10-1984

Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.

Lewis F. Powell Jr.

Call for Views 6/56.

An important arbitration issue w/respect to alleged anti-trust violations arising out of an international K'tt.

PRELIMINARY MEMORANDUM

May 10, 1984 Conference
List 3, Sheet 3

No. 83-1569

MITSUBISHI MOTORS CORP. OK. Cert to CA1 (Campbell, Coffin, Bownes)

v.

SOLER CHRYSLER-PLYMOUTH Federal/Civil Timely

SUMMARY: Petr challenges a holding that, notwithstanding agreement by parties to submit all disputes arising out of their contract to arbitration, an alleged antitrust violation arising out of the international contract is nonarbitrable.

FACTS: Petr, of course, is a well-known Japanese corporation and automaker, which manufactures vehicles for sale in certain territories outside the United States through Chrysler dealers. Resp is a Puerto Rico corporation and formerly a franchised Chrysler dealer. In 1979, Resp entered into a "distributor agreement" with Chrysler. At the same time, it entered into a separate "sales procedure agreement" with both Chrysler and Petr. Paragraph VI of the sales procedure agreement

Yes

CVSG The holding below appears inconsistent with Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

provided in relevant part that all disputes which may arise "shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." Two years later, Resp became unable to meet its minimum sales commitments in its territory. Resp's inventory grew, its finances worsened, and Petr began withholding shipments of new vehicles to Resp. Eventually, Petr stored 966 vehicles that otherwise would have been shipped to Resp in Puerto Rico.

In February 1982, Resp disclaimed responsibility for the 966 vehicles stored in Japan. A month later, Petr brought suit against Resp in federal district court, raising a host of claims. On the basis of its claims, Petr sought an order compelling arbitration under the Federal Arbitration Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Convention's implementing legislation. Resp denied the claims and counterclaimed, alleging, inter alia, violation of the Sherman Act. The District Court held that all of Petr's claims and all but two of Resp's counterclaims fell within the scope of the parties' arbitration agreement. The court explicitly held that Resp's counterclaim for violation of the Sherman Act came within the terms of the agreement. In express reliance upon Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the District Court rejected Resp's argument that an antitrust claim could not, as a matter of law, be referred to arbitration, dismissed the Sherman Act claim, and referred it to arbitration. It found, "based on the reasoning of the Court in Scherk refusing to extend Wilko [v. Swan, 346 U.S. 427 (1953)] to international securities transactions," that the Second Circuit's decision in American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (CA2 1968), should not govern antitrust claims arising out of international agreements.

HOLDING BELOW: The Court of Appeals affirmed the District Court's holding that each of the claims and counterclaims that had been referred by the District Court to arbitration, including the Sherman Act claim, were within the scope of the arbitration agreement. Notwithstanding its finding that the antitrust claim fell within the terms of the arbitration agreement, however, the Court of Appeals held that litigation was the proper means for resolution of the Sherman Act claim. As is true of antitrust claims arising out of domestic contracts, American Safety, supra, said the court, antitrust claims in an international context should not be submitted to arbitration. (Because the question was one of first impression, the court had requested the views of the Department of Justice and the State Department on this issue. Both had urged that the court apply to international contracts the same exception that has for years been applied to domestic contracts.)

The court noted that courts are unanimous that Sherman Act claims arising out of domestic contracts should not be submitted to arbitration. Such a policy is dictated by numerous policy concerns. Among others, the complexity of antitrust issues renders them ill-suited for arbitration. Second, the antitrust laws are thought so important to the functioning of a free economy that the combined efforts of government and the private parties are needed to enforce them. And third, enforcement of the antitrust laws is thought too important to be lodged in arbitrators from the business community who have a vested interest in the application of those laws.

The court saw no reason why these same policy concerns do not apply in the international context. It suggested that other nations are not ignorant of "the primacy" we accord our antitrust laws, and it observed that the Republic of Germany also prohibits enforcement of

its antitrust laws through arbitration. The court said that it doubted that other countries would describe the interest of the United States in the enforcement of its antitrust laws as "'parochial' in the sense of being petty provincialisms."

It then considered whether there are any policy reasons supporting application of the rule against arbitration of antitrust claims. In this regard, the court said that the "insulation of agreements with some international coloration from the antitrust exception would go far to limit it to the most minor and significant of business dealings." It reasoned further that "suppliers and sellers could achieve immunity from antitrust law threats and sanctions by the simple expedient of co-opting some foreign or international entity into the arrangement." Against this background, the Court of Appeals concluded that the doctrine of nonarbitrability of antitrust issues applies "at least [to] the kind of international agreement we confront in this case--an agreement governing the sales and distribution of vehicles in the United States." Pet., at A-18 (emphasis in original).

The court then turned to the question whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards prevented a holding that antitrust claims are nonarbitrable. On this score, it concluded that an agreement to arbitrate is not "an agreement within the meaning of" Article II(3) of the Convention because such an agreement does not concern "a subject matter capable of settlement by arbitration," as required by Article II(1), presumably because the policy of this country does not permit the submission of such an issue to arbitration.

Finally, the court addressed the question of the applicability of this Court's decision in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). It acknowledged that Scherk "poses a considerable roadblock"

to excepting antitrust from the general rule of arbitrability "if its holding is extrapolated to fit a situation of demonstrably greater impact on the United States and a public policy of incommensurably greater depth." It nonetheless distinguished Scherk, largely on the different policies at issue in the respective cases. The securities laws at issue in Scherk were enacted to protect a relatively small group of investors; the antitrust laws, on the other hand, were designed to protect the general public by preserving a competitive atmosphere nationwide. Balancing the private party's interest in having antitrust claims arbitrated against the public interest "in the preservation of economic order in the United States," the court found that the latter prevailed.

The court thought it important as well that parties "could not be blind to the obvious fact that American law would normally apply to any claim of monopolization or restraint of trade," and that antitrust is not a "parochial" consideration of the kind referred to in Scherk. The court also noted that the Court in Scherk did not rely upon the Convention for its holding; the Convention provisions were said only to "confirm" the decision required under the Federal Arbitration Act.

CONTENTIONS: (1) Petr contends that the decision below, refusing to require an antitrust claim to be arbitrated, is "at odds" with the Federal Arbitration Act, which provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and Southland Corp. v. Keating, ___ U.S. ___ (1984), which recited the above language from the Federal Arbitration Act as one of only two exceptions to the enforceability of arbitration agreements. If permitted to stand, the decision will disrupt the certainty intended by the Federal Arbitration Act. Moreover, courts should not be allowed

to engage in the kind of ad hoc decisions on whether a particular statutory claim is sufficiently important to defeat congressional policy as expressed in the Federal Arbitration Act. The Court should make it clear that it is for Congress to strike the balance in determining which, if any, claims should be exempt from arbitration. When Congress has wanted to exempt certain classes of litigants or categories of claims from arbitration, it has done so explicitly.

(2) Petr next contends that, to the extent the Court of Appeals held that an antitrust dispute is not "capable of settlement by arbitration," it refused to enforce a treaty of the United States. If "capable of settlement by arbitration" were to have the meaning that the Court of Appeals said, the Convention would be but an invitation to courts to impose their own notions of wise policy respecting arbitration. An agreement to submit to arbitration a securities dispute arising out of international commerce must be enforced, Scherk v. Alberto-Culver Co., supra. Since nothing in Scherk limits its holding to securities actions, the same must be true of antitrust actions arising from international transactions. The lower court's conclusion that the policies underlying the antitrust laws are greater in significance than those of the securities laws, thus requiring a different result, is without foundation.

Resp points out that the Second Circuit's decision not to force arbitration of antitrust disputes arising out of domestic disputes has been followed by every court to consider the issue. It then notes that this Court has long recognized that, for public policy reasons, certain claims (Title VII & Securities Act) should not be referred to arbitration. Citing to United States v. Topco Associates Inc., 405 U.S. 596, 610 (1972), Resp says the public's interest in judicial resolution of antitrust claims at least "stands on equal footing" with

Too Long }

the public's interest in judicial enforcement of these statutory claims.

This case is distinguishable from Scherk principally for the reason cited by the Court of Appeals--the strength of the public interest in judicial enforcement of the antitrust laws, as opposed to the securities laws. Moreover, as the Scherk Court went to pains to emphasize, the dispute there had only a tangential relationship to the United States. Here, in contrast, the relationship to the United States is direct and substantial; Petr has not only expanded its sales to the American marketplace, it has restricted the sale of vehicles in question solely to that market.

Finally, the Court of Appeals did not refuse to enforce a treaty of the United States. Article V(2) of the Convention provides that enforcement of an arbitral award may be refused where the subject matter is not capable of settlement by arbitration under the law of that country, or where the enforcement of the award would be contrary to the public policy of the country. The drafters contemplated situations where a country would refuse to enforce arbitration. This is such an appropriate situation, as Germany has determined with respect to disputes arising under its antitrust statutes.

DISCUSSION: Resp is correct that the Court of Appeals did not refuse to enforce a treaty of the United States; the court simply held that antitrust claims, to the extent that they are nonarbitrable under the laws in the majority of the circuits, are not "capable of settlement by arbitration" within the meaning of the exception expressly provided for by the Convention. This is no more than an interpretation of the treaty's exception. Southland Corp. v. Keating does not in any way bar the result reached by the Court of Appeals. Petr's various contentions, thus, in effect reduce to claims that the deci-

sion below declining to submit to arbitration an antitrust claim concededly within the terms of the agreement between the parties conflicts with the Federal Arbitration Act, this Court's decision in Scherk v. Alberto-Culver Co., and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. These claims are substantial, even if they would not ultimately prevail.

In Scherk, Alberto-Culver had decided to expand its overseas operations. Alberto-Culver contracted with Scherk, who owned businesses engaged in the manufacture of toiletries and the licensing of trademarks for toiletries, for the transfer to Alberto-Culver of Scherk's businesses and the rights held by the businesses to trademarks in cosmetic goods. The contract embodied warranties by Scherk guaranteeing unencumbered ownership of the trademarks. The contract also contained an arbitration clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that the laws of Illinois would govern resolution of the dispute. Alberto-Culver subsequently discovered that the trademarks were subject to substantial encumbrances. When Scherk refused Alberto-Culver's tender of the trademarks and attempt to rescind the contract, Alberto-Culver brought suit in federal district court, contending that Scherk's fraudulent representations on the status of the trademarks violated §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The District Court enjoined Scherk from proceeding to arbitration, pursuant to the contract. The Seventh Circuit affirmed.

This Court, 5-4, reversed, rejecting Alberto-Culver's contentions that the Securities Exchange Act claim was nonarbitrable under the Court's decision in Wilko v. Swan, supra. (In Wilko, the Court held that a claim under §12(2) of the Securities Act of 1933 did not have

to be submitted to arbitration, notwithstanding an agreement purporting to require submission of all claims to arbitration, principally because §14 of the Act prohibited a party from waiving its right to a judicial forum.) Alberto-Culver's contention that Wilko controlled, said the Court, ignored the "significant" and "crucial differences" between the agreement in Wilko and that in Scherk. 417 U.S., at 515. The Alberto-Culver/Scherk agreement, it noted, was "a truly international agreement." Ibid. Alberto-Culver was an American company doing the bulk of its activity here; Scherk was a citizen of Germany and his businesses were organized under the laws of Germany and Liechtenstein. The negotiations leading to the contract took place in several different countries, and the subject matter of the contract concerned the sale of businesses in Europe, whose activities were largely, if not entirely, confined to Europe. "Such a contract," said the Court, "involves considerations and policies significantly different from those found controlling in Wilko." Ibid.

After observing that, absent an arbitration provision, considerable uncertainty existed at the time of the agreement as to the law applicable to disputes between the parties, the Court went on to say that

> [s]uch 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. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
>
> 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.

Id., at 516-517.

After a brief discussion of The Bremen v. Zapato Off-Shore Co., 407 U.S. 1 (1972), where it was held that a forum-selection clause must be respected in United States courts, the Scherk Court emphasized that

> [a]n 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.

Id., at 519 (footnotes omitted; quoting Zapato, supra, at 9).

The Court did not find it necessary to rest its decision on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It did note, however, that its decision was "confirmed" by legislation implementing the Convention, specifically 9 U.S.C. §201, which provides that the Convention "shall be enforced in United States courts...." Id., at 520 n. 15.

While the composition of the Court has changed somewhat since Scherk was decided, I think it likely that at least several members of the Court would be of the view that Scherk controls this case, and that, consequently, arbitration should have been ordered. In this case, as in Scherk, Petr and Resp were parties to "a truly international agreement." No less uncertainty would exist here than in Scherk were the Court to permit the lower courts to refuse to enforce arbitration of antitrust claims. No less so here is a contract provision specifying the forum and the law to be applied "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." The

same danger exists with respect to antitrust suits that a dispute will be submitted to a forum "hostile" to the interests of one party, either in the absence of an arbitration agreement or given a refusal to enforce an arbitration agreement, that was a source of concern in Scherk. Refusal to honor an arbitration agreement in the face of an antitrust claim evidences the same "parochial" view that all disputes must be resolved under our laws that in large part underlay the decision in Scherk. Finally, there is no more reason that an antitrust claims should be exempt from arbitration insofar as the terms of the Arbitration Act are concerned, than there is for an exemption for securities law violations.

In sum, I think Petr is correct that there is a substantial claim that the decision below conflicts with the Arbitration Act, providing that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and a decision of this Court--Scherk--interpreting that Act. The Court in Scherk did intimate that a situation might arise where the contacts with the foreign country were "so insignificant or attenuated" that the rule of Wilko might apply. 417 U.S., at 517 n. 11. However, it is doubtful that this is that case, given that Petr is a Japanese Corporation, with its principal place of business in Japan, and that the vehicles in question were manufactured in Japan and stored in Japan when Resp became insolvent. Additionally, the underlying conduct of the alleged antitrust violation is conduct that occurred in Japan. It may also be, as the Court of Appeals held and Resp suggests, that there are persuasive policy distinctions between the securities laws at issue in Scherk and the antitrust laws here that might counsel a policy of refusal to submit antitrust claims to international arbitration. Moreover, an argument can be made that

because Petr ships its vehicles into the domestic market, it should expect to have its antitrust claims resolved in American courts. But, while one can assert that there need not be an express congressional exemption for antitrust claims if the courts have so held and Congress has acquiesced, I do not read Scherk or the Arbitration Act to allow the courts to make this kind of policy assessment; as Petr contends, such a decision would appear to be one for Congress alone.

Were the Court to reverse on the Arbitration Act issue, presumably a remand would cause the Court of Appeals to reassess its holding on the Convention; that holding rested squarely on the ground that antitrust claims are not arbitrable under the laws of the United States. If the Court is not interested in the principal issue, I cannot say that the Convention issue alone is worthy of review here.

There are any number of options. First, every court of appeal to address the arbitrability of antitrust claims in the context of a domestic agreement has held that they are nonarbitrable, but to the extent that this case involves an international agreement, it is one of first impression. One could await a conflict. The Court of Appeals holding was limited to agreements relating to "sales and distribution of vehicles in the United States." There was apparently no conflict in Scherk, however; the Court took the case solely because of the "importance of the question presented." 417 U.S., at 510. This issue would seem no less important, particularly if the Court continues to have an interest in the international arbitration process.

Second, the Court could call for the views of the Solicitor General. Given that the Court has once recognized the importance of the general issue in Scherk, arguably this may be unnecessary in terms of the decision whether or not to take the case. As noted, both the Department of Justice--which may or may not have involved the Solicitor-

-and the State Department, expressed their views to the Court of Appeals that such claims should be nonarbitrable. If the Court does not now CVSG, he can come in as amicus if the case is taken. Third, the Court could simply grant the case.

I lean slightly toward recommending a grant. However, I am uncertain enough about the potential disruptive effect internationally of the holding below that I recommend that the Court CVSG. The case clearly has national and international ramifications. The question is the nature of its effect. If the SG says the ramifications are significant, the Court can grant the case. If, on the other hand, he believes, for whatever reasons, that the international disruption is negligible, the Court might well choose to await further developments.

I recommend CVSG.

There is a response.

May 2, 1984 Luttig Ops in petn

May 31, 1984

Court .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 83-1569

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

MITSUBISHI MOTORS CORP.

vs.

SOLER CHRYSLER-PLYMOUTH

1. Discuss - Could Grant on the "arguable conflict with Schenk.

2. Deny X-Pet.

Rescheduled

CA1 held that an agreement in a contract to submit all disputes to arbitration where the dispute involved the Anti-Trust laws.

SG recommends Deny as there is no conflict among Circuits.

But in Schenk v. Alberto-Culver (1974), involving an issue under Securities Exchange Act, we held that an Arbitration Clause under Arbitration Act applies to international contracts.

SG says no conflict with Schenk - but it is close

Views of SG Received 10/1

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.	SG Views												
Brennan, J.			✓										
White, J.	Views												
Marshall, J.			✓										
Blackmun, J.	Views												
Powell, J.	"												
Rehnquist, J.	Join 3												
Stevens, J.			✓										
O'Connor, J.	Views												

There is a cross-petition in No 83-1569 Mitsubishi Motors Corp v. Soler Chrysler. Deny or Hold

We are holding 83-1569 awaiting views of SG.

In any event, this X-pet. has no merit. But could Hold — or Deny

PRELIMINARY MEMORANDUM

May 31, 1984 Conference
List 1, Sheet 3

No. 83-1733

SOLER CHRYSLER-PLYMOUTH, INC.	Cert to CA1 (Campbell, Coffin, Bownes)	
v.		
MITSUBISHI MOTORS CORP.	Federal/Civil	Timely

SUMMARY: Cross-Petr challenges the holding below requiring it to submit to arbitration one of its counterclaims under the Dealers' Day in Court Act. Additionally, it presents a question as to whether the opinion below intended to require arbitration of its antitrust claim under the Puerto Rican antitrust statute.

FACTS: This is a cross-petition to No. 83-1569, which was rescheduled from the May 10 Conference so it could be considered with

Deny - the issues raised here are not relevant to those raised in the petn.

David

this cross-petition. The recommendation in 83-1569 is to CVSG. I refer you to the earlier memorandum for a complete recitation of the facts. Essentially, Cross-Petr and Cross-Resp entered into a "sales procedure agreement" pursuant to which all disputes would be "finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." Cross-Petr became unable to meet its minimum sales committments in its territory, and Cross-Resp began to withhold vehicles that otherwise would have been shipped to Cross-Petr in Puerto Rico. Cross-Petr disclaimed responsibility for the vehicles that were stored on its behalf, and Cross-Resp brought suit in federal district court, seeking an order compelling arbitration under the Federal Arbitration Act. Cross-Petr counterclaimed, alleging, inter alia, violation of the Sherman Act, the federal Dealers' Day in Court Act, and Puerto Rico's antitrust act. The District Court held that all of Cross-Resp's claims and all but two of Cross-Petr's counterclaims fell within the scope of the parties' arbitration agreement, and it referred all these claims to arbitration. The court explicitly held that Cross-Petr's counterclaim for violation of the Sherman Act came within the terms of the agreement.

HOLDING BELOW: The Court of Appeals affirmed the District Court's holding that each of the claims and counterclaims that that court referred to arbitration, including the Sherman Act claim, were within the scope of the arbitration agreement. With the exception of Cross-Petr's Sherman Act claim, and possibly its antitrust claim based on the Puerto Rico statute, the court also affirmed the District Court's order directing that all claims and counterclaims, including

Cross-Petr's counterclaims under the Dealer's Day in Court Act, 15 U.S.C. §1221 et seq. be submitted to an arbitrator. The Court of Appeals declined for policy reasons to refer Cross-Petr's Sherman Act claim to arbitration. (This validity of this refusal is challenged in the petition.) There is some confusion over whether Cross-Petr's antitrust claim under the Puerto Rico statute has been referred to arbitration. In this regard, the Court of Appeals simply reversed the District Court's order "submitting [Cross-Petr's] Anti-Trust claims" to arbitration. Cross-Resp, however, has taken the position that this claim must be submitted to arbitration.

CONTENTIONS: (1) Cross-Petr contends that the Court of Appeals erred in referring to arbitration its counterclaim under the Dealers' Day in Court Act because Cross-Petr had not expressly agreed to arbitrate statutory claims. In holding that this claim must be submitted to arbitration because the factual allegations underlying the claim "touched" upon arbitrable provisions of the Sales Procedure Agreement, says Cross-Petr, the court adopted a standard in conflict with that of the Ninth Circuit in Leya v. Certified Grocers of California, Ltd., 593 F.2d 857, cert. denied. 444 U.S. 827 (1979). Before a party can be compelled to arbitrate a statutory claim, there must be some "positive assurance" that the party agreed to do so. The Court of Appeals simply misunderstood the scope of the parties' arbitration clause; they did not intend to arbitrate all disputes, but only selected ones. (2) Cross-Petr also contends that Cross-Resp is mistaken in asserting that the Court of Appeals intended to reverse the District Court's order of arbitration only to the extent that it included the Sherman Act claim, not Cross-Petr's antitrust claim under Puerto Rican law.

The court could not have intended to send the state statutory issue to arbitration, while holding that the Sherman Act claim could not be arbitrated.

(1) Cross-Resp says that Cross-Petr simply wants to have this Court narrowly construe a particular arbitration clause that by its terms is very broad, requiring the submission to arbitration of "all disputes, controversies or differences which may arise ... out of or in relation to ..." the relevant provisions of the agreement. It is well-settled that an arbitration clause need not refer to a particular statute to encompass claims under that statute. The claim is not certworthy in any event. (2) Cross-Resp says that the contention that the Court of Appeals did not intend to send the Puerto Rico antitrust claim to arbitration is not worthy of the Court's attention. Cross-Resp's remedy is to file a motion for clarification in the Court of Appeals. At any rate, it is clear that the Court of Appeals did not intend what Cross-Resp suggests it did. As the opinion states, "[t]he principal issue on this appeal is whether arbitration of federal antitrust claims may be compelled." There is no hint of nonarbitrability of the antitrust claim under the Puerto Rico statute.

DISCUSSION: There is nothing certworthy here. The only issue of real consequence in this case apparently is whether the Sherman Act claim is exempt from arbitration (83-1569). (1) Cross-Petr's first claim amounts to little more than a disagreement with the lower court's construction of the scope of the arbitration agreement. There is no conflict with the Ninth Circuit's decision. (2) As Cross-Resp notes, the second claim raises only an issue of the meaning of the Court of Appeals' opinion, i.e. whether, by referring to Cross-Petr's

"Anti-Trust claims," the court intended to affirm the District Court's order directing that the Dealers' Day in Court Act claim be arbitrated or to reverse that decision. It is essentially a factual question as to the scope of the opinion of the court below. This is a matter properly addressed to that court in the first instance.

I recommend denial.

There is a response.

May 23, 1984 Luttig Ops in petn

May 31, 1984

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 83-1733

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

SOLER CHRYSLER-PLYMOUTH

vs.

MITSUBISHI MOTORS CORP.

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Deny or Hold for 83-1569 if it is Granted

SG Views

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.									Same vote as				
Marshall, J.													
Blackmun, J.													
Powell, J.										83-1569			
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Excellent memo

aml 10/4/84

To: Justice Powell

From: Annmarie

Re: Nos. 83-1569 & 83-1733

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth

Soler Chrysler-Plymouth v. Mitsubishi Motors Corp.

Background

CA1 held that, notwithstanding the parties' agreement to submit all disputes arbitration, an alleged antitrust violation arising out of their international contract is nonarbitrable. Petr claims that this decision is "at odds" with the Federal Aribtration Act and this Court's decision in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). Cross-petr challenges CA1's holding that it must submit to arbitration one of its countercliams under the Dealers' Day in Court Act. The Court called for the views of the SG.

SG's Views

The SG recommends that cert be denied in both cases. The SG believes that CA1's holding that Soler's antitrust claim is nonarbitrable is correct and notes that five other courts of appeals have reached the same decision. The SG also rejects as unpersuasive petr's claim that in holding

the antitrust claim to be nonarbitrable, CA1 failed to enforce the Convention on Recognition and Enforcement of Foreign Arbitral Awards. The Convention is limited by its terms to matters capable of settlement by arbitration, and there is little doubt that antitrust falls into the limited class of such subjects.

Finally, contrary to petr, the SG argues that CA1's decision did not conflict with Scherck. In Scherck, the Court held that the arbitration clause in a "truly international contract" was enforceable in the context of a claim for damages for violations of §10(b) of the Securities Exchange Act. The Court reasoned that (1) the arbitration provision solved an "especially vexatious" problem, the choice of law for an international contract dispute; (2) a parochial refusal by one country's courts to grant arbitration would "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages;" (3) any advantage a domestic plaintiff might win by virtue of a ruling against arbitration may well be "chimercal", since the foreign defendant might obtain a foreign court order nullifying such advantage.

The SG argues that the antitrust laws represent fundamental policies of the United States and not the kind of "parochial" interest the Court wanted to avoid in Scherck. The Convention on arbitration recognizes exceptions to arbitration agreements for just such fundamental principles, and thus Scherck should not be deemed controlling here.

With respect to the cross-petr's claims, the SG believes that they are factbound and not certworthy.

Discussion

I am persuaded that the SG, like CA1, is right on the merits of this case. I am not entirely convinced, however, that the case isn't certworthy. The question whether Scherck applies seems close. Five CAs apparently agree that antitrust claims are not subject to arbitration, but only one or two of these decisions came after Scherck. A grant would give the Court a chance to clarify Scherck's applicability, and thus may be useful.

I recommend that you join three to grant No.1569 (the petition) and vote to deny No. 1733 (the cross-petition).

Court ..... *Voted on* ....., *19*... October 5, 1984

Argued ....., *19*... *Assigned* ....., *19*... No. 83-1733

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

SOLER CHRYSLER-PLYMOUTH, INC.

VS.

MITSUBISHI MOTORS CORP.

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	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Court ..... Voted on ....., 19. October 5, 1984

Argued ....., 19... Assigned ....., 19... No. 83-1569

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

MITSUBISHI MOTORS CORP.

vs.

SOLER CHRYSLER-PLYMOUTH, INC.

Schenk is hard to distinguish.

Grant
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for BRW
to take second
look

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.			✓										
White, J.		✓	✓										
Marshall, J.			✓										
Blackmun, J.					Join 3								
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.			✓										

Court ..... Voted on ....., 19...October 12, 1984

Argued ....., 19... Assigned ....., 19... No. 83-1569

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

MITSUBISHI MOTORS CORP.

vs.

SOLER CHRYSLER-PLYMOUTH, INC.

Grant

+

Consolidate

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.												vote	
White, J.									same				
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

October 12, 1984

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19...

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

No. 83-1733

SOLER CHRYSLER-PLYMOUTH, INC.

vs.

MITSUBISHI MOTORS CORP.

Grant
&
Consolidate
with 83-1569

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

OK to file
(no need to
correct)

lfp/ss 03/04/85 SOLER SALLY-POW

83-1569 Mitsubishi Motors v. Soler Chrysler-Plymouth
83-1733 Soler Chrysler-Plymouth v. Mitsubishi Motors

MEMO TO FILE:

This brief memo is dictated after a preliminary reading of the briefs. Although I am not entirely at rest, I am inclined to affirm CA1.

Soler is a Puerto Rican corporation (in effect a U.S. corporation) that entered into a Distributor's Agreement (dealership) that gave Soler the right to sell vehicles made in Japan - actually made by a Japanese corporation formed as a joint venture between Chrysler and Mitsubishi.

The dealership agreement provided that it should be construed in accordance with the laws of the "Swiss Confederation", and expressly provided for arbitration in Japan of contract disputes.

Following a slump in the new car market, Soler was unable to meet its minimum sales commitments in its asigned territory. Soler therefore attempted to transship automobiles to other areas, including Central and South America and the United States. Mitsubishi refused to

permit the transshipment, and withheld shipment to Soler of 1,000 vehicles ordered by Soler.

Mitsubishi brought suit against Soler in the U.S. District Court of Puerto Rico seeking an order compelling arbitration in Japan of alleged breaches of the dealership agreement. The District Court ordered arbitration, but CA1 - in a unanimous opinion, reversed the District Court on that issue. On other issues (it is not entirely clearly to me precisely what they are at this time), CA1 affirmed the DC.

The principal issue that prompted grant of certiorari, as stated in the amicus brief of the Solicitor General (SG), is:

> "Whether the District Court erred in referring the federal antitrust counterclaim in this case to foreign arbitration pursuant to the terms of the parties' contract".

I should have said above that Soler, in a cross petition filed in the DC, asserted a violation of the U.S. antitrust laws by the refusal of Mitsubishi to permit the verhicles to be sold outside of the original dealership agreement area.

The SG's brief, addressing only the arbitration issue, argues strongly and persuasively that foreign arbitration of our antitrust laws would be inappropriate. As the SG put it, the antitrust laws "embody a policy of preserving competition that is of great significance to our national interests". The enforcement of antitrust laws by private litigation, and treble damages, significantly furthers this national interest.

The SG states that "every court of appeals that has considered the question has held that federal antitrust claims are not arbitrable".

Mitsubishi presents a second question whether arbitration of antitrust issues is compelled under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. I am inclined to think that if the SG is correct as to the Sherman Act not being the subject of foreign arbitration, I do not think this Convention - that is not explicit ~~at all~~ with respect to antitrust claims - should cause a different result.

Mitsubishi relies primarily on this Court's decision in Scherk v. Alberto-Culver Co. Scherk involved a controversy between a United States company and a German national over a securities law question. Despite the

Court's prior holding in Wilko v. Swan, that securities claims under the '33 Act are not arbitrable in a domestic dispute, the Court in Scherk held that different considerations were involved where a specific arbitration agreement had been made between a foreign national and an American company with respect to a securities act question, and that arbitration was appropriate. The SG also commented that the treble damages provision of the antitrust laws is not included in the federal securities laws, and that this is another distinction.

I am not entirely satisified that Scherk is as easily distinguishable as the SG argues, but on balance I am inclined now to agree with him. I will be interested in seeing a very brief memo from my clerk.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1985

83-1569 and 83-1733 -

Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.

Soler Chrysler-Plymouth, Inc. v. Mitsubishi Motors Corporation

Dear Harry,

I agree.

Sincerely,

Byron

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 30, 1985

Re: 83-1569 & 83-1733, Mitsubishi Motors v. Soler Chrysler-Plymouth

Dear Harry:

Notwithstanding the extremely persuasive authority at the end of your opinion, I still plan to try my hand at a dissent.

Respectfully,

JPS

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1985

Re: Nos. 83-1569 and 1733-Mitsubishi Motors v. Soler Chrysler-Plymouth and Chrysler-Plymouth v. Mitsubishi Motors

Dear Harry:

I await the dissent.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1985

Re: No. 83-1569 Mitsubishi Motors v. Soler Chrysler-Plymouth

Dear Harry,

Please join me.

Sincerely,

WHR

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1985

Re: No. 83-1569 - Mitsubishi Motors v. Soler Chrysler-Plymouth
No. 83-1733 - Soler Chrysler-Plymouth v. Mitsubishi Motors

Dear Harry:

I join.

Regards,

WEB

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 24, 1985

No. 83-1569

Mitsubishi Motors Corporation
v. Soler Chrysler-Plymouth, Inc.

Dear John,

Please join me in your dissent.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 25, 1985

Re: No. 83-1569-Mitsubishi Motors v. Soler Chrysler-Plymouth

Dear John:

Please note in your opinion that I join all but Part II.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

83-1569 Mitsubishi Motors. v. Soler Chrysler-Plymouth (Lee)

LFP out - added by HAB
HAB for the Court 4/1/85
1st draft 5/29/85
2nd draft 6/26/85
Joined by BRW 5/20/85
WHR 6/12/85
CJ 6/24/85
JPS dissenting
Typed draft 6/24/85
1st printed draft 6/25/85
Joined by JPS 6/25/85
TM joins all but Part II
JPS will dissent 5/30/85
TM awaiting dissent 6/12/85