreement, 625 F. Supp. 1303, 1314 (S.D.N.Y. 1985).

158 *Ross*, 624 F. Supp. at 117 n.9.

part of an unconscionable contract. Until such a standard is adopted, it is improper to allow the arbitration of antitrust claims in the interest of international comity.

Lisa Sopata