The Burger Court Opinion Writing Database

Scherk v. Alberto-Culver Co.

417 U.S. 506 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1974

Re: 73-781 - Scherk v. Alberto-Culver Co.

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 30, 1974

MEMORANDUM TO THE CONFERENCE:

I have sent to the printer a dissent in No. 73-781 Scherk v. Alberto-Culver Company.

Yours faithfully,

WOD
William O. Douglas

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Circulate: 6-6

Recirculated: _____

No. 73-781

Fritz Scherk, Petitioner, *v.* Alberto-Culver Company. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

Respondent (Alberto) is a publicly held corporation whose stock is traded on the New York Stock Exchange. Alberto, a Delaware Corporation, has its principal place of business in Illinois. Petitioner (Scherk) owned a business in Germany, FLS (Firma Ludwig Scherk), dealing with cosmetics and toiletries. Scherk owned various trade marks and all outstanding securities of a Liechtenstein corporation (SEV) and of a German corporation (Lodeva). Scherk owned various trade marks which were licensed to manufacturers and distributors in Europe and in this country. SEV collected the royalties on those licenses.

Alberto undertook to purchase from Scherk the entire establishment—the trade marks and the stock of the two corporations; and later, alleging it had been defrauded, brought this suit in the U. S. District Court in Illinois to rescind the agreement and to receive damages.

The only defense, material at this stage of the proceeding is a provision of the contract providing that if any controversy or claim arises under the agreement the parties agree it will be settled "exclusively" by arbitration under the rules of the International Chamber of Commerce, Paris, France.

The basic dispute between the parties concerned allegations that the trademarks which were basic assets in

1, 5, 8-9, 12, 13

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-781

From: Douglas; J.

Fritz Scherk, Petitioner,
v.
Alberto-Culver Company.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Recirculated: 6-12

[May —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE and Mr. Justice Marshall concur, dissenting.

Respondent (Alberto) is a publicly held corporation whose stock is traded on the New York Stock Exchange. Alberto, a Delaware Corporation, has its principal place of business in Illinois. Petitioner (Scherk) owned a business in Germany, FLS (Firma Ludwig Scherk), dealing with cosmetics and toiletries. Scherk owned various trade marks and all outstanding securities of a Liechtenstein corporation (SEV) and of a German corporation (Lodeva). Scherk owned various trade marks which were licensed to manufacturers and distributors in Europe and in this country. SEV collected the royalties on those licenses.

Alberto undertook to purchase from Scherk the entire establishment—the trade marks and the stock of the two corporations; and later, alleging it had been defrauded, brought this suit in the U. S. District Court in Illinois to rescind the agreement and to receive damages.

The only defense, material at this stage of the proceeding is a provision of the contract providing that if any controversy or claim arises under the agreement the parties agree it will be settled "exclusively" by arbitration under the rules of the International Chamber of Commerce, Paris, France.

The basic dispute between the parties concerned allegations that the trademarks which were basic assets in

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 7, 1974

RE: No. 73-781 Scherk v. Alberto-Culver

Dear Bill:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stewart, J.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-781

Recirculated: _____

Fritz Scherk, Petitioner, *v.* Alberto-Culver Company. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

73-781

Supreme Court of the United States

Memorandum

June 5, 1974

Memorandum to The Chief Justice,
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

After considering the suggestions contained in Harry Blackmun's thoughtful letter of yesterday, I explained to him some of my difficulties with this opinion. As the result of our conversation, it is my understanding that he is willing to accept the changes made in this circulation as a minimally adequate response to his suggestions. There may, of course, be other changes in order after a dissenting opinion is circulated.

P. S.

pp 6, 7, 8, 11, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: JUN 5 1974

No. 73-781

Fritz Scherk, Petitioner,
v.
Alberto-Culver Company.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

pp. 8, 10, 11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Stewart, J.

Circulated: _____

Recirculated: JUN 7 1974

SUPREME COURT OF THE UNITED STATES

No. 73-781

Fritz Scherk, Petitioner, v. Alberto-Culver Company. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

P. 10, 14

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Stewart, J.

Circulated:

Recirculated: JUN 13 1974

SUPREME COURT OF THE UNITED STATES

No. 73-781

Fritz Scherk, Petitioner, v. Alberto-Culver Company. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1974

Re: No. 73-781 - Scherk v. Alberto-Culver Co.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Douglas

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1974

Re: No. 73-781 -- Fritz Scherk v. Alberto-Culver Co.

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1974

Re: No. 73-781 - Schark v. Alberto-Culver Co.

Dear Potter:

While I agree with the result you reach and with most of the reasoning by which you arrive at that result, I have some difficulty at two points in your proposed opinion. I hope you do not mind too much if I venture to state the sources of my difficulty.

Adopted by Mr Justice Stewart in part. This discussion will remain but it will altered to make it less noticeable

1. I suspect the benefit of the rather technical distinction you draw between the "special right" in Wilko and its absence in this case [discussed on pages 6-8] is marginal and does not really justify its inclusion. I am not entirely certain that I agree with the distinction. It seems to me that the implied right of action under the Court's decisions is not different from the so-called "special right" in the Wilko case, since the implied right adheres to Rule 10b-5 and § 10 of the Act, and is thereby included in the sweep of § 29(a). I see no apparent reason why the two are different. Even if the distinction is a proper one, you hint on page 8 that the discussion is somewhat gratuitous. For me, it raises more questions than it answers and it seems that it is likely to pose problems in later cases in which the waiver provisions are asserted as a defense.

Mr. Justice Blackmun has withdrawn this suggestion after a conversation with Mr. Justice Stewart.

2. I am inclined to believe that more prominence should be given to the Arbitral Convention and to those provisions of the United States Arbitration Act that make the Convention a part of the law of this country. This is more a matter of emphasis than substance, but it is, I believe, important. You refer to the Convention in your final footnote, but I wonder whether it does not deserve a higher level of recognition. I would propose that the following, or something similar to it, be inserted after your first paragraph on page 4 of your opinion:

"Chapter 2 of the Act, 9 U.S.C. §§ 201, et seq., provides for the recognition and enforcement of foreign arbitral awards. It was enacted in 1970 to implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Section 1 of the new chapter unequivocally provides that the Convention 'shall be enforced in United States courts in accordance with this chapter.' The goal of the Convention, and the principal purpose underlying American adoption of it and its implementation, 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 signatory countries.*/ Article II(3) of the Convention provides:

> 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

Thus, a local court, when seized of an action like the present case, should, at the request of one of the parties, refer the parties to arbitration, unless the arbitral agreement is 'null and void, inoperative or incapable of being performed.'**/ Here, respondent contends that the agreement is voided by § 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), providing:

> 'Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of

any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.'"

The two footnotes would be, respectively:

"*/ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. E. 90th Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049 (1961)."

"**/ Article II(1) also limits recognition of agreements to those 'concerning a subject matter capable of settlement by arbitration.' The issues raised in this case are appropriate for arbitration. See discussion, infra, page ____."

You will observe that much of the preceding paragraph tracks material in your present footnote 12.

3. I would be inclined to add the following to footnote 11.

Adopted by Mr. Justice Stewart.

"Although we do not decide the question, presumably the type of fraud alleged here could be challenged, under Article V of the Convention, in the enforcement of whatever arbitral award is produced through arbitration. Article V(2)(b) provides that recognition and enforcement of an award can be refused if 'recognition or enforcement of the award would be contrary to the public policy of that country.'"

These are my thoughts, for what they may be worth. I am taking the liberty of sending copies of this letter to the Chief,

Lewis, and Bill Rehnquist, who, along with us, have indicated a vote to reverse.

Sincerely,

Mr. Justice Stewart

cc: The Chief Justice
Mr. Justice Powell
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1974

Re: No. 73-781 - Scherk v. Alberto-Culver Co.

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1974

No. 73-781 Scherk v. Alberto-Culver

Dear Potter:

Please join me in your opinion for the Court.

If I can find the time this week I may add a few paragraph in a concurrence recording my view with respect to the Securities Acts as applicable in this case.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 29, 1974

Re: No. 73-781 - Scherk v. Alberto-Culver Co.

Dear Chief:

I now cast a tentative vote to reverse in this case on the following admittedly sketchy basis:

(1) Wilko v. Swan, 346 U.S. 427, 434-435 states that the "right to select a judicial forum is the kind of 'provision' that cannot be waived under section 14 of the Securities Act."

(2) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enacted after the Securities Act, since it has the status of a treaty, superseding that Act if there is a conflict, reserves possible "public policy" defenses to the enforcement stage of the arbitration proceeding, rather than permitting them to be raised in the original action to compel arbitration. See Article V(2). I do not believe the language of Article II(3) speaking of agreements that are "null and void, inoperative or incapable of being performed" is dealing with the sort of public policy defense that Wilko v. Swan allowed.

(3) If the parties can therefore be required to submit the claim to arbitration, the Convention obviates the only claim that Wilko preserved to the unwilling party: the right to insist that the judicial forum be chosen. Any other public policy defenses going to the merits of the arbitration award would be preserved to the enforcement stage.

Sincerely,

WJW

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1974

Re: 73-781 Scherk v. Alberto-Culver Co.

Dear Potter:

Please join me in the opinion for the Court you have prepared in this case.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference