C. 1

In the

Supreme Court of the United States

Fritz Scherk,

Petitioner,

v.

Alberto-Culver Company,

Respondent.

73-781

Pages 1 thru 42

Washington, D. C.

April 29, 1974

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

FRITZ SCHERK, Petitioner,	:	
v.	:	No. 73-781
ALBERTO-CULVER COMPANY, Respondent.	:	

Washington, D. C.,

Monday, April 29, 1974.

The above-entitled matter came on for argument at 11:12 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United STates
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT F. HANLEY, ESQ., Jenner & Block, One IBM Plaza, Chicago, Illinois, 60611; for the Petitioner.

GERALD AKSEN, ESQ., General Counsel, American Arbitration Association, 140 West 51st Street, New York, New York 10020; for the American Arbitration Association as Amicus Curiae.

FRANCIS J. HIGGINS, ESQ. Bell, Boyd, Lloyd, Haddad & Burns, 135 South LaSalle Street, Chicago, Illinois 60603; for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-781, Scherk against Alberto-Culver.

Mr. Hanley, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT F. HANLEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HANLEY: Mr. Chief Justice, and may it please the Court:

I represent the petitioner, Fritz Scherk, and this case involves the acquisition of petitioner's three related European cosmetic businesses by respondent, Alberto-Culver, an American corporation.

The issue that's presented is the enforcibility of arbitration clauses entered into as part of international agreements in the face of charges of violations of the Securites Exchange Act, Section 10(b) and Rule 10b-5.

The facts as reflected in the complaint and in the uncontradicted portions of the affidavits which were filed in the trial court, in the District Court, are as follows:

Alberto-Culver became interested in petitioner's businesses back in June or July of 1967, and apparently it became interested because they were having some problems getting their products, their hair products and so forth, into the German market, accepted on the German market. And Scherk, apparently, had a good name, an established name in

that, in that market.

So, in June or July, steps were taken, contacts were made in Berlin, in West Berlin, by Alberto-Culver.

Your Honors, there is some disagreement between the parties as to whether a meeting, which was held in Melrose Park, Illinois, in May of 1968, or a meeting in West Berlin in March of 1968 was the most significant, with respect to putting this transaction together.

But there is no contradiction about the fact that these negotiations commenced in Europe. They were then negotiated and conducted in both Europe and the United States for a period of two years, and were -- finally came to conclusion at a closing in Geneva, Switzerland, in June of 1969.

Now, a battery of attorneys took months to put together these acquisition agreements, which are spread over some hundred, hundred and twenty-five pages, and they contained clear clauses by which the parties agreed to negotiate to arbitrate all future disputes before the International Chamber of Commerce in Paris, France.

The parties used both American and German attorneys in investigating and in negotiating and putting together this sale of these three foreign businesses.

They also used trademark experts, business consultants, and Alberto-Culver used its outside auditors, Peat, Marwick &

Mitchell company.

Part of the purchase price for the companies was paid in the form of promissory, four promissory notes, which were delivered to the petitioner, Mr. Scherk, at the time of the closing in Geneva.

Now, in 1970, Alberto-Culver concluded that petitioner, Mr. Scherk, had breached trademark warranties, having to do with trademarks that had been owned by the Scherk enterprises. And he charged -- they charged violation -- they brought suit, notwithstanding the arbitration clause, brought suit in the United States District Court for the Northern District of Illinois, charging, in June of 1971, charging violations of Section 10(b), Rule 10b-5, charged common-law deceit, fraud, and charged breach of warranty, breach of trademark warranty.

Mr. Scherk had taken steps to arbitrate the controversy in Paris back in January of 1971, but he had not filed the necessary papers, taken the formal steps. Those steps were not taken until after the suit in this case was filed. Those steps were taken, arbitration was commenced officially, formally, in November of 1971.

We filed motions to dismiss the complaint based upon contentions that the court was without jurisdiction over the person of the petitioner; the court was without jurisdiction of the subject matter; and on the basis of forum non

conveniens.

In the alternative, we also applied for a stay, pending arbitration, a stay of the proceedings in the District Court. Our motions were all denied.

And the District Court granted an injunction enjoining the petitioner, Mr. Scherk, from proceeding with arbitration in Paris.

The Seventh Circuit affirmed, analyzing and applying the Court's 1953 decision in Wilko vs. Swan as invalidating arbitration clauses and, of course, in Wilko v. Swan, the invalidation was with respect to charges -- was in the face of charges under the Securities Act of 1933; here we're talking about the -- and here the Seventh Circuit applied Wilko vs. Swan in the face of charges of violations of the Exchange Act and 10b-5.

Our position --

QUESTION: Mr. Hanley, --

MR. HANLEY: Yes, Your Honor.

QUESTION: -- to what extent are you pursuing the suggestion that the federal District Court in Illinois did not have jurisdiction of this?

MR. HANLEY: Your Honor, we believe that the federal District Court has now ruled, and in the face of our motion to dismiss on jurisdictional grounds, we believe - and the Court of Appeals has -- if you're asking me as far as the

preliminary injunction is concerned, the Court of Appeals has ruled that it had jurisdiction under 1292(a)(1). We certainly agree with that contention. This was the granting of an injunction, preliminary injunction. We have -- as far as what we -- our motion to dismiss was not certified here, and that issue, I believe, is just not the -- the issue of whether or not this is a security or whether or not Mr. Scherk was properly before the court, I don't think is any longer subject to debate in these proceedings.

We have proceeded on the assumption that there -- that the court has jurisdiction over the parties, over the subject matter, and that this appeal is properly before this Court as a preliminary injunction under 1292.

Our position here is that this Court, upon a re-analysis of Wilko vs. Swan, in the light of the international context here, and the strong federal policy favoring arbitration, need not and should not apply Wilko vs. Swan mechanically, mechanistically, and invalidate arbitration agreements where securities violations are led in this international context.

There is no compelling reason to extend Wilko vs. Swan, and some very, very good reasons, we assert, why Wilko should not be applied in this circumstance.

As Circuit Judge Stevens said in his dissenting opinion below, the enforcement of these arbitration agreements

in this case would not frustrate the policies of the Exchange Act, whereas refusal to enforce them would certainly frustrate important policies which this Court has articulated as recently as 1972, in the Zapata case.

It's clear, I believe it's absolutely clear that without Wilko vs. Swan, the arbitration provisions in these, in this acquisition -- in these acquisition agreements would be enforced. They would be enforced under either Chapter 1 or Chapter 2 of the Federal Arbitration Act. And we look in vain, and have read the briefs in vain, for any reason to support the mechanical application of Wilko vs. Swan to the situation here.

The respondent is not going to lose his right to be heard on these trademark -- these breaches of trademark. The arbitration, the arbitral courts have and can arbitrate matters going to allegations of fraud, and breaches of warranty.

The respondent says in effect, I agree to arbitrate; now I don't want to arbitrate any more and I look around and I found this Supreme Court case, this 1953 case that says I don't have to. And it gives me an excuse, and so I'm not going to live up to my bargain.

The respondent points to the lanugage of Section 27 of the Exchange Act, which says that district courts shall have exclusive jurisdiction of violations of the title or

the rules and regulations thereunder, and that all suits in equity and actions at law to enforce any liability or duty created under the title, and so forth, will be in the district court.

Now, he points to that -- respondent points to that language and says that, as I understand his argument, that all securities disputes must be resolved in the United States District Courts. That just isn't -- that doesn't comport with the reality.

The Securities and Exchange Commission is resolving securities disputes every day in arbitration proceedings; where the matters involve existing disputes, are being arbitrated every day; we're having resolution of securities problems in arbitration proceedings between members of exchanges, where they have rules requiring arbitration; we're having arbitration in securities matters and proceedings between non-members and members of exchanges; and we're having arbitration proceedings where the broker opposes arbitration and the customer seeks it.

And it just doesn't follow.

QUESTION: It's your -- that's your submission, I guess, that that language means that if an action under the Exchange Act of '34 comes to a court, it's the federal district courts that have exclusive jurisdiction, exclusive of the State courts.

MR. HANLEY: That's correct.

QUESTION: Is that the point?

MR. HANLEY: That's correct, Your Honor.

QUESTION: That language is not in the '33 Act, is it?

MR. HANLEY: No, Your Honor.

QUESTION: And it was the '33 Act --

MR. HANLEY: Wilko.

QUESTION: -- which is Wilko v. Swan.

MR. HANLEY: That's correct.

QUESTION: Yes.

QUESTION: Mr. Hanley, --

MR. HANLEY: Yes, Your Honor.

QUESTION: -- before you proceed, let me come back to something you said a little earlier.

Do you concede that this transaction is within the scope of the Securities Acts, and, if so, why?

MR. HANLEY: Technically, Your Honor, I believe we would have to concede, under the cases that, for the purpose at least of this argument, we concede that there are promissory notes involved.

QUESTION: This was a purchase of assets and nothing more, wasn't it?

MR. HANLEY: In substance. In substance. There was a purchase of assets, there was a purchase of a going

business concern.

QUESTION: Right. And your -- and the purchase embraced 100 percent of the ownership of the -- of your client.

MR. HANLEY: There were some -- Your Honor, that's 90 percent accurate. There were some trademark rights and some rights in Israel and in other parts of the world that were reserved by Mr. Scherk, but basically they acquired, the respondent acquired his business enterprise.

QUESTION: The purchaser acquired stock in the German company that was organized as a part of the transaction, as I understood it.

MR. HANLEY: He acquired stock in a company or a business --

QUESTION: In Liechtenstein.

MR. HANLEY: It was a Liechtenstein "Anstalt", Your Honor, and at the time of the transaction, at the time that they were entering into it, it was not a stock company, it was specifically not a stock company, and was converted as part of the transaction.

QUESTION: Right.

MR. HANLEY: And stock was issued and was delivered at the time of the closing, it was held in escrow.

I think the point on this is that if we permit these four promissory notes and this transformed German -- Liechtenstein "Anstalt" to establish the rule for the Court,

and automatically -- the Court would automatically apply Wilko vs. Swan in that situation with those connecting factors, it's our position that you're certainly permitting form to rule substance, and that there is no reason, there is no counterveiling -- in this circumstance there is no counterveiling policy with respect to the enforcement of the Securities laws in this situation that would justify, that would justify that.

QUESTION: Well, neither the Act of '33 nor '34 was addressed to negotiated mergers and acquisitions of assets. Now, I don't understand why you give up that point. We haven't said so up here, have we?

MR. HANLEY: Well, Your Honor, I have read the cases, and have seen the extension of this definition of securities to include -- and I don't like to stand here and argue against myself, but I --

QUESTION: If we said so, perhaps I missed it; but have we said so?

MR. HANLEY: No, Your Honor. Not to my satisfaction.

But, nevertheless, I think that the -- our point here is that it really is not necessary for us to fight any longer on that point, because there is just really no requirement here to apply Wilko vs. Swan if we, arguendo, if we are within the Securities Exchange ambit in this case. And we argued that and we lost that in the District Court, and

we have conceded it for the sake of this argument.

QUESTION: You didn't lose it entirely with Judge Stevens, as I read his opinion.

MR. HANLEY: Well, --

QUESTION: Go ahead. I won't interrupt you on this point any further; but I wouldn't have given up an arguable point, based on what I understand of this case.

MR. HANLEY: All right, Your Honor.

QUESTION: Mr. Hanley, if I correctly understand, the main thrust of your argument is that given the long-standing judicial and legislative policy to encourage arbitration, that that should be followed absent compelling reasons of public policy not to do so, and that there are no compelling reasons of public policy presented here, --

MR. HANLEY: That's right.

QUESTION: -- as there were in Wilko.

MR. HANLEY: That's right. We say, Mr. Chief Justice, we say that Wilko just doesn't fit here. It was a garden variety, domestic case, involving a customer of a brokerage house who signed a 17-page form agreement provided by the brokerage house, contained an arbitration clause along with other provisions which waive the protection of the federal securities law. There was a great disparity in bargaining positions, great disparity in the relative degrees of sophistication, a clear -- just a very clear disparity in

bargaining power.

There was no compelling reason not to relieve the customer of his agreement to arbitrate under the circumstances, and some fairly compelling reasons to show that it would have been unfair to require him to arbitrate under the circumstances.

Our situation is entirely different. Alberto-Culver went to Europe. They purchased these Scherk businesses. They used an array of European and American lawyers, trademark experts, business consultants. The sophisticated businessmen here agreed to arbitrate their disputes after a two-year arm's-length transaction. There was no over-weaning bargaining power on the part of the petitioner.

It's clear also that Alberto-Culver considered the possibility that they were going to have trademark problems. Mr. Silver, their general counsel's affidavit here shows -- evidences great concern about trademarks, as shown also by the fact that the trademark warranties took up some 25 pages in the acquisition agreement.

They clearly anticipated trademark as an area of possible future dispute. And to permit the respondent to refuse to honor its promise to arbitrate, in an agreed form, where the agreement was reached in good faith, after free and fair bargaining between the parties, with equal

bargaining power, just plain isn't fair.

Wilko should not be extended to permit an American businessman to dishonor his agreement with the foreigner. And certainly the foreign aspects are compelling enough, the international aspects of this case are compelling enough not to extend the Wilko rule in this case. We know that uncertainty --

QUESTION: Mr. Hanley.

MR. HANLEY: Yes, Your Honor.

QUESTION: Let me see if I follow you on this. I take it it's your position of course that the parties should go to arbitration. Do you concede that once the arbitral award is arrived at that, nevertheless, the federal District Court may then pass upon the issue of whether our public policy prevents its enforcement?

MR. HANLEY: We believe, Your Honor, that the arbitral court should resolve all of the questions, all of the factual questions here; yes, we do.

We don't think we're in a situation where it's necessary to remand the case here to make a determination whether there are these policy matters present in this case. It's very clear here that there is no -- at least it's clear to me -- that there is no counterveiling policy present. There is no shown -- and the matter has been argued, there is no showing here that under the facts in this case, with

arbitration, that there would be a concomitant detriment to security law enforcement.

So I would say that this matter should be resolved by the court, by the arbitral court in Paris in accordance with the solemn agreement of the parties.

QUESTION: You have a federal statute, and it would be amazing, I think, to anybody who has worked in the field, to assume that if I bought out a company, lock, stock and barrel, with the stock and debentures and everything else, that wasn't a security.

MR. HANLEY: Your Honor, I can see areas --

QUESTION: Read the definition in Section 3(a)(10) of the Exchange Act of '34. It would be driving a hole in the Act big enough to send a caravan through.

MR. HANLEY: Your Honor, we can certainly -- we can certainly hypothecate factual situations in which it would be unreasonable to -- not to apply Wilko vs. Swan in this particular case.

Assume a British company coming over and making a tender offer on a widely held corporation. In that kind of situation --

QUESTION: But, you see, those old -- in this field you don't talk about equities, you talk about the law; whether or not you have a security or you don't have a security.

MR. HANLEY: Well, what we've tried to show, Your Honor,

is that the court -- that under Section 27, the courts have not been requiring that all securities disputes be resolved in the District Courts --

QUESTION: Well, you haven't cited anything in your brief that is contrary to what the Court of Appeals said here.

MR. HANLEY: Well, we hope we've shown, Your Honor, that it would be -- that because of the policies that were established by this Court or articulated in this Court in Zapata, that it would be unfair and it would be unnecessary to extend Zapata into this international situation.

I'm sorry, I mean Wilko vs. Swan.

QUESTION: Zapata was a common law case, was it not? An admiralty claim.

MR. HANLEY: And we believe that, as in Zapata, Your Honor, that the issues in this case are right for determination by the arbitral court.

The thing we didn't -- I didn't have a chance to really have it mentioned, was the uncertainty in these international transactions, which are the real bugaboo of these international transactions, and it's essential for the foreign businessmen to know in advance where and how they're going to resolve their conflicts. The parties bring to the bargaining tables different legal theories, and they pay for, they arbitrate and they negotiate and they pay for these

arbitration clauses. In fact, they may be the sine qua non of an international transaction.

In the Wilko garden variety securities matter, where you're buying securities from a broker, there's no compelling reason that the parties have such certainty. But they certainly need that certainty in international transactions, and how we -- one of the things that's happened, of course, since Wilko is that we have articulated a strong national policy in favor of arbitration of international transactions, both in Chapter 2 of the Federal Arbitration Act and also in the accesstion to the United Nations Treaty for the enforcement of arbitral awards. And we think --

QUESTION: But that Convention preserves consistently the issue of whether the arbitration award is against public policy in this country, or any country; does it not?

MR. HANLEY: Yes.

QUESTION: So I get back to my question: Do you, -- of whether, if you prevail on the primary availability of arbitration here under the agreement, you still aren't subject, possibly, to an American court's passing on the public policy issue.

MR. HANLEY: If there are facts, I would certainly agree, Mr. Justice Blackmun, I would certainly agree if there are facts to be resolved, that they may have to be resolved

as the Court indicated in Zapata.

I don't see them -- frankly, I don't see any facts for resolution with respect to public policy in the case that's before Your Honors.

QUESTION: That may well be, but certainly the arbitrator is not the one to pass on that.

MR. HANLEY: I would concede --

QUESTION: I just -- that's what I'm asking. All right.

QUESTION: But your problem is that Wilko was arm's-length bargaining, wasn't it? There's no overreaching there. That also was a situation of an arbitration clause arrived at by arm's-length bargaining, that's --

QUESTION: No.

MR. HANLEY: I think not. It was a garden variety, customer of a brokerage house, Haydenstone, Haydenstone sends them a 17-page form contract, signs an arbitration clause, tremendous disparity in bargaining power, tremendous disparity in relative bargaining strengths, business acumen, sophistication; it's just exactly the antithesis of our situation, with their battery of lawyers and experts who looked at this, as sophisticated businessmen, and got together after two years and agreed that we're going to arbitrate the very kinds of disputes that have arisen here in Paris, and what a shock and surprise it must be to wake up

and find that you're going to be required to resolve your conflicts in the United States District Court.

QUESTION: But, you see, the definition of security doesn't -- in the '34 Act -- doesn't turn upon how strong one party is and how weak the other party is. This is a generalized, wide category.

MR. HANLEY: Well, I understand --

QUESTION: It would be a very unusual situation to acquire the company, lock, stock and barrel, its securities and whatnot, and to march off saying that's not a security. That is more than a person who has worked in the field can swallow, at least quickly.

MR. HANLEY: Well, it may be a security, Your Honor, and in this particular situation, assuming it's a security, we're saying that it's not necessary for this Court to effectuate the rule, to apply the rule, to extend the rule in Wilko vs. Swan. And to prevent arbitration here.

The amicus now has five minutes.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hanley.

Mr. Aksen.

provision of the enforcement of arbitration agreements.

The Convention also states the specific grounds upon which a court may refuse to honor that agreement.

I would call to your attention that public policy is not one of those listed grounds.

I think it very important to note that four major developments have occurred in this country within the past few years, dealing with this Convention.

The first is the fact that Congress amended Chapter 2 of the Federal ARbitration Act. This Court was only ruling upon Chapter 1 of the Federal Arbitration Act in 1953 in the Wilko case.

Congress not only added a new chapter to that Act, but the Senate advised and consented on this International Treaty.

Only two years ago, the government of the United States, in a series of joint agreements with the Russians, the Polish, and more agreements are forthcoming, have provided for this mechanism, the use of voluntary arbitration in a neutral country, to resolve all commercial business disputes.

Finally, only this year, the American Bar Association, at its House of Delegates, wrote a letter to all of the other countries of the world, through their bar associations, advising and recommending that they pass this Convention,

which has now been passed in 42 countries of the world.

There is no other practical way to settle international business disputes than through the arbitration mechanism.

QUESTION: Mr. Aksen, let me get this straight. Did you say public policy was not a factor in the U.N. Convention?

MR. AKSEN: The U.N. Convention, Your Honor, provides, in the section on enforcement of awards, that the host country may of course refuse to honor the arbitration award, if it would offend its public policy.

It does not so provide on the section dealing with enforcement of arbitration agreements, which is Article II of the Convention.

We feel that --

QUESTION: Well, that doesn't invalidate the validity of my inquiry to Mr. Hanley.

MR. AKSEN: No, Your Honor, it does not. It does not. And, in fact, amicus does not argue that this Court should make a distinction between agreements and an award, because I don't think it would be appropriate to have two separate forums trying the same thing over again.

QUESTION: Well, is that presented in this case, at this stage?

MR. AKSEN: Amicus has not so argued in this case.

I was just pointing out the exact language of the Convention, should the Court wish to narrow its issue to the scope of the aribtration agreement itself.

QUESTION: The jurisdiction of a United States court to deal with what Mr. Justice Blackmun has raised to you, that is, the award when, as and if one is made, is a question not now before the Court.

MR. AKSEN: That is correct, Your Honor; it is not now before the Court.

QUESTION: Mr. Aksen, is there some workable line to be drawn, assuming that the Court wished to follow your suggestion, between the Wilko vs. Swan type of case and this type of case? It seems to be it's not entirely satisfactory to say this was a wealthy man, he had three lawyers, and the guy in Wilko v. Swan didn't have -- Swan didn't have any lawyers.

MR. AKSEN: The only workable line to accommodate the Federal Arbitration Act and the old Wilko v. Swan argument is to take a very hard look at recent times.

Now, all of the developments that we have listed for you in the brief have occurred since 1953. Two Administrations, Democratic and Republican, in this country have recognized the need for this mechanism to resolve disputes.

If you find that with the wording of this Convention

you can let one party, an American party, refuse to honor this arbitration agreement and, in the words of Mr. Justice Douglas, you will drive a caravan through this Convention.

This Convention was passed in this country at the --

QUESTION: Well, there are lots of financial refugees around the world who do not dare return to their own country. They would welcome arbitration of their disputes in Paris.

MR. AKSEN: I think, Mr. Justice Douglas, that all of the businessmen in the world would welcome the free use of arbitration.

QUESTION: I'm talking about the refugees.

MR. AKSEN: Well, if they're businessmen, Your Honor, I think they would welcome arbitration.

QUESTION: I'm sure they would. To avoid the rigors of their own regime at home.

MR. AKSEN: I'm perhaps missing something, but I'm sure if a political type problem would --

QUESTION: This is not political, what I'm talking about --

MR. AKSEN: -- problem with refugees is relevant to the definition of commerce, as defined by the Convention.

QUESTION: I'm thinking in terms of the problems of securities, regulation of securities, in Switzerland, here, England, and elsewhere.

MR. AKSEN: Well, I think it's clear if this Court finds that the securities matters in this case, which we consider peripheral, but if the Court finds that these securities matters are controlling, then it has a very difficult time accommodating these two statutes.

But in this case we do have a statutory problem, and the most recent statute is one of both the Convention and an enactment, a reenactment adding a full chapter to the Federal Arbitration Act. And with language, may I point out, that was not required.

The Convention does not require any court of any country to force a native to go abroad to arbitrate.

QUESTION: What do you think the result would be under the amendments to the Act and under the Convention if the Securities Act said, itself, expressly that arbitration clauses will not be permitted?

MR. AKSEN: Then there would be no doubt in my mind, and the Wilko attitude should prevail. But this is --

QUESTION: And that the Convention would concededly accept that sort of a provision. Now, isn't that what Wilko really said?

MR. AKSEN: We think not.

QUESTION: It's just as though that kind of a provision was written into the Act?

MR. AKSEN: No, because I think when you talk of

public policy, Wilko would have had to have said that you cannot not only not agree to arbitrate future disputes, but you could not agree to arbitrate an existing dispute. Wilko did not say that. The dissent clearly pointed out that they were not deciding whether or not two American parties could agree to arbitrate an existing securities question.

QUESTION: Well, what of Mr. Justice Jackson's concurring language, simple sentence: I agree with the Court's opinion in so far as it construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose?

MR. AKSEN: That is correct, but I don't think that is sufficient public policy of the kind required --

QUESTION: No, but that was -- at least Mr. Justice Jackson read Mr. Justice Reed's opinion as a construction of the Securities Act to prohibit, as Mr. Justice White suggested, --

MR. AKSEN: It could and did, Your Honor, in a domestic transaction between two Americans who were fully aware of their local statutory provisions.

QUESTION: Yes.

QUESTION: Did we not have something to say in the Zapata case of the impact on international trade and commerce

if arm's-length transactions by American companies and foreign companies could not freely commit themselves to arbitration? Wasn't there some discussion of that?

MR. AKSEN: You certainly did, Mr. Justice Burger, and we heartily endorse the language from the Zapata opinion if you would have insert "arbitration" rather than that "choice of forum".

We think that all you're doing is moving very slightly from the Zapata case to this one, that we're not really asking the Court here for a very drastic change in American law.

In fact, in domestic law this Court has already ruled that if you have a problem of fraud in the inducement or misrepresentation in Prima Paint, then that is a matter for the arbitrator, between Prima Paint and Zapata, in moving very slightly to another ruling in this case, which would encourage the use of international commercial arbitration.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Aksen.

Mr. Higgins.

ORAL ARGUMENT OF FRANCIS J. HIGGINS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HIGGINS: Mr. Chief Justice, and may it please the Court:

Before turning to what I consider to be some inaccuracies in the statement of facts made by my brethren, I would like to make this observation, after having heard the argument.

The two concessions which have been made here by counsel, which I thought were impliedly conceded in the briefs as well, namely, that (1) personal jurisdiction exists and (2) subject matter jurisdiction exists; that is, the coverage of the Act leads the petitioner in logic to ask this Court to overrule Wilko vs. Swan.

That, I think, is the necessary impact of their position.

Now, why were these concessions made?

Two reasons: one factual; the other legal.

First of all, the petitioner has consistently overlooked the fact that securities fraud was committed in this country within the territorial boundaries of the United States, to the injury of an American citizen.

Recent decisions, including the Leasco case in the Second Circuit, and the Travis case in the Eighth Circuit, have applied the Act to this type of situation, whether

negotiated or not.

So if the Act applies, Section 29(a) must apply as well.

Now, the suggestion has been made that 29(a) should not be the same as 14. Since the language of the two statutes is the same, we fail to see how that can occur.

QUESTION: 29(a) of the '34 --

MR. HIGGINS: Of the '34 Act is identical to 14 of the '33 Act.

Now, what is the ultimate logic of the petitioner's position here?

It is that my client, an American company, is not a person within the meaning of 29(a), which bars any stipulation by any person to waive compliance with the Act. That, we submit, is a matter of statutory logic, construction and policy should not be followed by this Court.

The Convention makes no change in this law. In fact, it expressly accommodates Wilko and 29(a) in international transactions.

Consider the effect, if the Court will, if you were to recognize an exception to this Act, wherever the defendant is a foreigner. Even though he has come into this country, defrauded an American citizen, he is concededly subject to the jurisdiction of the courts, he can escape it because he's a foreigner.

QUESTION: Well, not just because he's a foreigner, but because he made an agreement and is also a foreigner; isn't that it?

MR. HIGGINS: He made an agreement, but the plaintiff in the case is a person, the agreement is a stipulation, Chief Justice Burger, and section 27 of the Act creating exclusive jurisdiction is a provision.

Now, if you concede, as the petitioner has done here, that the Act applies, it must necessarily follow, we submit, that section 29(a) applies; and section 27 also applies.

QUESTION: Well, I could understand and follow that much more readily if you had a Swiss or a German or a French corporation coming into this country, selling securities in the traditional way, issuing them here.

MR. HIGGINS: I would like to address myself to that, because I think this is the heart of Chief Judge Friendly's position in Leasco. There you have securities which were totally foreign, you had a negotiated transaction, you had foreign defendants, and, nevertheless, the court there held, on traditional principles of international law, foreign relations law of the United States, that what was key was not whether the securities were those of a foreign corporation, but whether or not that company, through its representatives, in the concededly negotiated transaction,

came to this country and, here on our soil, defrauded an American citizen.

QUESTION: Yes, but that case didn't involve this question of arbitration.

MR. HIGGINS: No.

QUESTION: And that's the only question here. If you look at the petition for certiorari, it's conceded, rightly or wrongly, that at least, arguendo, this is a security and that there has been an alleged violation of the Securities and Exchange Act of '34. There's only one question presented in the petition for certiorari.

Leasco didn't involve arbitration. It simply involved the applicability of the '34 Act.

MR. HIGGINS: Correct. And that brings us, I suppose, to an analysis, a proper analysis of both 29(a) and Wilko. Because we concededly have power over this man, albeit he's a foreigner, our courts have jurisdiction over him. Just as they had jurisdiction over the defendant in Wilko.

Now, we submit that the petitioner here has mischaracterized this Court's holding in Wilko, or misunderstood it. It is true that that case involved a suit by a customer against a brokerage house. But what the Court had before it, Section 14 of the '33 Act, was again, like 29(a) of the '34 Act, a statute of general applicability. It

purported to benefit or protect any person signing any stipulation agreement or provision, waiving compliance with any portion of the Act.

The majority opinion stated, on its face, the opinion of Justice Reed, that we recognize that under certain circumstances buyers and sellers of securities may bargain at arm's length. But we nevertheless hold that the intention of Congress is better carried out by finding void any agreement to arbitrate a future dispute.

It was a statement of general applicability.

In his dissenting opinion, Justice Frankfurter recognized this. He said: We do not have before us here a case of overreaching, a case of coercion; and he nevertheless concluded in the last sentence: I read the majority's opinion to be a general limitation, a general limitation on the Federal Arbitration Act.

Now, that was the law, as it stood in 1970. Petitioner would have the Court believe that it's we who are trying to expand the law. Nothing could be further from the truth.

The question is whether the Convention repealed section 29(a) and section 14. And, for the reasons which have been outlined already here in argument, we feel that an argument of repealer here is totally without merit.

The State Department, when it prepared a memorandum

for the President, pointed out that these provisions, public policy, incapable of being enforced, are intended to take account of laws which prohibit the submission of certain questions to arbitration.

Wilko is such a holding, section 14 is such a law, section 29(a) is such a law.

Now, the two exceptions --

QUESTION: Mr. Higgins --

MR. HIGGINS: Yes, Mr. Justice --

QUESTION: -- when your client engages in considerable negotiation over where this shall be arbitrated, that's really a throwaway from his point of view, I suppose, since it can never be enforced, he can get some other concession for that and still renege if it comes up.

MR. HIGGINS: Well, I think when you talk about renege, I don't think that parties when they are entering into negotiations of this type assume, or necessarily foresee that there is going to be securities fraud committee, Justice Rehnquist. I think it's the argument that we should say to him: Now, look, if you commit fraud, there is in our country a case called Wilko, or a section 29(a) -- that's an unreal bargaining process, as I understand it.

Also the concept of reneging, if we call this reneging, it's no more reneging than what Mr. Wilko did, or Mr. Boyd, or Mr. Arguilis, or Mr. Alexander.

QUESTION: Except Wilko, I understand, was kind of contract of adhesion, where there wasn't a very substantial bargaining process.

MR. HIGGINS: But I was attempting to point out, Justice Rehnquist, that that's not what that case involved. As that case emerged through the court system, and as it got to the Supreme Court, there was no contention of any over-reaching, coercion and, in fact, Justice Frankfurter mentioned this, he said: I don't see why we're deciding this case this way, because there's no disparity of bargaining power here. No showing that this man had to sign this contract.

QUESTION: Under your view of the law, would the arbitration provision in the agreement that your client signed be applicable to some disputes that arose under the Act?

MR. HIGGINS: I would assume that if there was a straight non-securities violation or breach of contract, it would be applicable, yes.

But what makes this unique and different is the applicability of what Mr. Justice Douglas accurately referred to as the clear provisions of the Exchange Act.

There is no question here we have stock, we purchased stock, within the meaning of 3a-10; no question but what the long-term promissory notes which were issued for securities. Hence, we have a situation here which is similar

to a number of domestic cases, which are known to the parties here, where the Securities Act and the Securities Exchange Act have been applied to the acquisition of all the stock of a business.

They've been applied to acquisitions of interest in close corporations, and in fact this Court expressly said, in the Bankers Life case, that the construction of this Act is to be liberal and that it protects corporations -- protects corporations as well as individuals.

QUESTION: Would your position preclude agreements of the parties with respect to the applicable law, as to how the contract is to be interpreted and enforced?

MR. HIGGINS: No, I don't believe it would, Justice White.

QUESTION: Because the parties here would have stipulate that the law of West Germany or the French law or something would have --

MR. HIGGINS: In fact they did stipulate on Illinois law.

QUESTION: Yes, yes, indeed.

MR. HIGGINS: And this is another factor here, which --

QUESTION: I wondered if you would --

MR. HIGGINS: Yes. Yes.

QUESTION: -- if that isn't a factor in your

argument.

MR. HIGGINS: It hasn't been so far, but I --

QUESTION: But you would suppose businessmen, then, and their lawyers could, if Wilko is followed in this case, nevertheless structure their agreements to obtain the benefits of arbitration.

MR. HIGGINS: Yes. No question. To obtain the benefits of arbitration outside the Exchange Act, and they can also select their applicable law.

QUESTION: Well, they could stipulate to the Exchange Act, but would not the United States --

MR. HIGGINS: No, no --

QUESTION: That's what I'm asking you.

MR. HIGGINS: A stipulation in advance to weigh the provisions of the Exchange Act is void.

In advance. At least in advance.

QUESTION: Well -- so they can't stipulate, they cannot stipulate out of the determination of fraud or not, pursuant to the federal Act?

MR. HIGGINS: Correct. And as I read --

QUESTION: So if that is stipulated, West German law applies in this case, that would have been, you say it would have been pro tanto void, with respect to securities violations?

MR. HIGGINS: That's correct, Your Honor.

QUESTION: As long as under sound principles of international law, the Act would have been applicable at all?

MR. HIGGINS: Yes, and the defendant is subject to the jurisdiction of the court.

QUESTION: Yes.

MR. HIGGINS: We always have this limitation, that he must have done something to bring him within our power to begin with.

QUESTION: Yes.

MR. HIGGINS: And when he has done that something, it ceases to be what's called in the petitioner's brief, quote, "a mere international commercial transaction". The transaction indeed may be international, but that fraud is domestic, and it is that fraud, the domestic fraud, which confers both personal subject matter jurisdiction and gives the plaintiff, the injured plaintiff, the right to access in the United States courts.

Under the '33 Act it would be either State or federal, as he chose, and under the '34 Act it would be within the exclusive jurisdiction of the District Courts.

But you asked about the Illinois law provision. This is again a factor which is probably not necessary to our position in this case; but certainly reinforces it.

As the amicus, the Triple-A points out in his brief, when the parties selected Illinois law, they, ipso

factor, by operation of law selected federal law to the extent that it's applicable.

QUESTION: Well, except that it says the laws of the State of Illinois.

MR. HIGGINS: Right, Justice Stewart, but the Triple-A in its amicus brief pointed out, accurately we believe, that when parties select State law they also select federal law to the extent that that is under the supremacy clause part of the law of the State.

But this is simply another -- quite aside from that legal argument, this is simply another American mexus to this transaction, that here's a party, Scherk, who contracted with specific reference to the laws of this country.

QUESTION: Mr. Higgins, before you go on, why did your client insist that SEV be converted into a Liechtenstein stock corporation?

MR. HIGGINS: The record indicates that there were certain tax considerations, which Alberto-Culver wished to serve.

QUESTION: For the benefit of your client?

MR. HIGGINS: Well, it was for the benefit of having the deal made, it was our wish, Scherk agreed with it, and in order to effectuate the transaction he converted his "Anstalt" into a stock corporation. We purchased the stock and issued the notes.

QUESTION: That is a condition to the obligation to purchase the business?

MR. HIGGINS: Yes, sir.

QUESTION: Right.

MR. HIGGINS: Zapata has been mentioned. Zapata is indeed an important case. But the Chief Justice's opinion in Zapata clearly indicates room and in fact explicitly makes room for this type of case.

The opinion states that: choice of forum provisions should be declared void, if it contravenes statutory or judicially declared public policy.

And in support of that proposition, the Chief Justice's opinion cited Boyd vs. Grand Trunk Western Railroad. Boyd was the first of the string of cases which this Court has decided. There a railroad employee restricted his right of venue under the statute.

In fact, it was after the dispute arose in Boyd. Nevertheless, this Court held that that agreement was void to the extent that it attempted to deprive this man of his right to sue, wherever the statute provided the railroad could be sued.

Boyd was relied on in Wilko.

Now, the Court said in Wilko: We noticed in Boyd that we declared void a post-dispute agreement. We don't have to go that far today, and we're not doing so.

And it was that, I think, that led to Justice Jackson's concurring opinion, leaving open this question of a post-dispute agreement.

We do not have that situation here. If it comes before the Court, an agreement entered into after the dispute arises, different policy considerations are going to be applicable. You'll have the question of whether or not this is akin or analogous to a settlement agreement.

In any event, this Court has not faced or decided that issue, and it is not involved in the case before the Court today.

An argument could certainly be made as a matter of statutory construction that such an agreement should be void, just as this Court held the Boyd agreement was void.

So, summing up, neither of the two exceptions which have been urged here by the petitioner, namely, the exception based upon some concept of disparity of bargaining power or sophisticated people, or the fact that he is a foreigner who chose to come to this country and subject himself to the Act, can hold substance either under the language of section 29(a) or under 14.

The suggestion has been made that there's nothing unusual about a 10b05 case, that this is something very simple to understand. But if this Court were to hold that an arbitration agreement requires adjudication of this matter

before a foreign tribunal, where it's a virtual certainty that there will be unfamiliarity with this Act, then, as this Court noted in Barnhart, the remission of this case, the change of this case from a court to arbitration, would have very definite potential for affecting the underlying substantive right to recovery.

Arbitration is not simply a formal matter, a procedural matter. This Court held in Barnhart, under an eerie question, really, that arbitration versus the court is a matter of substance and can affect and perhaps even destroy the plaintiff's right to recovery.

Under circumstances where the power of review, the development of the record, the lack of discovery, the lack of development of a known body of doctrine for the guidance of the public, and all the other infirmities of arbitration mentioned in Wilko, are equally applicable here.

So, under the circumstances, we ask this Court to follow its holding in Wilko, not to overrule that case, because neither the statute nor the Convention nor any other judicial authority requires or permits it, and to affirm the judgments of the Seventh Circuit Court of Appeals and of the District Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 12:05 p.m., the case was submitted.]