OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1569 & 83-1733

TITLE MITSUBISHI MOTORS CORPORATION, Petitioner V. SOLER CHRYSLER-PLYMOUTH, INC.,; and SOLER CHRYSLER-PLYMOUTH, INC., Petitioner V. MITSUBISHI MOTORS CORPORATION

PLACE Washington, D. C.

DATE March 18, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

- -x

MITSUBISHI MOTORS :
CORPORATION, :
Petitioner :
V. : No. 83-1569
SOLER CHRYSLER-PLYMOUTH, INC.; :
and :
SOLER CHRYSLER-PLYMOUTH, INC.; :
Petitioner :
V. : No. 83-1733
MITSUBISHI MOTORS CORPORATION :

- -x

Washington, D.C.

Monday, March 18, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:02 o'clock p.m.

APPEARANCES:

WAYNE ALAN CROSS, ESQ., New York, New York; on behalf of Mitsubishi.

BENJAMIN RODRIGUEZ-RAMON, ESQ., Hato, Rey, Puerto Rico; on behalf of Soler-Chrysler-Plymouth.

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APPEARANCES: (Continued)

JERROLD JOSEPH GANSFRIED, Assistant to the Solicitor General, Department of Justice, Wshington, D. C., on behalf of the United States as amicus curiae in support of Soler Chrysler-Plymouth.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Cross, I think you may proceed now whenever you are ready.

ORAL ARGUMENT OF WAYNE ALAN CROSS, ESQ.,

ON BEHALF OF MITSUBISHI

MR. CROSS: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents an issue involving the tension between the unequivocal policy of the Federal Arbitration Act, that all private agreements to arbitrate shall be enforced except in those circumstances where countervailing federal policy found in another statute would create such an exception. The tension is between that policy and the judge-made policy initiated in the Second Circuit and followed by four other circuits which holds that antitrust claims may not be subject to arbitration.

In Dean-Witter v. Byrd which was decided by this Court two weeks ago, the Court expressed the purpose of the Federal Arbitration Act in precisely the terms that I think are presented today. It said "The preeminent concern of Congress in passing the act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is

piecemeal litigation, at least absent a countervailing policy manifested in another federal statute."

Mitsubishi in this case submits that the only issue before the Court is whether a party's contractual right to arbitrate antitrust disputes can be frustrated absent such a countervailing federal policy found in a federal statute. The issue, despite the plethora of briefs and issues raised in those briefs, the issue is not what standard should a court apply on the enforcement of an arbitral award, nor is the issue the extent to which an arbitral award on an antitrust claim would have preclusive effect.

Nor is the issue whether or not antitrust cases are subject to arbitration. Now, the parties and the courts agreed that under certain circumstances antitrust cases can in fact be arbitrated.

Finally, this Court is not today, we believe, properly presented with questions of arbitrability of the Puerto Rican State Franchise Act or the Dealers' Day in Court Act. I say that because in the current state of this record, those two claims have been submitted to the Japanese Commercial Arbitration Association by the Respondent, not withdrawn, and I believe probably a decision with respect to their arbitrability on this record is moot.

Thus, I think the only issue that you have to address today is whether or not Mitsubishis right to arbitrate the Respondent's counterclaim against it brought under the Sherman Act can be frustrated by what has been denominated the American Safety Doctrine.

QUESTION: Is there any issue about the arbitrability under the agreement, I mean, that reach?

MR. CROSS: No, Your Honor, the Respondent has raised that issue in their brief in response to our brief, but the fact is that the district court and the circuit court have both reviewed the scope of the agreement and rendered findings.

QUESTION: That unless there is some policy against it, the arbitration would have gone forward under the agreement.

MR. CROSS: That's right. The circuit court specifically reviewed the question of the scope of the agreement, affirmed the district court's decision that the antitrust claims reasonably fell within the scope of the arbitration agreement --

QUESTION: At least that is the way the case comes to us.

MR. CROSS: That's right, and the way the case comes to you is, as the circuit court put it, a question of initial impression, may antitrust cases be arbitrated

as a matter of public policy. I believe that is the only issue presently before you.

QUESTION: I don't really understand that. They argue the contrary, and maybe they are wrong. You've got two courts with you. But they squarely argue, as I read their brief, that the -- it's not arbitrable within the meaning of the agreement.

MR. CROSS: Oh, no, I'm saying I believe the only issue before you is may it be arbitrated. We are contending that antitrust cases can be arbitrated. They are clearly maintaining that they are not arbitrable and that all the circuit court --

QUESTION: But they also maintain that it is not within the scope of the agreement.

MR. CROSS: They maintain that. I --

QUESTION: You just think there is no merit to their argument.

MR. CROSS: What I am saying is I don't think there's any merit, but the circuit court and the district court also didn't think there was any merit. There was a finding of fact on that.

QUESTION: Well, I understand, but at least the issue is before us, I think, under their briefs. Maybe you --

MR. CROSS: Well, I --

QUESTION: There are two cases here, aren't there?

MR. CROSS: Yes, there are.

QUESTION: And that's the --

MR. CROSS: The question presented on the cross-petition does not raise that issue. It is in fairness raised in the brief. The question presented in the cross-petition is may -- to paraphrase the cross-petition, is may a party be compelled to arbitrate a statutory claim which was passed for his benefit? There isn't --

QUESTION: Well, but I suppose you would agree that the Respondent in the case you are arguing could suppcrt affirmance on a ground that is within the reach of the record. I mean, he doesn't need to have cross-petitioned to -- he may argue and say you should affirm because it was never arbitrable at all. The Respondent may certainly do that.

MR. CROSS: I suppose that's right, Your Honor.

QUESTION: Well, then, that's the first point of his brief.

QUESTION: Especially since he presented it to the court below.

MR. CROSS: He presented to the court below

not the issue that I believe is presented in this court. The issue that he presented to the court below is that the words of the arbitration agreement were not sufficiently expansive to take in this particular dispute.

QUESTION: I understand, I understand.

Well, he argued that below, and he is arguing it here. He is entitled to do so.

MR. CROSS: No, he's not argue -- I don't think he's arguing that here I think what he is arguing here, my recollection of what his brief argues before you is that in a general arbitration clause which says disputes between the parties may be arbitrated cannot as a matter of law be broad enough to encompass statutory claims --

QUESTION: I see.

MR. CROSS: -- absent specific agreement.

What was argued in the court below, in both of the courts below, was that the words of the arbitration clause and the description of the disputes between the parties --

QUESTION: Yes.

MR. CROSS: -- were not broad enough to take in an antitrust claim which they said was collateral to the contract.

QUESTION: Yes.

MR. CROSS: The Petitioner Mitsubishi Motors Corporation, is a Japanese manufacturer of automobiles. Respondent Soler Chrysler-Plymouth was a Chrysler distributor in Puerto Rico. Because for historical reasons Chrysler has had distribution rights to Mitsubishi vehicles, it was necessary in entering -- for Chrysler, in entering into its relationship with Soler, to have an arrangement whereby Mitsubishi and Soler could facilitate orders and deliveries of vehicles coming directly from Japan.

Accordingly, Chrysler, or in fact, a subsidiary of Chrysler, Chrysler International, Mitsubishi and Soler entered into what was called a sales procedure agreement. That sales procedure agreement has an arbitration clause providing for arbitration of certain disputes including, according to the circuit court, those disputes now presented in Japan for the Japanese Commercial Arbitration Association.

In 1981 Soler's business practices in effect destroyed its business. Soler became -- was placed in a position where it could not purchase cars from Mitsubishi. A series of negotiations ensued during which Mitsubishi offered to provide various forms of alternative financing to assist in obtaining financing,

basically to facilitate a continuation of the relationship. Soler refused to accept any of the alternatives proposed by Mitsubishi. At the same time, Soler failed to obtain financing itself to purchase cars.

In the meantime, without financing, it ordered from Mitsubishi nearly 1000 cars which were manufactured to specifications for Puerto Rico that rendered them essentially useless anywhere else in the world, and finally --

QUESTION: Why is that, Mr. Cross? I am curious?

MR. CROSS: That was peculiar to standards -- they were manufactured for unleaded gas, which made them virtually useless in the rest of South America which was predominantly leaded gas, and they were manufactured without heaters and defogges, which made them useless in the continental United States, basically putting Mitsubishi in a position that if they didn't go to Puerto Rico, they didn't go anywhere.

At the end of this, Soler terminated its relationship with Mitsubishi, and it is undisputed in this record that Soler said I don't want to have anything else to do with you.

MMC, then being owed approximately $3 million,

requested arbitration pursuant to the arbitration agreement, and moved to compel arbitration pursuant to the Federal Arbitration Act and the convention, in the district court in Puerto Rico. Soler responded somewhat predictably by filing nine counterclaims against Mitsubishi, including a federal antitrust claim, state antitrust claim, a Dealer Day in Court Act claim, and a Puerto Rican Franchise Act claim, so-called Act 75.

Soler also resisted arbitration.

The district court ordered arbitration, and Soler took an appeal. The Court of Appeals denied a petition for stay pending appeal, whereupon Soler submitted all of its counterclaims to arbitration, paid the arbitration fee, and the arbitration proceeded.

As the arbitration proceeded on all claims, including the antitrust claims, the appeal proceeded. The first circuit decided that all of the claims submitted by Soler to arbitration should indeed proceed in the arbitration, but for the federal antitrust claim, whereupon Soler withdrew the federal antitrust claim, and the case was remanded to the district court.

I think that sequence is significant because what Soler did not do is withdraw either the Act 75 claim or the Dealer's Day in Court Act claim at that time.

The circuit court, in reversing, found -- rested solely upon the American Safety doctrine. The circuit court, as I indicated before, found that the arbitration agreement was broad enough to encompass these antitrust disputes, affirmed the referenced arbitration of all other counterclaims and Mitsubishi's claims, and held that but for the American Safety doctrine, the doctrine that says that as a matter of public policy, antitrust cases are too important to be submitted to arbitral panels, it would have affirmed it with respect to that.

We submit that the circuit court's reliance upon the American Safety case is fundamentally at odds with the purpose of the Federal Arbitration Act. As this Court has repeatedly stated, and within the last three terms in Moses Cone, Southland, Dean-Witter and a few other cases, there is a strong, unequivocal policy in -- federal policy in favor of arbitration. That policy, as the Court said in Dean-Witter, leaves no place for the exercise of discretion by the district court but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which there is an arbitration agreement.

QUESTION: Mr. Cross.

MR. CROSS: Yes.

QUESTION: We really have here an international agreement --

MR. CROSS: Yes.

QUESTION: -- to deal with, and do you think that the Court has to necessarily decide the question about arbitrability of domestic contracts?

MR. CROSS: In the context that this case is presented to this Court, I believe you do. I should say I believe there are grounds on which you could decide this without confronting that issue, but the circuit court's rationale for submitting -- for reversing the district court and refusing to permit arbitration was that under the convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under the convention it found an exception to the mandatory nature of the convention, and that exception was in the clause of Article 2 of the Convention that requires that an agreement shall be submitted to arbitration unless it is a matter which is not capable of settlement by arbitration. It seized on that language and took the American Safety case and said that represents a policy of the United States which makes it not capable for resolution by arbitration.

In that context, to at least reserve it in the terms the circuit court cited, I believe you do have to

address that issue.

QUESTION: Do you think the American Safety should be overruled?

MR. CROSS: Yes, I do, Your Honor.

QUESTION: Don't you think that without overruling it we really can't review it?

MR. CROSS: Your Honor, I have to say as much as I would like to say no, you can't, I believe you could decide this case on the basis of Scherk, that the decision in Scherk, if applied to the antitrust laws, or if applied to American Safety in the same way that Scherk was applied to Wilko, if the four corners of the square were filled in, I believe you could decide that issue --

QUESTION: Except that Wilko is a decision of this Court.

MR. CROSS: Well, that's right.

QUESTION: And the American Safety is not, is it?

MR. CROSS: No, but I submit that if you were to decide to do the same thing in American Safety --

QUESTION: Well, we might just disapprove it rather than overrule it.

MR. CROSS: Well, that's right.

I did not read Scherk as overruling -- as

overruling Wilko so much as a limitation on Wilko in international conduct.

I believe you could decide it that way, yes.

QUESTION: But American Safety is not a precedent in this Court.

MR. CROSS: No, it's not.

The Federal Arbitration Act, as you found in Dean-Witter and in Southland last term, has only two exceptions from its coverage. The first is that the contract must be in commerce, and I don't think there's any question about that. The other is that it must be -- it may be revocable only upon grounds as exist for revocation of any contract such as fraud or duress.

QUESTION: Mr. Cross --

MR. CROSS: Yes.

QUESTION: Is it very common for manufacturer-dealer agreements to contain arbitration clauses? Is that a common practice?

MR. CROSS: It is certainly -- I can't speak to the domestic context, Your Honor. It certainly is in the international context. It is because of the tensions and the differing cultural backgrounds, the reference to arbitration is considered, as this Court indicated in Scherk and Bremen, is considered to be an important facet of international commerce.

QUESTION: If you are correct in this case, at least as far as international agreements are concerned, would the dealers ever get their day in court under the Dealer's Day in Court Act?

MR. CROSS: Your Honor, both with respect to the Dealer's Day in Court Act and with respect to the antitrust claims, it's our contention that an arbitral panel is simply an alternative form. We do not understand or certainly accept the proposition that federal statutory claims cannot be adjudicated by arbitrators.

All right, I should really state it. I think that the position of the Solicitor General is that either they will not be considered or cannot adequately be considered, and we reject both of those contentions. My experience and the experience of the law with arbitration is that arbitrators will in fact take antitrust claims. This case is a good example. Soler submitted his antitrust claims to the Japanese Commercial Arbitration Association. Mitsubishi did not object to that. The Japanese Commercial Arbitration Association accepted jurisdiction to determine it. The only reason that the Arbitration Association is not now deciding that case is because Soler withdrew it from its jurisdiction.

The --

QUESTION: Well, what if an arbitrator says, well, I just don't think I need to consider claims under the American antitrust laws; we will just ignore them? Would that -- could that arbitrator -- and then decided against the antitrust plaintiff, would that be subject to attack in this country in the sense that could he then bring a suit under the antitrust laws and not be barred by that arbitrator's decision?

MR. CROSS: Your Honor, my -- yes, I believe so. I believe that if the arbitrator clearly stated that he, notwithstanding the submission of the parties -- I mean, arbitral jurisdiction is determined by the submission of the parties, notwithstanding the submission of both parties that the arbitrator should decide the antitrust issues according to American law, which is the context that we have in this case, if he said, notwithstanding that submission, I refuse --

QUESTION: Or the issue -- or the issue is put before them by an order of a court to one party to submit it to arbitration.

MR. CROSS: Well, in that -- well, as a matter of fact, in this case what the district court did was to dismiss the antitrust claim because of the existence of the arbitration agreement. Soler thereafter did file a

complaint, an antitrust complaint before the arbitrators, and we consented to the filing of that complaint.

QUESTION: Is there any issue before us as to the choice of law? Is there a choice of law provision in this?

MR. CROSS: There is a choice of law provision. The amicus brief filed on behalf of the Commonwealth of Puerto Rico addressed that. The choice of law provision in these contracts -- there are two contracts -- indicates that Swiss law should be applied.

QUESTION: So an arbitrator could say, well, I didn't -- all of these disputes are governed by Swiss law, and so I don't -- I certainly am not going to consider American arbitration -- antitrust claims.

MR. CROSS: Your Honor, I think an arbitrator could do that. I think it might --

QUESTION: Why wouldn't he be bound to?

MR. CROSS: Partly because of the submission of the parties, if the parties submit the issue, the arbitrator is not limited to the issues --

QUESTION: Well --

MR. CROSS: But secondly, I think that --

QUESTION: What if Mitsubishi had said I

object to arbitrating these antitrust claims? There just aren't any claims available --

MR. CROSS: Under Swiss law.

QUESTION: No, under -- they are just -- because Swiss law is to govern, no American antitrust claims need to be considered.

MR. CROSS: The -- if Mitsubishi said that, there are really two hypotheticals. One is if the arbitrators did it sua sponte, and the other is if Mitsubishi did it.

QUESTION: Yes.

MR. CROSS: I believe that the practical result of Mitsubishi having obtained an order to compel arbitration of the antitrust claim, then went to the arbitrators and said there is no antitrust claim available in the arbitration, I suspect it would be estopped and we would see Soler back in the district court in Puerto Rico filing a new antitrust claim very rapidly.

QUESTION: Well, why shouldn't -- why didn't Mitsubishi or why didn't your client in response to the antitrust claim say, rely on the choice of law provision and say that -- just move to dismiss?

MR. CROSS: Well, Your Honor, two points. First of all, we started the action seeking an

arbitration. They counterclaimed, and we moved to compel arbitration of their counterclaims.

Second, we did move to dismiss, but on the merits of the antitrust claims.

Thirdly, it is not at all clear -- and I should be candid, we do not have an opinion of Swiss counsel in the record, but it is not at all clear that under Swiss law that the United States antitrust claims would not be given cognizance. Swiss law could apply to this dispute in two different ways, with respect to the contract claims, the claims could be decided under Swiss substantive law. With respect to claims outside the contracts but related to them, Swiss choice of law provisions would probably apply, and it is not at all clear that under Swiss choice of law provisions a tort or an action in the nature of tort such an antitrust claim would not be -- United States law would not be applied to that.

QUESTION: Well, I take it Mitsubishi anyway decided they would rather arbitrate it than risk Swiss law.

MR. CROSS: Well, we did certainly decide we would rather arbitrate it.

QUESTION: Yes.

MR. CROSS: The Federal Arbitration Act has,

of course, been limited in certain circumstances. For example, the Arbitration Act itself contains certain exemptions for labor related disputes. The fact that there isn't an exemption for antitrust claims in the Arbitration Act is itself significant, I believe, in that the Clayton Act establishing the private right of action under the antitrust laws was passed some ten years before the Arbitration Act, and the Arbitration Act -- or the Congress, in enacting the Arbitration Act, did not see fit to create an exemption for antitrust claims.

Secondly --

QUESTION: I was interested in that comment.

You assume the treble damage remedy was created in 1914 in that case.

MR. CROSS: No, the private right of action, Your Honor. I think the --

QUESTION: 1990.

MR. CROSS: That's right.

QUESTION: The private right of action was created in Section 7 of the Sherman Act, not of the Clayton Act. I know you say the contrary in your brief. I think you are quite wrong

MR. CROSS: That was not my understanding --

QUESTION: I suggest you reread the Sherman

Act.

MR. CROSS: All right.

The -- this Court has also created and found exceptions to the Federal Arbitration Act, most notably in Wilko, and in every instance where an exception from the Arbitration Act has been found by this Court, it has been in the context of finding an expression of congressional intent in another federal statute. That is the proper inquiry, we submit. As this Court said in Dean-Witter two weeks ago, absent a countervailing policy found in another federal statute, the Arbitration Act is mandatory. The excercise that the lower courts have engaged in in finding a public policy exception in their own reading of the importance of the antitrust laws we believe is an usurpation of congressional power and is inconsistent with the decisions of this Court addressing that.

Briefly, the American Safety -- you asked me earlier whether or not I thought the American Safety doctrine should be overruled. Clearly we do. First, we believe it is an usurpation of power. Secondly, the policy balance struck we suggest is wrong, that the concern expressed by the Second Circuit in the American Safety and the concern expressed by the Solicitor General in this case that somehow the antitrust laws

will not be adequately enforced simply flies in the face of the experience that we have had with arbitration over the last 50 years.

The fact of the matter is arbitrators will take disputes of this nature. They have been willing to do it in the past. With the increasing trend toward international arbitration, more and more cases of greater and greater complexity are being submitted.

QUESTION: I suppose it is irrelevant, but it was a prety good panel, wasn't it, in American Safety.

MR. CROSS: Yes, it was a good panel.

The second -- and what I think, what I suspect is at the core of the suspicion that the American Safety court and its progeny and the Solicitor General in this case has toward arbitration of antitrust cases is really a suspicion that arbitrators somehow will not be objective or competent to handle a problem, and I submit that the -- as detailed in the amicus brief of the International Chamber of Commerce, the decrease of sophistication that arbitrators bring to these arbitrations, the complex issues that they handle on a routine basis makes them perfectly capable of arbitrating complex or simple antitrust cases.

QUESTION: At least as capable as 600 different federal district judges and juries that

serve.

MR. CROSS: Your Honor, I couldn't have said it better myself. The world is imperfect, but three arbitrators sitting in Paris under the auspices of the International Chamber of Commerce or sitting in Japan, three law professors sitting in Japan I submit are more likely to give perfect credence to the antitrust laws than six jurors, howeve well instructed. The limits on instruction --

QUESTION: Is there any claim that this is a contract of adhesion at all?

MR. CROSS: There are suggestions throughout the briefs that it is. There has never been a claim presented in either lower court that it is. The evidence that is in the record suggests the contrary.

For example, there are two contracts here, one between Soler and Chrysler, which was the primary dealer relationship. Soler was primarily a Chrysler dealer. He incidentally sold Mitsubishi cars. In the Chrysler-Soler relationship there is no arbitration clause. The arbitration clause exists only in the Mitsubishi-Soler relationship.

I submit that if this was a contract of adhesion imposed on Soler by Mitsubishi and Chrysler acting jointly, that it would not have been so limited.

Secondly, the suggestion that it is a contract of adhesion is belied by the Respondent's own arguments where in the context of arguing both in the lower court and now in this court slightly different arguments, that somehow the arbitration clause was narrowed, was not broad enough -- in the lower court they argued that it wasn't broad enough to encompass these particular factual disputes, in this court they argue that it is not broad enough to encompass statutory claims, that is a peculiar argument in the context of arguing that the clause was imposed by defendant seeking to avoid liability.

If anything, it would have -- the broadest possible clause would have been imposed. The fact is these agreements were freely negotiated agreements, and according to the Federal Arbitration Act and the convention we submit should be enforced.

I would like to reserve some time for rebuttal.

The final comment that I would make at this point is that leaving aside the -- leaving aside the American Safety doctrine, the Federal Arbitration Act and the convention, I believe this Court must reverse the lower court solely based on Scherk. Read most charitably, the circuit court's decision with respect to

our Scherk argument is that the securities laws simply aren't as important as the antitrust laws, that this Court was prepared to limit its own holding in Wilko in the international context but should not be willing to limit the second Circuit's holding in American Safety to the domestic context because the securities laws at stake in Wilko were somehow not as important as the antitrut laws at stake here.

We submit that the language of the United States v. Naftalin conclusively rebuts that argument. The fact is the securities laws were passed in order tc restore integrity to the financial markets and the economy of this country. They do incidentally protect individual investors, there is no question about that, but they go as much to the fabric of this nation's economy as the antitrust laws do, we submit, and the attempt to distinguish Scherk on that ground cannot stand.

I would like to reserve the remainder of my time for a short rebuttal if possible.

CHIEF JUSTICE BURGER: Very well.

Mr. Rodriguez-Ramon.

ORAL ARGUMENT OF BENJAMIN RODRIGUEZ-RAMON, ESQ.

ON BEHALF OF SOLER CHRYSLER-PLYMOUTH

MR. RODRIGUEZ-RAMON: Mr. Chief Justice, and

may it please the Court:

This case presents before the Court the question as to whether a federal district court in San Juan, Puerto Rico or an arbitration panel in Tokyo, Japan is the appropriate forum to adjudicate controversies that appear in an action.

Counterclaims filed before the district court in San Juan under the United States antitrust statute, under the Automobile Dealer's Day in Court statute, under the Puerto Rican Act 75 statute apoproved by the Puertc Rican legislature for the protection of local distributors, and under the local antitrust statute.

The matter develops in the context of a distribution agreement executed between three parties, Chrysler International, S. A. Corpcisa, that's the wholly owned subsidiary of Chrysler Motor Corporation, Mitsubishi Motor Corporation, a subsidiary of Mitsubishi Heavy Industries, and partly of Chrysler Motor Corporation, and Soler Chrysler-Plymouth, a Puerto Rican dealer, engaged in the sale, distribution and sale in Puerto Rico of automobiles.

Basically, the facts as described by Mr. Cross are correct except with regard to a few particular areas. For instance, this is a contract that is executed back in October 31, 1979, for the distribution

of automobiles, and immediately after execution the grantor or manufacturer imposes so-called minimum sales volume for the year 1982 in the order of 1900 vehicles, more or less. Soler surpasses that quota extensively during that year. Soler sells more than 4000 vehicles.

It made out to Mitsubishi for the following year --

QUESTION: You say the quota was 1900 and they sold -- the quota was 1900 --

MR. RODRIGUEZ-RAMON: 1992, sir.

QUESTION: And they sold 4000?

MR. RODRIGUEZ-RAMON: Over 4000, yes.

For the following year, Mitsubishi, induced by the idea that Soler was selling a lot of automobiles in Puerto Rico and creating a substantial market, increased that quota to 4,750 automobiles, 236 percent. Despite that, Soler tried to comply with the quota and ordered, in its enthusiasm to sell more car, ordered more cars possibly than it should have ordered.

By the year 1981 it so happened that the market in Puerto Rico was extremely soft for this type of vehicle, and then Soler had to do something. Soler could not pay for the cars just on the basis of relying on sales in Puerto Rico because the market was very, very bad for sales of automobiles in Puerto Rico during

that year.

Soler tried to convince Mitsubishi repeatedly, and in this end, enlisted the aid of the different other two dealers in Puerto Rico in order that Mitsubishi would permit transshipment to the United States or to South America. The theory of Soler was that the other importers of Japanese vehicles, to wit, Toyota, Nissan, etc., were authorized to divert to the continental United States and in fact did divert, and it so appeared in the record, substantial amounts of cars.

Originally Mitsubishi took the position that they could not agree because this was, and I quote, "an issue with a tint of political complications," July 1981. Again Soler tried to convince Mitsubishi, and this time it was not Mitsubishi but Chrysler Motor Corporation, Chrysler Corporation, that answered in a telex that they could not agree because they had agreed with Mitsubishi to divide markets, to allocate markets and so certain dealers order on the basis of so-called negotiated volumes.

Soler kept insisting with Mitsubishi and with Chrysler, eventually received an order from Mitsubishi sometime in September 1981 to the effect that every efforty concerning the possibility of transshipment had to be stopped by Soler, and reiterated that there were

agreements between Chrysler, Chrysler International also, and between Mitsubishi, that prevented this type of transshipment.

By then and not by its counterclaim in the federal court, by then, February 1982, Soler for the first time, for the first time indicated in writing to Mitsubishi that this was in restraint of trade and it was against the law. That happened, for our justices, that happened a few months before the filing of the action by Mitsubishi before the federal district court in Puerto Rico.

Mitsubishi filed to compel arbitration. Soler answered and counterclaimed on various grounds. The district court in Puerto Rico heard argument on both sides and decided that all the claims involved in this proceeding were arbitrable and had to be arbitrated before the arbitration panel in Japan.

On this occasion, Soler took an appeal to the United States District Court for the First Circuit. In that occasion, as also as it did in the lower court, Soler insisted, among other particulars, that the clause involved in this proceeding was narrow. In fact, the Court of Appeals addresses that issue specifically because of the fact that it was addressed on appeal, and it said, and I quote, its opinion, Soler answers that it

never specifically agreed to arbitrate controversies that arose under such statutes as the Sherman Act, etc.

So I believe that it should be very clear that from the outset, we did argue that this was a narrow clause, that it did not encompass the different claims that we are talking about today, and that it was limited to certain controversies that appeared from the clause itself, to wit, controversies under paragraph 1 to 5, 1(b) to 5, which has controversies that have nothing to do with statutory claims to this Court.

QUESTION: Now, Mr. Rodriguez-Ramon, both the district court and the Court of Appeals decided this question against you, didn't they?

MR. RODRIGUEZ-RAMON: Yes, that's correct.

QUESTION: So you have a fairly hard row to hoe here I would say --

MR. RODRIGUEZ-RAMON: Yes, Your Honor.

QUESTION: -- in getting us to change that.

MR. RODRIGUEZ-RAMON: That is correct, Your Honor. But I believe when they decided that issue against us, they were wrong, and I will tell the court why, most respectfully.

We are aware of the policy of this honorable Court in favor of arbitration. In fact, arbitration is an method that is supposed to be simple, inexpensive for

the revolution of different controversies. Likewise, we do realize, do realize that arbitration is a method that promotes judicial efficiencies, particularly in these days when judicial resources are so scarce.

However, however, even though we believe that that's a salutory policy, we believe that it should not go beyond the policy itself. In other words, the mere fact that arbitration agreements are to be construed liberally does not necessarily mean that they should be construed in such a way as to encompass particulars and conditions and terms that the parties did not agree to arbitrate. In particularly this case, this is very important because the arbitration, it so happened, is suppose to take place about 9000 miles from Puerto Rico in Japanese -- and I don't have any problem with the language except for the cost that it entails for our time.

It entails going to Japan himself with his American attorneys. It entails having translators. It entails transporting from Puerto Rico not only documentary evidence, but accountants, witnesses, extra witnesses. It means that Mr. Soler will have to engage in all this costly litigation in Japan, and by the way, let me point to the court that at this stage Soler Chrysler-Plymouth is a Chapter 11 debtor before the

Bankruptcy Court of Puerto Rico.

But going back to the closest panel or not, this Court has stated that arbitration is a matter of contract, and a party cannot be required to submit to arbitration in a dispute which it has not agreed so to submit. These facts have been reiterated also by lower courts, circuit and district.

QUESTION: Is it your contention that none of the disputes between Mitsubishi and Soler were subject to arbitration?

MR. RODRIGUEZ-RAMON: That is correct. We say that none of the disputes under the antitrust statutes, under the Automobile Dealers' Statute, under Act 75, under our local antitrust statutes, were even considered by Mitsubishi a possible avenue.

QUESTION: But are there other disputes than those you hae just mentioned in the case?

MR. RODRIGUEZ-RAMON: Yes, sir.

QUESTION: And are those subject -- are those covered by the arbitration?

MR. RODRIGUEZ-RAMON: Yes, sir.

QUESTION: Then wouldn't Soler have to go to Japan anyway to arbitrate those?

MR. RODRIGUEZ-RAMON: Not necessarily, Your Honor, not necessarily, because we believe that the

facts are so intertwined -- and I know I am going to be faced with Dean-Witter, but the problem that we have with the nonapplicability of Dean-Witter is that Dean-Witter s an action solely under the Securities Act in regard to a claim under common law principles. In other words, this honorable Court distinguished two types of claims there, and in fact, the defendant there did not move for arbitration concerning the securities actiCn because that was -- Wilko was applied.

The Wilko case prevented the defendant in that occasion from moving to arbitration. The defendant only moved for knowledge on the common law claim and not on the securities claim because they said that the two could continue at the same time, and the other one could not necessarily -- unnecessarily, is not necessarily precluded in terms of the adjudicated of its facts in the securities claim.

We say that this clause was inserted in the contract by Mitsubishi, in a printed contract by Mitsubishi executed in Japan in where there was no negotiation. I don't believe, and I disagree with my brothgr Mr. Cross, when he state that there were negotiations, negotiations leading to the contract.

This is a printed contract. This is a printed contract in which Soler was faced -- with whch Soler was

faced when he was in Japan in a take it or leave it situation. Soler wanted to distribute Mitsubishi's automobiles in Puerto Rico. In fact, Puerto Rico is a very good market for small cars, and Soler wanted to take advantage of that. However, there were no negotiations that could lead to the possibility of an arm's length transaction as happening.

QUESTION: What do you say to your opponent's argument that if it is a -- you had a take it or leave it situation, why did they write an arbitration clause that wasn't as broad as they contended? It seems to be somewhat inconsistent.

MR. RODRIGUEZ-RAMON: I believe they wrote a very narrow arbitration clause, Your Honor, intendedly. They could never imagine that two courts of the United States, the district court in Puerto Rico and a separate Court of Appeals in Boston, could interpret that clause to the extent that it was interpreted by those two courts. I believe that Mitsubishi only considered, only considered the possibility of arbitrating commercial contractual controversy.

The best evidence of that is that Mitsubishi in the clause itself explicitly states the paragraphs that are covered in regard to the controversies. Another evidence of that is that for ease of

determination that appears in paragraph 7 is not included between 1 and 5. Other particulars, if the contract is examined, will --

QUESTION: It would seem to me that if arbitration in Japan is a great advantage to them, that they would have insisted on having all statutory claims arbitrated, too, if they were dictating the terms.

MR. RODRIGUEZ-RAMON: I agree, sir, but they did not. But they did not.

QUESTION: I see.

MR. RODRIGUEZ-RAMON: They probably did not have that in mind, and they probably could never imagine that two courts ino the United States could decide in their favor.

But let's assume, let's assume arguendo, let's assume arguendo that the clause is ample. Let's assume that it is not as narrow as we believe it is. Even so, even so, we respectfully submit that all these four claims are not suitable for arbitration. This honorable court has recognized on various occasions that there are differences between so-called statutory claims and contractual claims. Examples of that are the cases of Alexander in the Civil Rights Act context, the case of Barrentine in the Fair Labor Standards Act context, claims under the Securities Act of 1973 -- Wilko is just

one -- and of course, lower court cases to the effect that antitrust actions and during complex -- with the possibilities of arbitration that the Federal Arbitration Act contemplated, the Court in the American Safety referred to this type of claim as statutory claim. It utilized the same wording that the Supreme Court has utilized in these other cases.

Why is it so? I believe it is important to signify before the Court that this trend of distinguishing between statutory and contractual claims is a recognition that this Court has given to serious and important public policies approved by Congress. For instance, Civil Rights litigation, this honorable court has considered that civil rights claims should be tried befor a court and not before arbitrators, and if they are tried before arbitrators, they do not have neither collateral nor effect in the court action; Fair Labor Standards Act litigation, and things of this sort.

We respectfully submit also that both the convention and the Federal Arbitration Act allow for this type of distinction. The Federal Arbitration Act in paragraph 2 states that this type of contract can be enforced if they have an arbitration clause except upon such grounds as exist at law or in equity for the revocation of any contract.

The same thing can be said about the convention. The convention has similar language that was not utilized bu the Honorable Judge Coffin upon resolving that the antitrust claims exercised by Soler could be exercised in the judicial forum.

Finally, in terms of antitrust litigation, what are we talking about? An antitrust litigant in this country has a right to litigate before a court and before his peers. He is entitled to have a trial by jury. He is entitled to be heard by 12 of his peers concerning whether the defendant has committed, has so committed a restraint of trade. And that --

QUESTION: Well, why is that right that you say the litigant has in this proceeding any different than the claim made in Alberto Scherk -- or Alberto-Culver v. Scherk?

MR. RODRIGUEZ-RAMON: Well, in this case, Your Honor, in this case, this claim is of the constitutional rank. So this honorable court said in --

QUESTION: An antitrust claim is of constitutional rank?

MR. RODRIGUEZ-RAMON: No, no, litigation of an antitrust claim before a district court, U.S. District Court, and before a jury, the mere fact that the complainant has a right to be heard by a jury and to

adjudication through a remedy by a jury has constitutional rank.

QUESTION: But the plaintiff in Alberto-Culver I think could have made that same claim, couldn't he?

MR. RODRIGUEZ-RAMON: Yes, yes.

The only difference I see with Alberto-Culver in this case is that in that case you had a truly international agreement. In this case you may say that this contract looks like an international agreement, sir. However, this honorable Court explained what did it mean in characterizing as international the contract involved in the case of Scherk.

For instance, the Court said you need two nationals, one from -- a foreign national and an American national. That is met in this case. You need to have negotiations outside of the continental area. There were no negotiations in the case.

And most significantly, and I want to stress the words "most significantly" because they were recognized by the court, the court said the performance of the contract is to be carried out in a European country. In this case, the performance of the contract, which is most significantly stressed by the court, is to be carried out in American soil, Puerto Rico.

So I say that Scherk, Scherk, as such, I

cannot accept as applicable to this set of facts, just like that. This could be an international agreement, but a truly international agreement within the context of Scherk, I would respectfully submit, is not the case of Soler with Mitsubishi.

Finally, I believe the Solicitor General will address in more detail the issue of the nonapplicability of antitrust claims. The case of Southland, which has not been mentioned, I believe is not applicable. In Southland you only had a claim under the Franchise Act of California, a local act. In this case you have a claim under the Antitrust Act, you have a claim under the Automobile Dealer's Act which entitles a claimant, an automobile dealer, to his day in court, day in court.

I wonder whether all these rights can be waived through a stipulation for arbitration someplace in the world. The consequence of a contrary holding by this honorable Court, I respectfully submit, are ominous, ominous. All grantors of principal, foreign or even Americans, since they have subsidiaries some places in the Caribbean or in Europe or some other place, can impose processes of this sort and oblige people that are protected by statute that it can name strong policies to protect the small ones against the big ones, all these

people will have to go to arbitrate outside of the continental United States, in foreign arbitration areas different from the United States, possibly under different languages, under different juridical criteria for the adjudication of controversies.

We are not familiar --

CHIEF JUSTICE BURGER: Mr. Ganzfried:

ORAL ARGUMENT OF JERROLD JOSEPH GANZFRIED, ESQ.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF SOLER CHRYSLER-PLYMOUTH

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

We believe that the Court of Appeals properly accommodated the three interests that are at issue in this case, and those interests are, one, the primacy of antitrust law in preserving our economic system of free competition; two, the general encouragement of arbitration as a means of resolving private disputes; and three, our commitment to an international convention that requires enforcement of agreements to arbitrate with very limited exceptions.

The convention contemplates that each nation may withhold from arbitration certain limited matters of special national interest. It is a safety valve in the convention, and for the United States, that exception

covers antitrust

Now, it is central to our argument that the antitrust laws in the United States are of signal importance. They are designed to preserve competition, not just to protect competitors. They ensure the proper operation of the free enterprise system, and because of this systemic structural design, antitrust claims, even private antitrust claims, always touch on the strong public interest in competition. And it is this factor that sets antitrust actions apart from other commercial disputes.

I would like to refer to a statement by this Court in 1930 in the Paramount Famous Lasky case in which the Court said that not only the prohibitions of the Sherman Act but the remedies which it provided are coextensive with the broad conceptions of public policy.

Now, among the remedies that Congress provided in order to protect the public interest is the treble damage action in federal court. These private actions have been a vital part of Sherman Act enforcement for 95 years, and it is our position that parties cannot agree in advance to cast aside that statutory remedy.

QUESTION: Suppose an arbitration agreement were drafted that all claims including any possible

claims under antitrust theories would be submitted to final binding arbitration, and went on to provide that the arbitrators shall be three senior United States judges or three senior state Supreme Court justices?

MR. GANZFRIED: We would take the same position, that that would not be an enforceable agreement. The reasons are essentially these: no matter how qualified, no matter how experienced the arbitrators, the fact is that they are operating in a system in which there is no substantive appellate review, and as this Court is quite familiar -- of any legal decisions that they may make on the antitrust issues. The arbitrators also do not have compulsory process which the parties would be entitled to in federal court --

QUESTION: What is so bad about having no appellate review?

MR. GANZFRIED: The problem is that if there is an error in the application of the antitrust laws, and we are assuming now that the arbitration panel decides to apply the American antitrust laws, which is not at all certain in this case, there is always the possibility of error.

QUESTION: Yes, but that's what people bargain for in an arbitration. They say they would rather have

a relatively quick and speedy solution than wait for the answer five years later after an appeal.

MR. GANZFRIED: We say that when the parties are resolving a dispute that is essentially just between the two of them, they are perfectly free to do that, but when it comes to the antitrust laws and what they are talking about is an impact on competition, the public interest does require that the parties not discard that remedy, not discard the public interest in advance on a blanket basis.

Well, I would like to --

QUESTION: I suppose that even if the antitrust claims are arbitrable, that it isn't binding on customers, it isn't binding on the government antitrust enforcement people as well.

MR. GANZFRIED: That's right, but it --

QUESTION: So there still are mechanisms in place --

MR. GANZFRIED: Not necessarily. There is -- one answer to that is that it is always possible that the arbitrators, rather than applying the antitrust laws too leniently, will apply it too harshly and will penalize conduct that is in fact procompetitive. In that event, there would be no other party to come in to undo that damage, and you might have a possibility of

deterrence of the hard competition that the antitrust laws were designed to promote.

QUESTION: That wouldn't restrain the Department of Justice, would it?

MR. GANZFRIED: If the conduct was --

QUESTION: Just because the parties were bound by the agreement --

MR. GANZFRIED: But if the arbitrators had incorrectly concluded that conduct was permissible under the antitrust laws, the Department of Justice could bring an action. If the arbitrators had incorrectly concluded that the conduct was unlawful when in fact it was conduct that should have been encouraged, there would be nothing for the Department of Justice to do.

But in any event, the design of the public and private attorney general enforcement of the antitrust laws was put in place with the expectation and the encouragement of the private actions as a necessary supplement to private -- to governmental enforcement. It was not intended that actions by the Department of Justice be the sole mechanism for enforcing the antitrust laws, and that has not been the case back to 1890.

There is also the possibility in these arbitration clauses that a manufacturer could put

arbitration clauses in its contracts with all of its distributors and in a fairly effective way immunize itself from the American antitrust laws because it would now have arbitration clauses with all of its direct purchasers, so they couldn't bring an antitrust action in federal court. The indirect purchases would lack standing under Illinois Brick. And it would be a nice, tidy buffer from the American antitrust laws that would thereby be created. And that is contrary to the public policy, that is contrary to the primacy of the antitrust laws in our economic system.

We also think that it is contrary to what Congress intended in the antitrut laws land in the arbitration laws.

QUESTION: Well, Congress certainly never said so expressly, did it? It passed the Arbitration Act after the antitrust act was in place, and at least it is hard to find any reference by Congress to a desire to exempt antitrust actions from arbitration.

MR. GANZFRIED: There is no express statement to that effect. As we develop in the brief, the history of the antitrust laws and the history of the enforcement of the antitrust laws strongly indicates that it was not even considered a remote possibility worth discussing that antitrust actions would be subject to arbitration.

There is no suggestion at any point prior to the American Safety Equipment case or subsequent to it of any indication that an American antitrust action had been arbitrated by anyone anywhere.

And certainly, given the antiarbitration climate that existed in 1890, we can certainly suggest that Congress had no intention of supplanting the enforcement scheme that it put in place with an arbitration system that would not be subject to review on a substantive legal basis by any court.

We think it is contrary to what Congress intended in 1890. In 1890, Congress was combating companies that were using contracts to restrain trade, and appointed private attorneys general, gave them the weapon of the treble damage action to preserve the public interest and to protect it. We think it would be directly contrary to that purpose for this court now to disarm those private attorneys general and say that companies could as a matter of contract disarm the private treble damage action.

We have problems with submitting these cases to arbitration also in terms of remedy. As it has been mentioned in this case, it is by no means clear that Swiss law interpreting a contract which is deemed by the choice of law provision in the contract to have been

entirely performed in Switzerland, would say that American antitrust law is applicable to a contract entirely performed in Switzerland

There is a further shortcoming with respect to the particular arbitration rules at issue here, and that is that we note that under the rules of the Japanese Commercial Arbitration Association, the testimony that is taken is not taken under oath. That, too, is an important right that a party would have that ought to be preserved in his pursuing his treble damage action.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Cross?

ORAL ARGUMENT OF WAYNE ALAN CROSS, ESQ.,
ON BEHALF OF MITSUBISHI -- Rebuttal

MR. CROSS: A few comments, Your Honor.

QUESTION: Would you comment at some point on that last point, the absence of the oath taking?

MR. CROSS: Your Honor, I can't. I know that's in the rules, but other than -- evidence is submitted both in writing and orally before the panel, but it may be that the oath taking process has something to do with the culture of Japan where taking an oath doesn't have quite the significance that it does here in the sense that --

QUESTION: Well, then, the arbitrators have

got to pass on the credibility of the people.

MR. CROSS: I think the arbitrators do, Your Honor. I think the point that the Solicitor General makes primarily is -- I think is a straw man. It is setting up the proposition that the antitrust laws will not be enforced in an arbitration context, and that simply flies in the fact of the arbitral process itself.

But what an arbitration agreement does do to an antitrust claim is require that it be adjudicated in a different forum according to different procedures freely agreed to by the parties. I believe that's what the Federal Arbitration Act and the convention contemplates.

Secondly, the suggestion that --

QUESTION: May I ask you on the procedure, what about discovery in an arbitration? Discovery is a big part of antitrust litigation.

MR. CROSS: The discovery in our arbitration proceedings before the various arbitration associations is left largely to the discretion of the arbitrators themselves, and in practice, that means largely to the discretion of the parties.

There is no doubt that an arbitrator or a panel of arbitrators can say we simply won't permit

discovery. The practice before most of the major arbitration associations is that the parties attempt to agree upon the scope. There is, to be sure, a limitation on compulsory discovery at least with respect to tribunals sitting overseas. Tribunals sitting in the United States, of course, can't avail themselves of the domestic courts, and for example, they issue subpoenas.

The suggestion by the Solicitor General that antitrust cases cannot be effectively adjudicated in arbitration is of course belied by the fact that in an after-dispute clause, apparently everybody agrees it is perfectly appropriate to adjudicate antitrust disputes, and that the law and the nonappealability issues do not seem to bother anybody, including the Solicitor General in that context.

More significantly, however, is that the convention was passed, was adopted and ratified by this nation in order to implement the kind of uniformity and certainty in the international scene that was discussed in Bremen and in Scherk, that for international business to thrive, it is necessary that people of different cultural and legal background with natural suspicion have uniformity.

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

(Whereupon, at 3:03 p.m., the case in the above-entitled matter was submitted.)

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#83-1569 - MITSUBISHI MOTORS CORPORATION, Petitioner V. SOLER CHRYSLER-PLYMOUTH, INC.; and

#83-1733 - SOLER CHRYSLER-PLYMOUTH, INC., Petitioner V. MITSUBISHI MOTORS CORPORATION

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BY Paul A. Richardson

(REPORTER)