10-1973

Scherk v. Alberto-Culver Co.

Lewis F. Powell Jr.

DISCUSS

Grant

I agree with J. Stevens dissent. Act of 34 does not apply to this case: purchase of foreign business - not securities; sophisticated parties; Fed. policy in favor of arbitration, etc.

Resp., a U.S. corp., purchased 3 foreign business entities (holding certain patent rights, etc) from Petr, a German citizen living in Switzerland. The buyer & seller were sophisticated & represented by counsel. The closing occurred in Geneva.

The purchase agt. contained a broad arbitration clause - calling for arbitration of disputes in Paris & under arbitration rules of International Ch. of Commerce.

Resp. found later that the patents owned by the businesses it had acquired were of doubtful validity, & Resp. sued in Ill DC (don't know how service was effected) claiming fraud & 10(b)(5) violation - ask for rescission.

Petr. sought to enjoin suit as violative of arbitration agt. CA7 (2 to 1) held that Sec 14 of Act of 34 (parties can't waive rights under Act) is applicable and the agt. to arbitrate is not enforceable where a 10(b)(5) claim is asserted.

This means that the customary warranties & covenants in a merger or purchase of assets, including arbitration clause, are subject to Act of 33 & 34 - & arbitration agreement of parties is unenforceable.

Deny

gegj

Preliminary Memo

January 11, 1974 Conference
List 1, Sheet 2

No. 73-781

SCHERK

v.

ALBERTO-CULVER COMPANY

Cert to CA 7
(Grant, D.J.,
Gordon, D.J.;
Stevens, dissenting)
Federal - Civil

Timely

1. SUMMARY: In an action brought by resp in the USDC for the N.D. Ill. (Lynch) alleging material misrepresentations and omissions, in connection with resp's purchase from petr of 3 foreign business entities, in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, and common law fraud, deceit and breach of expressed contractual warranties, petr moved for a stay of the District Court proceedings pending arbitration of the dispute in accordance with the terms of the acquisition

contracts and instituted arbitration proceedings. The District Court, on the basis of Wilko v. Swan, 346 U.S. 427 (1953), denied the stay and enjoined petr from proceeding with arbitration. CA 7 (Grant, D.J., Gordon, D.J.) affirmed, one judge (Stevens) dissenting.

2. FACTS: Resp Alberto-Culver [A-C] manufactures and sells cosmetics in domestic and international markets and is centered in Illinois. Petr Scherk is a German citizen residing in Switzerland who formerly was engaged in the manufacture and sale of cosmetics in western Europe through a sole proprietorship manufacturing facility in Berlin [FLS] and a Liechtenstein holding company [SEV] licensing the sale and distribution of resp's cosmetics on an international basis under a variety of trademarks. Petr also owned another German business entity [Lodeva] which was and remains dormant.

Beginning in 1967, A-C commenced negotiations with Scherk to acquire petr's 3 businesses. Agreement was reached in Illinois in 1968 on the basic provisions of the acquisition agreement, the agreements were ultimately signed, after further negotiations, in Vienna in January 1969, and the closing was in June 1969 in Geneva. The agreement provided that SEV, an entity which had no U.S. counterpart, would be converted to a stock corporation and A-C would acquire 100% of the stock. It also provided that as to the acquisition of SEV and FLS:

> "The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall

> request that the matter be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France. . . . All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The law of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

Nearly a year after the closing, A-C discovered that the trademark rights it had purchased were "subject to substantial encumbrances," as the CA put it. As a result, A-C sought to rescind the purchase agreement and offered the business back to Scherk, who refused to accept it. Scherk started to institute arbitration in early 1971, but did not file a request to arbitrate with the International Chamber of Commerce [ICC] until November; in the interim in June, resp brought the present suit based on securities and common law fraud. In addition to unsuccessfully moving for dismissal on various grounds not in issue here, including failure to state a cause of action under the Securities Exchange Act, petr moved for a stay of the District Court action pending arbitration before the ICC. The District Court denied the motion and enjoined petr from continuing with the arbitration proceedings; on interlocutory appeal, the CA affirmed.

3. THE CA DECISION: The CA majority approved of the District Court's reliance on Wilko v. Swan, supra, where this Court held, in a suit by a customer against a securities brokerage firm, that an

agreement to arbitrate a future controversy contained in margin agreements was a "stipulation" waiving the right of a security buyer to select a judicial forum for determination of claims which might later arise under the Securities Act of 1933 and was, therefore, void under § 14 of the Act, 15 U.S.C. § 77n, which renders void "[a]ny condition, stipulation or provision binding any person acquiring any security to waive compliance with [the Act or SEC rules]." The Court noted in Wilko that two conflicting policies of Congress, one favoring the use of arbitration and the other protecting the rights of investors and forbidding waiver of those rights, were involved, and decided "that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." 346 U.S., at 438. The CA majority rejected petr's attempt to distinguish Wilko on the ground that a domestic transaction was involved there and the rule should be otherwise when dealing with international transactions under the approach of M.S. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, which held that a forum-selection clause contained in a towing contract negotiated at arms-length by experienced businessmen, providing for the litigation of any dispute in the High Court of Justice in London, should be specifically enforced by U.S. courts unless it could be shown that enforcement would be unreasonable and unjust, or that the clause was invalid for fraud or overreaching. Zapata did not involve the sale of securities and was therefore not controlling.

Judge Stevens, in dissent, recognized that the relevant statutory language in § 29(a) of the 1934 Act, 15 U.S.C. § 78cc(a) (App., at 38), was substantially identical to that in § 14 of the 1933 Act and it was therefore not easy to distinguish this case from Wilko. Nonetheless, he urged that § 29(a) should permit enforceability of certain agreements to arbitrate disputes which involve a claimed violation of the 1934 Act, because enforcement in some circumstances, including the present ones, would not be contrary to the policy of the Act and, in such situations, the stronger policy mandated by § 201 of the Federal Arbitration Act, 9 U.S.C. § 201, which provides for the enforcement in U.S. courts of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, should override. Stressing the recognition in Zapata of the expansion of American business abroad in the last 20 years, and the broad coverage of the 1934 Act to situations where the controversy is not between the sophisticated securities dealer and the average much less informed investor, but where Rule 10b-5 is applied to "negotiated transactions in which the amount at stake typically justifies an independent audit or other verification of the property being purchased or sold, and the transfer of securities is a function of the form in which the parties elect to cast their transaction," J. Stevens thought there was correspondingly less justification for prohibiting waiver of the right to sue in the district courts for securities violations. In this case, the dispute was covered by contract warranties and the trademark deficiencies were subject to pre-closing verification by a sophisticated American business concern so that including the "fraud"

language of 10b-5 in the complaint is far less significant than the desirability of having the ICC arbitrate the "questions of foreign law" which should determine the parties' rights in accordance with the arbitration clause in the acquisition agreements.

4. CONTENTIONS:

a. Petr first contends that the CA ignored and effectively nullified the policy of Congress as expressed in the 1970 Federal Arbitration Act, 9 U.S.C. § 201, et. seq. Resp answers that Wilko and § 29(a) of the 1934 Act invalidate agreements to arbitrate future disputes under the 1934 Act, especially in situations as here, where the petr violated the Act within the United States. Moreover, the 1958 Convention (attached as an appendix to the response) explicitly provides that a court of a contracting party need not refer a dispute to arbitration if it finds the agreement to arbitrate "null and void," Art. II ¶ 3, and that enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it," or the "recognition or enforcement of the award would be contrary to the public policy of [the] country" asked to enforce or recognize the award.

b. Petr next contends that the policy considerations found controlling in Zapata apply with equal force to the issue of enforcing arbitation clauses in international commerce to in arm's length bargaining between sophisticated businessmen. Resp considers Zapata inapplicable because it did not involve an alleged violation of a federal statute providing for exclusive jurisdiction in the federal courts, as is provided for securities violations, and for

no waiver of rights under the Act as does § 29(a). Moreover, Zapata itself noted, 407 U.S., at 15, that a "contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision."

c. Petr suggests Wilko should be reexamined in the context of sophisticated businessmen of equal bargaining strength operating in international commerce, along with the lines of Judge Stevens' dissent. Resp urges that Wilko controls and that the Court recognized in Superindendent of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6, 10, that "the Act protects corporations as well as individuals who are sellers of a security."

d. Finally, petr invokes the specter of wide-ranging detrimental effects on international commercial transactions in which American businesses participate if, contrary to agreements to arbitrate before international tribunals, they can avoid arbitration and sue in the federal courts. Resp replies that no such effects will occur and all that is involved here is requiring foreigners who do business in this country to comply with our securities laws.

5. DISCUSSION: The conflicting policies which the Court in Wilko considered "not easily reconcilable" are perhaps even more irreconcilable in this case where the 1934 Act is being applied to an alleged fraud violation arising from the acquisition by one sophisticated investor of the stock of another and where the element of international commercial transactions is involved, with the attendant policy considerations the Court recognized in Zapata. In

short, there is much merit in Judge Stevens' dissent below. Still, fraud is the central target of the securities laws, even if common law actions are also available for remedy of the fraudulent activities, and Wilko found the balance to be in favor of application of the non-waiver provisions of the Acts. There is no indication that the Federal Arbitration Act's adoption of the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards was meant to express any greater policy in favor of arbitration than the older provisions of the Federal Arbitration Act not found so important in Wilko as to override the Securities Act's non-waiver provisions. Indeed, the provisions cited by resp are wholly consistent with the Wilko approach. Thus, unless the Court desires to consider different rules applicable when the securities violation is alleged to have occurred between businessmen of equal bargaining strength negotiating in international commerce, Wilko was correctly applied by the CA, and the petn should be denied.

There is a response.

12/28/73 Varat CA and DC Opinions in Petition

ME Additionally, you should note that the Fed. Arb. Act is far from clear in what it accomplishes by way of substantive policy. This is a question tangentially involved in Merrill Lynch, and I do not think you want to return to it.

1-11-73 Conference

Court CA - 7 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 73-781

Submitted ....., 19... Announced ....., 19...

FRITZ SCHERK, Petitioner

DISCUSS

vs.

ALBERTO-CULVER COMPANY

Relist

11/15/73 Cert. filed.

The problem will be to get around Wilko

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

No. 73-781, Scherk v. Alberto-Culver Conf. 4/26/74

The Chief Justice D/G or Reverse

Immensely imp. case, with far reaching impact on international transactions.

Resp. undoubted benefited from its agreement to use a neutral forum.

~~He~~ Will try to find way to distinguish Wilko

Douglas, J. Affirm

29a of 34 Act is identical with 14 of 33 Act. Thus Wilko controls.

Purchase of stock is a security. Case is simple.

Brennan, J. Affirm

Can't distinguish Wilko on ground of difference bet. 33 & 34 Act.

In Boys Market we looked at intervening events which watered down Jenkins (?). But here there are no sig. intervening events.

This case will have a profound effect on international trade & with signatories to Convention.

But we are bound by Wilko

Stewart, J. Reverse

Feels strongly that to affirm would be a shocking miscarriage.

Need not overrule Wilko — there have been intervening events, this is an international transaction.

Would also be willing to overrule Wilko if necessary.

White, J. Affirm (tentative)
~~Sp. P~~ Wilko governs
unless we can distinguish.
We might rely on the
international convention
— but not sure this is
enough.
There has been a Treaty
approved by Congress
— which

Marshall, J.

Blackmun, J. Reverse
CA7 is wrong & parties.
Alexander-Gardner gives
him some comfort (why?)

Powell, J. Reverse
As to grant to review an
interlocutory order, the D.C. enjoined
resort to arbitration & this was
dispositive of a central issue.
(I have not studied my
substantive reasons

Rehnquist, J. Pass
All of agreement with Roth.
but Wilko different to
distinguished.
Possibly the approval
of the Arbitration Convention
by Congress is supportive —
but is quite uncertain.

Reverse

No. 73-831 SCHERK v. ALBERTO-CULVER

Argued 4/29/74

Hanley (for Petr) ~~(Resp)~~

A battery of lawyers took work to put together the purchase agts - some 125 pgs. Both U.S. & Germany ally, Trade Mark experts, Peat Marwick, etc

Part of purchase price worked in form of ~~note~~ notes

Issue whether

Supreme Court of the United States
Washington, D. C. 20543

File Carefully

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 29, 1974

Re: No. 73-781 - Scherk v. Alberto-Culver Co.

Dear Chief:

I now cast a tentative vote to reverse in this case on the following admittedly sketchy basis:

(1) Wilko v. Swan, 346 U.S. 427, 434-435 states that the "right to select a judicial forum is the kind of 'provision' that cannot be waived under section 14 of the Securities Act."

(2) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enacted after the Securities Act, since it has the status of a treaty, superseding that Act if there is a conflict, reserves possible "public policy" defenses to the enforcement stage of the arbitration proceeding, rather than permitting them to be raised in the original action to compel arbitration. See Article V(2). I do not believe the language of Article II(3) speaking of agreements that are "null and void, inoperative or incapable of being performed" is dealing with the sort of public policy defense that Wilko v. Swan allowed.

(3) If the parties can therefore be required to submit the claim to arbitration, the Convention obviates the only claim that Wilko preserved to the unwilling party: the right to insist that the judicial forum be chosen. Any other public policy defenses going to the merits of the arbitration award would be preserved to the enforcement stage.

Sincerely,

HLW

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAY 2 2 1974

No. 73-781

Recirculated: _____

Fritz Scherk, Petitioner,
v.
Alberto-Culver Company.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1974]

Received will join but write brief concurrence

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

ownership of these trademarks. In addition, the contract contained an arbitration clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that "[t]he laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."[1]

The closing of the transaction took place in Geneva, Switzerland, in June 1969. Nearly one year later Alberto-Culver allegedly discovered that the trademark rights purchased under the contract were subject to substantial encumbrances that threatened to give others superior rights to the trademarks and to restrict or preclude Alberto-Culver's use of them. Alberto-Culver thereupon tendered back to Scherk the property that had been transferred to it and offered to rescind the contract. Upon Scherk's refusal, Alberto-Culver commenced this action for damages and other relief in a federal district

[1] The arbitration clause relating to the transfer of one of Scherk's business entities, similar to the clauses covering the other two, reads in its entirety as follows:

"The parties agree that if any controversy or claim shall arise out of the agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."

court in Illinois, contending that Scherk's fraudulent representations concerning the status of the trademark rights constituted violations of § 10 (b) of the Securities Exchange Act of 1937, 15 U. S. C. § 78j, and Rule 10b–5 promulgated thereunder, 17 CFR §240.10b–5.

In response, Scherk filed a motion to dismiss the action for want of personal and subject matter jurisdiction as well as on the basis of forum non conviens, or, alternatively, to stay the action pending arbitration in Paris pursuant to the agreement of the parties. Alberto-Culver, in turn, opposed this motion and sought a preliminary injunction restraining the prosecution of arbitration proceedings.[2] On December 2, 1971, the District Court denied Scherk's motion to dismiss, and, on January 14, 1972, it granted a preliminary order enjoining Scherk from proceeding with arbitration. In taking these actions the Court relied entirely on this Court's decision in *Wilko* v. *Swan*, 346 U. S. 427, which held 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, barring "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . ." 15 U. S. C. § 77n.[3] The Court of Appeals for the Seventh Circuit, with one judge dissenting, affirmed, upon what it considered the controlling authority of the *Wilko* decision. 484 F. 2d 611. Because of the importance of the question presented we granted Scherk's petition for a writ of certiorari. — U. S. —.

[2] Scherk had taken steps to initiate arbitration in Paris in early 1971. He did not, however, file a formal request for arbitration with the International Chamber of Commerce until November 9, 1971, almost five months after the filing of Alberto-Culver's complaint in the Illinois federal court.

[3] The memorandum opinion of the District Court is unreported.

I

The Arbitration Act of 1925, 9 U. S. C. § 1 *et seq.*, reversing centuries of judicial hostility to arbitration agreements,[4] 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); see also S. Rep. No. 556, 68th Cong., 1st Sess. (1924). Accordingly, the Act provides that an arbitration agreement such as is here involved "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.[5] The Act also provides in § 3 for a stay of proceedings in a case where a court is satisfied that the issue before it is arbitrable under the agreement, and § 4 of the Act directs a federal court to order parties to proceed to arbitration if there has been a "failure, neglect, or refusal" of any party to honor an agreement to arbitrate.

In *Wilko* v. *Swan*, 346 U. S. 427, this Court acknowledged that the Act reflects a legislative recognition of

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[4] English courts traditionally considered irrevocable arbitration agreements as "ousting" the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act. See H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924); Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp. Prob. 580.

[5] Section 2 of the Arbitration Act renders "valid, irrevocable, and enforceable" written arbitration provisions "in any maritime transaction or a contract evidencing a transaction involving commerce . . . ," as those terms are defined in § 1. In *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, this Court held that the stay provisions of § 3 apply only to the two kinds of contracts specified in §§ 1 and 2. Since the transaction in this case constituted "commerce . . . with foreign nations," 9 U. S. C. § 1, the Act clearly covers this agreement.

court in Illinois, contending that Scherk's fraudulent representations concerning the status of the trademark rights constituted violations of § 10 (b) of the Securities Exchange Act of 1937, 15 U. S. C. § 78j, and Rule 10b–5 promulgated thereunder, 17 CFR §240.10b–5.

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the "desirability of arbitration as an alternative to the complications of litigation," *id.*, at 431, but nonetheless declined to apply the Act's provisions. That case involved an agreement between Anthony Wilko and Hayden, Stone & Co., a large brokerage firm, under which Wilko agreed to purchase on margin a number of shares of a corporation's common stock. Wilko alleged that his purchase of the stock was induced by false representations on the part of the defendant concerning the value of the shares, and he brought suit for damages under § 12 (2) of the Securities Act of 1933, 15 U. S. C. § 77*l*. The defendant responded that Wilko had agreed to submit all controversies arising out of the purchase to arbitration, and that this agreement, contained in a written margin contract between the parties, should be given full effect under the Arbitration Act.

The Court found that "[t]wo policies, not easily reconcilable, [are] involved in this case." 346 U. S., at 438. On the one hand, the Arbitration Act stressed "the need for avoiding the delay and expense of litigation," *id.*, at 431, and directed that such agreements be "valid, irrevocable, and enforceable" in federal courts. On the other hand, the Securities Act of 1933 was "[d]esigned to protect investors" and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale," by creating "a special right to recover for misrepresentation . . . ." *Id.*, at 431 (footnote omitted). In particular, the Court noted that § 14 of the Securities Act, 15 U. S. C. § 77n, 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."

The Court ruled that an agreement to arbitrate "is a

'stipulation,' and [that] the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act."[6] Thus, Wilko's advance agreement to arbitrate any disputes subsequently arising out of his contract to purchase the securities was unenforcable under the terms of § 14 of the Securities Act of 1933.

Alberto-Culver, relying on this precedent, contends that the District Court and Court of Appeals were correct in holding that its agreement to arbitrate disputes arising under the contract with Scherk is similarly unenforceable in view of its contentions that Scherk's conduct constituted violations of the Securities Exchange Act of 1934 and rules promulgated thereunder. For the reasons that follow, we reject this contention and hold that the provisions of the Arbitration Act cannot be ignored in this case.

At the outset, it should be pointed out that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12 (2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil liability, 346 U. S., at 431.

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[6] The arbitration agreement involved in Wilko was contained in a standard form margin contract. But see the dissenting opinion of Mr. Justice Frankfurter, 346 U. S., at 439, 440, concluding that the record did not show that "the plaintiff [Wilko] in opening an account had no choice but to accept the arbitration stipulation . . . ." The petitioner here would limit the decision in *Wilko* to situations where the parties exhibit a disparity of bargaining power, and contends that, since the negotiations leading to the present contract took place over a number of years and involved the participation on both sides of knowledgeable and sophisticated business and legal experts, the *Wilko* decision should not apply. See also the dissenting opinion of Judge Stevens of the Court of Appeals in this case, 484 F. 2d, at 615. Because of our disposition of this case on other grounds, we need not consider this contention.

There is no statutory counterpart of § 12 (2) in the Securities Exchange Act of 1934, and neither § 10 (b) of that Act nor Rule 10b–5 speaks of a private remedy to redress violations of the kind alleged here. While federal case law has established that § 10 (b) and Rule 10b–5 create an implied private cause of action, see 6 Loss, Securities 3869–3873 (1969) and cases cited therein; cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1963), the Act itself does not establish the "special right" that the Court in Wilko found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any "provision" of the respective acts,[7] certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act. In particular, the Court in Wilko noted that the jurisdictional provision of the 1933 Act, 15 U. S. C. § 77v, allowed a plaintiff to bring suit "in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited." 346 U. S., at 431. The equivalent provision of the 1934 Act, by contrast, provides for suit only in the federal district courts that have "exclusive jurisdiction,"

[7] Section 14 of the Securities Act of 1933, 15 U. S. C. § 77n, provides as follows:

"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."

Section 29 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (a), 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."

While the two sections are not identical, the variations in their wording seem irrelevant to the issue presented in this case.

15 U. S. C. § 78aa, thus significantly restricting the plaintiff's choice of forum.

Even if it could be said, however, that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934, the respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, and whose activities were largely, if not entirely, directed to European markets.

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict of laws problems would arise. In this case, by contrast, in the

absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.[8]

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict of law rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[9]

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if

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[8] Together with its motion for a stay pending arbitration, Scherk moved that the complaint be dismissed because the federal securities laws do not apply to this international transaction, cf. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326 (CA2 1972). Since only the order granting the injunction was appealed, this contention was not considered by the Court of Appeals and is not before this Court.

[9] See Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049, 1051 (1961). For example, while the arbitration agreement involved here provided that the controversies arising out of the agreement be resolved under "[t]he laws of the State of Illinois," *supra*, n. 1, a determination of the existence and extent of fraud concerning the trademarks would necessarily involve an understanding of foreign law on that subject.

Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingnes and ability of businessmen to enter into international commercial agreements.

The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to a case such as the one before us. In *Wilko* the Court reasoned that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him . . . ." 346 U. S., at 435. In the context of an international contract, however, these advantages become chimerical since, as indicated above, an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice.

Two Terms ago in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, we rejected the doctrine that a forum-selection clause of a contract, although voluntarily adopted by the parties, will not be respected in a suit brought in the United States "unless the selected state would provide a more convenient forum than the state in which suit is brought." *Id.*, at 7. Rather, we concluded that a "forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. We noted that "much uncertainty and possibly great

inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elmination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.*, at 13–14.

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.[10] The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate his solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts . . . . 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. *Id.*, at 9.[11]

For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising

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[10] Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, "[t]he laws of the State of Illinois" were explicitly made applicable by the arbitration agreement. See n. 1, *supra*.

[11] In *The Bremen* we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement [is] unaffected by fraud . . . ." 407 U. S. 1, 12–13. This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion. Compare *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395.

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.[12]

[12] Our conclusion today is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision. On June 10, 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1970 the Senate approved the treaty, 3 U. S. T. 2517, T. I. A. S. No. 6997, and Congress passed Chapter 2 of the United States Arbitration Act, 9 U. S. C. §§ 201 ff., in order to implement the Convention. Section 1 of the new chapter provides unequivocally that the Convention "shall be enforced in United States courts in accordance with this chapter."

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was 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. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. E, 90th Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049 (1961). Article II (1) of the Convention 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."

In their discussion of this Article, the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. See Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of United Nations Conference 24–28 (1958).

Without reaching the issue of whether the Convention, apart from

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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the considerations expressed in this opinion, 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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 30, 1974

MEMORANDUM TO THE CONFERENCE:

I have sent to the printer a dissent in No. 73-781 Scherk v. Alberto-Culver Company.

Yours faithfully,

WOD

William O. Douglas

June 2, 1974

No. 73-781 Scherk v. Alberto-Culver

Dear Potter:

Please join me in your opinion for the Court.

If I can find the time this week I may add a few paragraph in a concurrence recording my view with respect to the Securities Acts as applicable in this case.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

lfp/ss 6/2/74

File Copy

Rough first draft
— not used.

No. 73-781 SCHERK v. ALBERTO-CULVER COMPANY

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court and write only to address an additional issue. This action was instituted by Alberto-Culver, alleging that it was defrauded in the acquisition of Kherk's businesses in violation of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.

In my view that Act has no application whatever to the transaction involved in this litigation. Indeed, its application here finds no support in the terms of the Act and is a perversion of plain congressional intent and ~~xxxxxx~~ purpose reflected in the Act.

Section 10(b), in relevant part, provides that it shall be unlawful for any person, directly or indirectly, by use of the mails or any instrumentality of interstate commerce, to "use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device in contravention of such rules and regulations as the Commission may prescribe. . . ."

Rule 10b-5, in somewhat expansive terms, amplifies and makes more specific the language of § 10(b). But the core of these provisions, as well indeed as of the entire Act, is the term "security". Unless a security is purchased or sold the Act simply does not apply. Section ___(a)(10) [15 U.S.C. 78(c)(a)(10)] defines the term "security" broadly.* Nothing is contained in the definition which remotely embraces a purchase or sale of the assets of a business, certainly in a context like the transaction involved in this case.

The relevant facts, as found by the District Court, are as follows: Scherk owned several businesses engaged in the manufacture and distribution of cosmetic products primarily in Western ~~Europe~~ Europe. Following protracted negotiations, in which Alberto was represented by three

*Here quote the entire paragraph defining security.

law firms, an international accounting firm and patent counsel, an agreement of purchase and sale of three of Schark's businesses was executed by the parties. One of these businesses, SEV, was a ~~[illegible]~~ Liechtenstein business entity with no American counterpart, and as a part of the transaction and at the request of Alberto SEV was converted into Liechtenstein stock corporation. It was SEV which held the trademarks involved in this litigation. As the District Court noted:

> "The gist of plaintiff's complaint is that defendant misrepresented the value and validity of certain trademarks held by SEV which were an integral component of the transaction in question."

The District Court held that the transfer of all of SEV's stock was a sale of securities within the meaning of § 10(b) of the Act. The Court of Appeals, with Judge Stevens dissenting, affirmed.*

*The shares of one of the other businesses purchased, a German corporation, were also transferred. But the alleged fraud relates to the trademarks held by SEV.

In a case of this kind, the substance of the transaction, not its form, should control. As the District Court found, and indeed, the parties concede, Alberto-Culver desired to acquire and in fact did acquire "three business entities". These included a German corporation, a sole proprietorship, and a Liechtenstein corporation formed upon the insistence of Alberto-Culver. Indeed, as conceded in oral argument Alberto-Culver insisted on the incorporation of this entity for its own tax purposes.* Normally, a corporation desiring to acquire another corporation will pursue one of three methods: (i) merger; (ii)purchase of stock, which may be followed by a liquidation; and (iii) purchase of assets and assumption of liabilities. The selection of the acquisition method is usually influenced in major part by tax consequences,

*Check the oral argument near the end to verify the above.

whether the stock of the corporation to be acquired is widely held, whether 100% ownership is desired, and various other business considerations.

Where a proprietorship or partnership is acquired, the transaction may take the form simply of a sale of assets or there may be an incorporation ~~of~~ preliminary to the transfer. It is unnecessary to say that no acquisition of an entire business, where the method employed is transfer of stock, is ever convered by 10(b) of the Act. There may be situations where the substance or essence of the transaction is in fact the purchase and sale of securities. But certainly in a case where one large business interest is seeking to ~~buy~~ acquire the entire business of another large interest for the purpose of operating it, if blinks reality to say that a ~~security~~ security's transaction occurs within the language and intent of § 10(b). In this case Alberto-Culver's purpose was to acquire these business entities - their assets and going concern value - in Western Europe. Alberto-Culver desired to operate these businesses itself, and was free from the risk of acquisition

to convert them into such business forms as best suited its tax and business purposes. It is plain that Alberto-Culver had no interest in merely becoming a shareholder in Scherk's enterprises. In short, the purchase here was not in any realistic sense a security's transaction. It was the 100% acquisition of businesses by a strong, sophisticated purchaser fully capable of making all necessary investigations, and which indeed did make such investigations through American and European and accountants.

There is nothing in the history or language structures of the Securities Acts of 1933 and 1934 which remotely suggest an intent or purpose to apply to transactions such as this or to afford protection to parties such as Alberto-Culver.*

*In Wilko v. Swan, 346 U.S. 427, 435 (1953), the Court commented that "It is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers [of securities] labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers."

The complaint in this case should have been dismissed.

MEMORANDUM

TO: Mr. John Jeffries DATE: June 3, 1974

FROM: Lewis F. Powell, Jr.

No. 73-781 Scherk v. Alberto-Culver

Here is a rough draft of a concurrence in Alberto-Culver which I would appreciate your putting in appropriate form, assuming that you see no fatal flaw in my reasoning.

I am aware that there are Circuit Court opinions which have gone quite far in applying 10(b) and 10b-5 to transactions that I would consider not within the scope of the Act. One or two of these cases are cited in the opinions below. I would appreciate your adding in a note a reference to at least two or three of such cases, indicating that although some Circuit Courts have gone rather far in extending the original purpose and meaning of § 10(b), this Court has had no occasion to consider the application of the Act to a situation comparable to that presently involved.

One other point. Justice Stewart's opinion does not mention this issue, as it was not presented to us as one of the errors assigned. I will ask Justice Stewart to add a note to his opinion stating that for this reason the Court does not address the issue. If he is unwilling to do this, I will have to add a note generally to that effect, and saying further

that in my view this issue having been raised by the pleadings and considered by the courts below is one which we are free to consider and as it goes to the viability of the entire litigation, disposes of the case.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1974

Re: No. 73-781 - Schork v. Alberto-Culver Co.

Dear Potter:

While I agree with the result you reach and with most of the reasoning by which you arrive at that result, I have some difficulty at two points in your proposed opinion. I hope you do not mind too much if I venture to state the sources of my difficulty.

1. I suspect the benefit of the rather technical distinction you draw between the "special right" in Wilko and its absence in this case [discussed on pages 6-8] is marginal and does not really justify its inclusion. I am not entirely certain that I agree with the distinction. It seems to me that the implied right of action under the Court's decisions is not different from the so-called "special right" in the Wilko case, since the implied right adheres to Rule 10b-5 and § 10 of the Act, and is thereby included in the sweep of § 29(a). I see no apparent reason why the two are different. Even if the distinction is a proper one, you hint on page 8 that the discussion is somewhat gratuitous. For me, it raises more questions than it answers and it seems that it is likely to pose problems in later cases in which the waiver provisions are asserted as a defense.

Adopted by Mr. Justice Stewart in part. This discussion will remain but it will altered to make it less noticeable

2. I am inclined to believe that more prominence should be given to the Arbitral Convention and to those provisions of the United States Arbitration Act that make the Convention a part of the law of this country. This is more a matter of emphasis than substance, but it is, I believe, important. You refer to the Convention in your final footnote, but I wonder whether it does not deserve a higher level of recognition. I would propose that the following, or something similar to it, be inserted after your first paragraph on page 4 of your opinion:

Mr. Justice Blackmun has withdrawn this suggestion after a conversation with Mr. Justice Stewart.

"Chapter 2 of the Act, 9 U.S.C. §§ 201, et seq., provides for the recognition and enforcement of foreign arbitral awards. It was enacted in 1970 to implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Section 1 of the new chapter unequivocally provides that the Convention 'shall be enforced in United States courts in accordance with this chapter.' The goal of the Convention, and the principal purpose underlying American adoption of it and its implementation, was 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 signatory countries."* Article II(3) of the Convention provides:

> '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.'

Thus, a local court, when seized of an action like the present case, should, at the request of one of the parties, refer the parties to arbitration, unless the arbitral agreement is 'null and void, inoperative or incapable of being performed.'** Here, respondent contends that the agreement is voided by § 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), providing:

> '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.'"

The two footnotes would be, respectively:

"*/ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. E. 90th Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049 (1961)."

"**/ Article II(1) also limits recognition of agreements to those 'concerning a subject matter capable of settlement by arbitration.' The issues raised in this case are appropriate for arbitration. See discussion, infra, page ____."

You will observe that much of the preceding paragraph tracks material in your present footnote 12.

3. I would be inclined to add the following to footnote 11.

Adopted by Mr. Justice Stewart.

"Although we do not decide the question, presumably the type of fraud alleged here could be challenged, under Article V of the Convention, in the enforcement of whatever arbitral award is produced through arbitration. Article V(2)(b) provides that recognition and enforcement of an award can be refused if 'recognition or enforcement of the award would be contrary to the public policy of that country.'"

These are my thoughts, for what they may be worth. I am taking the liberty of sending copies of this letter to the Chief,

Lewis, and Bill Rehnquist, who, along with us, have indicated a vote to reverse.

Sincerely,

Mr. Justice Stewart

cc: The Chief Justice
Mr. Justice Powell
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1974

Re: Scherk v. Alberto-Culver Co. 73-781

Dear Potter:

Please join me in the opinion for the Court you have prepared in this case.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas; J.

No. 73-781

Circulate: 6-6

Recirculated: _____

Fritz Scherk, Petitioner, v. Alberto-Culver Company. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1974]

Reviewed 6/6 Cannot possibly join!

MR. JUSTICE DOUGLAS, dissenting.

Respondent (Alberto) is a publicly held corporation whose stock is traded on the New York Stock Exchange. Alberto, a Delaware Corporation, has its principal place of business in Illinois. Petitioner (Scherk) owned a business in Germany, FLS (Firma Ludwig Scherk), dealing with cosmetics and toiletries. Scherk owned various trade marks and all outstanding securities of a Liechtenstein corporation (SEV) and of a German corporation (Lodeva). Scherk owned various trade marks which were licensed to manufacturers and distributors in Europe and in this country. SEV collected the royalties on those licenses.

Alberto undertook to purchase from Scherk the entire establishment—the trade marks and the stock of the two corporations; and later, alleging it had been defrauded, brought this suit in the U. S. District Court in Illinois to rescind the agreement and to receive damages.

The only defense, material at this stage of the proceeding is a provision of the contract providing that if any controversy or claim arises under the agreement the parties agree it will be settled "exclusively" by arbitration under the rules of the International Chamber of Commerce, Paris, France.

The basic dispute between the parties concerned allegations that the trademarks which were basic assets in

the transaction were encumbered and that their purchase was induced through serious instances of fraudulent representations and omissions by Scherk and his agents within the jurisdiction of the United States. If a question of trademarks were the only one involved the principle of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, would be controlling.

We have here, however, questions under the Securities Exchange Act of 1934 which in § 3 (a)(10) defines "security" as including any "note, stock, treasury stock, bonds, debenture, certificate of interest or participation in any profit-sharing agreement . . . ." 15 U. S. C. § 78c (a)(10). We held in *Tcherepnin* v. *Knight*, 389 U. S. 332, as respects § 3 (a)(10).

> ". . . [R]emedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities, and the definition of security in § 3 (a)(10) necessarily determines the classes of investments and investors which will receive the Act's protections. Finally, we are reminded that, in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Id.*, at 336. (Footnote omitted.)

This supports my position

Section 10 (b) of the 1934 Act makes it unlawful for any person by use of agencies of interstate commerce or the mails "to use or employ, in connection with the purchase or sale of any security," whether or not registered on a national securities exchange, "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U. S. C. § 78j (b).

Alberto, as noted, is not a private person but a corporation with publicly held stock listed on the New York Exchange. If it is to be believed, if in other words the allegations made are proven, the American company has been defrauded by the issuance of "securities" (promissory notes) for assets which are worthless or of a much lower value than represented. The Regulations of the Commission state:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

Section 29 (a) of the Act 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." 15 U. S. C. § 78cc (a).

And § 29 (b) adds that "every contract" made in violation of the Act "shall be void."[1] No exception is made

[1] Section 29 (b) reads: "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an

for contracts which have an international character.

The 1933 Act, 48 Stat. 84, 15 U. S. C. § 77n had a like provision in its § 14:

> "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."

In *Wilko* v. *Swan*, 346 U. S. 427, a customer brought suit against a brokerage house alleging fraud in the sale of stock. A motion was made to stay the trial until an arbitration under the U. S. Arbitration Act, 9 U. S. C. § 3, as provided in the customer's contract. The Court held that an agreement for arbitration was a "stipulation" within the meaning of § 14 which sought to "waive" compliance with the Act. We accordingly held that the courts, not the arbitration tribunals, had jurisdiction over suits under the Act. The arbitration agency, we held, was bound by other standards which were not necessarily consistent with the 1933 Act. We said:

> "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review." *Id.*, at 437.

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exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation . . . ." 15 U. S. C. § 78cc (b).

Wilko was held by the Court of Appeals to control this case—and properly so.

It could perhaps be argued that *Wilko* does not govern because it involved a little customer pitted against a big brokerage house, while we deal here with sophisticated buyers and sellers: Scherk, a powerful German operator, and Alberto, an American business surrounded and protected by lawyers and experts. But that would miss the point of the problem. The Act does not speak in terms of "sophisticated" as opposed to "unsophisticated" people dealing in securities. The Rules when the giants play are the same as when the pigmies enter the market.

If there are victims here, they are not Alberto the corporation, but the thousands of investors who are the security holders in Alberto-Culver Co. If there is fraud and the promissory notes are excessive, the impact is on the equity in Alberto-Culver Co.

Moreover, the securities market these days is not made up of a host of small people scrambling to get in and out of stocks or other securities. The markets are overshadowed by huge institutional traders.[2] The so-called "off-shore funds" of which Scherk is a member present perplexing problems under both the 1933 and 1934 Acts.[3] The tendency of American investors to invest indirectly as through mutual funds[4] may change the character of the regulation but not its need.

There has been much support for arbitration of disputes; and it may be the superior way of settling some disagreements. If A and B were quarreling over a trademark and there was an arbitration clause in the contract, the policy of Congress in implementing the United Na-

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[2] See Institutional Investor Study Report of the SEC, H. R. Doc. No. 92-64 (1971), particularly Vol. 4.

[3] *Id.*, p. XVI, p. 879 *et seq.*

[4] *Id.*, p. XIX, p. 215 *et seq.*

tions Convention on the Recognition and Enforcement of Arbitral Awards as it did in 9 U. S. C. § 201 *et seq.*, would prevail. But the Act does not substitute an arbiter for the settlement of disputes under the 1933 and 1934 Acts. Art. II (3) of the Convention says:

> "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." [5]

But § 29 (a) of the 1934 Act makes *arbitration* of liabilities under § 10 of the 1934 Act "void" and "inoperative." Congress has specified a precise way whereby big and small investors will be protected and the rules under wihch the Alberto-Culver Co.'s of this Nation shall operate. They or their lawyers cannot waive those statutory conditions, for our corporate giants are not principalities of power but guardians of a host of wards unable to care for themselves. It is these wards that the 1934 Act tries to protect.[6] Not a word in the convention gov-

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[5] The Convention also permits that arbitral awards not be recognized and enforced when a court in the country where enforcement is sought finds that "the recognition and enforcement of the award would be contrary to the public policy of that country." Article V (2) (b). It also provides that recognition of an award may be refused when the arbitration agreement "is not valid under the law to which the parties have subjected it," in this case the laws of Illinois. See n. 10, *infra*. Article V (1) (a).

[6] Requirements promulgated under the 1934 Act require revelation to security holders of corporate action which may affect them. Extensive annual reports must be filed with the SEC including, *inter alia*, financial figures, changes in the conduct of business, the acquisition or disposition of assets, increases or decreases in out-

erning awards adopts the standards which Congress has passed to protect the investors under the 1934 Act. It is peculiarly appropriate that we adhere to *Wilko*—more so even than when *Wilko* was adopted. Huge foreign investments, many of them composed of the blackmail money we now pay for oil, are being made in our companies. It is important that American standards of fairness in security dealings, rather than these impromptu ones framed by "some friend in an arbital court in Paris" govern the destinies of American investors—until Congress changes these standards.

The Court finds it unnecessary to consider Scherk's argument that this case is distinguishable from *Wilko* in that *Wilko* involved parties of unequal bargaining strength. *Ante*, at 6 n. 6. Instead, the Court rests its

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standing securities, and even the importance to the business of trademarks held. See 17 CFR §§ 240.13a-1, 249.310; 3 CCH Fed. Sec. L. Rep. ¶ 31,101 *et seq.* (Form 10 K). The Commission has proposed that corporations furnish a copy of annual reports filed with the SEC to any security holder who is solicited for a proxy and requests the report. 39 Fed. Reg. 3836. Current reports must be filed with the SEC by an issuer of securities when substantial events occur, as when the rights evidenced by any class of securities are materially altered by the issuance of another class of securities or when an issuer has acquired a significant amount of assets other than in the ordinary course of business. See 17 CFR §§ 240.13a-11, 249.308; 3 CCH Fed. Sec. L. Rep. ¶ 31,001 *et seq.* (Form 8-K).

The SEC, recognizing that the Form 10-K reports filed annually with the Commission might be excessively abstruse for security holders, see 39 Fed. Reg. 3835, has proposed that the annual reports distributed to security holders in connection with annual meetings and solicitation of proxies provide substantially greater amounts of meaningful information than required presently. These annual reports would include a description of the business of the issuer, a summary of operations, explanation of changes in revenues and expenses, information on the liquidity position and the working capital requirements of the issuer, and identification of management and performance on the market of the issuer's securities. See 39 Fed. Reg. 3834–3838.

conclusion on the fact that this was an "international" agreement, with an American corporation investing in the stock and property of foreign businesses, and speaks favorably of the certainty which inheres when parties specify an arbitral forum for resolution of differences in "any contract touching two or more countries."

This invocation of the "international contract" talisman could as easily be applied to a situation where, for example, an interest in a foreign company or mutual fund was sold to an utterly unsophisticated American citizen, with material fraudulent misrepresentations made in this country. The arbitration clause could appear in the fine print of a form contract, and still be sufficient to preclude recourse to our courts, forcing the defrauded citizen to arbitration in Paris to vindicate his rights.

It has been recognized that the 1934 Act, including the protections of Rule 10b–5, applies when foreign defendants have defrauded American investors, particularly when, as alleged here,[7] they have profited by virtue of proscribed conduct within our boundaries. This is true even when the defendant is organized under the laws of a foreign country, is conducting much of its activity outside the United States, and is therefore governed largely by foreign law.[8] The language of § 29 of

[7] The District Court for the Northern District of Illinois noted allegations that Scherk had failed to state a material fact the omission of which would have been misleading, see 17 CFR § 240.10b–5 (2), during crucial negotiations in Melrose Park, Illinois, and that communications between Alberto and Scherk's attorney concerning the validity and value of the trademarks occurred within the territorial jurisdiction of the United States. Finally, the District Court noted that the full economic impact of the alleged fraud occurred within the United States.

[8] See, *e. g.*, *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F. 2d 1326, 1334–1339 (CA2 1972); *Travis* v. *Anthes Imperial Ltd.*, 473 F. 2d 515, 523–528 (CA8 1973); *SEC* v. *United Financial Group, Inc.*, 474 F. 2d 354 (CA9 1973); *Schoenbaum* v. *Firstbrook*, 405 F.

the 1934 Act does not immunize such international transactions, and the United Nations Convention provides that a forum court in which a suit is brought need not enforce an agreement to arbitrate which is "void" and "inoperative" as contrary to its public policy.[9] When a

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2d 200 (CA2 1965); *Roth* v. *Fund of Funds*, 279 F. Supp. 935, aff'd, 405 F. 2d 421 (CA2 1968).

[9] A summary of the conference proceedings which led to the adoption of the United Nations Convention was prepared by G. W. Haight, who served as a member of the International Chamber of Commerce delegation to the conference. G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Sumary Analysis of Record of United Nations Conference, May/June 1958 (1958).

When Art. II (3) was being discussed, the Israeli delegate pointed out that while a court could, under the draft Convention as it then stood, refuse enforcement of an *award* which was incompatible with public policy, " 'the court had to refer parties to arbitration whether or not such reference was lawful or incompatible with public policy.' " *Id.*, at 27. The German delegate observed that this difficulty arose from the omission in Art. II (3) " 'of any words which would relate the arbitral agreement to an arbitral award capable of enforcement under the convention.' " *Ibid.*

Haight continues:

"When the German proposal was put to a vote, it failed to obtain a two-thirds majority (13 to 9) and the Article was thus adopted without any words linking agreements to the awards enforceable under the Convention. Nor was this omission corrected in the Report of the Drafting Committee (1.61), *although the obligation to refer parties to arbitration was (and still is) qualified by the clause 'unless it finds that the agreement is null and void, inoperative or incapable of being performed.'*

"As the applicable law is not indicated, courts may under this wording be allowed some latitude; *they may find an agreement incapable of performance if it offends the law or the public policy of the forum.* Apart from this limited opening, the Conference appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements." *Id.*, at 28 (emphasis added).

Whatever "concern" the delegates had that signatories to the Convention "not be permitted to decline enforcement of such agree-

foreign corporation undertakes fraudulent action which subjects it to the jurisdiction of our federal securities laws, nothing justifies the conclusion that only a diluted version of those laws protect American investors.

Section 29 (a) of the Act provides that a stipulation binding one to waive compliance with "any provision" of the 1934 Act shall be void, and the 1934 Act expressly provides that the federal district courts shall have "exclusive jurisdiction" over suits brought under the Act. 15 U. S. C. § 78aa. The Court appears to attach some significance to the fact that the specific provisions of the 1933 Act involved in *Wilko* are not duplicated in the 1934 Act, which is involved in this case. While Alberto would not have the right to sue in either a state or federal forum as did the plaintiff in *Wilko*, 346 U. S., at 431, the Court deprives it of its right to have its 10b–5 claim heard in a federal court. We spoke at length in *Wilko* of this problem, elucidating the undesirable effects of remitting a securities plaintiff to an arbitral, rather than a judicial, forum. Here, as in *Wilko*, the allegations of

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ments on the basis of parochial views of their desirability," *ante*, at 12 n. 12, it would seem that they contemplated that a court may decline to enforce an agreement which offends its law or public policy.

The Court also attempts to treat this case as only a minor variation of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1. In that case, however, the Court, per BURGER, C. J., explicitly stated that: "A contractual choice-of-forum clause should be held unenforceable if the enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.*, at 15.

That is inescapably the case here, as § 29 of the Securities Exchange Act and *Wilko* v. *Swan* make clear. Neither § 29, nor the Convention on international arbitration, nor *The Bremen* justifies abandonment of a national public policy that securities claims be heard by a judicial forum simply because some international elements are involved in a contract.

fraudulent misrepresentation will involve "subjective findings on the purpose and knowledge" of the defendant, questions ill determined by arbitrators without judicial instruction on the law. See *id.*, at 435–436. An arbitral award can be made without explication of reasons and with development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law. We recognized in *Wilko* that there is no judicial review corresponding to review of court decisions. *Id.*, at 436–437. The extensive pretrial discovery provided by the Federal Rules of Civil Procedure for actions in District Court would not be available. And the wide choice of venue provided by the 1934 Act, 15 U. S. C. § 78aa, would be forfeited. See *Wilko* v. *Swan*, 346 U. S., at 431, 435. The loss of the proper judicial forum carries with it the loss of substantial rights.[10]

When a defendant, as alleged here, has through proscribed acts within our territory brought itself within the ken of federal securities regulation, a fact not disputed here, those laws—including the controlling principles of *Wilko*—apply whether the defendant is foreign or American, and whether or not there are transnational elements in the dealings. Those laws are rendered a chimera when foreign corporations or funds—unlike domestic defendants—can nullify them by virtue of

[10] The agreements in this case provided that the "laws of the State of Illinois" are applicable. Even if the arbitration court should read this clause to require application of Rule 10b–5's standards, Alberto's victory would be Pyrrhic. The arbitral court may improperly interpret the substantive protections of the Rule, and if it does its error will not be reviewable as would the error of a federal court. And the ability of Alberto to prosecute its claim would be eviscerated by lack of discovery. These are the policy considerations which underlay *Wilko* and which apply to the instant case as well.

arbitration clauses which send defrauded American investors to the uncertainty of arbitration on foreign soil, or, what may be more likely, to no remedy at all.

Moreover, the international aura which the Court gives this case is ominous. We now have many multi-national corporations in vast operations around the world—Europe, Latin America, the Middle East, and Asia. The investments of many American investors turn on dealings by these companies. Up to this day, it has been assumed by reason of *Wilko* that they were all protected by our various federal securities Acts. If these guarantees are to be removed, it should take a legislative enactment. I would enforce our laws as they stand, unless Congress makes an exception.

The virtue of certainty in international agreements is important, but Congress has dictated that when there are sufficient contacts for our securities laws to apply, the policies expressed in those laws take precedence. Section 29, which renders arbitration clauses void and inoperative, recognizes no exception for fraudulent dealings which incidentally have some international factors. The Convention makes provision for such national public policy in Art. II (3). Federal jurisdiction under the 1934 Act will attach only to some international transactions, but when it does, the protections afforded investors such as Alberto can only be full-fledged.

To repeat, the interests of investors in American companies are involved here. Justice Brandeis starting nearly 70 years ago tried to educate the Nation on the practices of the money trust. The giants of finance are the money trust today. They are the ones that fought the 1933 and 1934 Acts tooth and nail. They are the ones hopeful of short circuiting the protective devices of those Acts by using arbitration as a newly found loophole.

lfp/ss 6/6/74

No. 73-781 Scherk v. Alberto-Culver

Suggested note to be added to the opinion of the Court:

"We do not reach, or infer any opinion as to, the question whether the acquisition of Scherk's businesses was a security transaction within the meaning of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Although this important question was considered by the District Court and the Court of Appeals, and the dissenting opinion, infra, seems to consider it controlling, petitioner did not assign the adverse ruling on the question as error and it was not briefed or argued in this Court."

pp 8, 10, 11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-781

Recirculated: JUN 7 1974

Fritz Scherk, Petitioner,
v.
Alberto-Culver Company.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

my suggested note 8 is included

ownership of these trademarks. In addition, the contract contained an arbitration clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that "[t]he laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."[1]

The closing of the transaction took place in Geneva, Switzerland, in June 1969. Nearly one year later Alberto-Culver allegedly discovered that the trademark rights purchased under the contract were subject to substantial encumbrances that threatened to give others superior rights to the trademarks and to restrict or preclude Alberto-Culver's use of them. Alberto-Culver thereupon tendered back to Scherk the property that had been transferred to it and offered to rescind the contract. Upon Scherk's refusal, Alberto-Culver commenced this action for damages and other relief in a federal district

[1] The arbitration clause relating to the transfer of one of Scherk's business entities, similar to the clauses covering the other two, reads in its entirety as follows:

"The parties agree that if any controversy or claim shall arise out of the agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."

the "desirability of arbitration as an alternative to the complications of litigation," *id.*, at 431, but nonetheless declined to apply the Act's provisions. That case involved an agreement between Anthony Wilko and Hayden, Stone & Co., a large brokerage firm, under which Wilko agreed to purchase on margin a number of shares of a corporation's common stock. Wilko alleged that his purchase of the stock was induced by false representations on the part of the defendant concerning the value of the shares, and he brought suit for damages under § 12 (2) of the Securities Act of 1933, 15 U. S. C. § 77*l*. The defendant responded that Wilko had agreed to submit all controversies arising out of the purchase to arbitration, and that this agreement, contained in a written margin contract between the parties, should be given full effect under the Arbitration Act.

The Court found that "[t]wo policies, not easily reconcilable, [are] involved in this case." 346 U. S., at 438. On the one hand, the Arbitration Act stressed "the need for avoiding the delay and expense of litigation," *id.*, at 431, and directed that such agreements be "valid, irrevocable, and enforceable" in federal courts. On the other hand, the Securities Act of 1933 was "[d]esigned to protect investors" and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale," by creating "a special right to recover for misrepresentation . . . ." *Id.*, at 431 (footnote omitted). In particular, the Court noted that § 14 of the Securities Act, 15 U. S. C. § 77n, 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."

The Court ruled that an agreement to arbitrate "is a

'stipulation,' and [that] the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act."[6] Thus, Wilko's advance agreement to arbitrate any disputes subsequently arising out of his contract to purchase the securities was unenforcable under the terms of § 14 of the Securities Act of 1933.

Alberto-Culver, relying on this precedent, contends that the District Court and Court of Appeals were correct in holding that its agreement to arbitrate disputes arising under the contract with Scherk is similarly unenforceable in view of its contentions that Scherk's conduct constituted violations of the Securities Exchange Act of 1934 and rules promulgated thereunder. For the reasons that follow, we reject this contention and hold that the provisions of the Arbitration Act cannot be ignored in this case.

At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12 (2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil liability, 346 U. S., at

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[6] The arbitration agreement involved in Wilko was contained in a standard form margin contract. But see the dissenting opinion of Mr. Justice Frankfurter, 346 U. S., at 439, 440, concluding that the record did not show that "the plaintiff [Wilko] in opening an account had no choice but to accept the arbitration stipulation . . . ." The petitioner here would limit the decision in *Wilko* to situations where the parties exhibit a disparity of bargaining power, and contends that, since the negotiations leading to the present contract took place over a number of years and involved the participation on both sides of knowledgeable and sophisticated business and legal experts, the *Wilko* decision should not apply. See also the dissenting opinion of Judge Stevens of the Court of Appeals in this case, 484 F. 2d, at 615. Because of our disposition of this case on other grounds, we need not consider this contention.

431. There is no statutory counterpart of § 12 (2) in the Securities Exchange Act of 1934, and neither § 10 (b) of that Act nor Rule 10b–5 speaks of a private remedy to redress violations of the kind alleged here. While federal case law has established that § 10 (b) and Rule 10b–5 create an implied private cause of action, see 6 Loss, Securities 3869–3873 (1969) and cases cited therein; cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1963), the Act itself does not establish the "special right" that the Court in Wilko found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any "provision" of the respective acts,[7] certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act. In particular, the Court in Wilko noted that the jurisdictional provision of the 1933 Act, 15 U. S. C. § 77v, allowed a plaintiff to bring suit "in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited." 346 U. S., at 431. The analogous provision of the 1934 Act, by contrast, provides for suit only in the federal district courts that have "exclusive jurisdiction,"

[7] Section 14 of the Securities Act of 1933, 15 U. S. C. § 77n, provides as follows:

"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."

Section 29 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (a), 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."

While the two sections are not identical, the variations in their wording seem irrelevant to the issue presented in this case.

15 U. S. C. § 78aa, thus significantly restricting the plaintiff's choice of forum.[8]

Accepting the premise, however, that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934, the respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, and whose activities were largely, if not entirely, directed to European markets.

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration pro-

[8] We do not reach, or imply any opinion as to, the question whether the acquisition of Scherk's businesses was a security transaction within the meaning of § 10 (b) and Rule 10b–5 of the Securities Exchange Act of 1934. Although this important question was considered by the District Court and the Court of Appeals, and although the dissenting opinion, *post*, seems to consider it controlling, the petitioner did not assign the adverse ruling on the question as error and it was not briefed or argued in this Court.

vision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict of laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.[9]

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict of law rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[10]

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[9] Together with its motion for a stay pending arbitration, Scherk moved that the complaint be dismissed because the federal securities laws do not apply to this international transaction, cf. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326 (CA2 1972). Since only the order granting the injunction was appealed, this contention was not considered by the Court of Appeals and is not before this Court.

[10] See Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049, 1051 (1961). For example, while the arbitration agreement involved here provided that the controversies arising out of the agreement be resolved under "[t]he laws of the State of Illinois," *supra*, n. 1, a determination of the

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingnes and ability of businessmen to enter into international commercial agreements.[11]

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existence and extent of fraud concerning the trademarks would necessarily involve an understanding of foreign law on that subject.

[11] The dissenting opinion argues that our conclusion that *Wilko* is inapplicable to the situation presented in this case will vitiate the force of that decision because parties to transactions with many more direct contacts with this country than in the present case will nonetheless be able to invoke the "talisman" of having an "international contract." *Post*, at 8. Concededly, situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in *Wilko* would meaningfully apply. Judicial response to such situations can and should await future litigation in concrete cases. This case, however, provides no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere. The only contacts between the United States and the transaction involved here is the fact that Alberto-Culver is an American corporation and the occurrence of some—but by no means the greater part—of the precontract negotiations in this country. To determine that "American standards of fairness," *post*, at 7, must nonetheless govern the controversy, or to imply that the

The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to a case such as the one before us. In *Wilko* the Court reasoned that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him . . . ." 346 U. S., at 435. In the context of an international contract, however, these advantages become chimerical since, as indicated above, an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice.[12]

Two Terms ago in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, we rejected the doctrine that a forum-selection clause of a contract, although voluntarily adopted by the parties, will not be respected in a suit brought in the United States "unless the selected state would provide a more convenient forum than the state in which suit is brought." *Id.*, at 7. Rather, we concluded that a "forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. We noted that "much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident

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forum agreed upon will provide "no remedy at all," *post*, at 12, demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries.

[12] The dissenting opinion raises the specter that our holding today will leave American investors at the mercy of multinational corporations with "vast operations around the world . . . ." *Post*, at 12. Our decision, of course, has no bearing on the scope of the substantive provisions of the federal securities laws for the simple reason that the question is not presented in this case. See n. 8, *supra*.

might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.*, at 13–14.

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.[13] The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate his solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts . . . . 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. *Id.*, at 9.[14]

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[13] Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, "[t]he laws of the State of Illinois" were explicitly made applicable by the arbitration agreement. See n. 1, *supra*.

[14] In *The Bremen* we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement [is] unaffected by fraud . . . ." 407 U. S. 1, 12–13. This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion. Compare *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395.

Although we do not decide the question, presumably the type of fraud alleged here could be raised, under Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see n. 12, *infra*, in challenging the enforcement of whatever arbitral award is produced through arbitration. Article V (2) (b) of the

For all these reasons we hold 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.[16]

Convention provides that a country may refuse recognition and enforcement of an award if "recognition or enforcement of the award would be contrary to the public policy of that country."

[16] Our conclusion today is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision. On June 10, 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1970 the United States acceded to the treaty, [1970] 3 U. S. T. 2517, T. I. A. S. No. 6997, and Congress passed Chapter 2 of the United States Arbitration Act, 9 U. S. C. §§ 201 ff., in order to implement the Convention. Section 1 of the new chapter provides unequivocally that the Convention "shall be enforced in United States courts in accordance with this chapter."

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was 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. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. E. 90th Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049 (1961). Article II (1) of the Convention 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."

In their discussion of this Article, the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be per-

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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mitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. See Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of United Nations Conference 24–28 (1958).

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, 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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1974

Re: No. 73-781 - Scherk v. Alberto-Culver Co.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Douglas

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1974

Re: No. 73-781 - Scherk v. Alberto-Culver Co.

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 7, 1974

RE: No. 73-781 Scherk v. Alberto-Culver

Dear Bill:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1974

Re: No. 73-781 -- Fritz Scherk v. Alberto-Culver Co.

Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1974

Re: 73-781 - Scherk v. Alberto-Culver Co.

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
			4/30/74					
join PS 6-12-74	will circulate 5/30/74 9th draft 6/6/74 10th draft 6-12-74	join WOD 6-6-74 Concur with WOD	1st draft 5-29-74 3rd draft 6-5-74 4th draft 6/7/74 5th draft 6-13-74	join PS 6-7-74 Concur with WOD	Join WOD 6-11-74 Concur with WOD	join PS 6-7-74	Join PS 6/12/74 may write concurring	join PS 6-5-74
					73-781 Scherk v. Alberto-Culver			