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The Exuberant Pathway to Quixiotic Internationalism: Assessing the Folly of Mitsubishi

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I. THE GROUNDWORK FOR THE DECISION

The writing on international commercial arbitration often is replete with statements affirming the necessity and advocating the progression of the institution.[1] Entreaties to foster the collabora-

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1. An exhaustive bibliographic survey of the domestic and foreign literature on international commercial arbitration would be excessive. Accordingly, a representative sample of sources is given to illustrate the various points made. For a positive and supportive assessment of international arbitral dispute resolution, see generally INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE CO-

tion of national courts usually supplement analyses of the historical evolution and contemporary status of international arbitral law. Commentators apparently are reluctant to note or suggest restraints. The consideration of limits on the creative handiwork of national courts and international merchants might sully the merits of the appraisal or, worse, impede the growth of an institution destined to advance international commercial interests. Indeed, the transnational consensus on commercial arbitration is exceptional—a rare example of viable cohesion in the fragmented arena of international affairs. The unifying spirit of the 1958 New York Arbitration Convention,[2] the uniformity of approach among national courts to the implementation of the Convention,[3] and na-

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OPERATION (M. Domke ed. 1958); J. WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE (1979); Aksen, *International Arbitration—Its Time Has Arrived*, 14 CASE W. RES. J. INT'L L. 247 (1982); Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & POL'Y INT'L BUS. 1191 (1977); Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164; McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L L. 729 (1977). *Accord* Rhodes & Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANSNAT'L L. 19 (1984).

The classical treatments of the subject include: R. DAVID, ARBITRATION IN INTERNATIONAL TRADE (1985); P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965); J. ROBERT, L'ARBITRAGE DROIT INTERNE DROIT INTERNATIONAL PRIVÉ (5th ed. 1983); C. SCHMITTHOFF, INTERNATIONAL COMMERCIAL ARBITRATION (1986); G. WILNER, DOMKE ON COMMERCIAL ARBITRATION (1984); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

2. 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. 3 codified at 9 U.S.C. §§ 201-208 (1982) [hereinafter New York Arbitration Convention]. For a comprehensive scholarly discussion of the Convention, see A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981). *See also* Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283 (1959); Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The* [illegible] (1975) [illegible] Springer, [illegible] *vention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L L. 320 (1969).

3. *See, e.g.*, Sanders, *Consolidated Commentary on Court Decisions on the New York Convention 1958*, 4 Y.B. COM. ARB. 231 (1979). *See also* Aksen, *Application of the New York Convention by United States Courts*, 4 Y.B. COM. ARB. 341. *See generally* G. GAJA, 1-2 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK (1979) CONVENTION (1985).

tional legislation supportive of the emerging international consensus on arbitration[4] attest to a willingness to eradicate parochial concerns, to respond to felt needs, and to achieve functional international commercial cooperation. Nationalism may engender diplomatic incidents and actual warfare, but it should not incapacitate world commerce by depriving international merchants of the means to resolve their contractual disputes without regard to their national, jurisdictional, and cultural differences. The sounds of dissonance have been faint, episodic murmurings about the integrity of domestic public policy concerns, the dire implications of "anational" arbitration, and the necessity of having local law play a role in the proceedings.[5]

The United States officially joined the transnational ranks with its ratification of the New York Arbitration Convention[6] in 1970

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4. *See* Arbitration Act, 1979, ch. 42, *reprinted in* 5 Y.B. COM. ARB. 239, 239-46 (1980). For commentary on the 1979 Act, see, e.g., Hacking, *The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979*, 14 INT'L LAW. 95 (1980); Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87 (1980); Steyn, *England*, 8 Y.B. COM. ARB. 3 (1983). *See also* Decree of May 14, 1980, 1980 JOURNAL OFFICIEL 1238; Decree of May 12, 1981, 1981 JOURNAL OFFICIEL 1402. For commentary on the French decrees, see, e.g., Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION at 117 (T. Carbonneau ed. 1984) (Sixth Sokol Colloquium); Craig, Park, & Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 13 L. & POL'Y INT'L BUS. 727 (1981); Delaume, *International Arbitration Under French Law: The Decree of May 12, 1981*, ARB. J., March 1982, at 38; Derains, *France*, 7 Y.B. COM. ARB. 3 (1982); Goldman, *La nouvelle réglèmentation française de l'arbitrage international*, in THE ART OF ARBITRATION 153 (J. Schultsz & A. van den Berg eds. 1982). *See also* Arbitration (Amendment) Ordinance, 1982, Ord. No. 10/82 (Hong Kong), *reprinted in* W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, ch. 34 (1984).

5. For a discussion of these issues, see P. FOUCHARD, *supra* note 1, at 330-546; Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siègeant en Suisse*, 1976 REV. ARB. 155; Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967); Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Park & Paulsson, *The Binding Force of International Arbitral Awards*, 23 VA. J. INT'L L. 253 (1983); Paulsson, *Arbitration Unbound*, 30 INT'L & COMP. L.Q. 358 (1981); Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983).

6. New York Arbitration Convention, *supra* note 2. *See* Quigley, *Accession*

and the United States Supreme Court's 1974 pronouncement in *Scherk v. Alberto-Culver Co.*[7] In *Scherk*, seemingly inspired by the incorporation of the Convention into United States law, the Court began to articulate the more specific contours of a United States policy toward private international law matters. In *Scherk* and prior, like-minded decisions,[8] courts viewed international commercial transactions as beneficial to both the national interest and the world at large. These transactions constituted a unique sphere of mercantile activity, distinct from their domestic analogues, and were entitled by their nature to special, less restrictive regulation. Accordingly, an international commercial transaction, although involving a United States party and interests, was exempt from the reach of some domestic law imperatives.

Since 1925, the *Scherk* Court emphasized, the United States had endorsed a policy strongly favoring arbitration; the ratification of the Convention strengthened that policy. Domestic strictures on securities activity, requiring in at least one version of the relevant legislation recourse to judicial remedies in the event of dispute, fell in the face of the overriding international policy supporting the recourse to arbitration in international commercial activity. Although the precise import of the *Scherk* doctrine needed further refinement, what formerly had been a fragile and unanchored international consensus in United States policy, supported primarily by foreign legislation, now was emerging as a centerpiece of United States law—the seedbed for elaborating a comprehensive United States policy toward private international law matters.

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by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 YALE L.J. 1049 (1961); Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67 (1971). *See also* Czyzak & Sullivan, *American Arbitration Law and the UN Convention*, 13 ARB. J. 197 (1958).

7. 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974). The textual references to the *Scherk* opinion and observations regarding its significance are taken from Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 68-74 (1984).

8. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). *See also* Cowen & Da Costa, *The Contractual Forum: A Comparative Study*, 43 CAN. B. REV. 453 (1965); Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133.

II. SEEKING A MEASURE OF RESTRAINT

The concerns that surfaced in the wake of *Scherk* centered on how adequate limits, protective of national interests, might be defined and imposed upon the international arbitral process. Technical considerations pertaining to the exercise of arbitral authority, the validity of the arbitration agreement, and the contractual capacity of the parties certainly remained elements in the framework for evaluating the lawfulness of the claim to arbitrate.[9] Substantive issues also factored into the framework. Whether the subject matter of claims was arbitrable, for instance, constituted a principled impediment to arbitration in some circumstances.[10] According to *Wilko v. Swan*,[11] only judicial tribunals could adjudicate domestic disputes arising under the Securities Act of 1933.[12] In both domestic and international matters, despite the latitude of the *Scherk* doctrine, courts reasoned that issues relating to the status and capacity of individuals and to antitrust controversies generally could not be submitted to private adjudication[13] because the substance of these disputes was anchored in core public policy considerations. Also, the courts of the requested jurisdiction could deny recognition or enforcement to foreign arbitral awards under the New York Arbitration Convention either on grounds of inarbitrability or for reasons of domestic public policy.[14]

Prior to 1985, at least some substantive limitations on the arbitral resolution of international commercial disputes existed under United States law. On the one hand, *Scherk* symbolized United States allegiance to and participation in the transnational consensus on arbitration, that international commercial ventures needed to be distanced from purely national concerns and regulated by national courts in accordance with a transnational standard. On the other hand, while the creative interface between national law and international regulation minimized specifically national concerns, the aegis of the inarbitrability defense and the public policy exception could safeguard fundamental matters of national

9. *See* New York Arbitration Convention, *supra* note 2, arts. II(1)-(3), V(1).

10. *See id.*, arts. II(1), V(2)(a).

11. Wilko v. Swan, 346 U.S. 427, 434-35 (1953).

12. 15 U.S.C. §§ 77a-77aa (1982).

13. *See* G. WILNER, *supra* note 1, §§ 10:01, 13:09 (domestic relations), 19:04 (antitrust matters).

14. *See* New York Arbitration Convention, *supra* note 2, art. V(2)(a) & (b).

public interest.

Arbitrability was clearly the more meaningful deterrent to the possibility of uncontrolled arbitral internationalism and the "anational" effacement of domestic policy interests. Practice indicated that the public policy exception in the New York Arbitration Convention was a weak instrument, plagued by the lack of substantive specificity and a general redundancy with other grounds in the Convention. In the enforcement framework, the public policy exception had a nebulous catch-all character and probably was included as a stop-gap measure designed to placate abstract concern about the exceptional case.[15] A fairly wide conceptual overlap existed between the inarbitrability defense and the public policy exception: disputes involving public interest matters were not capable of resolution by arbitration and the enforcement of awards pertaining to inarbitrable matters would be contrary to domestic public policy. Except where the public policy exception was invoked to respond to a failure of basic procedural fairness (an omission for which other grounds of the Convention also provided),[16] for all practical purposes, inarbitrability and public policy were equivalent means by which to defeat the recourse to arbitration. Arbitrability, however, applied both to the validity of the agreement and to the award,[17] whereas the public policy exception related exclusively to the enforcement of awards.[18]

III. ARBITRABILITY

Arbitrability, therefore, was the chief source of equipoise in the otherwise uneven exchange between national juridical interests and the creation of a transnational arbitral dispute resolution process. While United States courts were prone to resolve conflicts between the right to have recourse to court litigation and arbitral adjudication simply by incanting the general federal policy favoring arbitration,[19] arbitrability was a substantive limita-

15. For a discussion of the public policy exception to enforcement, see A. VAN DEN BERG, *supra* note 2, at 376-82.

16. *See* New York Arbitration Convention, *supra* note 2, art. V(1)(a)-(c).

17. *See id.*, arts. II(1), V(2)(a).

18. *See id.*, art. V(2)(b).

19. The relevant cases illustrating the point are simply too numerous to list. *See, e.g.*, Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975); Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie Du Papier, 508 F.2d 969 (2d Cir. 1974). *See also* Delaume, *L'arbitrage transnational et les*

tion upon the reach of arbitral jurisdiction.

In domestic matters, there have been indications, however, that this traditional bar is being diluted, eroding in areas where courts formerly have applied it without reservation to disallow private adjudication.[20] There is an unmistakable (perhaps irreversible) trend in United States domestic arbitration law to expand the substantive jurisdictional scope of arbitration. Legislators tend to give predominant weight to the principles of party autonomy and mutuality and to minimize the potential burden upon the court system by promoting self-determination in dispute resolution. Legislators also envisage claims touching upon matters of the public interest as encompassing at least divisible disputes: a non-arbitrable principal dispute and arbitrable ancillary disputes. The trend in domestic law appears to have reduced considerably the breadth of the public interest concept.

The factors that contributed to the domestic re-evaluation of the concept of arbitrability, however, do not have the same presence or force in the area of international adjudication of disputes through arbitration.[21] Despite a similar need for expertise, eco-

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tribunaux américains, 108 JOURNAL DU DROIT INTERNATIONAL 788 (1981).

20. For example, while tort claims generally are inarbitrable (they cannot be foreseen by contract, involve a duty imposed by operation of law, and implicate public safety and individual corporeal integrity), state legislatures have enacted statutes providing for the arbitration of medical malpractice. *See, e.g.*, Heintz, *Medical Malpractice Arbitration: A Viable Alternative*, ARB. J., Dec. 1979, at 12, 15. Courts also have recognized that tort issues arising under a contract containing an arbitration clause may be submitted to arbitration. *See, e.g.*, United Aircraft International v. Greenlandair, Inc., 298 F. Supp. 1329 (D. Conn.), *aff'd* 410 F.2d 761 (2d Cir. 1969). Some states allow the arbitration of uninsured motorist accident claims. *See* G. WILNER, *supra* note 1, § 13:11 at 204. In 1983, federal legislation expressly allowed the arbitration of issues involving the validity and infringement of patents — matters previously considered "inherently unsuited to the procedure of arbitration statutes." *See* U.S. Patent Act, 35 U.S.C. § 294; Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184, 186 (D. Del. 1930). *See also* Carmichael, *The Arbitration of Patent Disputes*, ARB. J., March 1983, at 3. While arbitrators can neither perform nor dissolve marriages, arbitration agreements pertaining to nonstatus divorce disputes (child support and custody, maintenance, property division) have been recognized as binding in separation agreements. *See* G. WILNER, *supra* note 1, § 13:09. Arbitration also has acquired a role in the settlement of claims arising from decedents' estates. *See id.* § 13:07. Moreover, disputes relating to partnership contracts and the dissolution of a closely-held corporation have been deemed to be arbitrable. *See id.* § 13:02-03.

21. For a discussion of the similarities and differences between domestic and international disputes resolution needs, see a previous study: Carbonneau, *Ren-*

nomical and expeditious proceedings, and specialized (and also neutral) fora, the removal of imperative domestic concerns from the homogeneity of the national culture and juridical system would imperil the integrity of such concerns, making a reduction of the inarbitrability defense untenable. Regardless of how few areas are included within the purview of inarbitrability, the balancing of policy considerations implied in the adhesion to the international consensus on arbitration should dictate that these domestic imperatives be insulated from the general minimization of the national interest.

Following *Scherk*, circumstances involving alleged antitrust violations in an otherwise arbitrable international contractual dispute were a suitable springboard for articulating meaningful national law restraints on "truly international" contracts.[22] The United States courts had exhibited tremendous reverence for the antitrust laws, viewing them as instrumental to the ideological and economic integrity of the United States and the free world. In *United States v. Aluminum Co. of America (Alcoa)*[23] and its somewhat subdued progeny, the courts had defied international comity and upheld the extraterritorial application of United States antitrust law.[24] A refusal to enforce an arbitration agreement or award when antitrust claims were involved, therefore, would not be inconsonant with other United States international adjudication and, to some extent, would belie Justice Douglas' prophecy in *Scherk* concerning the " 'international contract' talisman,"[25] allaying fears of unfettered internationalism.

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dering Arbitral Awards With Reasons: The Elaboration of a Common Law of International Transactions, 23 COLUM. J. TRANSNAT'L L. 579, 603-05 (1985).

22. Scherk v. Alberto-Culver Co., 417 U.S. 506, 515 (1974).

23. 148 F.2d 416 (2d Cir. 1945).

24. *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). *See generally* Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963); Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L L. 254 (1980); Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. IND. & COM. L. REV. 199 (1977); Comment, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259 (1960); Recent Developments, *Antitrust Law; Extraterritoriality*, 21 HARV. INT'L L.J. 515 (1980).

25. 417 U.S. at 529 (Douglas, J., dissenting).

IV. The Initial Determination

The stage was set for a major decision. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[26] represents the long-awaited sequel to *Scherk*. This decision gives additional substance and definition to the nascent policy on private international law matters, specifies how that larger policy relates to transnational commercial arbitration in particular, and suggests the Court's initial position on the vexing question of "anational" arbitration.[27]

The facts of *Mitsubishi* fit admirably into the script.[28] Soler, an automobile dealer in Puerto Rico and formerly a franchised Chrysler dealer, entered into a distributorship agreement with Chrysler and a separate sales procedure agreement with both Chrysler and Mitsubishi. The latter agreement contained an arbitration clause stating that disputes arising under the contract "shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."[29] Mitsubishi was formed as part of a joint venture between Chrysler International, S.A., a wholly-owned subsidiary of the Chrysler Corporation, and Mitsubishi Heavy Industries, Inc. Pursuant to the terms of the joint venture agreement, Mitsubishi manufactured vehicles for sale through Chrysler dealers in territories outside the continental United States.

Experiencing a decline in sales, Soler was unable to meet the agreed minimum in the sales procedure agreement; Soler requested that Mitsubishi withhold the shipment of several orders. Mitsubishi, however, refused to release Soler from its minimum sales obligation and held Soler responsible for a shipment of vehicles that it withheld. Soler then sought to minimize its losses by "transshipping" its stock to the continental United States and

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26. 105 S. Ct. 3346 (1985).

27. For a discussion of "a national" or "floating" arbitration, see W. Craig, W. Park, & J. Paulsson, *supra* note 4, at Pt. V, § 28.05; A. van den Berg, *supra* note 2, at 28-51.

28. The facts are taken from the Supreme Court opinion: 105 S. Ct. 3346, 3349-52 (1985). For a commentary on the opinion, see Campbell & Vollmer, *International Arbitration*, 7 Nat'l L.J., Aug. 19, 1985, at 24; Robert, *Une date dans l'extension de l'arbitrage international: L'arret Mitsubishi c/ Soler*, 1986 Rev. Arb. 173. *See also* Lipner, *International Antitrust Laws: To Arbitrate or Not to Arbitrate*, 19 Geo. Wash. J. Int'l L. & Econ. 395 (1985); Recent Developments, *Arbitration: Arbitrability of Antitrust Claims in International Tribunals*, 27 Harv. Int'l L.J. 227 (1986).

29. 105 S.Ct. at 3349.

Latin American countries. Mitsubishi, however, refused to permit such shipments, claiming that the Soler vehicles were manufactured to meet Puerto Rican specifications and were unsuitable for use elsewhere.

Before the United States District Court for the District of Puerto Rico, Mitsubishi sought an order to compel arbitration. Soler counterclaimed, alleging, *inter alia*, antitrust violations, namely, that Mitsubishi's refusal to allow the "transshipment" of its stock amounted to a trade restriction and a breach of the Sherman Antitrust Act.[30] According to Soler, Mitsubishi and Chrysler unlawfully divided markets, and Mitsubishi had in effect engaged in a boycott and other predatory practices to drive Soler out of business. This allegation and others led Soler to argue that its dispute with Mitsubishi was inarbitrable for reasons of public policy. The district court ordered the arbitration of all claims and counterclaims between the parties. In issuing its order to compel arbitration, the court relied principally on the *Scherk* doctrine: disputes not ordinarily arbitrable under domestic law could be submitted to arbitration if they arose pursuant to an international contract. On appeal, the critical issue centered on the arbitrability of the antitrust claims.

Using a studied and intricate pattern of reasoning, the United States First Circuit Court of Appeals reversed the district court's holding on the arbitrability question.[31] In the appellate court's view, domestic decisional law had created an antitrust exception to arbitrability. This exception had gained unanimous judicial acceptance and support, indicating that the inarbitrability of antitrust claims was a "solid and sound doctrine."[32] The court of appeals relied primarily on the doctrine the Second Circuit elaborated in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[33] which was the source of the antitrust exception to arbitrability. Indeed, a number of persuasive reasons existed for ex-

30. 15 U.S.C. §§ 1-7 (1982).

31. 723 F.2d 155, 168 (1st Cir. 1983). For a commentary on the opinion, see Recent Developments, *Arbitration: Public Policy Exception To Arbitration of Antitrust Issues*, 25 HARV. INT'L L.J. 427 (1984). *See also* Recent Decisions, *Arbitration: Transnational Antitrust 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 (1984).

32. 723 F.2d at 163.

33. 391 F.2d 821 (2d Cir. 1968).

empting antitrust matters from the reach of arbitral jurisdiction.

First, the importance of antitrust regulation to the viability of a free economy supported the judiciary's privileged adjudicatory position in regard to antitrust matters.[34] Second, contracts that give rise to antitrust disputes usually are adhesion contracts. The forum selection provisions in such contracts, like agreements to arbitrate, therefore, would not satisfy the mutuality principle.[35] Third, the volume of discovery and other procedural complications normally associated with antitrust litigation are ill-suited for arbitral adjudication.[36] Finally, arbitrators, who usually are drawn from the ranks of the business community, should not be allowed to decide issues that simultaneously implicate the central interests of that community and a larger public interest.

Persuasive reasons justified the extension of the antitrust exception to international matters. Arbitrators who are foreign nationals probably would have some resistance to and special difficulty in ruling upon antitrust claims.[37] If restricted to a purely domestic context, parties, in an effort to avoid the applicable regulations, might fabricate artificial international dealings, thereby shielding themselves from the reach of the law and making the enforcement of antitrust provisions more onerous, if not impossible:

> In an increasingly interdependent and interrelated commercial world, where the multinational corporation with ties to several countries is becoming more prevalent, . . . the insulation of agreements with some international coloration from the antitrust exception would go far to limit it to the most minor and insignificant of business dealings. Indeed, suppliers and sellers could achieve immunity from antitrust law threats and sanctions by the simple expedient of co-opting some foreign or international entity into the arrangement.[38]

According to the appellate court, apprehensions concerning the destabilization of transnational dealings through unfair surprise by raising antitrust claims were ill-founded. Anti-monopolistic regulations increasingly were becoming a staple of foreign legisla-

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34. *See id.* at 826-27.
35. *See id.* at 827.
36. *See id.*
37. 723 F.2d at 162.
38. *Id.* at 163.

tion and an acknowledged factor in transnational commerce.[39]

The court further found that its application of the antitrust exception to the international context was consistent with the aims and objectives of the New York Arbitration Convention and the *Scherk* holding, because its application struck a balance between "deeply felt national policies" and "the desire to facilitate international arbitration."[40] The court reasoned that "unanimous judicial precedent for a decade and a half" and "a multiplicity of solid reasons that lose no pertinence or weight in an international context"[41] mandated the inarbitrability of antitrust claims and the concomitant restriction upon the scope of international arbitral dispute resolution.

V. Assessing the Appellate Reasoning

The measured balance of the First Circuit Court of Appeals' reasoning in *Mitsubishi* made its determination convincing. Without detracting from the achievements embodied in the New York Arbitration Convention and the *Scherk* holding, the court adroitly drew an identifiable boundary between national concerns and the development of international arbitral adjudication. The ruling prevented the interchange between national and international law from degenerating into a confusing and boundless form of symbiosis, and created a foundation for establishing a healthy relationship of mutual interdependence in which separable identities could be maintained fully.

In effect, the court created a necessary limit on entirely justifiable grounds. The weight of history and precedent, the experience with extraterritoriality, and the cardinal importance of antitrust regulation in the scheme of United States political and economic ideology supported the gravamen of the determination. Even the most strident and inflexible advocates of arbitral internationalism must have recognized the wisdom of the court's logic and rationality or at least should not have perceived it as a principled threat to the systemic integrity of the arbitral process. The position that antitrust matters were an imperative part of United States domestic public policy, even when compared to the strong policy interest in transnational commercial activity, should not have of-

39. *Id.*
40. *Id.* at 164.
41. *Id.*

fended or surprised anyone.

VI. The Oracular Injunctive Reaffirmed

The question of antitrust arbitrability received a very different disposition at the hands of the United States Supreme Court.[42] In reversing the appellate ruling in *Mitsubishi*, the Court reaffirmed its unequivocal internationalist orientation on the subject of arbitration, subordinating the public interest in antitrust regulations to the overarching federal policy favoring recourse to arbitration. The Court also outlined a methodology of analysis for application in international arbitration cases, and generally expressed a strong confidence in and support for alternative dispute resolution. In each segment of its reasoning, the Court anchored its determination in a legislative text, giving the impression that the Court was acting merely as the mouthpiece of an announced and settled congressional intent.

A. The Methodology

The critical considerations in assessing litigation on arbitration center on determining whether a valid agreement to arbitrate exists; if a valid agreement is found, whether that agreement covers the dispute in question; and, finally, when a valid agreement covers the controversy, whether external systemic considerations, for example, whether the subject matter of the dispute is arbitrable, prohibit the recourse to arbitration.[43] In the Supreme Court's view in *Mitsubishi*, in keeping with the pervasive United States judicial approach to arbitral matters, "a healthy regard for the federal policy favoring arbitration" must inform the application and interpretation of federal law on the subject of arbitrability.[44] While all arbitration agreements should be examined for possible fraud or duress, in the Court's view, no reason exists to deviate from the normally "hospitable" consideration of the arbitrability question.[45]

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42. *Mitsubishi*, 105 S. Ct. at 3346 (1985).

43. *Id.* at 3353-55.

44. *Id.* at 3354 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

45. *Id.* at 3354-55.

B. Statutory Rights

The *Mitsubishi* Court envisioned the question of the arbitrability of statutorily-conferred rights not from the perspective of the enabling legislation, but pursuant to the congressional policy underlying the Federal Arbitration Act.[46] Viewing the language consecrating the validity of arbitration agreements as "[t]he Act's centerpiece provision,"[47] the Court stated that the Federal Arbitration Act could not be construed to contain a "presumption against arbitration of statutory claims."[48] Rather, the substance of the Act and its judicial construction yielded a " 'liberal federal policy favoring arbitration agreements' "[49] underwritten by the recognition of the principle of contractual autonomy, namely "a policy guaranteeing the enforcement of private contractual arrangements."[50] Accordingly, as the Court had determined in previous opinions, the intent Congress manifested in the express language of the Arbitration Act dictated that the courts "rigorously enforce agreements to arbitrate."[51] In ruling upon arbitration cases, a clear legislative policy supporting the validity of arbitration agreements therefore bound the federal judiciary; any presumption that could be gleaned from the statutory language would favor rather than constrain the recourse to arbitration.

Although no basis existed for creating a presumption against agreements to arbitrate statutory claims, an express legislative mandate in the applicable statute excluding the recourse to arbitration would bind the courts. In such circumstances, Congress created an exception to its own policy favoring arbitration. In the absence of unequivocal legislative intent, parties are free, pursuant to their contractual discretion, to forego judicial remedies; in so doing, they do not divest themselves of statutorily-created rights, but rather opt for a form of remedial recourse for vindicating those rights that better suits their circumstances.[52] Accordingly, an agreement to arbitrate statutory claims can be defeated

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46. 9 U.S.C. §§ 1-14, 201-208 (1982).

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

48. *Id.*

49. *Id.* (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

50. *Id.*

51. *Id.* at 3354 (quoting Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238, 1243 (1985)).

52. *Mitsubishi*, 105 S. Ct. at 3355.

only if Congress has determined that the courts are the exclusive forum in which to remedy alleged grievances:

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.[53]

Presumably, although not absolutely clear from the opinion, the *Mitsubishi* Court's reasoning could have equal force in both domestic and international cases. Although the Court ultimately rejects the reasoning in *American Safety* that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration,"[54] the Court states that its refusal to apply that reasoning in international matters does not necessarily undo the effectiveness of the rule in the domestic context: "We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions."[55] The open-ended character of the statement and the qualified language in the holding which refers to the dichotomy between domestic and international determinations ("even *assuming* that a contrary result *would* be forthcoming in a domestic context"),[56] however, generate doubts as to the continued strength and vitality of the *American Safety* exception in domestic matters.

The conditional tenor of the language, its contrast to the more emphatic distinction in *Scherk* between matters domestic and international, and the insistence that inarbitrability requires a congressional intent to make judicial adjudication an exclusive remedy suggest that the Court may believe that the rule it articulates for international commercial matters is equally applicable to domestic transactions. Such a result would certainly be in accordance with the Court's concern about the systemic burden of protracted litigation and its general position on alternative dispute resolution.

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53. *Id.*
54. 391 F.2d 821, 827-28 (1968) (cited at 105 S. Ct. 3355).
55. *Mitsubishi*, 105 S. Ct. at 3355.
56. *Id.*

C. The Central Issue

The preliminary points of analysis regarding the tenor of the federal policy on arbitration and the arbitrability of statutory claims establish the context for consideration of the principal issue: whether the antitrust exception to arbitrability articulated in *American Safety* should be integrated into the United States judicial doctrine applying to international commercial arbitration. Given the substance of the Court's preliminary statements, the die already had been cast. The Court's vigorous, nearly unqualified internationalist attitude, faithful to its disposition in *Scherk*, and its burgeoning support for and confidence in alternative dispute resolution are the linchpin tenets of its reassessment of the policy status of antitrust disputes and the conclusion that the domestic antitrust exception to arbitrability should be excluded from application in the context of international transactions.

The *Mitsubishi* Court's allegiance to the *Scherk* doctrine is unequivocal and its internationalist orientation unmistakable:

> As in *Scherk v. Alberto-Culver Co.* . . ., we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to arbitrate], even assuming that a contrary result would be forthcoming in a domestic context.[57]

The Court in effect reiterates its view that choice-of-law and jurisdictional parochialism are outmoded and counterproductive to the interests of the United States, implying even more forcefully that its attitude is a product of legislative intent and that the judiciary's mission is to translate this intent into a policy on private international law matters.

The central tenet of that policy, which gained considerable impetus from the incorporation of the New York Arbitration Convention into United States law (making the "emphatic federal policy" favoring arbitration apply "with special force in the field of international commerce"),[58] began with the *Bremen* doctrine on forum-selection clauses (fostering the "enforcement of freely negotiated contractual choice-of-forum provisions"),[59] and at-

57. *Id.*
58. *Id.* at 3357.
59. *Id.* at 3356.

tained substantial force with the *Scherk* doctrine on international commerce and arbitration (eschewing "a provincial solicitude for the jurisdiction of domestic fora").[60] The policy now boasts of the *Mitsubishi* exemption of antitrust matters from the defense of inarbitrability. Perhaps the costly lessons of political history regarding isolationism, the decline of United States economic hegemony in world markets, or the more disinterested juridical disposition not to thwart the operation of a creative force in establishing transnational order and stability motivated the Court's choice of direction and objectives. Whatever the motivation, the essential message is clear: domestically nurtured concerns should not be allowed to impede the emerging transnational consensus on commercial arbitral dispute resolution.

The Court responded to the policy concerns articulated in *American Safety* by expressing strong confidence in the viability of arbitral dispute resolution.[61] The fear that duress or unfair bargaining advantage would taint arbitration agreements contained in contracts giving rise to antitrust claims is a purely abstract concern that needs to be buttressed by a specific showing in order to defeat the recourse to arbitration. The potential for antitrust claims to generate protracted litigation and staggeringly complex evidentiary matters are not a deterrent to arbitration. Even those courts that endorsed the *American Safety* doctrine subscribe to the view that parties can invoke arbitration once an antitrust dispute has arisen. Moreover, the submission of antitrust claims to arbitration might transform the character of such litigation and lead to economical and expeditious proceedings that might better serve the parties and interests involved. "In any event, adaptability and access to expertise are hallmarks of arbitration."[62]

The more widespread adoption of antitrust regulations, the parties' interest in selecting able and knowledgeable arbitrators, the business community's stake in economic regulations, and the experience of having dealt with problems of interpreting and applying foreign law[63] point to the inevitable conclusion: "There is no reason to assume . . . that international arbitration will not provide an adequate mechanism [for the resolution of antitrust

60. *Id.*
61. *Id.* at 3357.
62. *Id.* at 3357.
63. *Id.* at 3357-58.

disputes]."[64] Moreover, private parties have considerable discretion whether to file or settle a domestic antitrust claim. Parties to an international transaction, given the uncertainty of transnational dispute resolution, are entitled to similar discretion — the right to provide for a procedure by which to resolve potential antitrust controversies. Finally, evasion of national law should not be a concern; international arbitrators empowered to rule upon antitrust disputes should resolve the claims pursuant to the national law upon which the claims are based.[65]

D. An Appraisal of the Consequences

The various rationales proffered by the *Mitsubishi* Court for its minimization of the significance of antitrust claims certainly will have foreseeable consequences and, in all likelihood, will have unintended consequences on transnational commercial practice and the future development of the international commercial arbitration process. Given the Court's holding, most, if not all, international contracts will now contain provisions specifying that eventual antitrust claims will be submitted to arbitration. The quest for neutrality and self-determination in transnational commercial dealings makes such a development nearly inevitable.

Ingenious drafting techniques designed to avoid problematic laws are likely to generate significant difficulties. What result might apply under the *Mitsubishi* doctrine if the parties agree that antitrust claims are to be resolved pursuant to Japanese, West German, or EEC law rather than the United States antitrust regulations? The predictable lack of uniformity among the various national and regional laws could allow parties to escape the reach of a vital, but unfavorable, United States provision. What if the parties confect their own antitrust laws and refer the resolution of any future claim to those provisions? Considerable confusion also may arise when a third party alleges that an international contract between two other parties violates a Sherman Act provision and brings an action before a United States federal court based on the *Alcoa* interests test.[66] If an agreement to arbi-

64. *Id.* at 3359.

65. *Id.*

66. The test espoused by Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945), applies to the jurisdictional reach of the Sherman Act to conduct outside of the United States:

Judge Hand reasoned that agreements made outside of the United States

trate antitrust claims exists, courts probably would not deem it binding on a third party. In these circumstances, allowing for the national judicial resolution of the claims could defeat the spirit of self-determination implied in the *Mitsubishi* holding. It seems, in fact, that an intractable conflict may exist between the policy objectives stated in *Alcoa* and those applying to international arbitral dispute resolution under *Mitsubishi.*

The Court's ruling in *Mitsubishi* also may generate a wave of unanticipated activity in the centers of international arbitration. Allowing the international arbitral process to function with little or no national restraint places the burden of definition on the process itself. Arguably, this is where the burden should be lodged, although the integration of this new area of responsibility may tax the existing process to the point of dismantling its established patterns and compromising its viability. If parties actually submit antitrust claims to arbitration on a regular basis, a special corps of arbitrators with the required expertise may need to be constituted and new procedural rules tailored to the anatomy of antitrust adjudication devised. Such adjudication might further require the creation of a special body of international arbitral law and the adoption of court-like rules of binding precedent.[67] Unlike other disputes that may arise in the context of commercial transactions (for example, patent infringement questions which now are arbitrable under United States law), antitrust disputes not only are potentially complex and can raise choice-of-law difficulties, but they also involve vital and controversial matters that go to the core of political and public interest considerations.

E. Abating Concerns Through a Merits Review?

The Court attempts to minimize the implications of *Mitsubishi* by noting that international arbitral awards containing antitrust

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which restrain trade or commerce within the United States have the same effect as similar agreements entered into within our borders. Since, any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends, he concluded that Congress did intend to apply the Act to conduct abroad so long as the intended effect of that conduct is prohibited by the Act.

Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248, 1253 (7th Cir. 1979) (footnote omitted) (quoting from *Aluminum Co. of America*, 148 F.2d at 443).

67. *Accord* Carbonneau, *supra* note 21, at 603-05.

rulings could be denied enforcement under the public policy exception of the New York Arbitration Convention.[68] The intent here is to provide a mechanism by which United States courts could supervise the adjudication of antitrust claims by international arbitrators. As the Court admits, such an antidote to an expansive concept of arbitrability requires a form of merits review.[69] The elimination of a review on the merits, however, has been a focal point of the history of the law of arbitration and instrumental to the development of the systemic integrity of the process.[70]

Dismantling the English system of judicial supervision of the merits of arbitral awards took years.[71] Reintroducing it in United States law for whatever reason would be a step backward. Moreover, under the New York Arbitration Convention, the public policy exception is meant to be interpreted restrictively and to involve only a facial scrutiny of awards.[72] Linking the public policy exception to a merits review of awards involving the disposition of antitrust claims would change the entire complexion of the ground and certainly would confound the consistency of its previous application. Although most national courts have construed the provision narrowly — for example, one United States federal court held that only a breach of "the Forum state's most basic notions of morality and justice"[73] would trigger the public policy exception to enforcement — the inclusion of antitrust considerations might lead to a reordering of United States judicial priorities in enforcement (at least among some United States federal courts), eventually clouding a formerly limpid international standard and policy. The possibility also exists that a practice of merits review would require the rendering of reasoned awards. Whatever the advantages of such a practice,[74] the longstanding approach has been to render determinations without stating reasons.

The Court gives some recognition to these concerns, stating that "the efficacy of the arbitral process requires that substantive

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68. 105 S. Ct. at 3360.

69. *Id.*

70. *See* Carbonneau, *supra* note 21, at 579-86.

71. *See supra* note 4.

72. *See supra* note 19 and accompanying text.

73. Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie Du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

74. *See* Carbonneau, *supra* note 21.

review at the award-enforcement stage remain minimal. . . ."[75] The central problem, of course, resides in defining "minimal." The Court does provide some guidance on this question, declaring that a "minimal" merits review of antitrust arbitral awards "would not require intrusive inquiry" and would be limited to ascertaining whether "the tribunal took cognizance of the antitrust claims and actually decided them."[76] In practical terms, what appeared to be an enterprise fraught with peril turns out to be simply another exercise in the fabrication of straw limitations. Apparently, the Court is contemplating nothing more than a mechanical, pro forma inspection of the surface content of awards — a very far cry indeed from a judicial consideration of the merits. Although the defined standard has the great virtue of falling within the consensus on nonmerits review, it operates as a ploy, a meaningless token by which to give the semblance of protection to national interests where no such safeguard in fact exists.

F. The "Prospective Waiver" Example

The Court gives an example of circumstances in which the proposed standard of review and what remains of the inarbitrability defense might engender a denial of enforcement when antitrust claims are involved. In circumstances in which "choice-of-forum and choice-of-law clauses operate in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[77] Although technically the reasoning seems to apply to the question of the validity of an arbitration agreement, it should have equal force in and appears more germane to an enforcement action.

Moreover, the Court's reference to the word "agreement" is ambiguous. Rather than designating the arbitration agreement, it might refer to the principal contract. In these circumstances, the invalidation would not be linked to the regulatory framework of the New York Convention, but rather would pertain to the Court's general authority as a court of law. The Convention regulates international arbitration agreements and awards, not international contracts. Interpreting "agreement" to refer to the prin-

75. 105 S. Ct. at 3360.
76. *Id.*
77. *Id.* n.19.

cipal contract, however, is unlikely since the arbitration agreement, despite the invalidation of the principal contract, still would be effective under the separability doctrine.[78] This would permit arbitral proceedings to take place for disputes arising from the nullity of the principal contract.[79] The intent of the Court appears to be, however, to define circumstances in which the presence of antitrust claims might defeat the recourse to arbitration itself. It is, therefore, reasonable to assume that "agreement" refers to the arbitration agreement and not the principal contract.

The ambiguity aside, the Court's "prospective waiver" ruling is objectionable on a number of grounds. Finding that an arbitration agreement is invalid because the principal contract refers to a governing law that lacks antitrust provisions contravenes a number of consecrated principles of the federal policy on international commercial arbitration: the policy favoring the recourse to arbitration, the principles of party autonomy and self-determination in contracts (especially international ones), and the need to avoid parochial determinations and to recognize the special requirements of transnational commerce. The *Scherk* perspective compels the conclusion that experienced international merchants, aware of the importance of commercial competition, should be allowed to establish their own regulatory scheme if they so choose. The "dicey atmosphere"[80] of international commerce cannot tolerate easily the lack of predictability that the invalidation of arbitration agreements and choice-of-law clauses for reasons of the United States interest in antitrust enforcement would create.

Moreover, the substantive overlap between the inarbitrability defense and the public policy exception[81] makes it difficult to understand how the subject matter of an agreement could be arbitrable, yet at the same time violate the public policy exception by its substance. There is here at least a facial contradiction: either antitrust claims are arbitrable or public policy requires their resolution by courts of law. Moreover, the controlling federal law, as

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78. For a discussion of the separability doctrine, see G. WILNER, *supra* note 1, §§ 8:01-:02. *See also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

79. *See, e.g.*, Judgment of Feb. 15, 1966, Cour d'appel, Orléans, (1966) D.S. Jur. 340. *See also The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1, 36-40 (1980).

80. *Scherk*, 417 U.S. at 517.

81. *See supra* notes 15-18 and accompanying text.

informed by the provisions of the New York Arbitration Convention, does not recognize specifically the possibility of invalidating an arbitration agreement on a public policy basis. An agreement is invalid if it relates to a subject matter that cannot be referred to arbitration (inarbitrability)[82] or if it is "null and void, inoperable or incapable of being performed"[83] (referring here to the ordinary principles of contract law: lack of capacity, fraud, duress).[84] Although arguably the words "null and void" could refer to public policy violations, current doctrine and the legislative history of the Convention do not justify this interpretation.[85]

In its "prospective waiver" example, the Supreme Court misuses the public policy exception; the rule that should emerge from the Court's example is that, when the choice-of-law and forum provisions of an international contract operate to divest a party of its right to bring an antitrust claim, the arbitration clause contained in that contract will be invalidated because it applies to an inarbitrable subject matter. Although this reasoning may be tortuous, it does have the advantage of maintaining the integrity of the Convention's regulatory framework. The legal fiction (a valid arbitration agreement is invalid) and logical inconsistency (antitrust claims are arbitrable provided they in fact are arbitrated), however, are yet another illustration of how difficult affording any protection to fundamental national interests under the *Mitsubishi* doctrine of arbitrability may be. In effect, the relief contemplated under the "prospective waiver" example cannot be integrated into the Convention's regulatory framework except through the most arcane and intellectually suspect reasoning.

The Court's proposed standard of review is simply too diffuse to account for the complex situations that can be anticipated and, therefore, is unlikely to trigger either the inarbitrability defense or the public policy exception. For example, the parties' agreement might refer to a governing law, first, that contains no antitrust provisions whatsoever or, second, that differs from its United States counterpart in that it does not recognize the alleged conduct as violative or does not contain a similar or parallel remedial mechanism. Even when United States or a functionally

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82. *See* New York Arbitration Convention, *supra* note 2, art. II(1).

83. *See id.*, art. II(3).

84. *See* A. VAN DEN BERG, *supra* note 2, at 151-61.

85. *See id. See also* Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981).

equivalent law applies, international arbitrators might not apply that law or might interpret it according to international commercial customs and usages. Such complicated variations would be impossible to detect under a superficial level of scrutiny. In fact, the complexity of antitrust determinations, especially those involving international actors and conduct, simply does not lend itself to facile, token review.

The Court's "prospective waiver" example and its proposed minimal merits review, in effect, have brought the entire arbitrability question back nearly full circle, modifying to some extent the original rule: antitrust issues are arbitrable and agreements stipulating the arbitration of such matters are valid in the international context, provided a law that contains a statutory basis for lodging antitrust claims governs the contract and the resolution of contractual disputes. Obviously, such a decisional law rule could be used easily to thwart international arbitrations: merely alleging antitrust violations when the contract refers exclusively to a governing law that lacks antitrust regulations could undermine the effectiveness of an arbitration agreement, and an award could be denied enforcement if it lacks a ruling on antitrust when a de minimus showing of an alleged antitrust violation is made at the enforcement stage. Arguably, to avoid enforcement problems, international arbitrators might conclude that United States antitrust provisions apply as a matter of law to the arbitration of any antitrust claim if the law governing the merits of the arbitration does not contain antitrust provisions. Moreover, international contracts might include a special arbitral provision specifying an appropriate governing law for potential antitrust matters in the event that the law of the contract lacks the relevant regulations. Such foreseeable results would rub coarsely against the grain of the *Scherk-Mitsubishi* doctrine. What was intended as a "hands-off" approach would become substantially intrusive.

G. The Dissent

In keeping with the pattern established in *Scherk*, a vigorous, if not vehement, dissent follows the majority opinion in *Mitsubishi*.[86] Denouncing the result in the majority opinion as "folly,"[87]

86. 105 S. Ct. at 3361.

87. *Id.* at 3374. For an intermediating view of how the competing policy interests in antitrust regulation and arbitration might be reconciled, see Allison, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Ac-*

the dissent persuasively points to a number of fundamental weaknesses in the majority reasoning, namely, its exaggerated and idealistic internationalism and its failure to give sufficient consideration to the public law nature of antitrust regulation. In language reminiscent of Justice Douglas' reference to the " 'international contract' talisman,"[88] Justice Stevens states:

> The Court's repeated incantation of the high ideals of "international arbitration" creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so 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. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well — the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results.[89]

In addition to raising technical objections centering upon the fact that Chrysler was a party to the antitrust dispute but was not included in the arbitration,[90] the dissent emphasized that antitrust controversies exceed the competence and scope of private arbitral adjudication.[91] Aligning itself with the *Alcoa* decisional law, it stated that the United States antitrust laws are the creed of Western capitalistic democracies. Viewing the congressional mandate underlying the antitrust provisions as implying permissible recourse to arbitration rather than judicial remedies is an abuse of interpretative discretion. Their application generates issues of significant political and social moment for the public at large, requiring open debate and consideration before tribunals invested with public jurisdictional authority. Arbitral fora are inappropriate dispute resolution mechanisms since they are fash-

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commodation of Conflicting Public Policies, 64 N.C.L. REV. 219 (1986).

88. *Scherk*, 417 U.S. at 529 (Douglas, J., dissenting).

89. *Mitsubishi*, 105 S. Ct. at 3374 (footnote omitted).

90. *See id.* at 3362-63.

91. *Id.* at 3374.

ioned to grapple with private controversies of a commercial character and allow only limited possibilities for review. Moreover, the antitrust dispute in *Mitsubishi* was incidental to the specifically contractual controversy. Finally, by recognizing expressly the inarbitrability defense, the New York Arbitration Convention itself acknowledges that some domestic concerns remain vital and controlling — despite the policy favoring international arbitral dispute resolution.[92]

VII. IN THE AFTERMATH

Mitsubishi already has achieved a substantial degree of recognition and influence in United States adjudication pertaining to both domestic and international arbitral law. In domestic cases, *Mitsubishi* serves as authority for consolidating the principal decisional law advances. These advances include the submissibility of statutorily-based claims to arbitration, provided the controlling statute does not mandate exclusive judicial remedies.[93] Even when the statute provides for exclusive judicial resolution, the federal law on arbitrability may override it.[94] Along with *Dean Witter Reynolds Inc. v. Byrd*,[95] *Mitsubishi* has been influential in persuading federal district courts that domestic claims arising

92. *Id.*

93. *See* Good(e) Business Systems, Inc. v. Raytheon Co., 614 F. Supp. 428 (D.C. Wis. 1985) (provisions of Wisconsin Fair Dealership Law purporting to limit arbitrability of fair dealership claims involving agreements that would otherwise be within the purview of the Federal Arbitration Act conflicted with federal law and were preempted by the Supremacy Clause); Protane Gas Co. of Puerto Rico v. Sony Consumer Products Co., 613 F. Supp. 215 (D.P.R. 1985) (Puerto Rican statute, P.R. Laws Ann. tit. 10 § 278b-2 (Supp. 1985) which provides that any agreement to arbitrate out of Puerto Rico or subject to foreign laws any controversy arising out of a distribution contract is null and void, violating the Supremacy Clause and the provisions of the Federal Arbitration Act). *See also* Gemco Latinoamerica, Inc. v. Seiko Time Corp., 623 F. Supp. 912 (D.P.R. 1985).

94. *See* cases cited *supra* note 93.

95. 105 S. Ct. 1238 (1985). For commentary on this opinion, see Comment, *Dean Witter Reynolds, Inc. v. Byrd: The Unraveling of the Intertwining Doctrine*, 62 DEN. U. L. REV. 789 (1985); Note, *Investor-Broker Arbitration Agreements: Dean Witter Reynolds, Inc. v. Byrd*, 20 U.S.F. L. REV. 101 (1985). *See also*, Katsoris, *The Securities Arbitrators' Nightmare*, 14 FORDHAM URB. L.J. 3 (1986); Schaller & Schaller, *Applying the Wilko Doctrine's Anti-Arbitration Policy In Commodities Fraud Cases*, 61 CHI.[-]KENT L. REV. 515 (1985).

under the Securities Act of 1934[96] are arbitrable.[97] According to one court, "[t]he trend in Supreme Court rulings is toward arbitrability in an increasing number of cases."[98] The critical determiners of this trend are borrowed directly from *Mitsubishi*: the 1934 Act does not contain a specific congressional intent to exclude the arbitration of claims; by agreeing to arbitration, the parties do not divest themselves of their substantive statutory rights.[99] Quoting from *Mitsubishi*, the courts have held that the parties merely opted for a different remedial framework, "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[100] The emphasis on the federal policy favoring arbitration, a central tenet of the *Mitsubishi* doctrine, also permeates the recent cases.[101]

The *SEDCO* litigation[102] serves as a transition between the domestic and international cases. The Fifth Circuit relied on *Mitsubishi*'s internationalist tenor to compel arbitration in a maritime transaction.[103] The court of appeals further noted that the Supreme Court's latest pronouncements in domestic arbitral matters indicated increasing judicial support for arbitration.[104] The

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96. 15 U.S.C. 78a-78kk (1982).

97. *See* Moncrieff v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 623 F. Supp. 1005 (E.D. Mich. 1985); Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (S.D.N.Y. 1985); Harvey Prawer v. Dean Witter Reynolds, Inc., 626 F. Supp. 642 (D.C. Mass. 1985). *Accord* Green v. Shearson Leaman/American Express, Inc., 625 F. Supp. 382 (E.D. Pa. 1985); Michael Erlbaum v. Prudential-Bache Securities, No. 84-5541 (E.D. Pa. Aug. 9, 1985). *Contra* Lamb v. Legg Mason Wood Walker, Inc., No. 85-1316 (E.D. Pa. Sept. 16, 1985).

98. *See Moncrieff*, 623 F. Supp. at 1008.

99. *Mitsubishi*, 105 S. Ct. at 3355.

100. *Id.*

101. *See, e.g.*, Gelco Corp. v. Baker Industries, Inc., 779 F.2d 26 (8th Cir. 1985); Alfred Ferreri v. First Options of Chicago, Inc., 613 F. Supp. 427 (E.D. Pa. 1985). For a discussion of the federalism implications of the recent U.S. Supreme Court cases on arbitration, see Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985); Note, *Preemption of State Law Under the Federal Arbitration Act*, 15 BALT. L. REV. 129 (1985). For a brilliant synthesis and expansion on this topic, see Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

102. SEDCO, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140 (5th Cir. 1985).

103. *Id.* at 1148.

104. *Id.* at 1147-48.

illustration for this support came in the form of what might be called "reverse inarbitrability," namely, the rejection of the intertwining doctrine[105] that required federal courts to maintain jurisdiction over an action involving an agreement to arbitrate when the action involved several claims, at least one of which fell within exclusive federal jurisdiction. The purpose of the doctrine was to prevent arbitrators from inserting themselves into areas that Congress had reserved for exclusive federal court jurisdiction. In *Dean Witter Reynolds,* the Supreme Court undid this restraint on arbitration, holding that "the relevant federal law [the Federal Arbitration Act] *requires* piecemeal resolution when necessary to give effect to an arbitration agreement."[106] The demise of the intertwining doctrine further undermines the usually privileged status of public policy matters, enhancing the systemic autonomy and stature of arbitral dispute resolution.

Mitsubishi also has had a vital influence specifically in international litigation where the case serves as authority for the now well-settled tenets of the Supreme Court's doctrine toward private international law matters: to "strongly favor enforcement of forum selection clauses in international contracts" and to advance "the emphatic federal policy in favor of arbitral dispute resolution[,] . . . [a] policy [that] applies with special force in the field of international commerce."[107] For example, *Mitsubishi* figures prominently in a recent litigation[108] centering on allegations of antitrust violations in a distributorship arrangement involving a foreign party, several United States companies, and an arbitration agreement providing for arbitration in Houston, Texas. While the federal district court perceptively expressed doubt that the rejection of the *American Safety* doctrine in *Mitsubishi* was

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105. *See* Tai Ping Ins. Co. v. M/V WARSCHAU, 731 F.2d 1141 (5th Cir. 1984).

106. *Dean Witter Reynolds,* 105 S. Ct. at 1242 (emphasis in original) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)).

107. *Mitsubishi,* 105 S.Ct. at 3346, 3356-57. *See also,* Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft MBH, 618 F. Supp. 344, 347 (D.C. Ill. 1985); Practical Concepts, Inc. v. Republic of Bol., 615 F. Supp. 92 (D.D.C. 1985); Perkin Elmer v. Trans Mediterranean Airways, S.A.L., 107 F.R.D. 55 (E.D.N.Y. 1985); Quinn v. CGR, 48 B.R. 367 (D.C. Colo. 1985).

108. High Strength Steel, Inc. v. Svenskt Stal Aktiebolag, No. 85 C 1070 (N.D. Ill. Sept. 16, 1985).

restricted to international arbitral matters,[109] the court endorsed without question the principle of the arbitrability of antitrust claims arising in the context of a transnational commercial venture. The real difficulty in the case resided in determining whether the transaction in question, involving only a single foreign party and having a significant United States nexus, was "sufficiently international in character to come within the holding of *Mitsubishi*."[110]

The court determined that it was, applying the Supreme Court's rather lax definition of international contracts:

> The cases discussed by the Supreme Court as demonstrative of the requisite international transaction context clearly indicate that if one party to a contract is a foreign corporation and the contract involves some type of international transaction, then the parties' choice of forum clause will be enforced even when federal antitrust claims are at issue.[111]

Coupled with a broad arbitrability mandate, this essentially tautological definition of what constitutes an international transaction should expand greatly the scope and range of arbitral dispute resolution both within and at the periphery of transnational commerce. In any event, the lower federal courts, for good or ill, clearly have heard and understood the directive that the process of international commercial arbitration should go forward unimpeded.

Development Bank of the Philippines v. Chemtex Fibers Inc.,[112] is the most disturbing opinion to follow in the aftermath of *Mitsubishi*. The opinion confirms many of the apprehensions that the breadth of the holding generated. In *Chemtex Fibers*, a

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109. *Id.* n.2.

110. *Id.*

111. *Id. See also* Delaume, *What Is an International Contract? An American and a Gallic Dilemma*, 28 INT'L & COMP. L.Q. 258 (1979).

112. 617 F. Supp. 55 (D.C.N.Y. 1985). There is currently a sharp division of opinion among the federal courts as to whether RICO claims are arbitrable. Along with *Chemtex*, another court has held RICO claims to be arbitrable. *See* West v. Drexel, Burnham Lambert, Inc., 623 F. Supp. 26 (W.D. Wash. 1985). Other federal courts, however, have held that RICO claims are inarbitrable. *See* McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986); American Concept v. Irsay, No. 84 C 10026 (N.D. Ill. Oct. 4, 1985); Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985). Finally, one federal court has held domestic antitrust disputes to be arbitrable. *See* Genna v. Lady Foot Int'l, CA. 85-4372 (E.D. Pa., Jan. 28, 1986).

Philippine bank, which had acted as a guarantor of loans made by the United States company Chemtex to a Philippine concern, brought an action before the federal district court in New York, alleging that Chemtex had engaged in fraud and committed a civil violation of RICO. Pursuant to the arbitration clause in the loan agreement, Chemtex moved for an order to compel arbitration of the parties' differences. Precedent existed to support the position that RICO claims were inarbitrable; prior cases had analogized them to antitrust claims as matters involving "substantial public and community interests, the safeguarding of which Congress did not intend to leave in the hands of arbitrators," a status that exempted them from the purview of the Federal Arbitration Act and its "strong preference for arbitration over litigation."[113]

Relying on *Mitsubishi*, the federal district court issued an order to compel arbitration, holding that the RICO claims were arbitrable. In the court's view, if the domestic interest in antitrust regulation were not strong enough to warrant a finding of inarbitrability, the policy underlying the federal anti-racketeering statute, "arguably a great deal less strong"[114] than the interest in the enforcement of United States antitrust principles, could not prevent the recourse to international arbitration. "In view of the recent guidance provided by the Supreme Court in *Mitsubishi*, and taking into account the preference for arbitration in the international commercial context established by prior decisions, this Court is satisfied that plaintiff's RICO claims are arbitrable under the clause contained in the loan agreement."[115]

In applying the blanket mandate of the *Mitsubishi* holding, the court made reference to the minimal merits review standard and indirectly expounded upon the Supreme Court's "prospective waiver" example.[116] Seeing the argument as a misunderstanding of the provision, the district court criticized counsel's allegation that the New York Arbitration Convention's public policy exception to enforcement empowered United States courts to hold RICO claims "not arbitrable as contrary to public policy."[117] The

113. *Chemtex*, 617 F. Supp. at 56 (referring to S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566 (S.D.N.Y.), *aff'd*, 745 F.2d 190 (2d Cir. 1984)).

114. *Id.* at 57.

115. *Id.*

116. *Id.* n.12.

117. *Id.*

court correctly stated that the public policy exception applies exclusively to enforcement matters, and does not implicate the validity of an arbitration agreement. Further noting the *Mitsubishi* Court's ruling regarding the minimal merits review at the enforcement stage, the court concluded that "whatever the permissible inquiry after conclusion of an arbitration proceeding, it is clear that the Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims."[118]

The foregoing reasoning indicates how unfortunate and utterly confusing the implications and ancillary aspects of the *Mitsubishi* doctrine may become. The district court's view that the New York Arbitration Convention does not allow domestic public policy to defeat the arbitrability of disputes appears to contradict the Supreme Court's assessment of its authority under the Convention in circumstances where the provisions of an international contract amount to a "prospective waiver" of antitrust rights. Regardless of the justification for its position, the Court would invalidate the agreement by invoking domestic United States public policy, thereby allowing the latter to act by ricochet as "a barrier to the arbitrability of claims." In light of the practice surrounding the Convention, its legislative history, and its express language, the district court is probably correct in attributing a restrictive role to the public policy exception in such matters.

Also, the district court's failure in *Chemtex Fibers* to perceive, or at least acknowledge, the larger conceptual affinity between the inarbitrability defense and the public policy exception is troublesome. The court's failure reflects judicial confusion and uncertainty about the objective and framework of the Convention. While they function as separate grounds in the Convention, arbitrability acts as a metaphor for the concept of public policy. Like the public policy exception, arbitrability serves as an instrument by which to exempt matters of vital national public importance from the reach of private adjudication. It has a more specific theoretical content than the public policy conception and applies broadly to both arbitral agreements and awards, but its substantive mission and purpose under the Convention are much the same as the public policy exception. In some respects, arbitrability can be viewed as a narrower version of the public policy exception as applied to arbitration agreements.[119] The interna-

118. *Id.*

119. *See supra* notes 15-18 and accompanying text.

tional consensus favoring arbitration[120] recognizes only technical objections to the enforcement of arbitral agreements and awards (a lack of capacity, duress, notice, excess of arbitral authority) and limited substantive barriers (inarbitrability as to the subject matter of the agreement, and inarbitrability and public policy infringements as to the content of awards). The court's view that the "Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims,"[121] although accurately reflecting the technical pattern of the various grounds in the Convention, is inaccurate in a larger theoretical sense since national public policy defines the content of the inarbitrability defense.

Succinctly stated, *Chemtex* demonstrates that the federal courts will assume a heightened pace in the march toward a nearly absolute neutralization of vital national juridical interests in transnational commercial matters. Given the force and breadth of *Mitsubishi*, lower courts will acquiesce passively to the overarching federal policy favoring unfettered internationalism until they receive more studied guidance from the Supreme Court.

VIII. CONCLUSION

By holding that antitrust claims are arbitrable, the United States Supreme Court may have wanted to minimize, if not eliminate, the possibility that dilatory practices could thwart the international arbitral process. Faced with a potentially ruinous contractual relationship and the prospect of arbitration, a disgruntled party (like Soler) might find that it has no other remedy than postponing the day of reckoning. Raising the possibility that the entire transaction is illicit because of antitrust violations at least generates delay and might undermine the arbitration, staving off the possibility of resolution.

Dilatory practices were common in the early development of arbitral law. Previously, parties who wanted to impede the recourse to arbitration claimed that the subject matter or other material aspect of the main contract contravened public policy; the nullity of the main contract, in turn, rendered the agreement to arbitrate invalid. The judicial elaboration of the separability doctrine, providing that the agreement to arbitrate was juridically autonomous

120. *See supra* note 15 and accompanying text.
121. *Chemtex*, 617 F. Supp. at 57 n.12.

and separable from the main contract, put an end to such claims, insulating the arbitral process from bad faith challenges. The mere allegation of the invalidity of the main contract no longer engenders the divestiture of arbitral jurisdiction; questions of contractual invalidity are submitted for adjudication to arbitrators, who have the further authority to rule upon matters concerning the principle and scope of their jurisdiction (the *kompetenz-kompetenz* doctrine).

The doctrinal reach of the *Mitsubishi* determination makes it unlikely that the Supreme Court's reasoning focused upon this narrower concern. Even if it did, the means the Court used were entirely disproportionate to the end it meant to achieve. If ridding the arbitral process of potential dilatory practices were the Court's objective, the combined application of the separability and *kompetenz-kompetenz* doctrines easily presents a much less radical solution—a solution consecrated by past practice. Finally, as distributorship and franchising agreements often do both domestically and internationally, it seems that the *Mitsubishi* circumstances did raise genuine antitrust issues concerning vertical restraints. Although the eventual resolution of such issues is a matter of speculation centering upon an evolving judicial doctrine, Soler's antitrust claims were not designed, on their face, to achieve a merely dilatory purpose. They responded to and were embedded in the factual perimeters of the contractual relationship. The Supreme Court, therefore, was not concerned with dilatory practices and the integrity of the arbitral process, but rather wanted to affirm the "unbounded" scope of its arbitral internationalism.

The doctrine that emerges from *Mitsubishi* is excessive and does injustice to the domestic interest in public law by minimizing the public policy character of antitrust regulation. The specter of the talisman is becoming all too real: if such fundamental issues as antitrust matters (and RICO claims) can be submitted to arbitration, what possible limits could there be to the reach of arbitrability in the international (and also possibly in the domestic) context? The confusing and potentially dangerous shift of domestic public law concerns to the enforcement stage is likely to be ineffectual, destined to act as the shadow of a safeguard rather than a genuine means of protection. The Court's expansive internationalism conjoined to its more recent interest in alternative dispute resolution led it to envisage the issues raised through the undifferentiated perspective of pure policy commitment rather

than a studied analytical outlook. The result borders upon nearly absolute license rather than the measured rationality of regulation.

While national court support is indispensable to the furtherance of the international arbitral process and the creation of a praetorian system of transnational law, the *Mitsubishi* corollary to *Scherk* seems to place the dynamic and fertile interchange in jeopardy. The Court's rush to eradicate all national legal constraints not only compromises legitimate national concerns, but also threatens the integrity of international arbitral adjudication itself, frustrating its normal tendency to seek guidance and appropriate limits from external factors. The Court's failure to acknowledge logical, sensible and necessary restraints countermands the basic consensus of the New York Arbitration Convention and moves closer to placing international dispute resolution through arbitration in a realm of "anational" lawlessness.