

# RECENT DEVELOPMENTS

## DECISIONS

**CONTRACTS—ARBITRATION AGREEMENT—AN ARBITRATION AGREEMENT IN AN INTERNATIONAL CONTRACT IS TO BE GIVEN FULL EFFECT BY FEDERAL COURTS EXCEPT WHERE PUBLIC POLICY OR EQUITY DICTATE OTHERWISE.**

In February, 1969, after two years of negotiations in the United States and Europe, respondent<sup>1</sup> and petitioner<sup>2</sup> signed a contract which transferred petitioner's ownership of three European cosmetics firms and their respective trademarks.<sup>3</sup> The contract stipulated that any disputes arising out of the transfer agreement would be arbitrated before the International Chamber of Commerce in Paris, France.<sup>4</sup> Alleging that the trademarks of the transferred businesses were substantially encumbered, respondent ignored the arbitration clause and brought suit in the United States District Court for the Northern District of Illinois for damages and other relief. Respondent contended that petitioner's allegedly fraudulent misrepresentations violated § 10(b) of the Securities Exchange Act of 1934<sup>5</sup> and Rule 10b-5<sup>6</sup> promulgated thereunder. Petitioner moved to dismiss the action<sup>7</sup> or alternatively to stay the action pending arbitration pursuant to the terms of the transfer contract. Respondent in turn opposed this motion and sought a preliminary injunction restraining the prosecution of arbitration proceedings. The District Court denied petitioner's motion and issued a preliminary order preventing petitioner from commencing arbitration proceedings. The Seventh Circuit Court of Appeals affirmed the decision.<sup>8</sup> The Supreme Court granted petitioner's request for a writ of certiorari.<sup>9</sup> *Held*, reversed and remanded. In the context of an international commercial transaction, the agreement of the parties to arbitrate any dispute arising out of a breach of their contract is to be respected and enforced by the Federal

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<sup>1</sup> The respondent is Alberto-Culver Co., an American company incorporated in Delaware and with its principal office in Illinois. It manufactures and distributes toiletries in the United States and abroad.

<sup>2</sup> The petitioner, Fritz Scherk, is a German citizen residing in Switzerland. Petitioner was the owner of the three European businesses sold to Alberto-Culver.

<sup>3</sup> The firms involved were two German toiletries corporations, Firma Ludwig Scherk (FLS) and Lodeva, and a Liechtenstein corporation, Scherk Etablissement Vaouz (SEV). Petitioner expressly warranted that he was the sole owner of the enterprises and that their respective trademarks were unencumbered.

<sup>4</sup> It was further stipulated that the laws of Illinois would govern the agreement, its interpretation and performance.

<sup>5</sup> 15 U.S.C. § 78J (1970).

<sup>6</sup> 17 C.F.R. § 240.10b-5 (1972).

<sup>7</sup> The petitioner moved to dismiss for lack of personal and subject matter jurisdiction. He also asserted that the court was a *forum non conveniens*.

<sup>8</sup> 484 F.2d 611 (1973).

<sup>9</sup> 414 U.S. 1156 (1974).

Courts in accordance with the provisions of the Arbitration Act of 1925<sup>10</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

Arbitration has deep historical roots.<sup>11</sup> Although the practice has been widely used throughout our nation's history,<sup>12</sup> American courts have tended to regard agreements to arbitrate and contractual stipulations of fora with considerable suspicion. The nineteenth and early twentieth-century courts generally struck down these agreements on the basis of public policy or "principle."<sup>13</sup> The motivation underlying this hostility appeared to be the courts' fear of encroachments on judicial power.<sup>14</sup> The "ouster doctrine," as this policy of the courts came to be known, stood preeminent into the 1920's.<sup>15</sup>

In response to this judicial hostility Congress mandated the enforcement of general arbitration clauses with the enactment of the Arbitration Act of 1925.<sup>16</sup> The Act directed the courts to stay proceedings which involve an issue "referable to arbitration"<sup>17</sup> when (1) there has been a written agreement for such arbitration and (2) one of the parties to that agreement moves for a stay of

<sup>10</sup> 9 U.S.C. § 1 *et seq.* (1970). The Act states that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at § 2.

<sup>11</sup> See generally J.H. COHEN, *COMMERCIAL ARBITRATION AND THE LAW* (1918); Sayre, *The Development of Commercial Arbitration Law*, 37 *YALE L.J.* 595 (1928); W. Jones, *History of Commercial Arbitration in England and the United States: A Summary View* in *INTERNATIONAL TRADE ARBITRATION* 127 (M. Domke ed. 1958).

<sup>12</sup> See S. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 *MINN. L. REV.* 251 (1928). For a discussion of arbitration in British North America, see generally Jones, *Three Centuries of Arbitration in New York: A Brief Survey*, 1956 *WASH. U.L.Q.* 193.

<sup>13</sup> See, e.g., *Nute v. Hamilton Ins. Co.*, 72 *Mass.* (6 Gray) 174 (1856), for an outstanding state court's treatment; *Insurance Co. v. Morse*, 87 *U.S.* 445 (1874), for the United States Supreme Court's approach.

<sup>14</sup> For short discussions of judicial hostility to agreements purporting to oust a court of jurisdiction, see 45 *YALE L.J.* 1150 (1936); 22 *CORNELL L.Q.* 456 (1937); 6A *CORBIN ON CONTRACTS* § 1445 (1962).

<sup>15</sup> See, e.g., *Sudbury v. Ambi Verwaltung etc.*, 213 *App. Div.* 94, 210 *N.Y.S.* 164 (1st Dep't 1925) (Court refuses to require U.S. citizen to litigate in German courts); *Slisberg v. New York Life Ins. Co.*, 217 *App. Div.* 685, 217 *N.Y.S.* 226 (1st Dep't 1926) (same; Russian courts). Though the "ouster doctrine" reached its zenith in the 1920's, it still showed signs of life as late as 1959. *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 *F.2d* 297 (5th Cir. 1958), *cert. dismissed*, 359 *U.S.* 180 (1959). In *Carbon Black* the Court stated: "[A]greements in advance of controversy whose object is to 'oust' the jurisdiction of the courts are contrary to public policy." *Id.* at 300.

<sup>16</sup> 9 U.S.C. § 1 *et seq.* (1970) [hereinafter the Act].

<sup>17</sup> The submission of factual issues was considered an issue "referable to arbitration" while all legal questions were to be resolved by the courts. See, e.g., *Carr v. American Ins. Co.*, 152 *F. Supp.* 700 (D.C. Tenn. 1957). However, fraud in the inducement was also held to be a proper subject for arbitration. *E.g.*, *Southern Bell Tel. & Tel. Co. v. Louisiana Power & Light Co.*, 221 *F. Supp.* 364 (D. La. 1963); *Hamilton Ins. Co. v. Republic Nat. Life Ins. Co.*, 291 *F. Supp.* 225 (S.D.N.Y. 1968), *aff'd* 408 *F.2d* 606 (2nd Cir. 1969).

Courts were careful to sever the arbitration clause from the rest of the agreement, holding that claims of fraud regarding the clause itself were not subject to arbitration. See, e.g., *NLRB v. Keystone Floors, Inc.*, 306 *F.2d* 560 (3rd Cir. 1962); *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals Inc.*, 334 *F. Supp.* 1013 (S.D.N.Y. 1971); *Harman Elec. Const. Co. v. Consolidated Eng'r Co.*, 347 *F. Supp.* 392 (D. Del. 1972).

the proceedings until arbitration had been perfected.<sup>18</sup> The policy behind the Arbitration Act<sup>19</sup> has generally been followed by a majority of the courts,<sup>20</sup> but a vocal minority, particularly those of the Fifth Circuit, long continued to apply the Arbitration Act with reservations engendered by the ouster doctrine.<sup>21</sup>

As American courts allowed greater freedom of contract with regard to arbitration and choice-of-forum agreements, in international commercial transactions, there emerged a policy of recognizing these agreements as valid if they were reasonable in view of the circumstances of the case.<sup>22</sup> In 1955, the Second Circuit, in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*<sup>23</sup> upheld a forum-selection clause which gave jurisdiction to the Swedish courts over any dispute arising between the American and Swedish firms involved. The court acknowledged that the parties should not be allowed to oust a court's jurisdiction but held that, if by a preliminary ruling the court finds the clause reasonable under the circumstances of the case, it may properly decline jurisdiction in favor of the stipulated forum.<sup>24</sup> The burden of proving that the clause was unreasonable was placed on the plaintiff.<sup>25</sup>

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<sup>18</sup> 9 U.S.C. § 3 (1970) states that "[i]f there is a legitimate arbitration clause, the court in which a suit is pending, shall on application of one of the parties, stay the trial until such arbitration has been had in accordance with the terms of the agreement."

<sup>19</sup> 9 U.S.C. § 4 (1970) further provides that "[a] party aggrieved by the alleged failure . . . of another to arbitrate may petition any United States district court . . . for an order directing that such an arbitration proceed."

<sup>20</sup> The Act was designed to allow parties to avoid "the costliness and delays of litigation," and to place arbitration agreements "upon the same footing as other contracts . . ." H.R. REP. NO. 96, 68th Cong., 1st. Sess. 1 (1924).

<sup>21</sup> See, e.g., *Danielsen v. Entre Rios R.C.*, 22 F.2d 326 (4th Cir. 1927) (Arbitration Act allows court to stay proceeding until foreign arbitration is completed, while reserving power to enter decree on judgment); *Kulukundi Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2nd Cir. 1942) (Principle upheld but arbitration excused when wartime conditions made arbitration in London impossible); *Agostini Bros. Bldg. Corp. v. United States*, 142 F.2d 854 (4th Cir. 1944); *Mannesmann Rohrleitungsbau v. S.S. Bernhard Howald*, 254 F. Supp. 278 (S.D.N.Y. 1965) (Stay pending arbitration in the Netherlands); *Oregon-Pacific Forest Prods. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903 (D. Ore. 1965) (Stay pending arbitration in Japan); *Island Territory of Curaçao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y. 1973).

<sup>22</sup> *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958).

<sup>23</sup> RESTATEMENT OF CONTRACTS § 558 (1932), states that choice-of-forum clauses are invalid when they constitute unreasonable limits on a right of action.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) essentially restates the reasonable-ness doctrine: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."

<sup>24</sup> 224 F.2d 806 (2nd Cir. 1955), cert. denied, 350 U.S. 903 (1955).

<sup>25</sup> *Id.* at 808. While stating that it relied on the majority view, the court actually adopted Judge Clark's concurring view in *Cerro De Passco Copper Corp. v. Knut Knutsen O.A.S.*, 187 F.2d 990 (2nd Cir. 1951), which would have upheld the forum-selection clause under the circumstances of the case rather than on the broader grounds of judicial discretion. The factors which led the *Muller* court to declare the choice-of-forum clause reasonable included: the vessel had been constructed in Sweden and was Swedish-owned; the crew was entirely Swedish; it was undisputed that the Swedish courts were no more restrictive on the libellant's recovery than American maritime courts.

<sup>26</sup> The burden of proof in *forum non conveniens* cases is normally placed on the party seeking

The Supreme Court in *Bremen v. Zapata Off-Shore Co.*<sup>26</sup> applied the reasonableness doctrine in holding that the party seeking to avoid a forum-selection clause must show that enforcement would be unreasonable, unfair, or unjust.<sup>27</sup> The remoteness of the forum was not to be viewed as the determinative factor when the parties had deliberately chosen a neutral ground. The choice represented certainty in that the parties, both multinational in operation, could otherwise bring suit in the courts of any one of numerous nations.<sup>28</sup> The Court also found it to be significant that the chosen forum in London had had considerable experience in settling commercial disputes.<sup>29</sup> The Court limited *Bremen's* application to agreements untainted by fraud;<sup>30</sup> however, other courts have held that fraud in the inducement is a proper subject for arbitration.<sup>31</sup> The importance of *Bremen* lies in the recognition by the Court that businessmen, dealing openly and without coercion, should be allowed to stand by their reasonable contractual selection of a judicial forum.<sup>32</sup>

The majority opinion in *Scherk v. Alberto-Culver Co.*<sup>33</sup> stresses similar international considerations. Justice Stewart, speaking for the majority of five, points out that imposing unnecessary judicial restraints on arbitration agreements would be a "parochial" approach to the resolution of disputes in international commerce.<sup>34</sup> He characterizes a policy whereby American courts refuse to honor an international agreement to arbitrate as a "dicey atmosphere of such a legal no-man's-land."<sup>35</sup> Justice Stewart does not specifically refer to the reasonableness doctrine in *Scherk*, but he quotes with approval the language of *Bremen* that a forum clause should control unless there are strong reasons for it to be set aside.<sup>36</sup>

One apparently strong reason for setting aside the arbitration clause is stressed by dissenting Justice Douglas.<sup>37</sup> Since the transaction between

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to change plaintiff's choice of forum. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1946). Note, *Choice of Forum*, 14 HARV. INT'L L.J. 145-150 (1973), argues that the shift indicates a judicial solicitude for sanctity of contract and provides for "maximum certainty in cases where there is no suggestion of unfair bargaining."

<sup>26</sup> 407 U.S. 1 (1972).

<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.* at 11-12, 17.

<sup>29</sup> *Id.* at 17. The tribunal was to be the London Court of Justice.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> See note 18 *supra*.

<sup>32</sup> 407 U.S. 1, 11-12, 17 (1972). Agreements to arbitrate can be considered special types of forum selection clauses.

<sup>33</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) [hereinafter *Scherk*].

<sup>34</sup> *Id.* at 519. This statement paraphrases the *Bremen* approach that invalidating such agreements would be evidence of a "parochial concept that all disputes must be resolved in our courts under our laws . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

<sup>35</sup> 417 U.S. 506, 517 (1974).

<sup>36</sup> *Id.* at 518.

<sup>37</sup> *Id.* at 521.

Alberto-Culver and Scherk involves an exchange of securities,<sup>38</sup> Justice Douglas cites *Wilko v. Swan*<sup>39</sup> as the controlling case. In *Wilko* the Court held that an agreement to arbitrate could not prevent a buyer of securities from seeking a judicial remedy in a federal court under the Securities Act of 1933.<sup>40</sup> In Justice Douglas' opinion this Act and the Securities Exchange Act of 1934<sup>41</sup> are intended to protect American investors, large as well as small, by providing judicial direction in the settlement of securities disputes.<sup>42</sup> Furthermore, this protection is of Congressional origin and is not subject to waiver by the parties.<sup>43</sup> Justice Douglas recognizes the importance of arbitration for transactions not involving securities, but he insists that "American standards of fairness in security dealings (must) govern the destinies of American investors until Congress changes these standards."<sup>44</sup>

The majority, on the other hand, distinguishes the *Wilko* decision by showing that the "special right" to bring suit which the Court in *Wilko* found to be significant was not present in either § 10(b) or Rule 10b-5, both of which merely create an implied cause of action.<sup>45</sup> The protection for investors which could not be waived under the 1933 act<sup>46</sup> has no exact counterpart in § 10(b) or Rule

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<sup>38</sup> *Id.* at 516 n. 9. Presumably because the issue was not expressly raised by either party, the Court states that the question "was not briefed or argued in this Court." Justice Douglas, *id.* at 525, points out that the court of appeals held that securities within the meaning of the Securities Exchange Act of 1934 are involved here. 484 F.2d 611, 615 (1973). Justice Douglas further states that respondent's brief is based on the premise that "securities" are at issue.

<sup>39</sup> 346 U.S. 427 (1953) [hereinafter *Wilko*].

<sup>40</sup> 15 U.S.C. § 77a *et seq.* (1970).

<sup>41</sup> 15 U.S.C. § 78j(b) (1970).

<sup>42</sup> 15 U.S.C. §§ 77n, 77, 77aa (1970); *Wilko v. Swan*, 346 U.S. 427, 437 (1953). Justice Douglas rejects the notion that *Wilko* applies only to protect small investors. He asserts that "the Rules when the giants play are the same as when the pygmies enter the market." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 526 (1974).

<sup>43</sup> *Id.* at 527.

<sup>44</sup> *Id.* at 528.

<sup>45</sup> *Id.* at 513. This argument by the Court is tenuous at best. Rule 10b-5 was first construed as creating implied civil liability in *Kardon v. Nat'l Gypsum Co.*, 23 F. Supp. 798 (E.D. Pa. 1947), supplemented 87 F. Supp. 613 (E.D. Pa. 1947). Several theories have been articulated to support the private right of action under 10b-5. The first is the tort theory which is basically that the violation of a statute is a wrongful act and a tort. See RESTATEMENT (SECOND) OF TORTS, § 286 (1965). The second is the "void contract" theory. The premise is that the 1934 Act itself grants a private remedy under § 29(b), "every contract made in violation [of the statute and rule thereunder] shall be void." A third theory is that espoused in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), which dealt with an alleged violation of the proxy regulation. The Court states that:

It appears clear that private parties have a right under § 27 to bring suit for violations of § 14(a) of the Securities Act. Indeed, this section specifically grants the appropriate District Court jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act.

See also, Dystra, *Civil Liability Under Rule 10b-5*, 1967 UTAH L. REV. 207; Sussman, *Use of Rule 10b-5 as a Remedy for Minority Shareholders of Close Corporations*, 22 BUS. LAW. 193 (1967); Klein, *Extension of a Private Remedy to Defrauded Securities Investors Under SEC Rule 10b-5*, 20 U. MIAMI L. REV. 81 (1965); Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent*, 57 NEV. U.L. REV. 627 (1963).

<sup>46</sup> 15 U.S.C. § 77n (1970).

10b-5, the bases for Alberto-Culver's original suit.<sup>47</sup> Even conceding Justice Douglas' point that the acts of 1933 and 1934 do prohibit the removal of cases involving securities transactions from federal courts, Stewart declares that the question of whether Alberto-Culver's purchase of Sherk's business is a security transaction is irrelevant simply because that question is not before the Court.<sup>48</sup> The crucial factor in *Scherk* is the international character of the agreement. This factor introduces considerations and policies significantly different from those controlling in *Wilko*.<sup>49</sup> The chimerical advantage which a party would have in resorting to suit in an American court, contrary to an express agreement to arbitrate, would vanish when foreign parties would likewise seek to protect their interests by suing in the courts of another nation. The purpose of arbitration and forum-selection agreements then is to obviate the necessity for such a race to a forum and to stabilize agreements in international trade and commerce.<sup>50</sup>

It was not contended that Alberto-Culver was coerced into agreeing to the Paris forum. The neutrality of the forum and Alberto-Culver's relative sophistication in the international marketplace suggest otherwise. Had the Court agreed with Alberto-Culver that American businessmen might disregard with impunity their contracts to arbitrate, this pronouncement would stand as an insult to foreign legal systems and a repudiation of the freedom to contract. Instead the Court has determined that parties to an international commercial transaction are to be held to their arbitration agreement where the agreement is concluded fairly and violates no overriding policies of law or equity. The Court left unanswered the question of what effect the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>51</sup> would have on such international contracts. However, the Court did find that the acceptance of the Convention on Arbitral Awards by Congress<sup>52</sup> was strongly persuasive evidence of congressional policy consistent with the present decision.

Based on the facts of the case, the result in *Scherk* is correct. However, it must be noted that the *Scherk* decision, despite its apparently sweeping implications, is "not properly a test case of the importance which the Court attaches to commercial certainty."<sup>53</sup> Nor did the choice of forum make it impossible

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<sup>47</sup> 417 U.S. 506, 514 (1974).

<sup>48</sup> See note 38 *supra*.

<sup>49</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Cf. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) in which the court states: "[T]he provision of § 10(b) reaches beyond the territorial limits of the United States and applies when a violation of the rules is injurious to American investors." See, e.g., *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334-39 (2d Cir. 1972); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 523-28 (8th Cir. 1973). The majority in *Scherk* appears determined to avoid an in-depth analysis of the extraterritorial application of the Securities Exchange Act of 1934. It is true that *Wilko* does not contain international considerations, but the policy of the 1934 Act does.

<sup>50</sup> 417 U.S. 506, 516 (1974).

<sup>51</sup> Dec. 29, 1970, 3 U.S.T. 2517, T.I.A.S. No. 6997.

<sup>52</sup> 9 U.S.C. § 201 *et seq.* (1970).

<sup>53</sup> Note, *Choice of Forum*, 14 HARV. INT'L L.J. 145, 157 (1973).

for the American party to arbitrate. The Court's desire for certainty in international commerce will face its severest test in cases where relatively unsophisticated, small investors enter into agreements, which contain arbitration clauses, and the forum is either patently inconvenient for the United States party, or there is a sharper conflict with the public policy underlying the remedial legislation which the Court cannot in good faith distinguish away.<sup>54</sup> Considering the merits of such individual cases will mean weighing factors not present in *Scherk*. It is thus quite foreseeable that *Scherk's* influence and application will be much narrower than the Court's language indicates.

*James David Dunham*  
*J. Stephen Schuster*

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<sup>54</sup> Justice Douglas in his dissenting opinion in *Scherk* expresses concern for the perplexing problems which "off-shore funds" will present under the 1933 and 1934 Securities Acts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 526 (1974). Justice Douglas argues that remedial legislation, such as the Securities Exchange Act, is rendered useless when foreign corporations or funds, unlike domestic defendants, nullify investor protection laws by use of arbitration clauses which send defrauded American investors to the uncertainty of litigation in foreign forums, or, if those investors cannot afford to arbitrate their claim in a distant forum, to no remedy at all. *Id.* at 533.