

U.S. SUPREME COURT DECISION IN AMERICAN EXPRESS CASE A SIGNIFICANT ONE FOR ARBITRATION AGREEMENTS

Publication
Oct 2, 2013

In June, the U.S. Supreme Court held in *American Express v. Italian Colors Restaurant* that the Federal Arbitration Act does not allow courts to invalidate a contractual waiver of the right to bring a class arbitration on the grounds that individually arbitrating claims may be cost prohibitive. The decision reinforces the principle that the act requires arbitration agreements to be enforced according to their terms, and it limits a judicially created hurdle which had allowed parties to avoid the enforcement of those agreements.

The court's decision centered on the card acceptance agreement entered into between American Express and various merchants who accepted payments from customers using Amex cards. The acceptance agreement required that all disputes be resolved by arbitration and stated that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."

In 2003, a group of merchants initiated an antitrust class action lawsuit against Amex alleging that Amex forced them to pay excessive merchant discount fees by requiring them to also accept credit cards at rates which were 30 percent higher than the rates of competing credit cards. The merchants claimed that was an illegal tying arrangement in violation of the Sherman Antitrust Act.

Amex moved to compel individual arbitration in accordance with the acceptance agreement. In opposition to Amex's motion, the merchants submitted a declaration from an economist who estimated that the expert analysis needed to

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prove the alleged antitrust claims would cost at least several hundred thousand dollars and might exceed one million dollars. In contrast, the maximum recovery for an individual plaintiff would be only \$38,549. The district court granted Amex's motion and dismissed the merchants' lawsuit.

However, the U.S. Court of Appeals for the 2nd Circuit reversed the dismissal and held that the waiver of class action was unenforceable because of the prohibitive costs involved in arbitrating individually. After several more years of legal wrangling, including an earlier trip to the Supreme Court and two more reversals from the 2nd Circuit, the Supreme Court granted certiorari.

The court's decision strongly indicates that courts will be more inclined than ever before to enforce such arbitration agreements on their face.

This article appeared in the October 2, 2013 edition of [*The Daily Business Review*](#).