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Arbitration, Forum Selection and Choice of Law Agreements in International Securities Transactions

ARBITRATION, FORUM SELECTION, AND CHOICE OF LAW AGREEMENTS IN INTERNATIONAL SECURITIES TRANSACTIONS

Since the 1950's, United States courts increasingly have enforced arbitration, forum selection, and choice of law clauses in international commercial agreements.[1] In doing so, the courts have discarded the traditional judicial attitude that contractual dispute-resolution clauses usurp the legislature's function of prescribing the governing law[2] and improperly "oust" the courts of jurisdiction.[3] Instead, the courts have embraced the view that party

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1. *See, e.g.,* The Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 15 (1972) (enforcing selection of English forum in maritime dispute between American and German companies); Crown Beverage Co., Inc. v. Cerveceria Montezuma, S.A., 663 F.2d 886, 888 (9th Cir. 1981) (enforcing selection of Mexican courts for distributorship contract dispute between Mexican and American parties); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43-45, 47 (3d Cir. 1978) (upholding agreement of German and American companies to arbitrate disputes in Germany); Republic International Corp. v. Amco Engineers, Inc., 516 F.2d 161, 168 (9th Cir. 1975) (upholding choice of Uruguayan forum in contract for civil works to be performed by California corporation in Uruguay); McCreary Tire & Rubber Company v. CEAT, S.p.A., 501 F.2d 1032, 1036-37 (3rd Cir. 1975) (enforcing choice of Italian law and Belgian arbitral tribunal in distributorship contract dispute between Italian and American parties); Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 807-08 (2d Cir.) (upholding agreement of Swedish and American parties to litigate disputes in Swedish courts), *cert. denied,* 350 U.S. 903 (1955). United States courts generally have recognized a distinction between contractual agreements as to the forum in which parties must litigate future causes of action and agreements which relate to existing causes. *See* Herrington v. Thompson, 61 F. Supp. 903, 904-05 (W.D. Mo. 1945) (recognizing that distinction is made between executory forum selection agreement and agreement made after cause of action has accrued). While the enforceability of agreements relating to future causes of action is the subject of considerable controversy, agreements relating to existing causes of action almost always are held valid and enforceable. *See id.; see also* Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968) (voluntary submission of existing securities dispute to arbitration held valid).

2. *See* Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (choice of law agreement did not usurp legislative function, but rather relieved court of having to resolve conflict of laws problem); Kraus v. Zivnostenska Banka, 187 Misc. 681, 683-84, 64 N.Y.S.2d 208, 209-10 (Sup. Ct. 1946) (parties' stipulation of foreign law is valid with respect to securities deposit contract); *see also* U.C.C. §1-105(1) (1978) (authorizing contractual choice of law agreements); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (approving parties' use of choice of law provision to govern their contracts). The traditional objection to choice of law agreements has been that such agreements permit the parties to such an agreement to perform a legislative act. J. H. BEALE, THE CONFLICT OF LAWS 1079-80 (1935).

3. *See, e.g.,* The Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 12 (1971) (renouncing view that forum selection agreements "oust" courts of jurisdiction); Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 991 (2d Cir. 1951) (agreement to litigate disputes in Norwegian courts did not improperly deprive United States courts of jurisdiction); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983-85 (2d Cir. 1942) (arbitration agreement did not unlawfully deprive courts of jurisdiction since parties bargained for agreement in their contract); *see also* United States Arbitration Act, 9 U.S.C. §§ 1-14 (1982) (authorizing arbitration agreements in maritime transactions and transactions involving interstate

autonomy in international commercial agreements is virtually indispensable to the achievement of certainty and predictability in international commerce.[4]

The volume of international investment has increased dramatically since 1970.[5] As international investment has increased, United States courts have extended the extraterritorial scope of the Securities Act of 1933[6] ('33 Act) and the Securities Exchange Act of 1934[7] ('34 Act) to cover international as well as domestic investment disputes.[8] In securities investors' suits charging

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or international commerce); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 3 U.S.T. 2517, T.I.A.S. No. 6997, 751 U.N.T.S. 58 (effective July 31, 1970) (codified at 9 U.S.C. §§ 201-208) (1982) (authorizing enforcement of commercial arbitral awards rendered by foreign arbitral tribunals if agreement or award was international). An English court in the case of *Kill v. Hollister* seems to have coined the phrase "oust the jurisdiction" with respect to contractual agreements that specify another forum for resolving the parties' disputes. *See* Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746) (holding contractual agreement to arbitrate insurance policy claims unenforceable).

4. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (forum selection agreements are vital to predictability and orderliness of international business transactions); The Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 13-14 (1972) (finding that forum selection clauses are essential in international trade, commerce, and contracting to eliminate uncertainty surrounding selection of acceptable forum for litigating disputes); *see also infra* notes 172-182 and accompanying text (outlining public policy considerations regarding contractual dispute-resolution agreements). *See generally* Park, *Arbitration of International Contract Disputes,* 39 BUS. LAW 1783 (1984) (outlining essential elements and occasionally useful elements needed to ensure enforcement of arbitration agreements); Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements,* 1982 U. ILL. L. REV. 133 (reviewing trend in United States courts toward enforcement of pre-dispute forum selection agreements); Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach,* 12 HARV. INT'L L. J. 1 (1971) (examining enforceability of choice of law clauses in international commercial transactions.)

5. *See* BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, 64 SURV. OF CURRENT BUS. No 8, at 18, 40 (Table 1) (August 1984) (outlining international investment position of United States from 1970 to 1983). From 1970 to 1983, United States private ownership of foreign corporate stocks increased from $6.5 billion to $26.5 billion. *Id.* During the same period, United States private ownership of foreign bonds increased from $14.3 billion to $58.2 billion, and United States private direct investment abroad increased from $75 billion to $226 billion. *Id.* Direct investment refers to ownership or control over the management of an investment and generally requires ownership of at least 10% of the voting securities in the investment or the equivalent. *Id.* at 20n.1. From 1970 to 1983, foreign ownership of United States corporate stocks increased from $27 billion to $97 billion. *Id.* at 40 (Table 1). During the same period, foreign ownership of United States corporate bonds and other bonds increased from $7 billion to $17 billion, and foreign direct investment in the United States increased from $13 billion to $133 billion. *Id. See generally* Thomas, *Internationalization of the Securities Markets: An Empirical Analysis,* 50 GEO. WASH. L. REV. 155 (1982) (discussing entrance of foreign companies into United States securities markets).

6. Securities Act of 1933, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (1982)).

7. Securities Exchange Act of 1934, 48 Stat. 887 (codified as amended at 15 U.S.C. §§ 78a-78kk (1982)).

8. *See generally* Morganstern, *Extraterritorial Application of United States Securities Laws: A Matrix Analysis,* 7 HASTINGS INT'L & COMP. L. REV. 1 (1984) (although securities

sellers with securities fraud under the '33 Act or the '34 Act, United States federal courts have found subject matter jurisdiction when the sellers' allegedly fraudulent conduct occurred within the United States[10] or if the alleged fraud resulted in detrimental effects to American investors or securities markets.[11] To provide investors with added protection against fraudu-

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registration rules are inapplicable to foreign securities sales, antifraud provisions apply when such sales have certain combinations of domestic contacts).

9. *See* 15 U.S.C. §§ 771(2), 77q(a) (1982) (providing investors with remedy for seller's misrepresentations and prohibiting fraud in sale of securities); 15 U.S.C. § 78j(b) (1982) (prohibiting use of manipulative or deceptive devices in connection with purchase or sales of securities); 17 C.F.R. § 240.10b-5 (1984) (declaring fraudulent devices or false and misleading statements of material facts illegal under '34 Act). While the '33 Act expressly provides a remedy for negligent conduct of sellers of securities, the implied remedy under §10(b) of the '34 Act requires evidence of intent to deceive. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208-10 (1976); *see also* Siegel, *Interplay between the Implied Remedy Under Section 10(b) and the Express Causes of Action of the Federal Securities Laws,* 62 B.U.L. REV. 385 (1982) (comparing express and implied securities fraud remedies); Note, *Conflict Resolved: An Implied Remedy Under Section 10(b) of the '34 Act Survives Despite the Existence of Express Remedies,* 40 WASH. & LEE L. REV. 1039, 1040-43 (1983) (implied cause of action under § 10(b) of '34 Act remains established in United States courts).

10. *See* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1333-35 (2d Cir. 1972) (finding subject matter jurisdiction under antifraud provisions of '34 Act because significant conduct of defendant occurred in United States); *see also* Grunenthal GmbH v. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983) (finding subject matter jurisdiction under antifraud provisions because allegedly fraudulent conduct occurred in United States); IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980) (finding subject matter jurisdiction because parties consummated securities transaction in United States); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 420-21 (8th Cir. 1979) (finding subject matter jurisdiction because fraudulent conduct in United States was significant with respect to fraudulent scheme); IIT v. Vencap Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975) (conduct in United States will support subject matter jurisdiction in American courts unless conduct was merely preparatory to violation of antifraud provisions); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987-93 (2d Cir.) (different amounts of conduct in United States may sustain jurisdiction over international securities disputes, depending on residency and nationality of plaintiffs), *cert. denied,* 423 U.S. 1018 (1975). Because the United States securities laws fail to provide specific guidance on the extraterritorial scope of the antifraud provisions, United States courts have relied on the subjective territorial principle of international law which authorizes subject matter jurisdiction when disputed conduct has occurred within the United States. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965) (endorsing jurisdiction to prescribe national laws under subjective territorial principle if disputed conduct occurs within nation's territory) [hereinafter cited as FOREIGN RELATIONS RESTATEMENT]. *See generally* Murano, *Extraterritorial Application of the Antifraud Provisions of the Securities Exchange Act of 1934,* 2 INT'L TAX & BUS. LAW 298, 308-15 (1984) (discussing application of "conduct" test to confer jurisdiction over fraudulent securities activities).

11. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 208-09 (2d Cir.) (finding subject matter jurisdiction under antifraud provisions of United States securities laws when foreign directors' allegedly fraudulent activities had affected value of securities listed on American stock exchange), *rev'd on other grounds,* 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 906 (1969); *see also* Des Brisay v. Goldfield Corp., 549 F.2d 133, 136 (9th Cir. 1977) (finding subject matter jurisdiction on grounds that allegedly fraudulent deal caused collapse in United States securities markets); Securities and Exchange Commission v. United Financial Group, Inc., 474 F.2d 354, 356 (9th Cir. 1973) (transaction's effects on several American investors

lent securities sellers, the '33 Act and the '34 Act forbid waiver of compliance with any provision therein,[12] including the investor's right to bring securities fraud claims in federal court.[13] The nonwaiver rule, therefore, authorizes

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supported subject matter jurisdiction under United States securities laws); Travis v. Anthes Imperial Limited, 473 F.2d 515, 527-28 (8th Cir. 1973) (substantial diminution in value of American plaintiff's securities supported subject matter jurisdiction under antifraud provisions). When allegedly fraudulent activity in connection with a sale of securities has occurred outside the United States, courts have applied the objective territorial principle of international law which authorizes jurisdiction to regulate conduct outside United States territory if the conduct had a substantial, direct, and foreseeable effect within the United States. *See* FOREIGN RELATIONS RESTATEMENT, *supra* note 10, at § 18 (endorsing jurisdiction to prescribe national laws of forum state if disputed conduct causes substantial, direct and foreseeable effects within forum nation's territory). *See generally,* Larosse, *Conflicts, Contacts, and Cooperation: Extraterritorial Application of the United States Securities Laws,* 12 SEC. REG. L. J. 99, 115-19 (1984) (evaluating application of "effects" test to confer jurisdiction over conduct outside United States).

12. 15 U.S.C. § 77n (1982) (prohibiting waiver of compliance with any provision of the '33 Act); 15 U.S.C. § 78cc(a) (1982) (prohibiting waiver of compliance with provisions of '34 Act).

13. *See* Wilko v. Swan, 346 U.S. 427, 434-35 (1953) (concluding that antiwaiver provision of '33 Act protects investors' right to bring suit against securities sellers in United States courts); *see also* 15 U.S.C. §77v(a) (1982) (providing investors with choice of federal or state courts for actions under '33 Act). Although § 10(b) of the '34 Act does not provide expressly a private cause of action against securities sellers, the federal courts consistently have held that the nonwaiver rule of the '34 Act protects investors' implied right to bring § 10(b) suits in United States courts. *See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 827-29 (10th Cir. 1978) (nonwaiver rule protects investor's implied right of action under section 10(b) of '34 Act); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 833-36 (7th Cir. 1977) (nonwaiver rule of '34 Act protects investor's right to bring rule 10b-5 claims in federal court); Sibley v. Tandy Corp., 534 F.2d 540, 543n.3 (5th Cir. 1976) (similarities between '33 Act and '34 Act require same application of nonwaiver rule to investors' fraud actions), *cert. denied,* 434 U.S. 824 (1977); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536-37 (3d Cir.) (nonwaiver rule applies to § 10(b) claims under '34 Act), *cert. denied,* 429 U.S. 1010 (1976); Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 245-46 (3d Cir. 1968) (explaining in dictum that nonwaiver rule prohibits waiver of '34 Act's implied rights of action); Starkman v. Seroussi, 377 F. Supp. 518, 522-23 (S.D.N.Y. 1974) (prohibiting waiver of investor's right of action against securities broker for violation of stock exchange rules under § 27 of the '34 Act); Reader v. Hirsch & Co., 197 F. Supp. 111, 115 (S.D.N.Y. 1961) ('34 Act prohibits waiver of investor's implied right of action against brokerage firm for violation of margin requirement under § 7 of '34 Act); *cf.* 15 U.S.C. § 78aa (1982) (providing exclusive jurisdiction in federal courts for actions under '34 Act). *But see* Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238, 1240 n.1 (1985) (suggesting that nonwaiver rule might not apply to implied remedies). In *Byrd,* the Supreme Count suggested that the nonwaiver rule for an express right of action under § 12(2) of the '33 Act might not protect securities investors' implied right of action under § 10(b) of the '34 Act. *Id.* Since the parties never raised the issue in the lower court, however, the Supreme Court declined to resolve the issue. *Id.* Justice White, concurring in *Byrd,* asserted that the nonwaiver rule under the '33 Act should not be "mechanically transplanted" to the '34 Act. *Id.* at 1244 (White, J., concurring). In *Scherk v. Alberto-Culver Co.,* as in *Byrd,* the Supreme Court reserved the question whether investors could waive an implied cause of action under the '34 Act and thus the contrary holdings of the lower courts remain in doubt. *See id.;* Scherk v. Alberto-Culver Co., 417 U.S. 506, 513-14 (1974).

federal courts to entertain securities fraud actions regardless of the parties' predispute arbitration, forum selection, or choice of law agreements.[14]

The federal courts generally have enforced the nonwaiver rule in securities fraud suits arising from purely domestic securities transactions.[15] Recently, however, the courts have declined to enforce the nonwaiver rule in securities fraud suits arising from transactions which are international in scope.[16] The federal courts have concluded that arbitration, forum selection, and choice of law agreements are essential for certainty and predictability in international securities transactions.[17] Although these recent decisions have distinguished international securities transactions from domestic securities transactions, the decisions have not outlined a clear standard for determining whether a particular transaction is an international securities transaction.[18] Without a clear standard, securities investors and sellers cannot predict with certainty whether the federal courts will entertain securities fraud actions arising under a particular contract or will enforce an arbitration, forum selection, or choice of law agreement in the contract.[19] An analysis of the significant international

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14. *See infra* notes 33-35 and accompanying text (explaining reasoning behind rule prohibiting dismissal of securities fraud actions pursuant to pre-dispute arbitration, forum selection, or choice of law agreements).

15. *See* Sawyer v. Raymond, James and Associates, Inc., 642 F.2d 791, 792 (5th Cir. 1981) (applying nonwaiver rule in domestic securities fraud dispute); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1030 (6th Cir. 1979) (holding arbitration agreement unenforceable against domestic investor who brought suit against domestic securities seller); *see also supra* note 13 (citing domestic securities fraud cases brought under '34 Act in which nonwaiver rule prohibited dismissal). Although the federal courts have enforced the nonwaiver rule in securities fraud suits between American investors and sellers, the courts have not enforced the nonwaiver rule in suits between American stock exchange members. *See* Tullis v. Kohlmeyer & Co., 551 F.2d 632, 636-38 (5th Cir. 1977) (enforcing arbitration of dispute between stock exchange members having equal bargaining power); Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1212-14 (2d Cir. 1972) (nonwaiver rule did not apply to securities fraud dispute between stock exchange members).

16. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974) (enforcing arbitration clause because Court found that securities transaction was international); S. A. Mineracao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190, 194-95 (2d Cir. 1984) (refusing to apply nonwaiver rule after concluding that securities transaction was international); AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 158-59 (2d Cir. 1984) (enforcing forum selection and choice of law agreements in international securities transaction); Pioneer Properties, Inc. v. Martin, 557 F. Supp. 1354, 1365 (D. Kan. 1983) (finding nonwaiver rule inapplicable because securities transaction was international); *see also infra* notes 37-113 and accompanying text (discussion of decisions holding that nonwaiver rule does not apply in international securities fraud disputes).

17. *See infra* notes 122-145 and accompanying text (outlining goal of increased certainty and predictability in international securities transactions). *See generally* Ishizumi, *International Commercial Arbitration and Federal Securities Regulation: Reconciling Two Conflicting Policies,* 6 J. COMP. BUS. & CAP. MKT. L. 81 (1984) (setting forth reasons why nonwaiver rule should not apply in international securities fraud cases).

18. *See infra* notes 37-117 and accompanying text (examining international contacts in securities fraud cases holding that transactions were international).

19. *See* Delaume, *What Is An International Contract? An American and Gallic Dilemma,*

contacts, public policies, and objectives underlying dispute-resolution agreements provides guidance in attempting to define international securities transactions and in predicting whether the federal courts will enforce a particular dispute-resolution agreement.[20]

The Supreme Court first addressed the nonwaiver rule in the context of securities fraud in *Wilko v. Swan.*[21] In *Wilko,* an American citizen purchased 1600 shares of stock from an American brokerage firm.[22] Under the brokerage firm's standard form contract, the parties agreed to arbitrate any future disputes arising from purchase of the stock.[23] Despite the arbitration clause in the contract, the investor brought suit against the brokerage firm in the United States District Court for the Southern District of New York after the investor resold the stock at a loss.[24] The investor in *Wilko* alleged that the brokerage firm falsely represented the value of the stock in violation of section 12(2) of the '33 Act.[25] The brokerage firm moved to stay the proceedings pursuant to the parties' arbitration agreement[26] and the district court denied the brokerage firm's motion.[27] On appeal, the Second Circuit reversed the district court and enforced the arbitration clause, concluding that congressional policy strongly favored arbitration.[28]

Like the Second Circuit, the Supreme Court in *Wilko* recognized that

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28 INT'L & COMP. L. Q. 258, 258-71 (1979) (considering existing vague qualifications for international securities transactions); *see also* Ishizumi, *supra* note 17, at 96-97 (questioning sufficiency of criterion for international securities transactions).

20. *See infra* notes 114-65 and accompanying text (examining international contacts, public policies, and objectives that federal courts have relied on in enforcing arbitration, forum selection, and choice of law agreements).

21. 346 U.S. 427 (1953).

22. *Id.* at 428-29. In *Wilko,* Anthony Wilko, an American investor, purchased 1600 shares of common stock of Air Associates, Inc., a New Jersey corporation. *Id.* Wilko purchased the stock for $29,517.54 from Hayden, Stone & Co., an American brokerage firm. *Id.*

23. *Id.* at 429, 432n.15. The arbitration agreement in Wilko stated that any controversy between the parties would be governed by New York's arbitration laws and the arbitration rules of either the New York Chamber of Commerce Arbitration Committee, the American Arbitration Association, the New York Stock Exchange Arbitration Committee, or the arbitration committee of any other stock exchange having jurisdiction. *Id.* at 432n.15.

24. Wilko v. Swan, 107 F. Supp. 75, 76 (S.D.N.Y. 1952).

25. *Id.* The investor in *Wilko* alleged that the brokerage firm represented falsely that Air Associates' stock would increase in value and that large financial interests were buying the stock because of a planned merger with the Borg Warner Corporation. *Id.* In addition, Wilko claimed that the brokerage firm failed to disclose that a director of Air Associates was selling a large block of his stock. *Id.* Wilko sought recessionary damages under § 12(2) of the '33 Act in the amount of $3,888.88 which represented the amount lost on resale of his stock two weeks after his purchase. Wilko v. Swan, 201 F.2d 439, 441 (2d Cir. 1953).

26. *Wilko,* 107 F. Supp at 76, 79. The defendant brokerage firm in *Wilko* argued that § 3 of the United States Arbitration Act required the court to stay the proceedings until arbitration was completed. *Id.* at 76; *see* United States Arbitration Act § 3 (codified at 9 U.S.C. § 3 (1982)) (requiring courts to enforce arbitration if issues are referrable to arbitration).

27. *Wilko,* 107 F. Supp. at 79.

28. *Wilko,* 201 F.2d at 445.

congressional policy favored arbitration.[29] The *Wilko* Court, however, reversed the Second Circuit because the Court found that the arbitration agreement unlawfully waived the defrauded investor's right to bring suit in the United States courts.[30] The *Wilko* Court stated that the United States Arbitration Act[31] encouraged arbitration as an economical and effective method of resolving contractual disputes.[32] The Court, however, explained that the nonwaiver rule of the '33 Act reflected a congressional desire to redress the inequalities in bargaining position between securities investors and sellers.[33] The *Wilko* Court concluded that judicial direction was necessary to ensure the enforcement of the '33 Act's procedural and substantive advantages for defrauded investors.[34] Under the rule in *Wilko,* therefore, the antifraud provisions of the United States securities laws must prevail over the parties' arbitration, forum selection, and choice of law agreements.[35]

The federal courts consistently enforced the *Wilko* rule that predispute agreements may not waive the investor's right to bring securities fraud actions in the United States courts,[36] until the Supreme Court carved out an exception to the *Wilko* rule in *Scherk v. Alberto-Culver Co.*[37] The *Scherk* Court held that the antifraud provision of the United States securities laws must yield to the parties' dispute-resolution agreement when the dispute arises in the context of a "truly international" securities transaction.[38] In

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29. *Wilko,* 346 U.S. at 431-32.

30. *Id.* at 438. The *Wilko* Court found that § 14 of the '33 Act prohibited any stipulation waiving compliance with a provision of the '33 Act, and that the executory arbitration agreement was a stipulation that waived a defrauded investor's right to select the judicial forum in which to bring securities fraud actions. *Id.* at 434-35; *see* 15 U.S.C. § 77v(a) (1982) (providing investors with choice of federal or state courts for actions under '33 Act); 15 U.S.C. § 77n (1982) (prohibiting waiver of compliance with any provision of '33 Act).

31. 9 U.S.C. §§ 1-14 (1982) (United States Arbitration Act).

32. *Wilko,* 346 U.S. at 431-32. The *Wilko* court noted the Congress passed the United States Arbitration Act to encourage the resolution of disputes without the delay and expense of litigation. *Id.; see* H. R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924) (stressing desirability of arbitration); S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924) (encouraging arbitration of interstate and maritime disputes because of delay and expense of litigation).

33. *Wilko,* 346 U.S. at 435.

34. *Id.* at 435-38. According to the *Wilko* Court, procedural advantages for investors seeking resolution of disputes in United States courts, rather than through arbitration, included more complete records of the proceedings and judicial review for error in interpretation of the law. *Id.* at 436-37. Although the *Wilko* Court recognized that the antifraud provisions of the '33 Act would apply in arbitral proceedings, the court doubted whether arbitrators would understand fully the application of the antifraud provisions of the '33 Act. *Id.* at 431, 436.

35. *See id.* at 438.

36. *See supra* notes 13 & 15 (citing domestic cases that applied *Wilko* in prohibiting dismissal of securities fraud claims).

37. 417 U.S. 506 (1974).

38. *Id.* at 515, 519-20; *see* Note, Scherk v. Alberto-Culver Co. *and Arbitration Under the Securities Exchange Act: A Comity of Errors,* 1 J. CORP. L. 100, 109-10 (1975) (explaining ramifications of international exception to *Wilko); Note, Extraterritorial Application of United States Securities Laws Denied; Arbitration Clause in Investment Conract Enforced*—Scherk v. Alberto-Culver Co., 16 HARV. INT'L L. J. 705, 709-14 (1975) (examining the *Scherk* Court's

Scherk, Alberto-Culver, an American toiletries manufacturer, purchased from Fritz Scherk, a German citizen, three businesses organized under the laws of Germany and Liechtenstein, and the rights to the trademarks associated with those firms.[39] The parties negotiated their purchase agreement in Europe and the United States over a two year period.[40] The purchase agreement provided that the parties would submit any disputes concerning the agreement to arbitration before the International Chamber of Commerce in Paris, France.[41] The purchase agreement also stated that the laws of Illinois would govern the interpretation and performance of the agreement.[42]

Nearly one year after closing the *Scherk* deal, Alberto-Culver allegedly discovered that Scherk's trademarks were deficient, and brought suit against Scherk in the United States District Court for the Northern District of Illinois.[43] In its complaint, Alberto-Culver alleged that Scherk's misrepresentations concerning his trademark rights constituted violations of section 10(b) of the '34 Act and Securities and Exchange Commission (SEC) rule 10b-5.[44]

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judicially created exception to the nonwaiver rule); Comment, Scherk v. Alberto-Culver Co., *The Exemption of International Contracts from the Wilko Doctrine Voiding Agreements to Arbitrate Securities Disputes,* 6 LOY. U. CHI. L. J. 738, 749-52 (1975) (discussing international securities transactions exception to *Wilko* rule).

39. *Id.* at 508. Alberto-Culver, the buyer in *Scherk,* purchased 100% of the stock in Firma Ludwig Scherk, a manufacturing facility in Berlin, Germany, Scherk Establissement Vaduz (SEV), a Liechtenstein holding company, and Lodeva Herstelking und Vertrieb Kosmetischer Artikel GmbH, a dormant German company. Alberto-Culver Co. v. Scherk, 484 F.2d 611, 613 (7th Cir. 1973). SEV licensed the sale and distribution of Scherk's cosmetics under approximately 275 European trademarks. Brief for Petitioner at 5, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). Prior to the sale of the stock, Fritz Scherk, the seller, expressly guaranteed sole and unencumbered ownership of the SEV trademarks. *Scherk,* 417 U.S. at 508; Brief for Respondent at 5, *Scherk,* 417 U.S. 506.

40. *Scherk,* 417 U.S. at 515. Alberto-Culver executives initially contacted Scherk in June 1967 and later visited Scherk in Berlin in November 1967 to negotiate the acquisition. *Scherk,* 484 F.2d at 613. In December 1967 Scherk's representative met with Alberto-Culver executives in Chicago, but the negotiations reached an impasse. *Id.;* Brief for Petitioner at 4, *Scherk,* 417 U.S. 506. Alberto-Culver again contacted Scherk in February 1968 and the parties resumed negotiations. *Scherk,* 484 F.2d at 613. Following another meeting in Berlin in March 1968 the parties finally settled on terms during a three-day meeting held in Illinois during late May and early June, 1968. *Id.;* Brief for Petitioner at 4, *Scherk,* 417 U.S. 506. Subsequently, the parties retained lawyers to draft definitive written contracts. Brief for Petitioner at 4, *Scherk,* 417 U.S. 506. Alberto-Culver engaged two American law firms, a German lawyer, a Liechtenstein lawyer, an American accounting firm, and European trademark experts to work on the matter. *Id.* at 4-5. Scherk's New York lawyer met with Alberto-Culver representatives in Chicago in December 1968 and answered Alberto-Culver's questions concerning Scherk's European trademarks. Brief for Respondent at 5-6, *Scherk,* 417 U.S. 506. Scherk signed the contracts in Vienna, Austria, in February 1969. *Scherk,* 484 F.2d at 613. The formal closing took place in Geneva, Switzerland in June 1969 where Alberto-Culver delivered payment to Scherk. *Scherk,* 417 U.S. at 509; Brief for Petitioner at 5, *Scherk,* 417 U.S. 506.

41. *Scherk,* 417 U.S. at 508-09n.1.

42. *Id.*

43. *Id.* at 509; Scherk v. Alberto-Culver Co., No. 71 Civ. 1414 (N.D. Ill. Jan. 17, 1972) (memorandum of decision), *reprinted in* Petition for a Writ of Certiorari, App. 18, *Scherk,* 417 U.S. 506.

44. *Scherk,* 417 U.S. at 509. In *Scherk,* Alberto-Culver, the buyer, allegedly discovered

Scherk moved to stay the action pending the outcome of arbitration in Paris pursuant to the parties' arbitration agreement.[45] Relying on the *Wilko* rule that predispute agreements may not waive the investor's right to bring securities fraud actions in United States courts, the district court denied Scherk's motion to stay the action and enjoined Scherk from pursuing arbitration.[46] On appeal, the Seventh Circuit affirmed the district court's injunction barring arbitration, concluding that the arbitration agreement was void under *Wilko*.[47]

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that Scherk, the seller, had breached his contractual warranties as to the purchased trademarks. *Id.* Specifically, Alberto-Culver claimed that Scherk had failed to disclose several agreements which granted others superior rights and which limited Scherk's own rights to use the trademarks. Brief for Respondent at 7, *Scherk,* 417 U.S. 506. Alberto-Culver also asserted that under European law several of Scherk's trademarks were subject to cancellation and that legal proceedings were underway in Europe to declare certain of the trademarks void. Brief for Respondent at 7, *Scherk,* 417 U.S. 506. Upon discovering these deficiencies in the trademarks, Alberto-Culver offered to rescind the purchase agreement and tendered back to Scherk the stock Alberto-Culver had purchased. *Scherk,* 417 U.S. at 509. In addition to Alberto-Culver's claims under § 10(b) of the '34 Act and rule 10b-5, Alberto-Culver alleged that Scherk committed common law fraud and breached contractual warranties. *Scherk,* No. 71 Civ. 1414 (N.D. Ill. Jan. 17, 1971) (memorandum of decision), *reprinted in* Petition for Writ of Certiorari, App. 18, at App. 20, *Scherk,* 417 U.S. 506.

45. *See Scherk,* 417 U.S. at 509. Scherk, the securities seller, moved to stay the 1972 *Scherk* district court action pursuant to the arbitration clause, or alternatively, to dismiss the suit for lack of personal and subject matter jurisdiction or on the basis of forum non conveniens. *Id.* Prior to commencement of the suit, Scherk refused to accept Alberto-Culver's tender of the stock purchased, and took steps to initiate arbitration in Paris. *Id.* at 509, 510n.2. Scherk also initiated actions in German and Liechtenstein courts to preserve the assets of the companies he sold. Alberto-Culver Co. v. Scherk, No. 71 Civ. 1414, slip op. at 3 (N.D. Ill. July 12, 1978) (memorandum opinion on remand). Almost five months after Alberto-Culver commenced the 1972 action in the district court, Scherk formally filed a request for arbitration with the International Chamber of Commerce in Paris. *Scherk,* 417 U.S. at 510n.2.

46. *See Scherk,* No. 71 Civ. 1414 (N.D. Ill. Jan 17, 1972) (memorandum of decision), *reprinted in* Petition for a Writ of Certiorari, App. 18, at 31-33, *Scherk,* 417 U.S. 506. The *Scherk* district court in 1972 enforced the *Wilko* nonwaiver rule after the court found personal jurisdiction over Scherk based on Scherk's contacts with the United States. *Scherk,* No. 71 Civ. 1414 (N.D. Ill. Jan. 17, 1972) (memorandum of decision), *reprinted in* Petition for a Writ of Certiorari, App. 18, at 27-28, *Scherk,* 417 U.S. 506. The district court also found subject matter jurisdiction because the sale of Scherk's businesses qualified as securities under the '34 Act and because Scherk's communications within the United States satisfied the conduct test for jurisdiction. *Scherk,* No. 71 Civ. 1414 (N.D. Ill. Jan. 17, 1972) (memorandum of decision), *reprinted in* Petition for a Writ of Certiorari, App. 18, at 22-27, *Scherk,* 417 U.S. 506; *see supra* note 10 and accompanying text (citing cases that developed conduct test for subject matter jurisdiction under United States securities laws). The district court denied Scherk's motion to dismiss on the basis of forum non conveniens because the court found that under the doctrine of forum non conveniens the action could not be brought to a better forum in which the plaintiff could pursue remedies under the '34 Act. *Scherk,* No. 71 Civ. 1414 (N.D. Ill. Jan 17, 1972) (memorandum of decision), *reprinted in* Petition for a Writ of Certiorari, App. 18, at 29-31, *Scherk,* 417 U.S. 506.

47. *See* Alberto-Culver Co. v. Scherk, 484 F.2d 611, 615 (7th Cir. 1973). After the *Scherk* district court refused to stay the action and enjoined the parties from arbitration, Scherk filed an interlocutory appeal. *Id.* at 612. The district court then stayed the proceedings pending the Seventh Circuit's determination of the appeal. *Scherk,* No. 71 Civ. 1414 (N.D. Ill. Jan. 14, 1972) (amended order), *Scherk,* 417 U.S. 506. In addition to affirming the district court's

On Scherk's petition for certiorari, the Supreme Court refused to apply the *Wilko* rule and reversed the Seventh Circuit.[48] The *Scherk* Court chose not to distinguish the *Wilko* case on the basis that equal bargaining strengths existed between the securities seller and the investor in *Scherk*.[49] Instead, the Court distinguished *Scherk* from *Wilko* on grounds that *Scherk* involved international parties, negotiations, and subject matter whereas *Wilko* involved an entirely domestic transaction.[50] The Court emphasized that the parties in *Scherk* had intended their arbitration and choice of law agreements to increase certainty concerning the applicable law[51] and to lessen the danger of litigation in unfamiliar courts.[52] The *Scherk* Court refuted Alberto-

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decision concerning arbitration, the Seventh Circuit agreed that Scherk had sufficient contacts within the United States for the district court to exercise personal jurisdiction. *Scherk,* 484 F.2d at 615. The Seventh Circuit also concluded that Scherk's sale of the businesses qualified as a sale of securities within the meaning of the '34 Act. *Id.* Scherk did not assign as error the Seventh Circuit's ruling that the sale of Scherk's businesses constituted the sale of securities, nor did the parties argue the issue before the Supreme Court. *Scherk,* 417 U.S. at 514n.8, 516n.9. *See* Landreth Timber Co. v. Landreth, 105 S.Ct. 2297 (1985) (holding "sale of business" doctrine does not preclude antifraud protections if stock sold possesses characteristics traditionally associated with common stock). *See generally* Note, *The Sale of Business Doctrine: Judicial Exemption From the Federal Securities Laws,* 41 WASH. & LEE L. REV. 1141 (1984) (discussing cases holding that sale of business is not a security).

48. *See Scherk,* 417 U.S. at 519-21. After reversing the Seventh Circuit, the Supreme Court in *Scherk* remanded to the district court. *Id.* at 521. On remand, the district court ordered arbitration as provided by the parties' agreement. *Scherk,* No. 71 Civ. 1414, slip op. at 3 (N.D. Ill. July 12, 1978) (memorandum opinion on remand). The International Chamber of Commerce rendered its arbitral award in November of 1977. *Id.* at 4. The arbitrators ordered rescission of the purchase agreement because the arbitrators found that Scherk had breached his trademark warranty. *Id.* The arbitrators, however, did not find that Scherk was guilty of deliberate fraud. *Id.* Although the parties disputed the scope of the arbitral award in subsequent proceedings in the district court, the parties carried out the rescission voluntarily. *Id.* at 5.

49. *Scherk,* 417 U.S. at 512n.6. The *Scherk* Court did not distinguish *Scherk* from *Wilko* on the basis that the parties in *Scherk* had equal bargaining power whereas in *Wilko* the seller had greater bargaining power than the investor. *Id.* Furthermore, the Court did not distinguish the two cases on the basis that the '34 Act provides only an implied right of action for defrauded securities purchasers in contrast to the express right of action under the '33 Act. *Id.* at 513-14; *see supra* note 13 (discussing application of nonwaiver rule to actions brought under '34 Act).

50. *See Scherk,* 417 U.S. at 515.

51. *See id.* at 515-16; *see infra* notes 122-145 and accompanying text (examining cause of uncertainties concerning applicable law in international transactions). Since the parties' agreement in *Scherk* provided that the laws of Illinois would apply, the parties may have presumed that the arbitral tribunal would honor that choice unless it violated French national conflict of laws rules, where arbitration was to be held. *See Scherk,* 417 U.S. at 508-09n.1 (agreement provided that Illinois law governs disputes); Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?,* 16 INT'L LAW. 613, 615-22 (1982) (considering arbitrators' basis for determining applicable law when parties choose national law). *But see Scherk,* 417 U.S. at 532n.11 (Douglas, J. dissenting) (expressing concern that foreign arbitrators improperly might apply Illinois laws, including antifraud provisions under United States securities laws); Note, *Greater Certainty in International Transactions Through Choices of Forum?,* 69 AM. J. INT'L L. 366 (1975) (questioning whether *Scherk's* "truly international" exception actually will increase parties' certainties).

52. *See Scherk,* 417 U.S. at 516 (dispute-resolution provisions diminish possibility that forum hostile to interest of one of parties, or unfamiliar with problem area, will hear disputes).

Culver's argument that the *Wilko* nonwaiver rule was necessary to protect securities investors, observing that a seller could invoke foreign laws in foreign courts to offset a defrauded investor's advantages in United States courts.[53] In *Scherk,* the seller's possible countermeasures to the buyer's suit in United States courts included the use of foreign blocking laws which could impede United States litigation by conditioning the disclosure of foreign documents on the express consent of foreign governmental authorities.[54] In addition, the *Scherk* Court suggested that foreign courts might refuse to recognize or enforce an American judgment rendered in violation of the parties' arbitration agreement.[55] The *Scherk* Court found that international parties, international negotiations, and international subject matter clearly comprised a "truly international" securities transaction,[56] but declined to specify any minimum standards for a "truly international" securities transaction.[57] The *Scherk* Court only indicated that future decisions would determine the minimum combination of international contacts required before the courts would enforce a dispute-resolution agreement in a securities transaction.[58]

Following the 1974 *Scherk* decision, nearly nine years passed before a United States court again upheld an arbitration, forum selection, or choice of law agreement in a securities transaction under the *Scherk* "truly international" exception. The first decision holding that a securities transaction was "truly international" under *Scherk* was *Pioneer Properties, Inc. v. Martin.*[59] In *Pioneer,* the United States District Court for the District of Kansas stayed a securities fraud action pending arbitration in Ontario, Canada.[60] The defendants in *Pioneer* were Ross Martin, a Canadian citizen, and the Genesis Marketing Organization, a Canadian corporation.[61] The *Pioneer* defendants sold several real estate joint ventures to Pioneer Properties (Pioneer), a Kansas corporation.[62] The real estate was located in Ontario, Canada,[63] where the parties negotiated the joint venture agreements.[64] The joint venture agreements stipulated that the parties would submit

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53. *Id.* at 516-18; *see infra* notes 146-171 and accompanying text (examining foreign impediments to litigation in United States courts and enforcement of United States judgments).

54. *See Scherk,* 417 U.S. at 517-18; *see infra* notes 147-165 and accompanying text (explaining use of blocking statutes and bank secrecy laws in international litigation).

55. *See Scherk,* 417 U.S. at 516-17; *see infra* notes 166-171 and accompanying text (discussing foreign recognition and enforcement of United States judgments).

56. *Scherk,* 417 U.S. at 515.

57. *See id.* at 517n.11.

58. *See id.*

59. 557 F. Supp. 1354 (D. Kan. 1983)

60. *Id.* at 1366.

61. *Id.* at 1357.

62. *Id.* Under three separate joint venture agreements in *Pioneer,* the sellers assumed responsibility for managing the daily operations of the residential real estate while the investors providing the working capital. *Id.*

63. *Id.*

64. *Id.* at 1365. In *Pioneer,* the plaintiff investor maintained that the defendant seller solicited the joint ventures through telephone calls and correspondence between Ontario and

for arbitration in Ontario any disputes involving the agreements.[65]

Despite the parties' agreements to arbitrate any future disputes in Ontario, Pioneer filed suit in the Kansas district court after the defendants repeatedly requested additional contributions to cover expenses and mortgage payments.[66] Pioneer alleged that the defendants misrepresented each party's joint venture obligations in violation of section 12(2) of the '33 Act and SEC rule 10b-5 promulgated under section 10(b) of the '34 Act.[67] The defendants moved to stay the action pending arbitration in Ontario,[68] and the *Pioneer* court granted the motion.[69] The *Pioneer* court did not explain why public policy warranted enforcement of the arbitration agreements, but nevertheless relied on *Scherk* because the securities transaction in question involved international parties, international negotiations, and international subject matter.[70] Although the international contacts in *Pioneer* correspond to the international contacts in *Scherk,*[71] Pioneer can be distinguished from *Scherk.*[72] The foreign businessman in *Scherk* sold his own businesses to Alberto-Culver in a solitary transaction,[73] whereas the foreign investment company in *Pioneer* sold similar joint venture interests to sixteen different investors other than

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Kansas. *Id.* at 1359. The district court observed that the parties held meetings in Ontario, Chicago, and Kansas, and finalized the agreements in Ontario. *Id.* Furthermore, an Ontario law firm acted as an intermediary between the parties. *Id.*

65. *Id.* at 1362-63. The joint venture agreements in *Pioneer* stipulated that the parties would arbitrate any disputes touching the agreements under the provisions of the Ontario Arbitration Act. *Id.* at 1363. The agreements also stipulated that the laws of Ontario governed the joint venture agreements. *Id.* at 1365n.14.

66. *Id.* at 1357, 1359n.8.

67. *Id.* In addition to claims under the '33 Act and '34 Act, the American investor in *Pioneer* asserted pendant claims of common law fraud, breach of contract, and breach of fiduciary duties. *Id.* at 1357.

68. *Id.* In addition to requesting a stay pending arbitration, the defendant in *Pioneer* moved to dismiss the action either for lack of personal jurisdiction, or on forum non conveniens grounds. *Id.* at 1357-58.

69. *Id.* at 1365-66. Before the *Pioneer* court stayed the action pending arbitration in Ontario, the court found that the Canadian securities sellers had sufficient contacts within the United States for the court to exercise personal jurisdiction. *Id.* at 1360-61. Specifically, the court concluded that the sellers' numerous communications to the United States investors, including ongoing status reports and requests for further contributions, satisfied the requirements for personal jurisdiction. *Id.* The court denied the sellers' forum non conveniens motion, determining that the forum was neither clearly inappropriate nor inconvenient. *Id.* at 1361-62. The court also found that the doctrine of forum non conveniens was inapplicable when legislation provides plaintiffs with a wide choice of forum. *Id.*

70. *Id.* at 1365. According to the *Pioneer* court, the parties' arbitration agreement was valid and enforceable under the United States Arbitration Act since, under *Scherk,* the nonwaiver rule did not apply. *Id.; see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 (1974) (Wilko's exception to the United States Arbitration Act was unsuitable for "truly international" securities disputes); 9 U.S.C. §§ 1-14 (1982) (United States Arbitration Act) (legalizing arbitration agreements in maritime, interstate, and international commercial disputes).

71. *Compare Pioneer,* 557 F. Supp. at 1365 (securities transaction involved Canadian seller, property in Canada, and negotiations held in Canada) with *Scherk,* 417 U.S. at 515 (securities transaction involved German seller, German and Liechtenstein subject matter, and negotiations throughout Europe).

Pioneer.[74] In *Pioneer*, therefore, the Kansas district court extended *Scherk* to international securities fraud actions arising from transactions carried out between investors and investment companies.[75]

In a case involving a real estate investment transaction similar to the transactions in *Pioneer*, the Second Circuit also held that sales by investment companies could qualify as "truly international" securities transactions under *Scherk*.[76] In *AVC Nederland B.V. v. Atrium Investment Partnership*,[77] the Dutch owner of AVC Nederland B.V. (AVC), a Dutch importing business, purchased a real estate partnership interest from the Atrium Investment Partnership (Atrium), a real estate investment partnership organized by two other Dutch citizens.[78] The two organizers of Atrium formed their investment company to market American real estate to European investors.[79] The American real estate at issue in *AVC* was a forty percent general partnership interest in a building in Great Neck, New York.[80] The parties negotiated the transaction in both the United States and the Netherlands,[81] and signed an

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72. *See infra* text accompanying notes 73-75 (explaining significant difference between securities transactions in *Pioneer* and *Scherk*).

73. *Scherk*, 417 U.S. at 508.

74. *Pioneer*, 557 F. Supp. at 1357.

75. *See id.* at 1364-65.

76. *See infra* notes 77-94 (discussing *AVC Nederland B.V. v. Atrium Investment Partnership*).

77. 740 F.2d 148 (2d Cir. 1984).

78. *Id.* at 149. In *AVC*, the Dutch organizers and sellers of the Atrium Investment Partnership were Pieter Kuik and Robert K. Lenting. *Id.* The Dutch investor was Peter J. Haan, sole owner of AVC Nederland B.V. (AVC), an importer of recording tapes and cassettes. *Id.*

79. *Id.* at 149-50. The sellers in *AVC* formed their investment company, called the K&L Advisory Group, in Atlanta, Georgia. *Id.* The purpose of the company was to market American real estate investments to European investors. *Id.* Prior to commencement of the suit, K&L had retained an Atlanta law firm as counsel. *Id.* at 150.

80. *Id.* at 151. The investor in *AVC* purchased a 40% general partnership interest in the Atrium building for $3,800,000. *Id.* at 151, 152-53. The parties' partnership agreement specified the investor's return on the investment. *Id.* at 151. The partnership agreement also stated that the sellers would receive a percentage of the building's gross receipts and a percentage of profits realized on resale of the building. *Id.*

81. *Id.* at 149-51. In *AVC*, the sellers formed the Atrium investment partnership in July 1981. *Id.* at 149. Negotiations with AVC began in August 1981, when, at the suggestion of AVC's financial auditor, the parties met in the Netherlands and discussed the Atrium investment partnership. *Id.* at 150. In November 1981 AVC representatives visited the Atrium building in New York, and also visited other investment real estate ventures that the sellers had organized. *Id.* The parties met in Atlanta and outlined the terms of an agreement to join the Atrium partnership, but did not conclude the agreement. *Id.* On November 27, 1981, the parties again met in the Netherlands. *Id.* at 150-51. As a result of the meeting in the Netherlands, a Dutch civil law notary drafted the agreement to join the partnership. *Id.* at 151. Under Dutch law, civil law notaries are civil servants and impartial lawyers rather than legal advocates. *Id.* at 151n.5. The parties signed the agreement in the Netherlands. *Id.* at 151. According to the agreement for joining the partnership, the sellers' legal counsel in Atlanta would revise the Atrium investment partnership agreement to reflect the addition of AVC and other investors. *Id.*

agreement to submit any disputes arising from the transaction to the Netherlands' courts under Dutch law.[82]

Despite the parties' agreement to litigate any future disputes in the Netherlands, AVC brought suit against Atrium in the United States District Court for the Eastern District of New York after concluding that the investment was unsound.[83] AVC alleged that Atrium had misrepresented the building's value and thus violated section 10(b) of the '34 Act and SEC rule 10b-5.[84] Atrium moved to dismiss the action pursuant to the parties' forum selection and choice of law agreement.[85] The district court granted the motion to dismiss[86] and the Second Circuit affirmed.[87] The Second Circuit concluded

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82. *Id.* at 151. The partnership agreement in *AVC* stated that any disputes arising from the agreement would be decided by the court in Utrecht, the Netherlands, and that the laws of the Netherlands would govern the agreement. *Id.* The parties drafted the agreement in Dutch. *Id.* at 155.

83. *Id.* at 152. Prior to filing the *AVC* suit in federal court in New York, AVC had ceased making payments to the Atrium Investment Partnership. *Id.* AVC then filed suit in the Supreme Court of New York, alleging fraud in the sale of the partnership interest and seeking to block Atrium's sale of the building. *Id.* The Supreme Court of New York dismissed the action pursuant to the parties' forum selection agreement. *Id.* at 152n.7. Shortly after AVC initiated the state court action, Atrium brought suit against AVC in the Netherlands requesting that AVC pay the sum still due under the partnership agreement. *Id.* at 152. AVC's answer to the action in the Netherlands court maintained that Atrium's fraudulent representations violated the Dutch Civil Code. *Id.*

84. *Id.* In *AVC,* the investor's claims under §10(b) of the '34 Act and SEC rule 10b-5 alleged that Atrium had overstated the total cost of the Atrium building, overstated Atrium's equity interest in the building, misrepresented Atrium's fee on resale of the building, and misrepresented Atrium's plans to report partnership activities to the investors. *Id.* at 150n.3.

85. *Id.* at 152. In addition to Atrium's motion to dismiss the *AVC* action in federal court pursuant to the parties' forum selection agreement, Atrium moved to dismiss for lack of subject matter jurisdiction. *Id.*

86. *Id.* The district court in *AVC* dismissed the action pursuant to the forum selection agreement and did not discuss subject matter jurisdiction. *Id.*

87. *Id.* at 160. Prior to affirming the district court's dismissal pursuant to the forum selection agreement, the Second Circuit found that the court could exercise subject matter jurisdiction. *Id.* at 154. The Second Circuit did not determine whether AVC's general partnership interest was a security but refused to dismiss on that basis because the contested basis of jurisdiction also was an element of AVC's securities fraud claim. *Id.* at 152-53. The court noted that AVC's contentions that the general partnership was a security were neither immaterial nor insubstantial. *Id.* at 152-53; *see* Bell v. Hood, 327 U.S. 678, 682 (1945) (when contested basis of federal jurisdiction is element of federal claim, federal courts should not dismiss unless claim is insubstantial or immaterial). The Second Circuit found that case law was inconclusive on the issue of subject matter jurisdiction under the extraterritorial scope of the securities laws. *Id.* at 153-54; *see supra* notes 10-11 and accompanying text (citing case law for subject matter jurisdiction principles in securities fraud cases). The Second Circuit then concluded that Atrium's negotiations and representations in the United States satisfied one of the four conditions for upholding jurisdiction under the American Law Institute's Tentative Draft No. 2 of the Revised Restatement (Second) of Foreign Relations Law (Revised Restatement). *Id.* at 154; *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 416(2)(b) (Tent. Draft No. 2 (1981)) (proposing rules for subject matter jurisdiction in international securities transactions) [hereinafter cited as REVISED RESTATEMENT]. Since § 416(2) of the Revised Restatement also states that courts should examine the reasonableness of United States jurisdic-

that the transaction was "truly international" and thus within the purview of *Scherk* even though the subject matter in AVC was American real estate.[88] According to the Second Circuit, the international situs and character of negotiations combined with the Dutch nationality of both parties made the transaction a "truly international" securities transaction.[89] The Second Circuit suggested that the challenged provision in the parties' agreement tended to increase certainty about the applicable law.[90] The court also suggested that even though Congress intended the United States securities laws to protect foreign as well as domestic investors from fraudulent sellers, the Dutch seller might have requested the Netherlands' courts to enjoin the Dutch investor from suing in United States courts.[91] Because all of the significant contacts in *AVC* were international with the exception of the situs of the American real estate,[92] the Second Circuit's decision arguably does not abbreviate the standard for a "truly international" securities transaction.[93] Instead, the *AVC* court simply may have modified the standard in holding that the presence of only foreign parties in the securities transaction compensated for a lack of international subject matter.[94]

Shortly after the *AVC* decision, the Second Circuit in *S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc.*[95] alleviated ambiguity in finding that, at a minimum, a "truly international" securities transaction requires parties of diverse nationalities.[96] The plaintiff in the *Samitri* case was S.A. Mineracao Da Trindade-Samitri (Samitri), a Brazilian corporation, and the defendants were two United States corporations, two Brazilian corporations, and a Panamanian corporation.[97] Samitri purchased a forty-

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tion, the *AVC* court turned to § 403(2) of the Revised Restatement which provides relevant factors and concluded that jurisdiction was not unreasonable in light of the factors listed in § 403(2). *See AVC*, 740 F.2d at 154-55; *see also* REVISED RESTATEMENT, *supra* at § 403(2) (listing factors that courts may consider in determining whether exercise of subject matter jurisdiction is reasonable). *See generally*, Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983) (questioning effectiveness of balancing national policies in courts).

88. *AVC*, 740 F.2d at 158-59. The *AVC* court recognized the United States' interests in utilizing American securities laws to ensure the integrity of American securities markets and encourage foreign investment in American real estate, but concluded that those interests must yield to the parties' agreements in international securities transactions. *Id.* at 159.

89. *Id.*

90. *Id.* at 158. The *AVC* court explained that while American courts would apply the '34 Act, a court in the Netherlands would apply Dutch law. *Id.*

91. *Id.*

92. *Id.* at 158-59.

93. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 515 (1974) (securities transaction qualifies as international because of international parties, subject matter, and negotiations).

94. *See AVC*, 740 F.2d at 158-59.

95. 745 F.2d 190 (2d Cir. 1984).

96. *Id.* at 195.

97. *Id.* at 191. The plaintiff in *Samitri* was S. A. Mineracao da Trindade-Samitri (Samitri), a Brazilian Corporation that supplied iron ore products to European and South American purchasers. *Id.*; S. A. Mineracao da Trindade-Samitri v. Utah International, Inc., 576 F. Supp. 566, 568 (S.D.N.Y. 1983). The United States defendants were Utah International, Inc. and

nine percent interest in a jointly owned corporation for the purpose of mining iron ore in Brazil and marketing the ore in the United States and throughout the world.[98] Samitri and the defendants negotiated joint venture agreements over the course of several years[99] and stipulated in the agreements that the parties would submit any disputes under the agreements to arbitration in Paris, France.[100]

When Samitri learned that several large buyers had cancelled contracts to purchase iron ore from the joint venture,[101] Samitri ignored the parties' arbitration agreement and filed suit against the six defendants in the United States District Court for the Southern District of New York.[102] Samitri alleged that during the negotiation of the joint venture agreements the defendants fraudulently represented the existence of long-term contracts with iron ore buyers, and that the alleged misrepresentation violated various antifraud provisions of the '33 Act and '34 Act.[103] The defendants moved to

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Utah Marcona Corporation. *Samitri,* 745 F.2d at 191n.1. The Brazilian defendants were Mineracao Marex Ltda. and Samarco Mineracao S.A. *Id.* The Panamanian defendant was Marcona International S.A. *Id.*

98. *Samitri,* 576 F. Supp. at 568. The parties in *Samitri* signed three major contracts in 1974 that established the Samarco project. *Id.* Under the Samarco project agreements, Samitri would provide access to Samitri's undeveloped iron ore reserves in Brazil while Samarco would mine and process the ore, and the defendants would market the ore. *Id.* One of the agreements provided that Samitri and the defendants would purchase, respectively, 49% and 51% of the equity securities in Samarco. *Id.* at 568-69. The agreements also authorized future stock purchase agreements in the same ratio. *Id.* Following the 1974 agreements, the parties amended the agreements and entered into several supplemental agreements, some of which required the parties to purchase additional securities in Samarco. *Id.*

99. *Samitri,* 745 F.2d at 192. In *Samitri,* the parties commenced negotiations in the early 1970's and in 1973 agreed to undertake the joint venture. *Id.* The parties signed the three major contracts on December 10, 1974. *Id.* The total investment in the assets of the venture was estimated at $600,000,000. *Samitri,* 576 F. Supp. at 567.

100. *Samitri,* 745 F.2d at 192. In *Samitri,* the 1974 agreements provided that the parties would settle any disputes that arose or occurred under the agreements through arbitration in Paris, France, by arbitrators appointed under International Chamber of Commerce rules. *Id.* The 1974 agreements also stated that the joint venture would be governed by the laws of Brazil. *Samitri,* 576 F. Supp. at 572-73. The parties' supplemental agreements did not contain arbitration clauses. *Samitri,* 745 F.2d at 192.

101. *Samitri,* 576 F. Supp. at 569.

102. *Id.*

103. *Id.* The Brazilian plainfiff in *Samitri,* after learning that several United States iron ore buyers had cancelled major contracts with Samarco, sought to rescind the joint venture agreements for the Samarco project. *Id.* Samitri then brought suit in the United States District Court for the Southern District of New York alleging that the defendants fraudulently had induced Samitri to enter the project. *Id.* Additionally, Samitri alleged breach of contract, breach of fiduciary duty, common law fraud, violations of Brazilian law, violations of the United States Declaratory Judgments Act, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). *Id.* at 567n.3, 569; *see* United States Declaratory Judgment Act, 28 U.S.C. § 2201 (1982) (providing immediate federal forum for adjudication of rights and obligations before controversy ripens); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982) (prohibiting racketeering activity, including securities fraud, and authorizing sanctions and private remedies). The Brazilian plaintiff sought restitution

stay the action and compel arbitration in Paris as provided by the parties' agreements.[104] The district court granted the defendants' motion[105] and the Second Circuit affirmed.[106] The Second Circuit in *Samitri* concluded that the securities transaction qualified as "truly international" because the parties were of diverse nationality, the joint venture's iron ore production was outside the United States, and sales of the ore took place throughout the world.[107] The *Samitri* court emphasized the parties' need for certainty concerning the law governing their transaction[108] and suggested that United States courts lacked familiarity with the foreign subject matter of the case.[109] Although the international parties, negotiations, and subject matter in *Samitri* clearly comprised a "truly international" securities transaction under Scherk,[110] the *Samitri* facts differ from those in *Scherk* in one significant respect. The only defendant in *Scherk* was foreign,[111] while two of the defendants in *Samitri* were United States corporations.[112] The *Samitri* decision, therefore, suggests that courts in some instances will enforce arbitration, forum selection, and choice of law agreements in securities transactions between United States sellers and foreign investors.[113]

After the decisions in *Pioneer, AVC,* and *Samitri,* the list of significant international contacts for a "truly international" securities transaction under *Scherk* still includes international parties, international negotiations, and international subject matter.[114] Significantly, *Pioneer* and *AVC* enforced

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of approximately $200,000,000 which it had invested in the Samarco project. *Samitri,* 576 F. Supp. at 569.

104. *Samitri,* 576 F. Supp. at 567-68. The defendants in *Samitri* moved to compel arbitration pursuant to the United States Arbitration Act. *Id.; see* United States Arbitration Act, 9 U.S.C. §§ 1-14 (1982) (legalizing arbitration of maritime, interstate, and international commercial disputes).

105. *Samitri,* 576 F. Supp. at 576. The district court ordered arbitration of all claims except those brought under RICO. *Id.* The district court held that RICO claims were not arbitrable because of the important public interest in enforcing RICO. *Id.* at 574; *see infra* notes 179-181 (discussing reasons for nonarbitrability of RICO claims). The district court also concluded that the 1974 arbitration agreements served as an umbrella covering the parties' supplemental agreements. *Samitri,* 576 F. Supp. at 573-74. In addition, the district court held that because the arbitration agreement covered any disputes that might "arise or occur" under the joint venture agreements, the arbitration agreements cover fraudulent inducement claims).

106. *Samitri,* 745 F.2d at 197.

107. *Id.* at 195.

108. *Id.* The Second Circuit in *Samitri* suggested that uncertainties concerning the applicable law might result from the defendants' possible challenge to the application of United States securities laws. *Id.*

109. *Id.*

110. *Compare Samitri,* 745 F.2d at 195 (securities transaction between American, Panamanian, and Brazilian parties, international subject matter, and international negotiations) *with Scherk,* 417 U.S. at 515 (securities transactions between German and American parties, international subject matter, and international negotiations).

111. *See Scherk,* 417 U.S. at 515.

112. *See Samitri,* 745 F.2d at 191n.1.

113. *See id.* at 195.

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

arbitration, forum selection, and choice of law agreements in securities fraud actions brought against investment companies.[115] *AVC* also held that under *Scherk,* a securities dispute concerning domestic subject matter could qualify as "truly international" if all parties to the dispute were foreign citizens.[116] Finally, *Samitri* clarified that "truly international" securities transactions under *Scherk* could include transactions between domestic sellers and foreign investors.[117]

Analysis of the international contacts in *Pioneer, AVC,* and *Samitri* does not reveal clearly any minimum standards for a "truly international" securities transaction.[118] Because a mere examination of the international contacts at issue in the cases following *Scherk* provides little guidance in determining whether the federal courts will enforce a particular dispute-resolution agreement, it is necessary to consider the objectives and public policies behind the *Scherk* "truly international" standard.[119] In developing the "truly international" exception to the *Wilko* nonwaiver rule, United States courts primarily have recognized that public policy favors increasing certainty concerning the applicable law in international securities transactions.[120] In addition, the courts have attempted to avoid conflicts with foreign countermeasures intended to frustrate securities fraud actions in United States courts.[121]

Arbitration and forum selection agreements increase predictability and certainty in international securities transactions by diminishing the risk that a party might bring suit based on a disputed transaction in any court that could assert adjudicatory jurisdiction over the parties.[122] Jurisdiction to adjudicate means the authority to subject persons or property to the process of national courts, regardless of whether the courts would prescribe and apply the forum nation's laws.[123] The common law bases of adjudicatory

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115. *See* AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 158-59 (2d Cir. 1984); Pioneer Properties, Inc. v. Martin, 557 F. Supp. 1354 (D. Kan. 1983).

116. *See AVC,* 740 F.2d at 158-59.

117. *See* S. A. Mineracao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190, 195 (2d Cir. 1984).

118. *See supra* notes 59-117 and accompanying text (discussion of *Pioneer, AVC* and *Samitri).*

119. *See Scherk,* 417 U.S. at 515-20 (outlining considerations and policies that distinguished *Scherk* from *Wilko).*

120. *See id.* at 515-16, 518-19 (stressing parties' need for certainty in international transactions); 1 G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES § 1.01, at 1-3 (1985) (dispute-resolution agreements accomplish objectives of increased certainty and avoidance of conflicts in transnational contracts).

121. *See Scherk,* 417 U.S. at 516-17 (emphasizing that foreign obstacles might deprive defrauded securities investors of advantages of litigation in Unites States courts).

122. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-15 (1972) (parties might bring suit in many different jurisdictions unless agreement stipulates forum); 1 G. DELAUME, *supra* note 120, §§ II.01 at 3-8 (exclusive forum selection and arbitration clauses enable parties to avoid questionable foreign jurisdiction).

123. *See generally* REVISED RESTATEMENT, *supra* note 87, at §§ 401, 441 (distinguishing jurisdiction to adjudicate from jurisdiction to prescribe laws).

jurisdiction are the defendants' presence and submission, either by consent or appearance, to the court's jurisdiction.[124] English and other British Commonwealth courts generally have shown greater restraint than United States courts in the exercise of adjudicatory jurisdiction.[125] In securities disputes, for example, Canadian provincial courts have not asserted adjudicatory jurisdiction unless trading activities took place within a province's boundaries and either the sellers or the victims were located in Canada.[126] Civil law countries, however, have used factors other than the defendant's presence or submission as bases for adjudicatory jurisdiction. For example, civil law countries may condition jurisdiction on factors such as the plaintiff's nationality or the presence of the defendant's property within the country.[127] Notwithstanding the different foreign standards for adjudicatory jurisdiction, a "truly international" securities transaction under *Scherk* should include international contacts such that one or more foreign courts, as well as the United States courts, could assert adjudicatory jurisdiction over a dispute between the parties.[128]

When a foreign court asserts adjudicatory jurisdiction, that court applies its own national conflict of laws rules.[129] Differing national conflict of laws

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124. *See* 1 G. DELAUME, *supra* note 120, §§ 7.02-7.03, at 2-12 (adjudicatory jurisdiction in common law courts is based on presence of defendant within forum nation's territory and submission of defendant to forum nation's courts).

125. *See id.*

126. *See, e.g.*, R. v. W. McKenzie Securities Ltd., 56 D.L.R.2d 56, 62-64 (Man. C.A. 1966) (finding jurisdiction under Manitoba's securities laws based on nonresident defendant's solicitations to local investors); Gregory & Co., Inc. v. Quebec Securities Commission, 28 D.L.R.2d 721, 725-27 (Can. 1961) (finding jurisdiction over local seller of securities under Quebec's securities laws although all sales were to nonresident investors); *see also* Re Chapman, 3 Ont. 344, 348-50 (C.A. 1970) (Canadian securities laws applied even though only persons defrauded were United States investors). Provincial law regulates securities trading in Canada except with respect to securities of widely held corporations which is governed by corporation legislation. *See generally* D. JOHNSTON, CANADIAN SECURITIES REGULATION 5-9, 17-18 (1977) (explaining structure of securities regulation in Canada); Simmonds, *Proposals for a Securities Market Law For Canada: A Review*, 3 J. COMP. CORP. L. & SEC. REG. 31, 32 (1981) (discussing reasons for Canada's lack of federal scheme of securities regulations).

127. *See generally* 2 G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES § 8.01, at 1-21 (1985) (outlining civil law rules for adjudicatory jurisdiction). While civil law countries in the European Economic Community (EEC) have based jurisdiction on the nationality of the plaintiff or the presence of the defendant's assets within the jurisdiction, these countries have applied securities disclosure requirements only to issuers whose shares are listed on a stock exchange in a member state but not to issuers whose shares are traded over the counter. *See* Pierce, *The Regulation of the Issuance and Trading of Securities in the United States and the European Economic Community: A Comparison*, 3 J. COMP. CORP. L. & SEC. REG. 129, 131-32 (1981) (EEC securities disclosure requirements, unlike United States disclosure requirements, do not become applicable until stock exchange listing admits securities of issuer).

128. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (uncertainty about applicable law exists for any contract touching two or more countries).

129. *See id.* (if contract touches two or more countries, each country would apply its own conflict of laws rules); Lando, *The Substantive Rules in the Conflict of Laws: Comparative*

rules often prescribe the application of different nations' laws.[130] The *Samitri* case provides an example of differences between United States and Brazilian conflict of laws rules.[131] In the case of a contract dispute, United States conflict of laws rules consider a series of factors to determine the applicable law, including the nationality of the parties, the location of the subject matter, and the place of negotiations.[132] Each factor helps to identify the law of the place having the most significant relationship to the contract.[133] Unlike the United States conflict of laws rules, the Brazilian conflict of laws rules generally specify as the applicable law the law of the place where the parties entered into the contract in question.[134] If the performance of the contract is in Brazil, however, Brazilian courts apply Brazilian law.[135]

A comparison of Brazilian securities laws and United States securities law demonstrates that application of different laws may lead to different results.[136] Although Brazilian securities laws provide investors with protections against fraudulent sellers, those protections are weak in comparison to the protections under United States securities laws.[137] The possibility that parties to the *Samitri* transaction might bring actions in various forums and

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Comments from the Law of Contracts, 11 TEX. INT'L L.J. 505, 512-13 (1976) (uncertainties result from diversity of conflict of laws rules in international contracts); *see also* Vitta, *The Impact in Europe of the American "Conflicts Revolution",* 30 AM. J. COMP. L. 1, 7-9 (1982) (European conflict of laws rules, unlike American rules, tend to set forth mechanical approach with little room for judicial discretion); *cf.* Hay, *The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law,* 28 INT'L & COMP. L.Q. 161, 163-66 (1979) (explaining distinction between jurisdictional and choice of law issues).

130. *See* A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 20-21 (8th ed. 1967) (conflict of laws rules may differ on their faces, may interpret a connecting factor differently, or may characterize a legal question differently); Rabel, *Conflicts Rules On Contracts,* in LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 127-37 (1951) (discussing manner in which inconsistent conflict of laws rules may lead to different results).

131. *See supra* notes 95-113 and accompanying text (examining Second Circuit's decision in *Samitri).*

132. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971) listing factors to be evaluated in determining applicable law in interstate and international contract disputes).

133. *See id.* § 188(1) (1971) (United States' conflict of laws rules point to the law of place having most significant relationship to transaction in question).

134. *See* P. GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW 54 (1959). In contract disputes, Brazilian conflict of laws rules apply, as controlling law, the law of the place where the parties formed their contract. *Id.* Brazilian conflict of laws rules also presume that the parties formed their contract at the residence of the party who made the initial proposal. *Id.*

135. *See id.* (Brazilian courts apply Brazilian law if performance of contract is to occur in Brazil). *See generally* Note, *The Choice of Law Clause in Contracts Between Parties of Developing and Developed Nations,* 11 GA. J. INT'L & COMP. L. 617, 622-29 (1981) (conflict of laws rules in Brazil, Argentina, and Columbia stress protection of national interests) [hereinafter cited as Note, *Choice of Law].*

136. *See* Eizirik, *The Role of the State in the Regulation of the Securities Markets: The Brazilian Experience,* 1 J. COMP. CORP. L. & SEC. REG. 211, 223 (1978) (under Brazilian law, investors have only limited protection against fraudulent sellers of securities).

137. *See id.*

the potential application of various securities laws, therefore, subjected those parties to uncertainty concerning the law governing the transaction.[138]

To increase the predictability and certainty of international securities transactions, choice of law agreements explicitly set forth the laws that the parties intend to apply.[139] Even without an explicit choice of law clause, an arbitration or forum selection agreement increases certainty concerning the governing law by implicitly pointing to the conflict of laws rules of a particular forum.[140] In addition, arbitration and forum selection agreements diminish the risk of litigation in an inconvenient or hostile forum.[141] Generally, foreign courts have respected and enforced arbitration, forum selection, and choice of law agreements unless the agreements are contrary to a strong public policy held by the forum.[142] In light of the public policy favoring

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138. *See* S. A. Mineracao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190, 195 (1984).

139. *See* 1 G. DELAUME, *supra* note 120, § 1.01, at 1-3 (express choice of law agreements in transnational contracts stipulate law governing future contractual disputes between the parties to contract).

140. *See* Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?,* 16 INT'L LAW. 613, 623-38 (1982) (arbitral tribunals select appropriate conflict of laws rules from various national and international conflict of laws systems); *see also* Thomas, *Arbitration Agreements as a Signpost of the Proper Law,* 1984 LLOYD'S MARITIME & COMP. L.Q. 141, 147 (neither forum selection nor arbitration agreement conclusively implies that law of forum nation is proper law).

141. *See* 1 G. DELAUME, *supra* note 120, § 6.01 at 1-4 (emphasizing parties' need to eliminate uncertainties arising from various national rules of adjudicatory jurisdiction); Note, *International Arbitration of Multi-Party Contract Disputes: The Need for Change,* 6 LOY. L.A. INT'L & COMP. L. REV. 427, 429 (1983) (parties that arbitrate contractual disputes avoid litigation in hostile or unfamiliar courts).

142. *See* 1 G. DELAUME, *supra* note 120, § 6.15, at 68-76 (although foreign courts give parties considerable autonomy to stipulate forum, courts have held such clauses invalid on public policy grounds). Most foreign countries recognize the validity or arbitration, forum selection, and choice of law agreements, except when agreements are contrary to an important public policy of that forum. *See* Pryles, *Comparative Aspects of Prorogation and Arbitration Agreements,* 25 INT'L & COMP. L.Q. 543, 558, 568-71 (1976) (foreign courts exercise discretion to enforce or ignore forum selection and arbitration agreements); *see also* Note, *Enforcement of Forum-Selection Agreements in Contracts between Unequal Parties,* 11 GA. J. IN'TL & COMP. L. 693, 702, 704-05 (1981) (Latin American courts may refuse to enforce forum selection agreements that conflict with national policy). The European Economic Community set forth rules governing the validity and effectiveness of contractual choice of law agreements in the 1980 Convention on the Law Applicable to Contractual Obligations (1980 EEC Convention). Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 23 O.J. EUR. COMM. (No. L 266) 1 (1980). The 1980 EEC Convention authorizes contracting parties to stipulate the applicable law for a contract, but negates the parties' choice of foreign law if the choice violates mandatory laws relating to important national interests of the forum or another interested nation which may include those rules relating to cartels, consumer protection, or competition and restrictive practices. *See* Philip, *Mandatory Rules, Public Law (Political Rules) And Choice of Law In the E.E.C. Convention on the Law Applicable to Contractual Obligations,* in CONTRACT CONFLICTS 81-110 (P. North ed. 1982) (mandatory rules of forum or other interested nation may restrict party autonomy to choose applicable law). Similarly, many South American countries and European countries outside the

increased predictability and certainty in international transactions, therefore, a "truly international" securities transaction under *Scherk* should involve the risk that foreign courts might assert adjudicatory jurisdiction over disputes relating to the parties' transaction,[143] apply different national conflict of laws rules,[144] and reach different substantive results.[145]

The standards for a "truly international" securities transaction under *Scherk,* however, were based not only on the public policy of increasing certainty in international transactions, but also on the fear that foreign countermeasures intended to frustrate litigation in United States courts effectively might deny a defrauded buyer relief in United States courts.[146] Foreign parties involved in United States litigation increasingly have invoked foreign blocking statutes and bank secrecy laws in an effort to excuse or limit compliance with discovery orders from United States courts.[147] In general, bank secrecy laws prohibit the disclosure of bank customers' names and the details of bank account activity.[148] Although some foreign jurisdictions permit exceptions to their bank secrecy laws, the exceptions do not necessarily enable opposing parties to investigate suspected violations of United States securities laws.[149] For example, exceptions to the Panamanian bank secrecy laws are quite narrow.[150] A Panamanian court will not order an exception to the Panamanian bank secrecy laws unless the discovery

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ECC disregard the parties' choice of foreign law if the law selected is incompatible with an important public policy of the forum country. *See* McDougal, *Codification of Choice of Law: A Critique of the Recent European Trend,* 55 TUL. L. REV. 114, 122-23 (1980) (Eastern European nations may disregard choice of foreign law if that choice violates public policy); Note, *Choice of Law, supra* note 135, at 624-26 (South American countries generally uphold choice of law clauses unless choice conflicts with public policy).

143. *See supra* notes 122-128 and accompanying text (if transaction touches two or more countries, parties may be subject to suit in each of those countries).

144. *See supra* notes 129-135 and accompanying text (different national conflict of laws rules contribute to parties' uncertainties in international transactions).

145. *See* Williams & Spencer, *Regulation of International Securities Markets: Towards a Greater Cooperation,* 4 J. COMP. CORP. L. & SEC. REG. 55, 56-59 (1982) (companies may be subject to inconsistent securities regulations and various disclosure standards as result of regulatory disparities).

146. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-18 (1974) (foreign defendant might have sought foreign order enjoining investor from proceeding with litigation in United States).

147. *See* Batista, *Confronting Foreign "Blocking Legislation": A Guide to Securing Disclosure from Non-Resident Parties to American Litigation,* 17 INT'L LAW. 61, 61-63 (1983) (recent proliferation of blocking statutes has caused practical problems for litigants seeking disclosure from foreign parties).

148. *See* Fedders, *Waiver by Conduct—A Possible Response to the Internationalization of the Securities Markets,* 6 J. COMP. BUS. & CAP. MKT. L. 1, 30-35 (1984) (countries such as Switzerland, Cayman Islands, Bahamas, Austria, Costa Rica, El Salvador, Liechtenstein, and Panama have enacted bank secrecy laws to ensure confidentiality of bank-customer relationship).

149. *See id.* at 34-35 (despite exceptions to bank secrecy, such as obligation to testify in legal proceedings concerning debt collection, SEC often is unable to penetrate shield of secrecy laws).

150. *See id.* at 35.

request concerns a crime under Panamanian law or a civil dispute within Panamanian territory.[151] The potential obstruction of litigation in United States courts by foreign bank secrecy laws, therefore, may encourage the United States courts to enforce dispute-resolution agreements rather than adjudicate the dispute under the United States securities laws.[152]

Blocking statutes also may obstruct litigation in United States courts by prohibiting individuals from submitting to various types of discovery requests.[153] An increasing number of countries have enacted blocking statutes which prevent disclosure by their citizens who are involved as parties to United States litigation, and which often preclude discovery in United States' antitrust investigations.[154] The use of blocking statutes, however, is not limited to antitrust investigations.[155] For example, the Ontario Business Records Protection Act prohibits the disclosure of material relating to an Ontario business in any type of foreign litigation, unless another law of Ontario or Canada explicitly provides for disclosure of the material.[156] Similarly, Great Britain permits the British Secretary of State to prohibit compliance with foreign discovery requests if the requests infringe on British jurisdiction or if the requests are prejudicial to British sovereignty, security, or intergovernmental relations.[157] When securities fraud litigation calls for discovery of foreign documents, United States courts may avoid conflicts arising from foreign blocking statutes by recognizing and enforcing the parties' dispute-resolution agreements.[158]

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151. *See id.*

152. *See supra* notes 146-151 and accompanying text (bank secrecy laws inhibit litigation in United States courts).

153. *See* Fedders, *supra* note 148, at 35-39 (discovery blocking statutes prohibit compliance with requests for documents and information from foreign courts, foreign investigatory agencies, or private foreign parties).

154. *See* Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws,* 37 BUS. LAW. 697, 698-99 (1982) (foreign blocking laws exhibit foreign nations' hostility towards extraterritorial application of United States laws); Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes,* 28 LOY. L. REV. 213, 234-68 (1982) (foreign blocking laws in Canada, England, Australia, South Africa, Netherlands, France, Philippines, and New Zealand oppose extraterritorial enforcement of United States antitrust law); Comment, *Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law,* 1981 ARIZ. ST. L.J. 945, 948-54 (foreign nations have adopted statutes that set forth general conditions upon which discovery requests may be granted and statutes which specifically prohibit disclosure in antitrust actions).

155. *See* Fedders, *supra* note 148, at 3-5 (foreign blocking statutes act as impediments to enforcement of United States securities laws abroad).

156. Business Records Protection Act, [1947] Ont. Stat. ch. 10 (codified at ONT. REV. STAT. 56 (1980)).

157. Protection of Trading Interests Act, 1980, ch. 11, *reprinted in* 1 CURRENT L. STAT. ANN. 11. *See generally* Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980,* 75 AM. J. INT'L L. 257 (1981) (discussing British blocking legislation).

158. *See* Fedders, *supra* note 148, at 4-8 (secrecy and blocking laws have frustrated SEC's enforcement efforts in cases dealing with insider trading, disclosure violations, price manipula-

The prohibition of discovery under a foreign statute, however, is not an absolute bar to disclosure.[159] United States courts in come instances have compelled discovery despite contradictory foreign law.[160] The courts have adopted two approaches for dealing with discovery orders that conflict with foreign bank secrecy laws and blocking statutes. The first judicial approach balances the vital United States interest against the vital foreign interests at stake in the dispute.[161] In securities fraud cases, for example, the vital United States interest is assuring full discovery of evidence concerning fraudulent securities transactions carried out in United States securities markets.[162] In recent cases, the courts have concluded that the United States interest in assuring full discovery outweighed foreign interests in preserving the privacy of bank customers and in resisting infringement of national sovereignty.[163] The second judicial approach compels disclosure only if a party relying on foreign nondisclosure laws failed to make a good faith effort to comply with the discovery order.[164] The courts have concluded that when a party delib-

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tion, registration violations, and other illegal securities activities); Note, *International Cooperation in Insider Trading Cases,* 40 WASH. & LEE L. REV. 1149 (1983) (international cooperation alleviates problems in securities investigations).

159. *See* Securities and Exchange Commission v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 116-19 (S.D.N.Y. 1981) (Swiss bank secrecy law did not prohibit disclosure in SEC investigation of insider trading).

160. *See id.* at 119 (upholding disclosure order in foreign insider trading case); *see also* Securities and Exchange Commission v. Gilbert, 82 F.R.D. 723, 725 (S.D.N.Y. 1979) (finding jurisdiction over Swiss bank in stock price manipulation action); *cf.* Securities and Exchange Commission v. General Refractories Co., 400 F. Supp. 1248, 1256 (D.C. 1975) (deciding misleading proxy solicitation suit against defendants because defendants refused to provide information concerning foreign securities transactions).

161. *See* Securities and Exchange Commission v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-18 (S.D.N.Y. 1981) (balancing United States and Swiss interests in securities insider trading investigation); *see also* United States v. First National City Bank, 396 F.2d 897, 903 (1968) (balancing United States and foreign interests in antitrust investigation). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40(a) (1965) (courts should balance vital national interests of each country seeking to compel inconsistent conduct).

162. *See* Securities and Exchange Commission v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-18 (S.D.N.Y. 1981) (finding strong United States interest in ensuring integrity of securities markets).

163. *See id.* at 118 (foreign interests in enforcing bank secrecy laws are not as strong as United States interest in enforcing securities laws); *see also* Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1373-74 (10th Cir.) (balancing interests in securities fraud case in favor of enforcement of American laws), *cert. denied,* 439 U.S. 833 (1978). *But see* Trade Development Bank v. Continental Insurance Co., 469 F.2d 35, 41 (2d Cir. 1972) (foreign bank secrecy interest outweighed need for disclosure of customers' names in suit charging fraudulent use of bank's and customers' funds).

164. *See* Securities and Exchange Commission v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 118-19 (S.D.N.Y. 1981) (enforcing discovery order because defendant made no good faith effort to comply with discovery); *see also* Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958) (questioning good faith efforts of nondisclosing party to comply with discovery order). *See generally* Note, *Extraterritorial*

erately invokes foreign nondisclosure laws to shield himself from discovery or makes no effort to obtain a waiver of such laws, the party has not acted in good faith and should be required to comply or be sanctioned for failure to disclose the requested information.[165]

Even if a United States court compels disclosure despite foreign bank secrecy laws or blocking statutes, a foreign court might refuse to recognize or enforce a United States judgment.[166] Unlike many countries, the United States has no agreement with other countries providing for reciprocal recognition and enforcement of foreign judgments.[167] If a United States court were to render a judgment against a Dutch citizen, for example, the judgment creditor would have to bring a new action in the Netherlands' courts.[168] Courts in the Netherlands, however, will not recognize or enforce a judgment rendered in violation of the parties' forum selection or arbitration agreement.[169] Other foreign countries may refuse to recognize United States judgments when courts have rendered a judgment on jurisdictional grounds which would have been sufficient to confer jurisdiction on the foreign countries' own national courts.[170] A "truly international" securities transac-

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Discovery: An Analysis Based on Good Faith, 83 COLUM. L. REV. 1320, 1340-45 (1983) (defendant's good faith efforts to comply with discovery should preclude sanctions for failure to comply).

165. *See, e.g.,* Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1373 (10th Cir.) (finding bad faith since nondisclosing party made unsubstantiated assertions that Swiss law precluded discovery), *cert. denied,* 439 U.S. 833 (1978); United States v. First National City Bank, 396 F.2d 897, 900n.8 (2d Cir. 1968) (defendant's failure to inquire into scope of foreign nondisclosure law precluded finding of good faith); Securities and Exchange Commission v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 118-19 (S.D.N.Y. 1981) (defendant's deliberate courting of legal impediments to production of evidence amounted to bad faith); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 296-99 (S.D. Cal. 1981) (defendant's act of secreting documents in foreign countries having nondisclosure laws constituted bad faith).

166. *See* Fedders, *supra* note 148, at 38-39 (several countries have adopted legislation that denies recognition of decisions of foreign courts under certain circumstances); Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Community,* 8 N.C.J. INT'L L. & COM. REG. 229, 320 (1983) (European conventions on recognition of foreign judgments do not apply to American judgments, so European courts often have denied recognition to judgments of American courts); Larsen, *Enforcement of Foreign Judgments in Latin America: Trends and Individual Differences,* 17 TEX. INT'L L.J. 213, 215-16 (1982) (Latin American countries may deny recognition of United States judgments when United States courts have asserted extraterritorial jurisdiction over case); Note, *The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective,* 11 GA. J. INT'L & COMP. L. 635, 638-41 (1981) (reasons for nonenforcement of United States judgments abroad include lack of reciprocity, contravention of public policy, and derogation of mandatory jurisdiction).

167. *See* Woodward, *supra* note 166, at 299 (unlike United Kingdom, United States has reached no such agreement with any country regarding recognition and enforcement of foreign judgments).

168. *See* 2 G. DELAUME, *supra* note 127, § 10.09 at 18-19 (foreign judgment creditor must bring suit *de novo* in Dutch court against Dutch citizen).

169. *See id.* (Dutch courts enforce forum selection agreements when complied with in good faith).

170. *See* 2 G. DELAUME, *supra* note 127, § 9.07, at 3, 15-17 (English courts disregard

tion under *Scherk,* therefore, should involve the risk that foreign cooperation will be essential to effective litigation in the United States or to enforcement of the resulting judgment.[171]

Assuming a securities transaction qualifies as "truly international" under *Scherk,* United States courts nevertheless may refuse to enforce the parties' arbitration, forum selection, or choice of law agreement.[172] The courts may refuse to enforce agreements that are the product of fraud or coercion,[173] are unreasonable or unjust,[174] are contrary to a fundamental public policy,[175]

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foreign judgments when English courts could exercise jurisdiction over case).

171. *See supra* notes 146-170 and accompanying text (foreign blocking and bank secrecy laws inhibit litigation in United States courts).

172. *See infra* notes 173-182 and accompanying text (explaining circumstances under which United States courts refuse to enforce dispute-resolution agreements).

173. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (courts should give forum selection agreements full effect absent fraud, undue influence, or overweening bargaining power); *see also* Lagerman, *Choice of Forum Clauses in International Contracts: What is Unjust and Unreasonable?,* 12 INT'L LAW. 779, 784-86 (1978) (United States courts will not enforce unconscionable forum selection agreements); Covey & Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection,* 61 DEN. L.J. 837, 842-44, 855 (1984) (adhesion contracts or fraudulent contracts stipulating forum or choice of law generally are held unenforceable by American courts).

174. *See, e.g.,* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972) (enforcing forum selection clause because clause was not unreasonable or unjust); Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953, 964-66 (3d Cir. 1978) (forum selection clause providing for dispute resolution before German court was unreasonable because of important United States interests); Sam Reisfeld and Son Import Co. v. S. A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976) (considering whether arbitration agreement was reasonable); Hoes of America, Inc. v. Hoes, 493 F. Supp. 1205, 1208-10 (C.D. Ill. 1979) (American courts should enforce forum selection clause unless clause was unreasonable or unjust); *cf.* Fricke v. Isbrandtsen Co., 151 F. Supp. 465, 467-68 (S.D.N.Y. 1957) (choice of law clause controls unless clause defeats parties' expectations of the applicable law). *See generally* Lagerman, *supra* note 173, at 781-93 (unjust and unreasonable forum selection clauses include clauses which show substantial inconvenience, denial of an effective remedy, or unconscionability).

175. *See* Union Insurance Society v. S.S. Elikon, 642 F.2d 721, 724-25 (4th Cir. 1981) (foreign forum selection clause was not enforceable because clause was prohibited by public policy favoring litigation of suits relating to maritime cargo); Parsons & Whittenmore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (public policy defense should be construed narrowly in considering whether international arbitration clause is enforceable); *see also* Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense,* 2 CARDOZO L. REV. 481, 493-542 (1981) (United States public policy opposes arbitration of various types of disputes, including disputes relating to antitrust, patent law, and bankruptcy); Comment, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards,* 7 CAL. WEST. INT'L L.J. 228, 229-45 (1977) (defining public policy defense to enforcement of foreign arbitral awards). Despite potential conflicts with foreign sovereignty, the United States courts uniformly have held that public policy prohibits the enforcement of agreements to arbitrate all future disputes when the disputes concern the antitrust laws. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 162-63 (1st Cir. 1983) (antitrust issues are not arbitrable); American Safety Equipment v. J. P. Maguire & Co., 391 F.2d 821, 826-27 (2d Cir. 1968) (antitrust claims are not arbitrable since antitrust laws were designed not to protect contracting parties, but to promote competition in economic system).

or fail to cover the dispute in question.[176] For example, United States courts may refuse to enforce a forum selection clause when the clause is the product of the securities seller's superior bargaining power and when the stipulated forum would deny an investor an effective remedy.[177] United States courts may enforce a clause to govern resolution of disputes outside the scope of the agreement itself, unless the clause covers only disputes "arising under" the agreement.[178] In addition, the courts may refuse to enforce arbitration of securities fraud claims brought under the Racketeer Influenced and Corrupt Organization Act[179] (RICO) even if the transaction was "truly international." The *Samitri* district court explained that arbitration of securities fraud claims brought under RICO was inappropriate because the public interest in enforcement of RICO was greater than the public interest in enforcement of the securities laws.[180] The *Samitri* court concluded that the public interest in RICO enforcement outweighed even the need for certainty and predictability in international commercial transactions.[181] In some "truly international" securities transactions, therefore, United Stated courts may refuse to enforce arbitration, forum selection, and choice of law agreements,

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176. *See* Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464-65 (9th Cir. 1983) (arbitration clause in construction joint venture contract referring to disputes "arising under" contract did not cover claims arising from separate contract, implied contract, or other issues largely distinct from central conflict over interpretation and performance of contract itself); *In re* Kinoshita & Co., 287 F.2d 951, 953 (2d Cir. 1961) (fraud in inducement of shipping contract was not included within scope of arbitration clause that was restricted to disputes relating to interpretation and performance of contract); *see also* Necchi S.P.A. v. Necchi Sewing Machine Sales Corp., 348 F.2d 693, 698 (2d Cir. 1965) (arbitration clause in distributorship agreement only covered claims arising from agreement itself, and did not cover claims relating to renewal of agreement), *cert. denied,* 383 U.S. 909 (1966).

177. *See* Lagerman, *supra* note 173, at 781-86. The courts rarely find that a forum selection or arbitration agreement is unjust or unreasonable based on only one factor, but prefer to consider various elements of unreasonableness together. *Id.* at 786; *see also* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972) (party seeking to escape forum selection clause must show that for all practical purposes he will be denied day in court if clause is enforced); Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361, 363-70 (S.D.N.Y. 1975) (although forum selection clause in employment contract was written in German, plaintiff failed to show that clause was product of overweening bargaining power); Roach v. Hapag-Lloyd, 358 F. Supp. 481, 484 (N.D. Cal. 1973) (forum selection clause in shipping contract was enforceable because party challenging forum clause did not show fraud or overreaching).

178. *See* S. A. Mineracao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190, 193-95 (2d Cir. 1984).

179. *See id.* at 196; Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (1982) (prohibiting racketeering activity, including securities fraud, and authorizing sanctions and private remedies).

180. *See Samitri,* 576 F. Supp. at 574-76; Note, *A Day of Reckoning Is Near: RICO, Treble Damages, and Securities Fraud,* 41 WASH. & LEE L. REV. 1089 (1984) (RICO claims in securities fraud suits increase potential damage awards); Note, *RICO and Securities Fraud: A Workable Limitation,* 83 COLUM. L. REV. 1513 (1983) (claims under RICO have proliferated in recent securities fraud cases).

181. *See Samitri,* 576 F. Supp. at 575.

or may limit enforcement of the agreement to certain claims included in a securities fraud action.[182]

Until future decisions elaborate on the minimum standards for a "truly international" securities transaction under *Scherk,* securities sellers and investors will have no clear guidelines for determining whether United States courts will enforce an arbitration, forum selection, or choice of law agreement in a particular transaction.[183] While the *Scherk* decision established that international parties, negotiations and subject matter clearly comprise a "truly international" securities transaction, *Scherk* did not outline any minimum standards for such a transaction.[184] The recent lower court rulings, *Pioneer, AVC,* and *Samitri,* follow closely the list of significant international contacts in *Scherk.*[185] More importantly, the recent decisions enforcing arbitration, forum selection, or choice of law agreements under *Scherk* have emphasized that such agreements increased the parties' certainty about the law governing the transactions in question.[186] Additionally, the recent decisions have explained that enforcement of dispute-resolution agreements may be appropriate if foreign countermeasures, such as discovery blocking statutes, might obstruct United States securities litigation or prevent enforcement of a United States judgment.[187] Therefore, unless a court finds that a dispute-resolution agreement is invalid for reasons such as fraud or coercion,[188] the

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182. *See supra* notes 173-181 and accompanying text (discussing exceptions to enforcement of arbitration, forum selection and choice of law agreements in international contracts). If a dispute includes arbitrable as well as nonarbitrable claims, courts may compel arbitration of the pendent arbitrable claims and preserve the other claims for litigation. Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238, 1241-44 (1985); *see* Note, *The Severability of Arbitrable and Nonarbitrable Securities Claims,* 41 WASH. & LEE L. REV. 1165 (1984) (questioning whether bifurcated proceedings for securities and nonsecurities claims may lead to inefficient litigation). When nonarbitrable securities claims are insubstantial in relation to arbitrable claims, some courts have mandated arbitration of all claims in a dispute. See Kavit v. A. L. Stamm & Co., 491 F.2d 1176, 1178-79 (2d Cir. 1974) (ordering arbitration of entire dispute because fraud claims under United States securities laws were inappropriate); Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 445 (2d Cir. 1971) (finding securities fraud claim insubstantial in dispute over brokerage firm's failure to sell out plaintiff's account).

183. *See* Delaume, *supra* note 19, at 258-71 (discussing problems in identification of international securities transactions under Scherk); *see also* Ishizumi, *supra* note 17, at 96-97 (Scherk's qualifications for an international securities transaction were poorly defined).

184. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-17 (1974).

185. *See* S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190 (2d Cir. 1984); AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 158-59 (2d Cir. 1984); Pioneer Properties, Inc. v. Martin, 557 F. Supp. 1354, 1365 (D. Kan. 1983).

186. *See Scherk,* 417 U.S. at 515-16; *Samitri,* 745 F.2d at 195 (need for certainty favored enforcement of international arbitration agreement); *AVC,* 740 F.2d at 158 (parties' need for certainty concerning applicable law was primary concern).

187. *See Scherk,* 417 U.S. at 516-18; *AVC,* 740 F.2d at 158 (risk of foreign countermeasures favored enforcement of foreign forum selection clause).

188. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (forum selection agreements in international contracts are presumed valid unless agreement is unjust or unreasonable).

court should enforce any agreement that increases certainty concerning the governing law[189] and avoids the risk of foreign countermeasures intended to obstruct securities fraud actions in United States courts.[190]

STEPHEN DELLETT

189. *See supra* notes 122-145 (arbitration, forum selection, and choice of law agreements diminish uncertainties due to potential applicability of various conflict of laws rules and various securities laws in foreign courts).

190. *See supra* notes 146-171 (risk of foreign countermeasures to litigation in United States courts and nonenforcement of United States judgments may urge courts to recognize dispute-resolution agreements).