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Towards class arbitration in the consumer law in Colombia. A reference to the AT&T mobility IIC v. Concepcion case

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ABSTRACT

This article highlights a new discussion in Colombia, that is, the role that arbitration could play in consumer law. The paper also analyses a signature case in U.S. arbitration consumer law (AT&T Mobility v Concepcion), which offers the basis to open the debate of small claims contested during a Class Arbitral proceeding. It also weighs on the legal nature of Class Waiver Clause. It furthers on the possible sanctions that could be imposed on that clause, to conclude that Consumer Law in Colombia deserves a better and effective procedure favoring consumers by voiding with inefficacy a possible Class Waiver in an arbitration agreement.

KEY WORDS: Arbitration, consumer, contract law, inefficacy, contract relativity

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Hacia el arbitraje colectivo en el Derecho del Consumidor en Colombia. Una Referencia al caso AT&T mobility IIC v. Concepcion

RESUMEN

Este artículo hace hincapié en una nueva discusión en Colombia sobre el rol que puede jugar el arbitraje en el Derecho del Consumidor. El estudio profundiza en el análisis de un precedente en los Estados Unidos sobre el Arbitraje en el derecho de los consumidores, esto es AT&T Mobility vs. Concepcion, el cual ofrece las bases para abrir el debate de las reclamaciones de baja cuantía a través de arbitraje y como no pueden los consumidores en esa jurisdicción demandar colectivamente. Esto hace necesario que se comience a observar en Colombia las demandas colectivas así como el estudio legal de las posibles sanciones a la cláusula de renuncia colectiva en el arbitraje del consumidor en Colombia. Lo anterior lleva a la conclusión que se necesita un proceso efectivo que favorezca a los consumidores sancionando con ineficacia de pleno derecho las renunciaciones a los arbitrajes colectivos.

PALABRAS CLAVES: Arbitraje, consumidor, derecho de los contratos, ineficacia, relatividad contractual.

Introduction

To better understand how a consumer right is effective in the territory of a country without judging how strong or weak that right may be, it is necessary to look at the judiciary and legal mechanisms available for consumers to have the violation of their rights repaired. In Colombia, by conferring special jurisdiction to the Superintendency of Industry and Commerce granted by Law 1480 of 2011, the way that marks an advance towards consumer rights real protection has started being paved. Additionally, the Colombian legal system accepts Consumer Arbitration according to the regulation of Law 1563 of 2012 and Decree 1829 of 2013.

However, the discussion here focuses on permitting arbitration as an instrument to protect consumers rights and to provide effective solutions, but arbitration itself with such special characteristics as those recommended in Decree 1829 of 2013 (articles 80 and 81 respectively) may offer more setbacks both to the institution of arbitration and to consumers rights, especially regarding low-amount claims.

This paper analyzes the application of Class Arbitration Waiver Clauses in the Colombian's Consumer Arbitration Law. To this end, the contractual importance that the Supreme Court of the United States has envisioned for arbitration clauses under the FAA is examined. A special reference to the AT&T Mobility LLC v. Concepcion case as well as to other cases in the U.S. is made to showcase how the minimum amount claims in Consumer Law associated with class arbitration waivers work in that country.

Accordingly, the purpose is to weigh further on that subject matter in Colombia since a necessity for a legal approach to acting on that front has become apparent. Furthermore, the study examines Colombian provisions by succinctly analyzing the adhesion contract so intrinsically related to the subject here addressed and the proper sanction that should help resolve a potential waiver of a class, to culminate in a conclusion in favor of Class Arbitration in the Colombian Consumer Law related to the issues herein mentioned.

I. The preponderance of the agreement between the parties in the USA arbitration. A brief reference to AT&T Mobility LLC v. Concepcion.

The company AT&T sold services under the modality of offering free phones. Liza and Vincent Concepcion took advantage of this deal on free phones, but AT&T charged them \$ 30.22 based on taxes from the sale of cell phones. Concepcion filed a lawsuit in 2006 in the Southern District of California, more specifically in a district court in that state. The claimant stated that the company charged taxes for phones that are supposed to be free. This fact was deemed as false advertising and fraud. An important detail of the case is that the arbitration clause that Concepcion signed with the company AT&T

did not contemplate a Class Arbitration, but only an Arbitration based on individual claims. Besides, the arbitrator, under the agreement, may not consolidate more than one person's claim or preside any form of a class proceeding. In March 2008 AT&T filed a motion to force arbitration under the terms of the clause agreed in the contract. The Concepcion introduced a petition against AT&T request, for they considered the arbitration clause unconscionable and it did not go in accordance with the laws of the State of California with respect Class Actions. The district court denied AT&T's motion. The Ninth Circuit Court also denied AT&T's request and declared the clause unconscionable (United States of America. Supreme Court, 2011)

The majority of the United States Supreme Court opinion, in this case, did not find correct the judgments of the Californian courts, as they point out, the pretension of the Congress of the United States of America when issuing the Federal Arbitration Act was that arbitration clauses emanating from any contract, even an adhesion one, have to abide the original intentions and purposes of the contracting parties. This was expressed in the USA Supreme Court (1989) ruling that "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms."

The understanding of the Supreme Court of the United States regarding the enforcement of the FAA cannot be denied; they do not intend to include visions that could be misguided or in dissonance with the idea that arbitration must be a simple and light procedure that favors the arbitration institution in itself.

Likewise, judgment asserts that arbitration must be an informal procedure without so much complexity in its development after its adoption in the contract. It has to be a process that matches the main purpose of the FAA, *i.e.*, to facilitate the enforcement of arbitration agreements through proper procedure. It is notorious, how the opinion observes Class Arbitrations as a way of interfering with the aforementioned purposes making it unfeasible.

The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms to facilitate streamlined proceedings. Requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. (United States of America, Supreme Court, 2011).

The latter quote depicts how the opinion disregarded the Class Action by considering it an interference since the most important criterion is to have an efficient proceeding. Accordingly, one can manifest that Concepcion has become a precedent in the USA regarding Class Arbitration in the area of Consumer Law.

In order to understand the overarching point why this case was being reviewed by the Supreme Court, it is important to underscore the intentions of the California Courts by examining a rule emanated in the case *Discover Bank v Superior Court*.

I.1. Discover Bank's rule

In the Discover Bank case, the Supreme Court of Justice of the State of California applied a clear framework of understanding for Class Arbitration waiver clauses when included in adhesion contracts and in small sums claims. In Discover, part of the reasoning express:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced. (United States of America. Supreme Court of California, 2005)

Then, according to this rule, the companies that exert Class Arbitration waivers aimed at hatching a scheme which clearly harms consumers must be deemed unconscionable. In California, judges have followed this rule in several cases to act accordingly. A clear example is the Dale case (2007), which expresses:

While the subscribers in the instant case do not argue the class action waiver prevents them from vindicating their statutory rights, we nonetheless find the First Circuit's analysis in Kristian instructive. Without the benefit of a class action mechanism, the subscribers would effectively be precluded from suing Comcast for a violation of 47 U.S.C. § 542. The cost of vindicating an individual subscriber's claim, when compared to his or her potential recovery, is too great. Additionally, because the Cable Act does not provide for the recovery of attorneys' fees or related costs for the violations alleged by the subscribers, and because state law allows fees and costs to be awarded only where bad faith is shown, it will be difficult for a single subscriber to obtain representation. This will allow Comcast to engage in unchecked market behavior that may be unlawful. Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims.

In sum, the Discover rule requires that the contract should be adhesive, "that damages be predictably small, and that the consumer allege a scheme to cheat consumers" (United States of America. Supreme Court, 2011). This rule was applied in Concepcion until the Supreme Court of the United States urged for a contractual vision of the matter. Arbitration thereby should be understood as a written contract and the defenses pursuant to revocability are associated with the making of such agreement. Thus, a party must prove duress, fraud, or mutual mistake to at least aspire in any court to deem the arbitration agreement unenforceable.

In other words, Concepcion was reinterpreted under this standard for Section 2 of the FAA provided that an arbitration clause “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Such a rule would be valid and enforceable under the Californian Law but based on the purposes that the Congress purported by enacting the FAA, it is not consistent with those according to Concepcion’s ruling.

1.2. Criticism of the Class Waiver in arbitration agreements imposed in adhesive contracts in the U.S.

The incursion of adhesion contracts in the world has become necessary in pursuit of efficient markets. The implementation of these types of agreements where the consumer has no option to negotiate manifest a clear asymmetry in the legal relationship. It is also true that in certain legal scenarios, the parties with the most bargaining power try to avoid potentially damaging legal consequences.

Establishing standardized adhesion contracts when making transactions involving small sums of money is a good reason to think that the party with superior bargaining power is taking advantage; thus, in the long run, the large unresolved disputes which entail those amounts are likely not to be settled or resolved in court.

That is why, in the case of those type of claims, by expressly permitting arbitration directly favors an economic scheme which reports results for big Corporations. In addition, imposing Class Waivers within an arbitration agreement, under those circumstances, amounts to factual exoneration favoring the party with the most power in the contractual relationship and in clear detriment of the weaker party. The Discover Bank case (2005) expressed it this way:

when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another. (p. 162)

The Concepcion judgment clearly asserted that Arbitration should be pursued on an individual basis when the waiver is present, which precludes the plaintiff to go as a Class. These Arbitration Agreements must be examined in the same footing as other contracts, therefore, they cannot be revoked without finding any grounds setting for any contract such as fraud, duress, or unconscionability. Raymond (2012) regarding the class stated the following:

The practical effect of the Supreme Courts determination in AT&T Mobility LLC v Concepcion is that the Concepcion's and all of the others wish to join the class will now need to arbitrate the dispute as individuals not as a class. Based on the practical impact of this decision, many commentators, academics, and consumer groups argue that the AT&T Mobility decision has signaled the end of class action arbitrations in consumer-based contracts. (p. 13)

On that basis, the concern for consumers and their lawyers is the lack of incentives and how expensive arbitration can become. In that respect, Lampley (2008) comments "Courts have become increasingly likely in recent years to find class arbitration waivers in consumer product sales unenforceable due to the lack of incentives for consumers and their attorneys to recover for "low – value" claims."

Consumers neither litigate nor want to settle low-value claims which in turn led Corporations to impose their policies, namely, establish arbitration in every agreement, which reflects in an advantage over the consumers.

Additionally, Concepcion somehow forecloses the possibility of pursuing Class Actions, which makes the disputes impracticable on low claims presented in those scenarios. In that regard, Cole says (2011):

The Court's interpretation of the FAA is that parties will not be required to participate in class arbitrations unless they agree to do so, and, most likely, courts will be unable to create blanket requirements that arbitration agreements that waive class-action arbitration are unenforceable. (p. 10)

Finally, the importance of the Concepcion case is that it has been taken as precedent by the Supreme Court itself to issue opinions in subsequent cases such as Murphy V. DirecTV, INC and DirecTV, Inc. V. Bourgia, but the underlying issue remains unaddressed, which is how the legal system can sanction companies imposing agreements to arbitrate disputes over derisory claims on an individual basis.

2. The consumer contract as an adhesion contract and consumer arbitration in Colombia. Abusive clause and inefficacy in Consumer Law

2.1. The consumer contract and its basis as an adhesion contract

Concerning contracts, it is known that the *iter contractus* of the classical theory explains how the legal relationship is formed between two or more persons (1495 Civil Code, 864 Code of Commerce) and gives the parties the power of self-regulation by way of the autonomy principle. At the same time, this principle is a transitional instrument that serves to hierarchize their norm. In this vision, two

or more parties negotiate, or, in other words, they can negotiate because the law regards them on the same footing.

Nowadays, it is noticeable how modernization modified the way of seeing the construction of a contract, going from an understanding of perfect negotiation to a stage that brings ignorance, economic power over the other party, and the ability to handle information. Consumption and the market helped to the evolution and the understanding of contractual formation. Currently, the modern contract scheme is no longer necessary to interpret the formation or essence of contracts involving consumers. Monsalve-Caballero and Rodado-Barreto (2011) in this regard says:

Currently, modern business transactions present an economic and legal reality (proliferation of mass contracting, abusive clauses in contracts, abuse of dominant position, lack of information and constant generation of unwanted contracts, specialization of business, etc.) that differs from the technical notion of the contract of the era of codifications. To think that this instrument can be extrapolated to Consumers Law would be an abstraction by content and by definition to modern pro consumatore rights (p. 486).

Law 1480 of 2011 could be seen as a norm aligned to these new trends. It imposed a provision of public policy on arbitration regarding Consumer Law, preventing this mechanism of conflict resolution in consumer matters. Then, after Decree 1829 of 2013, which established an online arbitration for adhesive contracts comes the repeal of numeral 12 of Article 43 of the Law 1480 of 2011.

The consumer contract is indeed a discussion that is still unclear as to its nature, and it is also true that any contract that underlies a consumer relationship (1480 of 2011) may be called a consumer contract. However, it is necessary to stress that Decree 1829 of 2013 only refers to arbitration clauses included in adhesion contracts.

Whether deemed as a commercial contract or a consumer contract, it is clear that in a consumers perspective all contracts are adhesive, since, for transfer and trade in general, the absence of that contractual form would be inefficient. As Villalba Cuellar (2011) states, “economic relations in modern society have become more complex, which has posed challenges to private law” (p.173). Consequently, it is not farfetched to envision arbitration agreements within consumer adhesion contracts, particularly when they involve a large scale of consumption relationship.

2.2. Consumer Arbitration in Colombia as an adhesion contract and the relativity principle from a Class Waiver Clause viewpoint

Consumer Arbitration in Colombia has a very strong debate regarding its admissibility notwithstanding that some provisions allow arbitration for adhesive contracts. Undoubtedly, consumers’ agreements amount in their form with that type of contract, thus Consumer Arbitration is permitted by the Colombian Law.

Arbitration in Colombia is understood as a process (SU-174 of 2007) and Article 3 of Law 1563 of 2012 defines the arbitration agreement as “(...) a juridical transaction under which the parties submit or are obliged to submit to arbitration controversies that have arisen or may arise between them.” The foregoing could be seen as a manifestation of the autonomy of the will principle employed to determine a different jurisdictional system by what the parties may agree. In other words, a contract.

In this sense, the arbitration pact understood as an accord is aligned with the classic definitions contained in Colombian Codes. As a consequence, in the adhesion contracts the parties do not have an agreement. Law 1480 of 2011 defines it as “one in which the clauses are arranged by the producer or supplier so that the consumer cannot modify them, nor can he do anything other than accept or reject them” (Article 5).

Simply put, arbitrability in Colombia for Consumer Arbitration permits consumer issues to be submitted to arbitration provided that those exist within an adhesion contract. As article 81 of the Decree 1829 of 2013 prescribe:

Article 81. For the aforementioned purpose, the offer of a juridical transaction, arbitration clause, may include the following conditions:
1. Arbitrable matter: all the differences that arise regarding the consumption relationship, in any of its phases and/or aspects, originated in the juridical transaction of acquisition of goods or provision of services.

The latter norm is not imperative which allows the party to tailor the arbitration clause as they see fit. However, arbitration in the consumer relationship comes usually to life if it is previously decided by the party that predisposes the contract which in turn results in an adhesion contract.

As to the arbitration agreement, it starts as an offer or an option made by the powerful party of the contract. An obligation surfaces to this party: the irrevocability of the agreement so that the consumer through a process of recognition and rationalization of the information, decides to accept or reject the arbitration freely and spontaneously. The non-acceptance by the consumer during the offer voids the arbitration agreement (Decree 1829 of 2013, Article 80).

In Colombia a Class waiver often is not needed when the agreement is between two parties without more Subjects of Law. In this view, the relativity principle of contracts affects as Colombian Private Law accepts and enshrines the following Roman sentence: *res inter alios acta aliis neque nocere neque prodese potest*, which means that the effects of the contract were made only in respect of the persons who participated in its conclusion.

Although the Law contemplates some exceptions to the relativity principle and the Colombian jurisprudence also has started to apply them in some particular cases,

namely, in a contractual liability for physicians where they were not a party in the contract (Colombia. Supreme Court of Justice, 2002) or by enabling third parties to a contract to rescind it for *laesio enormis* (Colombia. Supreme Court of Justice, 2016).

The Colombian Consumer Arbitration should be read from a Consumer Law perspective; thus, a Class Waiver in adhesion agreements with consumers could fall as an abusive clause in terms of Law 1480 of 2011. An arbitrator that has the power to adjudicate a consumer right litigation should consider the exceptions of the relativity principle of contracts inspired by the jurisprudence of the Colombian Supreme Court in lieu of enforcing it, particularly when a small sum of money claim is involved and third parties are being affected as Concepcion's showcases.

In sum, there are several points to be made from the get-go of a Consumer Contract vis-à-vis Consumer Arbitration Agreement in Colombia Private Law: (I) It is not certain that the adhesion contracts contemplate arbitration clauses. (II) If they are contained, it is not certain that the consumer will accept them for the cost. Let's remember, arbitration in this context is presented as an option or as an offer by the manufacturer or wholesaler. (III) Accepting the arbitration agreement is likely to be a two-party process if having a waiver clause for there is no exception established for the relativity principle within the Consumer Law. (IV) It is up to the arbitrator to recognize non-signatories third parties to the arbitration as defendants when adjudicating small sums of money claims by considering the exceptions accepted by the Supreme Court of Colombia in general terms regarding the relativity principle of the contracts.

2.3. Abusive Clause in the Colombian Consumer Law

Abusive clauses may present an imbalance in the performance of the contract by harming the reciprocity in the rights and obligations of the parties that form the relationship. Beyond the economic dimension on which the unbalance to solve the hurdles arising from this damage is based, two theories can be applied in order to seek redress: the theory of abuse of the right and the good faith in the *iter contractus*.

The two theories could be employed, but in Colombia good faith is taking hold because it has been useful to solve certain cases by the Supreme Court of Justice (C. S de J., 2011; C. S de J., 1998; C. S de J., 1994).

The contractual good faith (*bona fides*) must be used with correctness and loyalty in drafting the adhesion contract, where the predisposing party in creating the provisions of the contract tends to respect the rights of the adherents. Thus, obligations must be designed in a fashion to benefit the reciprocity and equivalence between the parties. If there is an unbalance in the creation and perfection of the contract and its obligations, we would be in the presence of an abusive clause (Posada, 2015).

In relation to the abusive clauses in consumer law, the doctrine has also registered its possibility. Fernández (1994) states:

Regarding the abusive, inequitable, or unlawful clauses, all of them coincide in the extreme advantage of the provider's rights to the detriment of the consumer, or that may establish inequitable stipulations that diminish the rights of consumers and even renounce them, and that consequently they place the consumers in an economic detrimental and inequitable situation in the consumer-supplier relationship. (p.236)

The abuse present in the formation of a consumer contract, which dictates numerous clauses, is patent and common in Consumer Law, which evidences that those agreements are practically inoperative as "in this way, contractual abuses derived from standard pre-established clause will be standardized by way of standard forms or type contracts, where the discussion of contractual contents is practically null" (Gual, 2016, p. 114).

At this point, one can argue that the Class Arbitration Waiver Clause as evidence could be based on an imbalance in the performance and a lack of reciprocity, which is a good example of an abuse of right case. In this context, such a clause should be sanctioned either by annulment or by a stricter form of sanction as the Inefficacy of the acts.

2.4. Inefficacy as a sanction to Class Arbitration Waivers

Given the assumption that arbitration is allowed in adhesion contracts and possibly extends to contracts that contain a consumer relationship, it is relevant to determine which sanction is the best remedial mechanism in case manufacturers incorporate a Class Arbitration Waiver.

The reason for bringing the example of the Concepcion case is to extract the analysis of the small claim and the advantage that individual arbitration can suppose to the superior party in any given agreement. In Colombia, the reality of small claims is present every day and those situations need to be addressed somehow. The Consumers' Law can be effective by way of arbitration or other jurisdictional actions, but there is not a better sanction than inefficacy to disappear an act out of the legal system.

In Colombia, the current discussion is about the implementation of arbitration in the Consumer Law not whether Class Arbitration should be allowed. This last option seems unfeasible given that, if the manufacturer or supplier does not display the arbitration agreement within the contract, there is nothing to accept on the consumers' side. And, if the consumer has the option to decide whether to accept or reject the arbitration agreement, he would not have further a decision on either to include or bargain the Class Arbitration Clause. Thereby, sanctions established in Article 42 of Law 1480 of

2011 possibly could affect these agreements tending to exclude or prevent negotiations of Class Arbitration against companies with greater economic power.

Therefore, it must be an unjustified imbalance, as well as an affectation to the time, mode or place in the exercise of consumers' rights. A waiver clause that aims to preclude the consumer' right to be part of a class is an outright manifestation of an abusive clause in the terms described above, worthy of a proper sanction.

The abusive clause is the one that "excessively or disproportionately favors the contractual position of the predisposing party and harms inequitably and unlawfully and unfairly the adherents" (Colombia. Supreme Court of Justice, 2001). The latter could be a vivid reflection of the class arbitration waiver within a contract.

The Supreme Court of Justice furthers on the requisites that must meet an abusive clause:

- a) That their negotiation has not been individual; b) that injure the emerging requirements of the negotiable good faith, *i.e.*, that this guiding principle be disregarded from an objective perspective: good faith probity or loyalty-, and c) that generates a significant imbalance in terms of the rights and obligations which the parties incur (2001).

A class waiver within an arbitration agreement/clause easily could meet the abovementioned requirements. It is pertinent to add that a blacklist provision is regulated in article 43 of Law 1480 of 2011. As far as the blacklist as a method of legislative control Soto (2000) states that "a 'blacklist' consists in the exhaustive enumeration of a relationship, closed or open, of cases in which certain clauses or contractual stipulations would be declared void." (p. 423)

Consequently, if the class waiver is introduced as a predisposing clause abusing the other party in the legal relationship, it is best that through jurisprudence and doctrinal interpretation the recognition of an effective remedy like the inefficacy instead of nullity would be adopted. Several reasons such as the inefficacy does not require a judicial pronouncement, but the nullity does, and that inefficacy operates *de jure* whereas the nullity needs a sentence support this view.

Insofar as certain abusive clauses are not regulated in Colombia through a blacklist, class waiver clauses may probably be included in the so-called gray or broad lists (Echeverri, 2011), which would imply an obstacle in the effectiveness of consumers' rights. The query is not aimed at the role of justice at all, but how speedy and handy the norm upon consumers' rights protection can be.

Conclusion

Class arbitration in Colombia could become a method to access private justice, which is premised on seeking the benefit of consumers rights. It could be established as a pillar for low claim disputes in Colombia, something that has been demanded and longed for a long time. By adopting the thesis that class waivers are abusive clauses under Art. 43 Law 1480 of 2011, the low claims disputes conducted as a class can serve as a means to adjust the conduct of powerful parties in the market with respect of consumers and it will help to have a streamlined procedure. Otherwise, class waivers would contribute to a scheme aimed to favor the companies' finances and will legally be able to cheat consumers for costly proceedings and attorney fees.

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