

The background of the slide is a photograph of a rugged, rocky mountain peak, likely in the Colorado Rockies, under a clear blue sky. The foreground shows some green and yellow foliage. A semi-transparent grey rectangular box is overlaid on the lower half of the image, containing the title and author information in white text.

ODR to Address American Exceptionalism in Arbitration

by Professor Amy J. Schmitz

Introduction

- ▶ “American exceptionalism” has been used to reference the United States’ outlier policies in various contexts, including its strict enforcement of arbitration provisions in business-to-consumer (“B2C”) contracts. This is exceptional because although most of the world joins the United States in generally enforcing business-to-business (“B2B”) arbitration under the New York Convention, many other countries refuse or limit arbitration enforcement in B2C relationships due to concerns regarding power imbalances and public enforcement of consumer protections. The resulting clash in arbitration law and policy, coupled with the futility of international litigation, has left consumers uncertain whether they must abide by arbitration clauses and frustrated in seeking remedies in cross-border cases. This raises need for internationally acceptable ODR designed to resolve consumer disputes in an increasingly global marketplace.



Arbitration Law: U.S. vs. E.U.

- ▶ B2B: Universal Enforcement Per the NY Conv.
- ▶ B2C: Clashing Law and Public Policies
 - ▶ U.S. Strict Enforcement Per the NY Conv. & FAA
 - ▶ E.U. Refusal or Reluctance to Enforce Pre-Dispute Arbitration Clauses in B2C Contracts



U.S. Green Light On Arbitration

- ▶ FAA Enforcement Solidified Over Time
- ▶ Evolutionary Inclusion of Statutory Rights
 - ▶ Securities and Antitrust Claims
 - ▶ Employment Civil Rights Claims
 - ▶ Truth in Lending Act (w/Dodd-Frank Limits)
 - ▶ Credit Repair Organization Act
 - ▶ Magnusson Moss Warranty Act (Majority)



U.S. Supreme Court's Recent Reinforcement of Arbitration

- ▶ *Stolt-Nielsen S.A. vs. Animalfeeds Int'l Corp.*
 - ▶ Limits Allowance for Class Arbitration
- ▶ *AT&T Mobility L.L.C vs. Concepcion*
 - ▶ Limits Application of State Law to Police Fairness
- ▶ *Rent-A-Center vs. Jackson*
 - ▶ Limits Judicial Power to Determine Arbitrability



Cases Pending in the U.S. Supreme Court

- ▶ *Am. Express Merchants v. Italian Colors Restaurant*
 - ▶ 2nd Circuit Held Class Waiver Precluded Vindication of Statutory Rights Due to Prohibitive Costs of Individual Arb
 - ▶ Argued Feb. 27, 2013; Opinion Expected June 2013
- ▶ *Oxford Health Plans LLC v. Sutter*
 - ▶ 3rd Circuit Held Arbitrator Did Not Exceed Powers in Ordering Class Arbitration Per a Broad Arbitration Clause
 - ▶ Argued March 25, 2013; Opinion Expected June 2013



U.S. Red & Yellow Lights On Arbitrability

- ▶ Statutory Exceptions to the FAA for Military Credit Card and Motor Vehicle Franchise Claims
- ▶ Dodd-Frank Arbitration Preclusions
 - ▶ No Pre-Dispute Arbitration Clauses in Mortgage Contracts
 - ▶ No Arbitration of Whistleblower Claims
- ▶ CFPB Limits or Ban on Arbitration Clauses in Consumer Financial Product/Service Contracts
- ▶ SEC Regulation of Arbitration in Securities Contracts



E.U. Directives and Initiatives for Consumer Remedies

- ▶ *Article 6 of E.C. Directive 93/13*
 - ▶ Lists Arbitration as an Unfair Term in Consumer Contracts
 - ▶ Limits Choice of Law Provisions Hindering E.U. Rights
- ▶ *ECJ Ruling in Mostaza Claro v. Centro Movil Milenium*
 - ▶ Makes Dir. 93/13 a Rule of Public Policy
 - ▶ Directs Court to Examine Arbitration Clauses in B2C Contracts on its Own Motion
 - ▶ Allows Examination *Sua Sponte* at Enforcement Stage



Examples of Restrictions on Arbitration Enforcement of B2C Arbitration

- ▶ France: Red Light on B2C Arbitration
 - ▶ Authorization of Arbitration in B2B Impliedly Excludes B2C
 - ▶ Precludes Arbitration Agreements in Matters of Public Policy
- ▶ Germany: Yellow Light on B2C Arbitration
 - ▶ Must Separately Negotiate an Arbitration Clause
 - ▶ Court Examines Fairness *Sua Sponte* Per ECJ Rulings



New E.U. ADR/ODR Directives

March 12, 2013

- ▶ Require Creation of an E.U.-Wide ODR Platform For All Contract Disputes by March 2015
- ▶ Cover All Sectors Except Health & Education
- ▶ Require Common Rules for All ODR Providers
- ▶ Recital 20 *Preserves Rights to Redress in Courts*
- ▶ Art. 9 Allows for *Post-Dispute* Agreement to ODR



Initiatives for Internationally Acceptable B2C Remedy Mechanisms

- ▶ Capitalize on ODR's Potential
- ▶ Eliminate Boundaries
- ▶ Increase Consumers' Access to Remedies



Initial Considerations for B2C Arbitration

- ✓ Notice & Concise Guidance
- ✓ Balanced Arbitrator Selection
- ✓ Contained Costs & Expanded ODR
- ✓ Adequate Discovery



Initial Considerations . . .

- ✓ Online or Telephonic Hearings
- ✓ Timely Decisions & Award Compliance
- ✓ Preservation of Legislative Remedies



Initial Considerations . . .

- ✓ Public Disclosure & Transparency
- ✓ Access to Local Small Claims Courts?
- ✓ Allowance for Class Relief or Consolidation?



Conclusion

- ▶ Need for Access to Remedies in Global Marketplace
- ▶ Essential to Address Law & Policy Conflicts
- ▶ Opportunity to Develop Globally Acceptable ODR
- ▶ Process Guided by Procedural Fairness Considerations
- ▶ Focus on Accessible & Worthwhile Dispute Resolution to Aid Companies and Consumers



Thank you!

Your Comments Are Welcome:
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