DETERMINING THE ARBITRABILITY OF INTERNATIONAL ANTITRUST DISPUTES

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The Supreme Court has recently analyzed the difficulties inherent in determining the arbitrability of international antitrust disputes. This comment proposes an alternative analysis of the arbitration issue by applying traditional court concerns about the extraterritorial application of U.S. antitrust laws to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

1. Introduction

Due to the proliferation of multinational transactions [1] and variations among nations' antitrust policies [2], the issue of the arbitrability of antitrust disputes pursuant to a valid agreement to arbitrate is of widespread concern. Because the growth of international transactions in the world economy has focused on the need for quick, efficient modes of dispute resolution [3], the issue of the enforceability of an arbitration agreement seeking to resolve an international antitrust dispute is of great concern both in the United States and among its trading partners.

In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. [4], the United States Supreme Court addressed this matter and held that antitrust claims were arbitrable if the dispute was encompassed within a valid arbitration clause in an international transaction [5]. Without criticizing the result reached by the Supreme Court, this comment suggests an alternative method of resolving the problem of the arbitrability of antitrust disputes.

First, the comment will examine the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) [6] and the effect of its provisions on signatory nations. The next section discusses Scherk v. Alberto Culver Co. [7], a 1974 Supreme Court decision interpreting the scope of the Convention. The comment will then examine the issue of arbitrability of antitrust disputes as evidenced by the Soler case. The comment will conclude by setting forth an alternative manner of analyzing the Soler problem taking

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into account both the Convention and the extraterritorial application of U.S. antitrust laws. This test should provide a principled manner of deciding the issue of arbitrability as presented by Soler.

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

In 1970, the United States Congress adopted the Convention by enacting Chapter 2 of the Federal Arbitration Act (Arbitration Act) [8]. Initially implemented in 1958 by forty-five nations [9], the Convention’s primary goal is “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries” [10].

The strong support for the Convention in the United States, both inside and outside the government, was due to the perception that arbitration would improve the ability of U.S. businessmen to engage in international trade [11]. The agreement to the simplified dispute resolution mechanism was perceived as a more efficient manner of resolving international disputes than the usual resort to the peculiarities of each individual nation's system of justice [12]. Arbitration was thus viewed as a mechanism of “settling disputes effectively, quickly and with a minimum of international bitterness” [13].

2.1. The Provisions of the Convention

The most important innovation of the Convention is that it relaxed the requirements needed to enforce an award issued under an arbitration agreement. Under the Geneva Convention of the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention) [14], the international law existing prior to the Convention, the party seeking enforcement had to prove to the enforcing court that the award was final [15], and that enforcement had not been suspended in the awarding country [16]. The Convention alters this practice by requiring the party opposing enforcement to show cause why the award should not be enforced [17]. Moreover, the Convention liberalizes the conditions necessary for the enforcement of an award. While under the Geneva Convention it was possible to challenge enforcement on many different grounds [18], a court under the Convention may refuse enforcement only on grounds specifically set out in Articles V and VI [19].

Before an arbitral agreement is subject to the Convention under U.S. law, several criteria must be satisfied. First, there is a threshold requirement that there be an agreement in writing to arbitrate the subject of the dispute and that the subject of the dispute must be capable of being settled by arbitration
Second, at least one party to the arbitral agreement must not be a citizen of the United States or the commercial relation must have some reasonable relation with one or more foreign states. Third, the agreement cannot be "null and void, inoperative or incapable of being performed". If these requirements are satisfied, then a court presented with a request to refer a dispute to arbitration must order the dispute arbitrated.

The international bias of the Convention is limited by several provisions that allow a signatory country to retain some discretion in the determination of the arbitrability of a dispute. Certain laws of a nation prohibiting the submission of certain questions to arbitration are taken into account by Article II(1), which limits the applicability of the Convention to agreements "concerning a subject matter capable of settlement by arbitration". Article II(3) further accommodates the domestic concerns of a contracting state by relieving a court of its duty to refer disputants to arbitration if the court finds the agreement in violation of local law. The provisions of Article II are reinforced by Article V(2) which gives a signatory country grounds for not adhering to the Convention. Thus, a foreign award may be disregarded if "the subject matter of the [dispute] is not capable of settlement by arbitration under the law of that country". Article V(2)(b) permits the competent authority of the country where enforcement is sought to disregard a foreign award on the grounds of public policy.

2.2. Interpretation of the Convention in the U.S.

The Convention contains many phrases lacking precise, readily discernible meanings. Moreover, since the Convention was adopted by the United States in 1970, there have been few cases giving substance to the Convention's language. Such limited guidance has led to inconsistent applications of the Convention. The judicial construction of the "null and void" clause of Article II provides an illuminating example. In Ledee v. Ceramiche Ragno, the First Circuit Court of Appeals construed the clause to "encompass only those situations - such as fraud, mistake, duress, and waiver - that can be applied neutrally on an international scale". But the district court in Antco Shipping Co. v. Sidermar S.p.A. held that this provision required "a showing by the party resisting enforcement of the agreement that the essence of the obligation or remedy [be] prohibited by a pertinent statute or other declaration of public policy". In essence, the Antco court engrafted the public policy exception of Article V onto Article II(3).

Like the "null and void" clause, the "nonarbitrable subject matter" language of Article II(1) requires clarification. Commentators have reasoned that the determination whether a dispute is amenable to the process of arbitration, should be made pursuant to the law that the parties have chosen to govern their disputes, or, in the absence of such a contractual stipulation, the law of
the forum where the disputes are to be settled [35]. This approach does give courts added guidance when defining ambiguous phrases; however, courts will still be faced with the additional problem of deciding just what a particular forum's law really is. In its official commentary to the Convention, the State Department explains that this "nonarbitrable subject" provision was included to take account of local laws such as state laws which prohibit artibrating controversies affecting title to real property [36]. Moreover, the State Department implies that any arbitral arrangement violating the provisions of Article V would necessarily involve a dispute not capable of being settled by arbitration and would therefore fall under Article II(1) [37]. The State Department, like the court in *Antco*, derived meaning from language in the Convention, particularly the "incapable of settlement by arbitration" clause, by applying Article V [38].

Thus, it appears that the public policy concept of Article V is important in providing the other sections with discernible meaning. In view of the central importance of Article V, the concept of public policy should be clearly delineated. Only when the contours of public policy are established will courts be able to apply the provisions of Articles II and V in a consistent, predictable manner [39]. In *Transmarine Seaways Corp. v. Marc Rich & Co. A.G.* [40] the district court defined the term when it stated that "[a]greements exacted by duress contravene the public policy of the nation ... and accordingly, duress, if established, furnishes a basis for refusing enforcement of an award under Article V(b)(2) of the Convention" [41]. The *Transmarine* court, however, ruled that the burden of proving duress was a heavy one, necessitating a showing that "a party is so overborne that it loses its options" [42]. This decision is instructive in that it identifies duress as a legitimate public policy ground for challenging an award and also because the exacting requirements the court imposed on the defendant to prove duress, indicate the court's reluctance to upset an arbitral award [43].

This tendency to construe the public policy defense narrowly is manifest in numerous decisions; yet the case law does not set forth the specific situations in which a court will disregard an award on grounds of public policy. The holdings often articulate either broad, unworkable guidelines [44] or merely rule out those situations in which the court deems the public policy exception inapplicable [45]. Since the cases cannot satisfactorily define the parameters of public policy, a functional definition must be derived from other sources.

A general principle giving the concept of public policy more substance is: "where a legislature has expressly stated the grounds on which a court of law may vacate an arbitrator's award, [the] court should practice self-restraint in equating an alleged violation of 'public policy' with one of the statutory grounds" [46]. This rule of construction is consistent with Chapter 2 of the Arbitration Act, which provides in part, that "[i]f the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition
or enforcement of the award specified in the said convention” [47]. Yet, despite the apparent limitation on the grounds for challenging an award to those listed in Article V, Congress has implicitly recognized several other grounds for refusing to enforce an arbitration award. In enacting the Convention, Congress approved the application of Chapter 1 [48] of the Arbitration Act in arbitration disputes “to the extent that that [Chapter 1] is not in conflict with [Chapter 2] or the Convention as ratified by the United States” [49]. In Chapter 1, Congress enacted five grounds upon which a court may, on the motion of the protesting party, vacate an arbiter’s award [50]. Thus, barring any inconsistency, Chapter 1 implicitly expands the grounds on which a U.S. court can entertain a public policy defense in enforcement actions falling under the Convention. In short, these statutorily defined situations should guide courts in ruling upon public policy defenses asserted to have an arbitral award vacated.

The last Convention article that has been interpreted by the courts is Article XIV. Article XIV contains the general reciprocity clause. It stipulates that “[a] Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention” [51]. If the courts of one nation were to abuse the “escape” clauses, Articles II and V, and trigger retaliatory responses by other member nations, Article XIV may operate to discourage this abuse of the discretion [52]. The reciprocity clause has been narrowly construed in order to obtain acceptance of awards issued in the United States [53]. For example, in Fertilizer Corp. of India v. IDI Management, Inc. [54], the court enforced an arbitral award issued in India, pursuant to the parties’ agreement, over the argument of the defendant asserting a lack of reciprocity as required by Article XIV [55]. Rejecting the U.S. company’s argument that the Indian courts would not enforce an award rendered in the United States against the Indian entity, the court found that the Indian courts were “functioning in a responsible manner ... and will enforce awards against Indian parties” [56]. The district court construed the exceptions “narrowly lest foreign courts use holdings against application of the Convention as a reason for refusing enforcement of awards made in the United States” [57].

3. The Scherk Factor

Although the Convention provides general guidelines on the resolution of the issue of arbitrability there are other analytic tools that should be considered. The United States Supreme Court’s opinion in Scherk v. Alberto-Culver Co. [58] suggests a theory that a U.S. court can apply in analyzing the Convention’s escape clauses [59].
3.1. The Scherk Case

In Scherk, a Delaware corporation brought suit against Fritz Scherk, a German citizen, accusing him of violating the Securities and Exchange Act of 1934 [60]. Because the parties had agreed contractually to submit controversies of this nature to arbitration, Scherk moved to dismiss and initiated arbitration proceedings [61]. The district court denied Scherk's motion to dismiss and granted a preliminary order enjoining Scherk from proceeding with arbitration [62]. In doing so the court relied upon the holding in Wilko v. Swan, [63] that "an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of §14 of that Act" [64]. The Supreme Court reversed, holding that "the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act" [65].

The Court's treatment of Wilko v. Swan is significant in outlining the implications of its holding in Scherk. In Wilko, an action alleging defendant's violation of the Securities Act of 1933 [66] by inducing plaintiff to purchase stock through false representation [67], the Court held that section 14 of the Securities Act, the anti-waiver clause [68], mandated that the dispute be resolved in a judicial forum, despite the existence of a valid arbitration agreement [69]. The Court reasoned that since the "protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness, it seems to us that Congress must have intended Section 14 ... to apply to waiver of judicial trial and review" [70].

Although Scherk involved alleged violations of the Securities Exchange Act of 1934, the Supreme Court was confronted in Wilko with a similar anti-waiver provision [71]. Even though the Court in Scherk conceded "that the operative portions of the language of the 1933 Act relied upon in Wilko are contained in the Securities Exchange Act of 1934" [72], it held that the arbitration agreement must be honored by the parties [73]. The Court distinguished Wilko on the grounds that both parties to the lawsuit were citizens of the United States whereas Scherk involved a "truly international agreement" negotiated in the United States, England, Germany and Austria and consummated in Switzerland between a U.S. corporation and a German citizen [74]. The Court noted that the Wilko parties were aware from the outset that any disputes would be governed by the U.S. securities laws and resolved in a United States district court [75]. "In [Scherk], by contrast, in absence of the arbitration provision considerable uncertainty existed at the time of the agreement ... concerning the law applicable to the resolution of disputes arising out of the contract" [76]. Thus, while the Wilko case involved a purely domestic dispute, Scherk involved a dispute concerning an international transaction. The Court's moti-
vation in Scherk, the desire to foster international trade, was absent in Wilko. The Scherk court referred to the certainty imposed by an arbitration agreement as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction" [77]. Alluding to the possibility of the parties bringing antagonistic actions in the absence of an agreement to arbitrate, the Court remarked that "the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements" [78].

Furthermore, in line with the international scope of the Scherk dispute, the Supreme Court, quoting from its decision in Bremen v. Zapata Off-Shore Co. [79], acknowledged that international trade and disagreements arising from that trade cannot be governed exclusively by terms dictated by the United States; such a position would "demean the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries" [80].

3.2. The Importance of Scherk

Even though the Supreme Court's decision in Scherk only briefly mentions the Convention [81], the decision has broad implications as to the proper treatment of certain Convention provisions in U.S. courts. Specifically, the Court's holding suggests that courts should narrowly construe the Convention provisions that can avoid enforcement of an arbitration agreement, especially when domestic policies conflict with those of the Convention. In light of the proliferation of international transactions [82] and the United States' desire to foster their growth [83], the Supreme Court has not insisted upon the preeminence of U.S. national concerns regardless or the repercussions that such a position might have on foreign relations. The Supreme Court expressed the need to acknowledge and respect the interests of other nations in Bremen [84] and reaffirmed this conviction in Scherk by refusing to exalt U.S. securities laws over considerations of facilitating international trade [85]. Although the Convention would allow a signatory nation to assert the primacy of its law, Scherk suggest that the U.S. courts will not blindly pursue this course.

3.3. Judicial Support for the Scherk Inference

The Supreme Court's suggestion that the Convention's escape clause be narrowly construed has been adopted by several circuit courts of appeals in construing the Convention provisions. For example, in I.T.A.D. Associates, Inc. v. Podor Bros. [86], the Fourth Circuit, citing Scherk, held that the "null and void" clause of Article II(3) should not be construed to allow for the waiver of arbitration [87]. The appeals court, in reversing the lower court, held
that the Indian partnership did not waive its contractual right to arbitrate even though it filed the motion to compel arbitration just prior to the trial of the contract claim [88].

Similarly, the Third Circuit Court of Appeals in McCreary Tire & Rubber Co. v. CEAT [89] concluded that the language of Article II demonstrated "the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context" [90].

The U.S. Court of Appeals for the Second Circuit adopted a similar construction of the Convention in Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier [91]. In determining whether the United States' diplomatic break with Egypt gave a court license under Article V(2)(b) to disregard an arbitration agreement between U.S. and Egyptian corporations, the court stressed that "[t]he general pro-enforcement bias informing the Convention and explaining its supercession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of the defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement" [92]. Moreover, the court cautioned that under Article XIV, the reciprocity provision of the Convention, foreign nations could also adopt a broad reading of Article V(2)(b) and thereby refuse enforcement of U.S. arbitration awards [93]. Thus, in order to invoke the public policy doctrine consistently with the Convention, the court limited the invocation to instances in which the forum state's most basic notions of morality and justice were violated [94].

Consequently, the Supreme Court's holding in the 1985 Solar case was decided against this backdrop of narrow judicial construction of the Convention's provision.

4. The Soler Case

On October 31, 1979, Soler Chrysler-Plymouth, Inc. (Soler), a Puerto Rican corporation, entered into a Distributor Agreement with Chrysler International, S.A. (CISA), a Swiss corporation. Pursuant to this agreement, Soler was to sell, within a designated area of Puerto Rico, vehicles manufactured by Mitsubishi, an entity formed by CISA and Mitsubishi Heavy Industries, Inc., a Japanese corporation [95]. At the same time, CISA, Soler, and Mitsubishi entered into a Sales Procedure Agreement (Sales Agreement) which, referring to the Distributor Agreement, provided for the direct sale of Mitsubishi products to Soler [96]. Paragraph VI of the Sales Agreement, labeled "Arbitration of Certain Matters" provided:

All disputes, controversies or differences which may arise between Mitsubishi and Soler out of or in relation to Articles I-B through V of this Agreement or for the
breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association [97].

Due to a slack in the new-car market in early 1981, Soler was having difficulty meeting its minimum sales volume and in the spring of that year requested that Mitsubishi delay or cancel shipment of several orders [98]. At the same time, Soler tried to arrange for the transshipment of automobiles to the continental United States and Latin America. Mitsubishi, however, denied permission to so divert the vehicles [99]. Mitsubishi eventually withheld shipment of 966 vehicles, responsibility for which Soler disclaimed in 1982 [100].

Mitsubishi sued Soler in the United States District Court for the District of Puerto Rico for an order to compel arbitration before the Japan Commercial Arbitration Association [101]. Soler denied the allegations and counterclaimed against Mitsubishi and CISA alleging that they had violated the Sherman Act by conspiring to divide markets in restraint of trade [102].

The district court ordered that all of the issues in the complaint and counterclaim that fell within the parties' arbitration clause be submitted to arbitration [103]. With regard to the antitrust charges, the court, relying upon Scherk, held that the international character of the Mitsubishi–Soler undertaking required that these claims should also be arbitrated [104].

The court of appeals reversed the district court citing American Safety Equipment Corp. v. J.P. McGuire & Co. [105] for the proposition that antitrust claims are not subject to arbitration [106]. The court reasoned that neither Scherk nor the Convention required the abandonment of this doctrine in an international setting [107].

The United States Supreme Court reversed the First Circuit and held 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" [108]. Citing Bremen and Scherk and the United States' implementation of the Convention, the Court noted the strong federal policy in favor of arbitration dispute resolution [109].

The Court also expressed skepticism about the American Safety Equipment doctrine [110]. In assessing this doctrine, the Court reasoned that if a contract which generated an antitrust dispute was in fact a contract of adhesion, a party could directly attack its validity on grounds such as fraud, undue influence or overwhelming bargaining power [111]. In response to the American Safety Equipment concern that the potential complexity of antitrust disputes makes them ill-adapted to the arbitral process, the Court noted that antitrust disputes are not inherently unsuceptible to resolution by arbitration [112]. The Court also noted that parties entering an arbitration agreement assume that streamlined proceedings and expeditious results will best serve their needs [113]. Moreover, believing that competent, conscientious and
impartial arbitrators can be obtained [114], the Court also discounted the argument that decisions on the antitrust regulation of business should not be vested in arbitrators who are often members of the business community [115]. Finally, the Court reasoned that treble damages, available in antitrust proceedings, could be sought in an arbitration tribunal [116]. If an arbitration panel did not accord this statutory claim proper attention, a U.S. court could, pursuant to Article V(2)(b) of the Convention, refuse to enforce a resultant arbitral award as contrary to U.S. public policy [117]. Therefore, the Court held that the elements of the American Safety Equipment doctrine were not compelling enough to outweigh the United States' policy favoring the resolution of disputes through the arbitration process [118].

5. A Two-part Test to Resolve the Issue of Arbitrability

The Supreme Court resolved the question of the arbitrability of international antitrust disputes with little reference to the Convention and the case law interpreting its provisions. The Court essentially analyzed the issue in a balancing test when it weighed the concerns of American Safety against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses [119].

In espousing a balancing test, the Court's decision does not provide for a principled method of resolving the arbitrability of international antitrust disputes. This comment proposes a two-part test that takes into account both Convention and antitrust law in seeking a principled manner of resolving the issue.

5.1. Part One: The Antitrust Prong

The first prong [120] of the test complex a court to assess the international ramifications of disregarding an arbitral agreement and resolving the dispute in U.S. courts under U.S. antitrust law. If the court finds that the potential for negative international repercussions is minimal, the court can assert jurisdiction and accommodate the policy favoring the judicial resolution of antitrust disputes. But if the court determines that the extraterritorial application of U.S. antitrust laws would create international repercussions, the court should refrain from exerting jurisdiction over the dispute and proceed with part two of the test.

5.1.2. Factors to Consider in the Determination of the "Acceptance" of the Application of U.S. Antitrust Laws

The crucial determination in the first part of the test is whether or not the extraterritorial application of U.S. antitrust laws would be accepted by the
foreign state whose citizen is attempting to arbitrate the controversy [121]. The extraterritorial application of U.S. antitrust laws is relevant because if a court rejects an attempt to arbitrate the dispute, the foreign entity would have to defend claims of antitrust violations in U.S. courts. Moreover, many foreign nations have fiercely resisted the extraterritorial application of U.S. antitrust laws [122]. The problem arises frequently since many countries condone business practices which the U.S. antitrust laws prohibit [123].

In analyzing disputes over the extraterritorial application of U.S. antitrust law, the U.S. courts have adopted a balancing approach, weighing the interests of all the nations involved in the dispute [124]. In *Mannington Mills, Inc. v. Congoleum Corp.* [125], the Third Circuit set forth ten considerations that should guide the trial court's determination of the question of jurisdiction over an entity located outside the United States. They are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue [126].

Although critics have taken issue with this "laundry list" of factors [127], several elements have emerged as controlling factors. For example, the first factor, the degree of conflict with foreign law or policy, has been given considerable weight in the balancing process [128]. In accordance with this factor, U.S. courts would decline to exercise jurisdiction in order to avert international friction. Likewise, the sixth factor could also be given much weight in the balancing test [129]. Lastly, considerable weight is given to the fifth factor, the existence of intent to harm or affect U.S. commerce and its foreseeability [130]. This factor, a reformulation of the "effects test" as originally articulated by Judge Learned Hand in *United States v. Aluminum Co. of America* [131], is significant because the United States interest in applying its antitrust laws is nonexistent if U.S. commerce is completely unaffected by the disputed transaction.
In short, the *Mannington Mills* test is relevant in analyzing the first prong of the test, i.e., whether the extraterritorial application of U.S. antitrust laws would be acceptable in a given situation. Like the concerns motivating the *Scherk* opinion, [132] the *Mannington Mills* approach does not subordinate international considerations to domestic policies in resolving an international dispute.

5.2. Part Two: The Convention Prong

The second prong of the proposed test requires the U.S. court to analyze the arbitration agreement under Chapters 1 and 2 of the Arbitration Act and the Convention. If the agreement does not violate any of those provisions, the court must honor the agreement and either enforce a validly issued award or compel arbitration. If the agreement violates any of these provisions, particularly the escape clauses of Articles II and V of the Convention and Chapter 1 of the Arbitration Act, then the court must void the agreement under Article II [133]. In accordance with the *Scherk* opinion, courts should narrowly construe the exemptions invalidating agreements to arbitrate [134]. The lesson of *Scherk* is that due to the international context of these types of disputes, courts should not apply U.S. policies without consideration of the international implications at stake. Rather, courts should consider the international ramifications of a decision to forgo arbitration to accommodate domestic U.S. interests [135]. *Scherk* compels the courts to use the escape clauses sparingly in determining the arbitrability of international antitrust disputes [136]. In other words, the United States' deep-seated concern with maintaining international harmony to enhance commerce should balance any tendency the courts may have to vindicate U.S. antitrust policy by requiring judicial resolution of such disputes.

5.3. Application of the Test to the Soler Controversy

Utilizing this comment's two-part test, a court faced with the *Soler* dispute would reach the same result as the Supreme Court, but in a principled manner. As to the first part, a court would likely find that the extraterritorial application of U.S. antitrust laws would create serious international repercussions. The dispute in *Soler* involved corporations from Switzerland and Japan. Both Switzerland [137] and Japan [138] have antitrust policies that tolerate business activity that restricts competition. In other words, the first *Mannington Mills* factor is implicated since U.S. antitrust law is directly in conflict with the antitrust policy of the foreign states involved in the dispute. Moreover, both Japan and Switzerland have been sensitive to the extraterritorial application of U.S. antitrust laws in the past, thus implicating the sixth *Mannington Mills* factor [139]. Lastly, the fifth *Mannington Mills* factor is invoked in *Soler*. 
Soler Chrysler's antitrust allegation, that Mitsubishi and CISA had conspired to divide up the U.S. auto markets in restraint of trade, if true would have a large foreseeable impact on U.S. commerce. Because the extraterritorial application of U.S. antitrust laws would create international friction, a court faced with the Soler dispute should refrain from exerting jurisdiction over the controversy and proceed to part two.

As to the second prong, a court narrowly construing the escape clauses of the Convention and the Arbitration Act, would find that the parties' agreement does not violate any of the Convention's provisions. In resisting Mitsubishi's motion to compel arbitration, Soler Chrysler did not allege any grounds from which a court could deny the Convention mandate. There is no allegation that the agreement was not validly entered into nor is there any hint that the distribution and sales agreements were in any way in violation of any public policy. Thus, a court would hold the agreement valid and compel arbitration of the antitrust dispute.

In sum, a court faced with the Soler dispute would have a principled manner of assessing the competing interests to hold the international antitrust dispute arbitrable.

6. Conclusion

In order to streamline the resolution of commercial disputes and stimulate international commercial transactions, the United States adopted the Convention in 1970. Because U.S. antitrust laws differ from the antitrust policies of our trading partners, the arbitrability of international antitrust disputes is important if the goals and policies of the Convention are to be upheld. The Supreme Court in Soler analyzed the issue of arbitrability, but it did so in an unprincipled manner. This comment seeks to propose a principled approach by considering the extraterritorial application of U.S. antitrust laws and the pertinent Convention provision. In this way parties to an international commercial transaction will have certainty as to the forum that will adjudicate the dispute.

Notes

[5] Id. at 3355, 3361.


[11] See Letter from Donald B. Straus to Hon. Dean Rusk (March 1, 1966), reprinted in Exec. Doc. E, supra note 9, at 41. Mr. Straus, then president of the American Arbitration Association, in a 1966 letter to the Secretary of State, commented that

[t]here is a growing interest on the part of businessmen throughout the world in the use of arbitration to settle commercial disputes. The increasing volume of trade, the complexity of modern commercial contracts, and the tangled and conflicting laws of the trading nations, all contribute to the advantages arbitration has over litigation in different countries, for settling disputes effectively, quickly and with a minimum of international bitterness.

Id.

[12] Id.

[13] Id.


[15] Id. art. I, para. 2(d).

[16] Id. art. II, para. 1(a).

[17] Convention, supra note 6, at V. The proponent of the award must:

1. File an application for recognition and enforcement of the award with the competent authority in the contracting state;
2. Supply the duly authenticated original award or a duly certified copy;
3. Supply the original arbitration agreement or a duly certified copy; and
4. Supply, if appropriate, a translation of the award and agreement, which may be certified by an official or sworn translator or by a diplomatic or consular agent.


[19] Convention, supra note 6, arts. V, VI.

[20] Id. art. II(1)-(2). In adopting the reservations of Article I(3), the United States opted to apply the Convention only to legal agreements arising out of a commercial relationship. 9 U.S.C. § 202 (1982). Article I(3) sets out the reservations a ratifying nation may adhere to:

When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will
apply the Convention to the recognition and enforcement of awards made only in
the territory of another Contracting State. It may also declare that it will apply the
Convention only to differences arising out of legal relationships, whether contrac-
tual or not, which are considered as commercial under the national law of the State
making such declaration.

Convention, supra note 6, art. I(3).

An agreement or award arising out of such a [commercial] relationship which is
entirely between citizens of the United States shall be deemed not to fall under the
Convention unless that relationship ... has some other reasonable relation with one
or more foreign states.

[22] Convention, supra note 6, art. II(3). Article II(3) declares:

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

This provision and Article II(1), which stipulates that to be recognized an agreement must
pertain to a subject matter capable of settlement by arbitration, allow member nations to insulate
certain disputes from the arbitral process. Along with Article V, which enumerates seven grounds
upon which a foreign award may be challenged, id. art. V, these exemption clauses, if applied
indiscretely, could frustrate the aims of the Convention. See supra notes 8–13 and accompanying
text.

[23] Id. art. II(3).
[24] Id. art. II(1); Article II(1) provides:

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

See Exec. Doc. E, supra note 9, at 19.

[25] The court can refuse to enforce the agreement pursuant to the “null and void” clause in
Article II(3). Id. art. II(3).

[26] Id. art. V(2)(a).
[27] Id. art. V(2)(b).

 Authorities have suggested that exceptions of Article V may be read into Article II, in light of
the anomaly that might arise whereby a court would have to refer parties to arbitration, but then
refuse to enforce any resulting award under the public policy exception of Article V(2)(b); see,
e.g., G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards:
Summary Analysis of Record of United Nations Conference, May/June 1958, 1, 28 (1958);
(Courts “may find an agreement incapable of performance if it offends the law or the public
policy of the forum.”); Exec. Doc. E, supra note 9, at 21 (If broadly construed, these provisions
would provide a court much latitude in refusing to recognize and enforce arbitral agreements and
awards.)

[28] For example, the phrases “null and void,” “in operation or incapable of being performed,”
“subject matter capable of settlement by arbitration,” and “contrary to ... public policy ...” lack
precise meaning and thus could be construed in a number of ways. See infra notes 28–56 and
accompanying text.

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[30] 684 F. 2d 184 (1st Cir. 1982).
[31] Id. at 187.
[32] 417 F. Supp. 207 (S.D.N.Y. 1976). Antco involved a commercial contract of affreightment between Sidermar, an Italian shipowner, and Antco Shipping Co. (Antco), a Bahamian charterer. When a dispute arose, Sidermar initiated arbitration proceedings pursuant to the arbitration clause contained in the agreement. Antco moved to stay the arbitral proceedings, claiming that Sidermar's exclusion of the State of Israel as a designated loading port was desired by Siderman to win favor with the Arab world and that this action offended the public policy of the United States. The district court held that despite the provision concerning Israel, the contract was subject to arbitration noting that the public policy defense should be construed narrowly. *Id.* at 215.

[33] *Id.* (emphasis added).

[34] The Antco court's mode of construction is consistent with Haight's theory as to how courts should apply these provisions, *see supra* note 26 and accompanying text, and underscores the importance of "public policy" to the overall workings of the Convention.


[37] *Id.*

[38] *Id.*

[39] For an example of a court invoking the public policy defense according to its own varying perceptions, see Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P. 2d 905 (1955). In Black both the majority and the dissent justified their decisions on public policy.

[40] 480 F. Supp. 352 (S.D.N.Y. 1979). Transmarine involved a contract, containing an arbitration clause, in which Marc Rich & Co. A.G. (Rich) chartered a vessel owned by Transmarine Seaways Corp. of Monrovia (Transmarine) to load a cargo of crude oil at a Persian Gulf port for discharge into a larger tanker. Transmarine refused to proceed to Hormuz Island as the location of discharge. The resulting dispute between the parties was settled by arbitrators in Transmarine's favor. Transmarine moved for an order confirming the award. Rich, on the other hand, moved to vacate the award, alleging the contract was tainted by duress. The district court held that Rich had not met its burden of establishing duress and entered judgment in favor of Transmarine. *Id.* at 361.

[41] *Id.* at 358 (citations omitted).

[42] *Id.* at 359.

[43] Another case which is helpful in defining public policy is *La Société Nationale v. Shaheen Natural Resources Co.*, 585 F. Supp. 57 (S.D.N.Y. 1983), aff'd, 733 F. 2d 260 (2d Cir.), cert. denied, 105 S. Ct. 251 (1984). The defendant there sought to have the arbitrators' award vacated as contrary to public policy alleging that the parties' underlying contract was a "per se violation of the antitrust laws." The court found it unnecessary to determine whether the contract in fact violated the Sherman Act, but noted in general that "[a]ntitrust arguments interposed as a defense to a contract action ... traditionally have been viewed with disfavor." *Id.* at 63. Because of the summary manner in which the court disposed of the defendant's argument, one cannot infer with any degree of certainty whether courts will recognize an antitrust claim as a valid public policy defense. The case does illustrate the inclination of courts to restrict the use of public policy as a means of circumventing the arbitral process.

[44] *See, e.g.*, Parsons & Whitlemore Overseas Co. v. Société Générale de l'Industrie du Papier, 508 F. 2d 969, 974 (2d Cir. 1974) ("Enforcement ... may be denied ... only where enforcement would violate ... basic notions of morality and justice.").

[45] *See infra* notes 78–87 and accompanying text.


[47] 9 U.S.C. § 207 (1982). The grounds for refusing to enforce an award are set forth in Article V of the Convention. A court may refuse to enforce an award "at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the
recognition and enforcement is sought proof that: (a) the parties to the agreement were "under some incapacity" or the agreement is not valid under the law governing the agreement; (b) the party against whom the award is invoked was denied proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (c) the award deals with a dispute beyond the scope of the arbitration clause as defined by the parties of the arbitral decision exceeds the scope of the controversy submitted; (d) the composition of the arbitral authority or the arbitral proceeding was contrary to the rules governing the agreement; and (e) the award has not yet become binding or has been set aside or suspended by a competent authority. Convention, supra note 6, art. V(1).

Pursuant to article V(2) a court may refuse to enforce an award, without proof from the contesting party, if the competent authority in the country where recognition and enforcement finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Id.

[49] Id. § 208; see Comment, supra note 8, at 485.
[50] 9 U.S.C. §§ 10(a)-(e). A court may refuse to enforce an award:

(a) Where the award was procured by corruption, fraud or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, and in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(e) Where an award was vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

See also Comment, supra note 8, at 486 ("Thus, the scheme developed for enforcement of foreign arbitration awards ... provides the defendant with a network of protection which ... includes that available for enforcement of domestic awards," as well as that provided by the Convention itself.).

[51] Convention, supra note 6, art. XIV.
[52] Comment, supra note 8, at 486-87.
[53] See generally id. (arguing that the liberal invocation of the exception clauses should be tempered by the "desire to obtain the widest acceptance of America's awards among the courts of other signatory states, which also have the loopholes available to them.").

[54] 517 F. Supp. 948 (S.D. Ohio 1981). IDI contracted to build a nitrophosphate plant near Bombay, India, for the Fertilizer Corporation of India (FCI). After the facility was built, a dispute arose concerning the quantity of daily production from the plant. According to the parties' agreement, FCI requested arbitration proceedings that resulted in an award in India in FCI's favor. FCI brought this petition under the Convention to enforce the award.

[55] Id. at 952.
[56] Id. at 953.
[57] Id. (citations omitted).
[59] See supra note 47.
[60] 417 U.S. at 508–09. Plaintiff claimed that Scherk, in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), fraudulently misrepresented certain trademark rights that he had sold to Alberto–Culver as being unencumbered when, in fact, these rights were subject to substantial encumbrances.

[61] Scherk, 417 U.S. at 510 & n.2.
[62] Id.
[64] Scherk, 417 U.S. at 510.
[65] Id. at 519–20.
[69] 346 U.S. at 437. The agreement between plaintiff and defendant contained a clause providing “that arbitration ... be the method of settling all future controversies.” Id. at 429–30.
[70] Id. at 437. The Court thus voided the arbitration provision in the agreement.
[71] Compare Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a) (1982), which provides: “Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.” with Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n (1982), which provides: “Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”
[72] Scherk, 417 U.S. at 515.
[73] Id. at 519–20.
[74] Id. at 515.
[75] Id.
[76] Id. at 516.
[77] Id.
[78] Id. at 517.
[80] Scherk, 417 U.S. at 517, n. 11.
[81] See id. at 520 n. 15. The Court alluded to the Convention, enacted after the controversy arose:

Without reaching the issue of whether the Convention ... would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.

[82] See supra note 1.
[83] See, e.g., The 1985 State of the Union Address, 21 Weekly Comp. Pres. Doc. 140, 145 (Feb. 6, 1985). In his speech, President Reagan remarked:

We have seen the benefits of free trade and lived through the disasters of protectionism. Tonight, I ask all our trading partners, developed and developing alike, to join us in a new round of trade negotiations to expand trade and competition, and strengthen the global economy — and to begin it in the next year.

[84] See supra note 81 and accompanying text.
[85] See supra note 82 and accompanying text.
attend, the partnership set and then rescheduled several trial dates. On the day prior to trial, Podar Bros. removed the action to federal district court and then filed a motion to compel arbitration pursuant to Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 205–208 (1982). The district court rule that although the parties had contractually agreed to arbitrate, Podar Bros. had waived its contractual right through its conduct of apparent acquiescence to litigation. 636 F. 2d at 76.

[87] 636 F. 2d at 77.
[88] Id.

[89] 501 F. 2d 1032 (3d Cir. 1974). In McCreary, plaintiff McCreary Tire & Rubber Company (McCreary), a Pennsylvania corporation, sued CEAT S.p.A. (CEAT), an Italian corporation, for allegedly breaching a distributorship contract. CEAT moved to have the action stayed to permit arbitration of the dispute in accordance with the terms of the contract upon which McCreary sued. Believing the arbitration issue was discretionary under the terms of the Convention, the district court denied CEAT’s motion. Id. at 1033, 1036. The appeals court reversed. Id. at 1037.

[90] Id. Although the issue in McCreary was whether or not the district court’s decision to refer the parties to arbitration under Article II was discretionary, the opinion is illustrative of the court’s inclination to interpret the Convention provisions to enhance international trade.

[91] 508 F. 2d 969 (2d Cir. 1974). Parsons & Whittemore Overseas Co., Inc. (Overseas), a U.S. corporation, contracted with Société Générale de l’Industrie du Papier (RAKTA), an Egyptian corporation, to construct and manage for one year, a paperboard mill in Alexandria, Egypt. The parties included an arbitration clause in their agreement. Performance of the contract was interrupted by the Arab-Israeli Six Day War and Egyptian hostility to Americans. The Egyptian government broke diplomatic ties with the United States and ordered all U.S. citizens expelled from Egypt; they could, however, apply and qualify for a special visa. Overseas’ efforts to secure such a visa were no more than perfunctory. Claiming that the postponement in performance was not due to causes beyond Overseas’ reasonable capacity to control and thus, not excused by the “force majeure” clause of the contract, RAKTA sought damages for breach of contract. RAKTA initiated arbitration proceedings that culminated in an award for RAKTA. Overseas brought suit seeking a declaratory judgment to prevent RAKTA from collecting the award out of a letter of credit issued in RAKTA’s favor by the Bank of America at Overseas’ request. RAKTA counter-claimed to confirm and enter judgment on the arbitration award. The district court ruled in favor of RAKTA. Overseas appealed from this decision on several grounds, one of which was that enforcing the award would violate the public policy of the United States.

[92] Id. at 973.
[93] Id. at 973–74.
[94] Id. at 974.
[95] Soler, 105 S. Ct. at 3349.
[96] Id.
[97] Id.
[98] Id.
[99] Id. at 3349–50.
[100] Id. at 3350.
[101] Id.
[102] Id.
[103] Id. at 3351.
[104] Id.

[105] 391 F. 2d 821 (2d Cir. 1968). In American Safety Equipment, the Second Circuit held that antitrust claims were inappropriate for resolution in the arbitration process. Id. at 826. The court set out several reasons proclaiming an antitrust exception to the national policy in favor of arbitration. First, “a claim under the antitrust laws is not merely a private matter; the Sherman Act is designed to promote the national interest in a competitive economy.” Id. Furthermore,
because antitrust violations could conceivably affect hundreds of thousands or millions of people, the court reasoned that Congress would not have intended "such claims to be resolved elsewhere than in the courts." Id. at 827. Third, the court found that antitrust issues are "prone to be complicated and the evidence extensive and diverse." Id. Additionally, the court noted that decisions regarding "antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community." The court also observed that contracts generating antitrust disputes may be contracts of adhesion, and, therefore, automatic forum determination by such contracts was inappropriate. Lastly, the court noted the vast public interest vested in an antitrust controversy which, together with the other considerations, mandated judicial enforcement of the antitrust laws.


[107] Id.


[109] Id. at 3356–57.

[110] Id. at 3357. The major shortcoming in the First Circuit's Soler opinion is its assertion that the American Safety Equipment doctrine applies with equal force to international antitrust disputes. The court assumed that the existence in international antitrust controversies of the factors underlying the U.S. antitrust arbitration exception would justify the court in extending the doctrine to the context of the Solar case. But a careful analysis of the Scherk and Wilko opinions illustrates the fallacies in the First Circuit's reasoning.

To varying degrees, the same considerations deemed sufficient to give rise to the antitrust exception in domestic disputes are present in cases involving violations of the U.S. securities laws. Disregard of the securities laws can also touch the lives of many who are not directly injured by the act in question. See, e.g., SEC v. Transamerica Corp., 163 F. 2d 511 (3d Cir. 1947) (violation of § 14(a) of the Securities Exchange Act of 1934 affected more than 150,000 persons). Moreover, the securities laws, like antitrust legislation, pose complex substantive, procedural, and evidentiary issues. Lastly, the national interest in enforcing the securities laws is as high a national priority as assuring compliance with the antitrust laws. See Regulation of Securities, S. Rep. No. 47, 73d Cong., 1st Sess. (1933).

But despite the fact that Congress explicitly provided for securities disputes to be resolved in a judicial forum, Securities Act of 1933 § 22(a), 15 U.S.C. § 77v(a) (1982), and the Wilko holding that this provision gives rise to a preeminent right to have a dispute settled in federal court, 346 U.S. at 438, the Supreme Court in Scherk found that in international securities disputes the Wilko concerns are outweighed by concerns and necessities of international trade, and held the agreement to arbitrate was valid. Scherk, 417 U.S. at 510. See supra notes 57–70 and accompanying text.


[112] Id. at 3357–58.

[113] Id.

[114] Id. at 3358.

[115] Id.

[116] Id. at 3358–59.

[117] Id. at 3360.

[118] Id. at 3357.

[119] Id.

[120] This test does not reject the Supreme Court's general framework. The Court affirmed the First Circuit "approach which sought to first determine whether the parties agreement to arbitrate reached the issues involved in the dispute and if it did then consider whether external legal constraints foreclose arbitration of the claims. Id. at 3355. This comment prefers to provide a principled manner of analyzing the issue once it is determined that the arbitration agreement covers the issues in dispute.


The most prominent of the blocking statutes is the British Protection of Trading Interest Act, see Protection of Trading Interests Act, 1980, ch. 11, which serves three basic purposes. First, it blocks U.S. discovery requests. Second, the act blocks enforcement in the U.K. of foreign judgments for multiple damages against British defendants. Lastly, the Act allows British defendants to recover the punitive portion of any foreign multiple damage judgment. This last element, a "clawback" provision, is a "retaliatory measure aimed primarily at American treble damage actions." Circa, supra at 249; see also, Cannon, supra note 120 (outlining application of the British blocking statute in the Laker Airways antitrust litigation).

[123] For example, British law allows the predatory pricing scheme which drove Laker Airways out of business. See Cannon, supra note 120, at 64–72.

[124] There is considerable support within the United States for the balancing approach which takes into account the competing interests of foreign states. The U.S. has entered into bilateral agreements with Australia, see Agreement Relating to Cooperation on Antitrust Matters, United States–Australia, June 29, 1982, T.I.A.S. No. 10365, and West Germany, see Agreement Relating to Mutual Cooperation Regarding Destructive Business Practices, June 23, 1976, United States–West Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, whereby both signatories pledged mutual respect for the other's "national" interests. Moreover, the Justice Department has adopted the approach which weighs the concerns of foreign nations before extending the reach of U.S. antitrust laws to international disputes. Antitrust Div., U.S. Dep't of Justice, Antitrust Guide for International Operations (1977); see also Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965); Restatement of the Foreign Relations Law of the United States (Revised) §§ 402, 403, 415 (Tent. Draft No. 2, 1981) (enumerating factors to be considered in balancing the propriety of asserting jurisdiction over a foreign nation in an antitrust dispute).

[125] 395 F. 2d 1287 (3d Cir. 1979).

[126] Id. at 1297–98.


[128] See, e.g., International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981); see also Griffin, Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws, 18 Stan. J. Int'l L. 279, 289 (1981) (arguing that in giving consideration to a conflict of policies like the one the district court faced in OPEC, U.S. courts should follow the OPEC court and decline jurisdiction to avert the extreme international dissension that would follow a contrary decision).

[129] Circa, supra note 121, at 275.

[130] Id.

[131] 148 F. 2d 416 (2d Cir. 1945).
[133] If a court neither asserts jurisdiction nor enforces the agreement to arbitrate, the parties would have to seek an alternative means of dispute resolution, such as intergovernmental consultation. But these cases would be rare. In most cases, if the agreement to arbitrate is voided, there would be substantial evidence for the court to assert jurisdiction over the matter under Mannington Mills factor 4. See supra note 125 and accompanying text.
[134] See supra notes 81–85 and accompanying text.
[135] Id.
[136] Id.
[139] See supra notes 137–38.