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RECENT DECISIONS

ADMIRALTY—DAMAGES IN A MARITIME COLLISION OR STRANDING CAUSED BY MUTUAL FAULT MUST BE APPORTIONED ACCORDING TO THE COMPARATIVE NEGLIGENCE OF THE PARTIES

Plaintiff, the Reliable Transfer Company, sued the United States[1] to recover one-half the amount of damage to plaintiff's tanker caused by its grounding on a breakwater on which the Coast Guard maintained a light. The captain of the tanker knew that the light was not in operation on that night and that visibility was poor;[2] nonetheless he executed a turn and changed course without consulting any of the navigational aids available to him. Due to his miscalculation of the tanker's position, the vessel ran aground on the breakwater. Plaintiff contended that the failure of the Coast Guard to maintain the light was a contributing cause of the grounding, so that under the settled rule in cases of collision and stranding caused by mutual fault, the damages to the tanker should be divided equally between the parties. The district court found, and the court of appeals affirmed, that although the plaintiff contributed seventy-five per cent and the defendant only twenty-five per cent to causing the accident, the traditional rule dictated that each was liable for one-half of the damages, since both were at fault.[3] The Supreme Court *held*, however, that the judgment be vacated. The rule of equal division of property damage in a maritime collision or stranding caused by mutual fault is replaced by a rule of apportionment of damages among the parties according to their comparative faults, allowing equal division only when the parties are equally at fault or when fault cannot be fairly apportioned. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708 (1975).

The rule of divided damages has its origins in the maritime codes that were the foundation of the admiralty laws of most nations.[4]

1. Plaintiff sued under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.* (1970) and the Federal Tort Claims Act, 28 U.S.C. § 1345 *et seq.* (1970).

2. About one-half hour before the tanker approached the breakwater, the captain observed that the light was not in operation. Visibility was impaired that night by eight- to ten-foot waves caused by the gale force wind.

3. 497 F.2d 1036 (2d Cir. 1974).

4. This rule is found in the Laws of Oleron, which are thought to date from the twelfth century. This code was referred to as the law of English admiralty in the fourteenth century. Staring, *Contribution and Division of Damages on Admi-*

Originally, damages were divided equally when a court could not determine which party was at fault in a collision.[5] By the nineteenth century, the English courts applied the rule consistently in collisions between two vessels involving mutual fault.[6] When the Supreme Court of the United States formally adopted the rule in *The Schooner Catherine v. Dickinson*,[7] the Court premised its decision on both the widespread acceptance of the rule by the lower federal courts and considerations of equity and fairness.[8] *The Schooner Catherine* held simply that a finding of mutual fault in a collision between two vessels compels the application of the divided damages rule; however, by changing the burden of proof and presumptions governing the finding of mutual fault, the Supreme Court later expanded the scope of the rule in *The Pennsylvania*.[9] The Court there held that a party who at the time of the collision is in violation of a statute designed to prevent collisions has the burden of showing that his statutory fault was not a cause of the

ralty and Maritime Cases, 45 CALIF. L. REV. 304, 306 (1957) [hereinafter cited as Staring]. The rule may also be found in the codes of the Hanse Towns, Wisby, and the *Consolato del Mare*. *Id.* Staring's article traces the development of the divided damages rule. Its history is also detailed in R. MARSDEN, 4 BRITISH SHIPPING LAWS: COLLISIONS AT SEA §§ 119-37 (11th ed. 1961).

5. Staring, *supra* note 4, at 308.

6. The Woodrop-Sims, 165 Eng. Rep. 1422 (Adm. 1815) (dictum); Hay v. LeNeve, 2 Shaw Scotch App. Cas. 395 (1824), *cited in* Staring, *supra* note 4, at 310.

7. 58 U.S. (17 How.) 170 (1854).

8. "The rule that prevails in the district and circuit courts, we understand, has been to divide the loss . . . .

"Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and viligance on both sides, in the navigation." 58 U.S. at 177-78.

Equal division of damages was a far more equitable rule than the only alternative—the common law rule that contributory negligence barred any recovery. Furthermore, the divided damages rule allowed the courts to avoid the particular problem involved in proving relative fault in a collision: the only available witnesses were often the crew members of the colliding vessels, whose testimony was influenced more by loyalty to their ship and master than by a desire to establish the facts. For example, the conflicting testimony in *The Juniata*, which involved a collision between a mail steamer and a tug, prompted the Court to say: "There is no single fact alleged by either party injuriously affecting the other in relation to which the antagonisms in the evidence are not as direct and absolute as is possible . . . . Even the place of the collision—whether on the east or west side of the river—is wrapped in the darkness arising from this conflict." 93 U.S. 337, 338-39 (1876).

9. 86 U.S. (19 Wall.) 125 (1873).

collision, and, furthermore, that it could not have been a cause.[10] Under this rule a technical statutory violation with only a tenuous causal connection to the collision renders the violator liable for one-half of the damages. Subsequent to *The Pennsylvania*, the divided damages rule was further expanded to govern certain non-collision property damage situations—to collisions between ships and fixed objects,[11] and ship groundings.[12] While the inflexibility of the divided damages rule sometimes produced an inequitable result as between the parties at fault,[13] it was used with the traditional flexibility of admiralty as a basis for the right of contribution when an innocent third party sued one of the parties at fault for collision or grounding damages. First, the parties at fault were held jointly and severally liable for damages to an innocent third party,[14] so that the innocent party could sue either one of the parties at fault and collect the full amount of his damages. Subsequently a defendant, sued by an innocent cargo owner, was permitted to implead others whose fault may have contributed to the collision.[15] The court reasoned that since contribution was regarded as "a substantial legal right" of parties at fault who were before the court, it would be "a gross anomaly" to deny a court the power to bring in one of them if absent.[16] Finally, the Supreme Court acknowledged that since contribution was a substantive

10. *Id.* at 136.

11. Atlee v. Northwestern Union Packet Co., 88 U.S. (21 Wall.) 389 (1874) (ship struck pier); Louis-Dreyfuss v. Seaboard Great Lakes Corp., 69 F.2d 71 (2d Cir. 1934) (ship struck bridge).

12. White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co., 258 U.S. 341 (1922). This was the first American case to hold that the divided damages rule was generally applicable to groundings. *See also* United States v. Standard Oil Co, 498 F.2d 911 (9th Cir. 1974).

13. The instant case clearly illustrates the blind equality of the division dictated by the rule: the plaintiff, who was the only party to suffer injury, contributed seventy-five per cent to the cause of the grounding, yet according to the divided damages rule, the defendant was required to pay one-half of the plaintiff's damages.

14. The Atlas, 93 U.S. 302 (1876) (when a collision between two tugs was caused by their mutual fault, the cargo owner of a canal boat towed by one of the colliding vessels could recover the full amount of its damages from either of the tugs); The Juniata, 93 U.S. 337 (1876).

15. The Mariska, 107 F. 989 (7th Cir. 1901). *See also* The Hudson, 15 F. 162 (S.D.N.Y. 1883). In *The Hudson*, the defendant was permitted to implead a tug that contributed to the collision. Only a few months after that case was decided, the Supreme Court promulgated Rule 59 of Admiralty Practice, permitting impleader generally in collision cases. Admiralty R. 59, 112 U.S. 743 (1882).

16. 15 F. at 166.

right arising directly from the tort, a defendant who paid an innocent cargo owner in full could bring a separate suit for contribution against other parties at fault in the collision.[17] Thus the courts insured that no party would be forced to bear a disproportionate amount of damages merely because of the plaintiff's selection of defendants. Nevertheless, a party at fault remained liable for a fixed percentage of the damages,[18] regardless of his relative degree of fault.[19] In order to soften the harshness of this rule, the courts

17. Erie R.R. v. Erie & W. Transp. Co., 204 U.S. 220 (1907). This principle was reiterated in *Drummond v. United States*, 78 F. Supp. 730 (E.D. Va. 1948). The attitude of admiralty courts toward contribution has thus been very different from the attitude of common law courts. The general rule at common law prohibited contribution between joint tortfeasors. W. PROSSER, THE LAW OF TORTS § 50. When contribution was allowed it was not a "substantive legal right" but an equitable remedy chosen at the discretion of the court. Reath, *Contribution between Persons Jointly Charged for Negligence*, 12 HARV. L. REV. 176, 184 (1899).

18. The mechanics of the divided damages rule were set forth in *The Sapphire*, 85 U.S. (18 Wall.) 51 (1873); the Court also described the rule in *The North Star*, 106 U.S. 17, 22 (1882), as follows: "[I]n cases of collision occuring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one part to pay to the other such sum as is necessary to equalize the burden." If the collision is the proximate cause of damage to other property, the amount of that damage will be included in the "common mass." A shipper's right to recover in full for damage to cargo has particularly been upheld by the courts.

Although both the Harter Act, 46 U.S.C. § 192 (1970), and The Carriage of Goods by Sea Act, 46 U.S.C. § 1304(2)(a) (1970) [hereinafter cited as COGSA], purport to exempt a carrier from any liability to the shipper of its own cargo based on negligence of the master or crew in navigation or management of the ship, the divided damages computation effectively nullifies this exemption. Thus a shipper whose cargo was damaged in a collision between its carrier and another vessel may recover in full from the non-carrying vessel; however, when damages are then divided between the two ships, the common mass that is divided includes the cargo damage paid by the non-carrier, and the carrier's statutory exemption is, thereby, nullified. The Chattahoochee, 173 U.S. 540 (1899).

Shipowners formerly used the "both to blame" clause in bills of lading to avoid this result; the clause required the shipper to reimburse the carrier for payments it makes to the non-carrier in order to divide the damages to shipper's cargo. The clause was invalidated, however, in *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236 (1952). *See* H. BAER, ADMIRALTY LAW IN THE SUPREME COURT 222 (2d ed. 1969).

19. Ultimately a single liability arises from the application of the divided damages rule: the liability of one party at fault to pay an equalizing amount to the other party. Thus, a limitation of liability statute is applied only to that amount and only to the party who must pay it. The North Star, *supra* note 18. Maritime insurance contracts, on the other hand, will often provide that a mutual fault collision creates cross-liabilities, *i.e.*, no common mass is calculated, but

attempted to contract its scope in the same manner once used to expand it[20]—by changing the evidentiary rules that governed the finding of mutual fault. The "major-minor" rule, in the form adopted by the Supreme Court,[21] permits a court to resolve conflicts in testimony in favor of a party whose fault was relatively insignificant so long as the fault of the other party would alone have been sufficient to cause the collision.[22] After the application of the major-minor rule the evidence may support a finding that the minor fault was not a cause of the collision[23] and thereby relieve that party of all liability for damages. When the facts of a collision case do not warrant the use of this device, the courts have applied the divided damages rule, while roundly criticizing its inflexibility.[24] International criticism of the rule led to its abrogation in the Brussels Collision Liability Convention of 1910.[25] This Convention

each ship is liable for one-half of the other ship's damages. The pecuniary advantage of cross-liabilities to the insurance underwriter is illustrated in ARNOLD, 9 BRITISH SHIPPING LAWS: MARINE INSURANCE § 779 (1961).

20. *See* text accompanying note 9 *supra*.

21. The City of New York, 147 U.S. 72, 85 (1893).

22. When the minor fault is a statutory violation, the rule of *The Pennsylvania* prevents the application of the major-minor rule. *See* Yang-Tsze Ins. Ass'n v. Furness, Withy & Co., 215 F. 859 (2d Cir. 1914) (collision damages were divided when the negligence of one ship was found to be "inexcusable and even unparalleled" and the other ship's minor change of course was in violation of a statute); Hygrade v. The Gatco New Jersey, 250 F.2d 485, 487 (3d Cir. 1957) (dictum).

23. A review of the cases in which the major-minor rule was applied revealed that courts interpret this rule in the following different ways: (1) when one ship is grossly at fault, all doubts are resolved in favor of the other ship; (2) the fault of the less negligent ship is found not to be contributory; (3) a slight fault is wholly disregarded. J. GRIFFIN, THE AMERICAN LAW OF COLLISION § 224 (1949).

24. Judge Learned Hand referred to "our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations." National Bulk Carriers v. United States, 183 F.2d 405, 410 (2d Cir. 1950) (dissenting opinion). *See also* Hygrade v. The Gatco New Jersey, 250 F.2d 485, 488 (3d Cir. 1957) ("the archaic and frequently unjust rule of division of damages"); Oriental Trading & Transp. Co. v. Gulf Oil Corp., 173 F.2d 108, 111 (2d Cir. 1949) ("[w]e have no power to divest ourselves of this vestigial relic"). On rare occasions district courts have apportioned damages according to fault. *E.g.*, McKeel v. Schroeder, 215 F. Supp. 756 (N.D. Cal. 1963). Legal commentary criticizing the rule includes G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 531 (2d ed. 1975); Donovan, *Mutual Fault—Half Damage Rule: A Critical Analysis*, 41 INS. COUN. J. 395 (1974); Jackson, *The Archaic Rule of Dividing Damages in Maritime Collisions*, 19 ALA. L. REV. 263 (1967); Staring, *supra* note 4. Most writers who discuss the subject of divided damages in any detail make some negative comment on it.

25. International Convention for the Unification of Certain Rules to Govern

apportions property damage in collision cases according to relative fault;[26] in addition, it eliminates joint and several liability,[27] and thus prevents a cargo owner from recovering the full amount of his collision loss from any one of the parties at fault. The United States Senate never ratified this Convention, apparently because of American cargo owners' objections to the proposed abolition of joint and several liability, rather than because of any criticism of the comparative fault rule.[28] Until the instant case the United States was the only major maritime nation that had not adhered to the Convention[29] or in some way replaced the equal division of damages in collision cases with a comparative fault rule.

In the instant case the Court reconsidered the divided damages rule in light of the policies that the rule was intended to serve. The Court noted that the rule was no longer applied by other nations and was followed "only grudgingly"[30] by the lower federal courts. Althought it acknowledged that the rule produced fair results both when the parties were equally to blame and when fault could not be accurately apportioned, the Court found the rule inequitable in every other case. The Court was unpersuaded by the claim that the rigid predictability of the rule encourages out-of-court settlements, and added that, even if the claim were true, the courts could not enforce such a harsh and inequitable rule merely to relieve their crowded dockets. To counter the argument that this precedent should be overturned only by Congress, the Court asserted its traditionally broad power to create legal rights and remedies in admi-

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the Liability of Vessels when Collisions Occur between Them, Sept. 23, 1910, *reprinted in* J. GRIFFIN, THE AMERICAN LAW OF COLLISION 852 (1949).

26. Article 4 provides: "If two or more vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally."

27. Article 4 further provides: "The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportions without joint and several liability toward third persons."

28. The Court in the instant case accepted this interpretation of the Senate's failure to ratify the Convention. Consequently, the Court rejected the contention that the Senate's inaction manifested Congressional disapproval of comparative fault. 95 S.Ct. at 1714 n.14.

29. Thirty-eight nations, including all major seagoing countries except the United States now adhere to the Convention. 95 S.Ct. at 1712 n.7.

30. 95 S.Ct. at 1712.

ralty.[31] It noted further that the adoption of a proportional fault rule in this case would cause the law of property damage liability to conform to the statutes[32] enacted by Congress to govern liability for maritime personal injury. Since this left "sheer inertia" as the only justification for the divided damages rule, the Court concluded that a rule based on comparative fault should be applied to determine liability for property damage resulting from a collision or grounding, restricting the equal division of damages to cases in which the fault either is equally divided or is not reasonably allocable.

The Court's decision in the instant case to overturn centuries of precedent will no doubt be universally applauded. The same considerations of justice and equity that once favored the divided damages rule over common law contributory negligence now lead the Court to adopt the comparative fault rule and to harmonize United States law in this area with the law of most other seafaring nations. The Court did not, however, show any inclination to adopt other rules in the Brussels Convention that conflict with present American law. For example, the Court chose not to abolish the joint and several liability of parties at fault for property damage resulting from a collision.[33] Policy and precedent present forceful arguments for retention of joint and several liability notwithstanding the Convention. This principle protects the right of innocent third parties, most notably the owner of cargo damaged or lost in a collision, to collect in full for their losses.[34] Protection of the cargo owner against overreaching by the carrier has been a matter of Congressional concern, as expressed in the specific provisions and the general policies of the Harter Act and the Carriage of Goods by Sea Act.[35] Elimination of the divided damages rule will proba-

31. In *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), the Court discussed its "traditional responsibility to vindicate the policies of maritime laws": if there is no reason for existing distinctions and anomalies, then the court should not presume that Congress intended to freeze them into maritime law in the absence of compelling evidence. 398 U.S. at 396.

32. Jones Act, 46 U.S.C. § 688 (1975); Death on the High Seas Act, 46 U.S.C. § 766 (1975).

33. *See* note 27 *supra*.

34. Donovan, *Mutual Fault—Half Damage Rule: A Critical Analysis*, 41 INS. COUN. J. 395 (1974), presents the arguments in favor of joint and several liability.

35. COGSA, *supra* note 18, sets out in section 3 the broad grounds on which a cargo owner may recover; the grounds on which a carrier may avoid liability are defined in section 4 as exceptions to the general rule. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 3-28 (2d ed. 1975). *See also* United States v. Atlantic Mut. Ins. Co., 343 U.S. 236 (1952).

bly affect the rules that govern the findings of fault and causation in collision cases. Since the major-minor rule has traditionally been applied to counter the inequity of the divided damages rule, little use for it remains now that the inequity has been abolished. When there is great disparity between the contributing faults of the parties, the apportionment of damages will now reflect that disparity. Thus, the application of the major-minor rule would only permit the party less at fault to escape liability for its just portion of damages. Application of the rule of *The Pennsylvania* will now have a less inequitable effect on the relative liabilities arising from mutual fault. A party who violates a statute often cannot satisfy the heavy burden imposed by the rule to show that the violation could not have been a contributing cause of the collision. Nonetheless, if he can show that the violation probably did not cause the collision, then his fault should be considered a comparatively slight cause, and thus the share of damages apportioned to him will be correspondingly slight. If the Court, however, were to examine these rules in relation to their policy bases, as it examined the divided damages rule in the instant case, it would find ample support for their abandonment.

Anne Markey

ADMIRALTY—WRONGFUL DEATH—GENERAL MARITIME LAW PROVIDES REMEDY FOR PAIN AND SUFFERING OF DECEDENT INCURRED IN WRONGFUL DEATH ON HIGH SEAS BUT NOT FOR FUNERAL EXPENSES

Plaintiff, administrator of the estate of a decedent suffering wrongful death on the high seas,[1] brought an action in federal district court under general maritime law and, in the alternative, under a Massachusetts survival statute[2] for the conscious pain and suffering[3] incurred by the decedent prior to death and for the funeral expenses incurred by the decedent's estate.[4] The defendant contended that recovery of damages for the decedent's pain and suffering and for funeral expenses was prohibited by a federal statute restricting damages to "pecuniary loss."[5] The district court found, however, that the defendant had negligently caused the death of the decedent and awarded the plaintiff damages both for conscious pain and suffering and for funeral expenses. On appeal to the United States Court of Appeals for the First Circuit, *held*, damages for pain and suffering allowed and funeral expenses denied. General maritime law provides a remedy for the pain and suffering of a person incurred in wrongful death on the high seas,

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1. Decedent, Janet Barbe, was a passenger on a 26-foot Owens Sea Skiff that the defendant, David N. Drummond, had purchased only the day before Drummond and Barbe embarked on a nocturnal journey across the Massachusetts Bay. Because of Drummond's inexperience with power boats, and his failure to acquaint himself with the craft's safety equipment, Drummond was unable to restart his vessel when it stalled on the high seas. Since sinking seemed imminent, Drummond constructed a makeshift raft on which he launched Miss Barbe. She died from exposure shortly thereafter; Drummond, however, was rescued the next morning.

2. MASS. ANN. LAWS ch. 228, § 1(2)(a) (1974). This statute reads in pertinent part: "In addition to the actions which survive by the common law, the following shall survive . . . (2) [a]ctions of tort (a) for assault, battery, imprisonment or other damages to the person . . . ." This statute, when applicable, permits a cause of action for pain and suffering to survive the death of the victim. Gaudette v. Webb, ___ Mass. ___, 284 N.E.2d 222 (1972).

3. The court of appeals does not mention whether the plaintiff sought recovery for the wrongful death of the decedent, Janet Barbe, in addition to damages for her pain and suffering prior to death. In any event, no damages for wrongful death were awarded in either court.

4. Under Massachusetts law the estate of the decedent is primarily liable for the decedent's funeral expenses. *See* Magrath v. Sheehan, 296 Mass. 263, 5 N.E.2d 547 (1936).

5. Death on the High Seas Act, 46 U.S.C. § 762 (1970) [hereinafter cited as DOHSA]. Section 762 provides: "The recovery in such suit shall be a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought . . . ." (Emphasis added.)

but an award of funeral expenses is prohibited by federal statute. *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

Prior to 1886, when the Supreme Court decided *The Harrisburg*,[6] the courts were in disagreement over whether actions for wrongful death could be maintained under general maritime law.[7] The Supreme Court resolved this controversy in *The Harrisburg* by holding that federal maritime law did not provide a remedy for wrongful death.[8] Nevertheless, *The Harrisburg* did not preclude wrongful death actions brought pursuant to the wrongful death statute of the state in whose territorial waters the accident occurred.[9] In 1920 Congress supplemented the state remedies for wrongful death when it enacted the Death on the High Seas Act (DOHSA)[10] and

6. 119 U.S. 199 (1886).

7. A majority of the reported decisions permitted an action for wrongful death under general maritime law. George & Moore, *Wrongful Death and Survival Actions under the General Maritime Law: Pre-Harrisburg Through Post-Moragne*, 4 J. MARI. L. & COMM. 1 (1972-1973) [hereinafter cited as George & Moore]. Actions for pain and suffering appear to have met with general disfavor from the early admiralty courts. The courts adopted the common-law rule that the right of action for personal injury abates upon the death of the injured party. *See, e.g.*, Hollyday v. The David Reeves, 12 F. Cas. 386 (No. 6,625) (D. Md. 1879). *See generally* George & Moore at 8. The origin of the common law rule is unclear. W. PROSSER, THE LAW OF TORTS § 126 (4th ed. 1971) [hereinafter cited as PROSSER]. It appears that the rule has its basis in the same feudal principles cited in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), as the basis for denying an action for wrongful death. *See* PROSSER § 126; note 8 *infra*. Thus as a practical matter, the Court's decision in *The Harrisburg*, although strictly precluding only the general maritime remedy for wrongful death, effectively precluded a general maritime remedy for pain and suffering prior to death as well. *See* George & Moore at 13.

8. The Court in *The Harrisburg* relied on English precedent in its refusal to recognize a wrongful death action in general maritime law. 119 U.S. at 204 (1886). The English courts in turn based their refusal primarily on the felony-merger doctrine—a principle of law prevailing in England during feudal times but never adopted in the United States. Thus *The Harrisburg* rested on shaky ground, even at the time it was rendered.

9. The Hamilton, 207 U.S. 398 (1907).

10. 46 U.S.C. § 761 et seq. (1970). DOHSA gives a remedy for the death of a person when caused by "wrongful act, neglect, or default occurring on the high seas." A "wrongful act, neglect, or default" includes both actions for unseaworthiness and negligence when brought on behalf of a seaman. *See* McLaughlin v. Bildberg Rothchild Co., 167 F. Supp. 714. However, since it is well settled that a shipowner owes no duty of seaworthiness to a non-seaman (other than to certain types of harborworkers), recovery under DOHSA on behalf of a non-seaman is restricted to an action based on negligence. *See In re* Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974). Coverage of DOHSA is not limited to any

the Jones Act.[11] Although the Jones Act provides for the survival of an action for the pain and suffering of a decedent killed as a result of his employer's negligence, the Act is restricted to seamen.[12] DOHSA, on the other hand, is not limited to any particular class of persons; however, it does not provide for the survival of actions.[13] While this omission could be interpreted as deliberate,[14]

particular class of decedents. The recovery is, however, for the "exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. § 761 (1970). Recovery is also limited to compensation for the "pecuniary loss sustained." 46 U.S.C. § 762 (1970). *See* note 5 *supra.*

11. 46 U.S.C. § 688 et seq. (1970). The Jones Act incorporates the provisions of the Federal Employer's Liability Act, 45 U.S.C. §§ 51-59 (1970) (F.E.L.A.), thereby providing for the survival of actions. *See* 45 U.S.C. § 59 (1970). The Jones Act, like DOHSA, is for the exclusive benefit of certain beneficiaries; however, unlike DOHSA, the Jones Act sets up a system of ordered classes of beneficiaries. A member of a lower class may recover only if there are no members of a higher class living. *See* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). The class of highest priority is comprised of the spouse and children of the decedent. The next highest class consists of the parents of the decedent. The final class is made up of the decedent's next of kin that were dependent upon him prior to his death.

12. 46 U.S.C. § 688 (1970); Cleveland Tankers, Inc. v. Tierney, 169 F.2d 622 (6th Cir. 1948). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-30 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

13. Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968). Section 765 of DOHSA has language resembling that of a survival statute. However, it has been held to revive only those actions brought by the decedent before his death for injuries sustained from the wrongful act. "Had Congress intended to create a cause of action for conscious suffering which would survive to the representatives of the decedent or the group of beneficiaries denominated in section 761 [of U.S.C. title 46], it indicated in the Jones Act that it was well aware of language apt to produce this result. Absent such language in the Death on the High Seas Act, no cause of action for conscious suffering is created thereby." Brown v. Anderson-Nichols & Co., 203 F. Supp. 489 (D. Mass. 1962).

Moreover, section 765 has been held to apply only to those actions for the recovery of "compensation provided in section 762," *i.e.*, pecuniary loss, and not for the recovery of pain and suffering. Petition of Gulf Oil Corp., 172 F. Supp. 911, 916 n.28 (S.D.N.Y. 1959). On the other hand, it has been suggested that a literal interpretation of section 765 may not be in order and that the section may indeed revive actions for pain and suffering brought by the decedent prior to death. Abbott v. United States, 207 F. Supp. 468 (S.D.N.Y. 1962).

14. "The High Seas Act and the Jones Act, incorporating FELA, were passed almost at the same time; it is a reasonable assumption that the failure of Congress to provide specifically in the High Seas Act for the double recovery must have been deliberate and that only pecuniary loss to the beneficiaries was meant to be recoverable. On the other hand, no reason of policy suggests itself to explain why the two acts should have adopted different measures of recovery." GILMORE &

the courts have generally refused to construe DOHSA so strictly.[15] The passage of DOHSA in 1920 provided a federal remedy for wrongful death on the high seas where none had existed before, but since it did not provide exhaustive coverage of all maritime torts, it did little to ease the conflict between state and federal law that inevitably arises when both systems legislate on the same subject matter.[16] The difficulties in reconciling the conflicts between the two bodies of law were heightened by *The Tungus v. Skovgaard*[17] and *Lindgren v. United States*.[18] *The Tungus* restricted the ability of the admiralty courts to work around the constraint imposed by *The Harrisburg*. The Supreme Court held in *The Tungus* that whenever a gap in the federal law arises that is suitably filled by applying state law, a court is not at liberty to apply only so much of the state law as it should see fit. Rather, an admiralty court

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BLACK § 6-33, at 308 (1st ed. 1957).

15. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Supreme Court was confronted with the argument that Congress, by legislating on the subject of recovery in wrongful death actions in DOHSA, had preempted the field, so that the Court was barred from creating a general maritime remedy for an injury not expressly covered by DOHSA. The Court responded by stating that "no intention appears that [DOHSA] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U.S. at 400. The Court then proceeded to "conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." 398 U.S. at 402. Since DOHSA does not cover the survival of actions, the courts are generally agreed that DOHSA does not preclude recovery for damages brought under a state survival statute, even if the wrongful act occurred on the high seas. *See* Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968); Abbott v. United States, 207 F. Supp. 468 (S.D.N.Y. 1962). Note, however, that the *Barbe* case itself may now preclude actions brought under state survival statutes, although DOHSA alone would not. *See* note 16 *infra*.

16. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Supreme Court discussed the problems presented by state and federal legislation in the same subject area. The Court stressed that matters maritime were not properly the exclusive province of federal legislation, but that admiralty law was the outgrowth of a "highly intricate interplay of the States and the National Government in their regulation of maritime commerce." 358 U.S. at 373. Federal admiralty law supersedes the state law only when the courts find "inroads on a harmonious system," but "this limitation still leaves the States a wide scope." 358 U.S. at 373. Thus a state may regulate maritime affairs, so long as its law does not contravene any act of Congress or otherwise interfere with the harmony of federal law. *See also* Just v. Chambers, 312 U.S. 383, 389 (1941).

17. 358 U.S. 588 (1959).

18. 281 U.S. 38 (1930). The *Lindgren* doctrine was later reaffirmed in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

must apply a state right "with whatever conditions and limitations the creating State has attached."[19] Whereas *The Tungus* staked out an exclusive domain for state law in which the admiralty courts were not to tread, the *Lindgren* decision set forth a similar exclusive domain for federal law. In *Lindgren* the Supreme Court found that the Jones Act superseded any recovery available to seamen for wrongful death under state law.[20] Hence, the Court refused to allow recovery for the wrongful death of a seaman under a state cause of action for unseaworthiness, even though the wrongful act occurred in state waters.[21] The difficulties encountered in working with state law to fill the gaps in federal maritime law finally prompted the Supreme Court to overrule *The Harrisburg* in *Moragne v. States Marine Lines, Inc.*[22] In *Moragne* a longshoreman was killed while working aboard a vessel within the territorial waters of Florida. His personal representative brought actions for wrongful death and for pain and suffering, both of which were denied, since the Florida statutory right of action for wrongful death did not include unseaworthiness as a basis of liability. After granting certiorari, the

19. 358 U.S. at 592.

20. The Court in *Lindgren* expressly reserved the question whether the Jones Act superseded DOHSA. The lower courts have since consistently held that the Jones Act does not preclude recovery by the personal representative of a seaman under DOHSA. *See, e.g.*, The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947).

21. *Lindgren* spawned one of three anomalies stemming from *The Harrisburg*, as determined by the Court in *Moragne*. A true seaman covered by the Jones Act had, as a result of *Lindgren*, no remedy for death caused by unseaworthiness within territorial waters, since the Jones Act allows recovery only upon proof of negligence. A harborworker, on the other hand, did have a remedy for unseaworthiness when allowed by state statute. Although the remedy of unseaworthiness was extended to harborworkers simply because they performed the duties of seamen, since they were not covered by the Jones Act, the *Lindgren* preclusion did not apply to them. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 (1970). If, however, the same seaman did not die but was merely injured, a wrongful death was not involved and *Lindgren* would not preclude the joinder of an action under the Jones Act for negligence and an action under state maritime law for unseaworthiness. This exemplified the second of the anomalies, *i.e.*, that a shipowner may have been liable for personal injuries to a worker within territorial waters but often not for death. Although *Lindgren* was not the sole source of this anomaly, since the failure of a state to provide recovery for a wrongful death to a non-seaman generally had the same effect, *Lindgren* did contribute its share of anomalous results. Finally, it was anomalous that a federal remedy existed for the death of a person caused by wrongful act occurring more than three miles from shore, but no such federal remedy existed for death by the same act occurring within this boundary. *See generally* M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 135 (2d ed. 1966); GEORGE & MOORE at 8.

22. 398 U.S. 375 (1970).

Supreme Court overturned the decision of the Court of Appeals for the Fifth Circuit and created a general maritime remedy for wrongful death.[23] The Court based its decision primarily on the widespread acceptance of wrongful death actions by statutory enactment in every state and on the concomitant rejection of the old decisional rule on which *The Harrisburg* was based.[24] Because the Court in *Moragne* was overturning nearly a century of precedent, it wisely left the details of such a dramatic reversal to be resolved in the lower courts.[25] After *Moragne*, the Court in *Sea-Land Serv-*

23. Although the plaintiff's suit included causes of action for both wrongful death and for pain and suffering, the Supreme Court ruled only on the action for wrongful death. The Court left "particular questions of the measure of damages" for resolution in the lower courts using both DOHSA and the numerous state wrongful death statutes for guidance. Presumably, decision on the action for pain and suffering was reserved for later consideration under the label of "measure of damages."

24. "We need not, however, pronounce a verdict on whether *The Harrisburg*, when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most cases where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation." 398 U.S. at 388. In overruling *The Harrisburg* the Supreme Court emphasized the anomalous result of the rule denying recovery as well as the states' widespread statutory rejection of it. *See* note 21 *supra*.

25. Subsequent to *Moragne*, there has naturally been disagreement among the circuits over where the courts should look for guidance to fill out the details in the new general maritime remedy created by *Moragne*. *See* Annot., 18 A.L.R. Fed. 184 (1974). Some courts have chosen to look to DOHSA and other federal statutes as the only proper source to determine the measure of damages for the *Moragne* remedy. *See, e.g.*, Strickland v. Nutt, 264 So. 2d 317 (La. App. 1972). Proponents of this position cite *Moragne* statements that admiralty law should operate uniformly in the whole country as support for their approach. The opposing point of view notes that *Moragne* expressly suggested that the lower courts refer to both federal and state statutes to fill in the lacunae for the new federal cause of action. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408 (1970). Thus, argue the proponents of this view, the search for a single source of law to establish a uniform measure of damages throughout the circuits is improper. *See, e.g.*, Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (5th Cir. 1972).

The prevailing point of view justifiably seems to be the latter. Annot., 18 A.L.R. Fed. 184 (1974). It seems the better interpretation not only of Supreme Court pronouncements in *Moragne* but also of the doctrine of uniformity. As a constitutional doctrine, uniformity refers only to the preemptive power of a federal remedy when it conflicts with a state remedy. *See* Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Greene v. Vantage Steamship Corp., 466 F.2d 159 (4th Cir. 1972).

ices, Inc. v. Gaudet[26] attempted to resolve some of the controversy among the circuits over the proper measure of damages for the *Moragne* wrongful death action. In *Sea-Land* the personal representative of the decedent[27] brought an action for wrongful death from injuries incurred in territorial waters, and sought damages for loss of support, services, and society, and for funeral expenses. Although the decedent had previously recovered damages for injuries sustained in the accident,[28] the Court found that none of the causes of action in the second suit had been litigated, so that the doctrine of *res judicata* did not apply. The Court then granted all elements of recovery sought by the plaintiff except insofar as the damages recovered in the first action overlapped those in the second.[29] However, since the decedent in *Sea-Land* recovered for inju-

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As a matter of policy, uniformity among the circuits is, of course, desirable; however, it is not mandated any more than one circuit is mandated to follow another circuit's interpretation of a federal statute. Thus it is incorrect to assert that a 1920 federal statute must be applied by analogy in order to insure that all circuits develop a uniform and proper interpretation of the measure of damages for a *Moragne* wrongful death action.

Note, however, that there has been a tendency among the courts to look primarily to DOHSA and the Jones Act to determine the proper beneficiaries of the *Moragne* wrongful death remedy. *See* The Cambria Steamship, 505 F.2d 517 (6th Cir. 1974); Mungin v. Calmar Steamship Corp., 342 F. Supp. 479 (D. Md. 1972). This might be explained by the Congressional consistency in limiting recovery to virtually the same classes of beneficiaries in both the Jones Act and DOHSA. The same consistency does not exist for the measure of damages. As a practical matter the courts may feel that some limit must be placed on potential plaintiffs to avoid unnecessary litigation.

26. 414 U.S. 573 (1974).

27. The decedent, a longshoreman, died as a result of injuries received on the defendant's vessel while in Louisiana territorial waters.

28. The decedent recovered damages for past and future wages, pain and suffering, and medical expenses.

29. There are seven elements of damages for wrongful death that may be recovered by survivors either under statute or at common law as in *Sea-Land*. They are as follows: (1) loss of support and contribution, (2) lost inheritance, (3) loss of services, (4) loss of society, (5) mental anguish, (6) medical expenses, and (7) funeral expenses. *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH (1966) [hereinafter cited as SPEISER]. *Sea-Land* represents authority for the recovery of most of these elements in a *Moragne* action for wrongful death caused by injuries sustained in territorial waters.

The Court did not award recovery for lost inheritance, presumably because it was not requested. Although loss of support and contribution is probably the core of a survivor's recovery for the wrongful death of a benefactor, the present value of lost inheritance has been held to be a damage separate and apart from loss of support and thus recoverable under DOHSA. National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

ries personal to him prior to his death, the Court did not indicate whether general maritime law would allow the survival of such an action had he died before initiating the first suit.[30]

The court in *Barbe v. Drummond* noted that under DOHSA recovery for wrongful death on the high seas was limited to compensation for the pecuniary loss sustained.[31] Since pecuniary loss

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The Court did not award damages for the mental anguish of the survivors, commonly referred to as survivors' grief. Recovery of this element of damages has met with much greater resistance in the courts than have most of the other elements. The Federal District Court for the Eastern District of Louisiana awarded survivors' grief noting a "marked tendency in the common-law states to expand the concept of damages recoverable for wrongful death to embrace some measure of compensation for the emotional suffering of survivors." *In re* Sincere Navigation Corp., 329 F. Supp. 652, 655 (E.D. La. 1971). But the Louisiana court is distinctly in the minority. *See* Petition of M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973); Greene v. Vantage Steamship Corp., 466 F.2d 159 (4th Cir. 1972). *See also* SPEISER § 3:45 (Supp. 1974).

Furthermore, the Supreme Court in *Sea-Land* did not award medical expenses since the decedent had recovered such expenses in a previous suit, but the Court did award funeral expenses. The Court found the award of funeral services appropriate when the decedent's dependents have either paid for the funeral or are liable for its payment. In this award the Court followed the clear consensus of the states. *See, e.g.*, Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (5th Cir. 1972).

Finally the Court in *Sea-Land* awarded damages for loss of the decedent's society and services. Recovery for loss of the decedent's services has become standard in most jurisdictions and is crucial in recovering for the death of a decedent, such as a mother, whose services were most valuable to the beneficiaries even though they may be difficult to value monetarily. *See* Smith, *Wrongful Death Damages in North Carolina*, 44 N.C. L. REV. 402, 418 (1966). Recovery for the loss of the decedent's society is a much more controversial element of damages. Prior to *Sea-Land*, the federal courts generally denied recovery for loss of society. *See, e.g.*, Simpson v. Knutsen, 444 F.2d 523 (9th Cir. 1971). Nonetheless, allowance of damages for loss of society follows "the recent trend [that] is unmistakeably in favor of permitting such recovery." SPEISER § 3:42, at 218.

30. Damages personal to the decedent, such as pain and suffering incurred prior to death, are normally recoverable only by provision for survival of the action and not under a wrongful death action, although imprecise legislative drafting has blurred this distinction in many jurisdictions. *See* SPEISER § 14:1. Since DOHSA does not provide for the survival of personal rights of action, recovery for pain and suffering of non-seamen wrongfully killed on the high seas must be provided either under a state survival statute or under a general maritime provision for the survival of remedies. *See* Dugas v. National Aircraft Corp., 300 F. Supp. 1167 (E.D. Pa. 1969); Petition of Gulf Oil Corp., 172 F. Supp. 911 (S.D.N.Y. 1959). *See also* notes 13 and 15 *supra*.

31. *See* note 5 *supra* and accompanying text.

had been held to exclude pain and suffering,[32] the court determined that recovery for pain and suffering could be allowed only under an action independent of DOHSA. The court considered three theories advanced by the plaintiff as bases for recovering pain and suffering. The first looked to state law for a survival statute to supplement general maritime law. The second relied on *Moragne* as direct authority for the existence of a general maritime law survival action. The third theory asserted that although *Moragne* may not be applicable as direct authority since the injury in *Moragne* occurred outside the scope of DOHSA, the same policy grounds requiring the creation of a general maritime remedy for wrongful death in *Moragne* urged the creation of a general maritime survival action.[33] After discussing the difficulties inherent in the first two theories, the court adopted the third. It reasoned that the third theory avoided the difficulties of incorporating state law into admiralty[34] as well as the difficulties of conflict with DOHSA.[35] When confronted with the issue of funeral expenses, the court found that DOHSA presented a more formidable barrier. Despite the Supreme Court's approval of the award of funeral expenses for an injury in territorial waters,[36] the court found that

32. Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (5th Cir. 1972); Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968).

33. For a discussion of the policy grounds behind the *Moragne* decision see notes 24 and 21 *supra* and accompanying text.

34. In looking to state law for a survival statute to supplement federal maritime law, the court found two principal difficulties. First, it must be determined whether the state survival statute was intended to apply to actions arising from injury incurred on the high seas. The determination is a difficult one since apparently few state legislatures contemplated such an application when drafting their survival statutes. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 n.10 (1970). The second difficulty in using state law to supplement federal maritime law is the probability of inconsistency in relief accorded by a federal court over essentially federal subject matter. Although this non-uniformity in federal law is generally not prohibited by the constitutional doctrine of uniformity since state law produces the non-uniformity and federal law is "silent," as a matter of policy, consistent treatment in federal courts is desirable. For a brief discussion of the doctrine of uniformity see note 25 *supra*.

35. The second theory, in relying on *Moragne* as direct authority for the creation of a federal maritime survival action, encountered difficulties arising from differences between the applicable law in the two areas. *Moragne* established federal maritime law in an area in which Congress had not legislated. However, since the injury in *Barbe* arose on the high seas, the case was directly governed by DOHSA. To avoid these complications, the court simply used the *Moragne* policy basis as support for the creation of new federal law not covered by DOHSA and labelled this "theory three."

36. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 591 (1974).

funeral expenses did not present a pecuniary loss recoverable under DOHSA. Moreover, since the court determined that funeral expenses were properly recoverable only in an action for wrongful death, the recovery of funeral expenses could not be supported by a separate cause outside the domain of DOHSA, as was the case with recovery of pain and suffering. Thus the court held that federal maritime law provides a remedy for the pain and suffering of a person wrongfully killed on the high seas; whereas, award of funeral expenses is prohibited by federal statute.

In creating a general maritime survival action, the *Barbe* court added still another link in the chain of general maritime law precipitated by the Supreme Court in *Moragne*. The *Barbe* addition was the next logical step in the development of the law.[37] Although not unexpected,[38] the creation of a federal survival action insures the existence of a remedy for an injury widely acknowledged as deserving of relief.[39] It further guards against the inconsistent allowance of relief that is inherent in relying on state law to provide an essentially federal remedy. On the other hand, the *Barbe* court refused an award of funeral expenses on the ground that funeral expenses could not be classified as pecuniary loss and were, therefore, impermissible elements of recovery under DOHSA.[40] Al-

37. Prior to *Barbe*, courts had allowed recovery under general maritime law for pain and suffering from a wrongful injury incurred within territorial waters and resulting in death. *See* Spiller v. Thomas M. Lowe, Jr., and Associates, Inc., 466 F.2d 903 (8th Cir. 1972); *In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971). Courts had also allowed, under state survival statutes, recovery for pain and suffering from a fatal injury incurred on the high seas. *See* Petition of Gulf Oil Corp., 172 F. Supp.911 (S.D.N.Y. 1959); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954).

38. *See* GEORGE & MOORE at 13.

39. *See* SPEISER § 3:49.

40. Because funeral expenses are not ordinarily recoverable in survival actions, the *Barbe* court was unable to avoid the dictates of DOHSA by awarding funeral expenses in the same manner that it awarded damages for pain and suffering. Conceivably the Court could have awarded funeral expenses without regard to DOHSA by asserting that *Moragne* created a wrongful death action independent of any statutory restrictions. Under such a rationale the court would be free to shape the recovery as it pleased, with DOHSA providing only a persuasive analogy. It has been suggested that *Moragne* had this very effect. *See* GILMORE & BLACK § 6-32.

Nevertheless, the *Barbe* court refused to give such an expansive interpretation to *Moragne*. It was well aware of the proper boundaries of the judiciary in creating law—to fill lacunae and not to overrule admittedly outdated statutory law. The court implicitly recognized that although DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in

though the court's reasoning is not logically faultless,[41] the DOHSA limitation of recovery to "pecuniary loss" would seem to imply this result rather than the allowance sought by the plaintiff.[42] However, this interpretation of the DOHSA limitation refuses relief that would be granted in the great majority of states.[43] Because of the widespread acceptance of recovery for funeral expenses in state law, recovery under federal law in state waters is assured under the policies enunciated in *Moragne*.[44] Thus in addition to refusing a remedy widely recognized under state law, the *Barbe* interpretation of pecuniary loss introduces a fundamental difference between the general maritime law for territorial waters and the general maritime law for the high seas, without discernible policy grounds for the differentiation. Although such an inconsistency is not prohibited by the doctrine of uniformity, the policy grounds against prohibiting recovery of funeral expenses under federal law should override judicial hesitation to give certain statutory words a broader interpretation than their plain meaning would seem to imply.

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situations not covered by the Act," DOHSA should be regarded as the exclusive law in situations that are clearly covered by its provisions. *See* note 15 *supra*. To hold otherwise would give the judiciary license to revoke legislation at will under the guise of formulating federal common law.

41. The *Barbe* court reasoned that the beneficiaries of the decedent experienced no pecuniary loss, since the wrongful death of the decedent merely accelerated the inevitable. Nevertheless, the acceleration itself occasions the loss of interest that would otherwise have accrued had the decedent lived out her normal life. *See* Florida E.C.R.R. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).

42. First Nat'l Bank v. National Airlines, Inc., 171 F. Supp. 528 (S.D.N.Y. 1958). *Contra* Moore v. O/S Fram, 226 F. Supp. 816 (S.D. Tex. 1963).

43. *See* SPEISER § 3:49.

44. The *Sea-Land* case specifically authorizes the recovery of funeral expenses for wrongful death in territorial waters. 414 U.S. at 591. *See* note 29 *supra*.

ARBITRATION—SECURITIES REGULATION—IN INTERNATIONAL SALE OF SECURITIES, ARBITRATION AGREEMENT IS BINDING NOTWITHSTANDING NON-WAIVERABILITY OF JUDICIAL REMEDY OF SECURITIES EXCHANGE ACT OF 1934

Respondent,[1] an American manufacturer, contracted with petitioner,[2] a German citizen, to purchase petitioner's European enterprises.[3] The sale involved securities[4] and included certain trademarks that the defendant expressly warranted were unencumbered. The contract contained a clause providing that any controversy or claim arising out of the contract or the breach thereof would be settled exclusively by arbitration.[5] Respondent allegedly

1. Respondent, Alberto-Culver Co., is a Delaware corporation with its principal office in Illinois. Alberto, a publicly held corporation whose stock is traded on the New York Stock Exchange, manufactures and distributes toiletries and hair care products in national and international markets.

2. Petitioner, Fritz Scherk, resided at the time of trial in Switzerland, and, prior to the transactions at issue, engaged in the manufacture and sale of cosmetics in western European markets.

3. Principal manufacturing operations were conducted in Berlin, Germany, at facilities owned by Scherk through a sole proprietorship, Firma Ludwig Scherk (FLS). Scherk also owned interrelated businesses in Liechtenstein—Scherk Etablissement Vaduz (SEV)—and Germany—Lodeva Herstellung und Vertrieb Kosmetischer Artikel GmbH (Lodeva). SEV was operated as a holding company licensing the sale and distribution of Scherk's cosmetics on an international basis under a variety of trademarks; Lodeva was dormant. Alberto-Culver Co. v. Scherk, 484 F.2d 611, 613 (7th Cir. 1973).

4. The purchase agreement provided that SEV was to be converted to a stock corporation and Alberto was to acquire 100 per cent of the stock of the new corporation. The Seventh Circuit concluded that the agreement to incorporate SEV and transfer the assets of SEV, FLS, and Lodeva to Alberto in exchange for cash and promissory notes involved a security within the meaning of the Securities Exchange Act of 1934. 484 F.2d at 615. The Supreme Court did not decide whether the acquisition of Scherk's enterprises was a securities transaction within the meaning of § 10(b) of the Securities Exchange Act of 1934 and rule 10b-5, since petitioner did not assign the adverse rulings of the court of appeals or district court as error and the question was not briefed or argued before the Supreme Court. Scherk v. Alberto-Culver Co., 417 U.S. 506, 514 n.8 (1974).

5. The purchase agreement provided as to the acquisition of SEV:

> The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. . . . All arbitration proceedings shall be held in Paris, France, and each party agrees

discovered, one year after the closing, that the trademark rights were subject to substantial encumbrances and thereupon offered to rescind the contract. Upon petitioner's refusal, respondent brought suit for damages and recission, alleging that petitioner, within the United States, made fraudulent representations and omissions in violation of § 10(b) of the Securities Exchange Act of 1934[6] and Rule 10b-5.[7] Petitioner filed a motion to stay the action pending arbitration.[8] Respondent sought a preliminary injunction restraining the prosecution of arbitration proceedings. The District Court for the Northern District of Illinois denied petitioner's motion and granted a preliminary order enjoining petitioner from proceeding with arbitration,[9] holding that an agreement to arbitrate could not preclude a buyer of a security from seeking the judicial remedy created and made non-waiverable by the Securities Exchange Act.[10] The Court of Appeals for the Seventh Circuit

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to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The law of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance. 484 F.2d at 613. Substantially similar clauses applied to the acquisition of FLS and Lodeva.

6. 15 U.S.C. § 78a *et seq.* (1970). Section 10(b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78j(b) (1970).

7. This rule implements § 10(b) of the 1934 Act.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5 (1974). *See generally* 3 L. LOSS, SECURITIES REGULATION 1421-74 (1961).

8. Alternatively, petitioner filed motions to dismiss, alleging want of personal or subject matter jurisdiction and *forum non conveniens*. These motions were denied.

9. The memorandum opinion of the district court is unreported.

10. The district court relied on *Wilko v. Swan*, 346 U.S. 427 (1953).

affirmed.[11] On grant of writ of certiorari,[12] the Supreme Court, *held*, reversed and remanded. In an international commercial transaction involving a sale of securities, an executory arbitration agreement shall be enforced in accord with the Arbitration Act of 1925, notwithstanding the non-waiverability of the right to sue in federal district court under the Securities Exchange Act of 1934. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (5-to-4 decision).[13]

The hostility of the English courts to executory arbitration agreements was imported into this country along with the whole of the common law. American courts followed the English precedents in holding that, since an executory[14] agreement to arbitrate ousted the jurisdiction of the courts, the agreement would not be specifically enforced nor would it support a stay of proceedings on the original cause of action.[15] Although there were indications that the federal courts were becoming critical of this judicial hostility,[16] not until Congress passed the Arbitration Act of 1925[17] was there authority to require enforcement of arbitration agreements.[18] The

11. Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973).

12. The Supreme Court granted Scherk's petition for certiorari, 414 U.S. 1156 (1974), "[b]ecause of the importance of the question presented . . . ." 417 U.S. at 510.

13. Justice Stewart delivered the opinion of the Court, joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Justice Douglas filed a dissenting opinion, joined by Justices Brennan, White, and Marshall.

14. An agreement to arbitrate made *after* the dispute has arisen (a non-executory agreement) has been given a more favorable reception by the courts. In *Wilko v. Swan*, 346 U.S. 427 (1953), the Court did not prohibit the arbitration of disputes involving securities if the parties decided to refer to arbitration after the dispute arose. The *Wilko* decision is discussed in text accompanying notes 37-41 *infra*.

15. For a discussion of the history of hostility towards arbitration agreements see Judge Frank's opinion in Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942).

16. 126 F.2d at 984.

17. 9 U.S.C. § 1 *et seq.* (1970).

18. 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereunder arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Act allows the costliness and delays of litigation to be avoided[19] by providing that agreements to arbitrate will be binding upon the parties.[20] This command is made enforceable by providing for, first, a stay of proceedings in an action when the court is satisfied that the issues before it are arbitrable under the particular arbitration agreement[21] and, secondly, a court order directing parties to proceed to arbitration when there has been a failure, neglect, or refusal of a party to honor an arbitration agreement.[22] Recent recognition has been given to the enforceability of executory arbitration agreements in *international* commercial contracts by the accession of the United States in 1970 to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[23] which provides that each contracting state shall recognize agreements to arbitrate differences concerning a subject matter capable of settlement by arbitration.[24] In a related area, the

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The scope of application of the Federal Arbitration Act has varied since its passage. Arbitration had been characterized as a procedural remedy. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1931); H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924). The Supreme Court in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), held that procedural matters affecting substantive rights and significantly influencing the outcome of litigation were actually substantive and therefore to be governed by *state* law pursuant to *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938). Then, in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), the Court held that under the outcome determinitive test of *Guaranty Trust*, state arbitration law was applicable in federal diversity suits. In a change of direction, the Court, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), declared the Federal Arbitration Act to be federal substantive law and thus applicable in a federal court exercising diversity jurisdiction. *Prima Paint* avoided the emasculating effects of *Bernhardt*. *See* Coulson, *Prima Paint: An Arbitration Milestone*, 22 ARB. J. 237 (1967); Comment, 46 TEX. L. REV. 260 (1967).

19. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

20. 9 U.S.C. § 2 (1970). *See* note 18 *supra*.

21. 9 U.S.C. § 3 (1970) provides:

> If any suit . . . be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . shall . . . stay the trial . . . until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

22. 9 U.S.C. § 4 (1970).

23. [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997. Congress passed Chapter 2 of the United States Arbitration Act to implement the Convention. 9 U.S.C. § 201 *et seq.* (1970).

24. Article II(1) of the Convention provides:

> Each Contracting State shall recognize an agreement in writing under

Supreme Court recently moved to make international dispute resolution less speculative. In *The Bremen v. Zapata Off-shore Co.*,[25] the Court rejected the rule of *Carbon Black Export, Inc. v. The Monrosa*[26] that a forum selection clause in a contract will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought. The *Bremen* decision held that a forum selection clause in an international towage contract would be enforced by United States courts absent a strong showing by the resisting party that enforcement would be unreasonable and would effectively deprive him of his day in court. This new position was reached after a consideration by the Court of "present day commercial realities and expanding international trade."[27] The towage contract involved the transport of costly equipment from Louisiana to Italy. The Court saw the real possibility of much uncertainty and great inconvenience to both parties were a suit maintainable in any of the many jurisdictions along the route in which an accident might occur or where the tug *Bremen* or its owner might be found. In honoring contractually conferred jurisdiction the Court furthered predictability in world commerce and brought domestic law into closer harmony with international custom and comparative practice.[28] Together, the *Bremen* decision and the Arbitration Act allow parties to international commercial transactions to decide where and by what manner any disputes arising in the future are to be decided. On the other hand, the Securities Exchange Act of 1934[29] provides that the federal district

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which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

25. 407 U.S. 1 (1972). For an analysis of the impact of the decision see *Symposium—Comments on the Bremen v. Zapata Off-shore Co.*: Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*; Leflar, *The Bremen and the Model Choice of Forum Act*; Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 363 (1973).

26. 254 F.2d 297 (5th Cir. 1958).

27. 407 U.S. at 15.

28. For a discussion of comparative practice in Western Europe, Latin America, Scandinavia, England and the British Commonwealth, and the United States see *Proceedings of the 1964 Annual Meeting of the American Foreign Law Association: The Validity of Forum Selecting Clauses*, 13 AM. J. COMP. L. 157 (1964).

English courts regularly enforce contractual choice of forum clauses. *See, e.g.*, The Fehmarn, [1958] 1 W.L.R. 159 (C.A.).

29. 15 U.S.C. § 78a *et seq.* (1970).

courts shall have exclusive jurisdiction over suits brought under the Act,[30] and that any provision binding a person to waive compliance with the Act or any rule or regulation thereunder shall be void.[31] The 1934 Act was enacted, *inter alia,* to prevent and afford remedies for fraud in securities trading;[32] and an implied civil cause of action[33] has been recognized under the § 10(b) anti-fraud provision[34] and implementing Rule 10b-5.[35] Provisions of the Securities Act of 1933[36] grant substantially similar rights as those flowing from the 1934 Act. The rights flowing from the 1933 Act came into conflict with the general policy of the Arbitration Act in *Wilko v. Swan*[37] in which a purchaser of securities sued for damages alleging that false representations induced the sale. The vendor's defense answered that the purchaser had agreed to submit any disputes arising from the sale to arbitration, and, therefore, pursuant to the Arbitration Act, the arbitration agreement should be given full effect. The agreement to arbitrate was held to be a stipulation binding a person to waive his right to select a judicial forum[38] and therefore violative of the non-waiver section[39] of the Securities Act. The *Wilko* Court based its decision to allow the Securities Act requirements to override the mandate of the Arbitration Act on both the nature of the legal question presented in a securities fraud dispute and the nature of the arbitration process. The question presented in *Wilko* did not require an objective determination of the quality of a commodity or the amount of money due under a

30. "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits . . . brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa (1970).

31. Section 29(a), the anti-waiver provision of the Act, provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a) (1970).

32. L. Loss, Securities Regulation 130-31 (Temp. Stud. ed. 1961).

33. 6 L. Loss, Securities Regulation 3869-73 (1969).

34. 15 U.S.C. § 78j(b) (1970).

35. 17 C.F.R. § 240.10b-5 (1970). *See* note 7 *supra.*

36. 15 U.S.C. § 77a *et seq.* (1970).

37. 346 U.S. 427 (1953). This case had no transnational aspects. The buyer, Anthony Wilko, was a resident of New Rochelle, New York. He purchased the securities in New York from Joseph E. Swan, doing business as Hayden, Stone & Co., a domiciliary of New York, New York. Brief for SEC as *Amicus Curiae,* Appendix (Margin Agreement), Wilko v. Swan, 346 U.S. 427 (1953).

38. 15 U.S.C. § 77v(a) (1970).

39. Section 14 of the 1933 Act; 15 U.S.C. § 77n (1970).

contract, questions easily resolved by commercial arbitrators, but rather a subjective finding on the purpose behind an alleged violation of the Securities Act. The *Wilko* Court found that the application of these principles without judicial instruction on the law (which a jury would receive), together with the limited reviewability of the application of legal concepts by the arbitrators[40] and the limited power of the courts to vacate an award,[41] would defeat the intent of Congress to protect the rights of investors. The Supreme Court was thus presented in the instant decision with two directly conflicting policies: first, the grant of a non-waiverable right to sue in federal court for redress of a violation of the Securities Exchange Act of 1934, and secondly, the enforcement command of the Arbitration Act of 1925 and the United Nations Convention along with the choice of forum rule of the *Bremen* decision.

The instant Court began by recognizing the command of the Arbitration Act and the remedies available thereunder.[42] The Court, accepting respondent's premise that the operative language of the 1933 Act relied on in *Wilko* is contained in the 1934 Exchange Act, nevertheless found differences between the *Wilko* agreement and the agreement between Alberto-Culver and Scherk that precluded the application of the *Wilko* holding to the facts of the instant case. The *Wilko* dispute, the Court stated, involved parties, negotiations, and a contractual subject matter all situated in the United States, whereas the contract in the instant case involved negotiations in the United States, England, and Germany, a signing in Austria, and a closing in Switzerland between an American corporation with its principal place of business and major operations in the United States and a German citizen whose companies were organized under the laws of Germany and Liechtenstein.[43] The instant Court determined the most significant distinction between the two cases was the instant contractual subject matter: the sale of business enterprises whose activities were directed to European markets and which were organized under the

40. 346 U.S. at 436-37. *See, e.g.*, Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854).

41. 346 U.S. at 436 n.22. *See* 9 U.S.C. § 10 (1970).

42. *See* notes 17-22 *supra* and accompanying text.

43. While the dissent, *see* note 47 *infra* and accompanying text, discussed the issue of whether different standards of law should apply to sophisticated buyers as opposed to unsophisticated buyers, the majority did not reach the issue of whether the investor safeguards of the Securities Exchange Act are not needed by sophisticated buyers who are in a substantially equal bargaining position with their seller, but rather decided the case on other grounds. *See* 417 U.S. at 512 n.6.

laws of and primarily situated in European countries. The Court characterized the contract as a truly international agreement that as such involved considerations and policies significantly different from those flowing from a domestic contract. One major consideration was the conflict of law problems that would arise were the disputes litigated. The Court reasoned that the advantages to a plaintiff of a wider choice of courts and venue that flow from the Securities Exchange Act become illusory in the context of the international agreement since the opposing party might block or hinder the plaintiff's access to the American court of his choice by a speedy resort to a foreign court to enjoin the plaintiff from proceeding with litigation in the United States. Such a legal surprise as this, the Court found, would imperil the willingness and ability of businessmen to enter into international commercial agreements and thus would damage the fabric of international commerce and trade. The Court, viewing the agreement to arbitrate before a specified tribunal as a specialized type of forum selection clause that determines the procedure to be used in resolving the dispute as well as the situs of the suit, found in the *Bremen* decision additional policy arguments[44] for enforcing the arbitration agreement. Because the circumstances involved in an international commercial transaction created special problems of conflicts of law and made the Securities Exchange Act right of suit in a federal court illusory, the Court concluded that the agreement to arbitrate disputes arising out of the parties' international commercial transaction should be enforced by the federal courts in accordance with the explicit provisions of the Arbitration Act.

Justice Douglas,[45] with three Justices concurring, wrote a vigorous dissent to the instant decision, centered upon a strict construction of the statutes and treaty involved, and emphasizing the potential damage to shareholder equity that would flow from mismanagement by corporate officers of a transaction involving securities.[46] Stating that the Exchange Act does not speak of sophisti-

44. *See* notes 25 & 27 *supra* and accompanying text.

45. Justice Douglas served on the staff of the Securities and Exchange Commission from October 1934 until his appointment as an SEC Commissioner in January 1936. He served as a commissioner until his appointment to the Supreme Court in March 1939. He was chairman of the SEC from September 1937 to March 1939. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920 (1964).

46. The dissent emphasized the "thousands of investors who are the security holders" in Alberto-Culver as the real victims of any financial loss due to fraud, rather than the corporation itself.

cated and unsophisticated people, the dissent attempted to lay to rest the argument[47] that in transactions between sophisticated buyers and sellers with substantially equal bargaining power the dangers of gross overreaching and fraud are of less force in deciding whether the provision for federal jurisdiction will be supplanted by a compulsory arbitration agreement. Noting that no exception to the anti-waiver provision of the Securities Exchange Act is made for contracts that have an international character,[48] the dissent concluded that the rule of *Wilko v. Swan* was properly held by the Court of Appeals to control the instant case.[49]

The instant decision will put all international contracts that contain arbitration clauses on a par: no longer will international contracts involving transfers of securities be outside the command of the Arbitration Act. The *Wilko* decision, characterized by the instant Court as a judicially carved-out exception to the clear provisions of the Arbitration Act,[50] has been limited in scope of application to domestic transactions involving the sale of securities. Whether to include an arbitration clause and the selection of an arbitration forum are decisions that will now have to be made by the engineer of the international commercial securities transaction. These choices will provide new flexibility in fashioning the entire transaction. International contract formation may be facilitated as a consequence of the instant decision, and contract terms may be included that are more advantageous to American businessmen in exchange for the beneficial alternative to the foreign party of arbitration in a predetermined forum that may be less partial to the American party than United States courts. The in-

47. The majority did not reach the issue of disparity of bargaining power. *See* note 43 *supra* and accompanying text.

48. The dissent expressed fears that a securities transaction could escape the regulation of the Securities Exchange Act by the inclusion of a nominal international contact, thus bringing the transaction within the scope of the instant decision.

49. The dissent saw another basis to approve the court of appeals holding, finding in the ratification of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards an indication of congressional policy against enforcement of arbitration agreements in contracts in which securities are involved. Specifically, article II(3) of the Convention provides for a court to refrain from referral to arbitration when it finds the agreement to arbitrate either null and void, inoperative, or incapable of being performed. The dissent concluded that the instant agreement to arbitrate was void and inoperative under the anti-waiver provisions of the 1934 Act and so Congress in adopting the Convention intended that the arbitration agreement not be enforced.

50. 417 U.S. at 517.

stant decision can be seen as an awareness by the Court of the improving quality of decision-making by international arbitration tribunals[51] and of the special considerations that an international transaction involves. Henceforth, upon an alleged breach of an international contract involving a transfer of securities and containing an arbitration agreement, dispute resolution will be more orderly since a forum approved by both parties will be ready to proceed. American courts will be compelled to order prosecution of arbitration. Jockeying for a favorable judicial forum will thus be less advantageous. Time and expense will be avoided and again international trade will benefit from these economies. While international trade is the beneficiary of the Court's decision,[52] the equity of the investor in the American corporation doing business abroad, as the dissent noted, may be more vulnerable to the manipulation and negligence of corporate managers due to the newly-created waiverability of the statutorily guaranteed right to sue in federal district court for violations of the Securities Exchange Act. On balance, however, the decision to respect arbitration agreements is desirable. The fear of the dissent that federal jurisdiction will be avoided by the insertion of a nominal international contact into an otherwise domestic transaction is not well founded, since the Court indicated international contacts may exist that would not be sufficient to invoke the rule of the instant decision.[53] Uncertainty will continue, however, as to the enforceability of arbitration agreements in a large number of contracts until the federal courts formulate guidelines that can help determine whether the international contacts in a securities related transaction are significant enough to trigger the *Scherk* rule. This unfortunate situation can be dealt with by drafting international contracts with the

51. For a note by the former president of the American Arbitration Association on the growing use and quality of international arbitration, with suggestions for improvements, see Straus, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709 (1974).

52. For a discussion of the important role of arbitration in regulating the conduct of international business see M. DOMKE, COMMERCIAL ARBITRATION (1965); Gardner, *Economic and Political Implications of International Commercial Arbitration*, in INTERNATIONAL TRADE ARBITRATION 15, 16-17 (M. Domke ed. 1958).

53. The Court stated that the international aspects of some contracts would be so insignificant or attenuated that the *Wilko* rule would apply. 417 U.S. at 517 n.11. No attempt was made, however, to lay down any guidelines; the Court preferred to defer such decisions to future litigation wherein concrete controversies present the issues.

Scherk rule in mind and including alternative provisions in case the *Wilko* rule is held to govern the particular transaction.

Thomas C. Eklund

IMMIGRATION—ALIEN COMMUTERS, BOTH DAILY AND SEASONAL, WHO HAVE ONCE OBTAINED THE STATUS OF IMMIGRANTS ARE PROPERLY CLASSIFIED AS SPECIAL IMMIGRANTS LAWFULLY ADMITTED FOR PERMANENT RESIDENCE RETURNING FROM A TEMPORARY VISIT ABROAD

Plaintiffs, individual farm workers[1] and a workers committee,[2] brought a class action against defendants[3] for injunctive and declaratory relief against the Immigration and Naturalization Service (INS) practice of classifying alien commuters[4] as special immigrants[5] "lawfully admitted for permanent residence . . . returning from a temporary visit abroad."[6] A large number of workers live in either Mexico or Canada and commute to daily or seasonal jobs across the border in the United States.[7] Under the prevailing practice these aliens have been issued reentry permits or "green cards" permitting unlimited border crossing.[8] Plaintiffs

1. The individual plaintiffs were Robert Bustos, an American citizen, and Lupe Murguia, a Mexican national permanently residing in the United States, both of whom were farm workers in California. Five farm workers from Texas were allowed to intervene as plaintiffs. Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

2. The committee acted as a collective bargaining agent for farm workers. Saxbe v. Bustos, 419 U.S. 65, 68 n.11 (1974).

3. The Attorney General administers and enforces all immigration laws, except certain duties charged to the Department of State and United States Public Health Service. Immigration and Nationality Act, 8 U.S.C. § 1103 (1952) [hereinafter cited as Immigration Act]; *See generally* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 1.7 (1975) [hereinafter cited as GORDON].

4. Aliens who reside in Canada or Mexico and commute daily or seasonally to places of employment in the United States are alien commuters. 419 U.S. at 66. Note that a commuter is a person who has been granted permission in the past to enter the United States as an immigrant.

5. Special immigrants are not subject to general numerical restrictions applicable to other immigrants. Certain other restrictions, both numerical and nonnumerical, are applied to special immigrants. *See* notes 20, 26 *infra*.

6. Immigration Act § 101(a)(27)(B). "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such states not having changed." Immigration Act § 1101(a)(20).

7. The Court stated that over 60,000 foreign laborers were commuters, that 250,000 family members were dependent on commuter income, that over $50 million annually was earned by commuters, and that 25 per cent to 30 per cent of the income earned in some Mexican border communities was commuter earned. 419 U.S. at 78; *see* REPORT, SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION 104 (JAN. 1968).

8. NOTE, *Aliens in the Fields: The "Green-Card Commuters" Under the Im-*

asserted that alien commuters should be categorized as nonimmigrants temporarily entering the United States for jobs,[9] or, in the alternative, as immigrants who had lost their status as permanent residents because they did not live in the United States.[10] Defendants argued that statutory interpretation and long agency practice supported the INS classification.[11] The district court without an opinion granted summary judgment for defendants. The court of appeals reversed in part and remanded,[12] holding that daily commuters were properly classified, but that seasonal commuters were not.[13] On writs of certiorari to the Supreme Court, *held*, affirmed in part and reversed in part. Alien commuters, both daily and seasonal, who have once obtained the status of immigrants are properly classified as special immigrants "lawfully admitted for permanent residence . . . returning from a temporary visit abroad." *Saxbe v. Bustos*, 419 U.S. 65 (1974).

Before the passage of any major immigration legislation, alien commuters crossed United States borders to their jobs without hinderance.[14] Beginning in 1921 the federal government enacted the first comprehensive acts[15] in the area of immigration. The acts enumerated several categories for immigrants, and the specific category in which the alien was placed became vitally important. The

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migration and Naturalization Laws, 21 STAN. L. REV. 1750 (1969).

9. "The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—. . . (H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. . . ." Immigration Act § 1101(a)(15)(H).

10. 419 U.S. at 72.

11. *See* note 40 *infra*.

12. Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

13. The Circuit Court pointed out that seasonal commuters are generally alien workers who were once part of the *Bracero* program, a program initiated between Mexico and the United States to provide farm labor during the World War II labor shortage. Congress, according to the court, allowed this program to lapse, indicating that it no longer wished to allow seasonal commuters unhampered access to the United States.

The court also stated that seasonal commuters were not "returning from a temporary visit abroad;" it asserted that the practice of classifying seasonal commuters as aliens returning from a temporary visit abroad violated the clear and plain language of the statute. 481 F.2d at 483.

14. *See* GORDON, *supra* note 3, § 1-2.

15. Act of May 19, 1921, ch. 8, 42 Stat. 5; Act of May 26, 1924, ch. 190, 43 Stat. 153 [hereinafter cited as 1924 Act].

Bureau of Immigration[16] interpreted these first statutes as placing alien commuters in the category of nonimmigrants "visiting the United States . . . for business."[17] As visitors for business purposes, alien commuters could enter the United States without satisfying the stricter qualifications required of immigrants entering for permanent residence.[18] In 1927 the Bureau reinterpreted these statutes and classified alien commuters as immigrants admitted for permanent residence.[19] Thus, commuters as immigrants were subject to applicable immigration quotas when they first applied for immigrant status.[20] The legislation placed no numerical restrictions on natives of the Western Hemisphere,[21] however, allowing Canadian and Mexican citizens to commute across United States borders without hinderance until 1952.[22] The change of status, therefore, was not particularly important to commuters from the Western Hemisphere. In 1952 the immigration laws were substantially rewritten,[23] and, as a means of maintaining the alien commuter system, the commuter status as an immigrant "lawfully admitted for permanent residence" did take on importance. The 1952 Act placed immigrants "lawfully admitted for permanent residence . . . returning from a temporary visit abroad" in the category of "nonquota immigrants," later renamed "special immigrants."[24] The 1952 Act also added a restrictive section that under

16. The Bureau of Immigration became part of the Immigration and Naturalization Service in 1933. Exec. Order No. 6166, June 10, 1933; *see* GORDON, *supra* note 3, § 1.66.

17. 1924 Act § 3(2).

18. Amalgamated Meat Cutters & Butcher Workers v. Rogers, 186 F. Supp. 114, 117 (D.D.C. 1960).

19. Department of Labor, General Order No. 86 (April 1, 1927), *reprinted in* [1927] 1 FOREIGN REL. U.S. 494-495 (1942). The commuter's place of work was considered his domicile and each return to work was considered a return from a temporary absence abroad. *In re* H.O., 5 I. & N. Dec. 716, 719 n.13 (1954).

20. 1924 Act §§ 5,6. In *Karnuth v. United States*, 279 U.S. 231 (1929), the Supreme Court affirmed General Order No. 86 and stated that the 1924 Act and other immigration statutes were enacted in part to protect American labor. Therefore, the Court held that the word "business" (1924 Act § 3(2)), did not apply to alien commuters and that they were not nonimmigrants free of quota restrictions.

21. 1924 Act § 4.

22. GORDON, note 3 *supra*, § 1.2c-d, at 1-11.

23. Act of June 27, 1952, Pub. L. 82-414, 66 Stat. 163 [hereinafter cited as 1952 Act] (citation to the "Immigration Act" refers to the 1952 Act as presently amended; citation to the "1952 Act" refers to the Act as originally passed).

24. Immigration Act § 1101(a)(27).

specified conditions prohibited certain aliens, including some "nonquota immigrants," from entering the United States;[25] the section did not, however, affect, among others, immigrants "lawfully admitted for permanent residence . . . returning from a temporary visit abroad."[26] After the passage of the 1952 Act, the INS continued the prior classification of alien commuters.[27] Western-Hemisphere commuters could, therefore, continue crossing the border unhindered. In 1960 this concept of a commuter's permanent residency came under judicial attack. In *Amalgamated Meat Cutters & Butcher Workers v. Rogers*[28] the district court held that alien commuters were not "lawfully admitted for permanent resi-

25. 1952 Act § 212(a)(14). The section excluded these aliens from admission to the United States if the Secretary of Labor certified that (a) sufficient workers in the United States were available to perform their skills, or (b) "the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed." *See also* Immigration Act §§ 1153, 1101(a)(27).

26. Immigration Act § 1182(a)(14). *See also* Amalgamated Meat Cutters & Butcher Workers v. Rogers, 186 F. Supp. 114, 118 (D.D.C. 1960). Those other than immigrants "lawfully admitted for permanent residence returning from a temporary visit abroad" who were not affected by the restrictive statute were: (a) relatives of persons already in the United States, (b) aliens fleeing political repression or natural calamities (Immigration Act § 1153), (c) former citizens of the United States, (d) alien ministers needed to serve in the United States, and (e) long-time alien employees of United States citizens (Immigration Act §§ 1101(a)(27)(C)-(E)). Note that aliens attempting to become commuters for the first time, that is, entering the United States for the first time, would be subject to the restriction. 419 U.S. at 76.

27. *In re* H.O., 5 I. & N. Dec. 716 (1954). The Board of Immigration Appeals stated that the commuter system was recognized in the legislative history of the 1952 Act. The Board stated that these discussions revealed no congressional dissatisfaction with the commuter procedure. Without clear statutory language requiring a mandatory change in the commuter scheme, the law could not be construed as prohibiting this procedure.

28. 186 F. Supp. 114 (D.D.C. 1960). A union struck a company in El Paso, Texas. Acting upon the union's petition, the Secretary of Labor certified that admission of aliens for work at the company would "adversely affect the wages and working conditions of the workers in the United States similarly employed." *See* note 19 *supra*. The Immigration and Naturalization Service excepted all commuters from exclusionary action. The union brought suit to force the Service to exclude commuters.

In this case the Service argued that the courts should accept the fiction that an alien commuter's residence was his place of employment. 186 F. Supp. at 118 n.5. Later, the Service would argue that residency in the United States was not necessary for a commuter to be an immigrant "lawfully admitted for permanent residence." Texas AFL-CIO v. Kennedy, 330 F.2d 217, 218 n.2 (D.C. Cir. 1964).

dence." The court stated that aliens lawfully admitted for permanemt residence were excepted from exclusionary action but that alien commuters did fit that category because they lived in a foreign country and not in the United States. The case, however, became moot before it could be appealed, and the INS declined to follow the case as precedent and expressed its opposition to Congress.[29] In 1965 the pertinent section of the 1952 Act was amended[30] so that affected aliens would be subject to even tougher restrictions. An alien thereafter could not enter the United States seeking a job unless the Secretary of Labor certified that no laborers in the United States were available for the job and that the alien's entry into the United States would not adversely affect the wages and working conditions of similarly employed workers in the United States.[31] Those aliens previously classified as special immigrants "lawfully admitted for permanent residence . . . returning from a temporary visit abroad," however, were still not affected by the section since the change did not alter the categories exempted by the old statute. The ninth circuit court in *Gooch v. Clark* maintained alien commuters in their favored category.[32] The court in that case held that alien commuters were immigrants, rather than nonimmigrants, and that they had maintained their privilege of residing permanently in the United States.[33] INS decisions and Congressional acquiescence, according to the court, supported these conclusions.[34]

29. STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., IMMIGRATION AND NATIONALITY ACT WITH AMENDMENTS AND NOTES ON RELATED LAWS 210 (Comm. Print 4th ed. 1964); HOUSE COMM. ON THE JUDICIARY, SUBCOMM. No. 1, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, JUDICIAL DECISIONS CONSTRUING CERTAIN PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT 14 (Comm. Print 1963), *as cited in* Gooch v. Clark, 433 F.2d 74 (9th Cir. 1970). Only one other attack on the commuter system occurred under the original 1952 Act, but the case was dismissed on appeal because of plaintiff's lack of standing. Texas AFL-CIO v. Kennedy, 330 F.2d 217 (D.C. Cir. 1964).

30. Act of October 3, 1965, 79 Stat. 911 [hereinafter cited as 1965 Amendment].

31. The group of affected aliens remained the same after the 1965 Amendment. *See* 419 U.S. at 77; note 21 *supra*.

32. 433 F.2d at 74.

33. 433 F.2d at 79. The court also stated that the phrase "such status not having changed" in the definition of "lawfully admitted for permanent residence" referred to the status of being an immigrant or nonimmigrant, not to any place of residence.

34. 433 F.2d at 79-81. Two other cases have dealt indirectly with the commuter issue. In 1968, the district court in *Cermeno-Cerna v. Farrell*, 291 F. Supp.

In the instant case the Supreme Court accepted the interpretation asserted by the court in *Gooch v. Clark* that an alien commuter is an immigrant.[35] The Court restated the presumption created by statute that every alien is an immigrant unless he establishes a nonimmigrant status.[36] In this case alien commuters did not fit the category asserted by plaintiffs—that is, nonimmigrants who can temporarily enter the United States only if no domestic labor could be found. Commuters were not required to show the absence of domestic labor when they applied for entrance into the United States.[37] The Court also argued that alien commuters had not lost their status as immigrants "lawfully admitted for permanent residence" even though they did not live in the United States. It pointed out that the statutory definition of the phrase "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States. . . ."[38] That is, the commuter has the privilege of establishing permanent residence in the United States and that privilege will not be denied him even though he does not intend to reside here permanently.[39] Alien commuters, therefore, did not need to reside within the United States in order to retain their status as aliens "lawfully admitted for permanent residence." The Court also emphasized that the alien commuter system reflected the administrative practice of the INS and its predecessors since at least 1927.[40] It noted that "such long standing administrative construction was entitled to great weight." Congress was held to be aware of the system, and because it had not significantly changed the Immigration and Nationality Act in this area, it had acquiesed to the administrative policy of continuing the commuter

521 (C.D. Cal. 1968), while ruling on another issue of law, stated that it would not invalidate the commuter system. In *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972), the ninth circuit court reasserted its ruling in the *Gooch* case as a part of the discussion of another issue.

35. 419 U.S. at 70. The majority also accepted the *Gooch* interpretation of "such status not having changed" clause contained in the Immigration Act § 1101(a)(20). *See* note 29 *supra*.

36. Immigration Act § 1184(b).

37. 419 U.S. at 71.

38. Immigration Act § 1101(a)(20). *See* note 7 *supra*.

39. 419 U.S. at 72.

40. *In re* Hoffman-Arvayo, 13 I. & N. Dec. 750 (1971); *In re* Wighton, 13 I. & N. Dec. 683 (1971); *In re* Gerhard, 12 I. & N. Dec. 556 (1967); *In re* Burciaga-Salcedo, 11 I. & N. Dec. 665 (1966); *In re* Bailey, 11 I. & N. Dec. 466 (1966); *In re* M.D.S., 8 I. & N. Dec. 209 (1958); *In re* H.O., 5 I. & N. Dec. 716 (1954); *In re* L., 4 I. & N. Dec. 454 (1951).

system.[41] Thus, alien commuters were immigrants "lawfully admitted for permanent residence."[42] Alien commuters were also "returning from a temporary visit abroad." Both the majority and dissent in the circuit court agreed on this point concerning daily commuters, but the circuit court majority held that seasonal commuters were not returning from a temporary visit abroad. The Supreme Court felt, however, that both daily and seasonal commuters were given the same status[43] when they first became immigrants; both groups of commuters, therefore, should receive the same treatment. Finally the Court pointed out that an adverse decision in the instant case would deal a severe economic blow to the communities near United States borders, cause a massive immigration of former commuters to the United States, and seriously harm relations between the United States and both Mexico and Canada.[44] The Court concluded, therefore, that all alien commuters, both daily and seasonal, who had obtained the status of immigrants[45] were properly classified as special immigrants "lawfully admitted for permanent residence . . . returning from a temporary visit abroad."[46]

41. 419 U.S. at 74. *See also* S. Rep. No. 1515, 81st Cong., 2d Sess. 535 (1950).

42. 419 U.S. at 72.

43. The majority stated that the Court of Appeals had based its decision that seasonal commuters were not immigrants lawfully admitted for permanent residence on the erroneous belief that the lapse of the *Bracero* system prevented the entrance of seasonal commuters as immigrants "lawfully admitted for permanent residence." The Court stated that the *Bracero* system, enacted under 56 Stat. 1759, applied only to nonimmigrant foreign labor and not to immigrant alien commuters. 419 U.S. at 76.

44. *See* note 7 *supra*.

45. The Court pointed out that this conclusion would apply only to alien laborers who had received immigrant status prior to November 1, 1965, the effective date of an amendment to the immigration laws, which would require the Secretary of Labor to certify that domestic labor is not sufficient and will not be affected by the admission of an alien laborer as an immigrant lawfully admitted for permanent residence for the first time. 79 Stat. 917; Immigration Act § 1182(a)(14).

46. The dissent argued that the majority's statutory interpretation violated the "plain meaning" of the statutes and stated that the plain meaning of the statutes should overcome the weight given any administrative construction. Although Congress has been generally silent on the commuter problem, those statutes which Congress has passed which are related to immigration are clearly inconsistent with the majority's statutory interpretation. Therefore, according to the dissent, Congress has not accepted the treatment of alien commuters as immigrants "lawfully admitted for permanent residence . . . returning from a temporary visit abroad." The dissent also stated that the social, political, and

The Court in this opinion has firmly established the alien commuter's favored status under present statutes. In effect, the Court has effectively precluded further judicial challenges to the commuter system. The only alternative remaining for opponents of the alien commuter system would seem to be alteration of the immigration statutes. As matters now stand, the statutes confront aliens seeking admittance for the first time with severe statutory restrictions,[47] but no bills have been approved by Congress to destroy the privileges of those already classified as commuters.[48] Alien commuters, therefore, will continue to work in the United States in large numbers for the near future, but the numbers will decrease as those alien commuters who qualified under the older, less restrictive program retire from the work force. In deciding the instant case, the Court relied heavily on administrative construction of the statute in question,[49] a result not so surprising in relation to the lack of clear aid from other sources: first, the statute the Court sought to interpret was written in anything but "plain language;"[50] secondly, although since 1963 Congress has become increasingly aware of the alien commuter system, it has done little to clearly indicate its attitude toward that system;[51] and thirdly, the courts have been inconsistent in their interpretations,[52] while

economic factors cited by the majority are elements for the legislature to consider, not the Court. The dissent furthermore observed that the decision of the majority and the assertions of the government violated one of the Immigration and Naturalization Service's own rules, *i.e.*, "in order to be exempt from the normal documentation requirements upon entry, an alien must be returning to his 'unrelinquished lawful permanent residence' from a 'temporary absence abroad.'" 8 C.F.R. § 211.1(6) (1974).

47. *See* Immigration Act § 1182(a)(14).

48. GORDON § 219 (Supp. 1975).

49. Immigration Act § 1101(a)(27)(B).

50. Of the five courts which dealt with the commuter system prior to the instant case, two stated that all commuters were not entitled to favored status, two said all commuters were entitled to favored status, and one said daily commuters were entitled to favored status and seasonal commuters were not. *See* notes 8, 24, 28, 31 *supra*.

51. REPORT, SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION (Jan. 1968); *Hearings Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, H.R. Rep. No. 12667, 91st Cong., 1st Sess., 181, 183 (1969); *Hearings on Border Commuter Labor Problems before Subcomm. on Migratory Labor, Senate Comm. on Labor and Pub. Welfare*, 91st Cong., 2d Sess., pts. 5A, 5B (1969); HOUSE COMM. ON THE JUDICIARY, SUBCOMM. NO. 1, 88TH CONG., 1ST SESS. ADMISSION OF ALIENS INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND COMMUTER WORKERS, 156 (Comm. Print 1963).

52. *See* note 49 *supra*.

the INS has consistently ruled that alien commuters have a favored status.[53] The Court, therefore, as it indicated, had no other sources to which it could turn. In all probability, the Court would have given much less weight to the administrative construction if any other source had clearly indicated a preference for a particular construction of the statute in question. In addition, the INS interpretation coincided with the majority's political, economic, and social views.[54] Therefore, once the majority discovered a fairly reasonable statutory interpretation, which would coincide with the decisions of the Service and the policy stand of the majority, the holding of the Court was assured. In conclusion, the Supreme Court has conclusively placed alien commuters in a category which will continue the free access of commuters to domestic labor opportunities. In doing so, the majority reasonably relied on its only consistent source of authority and its own policy considerations.

Thomas F. Taylor

53. *See* note 40 *supra*.

54. Opposing policy considerations have been suggested. It can be argued that a continuing alien commuter system maintains a depressed pay scale near the Mexican border and thwarts union organization efforts in the area. Note, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 STAN. L. REV. 1750 (1969).

INSURANCE—WAR RISK EXCLUSION CLAUSE DOES NOT BAR RECOVERY UNDER AN ALL RISK POLICY FOR DAMAGES RESULTING FROM TERRORIST ACTIVITIES

Plaintiff[1] brought suit against defendant insurers[2] to recover for the loss of an airliner under all risk[3] and war risk[4] insurance policies. Two men, allegedly acting for the Popular Front for the Liberation of Palestine (PFLP),[5] hijacked one of plaintiff's planes while en route from Brussels to New York and forced the plane to land in Beirut, where a demolitions expert with explosives joined the hijackers. The aircraft, a Boeing 747, was then flown to Cairo, where the PFLP destroyed the aircraft after evacuating the passengers. In determining which insurer was to bear the loss, the district

1. The plaintiff in the present case was Pan American World Airways, Inc., a United States air carrier engaged in international passenger service.

2. The defendants consisted of Pan American's insurers: (1) Aetna Casualty & Surety Company; (2) United States; and (3) Phillip Graybell Wright, representing Lloyd's underwriting syndicate.

3. All risk insurance covers all losses except those resulting from specific exclusions stated in the particular policy. In this case the all risk coverage of Pan American was provided by three separate groups. One-third of the coverage was provided by members of the United States Aviation Insurance Group (USAIG), of which Aetna is a member; one-sixth by members of Lloyd's underwriting syndicate, and one-half by members of Associated Aviation Underwriters (AAU), another American group. These three groups include all of the underwriters in the world who supply aviation all risk insurance to American air carriers. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 993 (2d Cir. 1974).

4. Lloyd's underwriting syndicate and various companies of the London war risk insurance market covered direct physical loss or damage by the perils listed in the war risk exclusion clause of Pan American's all risk policy. The United States Government provided coverage for loss or damage resulting from "[w]ar, invasion, acts of foreign enemies, hostilities (whether declared or not), civil war, rebellion, revolution or insurrection, military or usurped power or confiscation and/or nationalization or requisition or destruction by any government or public or local authority or *by any independent unit or individual engaged in irregular warfare.*" 505 F.2d at 995. The government excluded coverage for loss covered under any other policy in effect for Pan American. These policies comprised the total war risk insurance coverage of the plaintiff.

5. The Popular Front for the Liberation of Palestine (PFLP) is the second largest group in the Palestinian Liberation Organization (PLO) after Al Fatah. "The militant Marxist" PFLP opposes not only Israel, but also such reactionary Arab monarchs as Jordon's King Hussein and Saudi Arabia's former King Faisal. The self-proclaimed goal of the PFLP is "the creation of a secular Palestine to replace Israel in which Jews, Christians and Moslems would live together." TIME, Oct. 14, 1974, at 54.

court held that the war risk exclusion clause[6] of the all risk insurers did not preclude liability on the policy, since the PFLP's terrorist activities toward non-belligerent civilians were not warlike. On appeal to the Court of Appeals for the Second Circuit, *held*, affirmed. A war risk exclusion clause does not bar recovery under an all risk policy for damages resulting from terrorist activities, unless such activities are clearly excluded from the coverage of the policy.[7] *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974).

Through the years, the courts have carefully defined the terms contained in war risk and all risk insurance policies. Some of the terms most frequently analyzed by the courts in their consideration of insurance cases involving war and conflict have included the following: (1) military or usurped power, (2) war, (3) warlike operations, (4) insurrection, (5) civil commotion, and (6) riot.

1. *Military or usurped power.*—To give rise to a military or usurped power, it is necessary that the belligerents attain the status of a de facto government.[8] One of the first cases to discuss this requirement was *Drinkwater v. The Corporation of London Assurance.*[9] *Drinkwater* stated that a military or usurped power involves an invasion by a foreign power or an internal rebellion in which the insurgent force or foreign power assumes the reins of government by making laws and by punishing for failure to obey

6. The war risk clause of the all risk insurance policy excluded coverage for losses from destruction of the property insured by any military or usurped power, or resulting from war, civil war, insurrection, warlike operations, riots, or civil commotion. 505 F.2d at 994.

7. In accordance with the canon of *contra proferentem*, an ambiguous insurance term will be construed against the drafter. *See* Sincoff v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (Ct. App. 1962).

8. A de facto government is characterized as maintaining its existence in its territories by superior military power against the authority of the lawful government. Thorington v. Smith, 75 U.S. (8 Wall) 1, 9-11 (1868) (for the purpose of determining the meaning of a contract for "dollars" during the Civil War, the Confederacy was a de facto government); MacLeod v. United States, 229 U.S. 416 (1913) (the United States had no authority to collect customs duties from ports in the Phillipines under insurgent control of a de facto government); The Three Friends, 166 U.S. 1 (1897) (Harlan dissent) (Cuban insurgents lacked administration and government in areas they overran and therefore could not be accorded de facto status).

9. 95 Eng. Rep. 863 (K.B. 1767) (fire resulting from the actions of a mob was not considered a loss by a military or usurped power for the purpose of insurance coverage); *see* City Fire Ins. Co. v. J. & H.P. Corlies, 21 Wend. 367, 369-70 (N.Y. Sup. Ct. 1839) (citing *Drinkwater* with approval).

those laws.[10] Hence, the conquering force must establish a de facto government. Other British courts have held similarly that for an internal rebellion to give rise to a military or usurped power it "must be conducted by authority."[11] In United States history, the clearest example of military or usurped power took place during the Civil War. In *Insurance Co. v. Boon*,[12] the Supreme Court viewed military or usurped power as that "power exerted by an invading foreign enemy, or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities."[13]

2. *War.*—War has been defined as the employment of force between governments, at least de facto.[14] It has also been defined as the utilization by two or more states of their armed forces for conquest and for the imposition of such conditions for peace as the victor pleases.[15] In *Vanderbilt v. Traveler's Insurance Co.*,[16] a New York court was confronted with the death of a passenger resulting from the sinking of the Lusitania during World War I. The *Vanderbilt* court found that this death was not covered by life insurance, since the policy in question excluded coverage for death resulting from war. The court reasoned that the destruction of the Lusitania resulted directly from war between Germany and Great Britain, both sovereigns, and that the actions taken in sinking the Lusitania were pursuant to the instructions of a sovereign government. However, war need not be waged between fully sovereign entities[17] nor need it be formally declared,[18] before it can legally

10. 95 Eng. Rep. at 863.

11. Langdale v. Mason, 1 Bennett's Fire Ins. Cas. 16 (K.B. 1780). As an example, the court theorized that if the rebels had ordered a house to be set on fire in 1745 when they came to Derby, that would have been by authority. 1 Bennett's Fire Ins. Cas. at 17. In other words, a usurped power must have at least a colorable claim to governmental power.

12. 95 U.S. (5 Otto) 117 (1877).

13. 95 U.S. at 127.

14. *See* The Brig Amy Warwick, 67 U.S. (2 Black) 635, 666-67 (1862) (The Prize Cases) (war is "that state in which a nation prosecutes its right by force"); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39-40 (1800) (The Eliza) (war is a forcible contest of arms between governments at least de facto in nature).

15. L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 54 (7th ed. Lauterpacht ed. 1952) [hereinafter cited as OPPENHEIM].

16. 112 Misc. 248, 184 N.Y.S. 54 (Sup. Ct. 1920), *aff'd mem.*, 202 App. Div. 738, 194 N.Y.S. 986 (1922), *aff'd mem.*, 235 N.Y. Rep. 514, 139 N.E. 715 (1923).

17. *See generally* Hamdi & Ibraham Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961) (war that existed in 1948 between Palestinian forces in Haifa and the Haganah before the proclamation of the state of Israel).

18. *See* New York Life Ins. Co. v. Bennion, 158 F.2d 260, 264 (10th Cir. 1946)

exist for insurance purposes. In *Welts v. Connecticut Mutual Life Insurance Co.*,[19] the court held that the homicide of a civilian working on a Union Army railroad crew during the Civil War was not a consequence of war. The court reasoned that since the murderers wore no insignia and did not otherwise indicate involvement with a sovereign government, their act could not be one of war. Thus, although war need not be waged between sovereign entities, elements of sovereignty in a destroying force greatly increase the likelihood that the destruction will be deemed a consequence of war. In other decisions, courts have established that guerilla groups must have at least some incidents of sovereignty before their activities can be considered war.[20] For example guerillas can enjoy privileges similar to those accorded to members of belligerent armed forces if they comply with certain requirements under Article I of the Hague Regulation and the Geneva Convention.[21] However, "individuals who are not members of regular forces and who take up arms to commit hostile acts singly and severally are still subject to be treated as war criminals and shot."[22] The United States has likewise refused to grant guerilla activity the status of war.[23]

3. *Warlike operations.*—Warlike operations generally exist only as part of an actual or intended conflict between combative forces

(where the Japanese attack on Pearl Harbor resulted in loss of life and a formal declaration by Congress was not essential to the existence of a state of war for insurance coverage).

19. 48 N.Y. 34 (1871).

20. *See, e.g.*, Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1013 (1974).

21. Guerillas will be accorded the privileges of armed forces of the belligerent if the same requirements are met as are present to qualify for POW status under the Geneva Convention. OPPENHEIM § 80. Article 4 of the Geneva Convention on Prisoner of War states, "one is a prisoner of war if (1) he is a member of a national armed force, or (2) if he is a member of a group that fulfills the following four conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; and (d) that of conducting their operations in accordance with the laws and customs of war."

It would be hard to imagine a guerilla activity that would accord POW status. While there is usually a hierarchical command, the members are not likely to bear fixed insignia recognizable at a distance, nor will they always bear arms openly. "In short, the guerilla under the Geneva Convention remains what he has always been: an outlaw." BOND, THE RULES OF RIOT 38 (1974) [hereinafter cited as BOND].

22. OPPENHEIM § 80.

23. BOND at 38.

of belligerents.[24] They do not include intentional violence by political groups upon civilians of nonbelligerent countries located far from any warfare.[25] They may include, however, acts not performed by belligerents per se, but acts of a general kind or character to which belligerents[26] have recourse in war.[27]

4. *Insurrection.*—An insurrection is a rebellion of citizens in resistance to their government.[28] It requires (1) a violent uprising by a group or movement (2) for the specific purpose of overthrowing the constituted government and seizing its powers.[29] Not only must the insurgent force intend to bring about the overthrow of the constituted government, but it apparently must intend this result as a direct consequence of its violent actions. In *Home Insurance Co. v. Davila*,[30] the Nationalist Party of Puerto Rico staged a series

24. Clan Line Steamers, Ltd. v. Liverpool and London War Risks Ins. Ass'n, Ltd., [1943] 1 K.B. 209, 221. Where the collision and sinking of a ship carrying steel rounds to be converted into shells for use in World War II was not considered to be engaged in a warlike operation. The operation may be performed as preparation to the actual acts of belligerency or it may be performed as subsequent to such acts, but there must be a sufficiently close connection to constitute a part of an act of belligerency. *See* United States v. Standard Oil Co., 178 F.2d 488 (2d Cir. 1949), *aff'd*, 340 U.S. 54 (1950) (loss arising from collision with warship in time of war); International Dairy Eng'r Co. v. American Home Assurance Co., 352 F. Supp. 827 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973) (burning of a warehouse during the Vietnamese conflict).

25. *See generally* Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) (hijacking by the PFLP was not even discussed as possibly arising from a warlike operation).

26. A state of belligerency exists when there is: (1) existence of a responsible government; (2) possession of territory; (3) existence of an army that follows the law of war; (4) recognition by third states of belligerency; and (5) existence of general hostilities. *See* OPPENHEIM § 76.

27. Although most examples of warlike operations have involved military or naval forces in time of actual war, there are instances where acts of United States forces not engaged in an actual war were regarded as warlike operations. *See, e.g.*, Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F.Supp. 540 (S.D.N.Y. 1967) (the firing of artillery was a warlike operation against the Dominican rebels even though the United States was not engaged in an actual war).

28. BLACK'S LAW DICTIONARY 946 (4th rev. ed. 1968). A clear example of a state of insurrection took place in Cuba during 1859-1899 when Cuban insurgents rebelled against the Spanish Government. In following the executive recognition of this activity as an insurrection, the Supreme Court termed the rebellion "an actual conflict of arms in resistance of the authority of a government." The Three Friends, 166 U.S. 1, 63-66 (1897).

29. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1124 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974).

30. 212 F.2d 731 (1st Cir. 1954).

of attacks on towns for the purpose of making the island independent of the United States. The *Davila* court found that such actions might constitute an insurrection if their purpose was to overthrow the government. However, if the acts of the Nationalists had been to "fire a shot heard around the world," then the outbreaks could not have been considered an insurrection.[31]

5. *Civil commotion.*—A civil commotion is a local domestic disturbance that is confined to the immediate area of its occurrence.[32]

6. *Riot.*—The definition of a riot for insurance purposes appears to be in some disarray. It has been defined as any gathering of three or more persons with the common design to do an unlawful act with the apparent intention to use force or violence against anyone in opposition.[33] Riot has also been defined as merely requiring a tumult or commotion at the time of the action.[34]

In the instant case the defendant all risk insurers sought to deny payment of plaintiff's claim of loss by virtue of a war risk exclusion clause that precluded recovery for destruction caused by any of the six acts above. The court first analyzed the PFLP's acts in light of a military or usurped power.[35] The only "power" displayed by the PFLP was the holding of hostages. The PFLP did not control any territory against the lawful government of any state. Moreover, what territory they occupied was at the sufferance of the state in which it was located.[36] With this in mind, the court concluded that

31. 212 F.2d at 738.

32. Hartford Fire Ins. Co. v. War Eagle Coal Co., 295 F. 663 (4th Cir. 1924) (a fire loss was covered by the insured's policy that excluded loss arising from riot or civil commotion because there was no tumult or disturbance). The cases that discuss civil commotion as compared to riot would seem to indicate a fine distinction between the two based on the degree of the disturbance. A civil commotion is a disturbance more serious than a riot but less serious than an insurrection. Brief for Appellant at 14, Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974).

33. INA v. Rosenberg, 25 F.2d 635, 636 (2d Cir. 1928) (five armed men threatened employees of a garment factory with guns and destroyed property during a labor dispute held a riot for insurance purposes). While the court's conclusion indicates the necessity of a common design for a riot to occur, it is probable that a riot can occur absent such a requirement.

34. *See* Brous v. Imperial Assurance Co., 130 Misc. 450, 224 N.Y.S. 136 (Sup. Ct. 1927), *aff'd mem.*, 223 App. Div. 713, 227 N.Y.S. 777 (Ct. App. 1928) (six armed men threatening to kill employees and subsequently destroying garments held to be a riot for insurance purposes). Hartford Fire Ins. Co. v. War Eagle Coal Co., 295 F. 663, 665 (4th Cir. 1924) (where a fire resulted and insured's policy covered the loss since there was no tumultuous assembly prior to the fire).

35. 505 F.2d at 1009.

36. Referring to the camps of Palestinian refugees permitted by King Hussein

the PFLP did not possess sufficient incidents of a de facto[37] government to constitute a military or usurped power.[38] Next the court considered whether the PFLP's actions were war.[39] The court found that the governments of Lebanon and Jordon negotiated with the PFLP only as a terrorist who holds hostages. In addition, no Arab state recognized the PFLP. The hijackers did not wear insignia nor did they openly carry arms. These actions were, therefore, not sufficient to be recognized as war or a part of a war,[40] since they had no incidents of sovereignty.[41] The PFLP's activities were next considered in relation to a warlike operation.[42] Plaintiff's flight was not involved in any warlike operation of its own. It carried no cargo of military stores and was not even destined for the Middle East. As a result, the court found that the PFLP's acts did not fall within the connotation of a warlike operation.[43] In examining the PFLP's actions in regard to an insurrection,[44] the court found that the hijacking did not occur with the intent to overthrow King Hussein. Moreover, had there been an insurrection *in Jordon* at the time of the hijacking, such an insurrection could not have caused the loss of the 747 *in Cairo*. Therefore, the court reasoned that the loss could not have resulted from an insurrection in Jordon. The court next viewed the PFLP's activities in relaion to a "civil commotion."[45] It reasoned that a civil commotion refers to a disorder that occurs among fellow citizens or within the limits of one community.[46] Such a definition did not comprehend a loss occurring in the air space above two continents. Therefore, the destruction of the plane could not be considered a loss resulting from a civil commotion. Finally, on the question of riot as the cause of the loss, the court recognized three lines of authority defining riot for insurance purposes.[47] The court did not hold any of the three as control-

in Jordon and the camps in Lebanon. *See* note 55 *infra*.

37. *See* note 8 *supra*.

38. 505 F.2d at 1009.

39. 505 F.2d at 1012.

40. 505 F.2d at 1013.

41. 505 F.2d at 1013.

42. 505 F.2d at 1016-17.

43. The court in the instant decision was treating warlike operations as those operations that exist only as a part of an actual conflict between combative forces of belligerents. Since there was no war between the United States and the PFLP there could be no warlike operation.

44. 505 F.2d at 1017-18.

45. 505 F.2d at 1019-20.

46. 505 F.2d at 1019.

47. 505 F.2d at 1021. The court recognized three lines of authority concerning

ling since the insurers failed to meet the definitional requirements for riot that the insurers themselves propounded and that was the most favorable to their case.[48] With these findings, the court concluded that the insurers failed to bring the acts of the PFLP within the war risk exclusion clause of their all risk policy and were, therefore, liable for the loss caused by a non-warlike act.

The court's holding reflects the refusal by the United States and other Western countries to treat terrorist actions as anything but criminal.[49] This position has been exemplified in the three hijacking conventions—the Tokyo Convention,[50] the Hague Convention,[51] and the Montreal Convention.[52] Insistance on treating terrorist activities as criminal or illegal has hindered their recognition under the traditional terms discussed above. In effect, terrorist activities are becoming a modern form of war by third world nations. This development urges a redefinition of the traditional classifications and recognition of guerilla organizations such as the PFLP. However, the refusal of industrial nations to recognize guer-

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the definition of riot; however, such fine distinctions were drawn that a more accurate interpretation of the case law would probably indicate only two lines of authority. *See* notes 33, 34 *supra* and accompanying text.

48. 505 F.2d at 1021. The insurers contended that a riot arose whenever three or more persons had the common design to do an unlawful act and the apparent intention to use force or violence against anyone in opposition. The court found that at the time of the initial hijacking there were only two PFLP members involved and rejected the insurers' proposition that the critical time to be considered was that of the destruction of the plane.

49. Before the General Assembly of the United Nations former Secretary of State William Rogers described the United States position on terrorism as follows: "The issue is not war—war between states, civil war, or revolutionary war. The issue is not the strivings of people to achieve self-determination and independence . . . . We are all aware that, aside from the psychotic and the purely felonious, many criminal acts of terrorism derive from political origins. We all recognize that issues such as self-determination must continue to be addressed seriously by the international community. But political passion, however deeply held, cannot be a justification for criminal violence against innocent persons." Address by Secretary of State William P. Rogers, United Nations General Assembly, September 25, 1972, Press Release USUN-104(72), *as cited in* Hannay, *International Terrorism: The Need for a Fresh Perspective*, 8 INT'L LAWYER 268 (1974) [hereinafter cited as Hannay].

50. Convention of Offenses and Certain Other Acts Committed on Board Aircraft, September 14, 1963, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768 (relating primarily to the return of hijacked airlines).

51. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, [1971] 2 U.S.T. 1641, T.I.A.S. No. 7192.

52. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, ___ U.S.T. ___, T.I.A.S. No. 7570.

illa activities as anything other than criminal hinders such a redefinition. The majority of United Nations members supports the right to self-determination of all peoples and the right to "wage wars of national liberation against oppressors."[53] In addition, during the United Nations debates on terrorism, several members expressed concern that proposed conventions could be interpreted to restrict the legitimate activities of "freedom fighters."[54] With this it would seem impossible to reconcile the points of view of the "Third World Nations"[55] and of the industrial countries. For the modern world to achieve an effective control on terrorism, it will be necessary to understand and respect the views of other nations that condone such acts as a legitimate method of war. This is essential because these nations have not adhered to any of the present conventions and will most likely not adhere to any of the proposed conventions.[56] Philosophical agreement with the actions of the Palestinian guerillas is immaterial, the states concerned by terrorism must recognize that such acts cannot be dismissed simply as common crimes.[57] By construing the PFLP's activities as criminal rather than warlike, the court refuses to distinguish between warlike hijackings and non-warlike hijackings. As a result, under the policies in existence at the time of this case, the all risk insurers are forced either to exclude all hijackings from coverage or to cover it totally.[58] If hijacking coverage is excluded, United States airlines must obtain coverage on the London market for

53. G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc A/4684 (1960). The Palestinian organizations view their activities as a war of freedom to create a secular Palestine to replace Israel. Such activity is aimed at Israel and all its supporters. *See* note 5 *supra.*

54. Hannay, *supra* note 49, at 275 n.43.

55. Lebanon, like Syria, has permitted enormous numbers of refugees from Israeli-occupied areas of Palestine to live in Lebanon for a temporary period until their lands are restored to them. Most importantly, Lebanon has permitted these refugee camps to be the headquarters of various liberation groups. Washington Post, May 11, 1973, § A, at 1, col. 6; *Id.*, May 14, 1973, § A, at 6, col, 3; *Id.*, May 18, 1973, § A, at 22, col. 2.

56. Hannay, *supra* note 49, at 276.

57. *Id.* at 279.

58. The all risk insurers contend they do not want to exclude all hijackings from their coverage. They have divided hijacking into two categories: (1) excluding from coverage those hijackings relating to the "war and other risk exclusion clauses," and (2) extending coverage to all other hijackings. Brief for Appellant at 138, Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974).

non-warlike hijackings.[59] This would force United States airlines to deal with two categories of aviation insurers. The result would be a loss of premium volume to the American all risk insurers. If American all risk insurers included hijacking in their coverage, they would be forced to insure against warlike hijackings. Such coverage is considered to be unprofitable based on the thin market for war risk insurance.[60] In an attempt to remedy this situation, the United States all risk insurers have adopted the Common North American Airline War Exclusion Clause (CWEC).[61] Through the use of buy-back provisions[62] and a clause excluding coverage of irregular warfare,[63] the all risk insurers hope to cover non-warlike hijackings and exclude warlike hijackings. This latter course would remedy the situation posed by the instant case. On the other hand, the courts have yet to interpret irregular warfare, and only the

59. *Id.* at 139 n.68.

60. American domestic carriers do not require war risk insurance. The only carriers that require such insurance are the United States international carriers, such as Pan American. As a result, the market is too thin to protect the insurance companies from excessively concentrated losses. On the other hand, domestic carriers all require insurance for non-warlike hijackings. *Id.* at 138. A plane that is involved in a non-warlike hijacking is usually returned intact, whereas a plane that is involved in a warlike hijacking is usually held for ransom and totally destroyed if the ransom demands are not met.

61. The new exclusion clause excludes losses arising from: "(a) War, invasion, acts of foreign enemies, hostilities . . . civil war, rebellion, revolution or insurrection, military or usurped power . . . (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion . . . (c) other than as excluded in Paragraph (a) hereinabove, any unlawful seizure, diversion or exercise of control of the aircraft, or attempt, threat, by force or threat . . . (d) Other than as excluded in Paragraph (a) hereinabove, strikes, lockouts, labor disturbances, riots, civil commotion. (e) Other than as excluded in Paragraph (a) hereinabove, vandalism, sabotage, malicious act or other act intended to cause loss or damage." Comment, *A Legal Response to Terrorist Hijacking and Insurance Liability*, 6 LAW & POL. INT'L BUS. 1167, 1195 n.191 (1974).

62. Section A, dealing with warlike risks and irregular warfare, and section B, concerning loss from nuclear weapons, are mandatory exclusions. The exclusions found in section C (hijacking), D (strikes, riots, and civil commotion), and E (intentional damage) are subject to "buy-back provisions." For an additional premium the insured can purchase coverage for any one or more of these three exclusions.

63. By buy-back sections C and E, the insured can receive coverage for intentional and unintentional hijacking. The mandatory section A would then exclude coverage for loss resulting from war and irregular warfare.

future will reveal whether the all risk insurers have achieved their objective.[64]

Ralph Vinciguerra

64. The instant decision demonstrates the need for parties to an insurance contract to express their intent in clear and unambiguous language. The canon of *contra proferentem* will place a heavy burden on insurers to constantly review their policies to determine whether they are adequate in light of changing conditions. If such review had been made prior to this case and the CWEC had been in effect, there is a strong possibility that the terrorist acts would have been excluded from the all risk insurance coverage.

INTERNATIONAL ARBITRATION—U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS—DEFENSES RAISED AGAINST ENFORCEMENT OF FOREIGN ARBITRAL AWARD WILL BE NARROWLY CONSTRUED BY U.S. COURTS TO COMPLY WITH PRO-ENFORCEMENT POLICY OF THE CONVENTION

Plaintiff contractor[1] agreed to build and to start up a paperboard mill for defendant[2] in Alexandria, Egypt. The work was near completion in 1967 when Arab-Israeli tensions heightened. Egypt subsequently broke diplomatic ties with the United States and expelled all Americans who did not obtain special visas. Plaintiff's American employees, not having applied for the special visas, left the country, citing the contract's *force majeure* clause to excuse the postponement of work.[3] Defendant completed the mill and sought damages for breach of contract. When plaintiff refused to settle, defendant invoked the contract's arbitration clause. When the arbitral board[4] found no good faith effort by plaintiff to complete the project and awarded damages and costs to defendant, plaintiff brought the instant suit seeking declaratory relief to prevent collection of the foreign arbitral award.[5] Contending that the foreign arbitral award did not comply with the requirements of the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards,[6] plaintiff raised several defenses derived from article V of the Convention[7] against enforcement of the award: (1) enforcement would violate the public policy of the United States;[8] (2) the matters arbitrated were inappropriate for arbitration;[9] (3) the arbitral tribunal denied plaintiff adequate

1. Parsons & Whittemore Overseas Co., an American corporation.

2. Société Générale de l'Industrie du Papier (Ratka), an Egyptian corporation.

3. The *force majeure* clause excused delays in performance due to causes reasonably beyond the contractor's control.

4. The arbitration clause provided for a three-person arbitral tribunal governed by the rules of the International Chamber of Commerce.

5. Defendant also sought assessment of damages and double costs against plaintiff for frivolous appeal.

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 84 Stat. 692, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

7. *See* text of article V quoted at note 36 *infra*.

8. Plaintiff argued that United States foreign policy interests in the Middle East demanded that plaintiff, as a loyal American citizen, abandon the project.

9. Plaintiff contended that foreign policy issues were involved in the work dispute and that these issues should not be decided by arbitration.

opportunity to present its case;[10] (4) the award was based upon resolution of issues outside the scope of the arbitration agreement;[11] and (5) the award was in manifest disregard of the law.[12] The district court[13] granted summary judgment for defendant. On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. The thrust of the Convention is to facilitate the enforcement of foreign arbitral awards, and to effectuate that purpose any defense to a foreign arbitral award will be narrowly construed. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (Ratka)*, 508 F.2d 969 (2d Cir. 1974).

The difficulty of enforcing foreign arbitral awards[14] has been a long-standing problem. At common law, courts treated all arbitration with hostility, maintaining that through arbitration the parties were attempting to oust the jurisdiction of the courts.[15] In 1925, however, the Federal Arbitration Act[16] proclaimed arbitral agreements to be "valid, irrevocable, and enforceable."[17] Despite the clarity of that language, agreements to arbitrate and the enforce-

10. Plaintiff charged that the refusal by the arbitral tribunal to delay proceedings to accomodate the speaking schedule of one of plaintiff's witnesses amounted to a denial of plaintiff's opportunity to present its case.

11. Plaintiff directed this defense at the award of damages for loss of production, which plaintiff argued was expressly excluded by the contract between the parties.

12. Plaintiff raised the defense of "manifest disregard" to attack the arbitral tribunal's findings of fact and conclusions of law.

13. The case originated in the New York Supreme Court. Defendant removed the case to the federal district court pursuant to 9 U.S.C. § 205, which authorizes removal from state courts of cases dealing with the recognition or enforcement of foreign arbitral awards covered by the Convention, and 9 U.S.C. § 203, which empowers federal district courts to entertain such cases.

14. Article I of the Convention defines foreign arbitral awards as those "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . . . [The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The Convention adopts what is known as the "territorial" rather than the "national" approach to arbitral awards, creating implications for the draftsmen of arbitration clauses falling under the Convention. *See* Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 822 (1972).

15. *E.g.*, J.T. Williams & Bro. v. Branning Mfg. Co., 154 N.C. 205, 70 S.E. 290 (1911); Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 A. 1037 (1908).

16. United States Arbitration Act of 1925, 9 U.S.C. §§ 1-14 (1975) [hereinafter cited as 1925 Act].

17. 1925 Act § 2.

ment of arbitral awards continued to encounter judicial resistance.[18] One of the major issues in these cases was whether the 1925 Act applied to the states as well as to the federal government.[19] In 1959, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,[20] the Second Circuit held that the 1925 Act created federal substantive law and that questions of the validity and the interpretation of arbitration agreements were governed by federal law, not state law.[21] The Supreme Court accepted this construction of the 1925 Act in *Prima Paint Corp. v. Conklin Manufacturing Co.*[22] Even accepting this principle, the enforceability of foreign arbitral awards pursuant to the 1925 Act remained questionable because the Act contains no provision aimed explicitly at foreign awards.[23]

18. For an account of the ways in which courts dealt with arbitration agreements see Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942).

19. This debate had its roots in several important Supreme Court decisions. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court held that federal courts could not create substantive law in diversity cases, thereby overruling *Swift v. Tyson*, 16 Pet. 1 (1842). *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), amplified *Erie* by stating that matters in a diversity action which were "outcome determinative" were to be tried according to state law. Then in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), the Court found that the jurisdictional treatment of arbitration was "outcome determinative" and raised the question whether the 1925 Act was applicable at all in diversity cases. The issue was not decided because the Court determined the contract in question was purely intrastate and therefore not covered by the 1925 Act.

20. 271 F.2d 402 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960).

21. 271 F.2d at 409.

22. 388 U.S. 395 (1967). The soundness of the reasoning in the *Devonshire-Prima-Paint* line of cases is still questioned by commentators. *See, e.g.*, Comment, *International Commercial Arbitration under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 WASH. L. REV. 441 (1972).

This dispute has been bypassed by congressional implementation of the Convention. The Arbitration Act of 1970, 9 U.S.C. §§ 201-08 (1975) [hereinafter cited as 1970 Act]. District courts now have original jurisdiction over disputes falling under the Convention (9 U.S.C. § 203), and cases may be removed from state courts (9 U.S.C. § 205).

23. Attempts to apply the 1925 Act to foreign arbitral awards through certain sections, primarily sections 8 and 9, received conflicting reactions from the courts, and hence no controlling authority resulted. Konstanstindis v. S.S. Tarsus, 248 F. Supp. 280 (S.D.N.Y. 1965), *aff'd*, 354 F.2d 240 (2d Cir. 1965); Danielson v. Entra Rios Rys. Co., 22 F.2d 326 (4th Cir. 1927) (court had power to enter decree on foreign arbitral award); *contra*, The Silverbrook, 18 F.2d 144 (E.D. La. 1927) (court did not have the power to confirm foreign arbitral award). In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 n.5 (1974), the Supreme Court indicated that section 1 of the 1925 Act covered an international agreement to arbitrate

Consequently, prior to the last few years, few federal court decisions could be found in which a foreign arbitral award was enforced;[24] actual enforcement occurred most frequently in New York state courts, which adopted a liberal approach to the enforcement of foreign arbitral awards.[25] Multilateral treaties, such as the Geneva Protocol of 1923[26] and the Geneva Convention of 1927,[27] which attempted to produce widespread enforcement of arbitral awards, were not acceded to by the United States, primarily because the federal government was constrained from adopting arbitration rules which would conflict with arbitration statutes of the states.[28] Regardless, these early multilateral agreements proved ineffective in providing for enforcement of foreign awards, due to inherent defects such as placing the burden of proving every issue upon the party seeking to enforce the award.[29] Commencing with the 1946 treaty with Nationalist China,[30] however, the United States has sought to facilitate recognition of the validity of foreign awards by

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although the Convention would clearly have encompassed the agreement in question.

24. Standard Magnesium Corp. v. Fuchs, 251 F.2d 455 (10th Cir. 1957); San Martine Compania de Navegacion, S.A. v. Saguenay Terminats Ltd., 293 F.2d 796 (9th Cir. 1961).

25. Gilbert v. Bernstein, 255 N.Y. 348, 174 N.E. 706 (1931) (New York public policy permitted New York resident to submit to foreign arbitral procedures); Sargent v. Monroe, 268 App. Div. 123, 49 N.Y.S.2d 546 (1944) (English final arbitral award valid and binding upon New York resident).

26. Geneva Convention on the Execution of Foreign Arbitral Awards, *adopted* September 26, 1927, 92 L.N.T.S. 301. Text in INTERNATIONAL TRADE ARBITRATION 283 (M. Domke ed. 1958).

27. Geneva Protocol on Arbitration Clauses, *adopted* September 24, 1923, 27 L.N.T.S. 158, *reprinted in* INTERNATIONAL TRADE ARBITRATION 283, 285. Both the 1923 Protocol and the 1927 Convention were expressly abrogated as to contracting states to the 1970 Convention by article VII(2).

28. For similar reasons the United States did not accede to hemispheric arbitration agreements such as the Code of Private International Law (Codigo Bustamente), Feb. 20, 1928, 68 L.N.T.S. III and the Treaty of International Procedural Law, March 19, 1940, *cited in* 37 AM. J. INT'L L. 116 (Supp. 1943). Likewise, the Convention was not adopted until 1970, after the United States delegation to the 1958 drafting recommended against adoption. *See* note 34 *infra* and accompanying text. For a discussion of American treaty policy concerning arbitration from 1920-1946 see Sullivan, *United States Treaty Policy on Commercial Arbitration—1920-1946* in INTERNATIONAL TRADE ARBITRATION 35 (M. Domke ed. 1958).

29. *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

30. Treaty with Republic of China on Friendship, Commerce, and Navigation, Nov. 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871.

including bilateral arbitration clauses in its treaties of friendship, commerce, and navigation (FCN treaties).[31] These arbitration clauses[32] attempt to eliminate discrimination against awards rendered in the contracting country but do not seek to change the country's *internal* policy toward arbitration. This conception of the purpose of arbitration clauses fits nicely into the United States federal-state dichotomy but leaves arbitral awards subject to the willingness of the other nation to accept arbitration. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[33] alleviates many of the problems in the previous multilateral and bilateral approaches.[34] The Convention requires not

31. The United States presently has eighteen of these treaties containing arbitration clauses. These include treaties with France, West Germany, Japan, Italy, and Israel. For a discussion of the bilateral approach to arbitration enforcement see Walker, *Commercial Arbitration—1946-1957* in INTERNATIONAL TRADE ARBITRATION 49 (M. Domke ed. 1958).

32. A typical provision reads:

> Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement by the authorities of either Party merely on the grounds that the place where such award was rendered is outside the territories of such Party or that the nationality of one or more of the arbitrators is not that of such Party.

Treaty of Friendship, Establishment, and Navigation between the United States and Belgium, art. III(6), 14 U.S.T. 1284, T.I.A.S. No. 5432. For a comparison among variations in these arbitration clauses see Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1051 (1961).

33. As of January, 1975, forty-two nations had acceded to the Convention. These included France, West Germany, Egypt, Japan, Sweden, and the Soviet Union. A major holdout is the United Kingdom, which has importance not only as a major trading nation, but also because London is the site of much arbitration. Thus, a state, like the United States, accepting the Convention with territorial reservation as to reciprocity in the place where the award was rendered (see note 42 *infra* and accompanying text) would not enforce awards made in London. Of course, other agreements may provide for the recognition and enforcement of the arbitral awards handed down in non-signatory states.

34. The president of the 1958 United Nations conference listed five advantages which the Convention had over previous arbitration treaties: (a) Wider definition of awards to which the Convention applied; (b) Reduced and simplified requirements with which the party seeking recognition or enforcement would have

only non-discrimination but also liberalization of a signatory's approach to enforcement of foreign arbitral awards. To accomplish this, the Convention places the burden of proof on the party opposing enforcement of the award,[35] limits the defenses which can be raised against enforcement of an award,[36] and simplifies the requirements with which the party seeking enforcement must comply.[37] However, certain areas remain within the discretion of either the contracting parties[38] or the courts where enforcement is sought.[39] The United States, for the same policy reasons discussed

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to comply; (c) The burden of proof is placed on the party opposing the award; (d) Parties have greater freedom in the choice of the arbitral authority and the arbitral procedure; (e) The authority before which enforcement sought has the right to order the opposing party to give suitable security. U.N. Doc. E/Conf. 26/SR. 25, at 2 (1958).

35. Art. V(1) provides that "recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes . . . proof. . . ."

36. Art. V provides the following possible defenses: "(a) The parties to the agreement . . . were, under the law applicable to them under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or . . . under the law of the country where the award was made; (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitration or of the arbitration proceedings or was otherwise unable to present his case; (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . .; (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recogniton and enforcement are sought finds that: "(a) The subject matters of the difference are not capable of settlement by arbitration under the laws of that country; (b) The recognition of enforcement of the award would be contrary to the public policy of that country."

37. Art. IV requires that the party seeking recognition or enforcement supply: "(a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement or a duly certified copy; (c) If the award or agreement is not made in an official language of the country in which enforcement is sought, the party shall supply a translation of these documents into an official language. The translation must be certified."

38. The contracting parties may determine the place of arbitration, arbitration procedures to be followed, and the scope of arbitration subject to the limitations set out in note 36 *supra*.

39. The enforcing court has discretion as to the public policy limits on awards,

earlier, refused to accede to the Convention until 1970[40] when Congress implemented the Convention through the addition of a second chapter to the 1925 Act,[41] although this accession was modified by the two reservations provided for in the Convention.[42] The United States Supreme Court in *Scherk v. Alberto-Culver*[43] gave further impetus to the recognition of foreign arbitration by upholding an arbitration clause in a dispute involving securities subject to the Securities Exchange Act of 1934.[44] The Court in *Scherk* stressed that an international agreement to arbitrate creates differ-

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the due process requirements, and the appropriate subjects for arbitration. *See* note 30 *supra*.

40. The United States delegation to the 1958 conference recommended "strongly" that the United States not sign or adhere to the convention. The delegation summarized its reasons as follows: (a) The Convention, if accepted on a basis that avoids conflict with state laws and judicial procedures, will confer no meaningful advantages on the United States; (b) The Convention, if accepted on a basis that assures such advantage, will override the arbitration laws of a substantial number of states and entail changes in state and possibly federal court procedures; (c) The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter; (d) The Convention embodies principles of arbitration law which it would not be desirable for the United States to endorse. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1074 n.108 (1961).

41. 9 U.S.C. §§ 201-08 (1975). One commentator has analyzed three developments which made United States accession to the Convention possible: (a) Interpretation of the 1925 Act as creating national substantive law (*see* notes 13-16 *supra* and accompanying text); (b) Enactment by a majority of American states of arbitration statutes overruling the common law rule of revocability of arbitration agreements; (c) Development of more ample legal precedent to indicate our courts will enforce foreign arbitral awards. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius*, in NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 41 (Am. Aribtration Ass'n ed. 1971).

42. Art. I(3) provides that "any State may on the basis of reciprocity declare that it will apply the Convention to . . . awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration." *See* Letter of Accession from President Nixon to United Nations, Sept. 1, 1970 in NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 72. Although limiting the Convention's scope somewhat, these reservations should not hinder the effectiveness of the Convention to any great degree.

43. 417 U.S. 506 (1974).

44. The *Scherk* decision is in conflict with an earlier court decision, *Wilko v. Swan*, 346 U.S. 427 (1953), that held an agreement to arbitrate unenforceable under the terms of § 14 of the Securities Act of 1933, 15 U.S.C. § 77 (1970).

ent concerns than a purely domestic contract.[45]

The instant court immediately recognized that the Convention's basic thrust is to liberalize procedures for enforcing foreign arbitral awards and, therefore, accepted the Convention's placement of the burden of proof on the party opposing enforcement.[46] In dealing with petitioner's defenses, the court complied with this pro-enforcement policy, relying on *Scherk's* rejection of parochial views as a basis for refusing to enforce a foreign arbitral award.[47] The court did not accept petitioner's equation of public policy with national political policy, reasoning that a public policy defense defined by the vagaries of international politics would seriously undermine the Convention's utility. The court concluded that a public policy argument would be an adequate defense only when enforcement would violate the forum nation's fundamental notions of morality and justice.[48] Responding to petitioner's defense of non-arbitrability, the court acknowledged that certain categories of claims were non-arbitrable because of special United States interests in judicial resolution.[49] Nevertheless, merely because an issue of national interest colors a dispute, the dispute is not necessarily within a non-arbitrable category. Thus, the court held that incidental United States national interests in the arbitration did not make the case non-arbitrable.[50] The court viewed petitioner's claim of an inadequate opportunity to present its defense in the arbitral forum as requiring analysis under United States concepts of due process. Noting that an agreement to arbitrate entails disadvantages as well as advantages, and upholding the arbitration

45. The Court relied on the decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which upheld a forum selection clause absent a strong showing that it should be set aside. The Court in *Scherk* called an agreement to arbitrate a specialized kind of forum selection clause. 417 U.S. at 519.

46. 508 F.2d at 973. *See* notes 34-35 *supra* and accompanying text.

47. 417 U.S. at 520 n.15.

48. *Cf.* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 117, comment *c* at 340 (1971).

49. The Court, by way of example, suggested that an American court might refuse to enforce the arbitral award of an antitrust claim because antitrust matters are within the exclusive jurisdiction of the judiciary. 508 F.2d at 974. In reference to the *Scherk* differentiation between domestic and international agreements (*see* note 45 *supra* and accompanying text), the Court left open the possibility that categories of non-arbitrability might be narrowed if an international agreement was in issue.

50. The Court analogized the instant case to *Scherk*, which was said to have a more prominent public aspect (regulation of securities), thereby compelling the conclusion that the instant case was arbitrable.

tribunal's discretion in declining to reschedule a hearing for the convenience of petitioner's witness, the court found petitioner's due process rights were in no way infringed by the arbitration tribunal's process and decision. Moving to petitioner's defense that the arbitral forum exceeded its jurisdiction, the court found that both the Convention's purposes and American case law[51] create a strong presumption, not overcome by petitioner, that an arbitral tribunal has acted within its powers. The petitioner could not overcome this presumption because, as the court stated, it was "not apparent"[52] that the scope of the agreement to arbitrate had been exceeded. While not deciding whether a defense of manifest disregard of the law obtains in a judicial review of an international arbitration award,[53] the court nonetheless rejected this defense of petitioner by claiming that extensive judicial review of an arbitral award would frustrate the basic purpose of arbitration, *i.e.*, quick, inexpensive resolution of disputes without resort to courtroom litigation.[54] Thus, by imposing a narrow construction on the five defenses, the court sought to uphold the Convention's purpose of rendering international arbitration awards enforceable in courts of law.

With this initial interpretation of the Convention, the instant court has diminished the problem of enforcing foreign arbitral awards in the United States. As transnational commerce grows, so the damage increases when disputes paralyze the flow of goods and services. Businessmen have long advocated arbitration as a means of making disputes less costly by avoiding lengthy, expensive courtroom litigation, which too often in international disputes in-

51. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (question of interpretation of collective bargaining agreement is a question for the arbitrator); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972) (arbitration clauses to be construed liberally with doubts to be resolved in favor of arbitration).

52. 363 U.S. at 598.

53. The 1925 Act, specifically § 10, has been construed to include an implied defense when an arbitral award is in manifest disregard of the law. Wilko v. Swan, 346 U.S. 427, 436 (1953); Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967). Article V of the Convention, however, makes its defenses exclusive. *See* note 36 *supra* and accompanying text. The defense of manifest disregard, therefore, may not be applicable to awards covered by the Convention.

54. In its decision, the Court refused to increase damages, which allegedly had been erroneously computed. The Court also declined to impose double costs on petitioner for a frivolous appeal. The Court considered the appeal a reasonable exploration of the statute implementing the Convention.

volves a cauldron of strange laws and suspect treatment of foreigners. But despite the instant court's enforcement of the arbitration award, the decision reveals some of the pitfalls that businessmen may yet encounter in arbitration pursuant to the Convention. The Convention leaves much discretion to the forum state, such as the interpretation of public policy and due process, in the determination of proper subject matter for arbitration, and in the two reservations relating to the place of arbitration and the requirement of a dispute in commerce. Certain problems, such as where to arbitrate and arbitral procedure, can be minimized by careful draftsmanship of the arbitration clause.[55] The degree to which the signatory states adhere to the purpose of the Convention—the ready enforcement of foreign arbitral awards—will determine the Convention's success. With many areas still left, perhaps necessarily, to national policy, the Convention will not completely alleviate the problems involved in the enforcement of foreign arbitral awards. Perhaps the ideal solution to these problems would be standardization of arbitration laws,[56] but agreement by disparate nations on the many questions of procedural and substantive law comprising the arbitration process is not a presently foreseeable possibility. The Convention, by urging the enforceability of arbitral awards, helps create an atmosphere in which arbitration is regarded as the logical and viable method for international commercial dispute resolution. Knowing that awards will be enforced, parties will be encouraged to turn to arbitration more frequently and knowledgeably and will comply more readily with an arbitrator's decision. Although aimed at effecting uniform enforcement litigation, the Convention ultimately enhances the authority of the arbitrator's decision and prevents post-arbitral litigation.

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55. For a discussion of the critical points in the drafting of the arbitration clause see Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821 (1972).

56. Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 308 (1959).