



UNC  
SCHOOL OF LAW

## NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

---

Volume 11 | Number 1

Article 8

---

Winter 1986

# Subject-Matter Arbitrability in International Cases: Mitsubishi Motors Closes the Circle

J. Stewart McClendon

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

 Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

J. S. McClendon, *Subject-Matter Arbitrability in International Cases: Mitsubishi Motors Closes the Circle*, 11 N.C. J. INT'L L. & COM. REG. 81 (1986).

Available at: <http://scholarship.law.unc.edu/ncilj/vol11/iss1/8>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# Subject-Matter Arbitrability in International Cases: *Mitsubishi Motors Closes the Circle*

*J. Stewart McClendon\**

## I. Introduction

Parties to commercial transactions have long enjoyed the freedom to submit to arbitration in preference to litigation almost any kind of a dispute arising out of their relationships. After a dispute arises, it is sometimes necessary, however, to seek court assistance to compel a reluctant party to comply with the agreement to arbitrate and, on occasion, to abandon or defer litigation of the dispute. Upon request for an order to compel compliance, U.S. courts will examine the agreement to arbitrate to see whether it was validly made and whether it encompasses the subject matter of the dispute. In so doing, U.S. courts, occasionally for public policy reasons, have determined that some matters are not arbitrable. While most of these suits have arisen in a domestic context, similar analyses have been employed in both domestic and international cases.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>1</sup> decided at the end of the 1984-85 term, the Supreme Court extended its 1974 holding in *Scherk v. Alberto-Culver Co.*<sup>2</sup> by relaxing judicially created limitations on subject matter arbitrability in international cases. It now appears that there will be no restrictions in those cases unless Congress imposes them.<sup>3</sup> This article will examine the historical background leading to *Mitsubishi Motors*, the issues decided by the Court, and some of the issues the Court did not decide and thus remain for future determination.

## II. Historical Background

Prior to the 1920s, agreements to arbitrate future disputes were generally unenforceable in the United States. Indeed, courts regularly found such agreements to be encroachments on the province of

---

\* Of counsel, Satterlee & Stephens, New York, N.Y.; Vice Chairman, International Advisory Committee, World Arbitration Institute; Member of the New York, Texas and Minnesota bars.

<sup>1</sup> 105 S. Ct. 3346 (1985), *modifying* 732 F.2d 155 (1st Cir. 1983).

<sup>2</sup> 417 U.S. 506 (1974).

<sup>3</sup> *Mitsubishi*, 105 S. Ct. at 3361 n.21.

the judiciary and contrary to public policy.<sup>4</sup> The United States Arbitration Act of 1925<sup>5</sup> changed all that. Section 2 of the Act provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>6</sup>

Section 1 of the Arbitration Act provides that nothing in the Act "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>7</sup> No other restriction, exception, or caveat with respect to subject matter arbitrability is contained in the original Arbitration Act.

The Arbitration Act does not, however, oust the courts completely from the arbitral process. When a suit is brought "upon any issue referable to arbitration under an agreement in writing," a court is authorized by section 3 to stay any trial "until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."<sup>8</sup> Before granting a stay the court will satisfy itself that the issue is "referable to arbitration under such an agreement" and consider allegations of default (waiver of arbitration). Section 4 directs a court to order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."<sup>9</sup> The court may also appoint arbitrators, compel attendance of witnesses, and vacate, modify, and confirm awards.<sup>10</sup> Only sections 3 and 4 relate to advance determination of matters connected with the scope of the arbitration agreement, and these provisions permit the courts to deal only with limited issues—whether there was an agreement to arbitrate a given issue,<sup>11</sup> whether there was a refusal to arbitrate,<sup>12</sup> and whether there was a waiver of the right to arbitrate.<sup>13</sup>

---

<sup>4</sup> See *Scherk*, 417 U.S. at 512 n.4. See also *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874) (state statute prohibiting out of state corporations from removing any trial to federal court held unconstitutional); *Tatsuma Kisen Kabushiki Kaisha v. Prescott*, 4 F.2d 670 (9th Cir. 1925) (courts will not enforce a charter provision requiring all disputes to be settled first by arbitration as this infringes upon federal jurisdiction).

<sup>5</sup> 9 U.S.C. §§ 1-14 (1982).

<sup>6</sup> *Id.* § 2.

<sup>7</sup> *Id.* § 1.

<sup>8</sup> *Id.* § 3.

<sup>9</sup> *Id.* § 4.

<sup>10</sup> *Id.* §§ 5, 7, 9-11.

<sup>11</sup> *Id.* §§ 3, 4.

<sup>12</sup> *Id.* § 4.

<sup>13</sup> *Id.* § 2.

Despite the broad acceptance of arbitrability in the Arbitration Act and the limitations on the scope of court review of agreements to arbitrate, certain matters have been held to be nonarbitrable. Patent validity and infringement is one example. In 1930, the U.S. District Court of Delaware held that a controversy over patent validity did not involve commerce and therefore did not fall under the Arbitration Act.<sup>14</sup> Later cases denied the arbitrability of patent disputes for public policy reasons, stressing the great public interest in monitoring patent validity because patents confer limited monopolies.<sup>15</sup> Such public policy considerations, however, did not prevent Congress from adopting legislation in 1982 and 1984 authorizing arbitration of patent validity, infringement, and interference questions.<sup>16</sup>

In 1953 the Supreme Court decided *Wilko v. Swan*,<sup>17</sup> holding that a provision of the Securities Act of 1933, voiding any waiver of compliance with that Act, prevented enforcement of an agreement to arbitrate. That case involved an arbitration provision in a brokerage contract. The issue was whether the customer was entitled to have his claim of misrepresentation determined by a court, as provided by section 12(2) of the Securities Act of 1933,<sup>18</sup> or whether he could be compelled to submit the matter to arbitration.<sup>19</sup> The Court had to determine whether an agreement to arbitrate a future controversy violated the provisions of section 14 of the Securities Act of 1933,<sup>20</sup> making void "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act of 1933.<sup>21</sup>

Although there was no suggestion that a contract of adhesion was involved, the Court stressed that Congress believed that brokerage customers needed protection. It also emphasized that the Securities Act gave the brokerage customer a wide choice of venues for his action, a choice that would be lost if the customer were forced to arbitrate.<sup>22</sup> In closing, the Court said:

Two policies, not easily reconcilable, are involved in this case . . . . Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitra-

---

<sup>14</sup> *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184 (D. Del. 1930).

<sup>15</sup> See Hoellering, *New Opportunities for Patent Arbitration*, N.Y.L.J., Dec. 23, 1985, at 1, col. 1.

<sup>16</sup> 35 U.S.C. § 294 (1982); Patent Law Amendments Act of 1984, Pub. L. No. 98-622, § 105, 98 Stat. 3383, 3385 (to be codified at 35 U.S.C. § 135(d)).

<sup>17</sup> 346 U.S. 427 (1953).

<sup>18</sup> 15 U.S.C. § 771 (1982).

<sup>19</sup> *Wilko*, 346 U.S. at 430.

<sup>20</sup> 15 U.S.C. § 77n (1982).

<sup>21</sup> *Id.*

<sup>22</sup> *Wilko*, 346 U.S. at 435.

tion of issues arising under the Act.<sup>23</sup>

Thus, while the Court commenced with an examination of whether the agreement to arbitrate amounted to a "condition, stipulation, or provision" waiving compliance with the Securities Act of 1933, it closed with broad language resolving conflicting congressional policies. The broad language was later relied on to extend the court-created limitation on subject matter arbitrability to other areas.

*Wilko* made two other important points that will be discussed more fully below. One was that the limitation on subject matter arbitrability does not extend to agreements to arbitrate made after the dispute arose. The Court said that "[w]hile the Securities Act does not require petitioner to sue, a waiver in advance of a controversy stands upon a different footing."<sup>24</sup> The premise that limitations on subject matter arbitrability apply only to agreements to arbitrate future disputes has been repeated a number of times since then and was cited by the Court in *Mitsubishi* as one reason for not disallowing arbitration of antitrust claims in international arbitrations.<sup>25</sup>

*Wilko* also discussed the extent of judicial review of arbitral awards. The Court questioned whether the review provisions of the Arbitration Act would give adequate protection from erroneous statutory interpretation contained in an arbitral award. It noted that "[i]n unrestricted submissions, . . . the arbitrators in contrast to manifest disregard are not subject, in federal courts, to judicial review for error of interpretation."<sup>26</sup> This language was the origin of the concept that an award can be vacated if it was made in "manifest disregard of the law," an idea repeated in later cases<sup>27</sup> and discussed below.<sup>28</sup>

In 1967 the Supreme Court extended the scope of arbitrability in *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*,<sup>29</sup> holding that when a contract contains a broad arbitration clause, the arbitrator, not a court, will decide whether the contract was fraudulently induced. A "broad" arbitration clause covers disputes "relating to," not merely "arising out of," the contract.<sup>30</sup> The Court ruled that the agreement to arbitrate was separable from the main contract and that although courts will determine the validity of the former, the validity of the latter can be arbitrated.<sup>31</sup>

---

<sup>23</sup> *Id.* at 438.

<sup>24</sup> *Id.*; see also *id.* (Jackson, J., concurring).

<sup>25</sup> *Mitsubishi*, 105 S. Ct. at 3355.

<sup>26</sup> 346 U.S. at 436-37.

<sup>27</sup> See *Parsons & Whittemore Overseas Co. v. Societe Generale du Papier*, 508 F.2d 969, 977 (2d Cir. 1974); *I/S. Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430-32 (2d Cir. 1974).

<sup>28</sup> See *infra* notes 116-18 and accompanying text.

<sup>29</sup> 388 U.S. 395 (1967).

<sup>30</sup> *Id.* at 398.

<sup>31</sup> *Id.* at 404.

The following year, in *American Safety Equipment Corp. v. J.P. McGuire & Co.*,<sup>32</sup> the Second Circuit, relying on *Wilko*, held that antitrust issues were not arbitrable for public policy reasons. Unlike *Wilko*, the court could not point to any specific provision of the Sherman Act that conflicted with the Arbitration Act, but instead based its decision on the great public interest in antitrust enforcement and the importance of private antitrust suits to the enforcement framework.<sup>33</sup> The court gave four reasons for its conclusion: the important role played by private plaintiffs in antitrust enforcement would be lost in arbitration; contracts giving rise to antitrust suits are likely to be contracts of adhesion; antitrust issues are too complicated for arbitrators; and businessmen-arbitrators are not appropriate judges of violations of the antitrust laws.<sup>34</sup>

In 1970, the United States acceded to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and Congress enacted implementing legislation by amendment to the Arbitration Act.<sup>35</sup> Article I of the Convention deals with arbitral awards; article II deals with agreements to arbitrate and provides in pertinent part:

1. 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* . . . .

3. 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.*<sup>36</sup>

Article V establishes the grounds for refusal to recognize and enforce awards, one ground being that "the recognition of enforcement of the award would be contrary to the public policy of [the forum] country."<sup>37</sup>

Chapter 2 of the Arbitration Act, in addition to providing that the Convention shall be enforced in accordance with the chapter, goes on to provide:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in

---

<sup>32</sup> 391 F.2d 821 (2d Cir. 1968).

<sup>33</sup> *Id.* at 826.

<sup>34</sup> *Id.* at 827.

<sup>35</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, §§ 1, 3, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (codified at 9 U.S.C. § 201 (1982)). The then existing Act became chapter 1, and the implementing legislation for the Convention was added as chapter 2 of the Arbitration Act.

<sup>36</sup> *Id.* art. II, §§ 1, 3 (emphasis added).

<sup>37</sup> *Id.* art. V, § 2(b).

section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. . . .<sup>38</sup>

*Scherk v. Alberto-Culver Co.*,<sup>39</sup> was the first major case involving an international agreement to arbitrate decided after the adoption of the Convention. It dealt with the issue of whether enforcement of an arbitration clause would defeat the remedial scheme established by Congress in the Securities Exchange Act of 1934.<sup>40</sup> The *Scherk* Court first distinguished its 1933 Securities Act holding in *Wilko* by saying:

At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. . . . There is no statutory counterpart of 12(2) in the Securities Exchange Act of 1934, and neither 10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here.<sup>41</sup>

Even assuming *arguendo* that the rationale in *Wilko* could be applied in a case involving the 1934 Act, the Court found "crucial differences between the agreement involved in *Wilko* and the one signed by the parties here."<sup>42</sup> The most significant of those differences was the international character of the transaction in *Scherk*, a transaction involving different sets of national laws and attendant conflict of law problems.

In assessing the enforceability of the arbitration clause in *Scherk*, the Court relied on its decision in *The Bremen v. Zapata Off-Shore Co.*,<sup>43</sup> handed down two terms earlier. That case approved a forum-selection clause in a contract involving international trade, thereby overcoming a long-held judicial reluctance to permit contracting parties the freedom to choose a forum for future dispute resolution. It did so because:

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.<sup>44</sup>

The *Scherk* Court found that "[a]n agreement to arbitrate before a specified tribunal [was], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the proce-

---

<sup>38</sup> 9 U.S.C. § 202 (1982).

<sup>39</sup> 417 U.S. at 506.

<sup>40</sup> 15 U.S.C. §§ 78a-78ff (1982).

<sup>41</sup> *Scherk*, 417 U.S. at 513.

<sup>42</sup> *Id.* at 515.

<sup>43</sup> 407 U.S. 1 (1972).

<sup>44</sup> *Id.* at 9.

dure used in resolving the dispute.”<sup>45</sup> Citing its opinion in *The Bremen*, the Court emphasized that “‘agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.’”<sup>46</sup> The Court concluded that a contractual dispute resolution mechanism is “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”<sup>47</sup> “A parochial refusal by the court of one country to enforce an international arbitration agreement” would lead to a “legal no-man’s land [that] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.”<sup>48</sup>

The Court in *Scherk* thus found that the public interest in international trade and commerce was greater than any public interest created by the Securities Exchange Act of 1934. It did not explicitly draw on the Convention or on chapter 2 of the Arbitration Act, but noted that “[o]ur conclusion today is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision,” including the 1970 accession to and codification of the Convention.<sup>49</sup>

Since *Scherk* the Supreme Court has reiterated and reinforced its commitment to arbitration, clarifying the supremacy of the Federal Arbitration Act over conflicting state laws. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>50</sup> the Court held erroneous the refusal of a federal district court to order arbitration pending resolution of the arbitrability question in state court. The federal district court should have immediately issued an order to arbitrate because it was “Congress’ clear intent in the Arbitration Act to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”<sup>51</sup>

In *Southland Corp. v. Keating*<sup>52</sup> the Court overturned a California Supreme Court ruling that issues arising under the California Franchise Investment Act were not arbitrable. It held that:

In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . .<sup>53</sup>

In creating a substantive rule in state as well as federal courts, Con-

---

<sup>45</sup> *Scherk*, 417 U.S. at 519.

<sup>46</sup> *Id.* at 518 (quoting *The Bremen*, 407 U.S. at 13-14).

<sup>47</sup> *Id.* at 516.

<sup>48</sup> *Id.* at 516-17.

<sup>49</sup> *Id.* at 520 n.15.

<sup>50</sup> 460 U.S. 1 (1982).

<sup>51</sup> *Id.* at 22.

<sup>52</sup> 465 U.S. 1 (1984).

<sup>53</sup> *Id.* at 10.



gress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that . . . the California Franchise Investment Law violates the Supremacy clause.<sup>54</sup>

In *Dean Witter Reynolds Inc. v. Byrd*<sup>55</sup> the Court disapproved the so-called "doctrine of intertwining," under which courts were given discretion to deny arbitration of arbitrable claims when arbitrable and nonarbitrable claims were intertwined factually and legally. The Court said that:

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 vigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute.<sup>56</sup>

Countervailing statutory policies have been found in several cases, none of which has involved a commercial dispute. Rather, these cases discussed whether an individual's right to sue for violation of rights granted by federal statutes was precluded by an arbitration clause in a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*<sup>57</sup> involved assertion of rights under Title VII of the Civil Rights Act of 1964;<sup>58</sup> *Barrantine v. Arkansas-Best Freight System, Inc.*<sup>59</sup> involved the Fair Labor Standards Act;<sup>60</sup> and *McDonald v. City of West Branch*<sup>61</sup> involved the Ku Klux Act of 1871.<sup>62</sup> These cases did not arise in proceeding to order or stay arbitration but came up on the issue of the preclusive effect of an arbitration award under a collective bargaining agreement. In each, the Court stressed that the agreement to arbitrate was not made by the party challenging the preclusive effect of the award.

### III. The Mitsubishi Case

#### A. The Setting

Mitsubishi Motors Corp. (Mitsubishi) was a Japanese corporation, a joint venture of Chrysler International, S.A. (Chrysler), a Swiss corporation, and Mitsubishi Heavy Industries, Inc., a Japanese corporation. Mitsubishi had its principal place of business in Japan, where it manufactured motor vehicles for sale through Chrysler dealers outside the continental United States. Soler Chrysler-Plymouth, Inc. (Soler) was a Chrysler dealer with its principal place of business

---

<sup>54</sup> *Id.* at 16.

<sup>55</sup> 105 S. Ct. 1238 (1985).

<sup>56</sup> *Id.* at 1242-43.

<sup>57</sup> 415 U.S. 36 (1974).

<sup>58</sup> 42 U.S.C. §§ 2000e to 2000e-17 (1982).

<sup>59</sup> 450 U.S. 728 (1981).

<sup>60</sup> 29 U.S.C. §§ 201-219 (1982).

<sup>61</sup> 104 S. Ct. 1799 (1984).

<sup>62</sup> Ku Klux Act, ch. 22, § 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1982)).

in Puerto Rico. In 1979 Soler and Mitsubishi entered into a "Sales Procedure Agreement," which contained an arbitration clause providing that certain disputes would be arbitrated in Japan under the rules of the Japan Commercial Arbitration Association.<sup>63</sup> It also provided that the agreement would "be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein."<sup>64</sup>

The sales arrangement was profitable until the new car market softened in 1981. Soler began to have difficulty selling its cars and asked Mitsubishi to cancel some of its orders. It also attempted to arrange for some of its vehicles to be transhipped to the continental United States and Latin America for sale there. Mitsubishi refused to authorize the transshipment and, because Soler was in default in payments for cars received, withheld shipment of a number of vehicles. Mitsubishi commenced an action in federal court in Puerto Rico to compel arbitration under sections 4 and 201 of the Arbitration Act. In addition, Mitsubishi filed a request for arbitration with the Japan Commercial Arbitration Association.<sup>65</sup>

Soler denied Mitsubishi's allegations and counterclaimed, alleging breaches of the Sales Procedure Agreement and asserting a number of other claims under the Sherman Act,<sup>66</sup> the Federal Automobile Dealers' Day in Court Act,<sup>67</sup> and several Puerto Rican statutes.<sup>68</sup> The antitrust claims charged that Mitsubishi and Chrysler had conspired to divide markets in restraint of trade by keeping Soler out of Latin American and continental U.S. markets.<sup>69</sup>

The district court held all of the claims and counterclaims arbitrable, except two and part of a third, none of which are relevant to the issues considered in this article. It also retained jurisdiction over Soler's antitrust claims. While noting that courts of appeals considering the issue had uniformly followed the lead of *American Safety* in finding antitrust claims "inappropriate" for arbitration, the district court held, on the authority of *Scherk*, that the international character of the transaction between Mitsubishi and Soler required it to order arbitration.<sup>70</sup>

The Court of Appeals for the First Circuit agreed with the district court that state (Puerto Rican) laws could not frustrate arbitration provided for by the Arbitration Act and the Convention.

---

<sup>63</sup> *Mitsubishi*, 105 S. Ct. at 3347-48.

<sup>64</sup> *Id.* at 3359 n.109.

<sup>65</sup> *Id.* at 3350.

<sup>66</sup> Sherman Anti-Trust Act, ch. 647, §§ 1-7, 26 Stat. 209-10 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

<sup>67</sup> Ch. 1038, 70 Stat. 1125 (1956) (codified as amended at 15 U.S.C. §§ 1221-1225 (1982)).

<sup>68</sup> P.R. LAWS ANN. tit. 10, §§ 257-278 (1978 & Supp. 1983).

<sup>69</sup> *Mitsubishi*, 105 S. Ct. at 3355.

<sup>70</sup> *Mitsubishi*, 723 F.2d at 162.

Additionally, the court held that an agreement to arbitrate statutory claims can be found within the terms of a general arbitration clause and need not be specifically mentioned and that the arbitration clause was broad enough to encompass all the statutory claims, including antitrust claims. It refused, however, to order arbitration of the antitrust claims, finding that neither *Scherk* nor the Convention required abandonment of the *American Safety* doctrine.<sup>71</sup>

The case attracted a great deal of interest. *Amicus* briefs were filed by the United States, the American Arbitration Association, and the International Chamber of Commerce. The United States urged the Court not to permit arbitrators to consider antitrust issues; the two arbitral institutions, of course, favored extension of the arbitral process.

The Supreme Court affirmed the circuit court finding that the arbitration clause encompassed Soler's statutory counterclaims (except, of course, those set aside by the district court), but reversed its finding that antitrust issues are not arbitrable in an international setting.<sup>72</sup> Justice Blackmun wrote the majority opinion and was joined by Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Justice Stevens wrote a dissenting opinion in which Justice Brennan joined and in which Justice Marshall also joined except as to Part II, relating to arbitrability of statutory claims without express agreement of the parties. Justice Powell took no part.<sup>73</sup>

### B. *The Mitsubishi Holdings*

As noted above, two principal questions faced the Court: whether a general agreement to arbitrate encompasses claims arising from statutes designed to protect a class to which the party resisting arbitration belongs; and, if the answer to that question is in the affirmative, whether U.S. courts should enforce agreements to arbitrate future antitrust claims when such agreements arise out of international transactions. It was the latter issue that persuaded the Court to grant certiorari.<sup>74</sup>

#### 1. *Statutory Claims*

In finding that arbitration of so-called statutory claims does not require express agreement by the parties, the Court looked first at the Arbitration Act. It observed that there is no basis in the Arbitration Act for "implying in every contract within its ken a presumption against arbitration of statutory claims."<sup>75</sup> The Court then examined

---

<sup>71</sup> *Id.* at 168-69.

<sup>72</sup> *Mitsubishi*, 105 S. Ct. at 3355.

<sup>73</sup> *Id.* at 3349.

<sup>74</sup> *Id.* at 3353.

<sup>75</sup> *Id.*

what the parties had agreed to arbitrate, taking into account the liberal federal policy favoring arbitration agreements. It pointed out that federal substantive law of arbitration requires that:

questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.<sup>76</sup>

The Court did not go so far as to suggest that all statutory claims are arbitrable. Other federal statutes might circumscribe the generally broad range of arbitrable claims under the Arbitration Act.<sup>77</sup> In passing, the Court also noted that agreements to arbitrate, like all contracts, are subject to revocation on grounds such as fraud or overwhelming economic power.<sup>78</sup> It refused, however, to consider whether claims under the Federal Automobile Dealers' Day in Court Act were arbitrable, because Soler did not raise the issue in the court below or in its cross-petition for certiorari.<sup>79</sup>

The Court then endorsed the circuit court's examination of the scope of the arbitration clause, noting that the clause extended to all factual allegations "arising 'out of' or 'in relation to'" enumerated sections of the sales agreement, regardless of "the legal labels attached to those allegations."<sup>80</sup> Justice Stevens' dissenting opinion took the opposite tack in construing the Arbitration Act, insisting that:

The plain language of this [arbitration] statute encompasses Soler's claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law, or indeed one that arises under its distributor agreement with Chrysler. Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.<sup>81</sup>

The dissent emphasized that "[u]ntil today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims."<sup>82</sup> He distinguished *Scherk* from the instant case by stating that the breach of contractual warranty in that case was also claimed to be actionable under the Securities and Exchange Act of 1934, whereas Soler's statutory claims "have only an indirect relationship to the contract."<sup>83</sup> Justice Stevens also stressed that the Court had refused to order arbitration in cases arising under Title

---

<sup>76</sup> *Id.* at 3354.

<sup>77</sup> *Id.* at 3355.

<sup>78</sup> *Id.* at 3354.

<sup>79</sup> *Id.* at 3352 n.11.

<sup>80</sup> *Mitsubishi*, 723 F.2d at 159.

<sup>81</sup> *Mitsubishi*, 105 S. Ct. at 3364 (Stevens, J., dissenting).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 3365 (Stevens, J., dissenting).

VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and the Ku Klux Act of 1871.

From this portion of the *Mitsubishi* decision it is possible to draw two conclusions. First, a "broad" arbitration clause generally encompasses statutory claims arising out of the contractual transaction. The parties to a contract may, of course, restrict the scope of arbitration by appropriate language in the arbitration clause. They should be aware, however, that if the restrictive language is not clear, the courts will resolve doubts in favor of arbitrability. Second, where statutory claims are asserted, the presumption of arbitrability may be rebutted only by showing some clear congressional intent "to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>84</sup>

## 2. Antitrust Claims

The majority opinion in *Mitsubishi* emphasized that neither the Arbitration Act nor the Sherman Act excepted antitrust claims from international arbitration.<sup>85</sup> Although the Court found it unnecessary to pass on the application of the *American Safety* doctrine to domestic arbitration, it nevertheless scrutinized the four reasons given by the Court in that case for precluding arbitration of antitrust disputes and found them not altogether convincing. It found three of the concerns unjustified or unpersuasive.

To the concern "that contracts which generate antitrust disputes may be contracts of adhesion,"<sup>86</sup> the Court gave two responses. First, "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted."<sup>87</sup> Second, a party may directly attack an agreement to arbitrate and show that it was procured by fraud, undue influence, or overwhelming bargaining power.<sup>88</sup>

The *Mitsubishi* Court also took issue with the notion that the complex nature of antitrust disputes make them ill-suited to arbitration.<sup>89</sup> The Court noted the inconsistency of a policy forbidding arbitration agreements encompassing future antitrust disputes but permitting agreements to arbitrate antitrust claims entered into after such disputes arise. It also stated that antitrust issues in arbitrations frequently involve vertical restraints that do not often give rise to the "monstrous proceedings" commonly associated with antitrust cases. Further, arbitrators can be selected for their expertise, other experts

---

<sup>84</sup> *Id.* at 3355.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 3357.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

can be employed, and parties may prefer a streamlined dispute resolution proceeding to keep costs and efforts within manageable bounds.<sup>90</sup>

Finally, the Court disputed the *American Safety* rationale that "decisions as to antitrust regulations of business are too important to be lodged in arbitrators chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our law and values."<sup>91</sup> The Court pointed out that international arbitrators are frequently selected from the legal community, particularly when the dispute involves important legal issues. It declined "to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."<sup>92</sup>

The Court characterized as the "core of the *American Safety* doctrine" the notion that "private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages."<sup>93</sup> While admitting that "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators," the Court went on to point out that it was primarily a remedial provision.<sup>94</sup> Because "the antitrust cause of action remains at all times under the control of the individual litigant," however, there is no requirement that the cause of action be brought or pursued and no restriction on the litigant's right to settle.<sup>95</sup> The *Mitsubishi* Court thus held that where the international character of a transaction further complicates "dispute resolution the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies."<sup>96</sup>

The Court relied heavily on *Scherk* and included the following quotation from that decision:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . . 'A parochial refusal by the courts of one country to enforce any international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages . . . [It would] damage the fabric of international commerce and trade and imperil the willingness and ability of businessmen to enter into in-

---

<sup>90</sup> *Id.* at 3357-58.

<sup>91</sup> *Id.* at 3357.

<sup>92</sup> *Id.* at 3358.

<sup>93</sup> *Id.* at 3357.

<sup>94</sup> *Id.* at 3358-59.

<sup>95</sup> *Id.* at 3359.

<sup>96</sup> *Id.*

ternational commercial agreements.<sup>97</sup>

Finally, the Court pointed out that U.S. courts would have an opportunity at the time of enforcement of the award to assess whether antitrust issues had been properly considered by the arbitrator. In this connection, it noted that “[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”<sup>98</sup>

Justice Stevens’ dissent reiterated the view that private agreements to arbitrate statutory claims are unenforceable, maintaining that the rationale behind the collective bargaining cases applied with special force to the federal policy protected by the antitrust laws. He reviewed in detail the importance of antitrust enforcement to the free enterprise system and the role played by private treble damage suits in this enforcement. He was also concerned that “[a]rbitration awards are only reviewable for manifest disregard of the law,” and that arbitral procedures frequently generate a record that “is so inadequate that the arbitrator’s decision is virtually unreviewable.”<sup>99</sup> He leveled some rather harsh criticisms at the arbitral process:

Despotic decision making of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets.<sup>100</sup>

He further suggested that the greatest risk of arbitration is the potential invalidation of business practices that do not violate the antitrust laws.<sup>101</sup>

### C. *Application of the Convention*

Although the Court of Appeals for the First Circuit made a detailed examination of the Convention and its applicability to the *Mitsubishi* dispute, the Supreme Court said very little about the Convention, relying instead on *Scherk* and *The Bremen*.<sup>102</sup> There was little discussion of the Convention in *Scherk*, except the comment that the adoption of the Convention by the United States and the passage of the enabling legislation in chapter 2 of the Arbitration Act con-

---

<sup>97</sup> *Id.* at 3356 (quoting *Scherk*, 417 U.S. at 516-17).

<sup>98</sup> *Id.* at 3360.

<sup>99</sup> *Id.* at 3370 (Stevens, J., dissenting).

<sup>100</sup> *Id.* (Stevens, J., dissenting).

<sup>101</sup> *Id.* at 3370 n.32 (Stevens, J., dissenting).

<sup>102</sup> *Id.* at 3360.

firmed its conclusion in favor of arbitrability.<sup>103</sup>

The Court in *Mitsubishi* indicated that the federal policy favoring arbitration has "appl[ie]d with special force" in international transactions since 1970, when the United States acceded to the Convention.<sup>104</sup> It also recognized that the Convention reserves to the contracting states the right to refuse award enforcement when to do so would be against the public policy of that country.<sup>105</sup>

In his dissent, Justice Stevens argued that the right to refuse award enforcement, embodied in article V, when read in conjunction with the article II provisions for enforcement of arbitration agreements, establishes a basis for declining to permit arbitration of antitrust claims.<sup>106</sup> The majority, however, declined to find an antitrust exception to arbitrability of international disputes when Congress had not expressly made such exception.<sup>107</sup> It reasoned that:

The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject matter exceptions where Congress has not expressly directed the courts to do so.<sup>108</sup>

This language may have been the Court's way of refuting Justice Stevens' contention that Convention articles II and V should be read together. By saying that Congress, and not the courts, should make exceptions to subject matter arbitrability under the Convention, the Court in effect concluded that the article V right to refuse to enforce awards violating the forum's public policy does not apply in determining whether to order arbitration.

The prospect of ordering arbitration of a dispute whose award would be unenforceable seemed to bother the court below. "We are mystified," the Court said, "at the sense of, say, having to refer to arbitration a dispute involving the selling of slaves, knowing that the award could never be enforced."<sup>109</sup> There is a vast difference, however, between arbitration of a dispute arising out of an agreement that is illegal on its face (a slave sale) and one involving an agreement that may or may not be tainted with illegality, depending on facts that will be adduced and examined in arbitration (a violation of the Sherman Act or other antitrust statute).

---

<sup>103</sup> *Scherk*, 417 U.S. at 520 n.15.

<sup>104</sup> *Mitsubishi*, 105 S. Ct. at 3357.

<sup>105</sup> *Id.* at 3360.

<sup>106</sup> *Id.* at 3371 (Stevens, J., dissenting).

<sup>107</sup> *Id.* at 3361 n.21.

<sup>108</sup> *Id.*

<sup>109</sup> *Mitsubishi*, 723 F.2d at 164.



No court has yet said that antitrust issues are never arbitrable. Courts have said only that agreements to arbitrate future disputes will not be enforced as to allegations of antitrust violations. Presumably, an award involving antitrust issues, resulting from an agreement to arbitrate made after the dispute arose, would not be vacated merely because it included the antitrust issues. The award might, however, be unenforceable because of the manner in which the antitrust issues were decided. If the arbitrator so misconstrued the antitrust laws that the award was made "in manifest disregard of the law" or was so egregiously wrong as to violate public policy, a court would not confirm or enforce the award. This is quite different from refusing to allow arbitrators to consider antitrust issues. Furthermore, in the case of subject matter that is clearly not arbitrable, there is no reason to believe that an arbitrator would not also find it not arbitrable. Leaving arbitrability to arbitrators in the first instance is the practice in many European countries, where arbitrators determine their competence, subject to later review by the courts.<sup>110</sup>

#### IV. Questions for the Future

The majority and dissenting opinions in *Mitsubishi* agreed that under the Convention a contracting state has the right to limit the subject matter capable of settlement by arbitration. The majority, however, said that any limitations should be imposed by Congress, not by the courts.<sup>111</sup> It thus implicitly suggested that articles II and V of the Convention need not be read together,<sup>112</sup> as Justice Stevens so maintained.<sup>113</sup>

It is at the award stage that most questions for future resolution will arise. The majority and dissenting opinions agreed that review of arbitral awards was limited, but disagreed on the efficacy of such review. The majority noted that the Convention grants to the forum court the right to refuse enforcement of an award that is contrary to the forum's public policy and indicated that it thought that such an examination would not be too difficult.<sup>114</sup> The dissent maintained that "arbitration awards are only reviewable for manifest disregard

---

<sup>110</sup> In many European countries, the arbitrator has the power, frequently referred to by the phrase "competence-competence," to determine jurisdiction subject to court review at the time of the award. See, e.g., Glossner, *National Report on Federal Republic of Germany*, 4 Y.B. COM. ARB. 72-73 (1979); Derain, *National Report on France*, 6 Y.B. COM. ARB. 17 (1981); Sanders, *National Report on the Netherlands*, 4 Y.B. COM. ARB. 74 (1980).

<sup>111</sup> *Mitsubishi*, 105 S. Ct. at 3361 n.21.

<sup>112</sup> See *Development Bank of the Philippines v. Chemtex Fibers, Inc.*, 617 F. Supp. 55 (S.D.N.Y. 1985), in which the court said on the authority of *Mitsubishi* that "[w]hatever the permissible inquiry after conclusion of an arbitration proceeding, it is clear that the Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims." *Id.* at 57 n.12.

<sup>113</sup> *Mitsubishi*, 105 S. Ct. at 3371 (Stevens, J., dissenting).

<sup>114</sup> *Id.* at 3360.

of the law."<sup>115</sup> "Manifest disregard of the law" is not one of the grounds for setting aside an award under section 10 of the Arbitration Act, which speaks of a lack of a "mutual, final and definitive award."<sup>116</sup> The Convention does not list "manifest disregard" as a basis for refusing to enforce an award.

While courts have not vacated cases for an ordinary error of law, they have vacated cases for a "manifest disregard of the law."<sup>117</sup> The application of this standard is made more difficult by the paucity of precedent indicating what might justify vacating an award for manifest disregard of the law.<sup>118</sup> Whether "manifest disregard" would be considered to be contrary to the public policy of the United States is not clear. Public policy as a defense to enforcement is often invoked and nearly always rejected. It is said to be limited to cases when "enforcement would violate the forum state's most basic notions of morality and justice."<sup>119</sup> Whatever the test, its scope is yet to be determined.

A related question is that of the preclusive effect of an award. Neither the majority nor the dissenting opinion in *Mitsubishi* has anything to say about this. Ordinarily, issues decided through arbitration may not be relitigated. The award may be introduced into evidence and is conclusive as to matters decided.<sup>120</sup> The Supreme Court has recently limited the application of this general principle. In *Dean Witter Reynolds, Inc. v. Byrd*<sup>121</sup> the Court said: "We believe the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest," and went on to say that "it is far from certain that arbitration proceedings will have any preclusive effect on nonarbitrable federal claims."<sup>122</sup> In *McDonald v. City of West Branch*<sup>123</sup> the Court pointed out that arbitral

---

<sup>115</sup> *Id.* at 3370 (Stevens, J., dissenting).

<sup>116</sup> 9 U.S.C. § 10(d) (1982).

<sup>117</sup> See McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 Nw. J. INT'L L. & Bus. 1, 65 (1982).

<sup>118</sup> In *San Martine Compania de Navigacion v. Saguenay Terminals*, 293 F.2d 796 (9th Cir. 1961), the court said "a manifest disregard of the law . . . might be present when arbitrators understand and correctly state the law, but proceed to disregard the same." *Id.* at 801. There are, however, almost no cases in which manifest disregard has been found. In *British Airtours Ltd. v. New England Travel Corp.*, Civ. No. 83-618 (D. Conn. Aug. 7, 1985), however, the court found that an arbitrator had exceeded his authority by making an award under an indemnity clause when the claimant had not claimed a loss. The court characterized this as manifest disregard of the law. See also *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972); *A/S Siljestad v. Hideca Trading, Inc.*, 541 F. Supp. 58, 60 (S.D.N.Y. 1981).

<sup>119</sup> *Parsons & Whittemore*, 508 F.2d at 974; see also *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1976).

<sup>120</sup> 5 AM. JUR. 2D *Arbitration and Award* § 147 (1962), cited with approval in *American Renaissance Lines, Inc. v. Saxis S.S. Co.*, 502 F.2d 674, 679 (2d Cir. 1974); see also *Ivery v. United States*, 686 F.2d 410, 414 (6th Cir. 1982).

<sup>121</sup> 105 S. Ct. at 1244.

<sup>122</sup> *Id.*

<sup>123</sup> 104 S. Ct. at 1799.

awards are not "judicial proceedings" under the full faith and credit statute.<sup>124</sup> Thus, federal courts are not obligated by statute to give awards *res judicata* or collateral estoppel effect. Any rule of preclusion, therefore, will necessarily be judicially crafted.<sup>125</sup>

With the great public interest in antitrust enforcement, it is likely that an award implicating antitrust issues would be given narrow effect and would obviously have no precedential effect in antitrust suits brought by the Justice Department. It could not be effective against anyone not a party to the arbitration. The effect of an award on the litigation of those claims over which the district court in *Mitsubishi* retained jurisdiction is not clear.<sup>126</sup>

The Court in *Mitsubishi* did not decide whether arbitrators may award treble damages. It said only that "[t]he importance of the private [treble damages] remedy . . . does not compel the conclusion that it may not be sought outside an American court."<sup>127</sup> There is no reason why arbitrators should not be able to award treble damages. Arbitrators generally have almost unlimited powers to fashion relief,<sup>128</sup> although some courts have refused to enforce awards for punitive damages, at least where such damages are not authorized by statute.<sup>129</sup> Where treble damages are specifically authorized by statute, as in antitrust cases, arbitrators could not award them. A more interesting question is what might happen to an award that includes damages for an antitrust violation but fails to treble them.<sup>130</sup>

Finally, although a detailed discussion of the matter is beyond the scope of this article, *Mitsubishi* raises the question whether the Supreme Court will, in a future decision, declare antitrust issues arbitrable in domestic as well as international cases. There are several reasons why it might. Most important is the skepticism the Court evinced toward the *American Safety* doctrine.<sup>131</sup> After stating that its skepticism extended only to "some aspects" of that doctrine, the Court discredited three of its four prongs. This left only the "core" of the doctrine, which the Court defined as "the fundamental importance to American democratic capitalism of the regime of the antitrust laws."<sup>132</sup>

---

<sup>124</sup> 28 U.S.C. § 1738 (1982).

<sup>125</sup> *McDonald*, 104 S. Ct. at 1802.

<sup>126</sup> *Mitsubishi*, 105 S. Ct. at 3351 n.7.

<sup>127</sup> *Id.* at 3358-59.

<sup>128</sup> See, e.g., AM. ARB. A. COM. ARB. R. 43.

<sup>129</sup> See *South E. Atl. Shipping Ltd. v. Garnac Grain Co.*, 356 F.2d 189, 192 (2d Cir. 1966); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976); but see *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984).

<sup>130</sup> For a discussion of potential complications when international arbitrations involve treble damages and semi-penal remedies, see Newman & Burrows, *Consequences of International Arbitration of Antitrust and RICO*, N.Y.L.J., Dec. 23, 1985, at 1, col. 1.

<sup>131</sup> *Mitsubishi*, 105 S. Ct. at 3357.

<sup>132</sup> *Id.* at 3358.

In a domestic arbitration case, neither the public policy favoring international trade nor the Convention is available to support antitrust claim arbitrability. The *Mitsubishi* Court, however, indicated that the main reason for denying arbitrability of antitrust claims is the important role played by private litigation in antitrust enforcement. The importance of private litigation need not preclude arbitrability. *Mitsubishi* held that: "[s]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>133</sup> The *Mitsubishi* rationale, while limited to the international context, applies with equal force to domestic antitrust disputes.

In support of a finding of arbitrability of domestic antitrust suits, the Court could cite the desirability of reducing the volume of antitrust litigation through arbitration and other forms of alternate dispute resolution. Lower federal courts have noted that antitrust claims are often frivolous.<sup>134</sup> By permitting arbitration of antitrust claims, the volume of unmeritorious claims could be reduced.<sup>135</sup> Furthermore, claims under the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>136</sup> which have been held nonarbitrable on the authority of *American Safety*, are increasing.<sup>137</sup> The prospect of additional frivolous claims in contract actions might provide the incentive necessary to widen subject matter arbitrability in domestic cases.

## V. Conclusion

In view of the Supreme Court's commitment to resolving doubtful cases in favor of arbitration and of Chief Justice Burger's great interest in reducing the volume of litigation in the courts by the use of arbitration and other forms of alternate dispute resolution,<sup>138</sup> it seems likely that courts will continue to expand the role of arbitration. Although the Court did not mention this issue in *Mitsubishi*, lower federal courts have noted that antitrust claims in contract disputes are often frivolous. Once in arbitration, parties occasionally assert such claims to avoid the arbitral process. Arbitrators should have no difficulty recognizing and rejecting unmeritorious antitrust

---

<sup>133</sup> *Id.* at 3359-60.

<sup>134</sup> See, e.g., *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1178 n.25 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982).

<sup>135</sup> See *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1480 (9th Cir. 1984).

<sup>136</sup> 18 U.S.C. §§ 1961-1968 (1982).

<sup>137</sup> See generally Nathan, *Doubling the Treble Damage Option: What an Antitrust Practitioner Needs To Know About RICO*, 52 ANTITRUST L.J. 327 (1983).

<sup>138</sup> Chief Justice Burger has spoken and written on this subject many times; see, e.g., Burger, *Using Arbitration To Achieve Justice*, 40 ARB. J. 4 (1985).

claims with the result that they would disappear from court calendars and reduce the courts' workload.

The rationale in *Mitsubishi* will undoubtedly be extended to most other statutory claims arising in international commercial arbitration. It has already been extended to apply to RICO claims, previously nonarbitrable because of their similarity to antitrust claims.<sup>139</sup> It is not inconceivable that the Supreme Court will ultimately decide that antitrust and RICO claims are arbitrable in a domestic context as well. Whether this occurs, the future battleground in international arbitration will almost surely be over the scope of review of international awards implicating a statutory right. Such review might occur in enforcement proceedings in which courts can refuse to enforce awards contrary to public policy. Review could also occur at the time of later litigation of the same or similar subject matter, when the preclusive effect to be given to the arbitral award is determined. In the meantime, however, the arbitral process will perform a useful function by winnowing out frivolous statutory claims from those that have merit.

---

<sup>139</sup> In *S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1983), *aff'd*, 745 F.2d 190 (2d Cir. 1984), the court refused to allow arbitration of RICO claims raised under a "broad" arbitration clause; *but see Chemtex Fibers, Inc.*, 617 F. Supp. at 55. In *Chemtex* an action based in part on a RICO claim was stayed and the parties ordered to arbitration. The court said that the domestic interest in RICO enforcement was "arguably a great deal less strong" than the interest in antitrust enforcement and was overcome by the compelling interest in certainty and predictability in international commercial transactions. *Id.* at 57.