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I. Introduction

With the growth of international commerce,\(^1\) arbitration has surfaced as an attractive alternative to traditional litigation in the resolution of international commercial disputes.\(^2\) The popularity of arbitration can be attributed to its speed, flexibility, economy, and neutrality.\(^3\) Irrefutably, the current trend among U.S. courts is to honor international commercial arbitration agreements, even with respect to matters previously considered to be strictly within the jurisdiction of the courts.\(^4\) The reticent impetus behind this trend has been judicial concern for the development of international com-

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2 Perlman, *New Approaches to the Resolution of International Commercial Disputes*, 17 *Int’l Law* 215, 225 (1983). Conventional litigation presents several problems in international disputes: (1) because there are no internationally recognized jurisdictional rules, a given dispute may fall within the jurisdiction of more than one country’s courts, thus fostering potential forum shopping; (2) the evidentiary and discovery rules vary from country to country; and (3) U.S. courts do not automatically enforce foreign judgments, and vice versa. *Id.* at 219-21.


4 See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (ordering arbitration of international antitrust claim); *infra* text accompanying notes 103-18; Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975) (upholding arbitration of international dispute involving bankruptcy); *infra* text accompanying note 100; Scherk v. Alberto-Culver Co., 417 U.S. 506, *reh’g denied*, 419 U.S. 885 (1974) (compelling arbitration of federal securities claim based on arbitration clause of an international commercial agreement); *infra* text accompanying notes 91-99.
coupled with a desire to ensure neutrality and predictability in the resolution of international disputes.\(^5\)

In *Marchetto v. DeKalb Genetics Corp.*,\(^7\) the United States District Court for the Northern District of Illinois continued this trend, ordering arbitration of breach of contract and tort claims arising from an international shareholder dispute.\(^8\) This Note examines the legislative and judicial trend toward enforcement of international arbitration agreements, as well as the rationale behind and the consequences of the *Marchetto* decision. Part II provides a brief overview of the *Marchetto* facts and holding. Part III traces the legislative development of international commercial arbitration in the United States and highlights relevant case law which influenced the outcome in *Marchetto*. Part IV thoroughly analyzes the *Marchetto* decision, its ramifications, and alternatives which the district court failed to pursue. Finally, this Note concludes that the *Marchetto* ruling is theoretically and logically sound, paying due respect to applicable legislative developments and recent judicial mandates.

**II. Overview of the *Marchetto* Facts and Decision**

In *Marchetto*, the parties to the dispute were shareholders in DeKalb Italiana, an Italian corporation formed in 1963 as a joint venture between a U.S. corporation, DeKalb Agricultural, and two Italian citizens, the Marchetto Group.\(^9\) When incorporated, DeKalb Agricultural and the Marchetto Group each owned fifty percent of the outstanding common stock. Their shareholder agreement provided a right of first refusal. This provision restricted the transferability of shares by requiring the consent of the remaining shareholders and an opportunity for such shareholders to purchase the stock.\(^10\) Some time thereafter, the agreement was amended to provide for resolution of shareholder disputes by a panel of arbitrators in Rome, Italy.\(^11\)

\(^5\) See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972), in which the Supreme Court announced:

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

*Id.* See also infra text accompanying notes 80-88.

\(^6\) See *Mitsubishi*, 473 U.S. at 629. The Court concluded, “[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement [to arbitrate].” *Id.*

\(^7\) 711 F. Supp. 936 (N.D. Ill. 1989).

\(^8\) *Id.* at 939.

\(^9\) *Id.* at 937. DeKalb Italiana engaged in the business of manufacturing and selling agricultural and vegetable products. *Id.*

\(^10\) *Id.*

\(^11\) *Id.*
INTERNATIONAL ARBITRATION

After DeKalb Agricultural changed its name to DeKalb Corporation ("DeKalb"), it sold its shares in DeKalb Italiana to DeKalb-Pfizer Genetics. DeKalb implemented such sale without the consent of the Marchetto Group and without first offering the Marchetto Group an opportunity to purchase the shares, thereby breaching the contractual right of first refusal. In 1988, DeKalb reorganized into three companies: DeKalb Energy (successor corporation to DeKalb), DeKalb Genetics, and Pride Petroleum Services, Inc.

The Marchetto Group filed a complaint based on the unauthorized sale of DeKalb Italiana stock and sought recovery arguing two theories: (1) breach of contract, and (2) tortious interference with the shareholder agreement. Collectively named as defendants were DeKalb Energy, DeKalb Genetics, Pfizer Genetics, and DeKalb-Pfizer Genetics. The defendants thereafter moved to dismiss the Marchetto complaint, insisting that the shareholder agreement mandated arbitration of the dispute in Italy.

The court cited the recent legislative and judicial trend toward enforcement of international arbitration agreements and ordered arbitration of the dispute in Italy, notwithstanding the Marchetto's contention that a unique Italian law would invalidate the arbitration clause. Explaining that the validity of the arbitration agreement must be determined by reference to U.S. law, the court concluded that the possibility of nonenforcement by Italian arbitrators was not dispositive of its duty to compel arbitration. Because such rationale applied to the tortious interference claim as well as the breach of contract claim, the entire dispute was to be arbitrated in Italy, and the plaintiffs' claims were dismissed without prejudice.

12 DeKalb-Pfizer Genetics is a partnership formed between DeKalb Corp. and Pfizer Genetics, Inc. Id. at 937-38.
13 Id. at 938.
14 Id. at 938. Moreover, DeKalb Genetics replaced DeKalb as a partner in DeKalb-Pfizer Genetics. Id.
15 Id.
16 DeKalb Energy is the successor corporation to DeKalb Agricultural, the party with whom the Marchettos initially entered into the shareholder agreement. Id. at 937-38.
17 DeKalb Genetics is one of the three companies which emerged from the DeKalb reorganization in 1988. Id. at 938.
18 Pfizer Genetics is the party with whom DeKalb entered a partnership, thereby forming DeKalb-Pfizer Genetics. Id. at 937-38. See supra note 12 and accompanying text.
19 711 F. Supp. at 937-38. See supra note 12 and accompanying text.
21 711 F. Supp. at 938-41. The Marchetto Group contended that a unique Italian law would preclude enforcement of the arbitration agreement because three of the four defendants were not parties to the arbitration agreement; i.e., DeKalb Energy, as successor corporation to DeKalb Agricultural, was the only defendant actually a party to the shareholder agreement.
22 Id. at 939.
23 Id. at 939-41.
III. Historical Background of International Commercial Arbitration

Legislative developments in the United States have evinced the growing popularity of arbitration as an alternative form of dispute resolution. In 1925, Congress promulgated the Federal Arbitration Act, thereby heralding the beginning of clear congressional support for a national policy respecting arbitration agreements. Subsequent Supreme Court decisions have broadly construed the Arbitration Act.

The Act provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Moreover, the Act enables a party to petition a U.S. district court for an order compelling a defendant party to proceed to arbitration, and it provides for the appointment of arbitrators and for the entry of an arbitral award. It also empowers courts to stay any litigation commenced in disregard of the arbitration agreement.

Despite past reluctance to join any multilateral treaty supporting international arbitration, the United States ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), in 1970, incorporating it as

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25 See H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924). The Act was designed to allow parties to avoid "the costliness and delays of litigation" and to place arbitration agreements "upon the same footing" as other freely negotiated contracts.
28 The section provides in pertinent part:
The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.
Id. § 4.
29 Id. § 5.
30 Id. § 9.
31 Id. § 3 (mandating that courts stay proceedings when a written agreement for arbitration exists and one of the parties has moved to stay the litigation pending arbitration).
33 Convention on the Recognition and Enforcement of Foreign Arbitral Awards,
Chapter Two of the Arbitration Act.\textsuperscript{34} "The goal of the Convention \ldots was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."\textsuperscript{35} Accordingly, the Convention regulates two aspects of the arbitral procedure: it determines whether an agreement is legally binding, and it enforces arbitral awards.\textsuperscript{36}

Among its most significant provisions, section 203 specifically vests federal district courts with jurisdiction over arbitration falling under the Convention.\textsuperscript{37} Moreover, pursuant to section 206, a court having jurisdiction over the subject matter of the dispute may order arbitration in the forum country.\textsuperscript{38} Courts have construed these provisions liberally to the extent that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration agreements.\textsuperscript{39}

The framework for enforcement of arbitration agreements is set out in Article II of the Convention.\textsuperscript{40} Under Article II(1), each con-

\begin{verbatim}

\textsuperscript{34} 9 U.S.C. \S\S 201-208 (1988).


\textsuperscript{39} \textit{Moses H. Cone Memorial Hosp.}, 460 U.S. at 24-25.

\textsuperscript{40} Article II of the Convention provides:

\begin{enumerate}
\item Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
\item The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
\item The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement in the meaning of
\end{enumerate}
\end{verbatim}
tracting party must respect an agreement concerning a subject mat-
"capable of settlement by arbitration." On the other hand, Article II(3) nullifies agreements which the courts determine to be "null and void, inoperative, or incapable of being performed."

With respect to Article II(1), U.S. courts have not explicitly set forth its meaning, but have instead ruled only on whether specific arbitration agreements are enforceable. However, with respect to the "null and void" clause of Article II(3), courts have stated that it must be construed as encompassing only situations such as fraud, mistake, duress, and waiver that can be applied neutrally on an international scale. Although it has been held that an agreement to arbitrate may also be "null and void" if it contravenes fundamental policies of the forum nation, an agreement is not invalid just because its provisions conflict with one party's national laws. In other words, the "parochial interests . . . of any state . . . cannot be the measure of how the 'null and void' clause is interpreted."

Once a court has assessed the validity of an arbitration agreement under the scrutiny of Article II(1) and Article II(3), finding neither defense sufficient to negate the presumption favoring arbitration, it must then stay any litigation and refer the parties to arbitration. After an arbitral award is rendered, Article V of the Convention provides several grounds on which a court may decline enforcement of an arbitral award, including the defenses of inarbitrability and public policy.

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41 See id. Article II is intended to prevent courts from contravening the aims of the Convention. It accomplishes this end by forbidding courts to refuse enforcement of an arbitral award by simply concluding that the underlying arbitration agreement is invalid. Note, Transnational Claims are Nonarbitrable under the Federal Arbitration Act and Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 17 Vand. J. Transnat'l L. 741, 747 n.33 (1984) [hereinafter Note, Transnational].

42 See Convention, supra note 33, art. II.

43 Note, Mitsubishi, supra note 36, at 399; see also Note, Transnational, supra note 41, at 746 n.30.


46 Rhone Mediterranee Compagnie v. Lauro, 712 F.2d 50, 54 (3d Cir. 1983). See, e.g., Ledee, 684 F.2d at 187 (Italian seller's and Puerto Rican distributors' arbitration agreement, providing for arbitration in Italy, was not "null and void" just because Puerto Rican statute would nullify such provision).

47 Ledee, 684 F.2d at 187.


49 Article V provides seven defenses to recognition and enforcement of an arbitral
There is necessarily somewhat of a conceptual overlap between these Article V defenses and the Article II defenses discussed above. For example, one of the provisions in Article V(1) provides that "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked... if that party furnishes... proof that... the said agreement is not valid under the law to which the parties have subjected it." However, Article II(1) was specifically drafted to preclude such a result. A court cannot refuse to recognize an arbitral award by simply finding that the underlying arbitration agreement was invalid. Moreover, Article V(2) of the Convention allows a court to refuse enforcement of an arbitral award either if the subject matter of the difference is not proper for arbitration, or if recognizing the award would be contrary to the public policy of that country.

Although the public policy exception relates exclusively to the enforcement of arbitral awards, there is great overlap with respect to the sweep of the inarbitrability defense. Under Article II(1), such defense may be invoked to assess the validity of an arbitration agreement, and under Article V(2)(a), it can be invoked to assess the validity of an arbitral award. Nonetheless, U.S. courts have narrowly construed all of these available defenses in order to effectuate the Convention's primary purpose of encouraging recognition and enforcement of international commercial arbitration agreements.

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award: incapacity; improper notice; an award not conforming with the subject matter of the submission; improper composition of the arbitral panel; lack of finality; subject matter not capable of settlement by arbitration; and public policy. Convention, supra note 33, art. V. See generally, Sanders, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 INT'L LAw. 269 (1979).

50 Convention, supra note 33, art. V(1)(a).

51 See supra notes 40-41 and accompanying text.

52 Article V(2) of the Convention provides in pertinent part: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country. Convention, supra note 33, art. V(2)(a)-(b).

53 Carbonneau, The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi, 19 Vand. J. TRANSNAT'L L. 265, 270 (1986). See also Note, International, supra note 48, at 439 n.17 (explaining that the "public policy" defense under art. V is available only after an award has been rendered).

54 Carbonneau, supra note 53, at 270.

55 See, e.g., Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de L'Industrie Du Papier (Rakta), 508 F.2d 969 (2d Cir. 1974), holding the Article V "public policy" defense can succeed only if the award violates the forum state's "most basic notions of morality and justice." Id. at 974. In fact, one commentator has noted that the "public policy" defense has succeeded only three times in approximately one hundred cases. Sanders, supra note 49, at 271.

With respect to the narrow construction of Article II(3), see supra notes 44-47 and accompanying text. This narrow construction has prevailed, whether a party seeks to void the agreement itself under Article II, or prevent enforcement of an arbitral award under
For example, in *Matter of Ferrara, S.P.A.*,56 Italian buyers of wheat brought an action against the Canadian seller seeking to stay arbitration of the seller's claim for breach of contract.57 Essentially, the buyers resisted arbitration based on a unique Italian rule of law providing that arbitration agreements are unenforceable unless they appear above the signatures of both parties.58 In the wheat contract, the arbitration clause appeared on the back of a one-page standard form contract, whereas the parties' signatures appeared on the front of the form, just above the legend.59

Citing the "general rule that a person of ordinary understanding and competence is bound by the provisions of a contract he signs whether or not he has read them," the United States District Court for the Southern District of New York upheld the validity of the arbitration agreement.60 The court found the unique Italian provision inapposite and noted that federal courts have consistently refused to recognize special foreign requirements governing agreements to arbitrate.61

In *Rhone Mediterranee Compagnie v. Lauro*,62 the plaintiff-insurer filed suit to recover payments made to the owner of a time charter vessel that burned while docked.63 The owner-defendant thereafter filed a motion to dismiss the suit based on an arbitration agreement in the parties' contract. Rhone, in response, contended that the arbitration agreement must be disregarded as null and void under Italian law, pursuant to which arbitration is valid only if conducted by an odd number of arbitrators.64 The contract in *Rhone* provided for a panel of two arbitrators supplemented with a tiebreaking process if there was not unanimity.65 Nonetheless, Rhone insisted that when an arbitration clause refers to a place of arbitration (e.g., Italy), the law of that place was dispositive as to the "null and void" inquiry of Article II(3).66
The United States Court of Appeals for the Third Circuit conceded the latent ambiguity of Article II(3) by virtue of the provision’s failure to specify what law determines whether an agreement is “null and void.” However, by looking to section 203 of the Convention, the court concluded that actions arising under the Convention thereby arise under U.S. law. As a consequence thereof, it found that the validity of the arbitration clause should be measured against the fundamental policies of the Convention, which include promoting the enforceability of arbitration agreements. Consequently, because the Italian rule as to the number of arbitrators did not implicate the Convention’s fundamental concerns, the arbitration agreement was valid and Rhone’s suit was stayed pending arbitration.

The United States Court of Appeals for the First Circuit reached a similar conclusion in Ledee v. Ceramiche Ragno, thereby establishing the test by which international arbitration agreements are evaluated under the Convention. In 1964, an Italian manufacturer of ceramic tiles entered a distributorship agreement by which it granted two Puerto Rican corporations and a private individual the exclusive right to sell and distribute its tiles in the Antilles. The contract was later reduced to writing and provided for arbitration of all disputes arising thereunder. Despite the arbitration clause, the Puerto Ricans filed a complaint in 1981, alleging that the manufacturer had unjustifiably terminated the distributorship. After the district court dismissed the complaint and ordered arbitration, the plaintiffs appealed, insisting that the arbitration agreement had been nullified by a unique Puerto Rican law which purported to override the Convention’s mandate favoring arbitration.

The First Circuit rejected the plaintiffs’ contentions. The court announced that the Convention requires a four-pronged inquiry, namely, (1) whether there is a written arbitration agreement; (2) whether the agreement provides for arbitration in a signatory country; (3) whether the agreement arises out of a commercial legal relationship; and (4) whether the commercial transaction has a reasonable relationship to a foreign state. If all questions are answered affirmatively, the court’s discretion is removed and it must

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67 Id. Commentators have suggested that Article II(3)’s ambiguity opened the door for forum states to look to their own rules regarding conflicts of laws. See, e.g., Quigley, supra note 3, at 1064 (contending that sec. 3 permits examination of forum law and policy).  
68 712 F.2d at 54.  
69 Id. at 53-54.  
70 Id. at 54-55.  
71 684 F.2d 184 (1st Cir. 1982).  
72 Id. at 185.  
73 Id.  
74 Id.  
75 Id. at 186.  
76 Id. at 186-87.
order arbitration unless the agreement is "null and void, inoperative or incapable of being performed."Because the distributorship agreement in question did satisfy the four-pronged test, the arbitration order was affirmed, notwithstanding the Puerto Rican statute which purportedly invalidated the agreement.

Expounding on its result, the court noted that the parochial interests of a particular state such as Puerto Rico cannot be the measure of interpreting the Convention's "null and void" clause. Rather, all defenses must be construed narrowly in order to effectuate the intent of the Convention. Consequently, "null and void" encompasses "only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale." The U.S. ratification of the Convention in 1970 was soon followed by an unprecedented judicial movement recognizing the validity of international choice-of-forum agreements. In *The Bremen v. Zapata Off-Shore Co.*, a German corporation had contracted to tow a drilling rig from Louisiana to Italy. Even though the parties and the transaction had no connection with England, they had agreed to litigate all disputes in London. Moreover, the contract contained two clauses purporting to exculpate the German firm from liability for any harm to the rig. Subsequently, a heavy storm damaged the rig while en route to Italy.

The choice-of-forum clause was crucial because English courts would almost certainly recognize the exculpatory clauses. On the other hand, U.S. admiralty courts usually denied enforcement of exculpatory clauses, considering them contrary to public policy. Accordingly, the U.S. rig-owner ignored the choice-of-forum clause and commenced suit in a U.S. district court. Although the lower courts had found the U.S. forum more appropriate, the Supreme Court reversed, noting that when parties to an international transaction have contractually designated a forum, such clause should be enforced unless it was the product of fraud or unequal bargaining power to the extent that its enforcement would be unreasonable or unjust. Moreover, the Court's solicitude for the forum-selection clause was prompted by its policy favoring expanded international trade, which

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77 Id. at 187 (quoting Convention, supra note 33, art. II(3)).
78 Id.
79 Id. (citing I.T.A.D. Assocs., Inc. v. Podar Bros., 656 F.2d 75 (4th Cir. 1981)).
81 Id. at 2.
82 Id. at 3.
83 Id.
84 Id. at 8.
85 Id.
86 Id. at 3-4.
87 Id. at 15.
would "hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."\textsuperscript{88}

Judicial endorsement of choice-of-forum clauses has evinced itself in the current trend among U.S. courts honoring international commercial arbitration agreements. In fact, international arbitration has even been extended to matters such as securities disputes, which had previously been considered strictly within the jurisdiction of the courts.

Ever since the Supreme Court decision \textit{Wilko v. Swan},\textsuperscript{89} a case arising under the Securities Act of 1933, it had been held that securities disputes were not appropriate for arbitration.\textsuperscript{90} However, in \textit{Scherk v. Alberto-Culver Co.},\textsuperscript{91} which arose under the Securities Act of 1934, the Supreme Court found \textit{Wilko} inapposite. \textit{Scherk} not only fell under a different statutory framework, but also, the circumstances of \textit{Scherk} arose from a truly international context.\textsuperscript{92}

Alberto-Culver, a U.S. firm, and Scherk, a German citizen, had signed a sales contract for the transfer of Scherk's ownership in certain European cosmetics companies, including all of his trademarks.\textsuperscript{93} The agreement contained a clause providing for arbitration of any disputes in Paris.\textsuperscript{94} Soon thereafter, alleging that Scherk had made fraudulent misrepresentations as to the trademarks, Alberto-Culver filed suit in a federal district court in Illinois.\textsuperscript{95} In response, Scherk sought to stay the proceedings in accordance with the contract's arbitration clause.\textsuperscript{96}

The Court distinguished its \textit{Wilko} holding from \textit{Scherk} by noting that \textit{Scherk} involved a "truly international" contract subject to competing considerations of international cooperation and trade.\textsuperscript{97} The Court further explained that because arbitration promotes orderliness and predictability in dispute resolution, such clauses are "almost indispensable" in international contracts.\textsuperscript{98} Consequently, the Court ordered enforcement of the arbitration agreement, giving rise to the theory that disputes not ordinarily arbitrable under domestic law may be subject to arbitration at the international level.\textsuperscript{99}

\textsuperscript{88} \textit{Id.} at 9.
\textsuperscript{89} 346 U.S. 427 (1953).
\textsuperscript{91} 417 U.S. 506 (1974).
\textsuperscript{92} 417 U.S. at 515.
\textsuperscript{93} \textit{Id.} at 508.
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.} at 509.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 515. The Court emphasized that \textit{Wilko} involved only U.S. domestic concerns.
\textsuperscript{98} \textit{Id.} at 516.
\textsuperscript{99} \textit{Id.} at 519-20. Citing \textit{The Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1, 9 (1972),
The trend favoring arbitration has recently been extended to international disputes involving bankruptcy, intellectual property, and most controversially, antitrust claims. Until the Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, U.S. courts had uniformly embraced the American Safety doctrine, pursuant to which antitrust disputes were considered within the exclusive jurisdiction of the judicial system. In 1979, Soler Chrysler-Plymouth, a Puerto Rican corporation, entered a distribution agreement with Chrysler International, S.A., a Swiss corporation owned by the American Chrysler Corporation. Soler simultaneously entered a sales agreement with Chrysler International and Mitsubishi Motors Corporation, a joint Japanese-U.S. venture, by which Soler was to distribute Mitsubishi vehicles as an agent for Chrysler. Soon thereafter, disputes arose over sales commitments and Mitsubishi sought certain storage costs from Soler. Because the parties had agreed to arbitrate all disputes, Mitsubishi brought suit to compel arbitration under the Arbitration Act and the Convention. In turn, Soler denied the allegations and counterclaimed alleging antitrust violations.

Despite years of adherence to the American Safety doctrine by higher federal courts, the district court ordered arbitration of the antitrust claims. The First Circuit reversed in favor of retaining the American Safety rule, but the Supreme Court criticized this traditional view. The Court held that such antitrust disputes are arbitrable despite the complexity and importance of such disputes.
With respect to antitrust complexities, the Court noted that the flexibility of arbitration provided for a panel of experts, maximizing the chances of a competent solution.\textsuperscript{115} With regard to the significance and impact of antitrust suits, the Court recognized that judicial review of arbitral decisions is provided for at the enforcement stage.\textsuperscript{116} The premise of the Court's decision was that the future expansion of U.S. business abroad would suffer if the United States insisted on resolving all disputes in U.S. courts pursuant to U.S. laws.\textsuperscript{117} In essence, the Court recapitulated its conviction that federal policies favoring arbitration apply with special force in the context of international commerce.\textsuperscript{118}

IV. Analysis of the \textit{Marchetto} Decision

\textit{Marchetto v. DeKalb Genetics Corp.}\textsuperscript{119} is the latest in the trend of U.S. courts toward a more liberal policy favoring arbitration. The district court's decision in \textit{Marchetto}, enforcing the arbitration provision of an international shareholder contract, comports with Supreme Court mandates announced in \textit{Mitsubishi}\textsuperscript{120} and its precursors.\textsuperscript{121} In \textit{Marchetto}, the court recognized that the strong "federal policy favoring arbitration applies with special force in the area of international commerce."\textsuperscript{122} Moreover, it explained that arbitration is mandatory if a commercial agreement having a reasonable relationship to a foreign state provides in writing that all disputes shall be arbitrated in a signatory country.\textsuperscript{123} In other words, when such conditions exist, the court must compel arbitration, thereby honoring the Convention's purposes of encouraging arbitration of international commercial disputes and unifying standards of enforcing such

\textsuperscript{115} Id. at 634.
\textsuperscript{116} Id. at 638 (citing Convention, supra note 33, art. V(2)(b)).
\textsuperscript{117} Id. at 629. The Court relied heavily on the "parochial" concept first espoused in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972). See supra note 88 and accompanying text.

Moreover, the Court pledged allegiance to its holding in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), by concluding that:

\textit{[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.}

473 U.S. at 629.
\textsuperscript{118} 473 U.S. at 631.
\textsuperscript{119} 711 F. Supp. 936 (N.D. Ill. 1989). See supra notes 7-23 and accompanying text.
\textsuperscript{120} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985). See supra notes 103-18 and accompanying text.
\textsuperscript{122} Marchetto, 711 F. Supp. at 938 (citing Mitsubishi, 473 U.S. at 629-31, and Scherk, 417 U.S. at 516-17).
\textsuperscript{123} Id. at 939.
agreements. \footnote{124} After the compelling mandate of \textit{Mitsubishi}, the Illinois district court was stringently obligated to order arbitration of the shareholder dispute in \textit{Marchetto}. Given the primacy which the United States attaches to the antitrust laws which regulate its free market economy, some commentators have insisted that the \textit{Mitsubishi} conflict was a rare example in which arbitration should have been precluded. \footnote{125} After all, antitrust issues are so complex that comprehensive discovery procedures unavailable in arbitration are often indispensable. \footnote{126} Judicial trial provides for such procedures, as well as detailed fact finding, both of which may be crucial on review. \footnote{127} Perhaps most significantly, when an antitrust claim is prosecuted, the breadth of the decision goes far beyond the parties to the case, thereby having considerable impact on the general public. \footnote{128} Notwithstanding these weighty considerations, antitrust regulation was deemed arbitrable in \textit{Mitsubishi}. \footnote{129}

\textit{Marchetto}, by comparison, involved a simple breach of contract allegation which gave rise to a companion claim for tortious interference with the contract. The issues were not complex, comprehensive discovery was not necessary, and the scope of the decision would not extend much beyond the parties to the suit. Even the dissent in \textit{Mitsubishi} acknowledged that arbitration is well suited for the resolution of simple contractual disputes. \footnote{130}

Nonetheless, the Marchettos insisted that their arbitration agreement was incapable of performance pursuant to an Italian law which would not recognize the clause because three of the four defendants were not parties to the agreement. \footnote{131} They invoked Article II(3) of the Convention to support their contention. \footnote{132} They also argued that their tortious interference claim was beyond the scope of the agreement. \footnote{133}

As explained previously, an agreement is not invalid under Article II(3) just because its provisions conflict with one party's national laws. \footnote{134} The validity of an arbitration agreement is not determined

\begin{footnotes}
\item[124] \textit{Id.} at 938.
\item[125] \textit{Note, Mitsubishi, supra note 36, at 613-14.}
\item[126] \textit{Id.} at 613.
\item[127] \textit{Id.} at 613-14.
\item[128] \textit{Id.} at 614.
\item[129] \textit{Id.}
\item[130] \textit{Mitsubishi}, 473 U.S. at 648-49 (Stevens, J., dissenting).
\item[131] \textit{Marchetto}, 711 F. Supp. at 939. Defendants disputed this contention, alleging the Italian courts, out of respect for the Convention, would vest Italian arbitrators with jurisdiction over all of the defendants. \textit{Id.} at 940.
\item[132] \textit{Id.} at 939.
\item[133] \textit{Id.}
\end{footnotes}
by the law of the place of arbitration. Rather, actions arising under the Convention are deemed to have arisen under U.S. law, and it is assumed "that signatory nations to the Convention will honor arbitration agreements and reject challenges to arbitration based on legal principles unique to the signatory nation." Pursuant to U.S. law, even the three defendant-nonparties to the agreement could participate in the Marchetto arbitration proceedings. Moreover, because the arbitration clause provided for the resolution of all disputes arising out of the contract, and the scope of arbitrability is itself a question for arbitration, the court had no authority to sever the Marchettos' tort claim.

The Marchetto decision has perpetuated the trend of honoring international commercial arbitration agreements. The desirability of such an approach has been well-documented. International trade is encouraged when U.S. and foreign corporations are assured that their freely formed contract provisions will be respected in U.S. courts. Also, neutrality and predictability in the resolution of international disputes is best achieved when defenses to arbitrability are construed narrowly. If, as the Marchetto court assumed, Italy honors the parties' arbitration agreement, the plaintiffs will be able to arbitrate their complaints against all four defendants. This avoids the undesirable consequence of several piecemeal adjudications.

However, Italy may choose not to honor the arbitration agreement, and the Marchettos may be allowed to arbitrate only against DeKalb Energy, the one party actually bound to arbitrate by virtue of succession to the obligations of DeKalb Agricultural. If DeKalb Genetics, Pfizer Genetics, and DeKalb-Pfizer Genetics are not made parties to the Italian arbitration, unique problems may arise. For example, if the arbitrator renders a decision in favor of the Marchettos, DeKalb Energy may be unable to satisfy the judgment on its own. Some scholars, in assessing the efficiency of arbitration, have noted that "there is no third-party procedure pursuant to which a party

Lauro, 712 F.2d 50 (3d Cir. 1983), discussed supra notes 62-70 and accompanying text; see also, Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982), discussed supra notes 71-79 and accompanying text.

135 Marchetto, 711 F. Supp. at 940.
136 Id. at 939 (citing 9 U.S.C. § 203 (1988)).
137 Id. at 940.
138 Id. at 939 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)). Relying on Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 109 S.Ct. 1248 (1989), the Marchettos asserted that even under U.S. law, arbitration is not permissible when claims are asserted against entities that were not formal parties to the agreement. 711 F. Supp. at 940. However, the Volt contract had specifically incorporated California rules of arbitration. Thus, the Volt holding simply lent credence to the principle that contracts should be enforced according to the terms agreed upon by the parties. Consequently, the Marchettos' contention was rejected. Id.
139 Id. at 939-40 (citing Moses H. Cone Memorial Hosp., 460 U.S. at 24-25).
140 Id.
might bring into the arbitration proceedings someone who is not a party to the arbitration agreement but who may be liable ultimately in whole or in part for the award."  

These problems are not without a solution. Despite the Convention's mandates favoring arbitration, nothing precludes parties from bringing suit against third parties not bound by the arbitration agreement. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Soler was compelled to arbitrate its antitrust allegation against Mitsubishi. Nonetheless, the Supreme Court noted that Soler was still free to file an antitrust suit against Chrysler International, an involved third party who was not actually bound by the arbitration agreement. In *Marchetto*, the plaintiffs' actions in federal district court were dismissed without prejudice because the disputes were arbitrable. If the Italian arbitrators dispose only of the Marchettos' claims against DeKalb Energy, presumably, the plaintiffs could still file an amended complaint against the other three defendants.

Perhaps a better resolution would have been simply to stay the plaintiffs' district court proceedings pending the outcome of the Italian arbitration. The district court could even have attached conditions to the stay order, including language to the effect that if the defendant DeKalb Energy is unable to satisfy a judgment in the plaintiffs' favor, the plaintiffs' action against the other three defendants would still be pending. This would have the desirable consequence of assuring the Marchettos a forum for resolving all of their complaints. Moreover, such an approach would comport with the Supreme Court's views announced in *Mitsubishi*, whereby U.S. courts have an opportunity at the award-enforcement stage to ensure that all legitimate interests of the parties have been addressed.

Viewed in light of recent legislative and judicial developments, the *Marchetto* ruling is both theoretically and logically sound. However, its likely overall impact in the world of international commercial arbitration will be minimal. It is not a ground breaking decision which represents an extreme deviation from past case law precedent. Rather, *Marchetto* simply represents a logical extension of the con-

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143 473 U.S. at 632-36.
144 Id. at 620 n.7.
146 See, e.g., Builders Fed. Ltd. v. Turner Constr., 655 F. Supp. 1400, 1408 (S.D.N.Y. 1987) (in action arising under Convention, district court's order of conditional stay pending results of a foreign arbitration in effect bound third parties who were not otherwise legally bound by the arbitration agreement).
147 *Mitsubishi*, 473 U.S. at 638.
cepts espoused by the Supreme Court in *Mitsubishi* and its precur-
sors.\textsuperscript{148} As noted by the dissent in *Mitsubishi*, simple contractual
disputes like *Marchetto* are generally well suited for arbitration.\textsuperscript{149} Relatively speaking, *Marchetto* is not a complex case. It would be dif-
ficult to genuinely contend that the district court’s arbitration order
was not proper. The real danger lurks in the more complicated areas
of law like antitrust and securities litigation. Granted, policy consid-
erations have prompted the Supreme Court to adopt an approach
that would deem nearly all such disputes arbitrable. However, this
approach is not without its critics,\textsuperscript{150} and cases like *Marchetto* should
not be construed as indicating that arbitration is always the optimal
dispute resolution alternative.

V. Conclusion

In summary, *Marchetto* is the latest characterization of the trend
among U.S. courts toward honoring freely formed international commercial arbitration agreements. Given the force and breadth of the Supreme Court’s 1985 *Mitsubishi* decision, the *Marchetto* court
passively acquiesced to the strong federal policy favoring arbitration
of international commercial disputes. Based on sound reasoning
and logic, the decision pays due respect to the legislative and judicial
developments of the past two decades. However, the court did not
adequately address the legitimate rights of the Marchettos. It simply
assumed that Italy, as a signatory to the Convention, would ignore its
local rules which forbid the joinder of nonparties to an arbitration
agreement. If the *Marchetto* court had ordered a conditional stay of
the proceedings, instead of simply granting a dismissal, it would have
evincen a greater respect for the need to protect the legitimate inter-
est of all parties bound by international commercial arbitration
agreements.

GREGORY J. HARE

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\textsuperscript{148} See supra note 121 and accompanying text.
\textsuperscript{149} See supra note 130 and accompanying text.