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CASENOTES

Development Bank of Philippines v. Chemtex Fibers, Inc.: A Vote in Favor of International Comity and Commercial Predictability

Private arbitration has become an increasingly attractive vehicle for commercial dispute resolution. One of the principal reasons behind this shift toward arbitration in the United States is the fact that crowded court dockets frequently cause unacceptably long delays for litigants. Avoiding these delays may be important for a party seeking performance of contractual obligations, as well as for an injured party who seeks damages for the value of the breached contract. When differences are adjudicated rapidly, parties can return to their business activities more promptly. This outcome translates into greater economic efficiency in the free-market system.

In the international commercial setting, parties may agree to private arbitration of their disputes mainly for other reasons. One of these reasons may be that a foreign party will tend to view another nation's judicial system as inherently untrustworthy. A world riddled with pronounced ideological and nationalistic tendencies further cautions the foreign party against submitting himself to another nation's judicial processes. Although a transnational tribunal cannot ensure a fairer resolution of disputes than a court of law, it is designed to avoid the taint of national prejudice.

Notwithstanding the assumption that international arbitrators will tend to be less biased than national officials, their ability to function effectively is necessarily dependent on the judicial authority of the forum nation. The powers of national courts may be called upon in any number of capacities during the arbitration process. These powers may be catego-

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rized as assistance, intervention, supervision or control, and recognition and enforcement.[1] Thus, there is an inescapable national presence that permeates private international arbitration.

Clearly, private arbitration is ineffective without the host nation's enforcement machinery. Conversely, public intervention by the host nation's judicial officials presents certain risks. For example, a party to arbitration may attempt to invoke the power of a forum court to order provisional relief, such as attachment or forced sale of perishable goods. If such relief is sought against a party resisting arbitration, then the possibility that it may be granted may have the salient effect of motivating the resisting party to begin the arbitration process. Nevertheless, any provisional coercive action taken by a court of law against a party to arbitration carries with it the risk of resolving components of the dispute that the parties had previously agreed would be resolved only by arbitration.[2]

At this juncture private international law is inextricably caught up in the public law of the arbitration forum. Decisions of national courts bearing on the proper scope of their intervention powers in private international arbitration are really policy decisions relating to international comity. Those decisions that tend to favor relegation of as many claims as possible exclusively to the arbitration process indicate a nation's firm commitment to predictability in the international commercial system. On the other hand, a court of law in a host nation may reserve for itself subject-matter jurisdiction over a particular issue that could otherwise be arbitrable. In such a case, assuming no precedential or statutory constraint, the court makes a policy choice in favor of national sovereignty over international transactional certainty.[3] The United Nations accepted the Commission on International Trade Law Model Arbitration Law a decade ago.[4] A recent draft of the Model Law deleted a provision that recognized concurrent court control of the arbitration process.[5] Thus, the

1. *See,* Kerr, *Arbitration and the Courts: The UNCITRAL Model Law,* 34 INT'L & COMP. L.Q. 1, 2-3 (1985).

2. *See* McDonell, *The Availability of Provisional Relief in International Commercial Arbitration,* 22 COLUM. J. TRANSNAT'L L. 273 (1984).

3. This is not to say that the courts of the forum state should not be able to intervene in appropriate circumstances. It is possible that arbitrators may conduct themselves in an unauthorized or outrageous manner. To permit such conduct to continue without the possibility of relief until conclusion of the proceedings would be unjust and costly. *See* Kerr, *supra* note 1, at 17. Moreover, genuine uncertainty about the validity of an arbitration agreement itself, or about a specific provision of an arbitration agreement such as a jurisdictional question, requires reference to authority outside the tribunal. Such a legitimate need, however, should be distinguished from coercive sanctions that summarily decide factual components of an arbitrable dispute.

4. Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), G.A. Res. 98, 31 U.N. GAOR Supp. (No. 39) at 182, U.N. Doc. A/31 (1976).

5. Article 17 provided in part:

Commission has endorsed complete independence of the international arbitration panel, at least until the conclusion of its proceedings.

Against this background, this Note examines the current posture of United States case law as it relates to the tension that constantly overshadows international arbitration, namely, the tension between the possibility that a court will reserve jurisdiction over particular issues, and the competing concerns of commercial predictability and international comity. Specifically, this Note discusses the recent decision in *Development Bank of Philippines v. Chemtex Fibers, Inc.*[6] and the policy position it signals to those parties considering the United States as a forum for international arbitration.

I. The Federal Arbitration Act and Domestic Case Law

The Federal Arbitration Act[7] guides enforcement of arbitration agreements in the United States. The Act's legislative history suggests that Congress's purpose in enacting it was "to ensure judicial enforcement of privately made agreements to arbitrate."[8] Domestic case law has interpreted the Act as favoring arbitration even at the risk of bifurcated proceedings or piecemeal resolution of litigation.[9] Bifurcated proceedings may result where, for example, a federal court has the power to assert jurisdiction over a federal securities claim, yet compels arbitration of pendent state law claims. Until recently, however, the courts of appeals were in conflict concerning the types of claims that should be referred to arbitration. The Fifth, Ninth, and Eleventh Circuits had relied on the "doctrine of intertwining." That doctrine permitted a district court to deny a motion to compel arbitration of arbitrable claims when arbitrable and nonarbitrable claims were sufficiently intertwined factually and le-

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[A] party may [at any time] request the Court specified in Article 16 to decide whether a valid arbitration agreement exists and [if arbitral proceedings have commenced], whether the arbitral tribunal has jurisdiction [with regard to the dispute referred to it]. (2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay of the arbitral proceedings].

Kerr, *supra* note 1, at 22. Kerr suggests that excising article 17 from this draft of the Model Law is unacceptable. Parties will become powerless, "and at the mercy of the arbitrator's unrestricted powers until his deficiencies ultimately result in an award which can only then be attacked and set aside." *Id.* at 17. Parties would still be free to make "exclusion agreements," however, which specifically restrict resort to the forum's courts of law. Such agreements "should require evidence of the specific consent of the parties to every contract, whether based on standard form or otherwise." *Id.* at 18.

6. 617 F. Supp. 55 (S.D.N.Y. 1985).

7. 9 U.S.C. §§ 1-14 (1976).

8. Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238, 1242 (1985).

9. *See id.; see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

gally.[10] Apparently, those circuits partially construed the Act as designed to promote speedy and efficient resolution of disputes, and bifurcated proceedings would defeat that objective. Moreover, the courts were concerned that fact-finding conducted by arbitrators that touched on non-arbitrable claims might have some preclusive effect on later district court proceedings.[11] Conversely, the Sixth, Seventh, and Eighth Circuits had held that the Federal Arbitration Act did not permit a court to "substitute [its] own views of economy and efficiency" for those of Congress.[12]

This conflict among the circuits apparently was resolved by the Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd.*[13] In *Dean Witter* the Court held that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."[14] This decision reflects the Court's view that Congress, by passing the Act, intended as its principal goal to give predictability to the legitimate expectations of those who agree to arbitration, notwithstanding the potential for inefficiency in certain cases.

Another decision issued a short time after *Dean Witter* further demonstrated the Supreme Court's commitment to give effect to arbitration agreements by limiting court jurisdiction. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[15] the Court held that statutory claims may be within the purview of an arbitration agreement even though the agreement does not specifically provide for their resolution through arbitration.[16] The *Mitsubishi* Court had no reservation about the competence of an arbitration panel to deal with complex antitrust matters. Moreover, during the Court's previous term, the Court had "held that Section 2 of the Act declared a national policy applicable equally in state as well as federal courts," and that it was not necessary to examine the source of state authority that the party resisting arbitration had asserted before compelling arbitration.[17]

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10. *See, e.g.*, Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318, 334-37 (5th Cir. 1981).

11. *See Dean Witter,* 105 S. Ct. at 1240.

12. *See* Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 646 (7th Cir. 1981); *see also* Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59 (8th Cir. 1984); Liskey v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983).

13. 105 S. Ct. 1238 (1985).

14. *Id.* at 1241.

15. 105 S. Ct. 3346 (1985).

16. The Court recalled its decision in Wilko v. Swan, 346 U.S. 427 (1953), where it had expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created." *Mitsubishi,* 105 S. Ct. at 3354.

17. *Mitsubishi,* 105 S. Ct. at 3354 (citing the Court's decision in Southland Corp. v. Keating, 104 S. Ct. 852, 859-60 (1984).

Two important doctrines have emerged from these decisions, at least in the domestic context. First, courts cannot exert their jurisdiction over arbitrable claims even though nonarbitrable claims are inextricably intertwined with them. Second, claims grounded in statutes are not immune from arbitration. These statutory claims may, in fact, be deemed subject to arbitration, regardless of their complexity, absent a specific provision for their exclusion.[18] With these doctrines in mind, we now turn to a decision that involved international arbitration in order to measure judicial commitment to these doctrines in the international context.

II. *Chemtex:* A New Direction for American Case Law in the International Commercial System

In 1976 American Philippine Fiber Industries, Inc. (APFI), a Philippine corporation with its principal place of business in Manila, contracted with Chemtex Fibers, Inc., a New York corporation, for assistance in dismantling a synthetic fiber plant located in Virginia and reassembling it in the Philippines. Additionally, the contract called for Chemtex to supply financing for the project in the amount of approximately five million dollars. Chemtex received promissory notes from APFI that were guaranteed by the Development Bank of the Philippines (DBP). Eventually, APFI defaulted on some of the notes, and DBP paid to Chemtex the amounts due as guarantor.

Subsequently, DBP brought suit in federal district court against Chemtex, alleging fraud and unjust enrichment. DBP contended that Chemtex presented false accounts of disbursements made on APFI's behalf. DBP sought money damages to recover these unauthorized amounts. DBP also included a count for civil violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[19] The violation was grounded in Chemtex's alleged fraudulent use of the mails and international communications facilities. Chemtex moved to compel arbitration and to stay proceedings in federal court. Chemtex based its motion on the arbitration clause contained in the loan agreement.[20]

DBP's initial response was that it acted only as a guarantor, not a signatory, to the loan agreement. If that argument were accepted as cor-

18. *Id.* at 3355.

19. 18 U.S.C. §§ 1961-1968 (1982).

20. The arbitration clause provided:

> Any dispute between the parties to this Agreement shall be referred to arbitration at such place as may be agreed upon, and in the event of a failure so to agree within 30 days of the request to arbitrate, then in New York City under the rules of the International Chamber of Commerce. The agreement on any arbitration award made hereunder shall be final.

617 F. Supp. at 56 n.2.

rect, then DBP would not be subject to arbitration. The court discounted this contention because DBP did in fact sign the loan agreement, initialed every page, and listed itself as a party to be noticed. DBP then argued that its statutory RICO claim was not subject to arbitration. It is the court's analysis of this second issue that is important as an indication of the course of American case law as it relates to international arbitration. And it is this second issue that carries with it the before-mentioned tension between national sovereignty and international comity.

DBP relied upon a prior Second Circuit case, *Samitri*,[21] as foundation for its argument that the RICO claim was not arbitrable. *Samitri* involved a joint venture arrangement among various foreign corporations for the purpose of exploiting iron ore in Brazil. Eventually, Samitri, a Brazilian corporation, brought an action in federal court against its venture partners, alleging a number of common law claims, including fraudulent inducement to enter into the project. Samitri also alleged federal RICO violations. Samitri argued to the district court that the statutory RICO claims were nonarbitrable. The district court analyzed the arbitrability of the RICO claims under a policy balancing test. "On the one hand is the policy which favors arbitration over litigation, especially where the dispute presented involves a transaction in international commerce . . . On the other hand . . . is the important public interest in the enforcement of RICO, which may make arbitration an inappropriate method for resolving RICO claims."[22] The district court concluded that the public interest in the enforcement of RICO was at least equal to that favoring arbitration and denied arbitration on the RICO counts.[23]

The *Chemtex* court rejected DBP's attempt to use *Samitri* as controlling precedent. The Supreme Court's decision in *Mitsubishi*,[24] issued only nine months after *Samitri*, had greatly weakened the conclusions in *Samitri*. Because *Mitsubishi* involved foreign parties subject to international arbitration, its holdings were particularly relevant to the *Chemtex* litigation. The *Mitsubishi* Court had rejected the notion that statutory claims were generally not arbitrable.[25] The specific statutory claims present in

21. S.A. Mineracao da Trinidade-Samitri v. Utah Int'l Inc., 745 F.2d 190 (2d Cir. 1984).

22. S.A. Mineracao da Trinidade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566, 574 (S.D.N.Y. 1984).

23. The defendants apparently accepted the district court's finding of nonarbitrability of the RICO counts because they did not cross-appeal retention of these claims for resolution in the judicial forum. Samitri, however, did raise on appeal as error the district court's stay of its RICO claims pending arbitration of the other issues. The Second Circuit disposed of this point by finding no merit in Samitri's contention that it should be permitted to proceed notwithstanding arbitration of other claims. "The decision to stay litigation of non-arbitrable claims pending the outcome of litigation 'is one left to the district court . . . as a matter of its discretion to control its docket.' " *Samitri*, 745 F.2d at 196 (citation omitted).

24. *See supra* notes 15-17 and accompanying text.

25. 105 S. Ct. at 3353.

Mitsubishi were alleged violations of the Sherman Act antitrust law. Although the Court refused to discard precedent that such claims were nonarbitrable in the domestic context,[26] it held that

> the concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[27]

In reaching this conclusion the *Mitsubishi* Court recalled two of its previous leading decisions that touched on international commercial transactions, *Scherk v. Alberto-Culver Co.*[28] and *The Bremen v. Zapata Off-Shore Co.*[29] In *The Bremen* the Court enforced a forum-selection clause, which specified England as the situs for dispute resolution, against an American corporation seeking to change venue to the United States.[30] In *Scherk* the Court permitted arbitration of a securities fraud claim resulting from an international transaction even though the claim was not arbitrable under domestic law.[31] It is worth noting, however, that the *Mitsubishi* decision provoked a lengthy dissent by Justice Stevens, who came to the opposite conclusion about the propriety of sending statutory claims to arbitration, even in the international setting.[32]

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26. *See* Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Helfenbein v. International Indus., Inc., 438 F.2d 1068, 1070 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

27. 105 S. Ct. at 3355.

28. 417 U.S. 506 (1974).

29. 407 U.S. 1 (1972).

30. The Court had observed:

> 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.

The Bremen, 407 U.S. at 9, *quoted in Mitsubishi*, 105 S. Ct. at 3356.

31. 417 U.S. at 516-17.

32. Justice Stevens noted that "an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify." 105 S. Ct. at 3362. Stevens distinguished *Scherk* by noting that the statutory claim in that case was present only tangentially because the claim resulted from an alleged breach of contractual warranties. *Id.* at 3364 & n.12. According to Stevens, the Court previously had never interpreted a standard arbitration clause referring to claims "arising out of or relating to a contract" to cover statutory claims which touched only indirectly on the contractual relationship. *Id.* at 3365. Rather, the Court had "refused to hold that an arbitration barred the assertion of a statutory right." *Id.* Stevens points to the fact that express statutory remedies have been preserved for the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), the Securities Act of 1933, 15 U.S.C. §§ 77-77aa (1982), the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). 105 S. Ct. at 3365-66. Interestingly, Stevens criticizes the majority's concern for international comity by observing the nonconforming behavior of other nations. He cites the cases of Audi-NSU

With *Mitsubishi* clearly pointing the way for disposition of the RICO claim present in *Chemtex*, the district court concluded that "the interest of the domestic community in enforcement of the federal anti-racketeering statute in these circumstances is certainly no stronger than the interest in the enforcement of American antitrust principles found wanting in *Mitsubishi*, and is indeed arguably a great deal less strong."[33] The district court ordered a stay of proceedings in federal court pending the completion of arbitration. Thus, the *Chemtex* court paved the way for referral of yet one more type of statutory claim to the international arbitration forum, notwithstanding the prior decision of the Second Circuit in *Samitri*, which the court might have invoked to reach a contrary result.[34]

III. Conclusion

Recent developments in American case law indicate an unmistakable shift toward compelling arbitration of all claims arising under an arbitration clause in an international transaction. This trend is evident even though some of these claims may be grounded in statutes that have been held to be nonarbitrable in the domestic context as public interest issues. The Supreme Court's decision in *Mitsubishi* helped frame the current American position in relation to the deference that should be accorded international arbitration. The Supreme Court has demonstrated that it places greater weight on respect for transnational tribunals and concerns of international comity than on so-called public interest issues. This policy choice contributes greatly to international commercial predictability when parties choose the United States as the location for their arbitration. The probability is now very low that claims will be able to be severed by one

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Auto Union A.G. v. S.A. Adelin Petit & Cie., 5 Y.B. Commercial Arbitration 257, 259 (1979), and Compagnia Generale Construzioni v. Piersanti, 6 Y.B. Commercial Arbitration 229, 230 (1979). 105 S. Ct. at 3372 n.5. In the former case, a Belgian court refused to permit arbitration of a dispute arising under a local statute limiting unilateral termination of an exclusive distributorship. In the latter case, an Italian court held that labor disputes are not arbitrable in that country. The supposed basis for the arbitrability of these issues would be these countries' subscription to the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards), June 6, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, to which the United States is also a signatory. Therefore, Stevens concludes that the United States need not defer to the principles of international comity when *statutory* claims are present because of the lack of adherence by other countries to this proposition. 105 S. Ct. at 3372.

33. *Chemtex*, 617 F. Supp. at 57.

34. It is noteworthy that since the decision in *Chemtex* several courts have cited it as support for the arbitrability of RICO claims in a purely domestic context. *See, e.g.*, Bale v. Dean Witter Reynolds, Inc., 627 F. Supp. 650, 654 (D. Minn. 1986); Brener v. Becker Paribas Inc., 628 F. Supp. 442, 450 (S.D.N.Y. 1985); *see also* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985), where the Court observed that the majority of civil RICO claims do not impact on the general society or involve critical national interests.

party for litigation in American state or federal courts. Both *Mitsubishi* and *Chemtex* disfavor bifurcated proceedings when the subject matter is any dispute arising under an arbitration clause in an international transaction. Additionally, a party to an international arbitration agreement with situs for arbitration other than the United States can now more easily rest assured that an American court will not be persuaded to assert jurisdiction where one party may be able jurisdictionally to bring suit in the United States. Hopefully, other nations will follow the American lead and also place a higher value on respect for private international agreements than on vaguer notions of national sovereignty.