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Big Business Wins—Court OKs Antitrust Class Action Waivers

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After years of ambiguity about the enforceability of contract clauses mandating arbitration and waiving class action rights in domestic antitrust cases, the U.S. Supreme Court has finally brought clarity to the situation. In June 2013 the court decided American Express v. Italian Colors Restaurant, holding that arbitration clauses and waivers of class action rights are enforceable in domestic antitrust cases.

Regardless of whether one agrees with the court's conclusion, the American Express decision clearly demonstrates the power of the conservative/pro-business majority consisting of Reagan/Bush high court appointees and signals that wherever possible the high court will favor that determinations be made in arbitration rather than through the clogged court system. This article traces the history of arbitration and waiver of class action clauses in the U.S. Court of Appeals for the Second Circuit and discusses the stated and hidden reasons behind the enforceability of such clauses.

Arbitration and Waivers

Until recently, the Second Circuit considered clauses requiring arbitration of antitrust claims in domestic disputes unenforceable under what became known as the American Safety doctrine.[1] There also was a lack of clarity on whether contractual waivers of antitrust class actions were enforceable.[2]

The American Safety case, decided in 1968, involved a license agreement containing a broad provision that "all claims…of whatsoever nature…be settled by arbitration."[3] The district court found this clause valid; however, the Second Circuit disagreed, holding that the antitrust claims raised were "inappropriate for arbitration," citing four well-reasoned grounds, i.e., (i) antitrust violations affect hundreds of thousands of people inflicting staggering economic damage and private actions play a pivotal role in aiding government enforcement of the antitrust laws; (ii) Congress

would hardly have intended for antitrust claims arising from contracts of adhesion (where one contracting party has overwhelming bargaining power) to be resolved through arbitration; (iii) judicial procedures are far better suited than arbitration procedures to address antitrust cases, which are prone to be complicated and in which the evidence is extensive and diverse; and (iv) commercial arbitrators, who are likely to be called upon to resolve business disputes due to their business expertise, are not likely to be neutral and would be inappropriate to determine antitrust issues of great public interest.[4] For more than 25 years following the American Safety decision, federal courts, both at the District and the Appellate levels, applied the American Safety doctrine and struck down clauses purporting to compel arbitration of antitrust and other federal statutory claims.[5]

With respect to contractual waivers of class action rights in antitrust cases, New York courts have been concerned with the ability of parties to vindicate their federal statutory rights effectively. While several lower federal court decisions treated contract waivers of class action rights as enforceable,[6] the Second Circuit noted the utility of the class action as a vehicle for vindicating antitrust statutory rights.[7] For example, in 2009 the Second Circuit in In re Am. Express Merchants' Litig. stated that in some circumstances the class action device was the only economically rational alternative when a large group of individuals suffered an alleged wrong, but the damage to any single individual was too small to justify bringing an individual action.[8] Agreements which, in effect, acted as a waiver of future liability under the federal antirust statues were considered by the Second Circuit to be void as a matter of public policy.[9]

Erosion of Doctrine

The heyday of the American Safety doctrine began eroding in 1985 when the Supreme Court decided Mistubishi Motors v. Soler Chrysler-Plymouth.[10] In Mitsubishi, a Japanese automobile manufacturer sued a Puerto Rican automobile dealer, claiming breaches of their sales procedure agreement. The dealer counterclaimed, asserting inter alia that the manufacturer violated antitrust law. The parties' agreement contained a clause requiring arbitration of certain disputes in Japan, on which Mitsubishi relied in its attempt to compel arbitration. The U.S. Court of Appeals for the First Circuit relied on the Second Circuit's decision in American Safety and held the arbitration clause unenforceable. The U.S. Supreme Court reversed, requiring the dealer's antitrust claims to be arbitrated in Japan despite the American Safety doctrine.

The high court's decision was based on 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 dispute resolution.[11] The Supreme Court enforced the parties' agreement stating that "a contrary result would be forthcoming in a domestic context,"[12] and that its decision did not assess the legitimacy of the American Safety doctrine in domestic transactions.[13] Notwithstanding these statements, the Mitsubishidecision analyzed the four pillars supporting the Second Circuit's reasoning in American Safety and in four pages of dicta undermined each pillar.[14] Thus, the Mitsubishi court noted that (i) arbitration was a recognized forum for the vindication of rights, (ii) plaintiffs could always attack the underlying contract as one of adhesion and seek to set aside the arbitration clause on that basis, (iii) the potential complexity of antitrust issues should not prevent arbitration, and (iv) the concern that arbitrators may not be neutral lacked merit.

Following Mitsubishi, courts in New York initially considered that American Safety remained good law. For example,

in Stendig Int'l, the federal court for the Southern District of New York held that Mitsubishi did not overrule American Safety and applied the American Safety doctrine as binding precedent in precluding arbitration of an antitrust claim in the domestic context.[15] Subsequently, however, several federal district courts in the Second Circuit began applying Mitsubishi more expansively, allowing antitrust claims in domestic transactions to proceed to arbitration, speculating (albeit incorrectly) that if the Second Circuit had the opportunity, it would overrule American Safety.[16] However, the Second Circuit never abandoned the American Safety doctrine; although in 2011 it did note, in dictum, that Mitsubishi limited American Safety.[17]

'American Express'

In June 2013, the U.S. Supreme Court decided American Express and specifically held that contract provisions for mandatory arbitration and class action waivers in domestic antitrust disputes are enforceable.[18] The history of this case is interesting. It involved a class action by merchants against American Express commenced in the Southern District of New York claiming that American Express used its monopoly power (in the market for charge cards) to force merchants to accept credit card rates approximately 30 percent higher than the rates charged by competing credit card companies. The parties' contracts required all disputes to be resolved through arbitration and that there shall be no right or authority for any claims to be arbitrated on a class action basis.[19] American Express moved to compel individual arbitration. The district court relied on Mitsubishi and ordered the cases to be individually arbitrated.

On the first appeal, the Second Circuit reversed, concluding that the mandatory class action waiver provision contained in the arbitration clause was unenforceable because it attempted to grant American Express "de facto immunity from federal antitrust liability by removing plaintiff merchants' only reasonably feasible means of recovery."[20] The economics of the case supporting this conclusion were that the plaintiff with the largest claim against American Express could potentially win, after trebling, damages of only $38,549 and that the cost of bringing the case on an individual basis was expected to be at least several hundred thousand dollars and possibly would exceed $1 million.

On the first appeal, the U.S. Supreme Court reversed and remanded the case back to the Second Circuit for reconsideration.[21] On reconsideration, the Second Circuit reiterated its reversal of the district court again stating that enforcing the arbitration clause would have the practical effect of entirely precluding federal antitrust claims against American Express.[22] The circuit court ordered remand of the case to the district court "with the instruction to deny defendant's motion to compel arbitration."[23] That decision was appealed to the Supreme Court, which examined the narrow issue of whether the class action waiver contained in the arbitration provision was enforceable where the plaintiffs' cost of individually arbitrating the antitrust claims exceeded the potential recovery.[24]

The Supreme Court ruled that the contractual waiver of class arbitration was enforceable, even though the cost of individually arbitrating the antitrust claims exceeded the potential recovery. The case appears to have been decided along political, philosophical grounds, with Justice Antonin Scalia delivering the opinion of the majority with the concurrence of Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito joining.[25] Justice Elena Kagan filed a dissenting opinion, with Justices Ruth Bader Ginsburg and Stephen Breyer joining; Justice Sonia Sotomayor took no part in this appeal.[26]

Observations

The U.S. Supreme Court decision in American Express effectively overrules the long-standing American Safety doctrine and there is now no doubt that all courts will enforce antitrust clauses and class action waivers in antitrust disputes, even if the cost of arbitrating the antitrust dispute far exceeds the potential recovery by the claimant. This huge victory by big business will have a profound effect as more large and powerful companies dealing with the public include arbitration and waiver of class action clauses in their "standard form" documents.[27]

Hidden in the American Express decision are two observable trends. The first is the favoritism of the present majority of the high court for "big business" at the expense of the "little guy." Unlike the Second Circuit, the majority of the Supreme Court was not moved by the economics of the underlying claims, i.e., that for a potential recovery of about $35,000, the largest claimant would have to expend at least several hundred thousand dollars and possibly up to $1 million to pursue an individual action. The Supreme Court also disregarded the realities of the power imbalance between the parties in contracts smacking of adhesion. The passionate dissent of Kagan pointed out that under the majority's decision, a "monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse." To quote Kagan, the majority's answer to this is "Too darn bad."[28]

The second trend, although not articulated by the majority, is a recognition of the reality that the federal court system is overburdened and the high court will apparently utilize all tools at its disposal to force cases into arbitration.

As a final observation, we note that the holding in American Express will, in time, have the likely effect of eliminating private class actions as a mechanism to enforce the antitrust laws. Accordingly, it is incumbent upon government agencies to step up their own enforcement efforts in order to assure that our country's antitrust laws remain effective.

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Endnotes:

1. Am. Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

2. In re Am. Express Merchants' Litig., 554 F.3d 300 (2d Cir. 2009) (stating that the issue of enforceability of a mandatory arbitration clause in a commercial contract that also contains a collective action waiver was a matter of first impression for the court) (overruled by Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304 (2013)).

3. Am. Safety Equipment Corp., 391 F.2d at 823.

4. Id. at 826-827.

5. Stendig Int'l v. B.&B. Italia, 633 F.Supp. 27, 28 (S.D.N.Y. 1986) (arbitrability of antitrust claims); S.A. Mineracao DA Trindade-Samitri v. Utah Int'l, 576 F.Supp. 566 (S.D.N.Y. 1984) (arbitrability of RICO claims); Allegaert v. Perot, 548 F.2d 432 (2d Cir. 1977) (arbitrability of securities laws); Fox v. Merrill Lynch & Co., 453 F.Supp. 561 (S.D.N.Y. 1978) (arbitrability of antitrust claims).

6. See Sherr v. Dell, 2006 WL 2109436 (S.D.N.Y. July 27, 2006); Dumanis v. Citibank (S. Dakota), 2007 WL

3253975 (W.D.N.Y. Nov. 2, 2007).

7. In re Am. Express Merchants' Litig., 554 F.3d 300.

8. Id.

9. Id.

10 Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 US 614 (1985).

11 Id. at 629.

12 Id.

13 Id.

14 Id. at 632-636.

15 Stendig Int'l, 633 F.Supp. at 28.

16 Gemco LatinoAmerica v. Seiko Time, 671 F.Supp. 972, 979 (S.D.N.Y. 1987) (holding that domestic antitrust claims are subject to arbitration); Syscomm Int'l v. Synoptics Commc'ns, 856 F.Supp. 135 (E.D.N.Y. 1994) (granting plaintiff's request to compel arbitration); NY Cross Harbor R.R. Terminal v. Consolidated Rail, 72 F.Supp.2d 70, 80 (E.D.N.Y. 1998); Empire State Ethanol & Energy v. BBI Int'l, 2009 WL 790962 (N.D.N.Y. Mar. 20, 2009).

17 Tradecomet.com v. Google, 435 Fed.Appx. 31, 37 (2d Cir. 2011) (noting in dicta that Mitsubishi Motors limited American Safety); see also Hough v. Merrill Lynch, Pierce, Fenner & Smith, 946 F.2d 883 (2d Cir. 1991) (affirming, without opinion, Hough v. Merrill Lynch, Pierce, Fenner & Smith, 757 F.Supp. 283 (S.D.N.Y. 1991) (noting in dicta that the foundations of the American Safety doctrine have been significantly eroded and holding that antitrust claims may be submitted to arbitration).

18 Am. Express Co., 133 S.Ct. 2304.

19 In re Am. Express Merchants' Litig., 667 F.3d at 209.

20 In re Am. Express Merchants' Litig., 554 F.3d at 320. Judge Rosemary Pooler wrote for a unanimous three-judge panel, which included Judge Sonia Sotomayor. Sotomayor was subsequently elevated to the Supreme Court but did not participate in the ultimate resolution of this case by the high court. Had she participated, the case would presumably have been decided the same way by a 5-4 vote.

21 In re Am. Express Merchants' Litig., 130 S.Ct. 2401 (2010).

22 In re Am. Express Merchants' Litig., 667 F.3d 204.

23 Id. at 219.

24 The Second Circuit court, in reconsidering plaintiff's appeal of a district court decision granting American Express' motion to compel arbitration, limited its query as to whether the class action waiver provision contained in the

contract between the parties should be enforced. In re American Express Merchants' Litig., 667 F.3d at 207.

25 President Ronald Reagan appointed Scalia to the Supreme Court in 1986 and Justice Anthony Kennedy in 1988; President George H.W. Bush appointed Thomas in 1991; and President George W. Bush appointed Roberts in 2005 and Alito in 2006.

26 President Bill Clinton appointed Ginsburg to the Supreme Court in 1993 and Breyer in 1994; President Barack Obama appointed Sotomayor in 2009 and Kagan in 2010.

27 Indeed, the writers of this article recently encountered such clauses in apparent contracts of adhesion between health insurance companies and network physician providers. These clauses even prohibit consolidation of separately brought arbitrations. Query whether the pro business high court would enforce the "no consolidation" clause where consolidation would avoid duplicate proceedings and minimize the cost to potentially injured individual plaintiffs. We note that practical considerations of costs will make it unlikely that claimants will ever test this issue in the courts.

28. Am. Express Co., 133 S.Ct. at 2313.