Class actions suits vs. Arbitration clause (Mexico)

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On September 24, 2014, the Mexican Supreme Court (SCJN) issued a landmark decision in the world of arbitration and class action suits. In summary, SCJN upheld that it is possible to file a class action suit, even though an arbitration clause is included in the agreement that governs the business relationship. SCJN reached the conclusion that the laws that regulate consumer relationship and class actions suits have a public interest, and; therefore, a Court may not reject a class action suit based on the argument that the parties are subject to arbitration.

Background

- On 2010 the Mexican Constitution was amended to incorporate into the Mexican legal system class action suits and on 2011 several federal procedural, environmental, financial and consumer protection laws were amended in order to adapt legislation to this type of procedures.

- The subject matter case came about due to the business relationship between the company that developed a Golf Club and a group of plaintiffs that purchased memberships for the use of the sport and social facilities. The plaintiffs claim that the company unilaterally amended the agreement, imposing obligations not foreseen in the initial agreement.

- The agreement signed by the plaintiffs included an arbitration clause, which stipulated that: “All disputes between the parties” arising out or in connection with such agreement shall be finally settled through arbitration.
Taking into account the existence of arbitration clause, plaintiffs argued that the class action suit should be admitted, since article 90 of the Consumer Protection Federal Law deems null and void clauses in agreements that: a) allow vendor to unilaterally amend the provisions of agreement; b) stipulate certain formality pre-requisites for validity of suits to be filed against vendor; and c) impose to consumer the obligation to waive protection from the above mentioned law. The plaintiffs claimed that the above mentioned clause applies only to business nature disputes that emerge individually between buyers and developer of Golf Club.

The Federal Court dismissed the class action suit and determined *sua sponte* (ie on its own) that it lacked jurisdiction to decide the subject matter of case, based on the arbitration clause stipulated by plaintiffs and defendant. The Court of Appeals affirmed the lower court decision. The plaintiff appealed such decision through an *amparo* (constitutional rights trial). The case finally reached the SCJN².

**The SCJN’s reasoning:**

- In the analyzed decision, the SCJN ruled that general jurisdiction courts may not dismiss a class action suit due to lack of subject matter jurisdiction, based on the existence of an arbitration clause stipulated by the parties. SCJN ruled that: i) class action is the ideal mechanism to resolve disputes between the parties, to provide legal expeditiousness and security, and to produce a dissuasive effect from abusive economic practices; and ii) the laws that regulate consumer relationship between vendors and consumers are of public interest and; therefore, the applicability of such laws may not be waived.

- The arbitration clause of the membership agreement to the Golf Club was designed for individual claims between the parties, e.g. the cancellation of the membership due to payment default by member, the deficient rendering of a service to a club member, the inappropriate use of the golf course facilities by a member, or liability determined in an event that could cause injury to a member or to defendant. However, such clause may not be

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² SCJN exercise the attraction authority under *amparto directo* 33/2004
applied to class action claims.

- The arbitration clause in this type of disputes is contrary to one of the main objectives when class actions were incorporated to the Mexican legal system. The legislature intended to generate within the society a dissuasive effect against abuses by the most powerful agents in the economy. The judgments that rule in favor of an affected group, act as a disincentive towards massive illicit practices, because if they are pursued collectively the amount of award could be higher than the ill-gotten gains. Therefore, arbitration is not an option for the resolution of class actions.

- The current procedural paradigms are insufficient and even contrary to the spirit of class actions. As consequence, the courts must interpret the statutes governing such procedures taking into account that the ultimate objective is the protection of class rights. The court’s task is to prepare interpretation standards and guidelines that lead to the perfection of class action procedures, so that each time they are more agile, simple and flexible, so that the class action claims enjoy an effective access to the justice system.

- In this specific case, if determined that arbitration is the ideal means to resolve disputes between the parties, then consumer rights would be rendered moot, because: in first place, the constitutional right of consumers to organize for the purpose of protecting their interests would be obstructed; and in second place, consumer would be deprived of the benefits that inure from class actions, such as the determination of rights in a uniform manner, given that the judgment that brings an end to procedure affords the same status to the group members with respect to the same set of facts. This situation may not be accomplished through independent arbitration procedures, as the respective arbitration awards that bring an end to such procedures could be mutually contradictory.

Final points to take into consideration

- The decision of the SCJN subject matter of this analysis is not binding, as is deemed an isolated (persuasive) precedent; however, since it was a unanimous decision, it is highly unlikely that such criteria will change in the short term. Going forward, this isolated (persuasive) precedent will be sufficient to serve as guide to courts (general jurisdiction courts and court of appeals)
in Mexico that have jurisdiction over similar cases.

- The line of argument made by the SCJN decision is based on that both consumer rights and class actions are afforded protection by articles 28 and 17 of the Mexican Constitution and; therefore, deserve a special tutelage that may not be waived.

  - I believe that the analysis of the constitutional aspect is incomplete, given that SCJN omitted to make reference to the constitutional mandate included in the fourth paragraph of the same article 17. Such paragraph was added to the Constitution in 2008. Such provision recognizes as a fundamental right the creation of alternative dispute resolution mechanisms, among which arbitration is included.

  - The legislative intent section of this amendment to the Constitution, when making reference to alternative dispute resolution mechanisms, states as follows: “...they constitute a guarantee for the people to have access to prompt and expedite justice..., they will allow, in first place, the change of restoration type justice, promote a more active participation of the people to find other way to relate among themselves, where personal responsibility, respect to other and the use of negotiation and communication is favored in order to achieve collective development.”

  - Since class actions and alternative dispute resolution mechanisms have the same legal hierarchy level as consumer right protection, then the resolution from SCJN should have considered this aspect as an important part of their analysis. Perhaps the conclusion reached would have been the same, but it would have been healthy to address the public interest issue to strengthen alternative dispute resolution methods.

- Final note regarding this subject matter. A similar case was decided by the U.S. Supreme Court on 2011, with a 5-4 split vote. In AT&T Mobility v. Concepcion, 563 U.S. 321 (2011), the U.S. Supreme Court decided to upheld the arbitration clause as a manner to restrict access to class

3 http://en.wikipedia.org/wiki/AT%26T_Mobility_v._Concepcion
action. A section of the decision provides: “Therefore, the opinion of the majority is clear: it may not be tolerated any federal or state interpretation that diverts from the intention of the arbitration act’s drafters, which is no other but to allow the parties to resolve their disputes in a more simple manner.”

- Taking into account the existing international trends in arbitration law, it would not be strange that in the future we see an amendment to the Commerce Code or the Civil Procedures Federal Code, to expressly allow or ban class actions regarding business relationships subject to an arbitration clause.

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