RECENT DEVELOPMENTS

ARBITRATION—ARBITRABILITY OF ANTITRUST CLAIMS ARISING FROM AN INTERNATIONAL COMMERCIAL CONTRACT—*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985).

I. FACTS

In conjunction with becoming a Chrysler-Mitsubishi dealer, Respondent, Soler Chrysler-Plymouth, Inc. (Soler), on October 31, 1979, entered a "Sales Procedure Agreement" with Chrysler International, S.A. (CISA) and Petitioner, Mitsubishi Motors Corporation (Mitsubishi).[1] Included in the agreement was a clause providing that "all disputes, controversies or differences which may arise" between Mitsubishi and Soler concerning certain sections of the agreement would be settled by arbitration in Japan.[2] Due to a sharp decline in sales in 1981, Soler became unable to meet its minimum sales commitments.[3] By the spring of 1981, Soler's dangerously swollen inventory prompted the dealer to request that Mitsubishi delay or cancel several shipments of vehicles.[4] Soler eventually disclaimed responsibility for withheld shipments, amounting to almost one thousand vehicles, which Mitsubishi had stored in Japan.[5]

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[1] Soler is a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico. Chrysler International, S.A., a Swiss corporation registered in Geneva, is a wholly owned subsidiary of Chrysler Corporation. Mitsubishi is a joint venture between Chrysler International, S.A. and Mitsubishi Heavy Industries, Inc., a Japanese corporation with its principal place of business in Tokyo, Japan. The joint venture was formed to distribute vehicles manufactured by Mitsubishi through Chrysler dealers located outside the continental United States. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3349 (1985).

[2] *Id.* The arbitration proceedings would be governed by the rules and regulations of the Japan Commercial Arbitration Association. *Id.*

[3] *Id.* As Soler's initial sales performance was quite good, Mitsubishi and Soler had agreed to increase Soler's minimum sales volume for 1981. *Id.*

[4] *Id.* As an alternative means of dealing with its inventory problems, Soler requested that a quantity of its vehicles be transshipped for sale in the continental United States and Latin America. Mitsubishi refused, citing possible problems with Japanese trade policy and the unsuitability of the vehicles for use in colder climates or in countries where high-octane unleaded fuel was unavailable.

[5] *Id.* at 3350.

On March 15, 1982, Mitsubishi brought suit against Soler in the United States District Court for the District of Puerto Rico, alleging various breaches of contract and seeking an order to compel arbitration under the Federal Arbitration Act[6] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[7] Soler denied these allegations and raised various counterclaims, including a cause of action under the Sherman Act.[8] The district court ordered arbitration of all disputed issues except two involving defamation and one concerning discriminatory treatment and the establishment of minimum sales volumes, and Soler appealed.[9]

The United States Court of Appeals for the First Circuit agreed with the district court's finding that virtually all of the claims fell within the scope of the arbitration clause.[10] Contrary to the district court's view, however, it held that arbitration of the antitrust claim was precluded by a strong federal policy disfavoring the arbitration of antitrust claims in domestic cases.[11] On appeal, *held*, reversed as to the arbitrability of Soler's antitrust claim. Concerns of international comity and the need for predictability in the resolution of international commercial disputes outweigh concerns justifying refusal of arbitration in domestic cases and require the enforcement of contract provisions governing the manner in which disputes under the contract are to be resolved. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, U.S. , 105 S. Ct. 3346 (1985).

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[6] Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-14 (1982)). Section Four of the Act directs the district courts to compel arbitration when it appears that the making of the arbitration agreement or compliance therewith is not in issue. Among Mitsubishi's allegations was Soler's failure to pay for the withheld shipments and their storage. *Mitsubishi*, 105 S. Ct. at 3350 n.2.

[7] *Mitsubishi*, 105 S. Ct. at 3350. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-208 (1982), [hereinafter cited as Convention]. The Convention has been adopted by over 50 nations, including the major industrialized nations. A.J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 410 (1981).

[8] *Mitsubishi*, 105 S. Ct. at 3350. Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* (1982). In its antitrust claim, Soler alleged that Mitsubishi's refusal to allow Soler to transship vehicles was part of a conspiracy between Chrysler and Mitsubishi to divide markets in restraint of trade. *Mitsubishi*, 105 S. Ct. at 3351.

[9] *Mitsubishi*, 105 S. Ct. at 3351 and n.7. In compelling arbitration of the antitrust claim, the district court relied on Sherck v. Alberto-Culver Co., 417 U.S. 506 (1974). For a discussion of *Sherck*, see *infra* notes 22-24 and accompanying text.

[10] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 159-61 (1st Cir. 1983).

[11] *Id.* at 162.

II. LEGAL BACKGROUND

The enactment by Congress in 1925 of the Federal Arbitration Act marked the beginning of a strong federal policy favoring the enforcement of arbitration agreements. Previously, some courts had been reluctant to enforce such agreements because they perceived that their jurisdiction would be unduly displaced if disputes which they were accustomed to settling came to be resolved through arbitration.[12] The Act made clear that agreements to arbitrate should stand or fall on the same gounds as any other type of contract.[13] Since passage of the Act, courts have continually reinforced strong approval of the policies embodied in the Act favoring arbitration.[14]

The extension of these policies to arbitration agreements made in international commercial contracts was evidenced by the accession of the United States in 1970 to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[15] The Convention sought to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[16] The patchwork of bilateral and multilateral arbitration treaties that existed before the Convention had produced grave uncertainties as to the effectiveness of any given international arbitration agreement.[17] To-

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[12] *See, e.g.*, United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915); Meacham v. Jamestown, Franklin & Clearfield R.R., 211 N.Y. 346, 105 N.E. 653 (1914); Vynior's Case, 8 Coke 81b, 77 Eng. Rep. 597 (K.B. 1609). The Act was designed to eradicate such judicial hostility toward arbitration agreements, which Congress and many courts considered an anachronistic vestige of the old English courts' jealous protection of their jurisdiction. H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924). *See also* 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).

[13] 9 U.S.C. § 2 provides that any written agreement to arbitrate contained in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[14] *See, e.g.*, Dean Witter Reynolds v. Byrd, 105 S. Ct. 1238, 1242-43 (1985); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983); Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 404-06 (1967).

[15] Convention, *supra* note 7.

[16] Sherck v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

[17] *See* Quigley, *supra* note 12, at 1051-59. The bilateral accords usually took the form of arbitration clauses in Treaties of Friendship, Commerce, and Navigation concluded between the United States and another country. The provisions of these clauses varied widely from treaty to treaty. For example, a treaty with China called for the recognition of arbitral awards only in the country in which the award was rendered, while a later treaty with the Netherlands provided for recognition and enforcement in both countries. Treaties had not been concluded with many countries by the time of the Convention. *Id.*

day, once an attorney determines that the country with whose citizen his client wants to do business is a party to the Convention, he can predict how that country will treat arbitration agreements.

Against this background of respect for arbitration agreements is poised the determination by United States courts that the nature of certain disputes makes them peculiarly inappropriate for resolution in an arbitral forum.[18] While courts have retained jurisdiction over such disputes in domestic cases, competing considerations of international comity have caused courts to compel arbitration where international commercial contracts were involved.[19] In *Wilko v. Swan*,[20] the Supreme Court held that the arbitration agreement being litigated was invalid because it was prohibited by the Securities Act of 1933.[21] Twenty years later, the Court upheld an arbitration agreement even though it assumed arguendo that the agreement violated analogous provisions of the Securities Exchange Act of 1934.[22] The *Sherck* Court reasoned that since the contract before it was a "truly international agreement," its arbitration provision served the purpose of eliminating any uncertainty as to which country's laws would govern the resolution of disputes arising from the contract. Refusing to enforce the pro-

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[18] For examples of cases in which the courts have cited certain subject matters as being inappropriate for resolution through arbitration see, *e.g.*, Wilko v. Swan, 346 U.S. 427 (1953) (securities); Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) (patent validity); American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (antitrust). The only types of arbitration agreements which the Federal Arbitration Act specifically prohibits are those involving the employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

[19] *See, e.g.*, Sherck v. Alberto-Culver Co., 417 U.S. 506 (1974) (securities); Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975) (bankruptcy); Anco Shipping Co. v. Sidermar S.P.A., 417 F. Supp. 207 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2d Cir. 1977) (trade boycott).

[20] 346 U.S. 427 (1953).

[21] Securities Act of 1933, 48 Stat. 74, (codified at 15 U.S.C. §§ 77a-77aa (1982)). The Court found that the arbitration agreement came within the purview of § 77n, which provides that "[a]ny . . . stipulation . . . binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void." The agreement was seen by the Court as waiving § 77v, which allows the securities purchaser to choose the forum in which he will bring suit. Wilko v. Swan, 346 U.S. 427, 430-35 (1953).

[22] Sherck v. Alberto-Culver Co., 417 U.S. 506 (1974). Section 78cc of the Securities Exchange Act of 1934, 48 Stat. 881 (codified in scattered sections of 15 U.S.C. §§ 77a-78kk (1982)), is essentially identical to the waiver provision of the 1933 Act. Section 78aa provides the purchaser with fewer forum choices than does the 1933 Act, by not allowing suit to be brought in a state court.

vision would frustrate this purpose and would "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[23] The Court likened international arbitration agreements to forum selection clauses, the enforcement of which it had vigorously championed two terms earlier.[24]

Unlike the securities exception to the federal policy favoring arbitration, the nonarbitrability of antitrust claims had no purported foundation in any statutory prohibition. Rather, it is based on four policy considerations first enunciated in the purely domestic case of *American Safety Equipment Corp. v. J.P. Maguire & Co.*[25] First, the vitality of the private antitrust action is essential to a competitive economy, the maintenance of which is a national concern.[26] Second, the likelihood that contracts which generate antitrust claims are contracts of adhesion counsels against the enforcement of arbitration clauses found therein.[27] Third, the arbitration process is ill-suited to the complexity of antitrust cases.[28] Finally, since arbitrators are generally drawn from the business community, they might not be so diligent in the enforcement of laws regulating business as would an impartial jurist.[29] Reasoning that these considerations outweighed the competing international concerns announced in *Sherck*, the Court of Appeals for the First Circuit in 1983 declined to enforce an arbitration

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[23] *Sherck*, 417 U.S. at 515-17.

[24] *Id.* at 518-19. In the case of The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Court criticized what it perceived as a widespread judicial hostility toward forum selection clauses in stating that "[t]he 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." *Id.* at 9. *The Bremen* was a logical extension of National Equipment Rental Co. v. Szukhent, 375 U.S. 311 (1964), a domestic case which recognized the right of contracting parties to designate the forum in which disputes arising from the contract would be settled. The validity of forum selection clauses in international contracts was also recently affirmed in AVC Netherland B.V. v. Atrium Investment Partnership, 740 F.2d 148 (2d Cir. 1984), a case which relied heavily upon *The Bremen*.

[25] 391 F.2d 821 (2d Cir. 1968).

[26] The court likened the plaintiff in an antitrust suit to a "private attorney-general," thus implying that the Department of Justice was not itself capable of policing all antitrust violations. *Id.* at 826.

[27] *Id.* at 827. While the court offered no support for this presumption, it is ostensibly derived from the perception that antitrust plaintiffs are generally in a position of inferior bargaining power in relation to antitrust defendants.

[28] *Id.*

[29] *Id.*

clause in an antitrust dispute involving an international commercial contract.[30]

III. THE DECISION

The Supreme Court's reversal of the First Circuit's decision in 1985 in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[31] was predicated upon an affirmation of the international concerns of *Sherck* as well as an attack upon the basic premises of the *American Safety* doctrine. While the court of appeals essentially recapitulated the rationale of *American Safety*,[32] the Supreme Court critically examined each of the four policies disfavoring the arbitration of antitrust claims in light of the factual context of the case and the realities of the arbitration process.[33]

The Court began its inquiry by questioning the proposition that arbitration clauses should not be enforced in antitrust cases because contracts which generate antitrust claims are likely to be contracts of adhesion.[34] The Court found no reason to assume that an arbitration clause is the product of an unfair bargaining process unless the party resisting arbitration makes a claim to that effect.[35] In answering the objection that antitrust claims are too complex to be arbitrated, the Court cited the flexibility and access to expertise afforded by arbitration, since arbitrators and experts can be chosen with an eye toward the subject matter of the dispute.[36] This ability to choose arbitrators familiar with antitrust issues would seem to be a luxury unavailable in the courts. Trial judges are not necessarily antitrust experts, and the ability of jurors to cope with the complexities of antitrust litigation has been questioned.[37] Doubting that even courts adhering to the *American Safety* doctrine are convinced by the complexity objection,[38] the Court noted that they sanction arbitration

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[30] *Mitsubishi*, 723 F.2d 155.

[31] 105 S. Ct. 3346 (1985).

[32] *Mitsubishi*, 723 F.2d at 162. The court took no judicial notice of the procedures of the arbitral body to which the parties were to submit the dispute.

[33] *Mitsubishi*, 105 S. Ct. at 3357-60. *Cf.* Wilko v. Swan, 346 U.S. 427, 429-30 (1953) (Frankfurter, J., dissenting) (as an early advocate of determining whether the proposed arbitration process will protect the rights of the party resisting arbitration).

[34] *Mitsubishi*, 105 S. Ct. at 3357.

[35] *Id.* Soler made no such claim. *Id.*

[36] *Id.* at 3357-58.

[37] *See In re* Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980) (as an example of such questioning).

[38] *Mitsubishi*, 105 S. Ct. at 3357.

agreements executed *after* the antitrust dispute has arisen.[39] The ability to mold the composition of the arbitral panel to the needs of the case was also cited as minimizing any hostility which that panel might have toward legislation imposing restraints on business. The Court answered the criticism that an arbitral tribunal composed of businessmen would be lax in the enforcement of such legislation by pointing out that arbitrators are not necessarily drawn from the business community and that disputants often enlist lawyers as arbitrators where important legal questions permeate the dispute.[40]

To complete its attack on the *American Safety* doctrine, the Court turned to what it considered the heart of that doctrine — the pivotal role played by the private cause of action in the enforcement of antitrust laws.[41] Proponents of the *American Safety* doctrine had argued that allowing the arbitration of antitrust claims would diminish the compensation and deterrence functions of the treble damages action conferred by the Clayton Act.[42] The Court answered this argument by pointing out that since arbitral tribunals generally decide disputes arising under national law in accordance with such law,[43]

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[39] *See, e.g., Mitsubishi*, 723 F.2d at 168 n.12 (expressing no opinion on the question of whether arbitration agreements are enforceable if entered into after the antitrust dispute has arisen); Cobb v. Lewis, 488 F.2d 41, 47-49 (5th Cir. 1974) (enforcing implied arbitration agreement entered into after the antitrust dispute arose); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1214-15 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) (enforcing express arbitration agreement executed after the inception of the antitrust dispute).

[40] *Mitsubishi*, 105 S. Ct. at 3358. The arbitral panel selected to hear the Mitsubishi-Soler dispute consisted of three Japanese lawyers: a former law school dean, a former judge, and an attorney who had published works dealing with the antitrust laws of both Japan and the United States. *Id.* at 3358 n.18. No "typical" arbitral panel exists. Under the rules of the International Chamber of Commerce (ICC), for example, each party has the option of designating an arbitrator. The chairman of the panel is chosen by the national committee of the ICC in the country where the arbitration will take place. An arbitrator designated by a party will not be confirmed if he is found not to be independent from that party. Paulsson, *Arbitration Under the Rules of the International Chamber of Commerce*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION, 251-53 (Carbonneau, ed. 1984). Obviously, each party should designate arbitrators knowledgeable in the subject matter of the dispute to be arbitrated.

[41] *Mitsubishi*, 105 S. Ct. at 3358. The Court presumably considered the private action crucial, because potential antitrust plaintiffs are closer than the government to events constituting antitrust violations. Such plaintiffs are, therefore, more likely to report such violations to a court, thus providing "a crucial deterrent to potential violators." *Id.*

[42] *See, e.g., Mitsubishi*, 723 F.2d at 168.

[43] *Mitsubishi*, 105 S. Ct. at 3359. In its *amicus* brief, the International Chamber

these functions will be effectuated when a party seeks to vindicate its statutory rights in an arbitral forum.[44] While the Court took pains to represent that it did not question the validity of the *American Safety* doctrine in the domestic arena,[45] it is difficult to see why the above-outlined criticisms of that doctrine would not apply with equal force in domestic antitrust cases.[46]

IV. COMMENT

The Court's approach of recognizing the adaptability of the arbitration process to the needs of a particular case is much more realistic than blind adherence to a doctrine formulated in the context of arbitration procedures available twenty years ago.[47] The *American Safety* doctrine, which amounts to a per se prohibition of the arbitration of antitrust claims, would tempt a party resisting arbitration

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of Commerce expressed the opinion that Soler's antitrust claim would be decided under the Sherman Act. Counsel for Mitsubishi indicated that the claim had been submitted to the arbitral panel with such an understanding. *Id.* at 3359 n.19. Failure to apply the relevant national law in the arbitration process would indeed be imprudent, as the resulting arbitral award frequently must be converted into a court judgment in order to be collected. Yates, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils,* in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION, 232 (Carbonneau, ed., 1984).

[44] *Mitsubishi*, 105 S. Ct. at 3358-60. The Court emphasized that compensation was the primary goal of the treble damages action, citing for support Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977). Why the Court was so careful to make this point is not clear unless perhaps it was anticipating criticism that the more private nature of the arbitration process would not so effectively serve the deterrent function as would a court action. Also noteworthy is that courts following *American Safety* do not seem to think that the purposes of the private antitrust action are undermined when a claim is abandoned or when parties to such actions settle out of court. Aksen, *Arbitration and Antitrust - Are They Compatible?*, 44 N.Y.U. L. REV. 1097, 1106-07 (1969). Litigants in three of the leading cases establishing the antitrust exception to arbitrability, including those in *American Safety*, eventually settled out of court. *Id.*

[45] *Mitsubishi*, 105 S. Ct. at 3355.

[46] For a more comprehensive discussion of the policies underlying the antitrust exception to arbitrability, see generally Aksen, *supra* note 44; Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085 (1969); Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072 (1969).

[47] Several arbitration procedures employed in the Mitsubishi-Soler dispute were cited shortly after the *American Safety* decision by one commentator as modifications necessary for the arbitration of antitrust disputes to be appropriate. Pitofsky, *supra* note 46, at 1084.

to raise superfluous antitrust claims.[48] The resultant procedural and substantive quagmire is an unnecessary burden on an already overworked judiciary.

Somewhat less exhaustive, but equally important, was the Court's treatment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[49] which was for the most part confined to a footnote.[50] In limiting its treatment of the Convention, the Court largely ignored what would seem to be a strong basis of support for its decision. Article II(1) of the Convention dictates that arbitration agreements "concerning a subject matter capable of arbitration" shall be recognized.[51] A court, when confronted with a dispute which falls within the scope of such a recognized agreement, is required by article II(3) to refer the parties to arbitration if requested to do so.[52] Article

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[48] For an example of such maneuvering, see Helfenbein v. International Industries, Inc., 438 F.2d 1068, 1072 (8th Cir. 1971), *cert. denied*, 404 U.S. 872 (1971). One court has remarked that "[a]rbitration is often thought of as a quick and efficient method for determining controversies. Unfortunately, cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration." Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304, 305 (2d Cir. 1967).

[49] Convention, *supra* note 7.

[50] *Mitsubishi*, 105 S. Ct. at 3360 n.21. Similarly, the Court relegated its discussion of the Convention to a note in *Sherck*, citing the United States' accession to the Convention as being "strongly persuasive evidence of congressional policy consistent with the decision we reach today." Sherck v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

[51] Convention, *supra* note 7, art. II, para. 1, which provides in full:

> 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 of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The "subject matter" clause of article II(1) has been called "one of the most troublesome provisions of the entire Convention." Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1, 8 (1971). For further commentary on the varying interpretations of this clause see, for example, VAN DEN BERG, *supra* note 7, at 152-54; McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM., 735, 753-56 (1971), Quigley, *supra* note 12, at 1062-64.

[52] Convention, *supra* note 7, at art. II, para. 3, which provides in full:

> 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.

V(2)(a) allows a court to decline enforcement of an arbitral *award* if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country."[53] The Court agreed with the appeals court's conclusion that since the language of V(2)(a) is "symmetrical"[54] with that of II(1), arbitration *agreements* need not be recognized, hence enforced, when they clash with domestic notions of arbitrability.[55]

The courts' paths diverge, however, on the matter of *whose* notions of arbitrability control the enforcement of arbitration agreements. The court of appeals believed that its own notions, derived from *American Safety* and its progeny, could trigger the "subject matter exception" of article II(1), and thus found its holding to be in accord with the Convention.[56] The Supreme Court, on the other hand, took a much narrower view of that exception. It declared that subject-matter exceptions should be recognized "only where Congress has . . . expressly directed the courts to do so."[57] This declaration cannot be read to imply that any statute prohibiting arbitration will trigger the exception of article II(1), as the Court decided in *Sherck* that

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[53] *Id.* art. V, para. 2a. Article V(2) provides in full:

> 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:
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> (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.

It is generally accepted that V(2)(a) is merely a specific instance of the "public policy exception" of V(2)(b). VAN DEN BERG, *supra* note 7, at 350.

[54] *Mitsubishi*, 723 F.2d at 164. Apparently, in terming the two provisions "symmetrical," the court of appeals was referring to the similarity of the language employed in these provisions. Both provisions contain the phrase "subject matter capable of settlement by arbitration." However, only V(2)(a) adds "under the law of that country."

[55] *Mitsubishi*, 105 S. Ct. at 3360 n.21. This conclusion essentially reads "under the law of that country" into II(1). It has been said that such a reading enhances the internal consistency of the Convention. This reading also finds support in the argument that since a court's competence is based upon the law of the nation in which it sits, that law should be consulted on the question of whether the court's jurisdiction has been lawfully excluded by an arbitration agreement. VAN DEN BERG, *supra* note 7, at 152-54.

[56] *Mitsubishi*, 723 F.2d at 164-66. The court of appeals decided that a federal judicial policy of disallowing the arbitration of antitrust claims was sufficient to trigger the subject matter exception of II(1). *Id.* Once this exception is brought into play, a court need not enforce the arbitration agreement which it is considering. *See supra* note 51, for the full text of article II(1) of the Convention.

[57] *Mitsubishi*, 105 S. Ct. at 3360 n.21.

just such a statute would not bar enforcement.[58] Rather, the Court referred to congressional directives which specify matters which are to be excluded from the scope of the Convention.[59]

The Court's reading of the subject-matter exception was extraordinary because Congress has yet to exclude *any* such matters.[60] Of course, courts may still invalidate arbitration agreements on grounds of basic contractual notions such as fraud or undue influence,[61] but the decision emasculates their authority to invalidate clauses calling for arbitration on policy grounds. The Court's extremely narrow reading of article II(1) of the Convention has further constricted a public policy exception to the Convention which had previously been criticized as "useless if not altogether nonexistent."[62]

The Court's decision dealt only with the enforcement of arbitration agreements; a court's authority under article V(2) to refuse enforcement of an arbitral award remains untouched. As a result, judicial intervention in the arbitration process will largely be confined to the award enforcement stage. This aspect of the Court's ruling will be beneficial because it will force parties to "let off steam" at the arbitration table, thereby avoiding vexatious and costly litigation. If the parties can discover through arbitration that otherwise "nonarbitrable" claims are without merit, much judicial energy will be saved.

The Court's decision also allows a protective escape mechanism, since under article V(2) courts can refuse enforcement of arbitral awards offensive to the interests of the laws under which the claims arose.[63] The efficacy of judicial review at the award enforcement

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[58] *See supra* notes 22-24 and accompanying text (discussion of *Sherck*).

[59] *Mitsubishi*, 105 S. Ct. at 3360 n.21. Presumably such directions would take the form of legislation amending the Convention (9 U.S.C. §§ 201-08).

[60] *Id.* There would, therefore, seem to be no "category of claims" capable of triggering the subject-matter is exception of article II(1). The determination of whether a particular subject-matter is arbitrable is essentially relegated to the arbitrators, a result which "would come closer to providing the parties with the intended result that they provided for in their international contract." Aksen, *supra* note 51, at 8-9.

[61] *See supra* note 52 for full text of article II(3) of the Convention, which provides for invalidation on such grounds. *See also* Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982) (limiting the "null and void" clause of article II(3) to situations such as fraud).

[62] Comment, *The Public Policy Defense to Recognition and Enforcement of Arbitral Awards*, 7 CAL. W. INT'L L.J. 228, 245 (1977). *But see* VAN DEN BERG, *supra* note 7, at 367-68 (arguing that such criticism is not justified and that the narrowing of public policy exceptions should rather be viewed as a beneficial retreat from earlier parochial attitudes).

[63] *Mitsubishi*, 105 S. Ct. at 3360.

stage, however, to a large extent depends upon the record generated by the arbitration procedure. Given the likelihood that parties will now be held to their agreements to arbitrate, it becomes very important that an attorney be careful to ensure that the arbitral tribunal before which his client may appear provides for adequate recording of its proceedings.[64]

In contrast to its novel interpretation of the Convention, the Court left undisturbed the policy that domestic notions of arbitrability should not control the enforcement of international arbitration agreements. Rather, the arguments of *Sherck*[65] and *The Bremen*[66] were cited as proof of the validity of these policies.[67] The Court once again advocated respect for "freely negotiated choice-of-forum provisions."[68] Such provisions, the Court reasoned, play the important role of affording the parties predictability of dispute resolution.[69] A "parochial"[70] refusal to enforce arbitration agreements would destroy this predictability and lead to retaliatory litigation responses.[71] For example, Mitsubishi might have made a preemptive strike against Soler by obtaining an order from a Japanese court enjoining Soler from litigation in United States courts. The resulting international judicial stalemate could only have negative repercussions. The Court failed, however, to address the possibility that insistence on settling international antitrust matters in United States courts might invite retaliation on a larger scale. A perception by other countries that this insistence constitutes an extraterritorial extension of United States

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[64] The Japanese Commercial Arbitration Association, for example, provides for stenographic recording of proceedings at the request of the parties or by order of the tribunal and for a statement of the reasons for the award. *Mitsubishi*, 105 S. Ct. at 3360 n.20.

[65] *See supra* notes 22-24 and accompanying text.

[66] *See supra* note 24.

[67] *Mitsubishi*, 105 S. Ct. at 3355-57.

[68] *Id.* at 3356.

[69] *Id.*

[70] Both the court of appeals, *Mitsubishi*, 723 F.2d at 163, and the dissent in the principal case, *Mitsubishi*, 105 S. Ct. at 3372, misinterpreted the admonitions in *The Bremen* and *Sherck* to abandon parochial attitudes. They both defended United States antitrust laws from accusations of parochialism, when the criticism of these cases was leveled at overly protective judicial attitudes and not any particular body of law. "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.*" *Mitsubishi*, 105 S. Ct. at 3361 n.21 (emphasis added).

[71] *Mitsubishi*, 105 S. Ct. at 3356.

antitrust law could lead to further statutory retaliation by those countries.[72]

IV. CONCLUSION

Mitsubishi represents the latest development of a trend in the federal courts favoring arbitration. It is difficult to imagine a decision which could be more unqualified in its support of the enforcement of international arbitration agreements. Parties to an international contract which have decided that, for whatever reason,[73] they want to keep the resolution of disputes arising from the contract out of the courts can now expect the courts to abide by such a decision. *Mitsubishi* is also significant as being the Court's first attack on the *American Safety* doctrine. Whether this attack will affect domestic cases remains to be seen, but the present federal policy toward enforcement of antitrust laws indicates that it could.

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[72] For example, these countries might implement discovery-blocking legislation or refuse to enforce court awards where choice of forum clauses entered into by its nationals are consistently invalidated by United States courts seeking to retain jurisdiction over antitrust matters. *See generally* Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Law*, 15 INT'L LAW. 585 (1981); Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213 (1982).

[73] For a general discussion of why parties tend to choose arbitration over litigation see Yates, *supra* note 43, at 225-32 (citing facts such as costs, speed, and confidentiality).