

ARBITRAL & JUDICIAL DECISIONS

FROM *THE BREMEN* TO *MITSUBISHI* (AND BEYOND): INTERNATIONAL ARBITRATION ADRIFT IN U.S. WATERS

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*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹ is the culmination of three cases in which the United States Supreme Court recognizes the special position occupied by arbitration in the resolution of international disputes. *Mitsubishi* is generally thought to represent the further expansion of the "hands off" treatment which United States federal courts give to international arbitration agreements and awards. However, on closer examination, a strain of parochialism is evident which does not reflect the internationalism broadly enunciated in not only *Mitsubishi*, but also each of its predecessors. Moreover, when the focus is narrowed to the issue of punitive damages, that most American of remedies, United States federal courts display not only protectionist tendencies, but a bit of ideological schizophrenia as well.

I. *THE BREMEN* DECISION

The three Supreme Court decisions establishing the extent to which courts are to recognize international agreements, sometimes referred to as a "trilogy,"² begin with the case of *The Bremen v. Zapata Off-Shore Co.*,³ a case which did not involve arbitration at all. Rather, the case involved a forum selection clause. Chief Justice Burger delivered the opinion of the court, from which only Justice Douglas dissented. An American corporation had contracted with a German corporation for the towing of a drilling rig from the coast of Louisiana to the Adriatic Sea off the coast of Italy.⁴ The contract provided that "[a]ny dispute arising must be treated before the London Court of Justice."⁵ While still in the Gulf of Mexico, the rig was severely damaged in a storm and was towed to

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¹ 473 U.S. 614 (1985).

² *Société Nationale Algérienne pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Distrigas Corp.*, 80 B.R. 606, 613 (D. Mass. 1987).

³ 407 U.S. 1 (1972).

⁴ 407 U.S. at 2.

⁵ *Id.*

Florida under the instructions of the American owner.⁶ The American company brought suit against the German corporation in the United States District Court in Tampa.⁷ The German corporation moved to dismiss or in the alternative to stay the U.S. action, citing the forum selection clause.⁸ The District Court denied the motion, citing the then prevailing view that agreements made in advance of a dispute actually arising which would oust United States courts of jurisdiction were contrary to public policy and would not be enforced.⁹ On appeal, the Court of Appeals affirmed, holding that such a forum selection clause would not be enforced, unless the selected forum could be shown to be more convenient than the U.S. forum in which the case had been brought.¹⁰

The Supreme Court, while recognizing that forum selection clauses historically had been disfavored in the United States, held that the forum selection clause in this case must be respected.¹¹ In so doing, the Supreme Court took great pains to recognize the needs of post-war international commerce and for American companies engaged in such commerce to play by the same rules as their foreign counterparts:

For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.¹²

The Supreme Court explicitly rejected a protectionist role:

The choice of [the] forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.¹³

Finally, the Court cited the need for certainty that is fulfilled by a forum selection clause:

It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a

⁶ 407 U.S. at 3.

⁷ 407 U.S. at 3-4.

⁸ 407 U.S. at 4. Additional procedural maneuvering ensued, not relevant to this discussion, but interesting to the commercial litigator.

⁹ 407 U.S. at 6.

¹⁰ 407 U.S. at 7.

¹¹ 407 U.S. at 8-9.

¹² *Id.*

¹³ 407 U.S. at 12.

forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.¹⁴

II. SCHERCK VS. ALBERTO-CULVER

These three themes, the requirements of expanding international trade, the respect for the agreement made by the parties to an international transaction, and the need for predictability in international dealings, recur in the second of the "trilogy," the case of *Scherck v. Alberto-Culver Co.*¹⁵ While reciting the appropriate passages from *The Bremen* decision, the Supreme Court rather deftly moves the public policy issues raised by the American company to the back burner, where they were allowed to simmer virtually unnoticed by commentators. It was in *Mitsubishi* that the Supreme Court, again without attracting much attention, not only put parochial public policy on the back burner, but also turned up the heat.

Scherck was a five to four decision in which the Supreme Court held that an international arbitration agreement was to be enforced even in the face of claims arising under the United States securities laws. The case involved the purchase by the American-based company, Alberto-Culver, of three businesses owned by a German citizen and organized under the laws of Germany and Liechtenstein.¹⁶ Negotiations took place in the U.S. and in Europe which culminated in a purchase and sale agreement executed in Vienna.¹⁷ The contract contained an arbitration clause which called for International Chamber of Commerce arbitration in Paris and specified the laws of the state of Illinois as the governing law.¹⁸ When a dispute arose regarding the property transferred, Alberto-Culver filed a lawsuit in U.S. District Court in Illinois, alleging fraudulent representations in violation of the Securities and Exchange Act of 1934.¹⁹ In response, Scherck moved to dismiss, or alternatively to stay the action pending the arbitration in France.²⁰ The District Court denied Scherck's motion and instead granted an order enjoining Scherck from proceeding with the arbitration.²¹ In so doing, the court relied on the Supreme Court's decision in *Wilko v. Swan*,²² which held that an agreement to arbitrate could not preclude a buyer of a security from bringing a suit in federal court pursuant to U.S. securities law.²³ The Court of Appeals affirmed, and the Supreme Court granted

¹⁴ 407 U.S. at 13-14.

¹⁵ 417 U.S. 506 (1974).

¹⁶ 417 U.S. at 508.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 417 U.S. at 509.

²⁰ *Id.*

²¹ 417 U.S. at 510.

²² 346 U.S. 427 (1953).

²³ 417 U.S. at 510.

a petition for a *writ of certiorari*.²⁴

Alberto-Culver argued that the lower courts had correctly decided the issue, since Alberto-Culver's claims were based on the federal securities laws, which render an agreement to arbitrate unenforceable.²⁵ In reversing the lower courts, the Supreme Court found "crucial differences" between the situation before it and that in *Wilko v. Swan*.²⁶ All of these differences went to the essential international nature of the transaction.²⁷ The Court specifically found that in *Wilko v. Swan* there was no question but that United States laws would govern, including particularly the federal securities laws, while in the case at issue, absent the arbitration provision "considerable uncertainty existed" at the time of the agreement, and still exists," as to the law applicable to the disputes arising out of the contract.²⁸ In a footnote, the Court noted that Scherck had moved for dismissal based on the contentions that U.S. securities laws do not apply in an international transaction. The Court further noted that because of the procedural posture of the case, this particular issue was not before it for decision.²⁹

In deciding to enforce the arbitration agreement, the majority cited the need for predictability in international transactions:

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.³⁰

Again the Supreme Court cited the needs of increasing international commerce and the desirability that all enterprises engaged in international transactions operate by the same rules:

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

²⁴ *Id.*

²⁵ 417 U.S. at 513.

²⁶ 417 U.S. at 515.

²⁷ The Court cited that the business entities were located in and organized under the laws of foreign countries, that the activities of the businesses were conducted largely, if not entirely in foreign markets, that the contract had been negotiated in both foreign countries and the U.S., that foreign legal experts were consulted, that the signing took place in Austria, and that the closing took place in Switzerland. *Id.*

²⁸ 417 U.S. at 515-16.

²⁹ 417 U.S. at 516 n.9.

³⁰ 417 U.S. at 516.

willingness and ability of businessmen to enter into international commercial agreements.³¹

The Supreme Court again returned to the importance of a respect for an agreement freely made by sophisticated international business people, intoning the mantra of the new internationalism set forth in *The Bremen*:

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." (Citing *The Bremen*).³²

But while it referred the matter to arbitration according to the parties' agreement, the Supreme Court left for another day the question of whether it might refuse enforcement of any arbitral award the tribunal might issue. In a footnote toward the end of the majority opinion, the Court noted:

Although we do not decide the question, presumably the type of fraud alleged here could be raised, under Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . in challenging the enforcement of whatever arbitral award is produced through arbitration. Article V (2)(b) of the Convention provides that a country may refuse recognition and enforcement of an award if "recognition and enforcement of the award would be contrary to the public policy of that country."³³

In effect, the Supreme Court in *Scherck* held out the option that while international commercial requirements, and perhaps the New York Convention,³⁴ mandated that national courts respect the agreement to arbitrate made by parties to international commercial agreements and refer their disputes to arbitration in accordance with that agreement, the New York Convention's public policy exception might render unenforceable any award issued by the tribunal to which the dispute had been referred. Thus, the very "parochial" interest which the Supreme Court had unequivocally rejected in favor of international predictability and fair play could be asserted anew by the American party should an award be brought to the United States for enforcement. And the Supreme Court had opined that a United States court, based on that "parochial" interest, could refuse to enforce the resulting award.

III. THE NEW YORK CONVENTION AND THE PUBLIC POLICY EXCEPTION

In 1958 the United Nations adopted The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, designed to facilitate the enforcement

³¹ 417 U.S. at 516-17.

³² 417 U.S. at 519 (footnote omitted).

³³ 417 U.S. at 519 n.14.

³⁴ 417 U.S. at 519 n.15.

and recognition of international agreements to arbitrate as well as the awards which resulted from those arbitrations.³⁵ Done in New York, the convention is commonly referred to as the "New York Convention." The United States ratified the convention in 1970.³⁶

Generally, the New York Convention provides for the recognition and enforcement of written agreements to submit commercial disputes to arbitration³⁷ and the recognition and enforcement in the territory of one contracting state of arbitral awards made in the territory of another contracting state or of awards "not considered as domestic awards in the State where their recognition or enforcement is sought."³⁸

Article V(1) of the New York Convention provides that an arbitral award which *prima facie* meets the Convention requirements shall be enforced unless the party resisting enforcement can prove that certain specific grounds exist for the refusal of recognition or enforcement. These grounds are in the nature of a denial of due process or a breach of natural justice. In addition, Article V(2) would permit a court to refuse enforcement or recognition based on certain legal principles existing in the country where enforcement is sought. Article V(2)(b) allows the court of the country in which recognition or enforcement is sought to refuse recognition or enforcement where "the recognition or enforcement of the award would be contrary to the public policy of that country."

Obviously, this exception to recognition and enforceability could effectively eviscerate the convention in the name of national public policy. However, this has not happened. Rather, courts throughout the world have viewed the public policy exception extremely narrowly. Many national courts have read Article V(2) to implicate *international*, rather than national, public policy. The German Supreme Court has so held.³⁹ So has the Court of Appeal in Luxembourg.⁴⁰ The Court of Appeal in Morocco enunciated the basis for such an approach: "The court must refer here to the principles of international public policy, as the dispute arises under an international commercial operation which underlies the arbitral award enforced."⁴¹ And in applying international public policy to recognize and enforce a foreign award that was issued in contravention of a principle of Italian procedure that was inherent in the Italian Constitution, the Italian Court of Appeal stated: "Moreover, the fact that the reasoning constituted a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such by

³⁵ *Opened for signature June 10, 1958*, 21 U.S.T. 2517, 2520; T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter the New York Convention].

³⁶ *Id.*

³⁷ Art. II.

³⁸ Art. I.

³⁹ FR Germany No. 43, sub. 1, Bundesgerichtshof [Supreme Court], April 26, 1990, 21 Y.B. COM. ARB. 532, 533 (1996).

⁴⁰ Kersa Holding Co. Luxembourg v. Infancourtage, Luxembourg No. 1, sub. 10, 15, 20, and 25, Cour Supérieure de Justice (Court of Appeal) November 24, 1993, 21 Y.B. COM. ARB. 617, 622, 624 (1996).

⁴¹ Office National du Thé et du Sucre v. Philippines Sugar Co. Ltd., Morocco No. 1, sub. 5, Court of Appeal, Casablanca, June 21, 1983, 21 Y.B. COM. ARB. 627, 629 (1996).

foreign legislative and judicial authorities."⁴² It is clear that national courts have been careful not to permit a nation's parochial interests to undermine the intent and international nature of the New York Convention.

While United States federal courts have not held that the "public policy" implicated in Article V(2)(b) is international public policy, they have taken a restrictive view of the public policy exception. The most comprehensive statement of the United States position perhaps is set out in the opinion of the Second Circuit in the case of *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*:

We conclude . . . that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.⁴³

In *Mitsubishi* the Supreme Court suggests by implication that the antitrust laws and their treble damages remedy may rise to the level of this country's "most basic notions of morality and justice."

IV. THE MITSUBISHI DECISION

Mitsubishi involved a distribution agreement between a Japanese automotive company and a Puerto Rican corporation.⁴⁴ The agreement contained an arbitration clause that required that "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out or in relation to [specified articles in the contract] or for the breach thereof" be submitted to arbitration under the arbitration rules of the Japan Commercial Arbitration Association, the arbitration to be conducted in Japan.⁴⁵ The contract also contained a choice-of-law clause that provided: "This agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein."⁴⁶ When disputes arose under the agreement, Mitsubishi brought an action in the United States District Court for the District of Puerto Rico seeking an order compelling arbitration.⁴⁷ Soler filed a counterclaim asserting, among other claims, violations of the Sherman Act.⁴⁸ The District Court ordered the parties to arbitrate the majority of the claims, including the antitrust claims, relying on the *Scherck* decision.⁴⁹ The appellate court reversed the ruling as to the arbitration of the Sherman Act claims, holding that antitrust claims were not arbitrable, even in the context of an international

⁴² *Bobbie Brooks, Inc. v. Lanificio Walter Banci*, Italy No. 29, sub. 7, Corte di Appello de Firenze, Oct. 8, 1977, 4 Y.B. COM. ARB. (1979).

⁴³ 508 F. 2d 969, 974 (2d Cir. 1974).

⁴⁴ 473 U.S. at 616-17.

⁴⁵ *Id.*

⁴⁶ 473 U.S. at 637 n.19.

⁴⁷ 473 U.S. at 618-19.

⁴⁸ 473 U.S. at 619-20.

⁴⁹ 473 U.S. at 620-21.

transaction.⁵⁰ The Supreme Court granted *certiorari* "primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."⁵¹

In its holding, the Supreme Court concluded that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."⁵² The Court then made the obligatory reference to *The Bremen* rationale:

"The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."⁵³

Later in the opinion it becomes evident that the "parochial concept that . . . disputes must be resolved under our laws" is still very much alive, even in the arena of international commerce.

The Supreme Court also quoted *The Bremen* on the need for predictability and for the importance of a level playing field in the resolution of international commercial disputes.⁵⁴ However, the Supreme Court found itself face to face with "the fundamental importance to American democratic capitalism of the regime of the antitrust laws. Without doubt, the private cause of action plays a central role in enforcing this regime."⁵⁵

'A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.'

The treble damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.⁵⁶

In emphasizing its importance to the public welfare, the Supreme Court tacitly acknowledges the punitive nature of the treble damages remedy.

In its ultimate reference of the dispute to arbitration, the Supreme Court treats the international arbitral tribunal as if it were a lower branch of the U.S. federal court system, accepting the case on remand from the Supreme Court, rather than under its own original jurisdiction. The Supreme Court not only directs the tribunal as to the proper law to be applied, but also seeks assurances that its instructions will be followed. Moreover, the Court warns the tribunal of the

⁵⁰ 473 U.S. at 623.

⁵¹ 473 U.S. at 624.

⁵² 473 U.S. at 629.

⁵³ *Id.*

⁵⁴ 473 U.S. at 631.

⁵⁵ 473 U.S. at 634-35 (citations omitted).

⁵⁶ 473 U.S. at 635 (citations omitted).

consequences of failing to heed its directives, reminding the arbitrators that there is a public policy exception under the New York Convention that the Court will not hesitate to adopt should U.S. antitrust law not be applied to Soler's claims.

First, the Court instructs that American law is to be applied to the antitrust claims:

Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.⁵⁷

Then the Court seeks confirmation that its instructions will be followed:

The United States raises the possibility that the arbitral panel will read [the choice-of-law provision] not simply to govern interpretation of the contract terms, but wholly to displace American law even where it would otherwise apply.⁵⁸ . . . The International Chamber of Commerce opines that it is "[conceivable], although we believe it unlikely, [that]the arbitrators could consider Soler's affirmative claim of anticompetitive conduct by . . .Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." . . . At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan.⁵⁹

But in the event that the arbitral tribunal had not properly attended to the Supreme Court's directives, the Court stated in clear and concise terms what would follow a failure to follow its instructions:

[W]e need [not] consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award "where the recognition or enforcement of the award would be contrary to the public policy of that country. . . ." While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.⁶⁰

⁵⁷ 473 U.S. at 636-37.

⁵⁸ A not unreasonable interpretation where the clause provides that the contract "will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." 473 U.S. at 637 n.19 (citations omitted).

⁵⁹ *Id.*

⁶⁰ 473 U.S. at 637 n.19, and 638 (citations omitted). A noted commentator has underscored precisely what this reference presages for international commercial arbitration, noting the "specter of a subsequent invalidation of the arbitrator's award because of failure to give proper consequence to the antitrust laws. [This] problem is of special significance, because it is likely that litigants in international arbitration will be tempted by the court's reference to the possible invalidation of

The majority opinion concluded with a quotation from *Scherck*: "[W]e 'require this representative of the American business community to honor its bargain,' by holding this agreement to arbitrate '[enforceable] . . . in accord with the explicit provisions of the Arbitration Act.'"⁶¹ However, while the Court permitted the representative of the American business community to agree to arbitration, it did not permit that representative to choose the law which would govern any dispute that might arise to the extent that such law would not recognize or enforce the American antitrust laws or their treble damages provisions. Why should a business concern engaged in international commerce not be permitted, as part of its contract, to waive certain remedies provided by a particular national law?⁶² Why should it be necessary for the Supreme Court of the United States to act *in loco parentis* to protect American corporations from the natural consequences of their international transactions?

The clear implication of *Mitsubishi* is that United States courts will apply the public policy defense to bar the recognition or enforcement of awards where the arbitrators have failed or refused to apply U.S. antitrust laws and their treble damages remedy in situations where it is raised as a defense to a contract claim.⁶³ Indeed, a federal circuit court recently said as much, indicating that if an international arbitral tribunal conducting an arbitration in China failed to apply United States customs laws and regulations and South Carolina law which provided for treble and punitive damages, the U.S. District Court might refuse enforcement under the public policy exception to the New York Convention, citing *Mitsubishi*.⁶⁴ This is especially troubling where United States federal courts have applied the same public policy defense to refuse recognition or enforcement of foreign arbitral awards, or portions thereof, in which the arbitrators have awarded damages under foreign laws which the United States regards as punitive in nature.

awards that improperly resolve antitrust claims to raise antitrust claims and defenses with the intention of using them in later attacks upon the award. In a real sense, the Supreme Court's reference to the possibility of successful attack on this ground is a significant setback for international arbitration, which properly seeks to limit attacks upon arbitral awards." Hans Smit, *Mitsubishi: It Is Not What It Seems To Be*, 4(3) J. INT'L ARB. 7 (1987).

⁶¹ 473 U.S. at 640.

⁶² At least one lower Federal court believes that a party can waive such rights by agreeing to a governing law which does not permit punitive damages. *Hoes of America, Inc. v. Hoes*, 493 F. Supp. 1205, 1209 (C.D.Ill. 1979).

⁶³ At least one court has questioned the practice of raising antitrust defenses to contract actions, and suggested that American antitrust laws do not rise to the level of "the forum state's most basic notions of morality and justice." *La Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation Des Hydrocarbures v. Shaheen Natural Resources*, 585 F. Supp. 57, 63 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 260 (2nd Cir. 1984), *cert. denied*, 469 U.S. 883 (1984).

⁶⁴ *Silkworm Screen Printers, Inc. v. Abrams*, 1992 U.S. App. Lexis 28843 (4th Cir. Nov. 4, 1992), 978 F.2d 1256. See also *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1210 (6th Cir. 1995).

V. THE PUBLIC POLICY EXCEPTION AND PUNITIVE DAMAGES AWARDED UNDER FOREIGN LAWS

The case in which the public policy exception to the New York Convention was first applied to invalidate a portion of an arbitral award which was determined to involve punitive damages was the case of *Laminoirs - Treffleries-Cableries de Lens, S. A. v. Southwire Co.*⁶⁵ The case involved an arbitration between a French manufacturer and a Georgia corporation that had contracted to purchase steel wire from the French company.⁶⁶ The contract contained an arbitration provision that provided for arbitration under the rules of the International Chamber of Commerce. The governing law clause provided that the agreement would be governed by the laws of the state of Georgia insofar as those laws were in accordance with French laws.⁶⁷

A dispute arose and an arbitration was held, resulting in an award to the French company, including interest awarded pursuant to French statutory law.⁶⁸ The Georgia corporation challenged the award of interest on several grounds, including that the award of interest in part constituted a penalty and should not be enforced since it violates U.S. public policy.⁶⁹ The French statute applied by the arbitrators called for interest at the rate of 9.5% and 10.5% per annum, which rates were to be increased by 5% two months after the award became enforceable.⁷⁰

The federal district court determined that the 5% increase in the interest rate was punitive in nature.⁷¹ Citing Georgia state appellate decisions dating back to the early 1900's, the court stated that foreign laws would not be enforced where they were penal in nature.⁷² The court thereafter determined that the portion of the award which increased the interest rate by 5% would not be enforced, citing paragraph V(2)(b) of the New York Convention, the public policy exception.⁷³

The case would appear to be anomalous, dealing as it does with a curious choice-of-law provision, an unusual foreign law, and a great leap from old Georgia state decisions to the public policy exception of the New York Convention. However, later holdings of other federal courts have accepted the proposition that interest awarded that can be shown to be penal in nature will not be enforced as contrary to public policy. The first case that adopted the conclusion of the *Laminoirs* court was *Brandeis Instel Limited v. Calabrian Chemicals Corporation*.⁷⁴ In *Brandeis Instel* the award of arbitrators made in London under the rules of the London Metal Exchange was challenged on several grounds, including that the arbitrators' award of pre-award interest at the

⁶⁵ 484 F. Supp. 1063 (N.D. Georgia 1980).

⁶⁶ *Id.* at 1065.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1068.

⁶⁹ *Id.* at 1066.

⁷⁰ *Id.* at 1069.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 656 F. Supp. 160 (S.D.N.Y. 1987).

rate of 11.25% was punitive in nature and thus contrary to U.S. public policy.⁷⁵ The district court rejected the claim, finding that the challenging party had made no showing that the award was penal under English law. In *dicta*, however, the court adopted the conclusion reached in *Laminoirs*:

Where a party resisting an arbitration award can demonstrate that the foreign law pursuant to which the arbitrators awarded interest is "penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries," the arbitrators' award of interest is unenforceable as contrary to the public policy of this country.⁷⁶

Subsequently, a federal district court modified the understanding somewhat, rejecting a public policy defense because there was no showing that an award of interest at the rate of 12% compounded annually was under foreign law penal in nature.⁷⁷

It must seem strange indeed to our international trading partners that on the one hand our federal courts are threatening not to enforce, on public policy grounds, arbitral awards where the arbitrators fail to consider American laws requiring treble and punitive damages, even where there is no reference to American law in the choice-of-law clause, while at the same time refusing to enforce portions of awards that American courts regard as based on punitive foreign law, also on public policy grounds. This dichotomy must be perplexing to our foreign counterparts, and may seem to be protective of American parties at the expense of non-American parties.

VI. CONCLUSION

For international commercial arbitration to serve the function for which it is intended, it must also meet the requirements set out initially in *The Bremen* and cited by numerous courts thereafter: it must be responsive to the needs of increasing international commerce, it must respect the agreements made by parties to international transactions, and it must provide the predictability necessary to international dealings. To the extent that the parties are referred to an arbitration with the understanding that the award that issues therefrom might be denied enforcement based on vague public policy objections, the necessary predictability is lacking. Where it appears that national courts are determined to protect their nationals from the consequences of their freely made agreements, then respect for international agreements are at risk. Where national courts treat awards made under their laws differently than they treat awards made under foreign laws, such treatment is not conducive to expanding international trade. It is hoped that the United States Supreme Court will take the opportunity when that opportunity presents itself to clarify that the principles enunciated in *The*

⁷⁵ *Id.* at 170.

⁷⁶ *Id.* (citing *Laminoirs*).

⁷⁷ *International Standard Electric Corp. v. Bidas Sociedad Anónima Petrolera, Industrial y Comercial*, 745 F. Supp. 172 (S.D.N.Y. 1990) (citing *Brandeis Instel*).

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Bremen do indeed guide our policy, including our public policy, in the field of international commercial arbitration.

