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GLOBAL K: Contrasting Attitudes towards Arbitration Clauses

By Kprofs2013

The recent discussion of the December 2013 decision by the Ninth Circuit in *In re Wal-Mart Wage & Hour Employment Practices Litigation* calls to mind the contrast in attitudes between international and domestic practice. Mention "arbitration" among international practitioners and profs, and you are likely to get a bit of a swoon from most – arbitration, properly structured, rescues us from the risks and uncertainties of unfamiliar legal systems and provides a comfort level in terms of predictability of process if not outcome. Mention "arbitration" in domestic circles, particularly with respect to consumer protection issues, and you encounter a growing skepticism if not outright hostility about the imposition of arbitration as an exclusive contract remedy.

There are delicate ironies in these contrasting attitudes. Many would say that the contrast – to the extent it actually exists – simply reflects the difference between complex disputes at the "wholesale" level, between commercial actors with more or less equal bargaining power, and consumer disputes in which arbitration is imposed by the dominant party on the "retail" party. However, *In re Wal-Mart* itself undermines that neat dichotomy, since it involves parties with, presumably, more or less equal bargaining power. In any event, there is certainly nothing in principle or in text that suggests a wholesale-retail split in the approach to deciding arbitration challenges. (Consider, for example, the Supremes' 2011 *AT & T Mobility LLC v. Concepcion*, upholding an arbitration provision in a class-action consumer suit, and the Ninth Circuit's own 2003 en banc decision in *Kyocera Corp. v. Prudential–Bache Trade Servs., Inc*., upholding arbitration in what was ostensibly a "wholesale" transaction between commercial parties.) It is nevertheless clear that there is a growing conception – or preconception – that arbitration clauses may be hostile to, or at least incompatible with, consumer interests.

This conception does have textual support in the 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1414(a) of the Act added a provision to the Truth in Lending Act, 15 U.S.C. § 1639c(e)(1), that prohibits the inclusion in any home mortgage or home equity loan of "terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction." However, as with so many of the provisions of the Dodd-Frank Act, § 1639c contained a special delayed effective date, namely, the date on which final regulations implementing the prohibition took effect, or a date 18 months after the transfer of authority to the new Consumer Financial Protection Bureau, whichever is earlier. Nevertheless, in the November 2013 case *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, the Supreme Court of Appeal of West Virginia found that the delayed effective date "only applies to those portions of Title XIV that require administrative regulations to be implemented." Accordingly, the effective date of this prohibition was the general effective date of the act, July 22, 2010. Good for us, not so good for the consumer plaintiffs suing the mortgage servicer, since their mortgage agreement containing an arbitration clause was entered into several years prior to the enactment of the Dodd-Frank Act. The West Virginia court refused to apply the Dodd-Frank Act retroactively,

and proceeded to decide that it was compelled to enforce the arbitration clause in light of the mandate of the Federal Arbitration Act, which generally favors the application and enforcement of such clauses, despite the plaintiffs' claims that the arbitration clause was procedurally and substantively unconscionable. *Ocwen Loan Servicing* is worth a careful read, particularly in light of its consideration of the interplay among emerging statutory policy with respect to consumer protection, general federal policy in favor of arbitration, and the contract doctrine of unconscionability.

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