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Shedding Light on the Effective Vindication Doctrine?

James U. Menz (Schellenberg Wittmer) · Tuesday, January 15th, 2013 · Schellenberg Wittmer

On November 9, 2012, the U.S. Supreme Court granted certiorari in *American Express Co. v. Italian Colors Restaurant*. A decision will be rendered in 2013. At issue is the enforceability of an arbitration clause that includes a class action waiver in a federal antitrust case. The case has attracted considerable attention in the United States, prompting amicus briefs by business representatives and the U.S. defense bar (available [here](#); see also David Garcia and Leo Caseria, *Supreme Court to Address Enforceability of Arbitration Agreements and Class Action Waivers Yet Again* (Nov. 18, 2012), available [here](#); Marc J. Goldstein, *Amex Class Arbitration Case Takes Stride Toward Supreme Court Review* (May 31, 2012), available [here](#)).

Plaintiff merchants alleged that American Express (“Amex”) had market power in corporate and personal charge cards, allowing it to extract high merchant discount fees, which a card issuer withholds as a percentage of each purchase made with its card at the merchant’s establishment. Amex allegedly leveraged this power to compel merchants to accept its credit card products at supra-competitive discount rates. By requiring merchants to accept both the charge cards and the credit cards, Amex allegedly created a “tying” arrangement in violation of Section 1 of the Sherman Act. Amex moved to compel arbitration based on the dispute resolution clause in the card acceptance agreement. The clause permitted elective arbitration and waived the right to pursue claims as part of a class.

The Second Circuit Court of Appeals, applying Section 2 of the Federal Arbitration Act (“FAA”), declined to enforce the provision, reasoning that the merchants would incur prohibitive costs if compelled to arbitrate under the class action waiver. A complex antitrust claim invariably requires economic evidence, including an expert report concerning liability and damages. The merchants had submitted an affidavit of an expert economist who compared the average estimated damages of each individual merchant with the out-of-pocket costs of retaining an economic expert. He concluded that it would not be worthwhile for an individual plaintiff to pursue individual arbitration or litigation. The Second Circuit held that under these circumstances, the arbitration agreement operated to “grant Amex de facto immunity from antitrust liability by removing the plaintiffs’ only reasonable feasible means of recovery” (*In Re American Express Merchants’ Litig.*, 634 F.3d 187, 199 (2d Cir. 2011)).

The Second Circuit relied on the so-called “effective vindication” doctrine articulated in Supreme Court decisions in *Green Tree Fin. Corp. – Alabama v. Randolph* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* *Green Tree* had stated that

“even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.” (531 U.S. 79, 90 (2000) (citation omitted)).

And further:

“It may well be that the existence of large arbitration costs could preclude a litigant such as [plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum” (Id.).

The doctrine originated in *Mitsubishi*. There, the Supreme Court determined that international arbitration did not prevent effective vindication of a federal antitrust claim, but noted that an agreement could be contrary to U.S. public policy “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations” (473 U.S. 614, 637 n. 19 (1985)).

The Second Circuit found its ruling unaffected by the Supreme Court’s decisions in *Stolt-Nielsen* (2010) and *AT&T Mobility LLC v. Concepcion* (131 S. Ct. 1740 (2011)). *Concepcion* held that Section 2 of the FAA preempted a California state law rule barring the enforcement of class action waivers in consumer contracts. The Supreme Court previously held that the savings clause in Section 2 (“such grounds as exist at law or equity for the revocation of any contract”) is not applicable to defenses that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue” (Id. at 1746). In *Concepcion*, it decided the California rule constituted such a defense.

The narrow question in *American Express* is whether the effective vindication principle is a recognizable ground under the savings clause of Section 2 of the FAA. The broader question is whether the effective vindication principle extends to de facto waivers of statutory rights, and whether excessive costs, or more broadly the non-availability of certain procedures without which the claim cannot realistically be pursued, amount to such a waiver.

Unlike in *Concepcion*, here the underlying substantive cause of action is based on federal, not state law. Amex and its amici urge that this distinction is irrelevant because “*Concepcion* held that conditioning the enforceability of ... arbitration agreements on the availability of classwide arbitration procedures is impermissible under the FAA” (Reply Brief for Petitioners dated 24 October 2012 at 2). The Second Circuit’s decision allegedly undermines *Concepcion* because a plaintiff “need only manufacture a federal statutory claim to evade” the decision (Id. at 3).

That risk seems real and in light of the Supreme Court’s clear disposition in *Concepcion* and the strong pro-arbitration policy arguments articulated therein, it is unlikely that the Second Circuit’s decisions will stand. However, *Concepcion* rested on preemption. The Supreme Court will not be able to rely on preemption because the vindication principle is a matter of federal, not state law.

In *Concepcion*, the Court reiterated that the savings clause “cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act” (131 S. Ct. 1748). The Court could find in *American Express* that

the effective vindication principle is specific to arbitration, and not to “any contract”. Such a decision would effectively complete the Court’s decades-long march away from its non-arbitrability decisions relating to claims under federal statutory law (see in this regard David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 KAN. L. REV. 723, 729 (2012)).

However, that seems improbable given the fact that the lower courts and the Supreme Court (including its current conservative majority in *Penn Plaza* (2009)) have repeatedly recited the effective vindication principle, that it is an expression of a more general statutory waiver rule, and that Amex and its amici themselves do not urge an abolition of the principle but merely a clarification of what they characterize as misapplied dicta from *Green Tree* and *Mitsubishi*.

Despite being invoked with some regularity, the nature and scope of the effective vindication doctrine has not been articulated adequately and remains conceptually vague (see Horton at 727 (the circuit courts disagree on how to implement the doctrine); see also Joseph R. Brubaker and Michael P. Daly, *Twenty-Five Years of the “Prospective Waiver” Doctrine in International Dispute Resolution: Mitsubishi’s Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. MIAMI L. REV. 1233 (2010) (the circuit courts differ on the status and meaning of footnote 19 from *Mitsubishi*)).

Directly eliminating a substantive remedy renders an agreement unenforceable (*Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.) (limitation on punitive damages)). But the non-availability in international arbitration of the precise rights and remedies of substantive federal law may not be sufficient to invalidate an agreement, at least at the pre-arbitral stage (see *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 722 (9th Cir. 1999); compare *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009) with *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011)).

It is also unclear what sort of procedural limitations make out an effective vindication case. For example, the courts have appeared to leave open the possibility that a discovery or other procedural limitation could qualify, even though the Supreme Court has also often repeated that the discretion in designing arbitral processes is key to achieving the aim of an efficient procedure (*Concepcion* at 1749). Because they arise before the arbitration has taken place when attempting to resist a motion to compel arbitration, plaintiffs’ allegations are often characterized by courts as speculative (compare *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991); *Booker* at 82; *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 5325589 (N.D.Cal. Sep. 19, 2011); with *Guyden v. Aetna, Inc.*, 544 F.3d 376, 386 (2d Cir. 2008); *Openshaw v. FedEx Ground Package Sys., Inc.*, 731 F.Supp.2d 987, 995 (C.D. Cal. 2010)). These cases suggest that the effective vindication doctrine comprises an *ex ante* due process inquiry.

Amex contends that the effective vindication doctrine is not applicable for two reasons. First, it and the dissent in the Second Circuit urge that while high costs might implicate the doctrine, they must be arbitration-specific, such as filing fees, arbitrators’ costs, and other arbitration expenses. Here, the cost of retaining an economic expert would accrue before a district court as well as an arbitral tribunal. Moreover, U.S. antitrust laws do not preclude waivers of class actions, and they contain a provision awarding costs to the prevailing plaintiff. The Supreme Court could therefore hold narrowly that whatever the effective vindication principle’s precise scope, it is not implicated by the particular limitation in this case.

Second, Amex contends that *Mitsubishi*'s concern was limited to the application of U.S. *substantive law* in an international arbitration, and therefore *Mitsubishi* does not stand in the way of parties foregoing what it calls a "purely procedural option" (Petition for a Writ of Certiorari dated July 30, 2012, at 21). Yet while *Mitsubishi* emphasized that the very nature of arbitration implied foregoing procedural rules and options available in state court, the substance/procedure distinction is necessarily not unambiguous. It is not difficult to imagine an arbitration agreement that so severely restricts a party's ability to present its case that it amounts to a substantive deprivation of rights. The progeny of *Mitsubishi* and *Green* appears to suggest that effective vindication does not turn on a substance/procedure classification but on the extent to which the restriction effectively undermines the interest protected by the statute. As one of the amici puts it:

"the "vindication" inquiry allows a party to challenge this strong federal presumption [in favor of the arbitral forum] but only by identifying unique costs or burdens under the agreement that would not exist in court and that would render arbitration an inaccessible or inadequate alternative forum for the adjudication of federal rights" (Brief of Amicus Curiae New England Legal Foundation's in Support of Petitioners dated August 28, 2012, at 8).

American Express presents an opportunity for the Supreme Court to clarify the viability and scope of the effective vindication doctrine. The decision will be significant beyond the U.S. consumer and class action arbitration contexts because the doctrine originated in, and has been applied with respect to, international commercial arbitrations over federal statutory causes of action. It raises the welcome possibility of delineating more clearly the nature and the extent of the inquiry that a federal district court will have to undertake, if any, when confronted with allegations that a provision in an arbitration agreement or some aspect of the arbitral procedure in practical effect disables the vindication of a federal claim.

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