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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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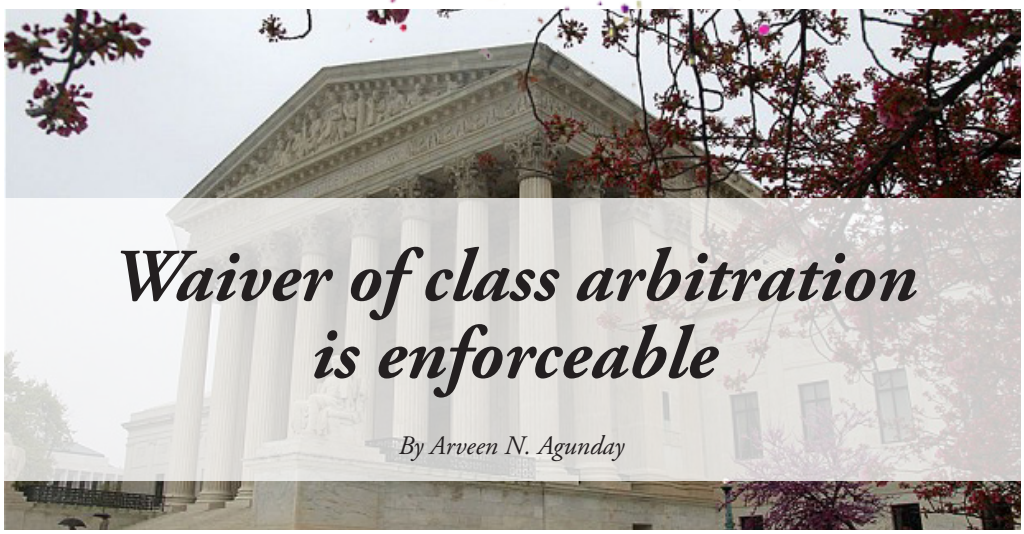

Waiver of class arbitration is enforceable

By Arveen N. Agunday

On June 20, 2013, the Supreme Court of the Unites States ruled in *American Express Co., et al. vs. Italian Colors Restaurant, et al.*, 570 U.S. _____ (2013); 133 S. Ct. 2304, that an arbitration agreement that precludes arbitration through a class action is enforceable under the Federal Arbitration Act (FAA), even if the proposed class of plaintiffs proves that it would not be economically feasible for them to pursue arbitration separately and individually.

The case arose from a dispute between American Express ("Amex") and a group of merchants who accepted Amex cards for payment. The merchants' agreement with Amex contains a clause that requires all disputes between the parties to be resolved by arbitration. The agreement likewise provides that "(t)here shall be no right or authority for any Claims to be arbitrated on a class action basis."

Despite the clause barring arbitration on a class action basis, the merchants brought a class action against Amex for violations of federal antitrust laws. According to the merchants, Amex used its monopoly power in the credit and charge card markets to force them to accept Amex cards at rates approximately 30% higher than the fees charged by competing companies.

In justifying the class action, the merchants argued that the cost to an individual merchant to arbitrate its claim vastly exceeded the potential recovery possible, and that Amex had used its monopoly power to compel arbitration agreements that preclude the enforcement of congressionally created rights.

Amex moved to compel individual arbitration of each dispute under the agreement and the FAA. The merchants resisted the motion with testimony from an expert witness that the costs of proving each antitrust claim (which would be "at least several hundred thousand dollars, and might exceed $1 million") would exceed the maximum amount that an individual plaintiff could potentially recover ($12,850, or $38,549 when trebled). The district court granted the motion and dismissed the suits. ▶ **PAGE 4**

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The SIAA Experience

By Christina A. Montes

The 2013 Singapore International Arbitration Academy (SIAA) was two weeks of intense work, intense fun, and intense friendships forged.

Organized by the Center for International Law (CIL) of the National University of Singapore and now running on its second year, the SIAA trains private practitioners and government lawyers in international commercial arbitration and investment treaty arbitration. Its 2013 session, which was held from November 22, 2013 to December 3, 2013, attracted 55 participants from Southeast Asia, Canada, Korea, the United States, Sri Lanka, Australia, India, and the United Kingdom.

I knew I was up for a wholesome intellectual challenge the moment I received the required readings a few days before my departure for Singapore. I realized that we would be doing serious study, and that I would have to invest a lot of effort to make the most of this opportunity.

The readings consisted of the facts of a hypothetical investment arbitration case that we would follow throughout the course, and investment treaty arbitration awards related to the case.

Our days consisted of lectures—on international commercial arbitration in the mornings, and on investment treaty arbitration in the afternoons. We familiarized ourselves with such documents as the New York Convention, the UNCITRAL Model Law, the ICSID Convention, the ASEAN Comprehensive Investment Agreement of 2009, various Bilateral Investment Treaties, the IBA Rules on the Taking of Evidence in International Arbitration, and others.

We learned about the common clauses in Bilateral Investment Treaties such as the Fair and Equitable Treatment clause, the Most Favored Nation clause, the Full Protection and Security clause, and the Denial of Benefits clause. We compared and contrasted the various stages of international commercial arbitration and investment treaty arbitration. We received practical tips on a request for arbitration and choosing arbitrators.

We heard two lawyers, Prof. Mark Feldman and Ms. Lucy Reed, analyze two investment treaty arbitration cases where they respectively acted as counsel (*Grand River v. USA* for Prof. Feldman and *Libananco v. Turkey* for Ms. Reed). We also had a session where three investment treaty arbitrators discussed the process from their point of view.

The lectures were complemented with workshops. After the lecture on drafting a request for arbitration, we were divided into groups to draft requests for arbitration on a common set of facts. It was a new experience discussing legal strategy with a team consisting of lawyers from different jurisdictions, but the lecturer commented that the set-up is typical in international commercial arbitration and investment treaty arbitration cases. We also had to simulate a consultation session in an attempt to settle the hypothetical case between an investor and a government.

The course culminated in the mock arbitration session, where we private practitioners and a few volunteer government lawyers were divided into two teams to orally argue both sides of the hypothetical case before a panel of real arbitrators. I was part the team arguing for the investor. Our team leader was a senior barrister from the United Kingdom, and the rest of the team consisted of lawyers from India, Singapore, Australia, the United States, and me.

Malaysian lawyer making oral submission at mock arbitration

Mr. Toby Landau and Ms. Teresa Cheng in panel discussion on the arbitrator perspective

Professors Lawrence Boo and Sebastian Besson lecturing on international commercial arbitration

The opposing team was also led by a senior barrister from the U.K. and was composed of lawyers from Singapore, Malaysia, South Korea, Canada, and the U.S. Each team spent break times during the seminar discussing and preparing for the mock oral arguments, and after the lectures were over for the day, we researched and drafted our respective oral submissions. Although we prepared as much as we could, we were all nervous before making our oral submissions. The feeling of relief was obvious on each lawyer's face as they returned to their seats from the podium after doing their respective oral submissions.

Although no side was declared the winner, awards were given to individuals for excellency in advocacy. I received no award but I felt satisfied nonetheless, having gone through the exercise. Observing others' argumentation styles was also very educational.

The course was officially over but participants were entitled to complimentary admission to the Singapore International Arbitration Forum 2013 and the CIL's 4th Singapore International Investment Arbitration Conference, which occupied the next two days. The Singapore International Arbitration Forum 2013 featured discussions on proposals to improve the arbitration process, while the CIL's 4th Singapore International Investment Arbitration Conference examined the extent of Asian participation in investment treaty arbitration.

On the whole, the SIAA 2013 was a valuable opportunity to learn more about the exciting fields of international commercial and investment treaty arbitration. I would highly recommend interested lawyers to send in their applications for SIAA 2014.

For more information about SIAA 2014, visit http://cil.nus.edu.sg/siaa-2014/ or send an e-mail to Ms. Geraldine Ng at gerry.ng@nus.edu.sg.

About the Author

Cristina A. Montes is an associate attorney of Parlade Hildawa Parlade Eco & Panga. She clerked for Associate Justice Conchita Carpio-Morales of the Supreme Court from 2005 to 2009. She was a research assistant at the U.P. Institute of International Legal Studies and served in the Committee of Economic Affairs of the Philippine House of Representatives.

Ms. Montes studied humanities and philosophy at the University of Asia and the Pacific, where she graduated *magna cum laude* and batch salutatorian in 1997. She finished law at the University of the Philippines and holds a master's degree in law from the Universidad de Navarra in Pamplona, Spain, where her masteral thesis on investment treaty arbitration garnered a Sobrasaliente grade with the highest possible numerical equivalent of 10.

MEMBER SPOTLIGHT

Atty. Maricef Valderrama

Atty. Maricef Valderrama is an associate counsel at the Singapore International Arbitration Centre (SIAC). Prior to joining SIAC, she clerked for Chief Justice Maria Lourdes Sereno of the Philippine Supreme Court and served as an associate attorney at one of the country's leading law firms, SyCip Salazar Hernandez & Gatmaitan.

As SIAC associate counsel, she works closely with parties and arbitral tribunals and assists the SIAC Registrar administer arbitrations under the SIAC Rules and the UNCITRAL Arbitration Rules, among others. Her cases deal mostly with cross-border transactions involving parties from different jurisdictions, with amounts in dispute of up to SGD 100 million.

She has dealt with arbitrations arising out of share purchase agreements, joint venture agreements, bank guarantees, shipping and maritime contracts and commodity trading contracts. Procedurally, she has dealt with emergency arbitration proceedings under the SIAC Rules and with complex arbitrations involving multiple arbitration clauses and multi-party disputes.

She holds a double degree of Master of Business Administration-Juris Doctor (First Honors) from the FEU-De La Salle consortium and was admitted to the Philippine Bar in 2011. She attended various public and private international law and arbitration law courses at the University of San Diego in Florence, Italy and the Paris Institutes on International and Comparative Law, the Hague Academy of International Law, and the International Academy for Arbitration Law in Paris.

Atty. Valderrama is active in international moot court competitions, having been a member, a coach and a team advisor of the FEU-De La Salle moot court team. Most recently, she has judged or arbitrated at the Jessup national rounds in Manila, Jakarta and Taipei, at the Vis (East) international rounds in Hong Kong and at the FDI Moot Asia Pacific regional rounds in Seoul.

She is a member of the Chartered Institute of Arbitrators, the Philippine Institute of Arbitrators, and the Philippine Dispute Resolution Center, Inc.

Waiver of class arbitration is enforceable

◀ **PAGE 1** However, the United States Court of Appeals for the Second Circuit reversed the district court's ruling and remanded the case for further proceedings. It held that because the merchants had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver," the waiver was unenforceable and arbitration could not proceed.

Voting five to three, the Supreme Court reversed the decision of the Second Circuit and held that the FTAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

According to the Supreme Court, arbitration is a matter of contract that courts must rigorously enforce according to its terms, "including terms that 'specify with whom (the parties) choose to arbitrate their disputes.'"

The Supreme Court stated that there is nothing in federal law which guarantees plaintiffs "an affordable procedural path to the vindication of every claim" and that the antitrust laws "do not evince an intention to preclude a waiver of class-action procedure." The Supreme Court reasoned that a class action is an exception to the "usual rule" that litigation is conducted by and on behalf of the individual named parties only and that the parties' arbitration agreement was executed pursuant to that "usual rule."

The Supreme Court likewise found that the judicially created "effective vindication" exception to the FAA could not be applied simply because individual arbitrations are more costly to litigate than they are often worth.

It stated that to follow the plaintiffs' argument would require that before a plaintiff could be held to contractually agreed bilateral arbitration, a court must first determine and the parties must first litigate the following: (a) the legal requirements for success on the merits claim-by-claim and theory-by-theory; (b) the evidence necessary to meet those requirements; (c) the cost of developing the necessary evidence; and (d) the damages that may be recovered in the event of success. According to the Supreme Court, such a preliminary procedure "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure."

Roberto N. Dio, *Editor*

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