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Arbitration Clause Prohibiting Class Action in Consumer Contracts

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Ⅰ. Introduction

Recently, the Ikea Malm drawer happened to kill a number of children in the U.S. and Ikea announced a recall for all of 29 million Malm drawers, as well as some other of their drawers in the United States of America.[1] Malm drawers were sold in Korea, too, but Ikea maintained a different policy that required consumers to install fixtures given with the drawer between the wall and the drawers. It was difficult for Korean consumers to understand the reason why the same drawers ended up with different treatments after many children's lives were taken. This incident led the Korean society to review Korea's substantial laws on consumer protection compared to other jurisdictions. An often cited criticism is that because punitive compensation is not allowed in Korean law, the multinational corporations treat Korean consumers with lack of concern.[2] This certainly catalyzed a thorough examination of international consumer contracts regarding consumer protection. However, it should be noted that the absence of punitive compensation in Korean law can be irrelevant to protecting Korean consumers in international contracts. Regardless of Korean law, the governing law of the contract regulates the consumers' rights. Therefore, adopting punitive compensation in civil law does not necessarily work to protect more rights of Korean consumers in international contracts against multinational corporations. This paper intends to review the procedural aspect rather than the substantial law to protect consumers in international contracts.

In the United States of America, class action in litigation has developed to protect weaker individuals in the lack of parity between the parties in contracts. Consumer contracts, as general terms, are the typical example of lack of parity between the parties, and class action is often presented in the disputes based on consumer contracts. As individual consumers buy goods and services crossing borders, and international arbitration has become a favorable dispute resolution method in international commercial disputes, class action in arbitration has emerged as another dispute resolution method in consumer contracts. Jurisprudence of party autonomy allows dispute resolution clauses to have various conditions in contracts by parties' free will, whereas parties can reserve litigation,

1) http://www.ikea.com/us/en/about_ikea/newsitem/062816-recall-chest-and-dressers, last visited Feb. 15, 2017
2) Ministry of Justice Blog http://blog.daum.net/mojjustice/8707930, last visited Feb. 15, 2017

choosing arbitration and anti-suit injunction as their dispute resolution method. Moreover, under the norm of party autonomy, parties can retain the traditional adjudicative method, litigation, but waive class action in litigation.

A new trend in consumer contracts especially in the U.S. is to prohibit class arbitration, and the legitimacy of the prohibition has been questioned in state and federal courts. At a glance, it seems no problem under the principle of party autonomy. Most jurisdictions do not even have class actions at all; waiving litigation and waiving class action in litigation both are legitimate in America. Waiving class action may possibly look acceptable. Very newly, the U.S. Supreme Court ruled that the arbitration clause, which waives class action, is valid[3] after a hot debate among California and federal courts regarding the validity of the arbitration clause. However, this paper challenges the ruling. This paper studies the rationale of the holding and compares it with the California state court's view. In order to understand the view that the class action waiver in arbitration clause is legitimate, the paper will start with contemplating the basic principle of contract and the fundamental jurisprudence of consumer contracts.

Ⅱ. Governing Principles of Consumer Contracts

1. Freedom of contract

The common grounds that modern civil laws are based on are "the three principles of modern civil law." These basic contract principles govern the validity of contracts including international consumer contracts: freedom of contract, fully respected ownership of private property, and responsibility for own fault.[4] People are free to agree on what they want in their ways, the ownership of private property is fully respected, and people are responsible for their own faults. International consumer contracts are also governed by these fundamental principles of contracts. These modern principles are known to have started from French civil law in early 19C with the emergence of individualism. Later, in 19C, German law, too, adopted the principles. As Korean law is largely based on German law, the three

3) DirecTV v. 136 S.Ct. 463 (2015)

4) Yoonjik Kwak and Jaehyung Kim, General Principles of Civil Law: Lecture on Civil Law 1, pp. 37-42, Bakyoungsa, 2013

fundamental principles have been deeply rooted in Korean civil law as well.[5] Common law is no exception. The freedom of contract was introduced in the United States of America as a constitutional doctrine into the case of Godcharles v. Wigeman in 1886, and the story reached its apogee in 1905 when the Supreme Court in Lochner v. New York[6] struck down a state law regulating working conditions in bakeries and giving the bakery owner autonomy to manage the workers. After this case in early 19C, Lochnerism[7] era started in the States. With liberal capitalism, "laissez-faire"[8] became the central constitutional principle. The U.S. Constitution respected private ownership, and without due process of the 14th Amendment of the Constitution, private properties could not be taken away. This is called "laissez-faire constitutionalism" and the period of "judicial protection of economic interests."[9]

These principles were amended in accordance with the realistic recognition that people are not equal in economic power. The typical example of this recognition is lack of parity in employment contracts and consumer contracts. It has already been a long while since our legal society recognized and adopted that consumers are practically not as free under the principle of freedom of contract as big companies. Accordingly, civilized legal societies adopted the consumer protection jurisprudence and have built consumer protection public policy against big corporations. The U.S. federal laws also provide a wide range of consumer protections such as false product claims, harassment by marketers and spammers, and so on.[10] Additionally, the federal government has Bureau of Consumer Protection under the Federal Trace Commission to regulate and manage consumer protection norms throughout the country.[11]

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5) Id at pp.41-42

6) Lochner v. New York, 198 US 45

7) "Lochnerism refers to the Supreme Court's 1905 decision in Lochner v. New York striking down a state law that limited bakers' work hours as violating employers' and employees' liberty of contract. The case became symbolic of a time in which courts found unconstitutional a series of statutes mandating maximum hours, days of rest, and minimum wages, and protecting collective bargaining and unionization. . . . the term Lochnerism has long been used to critique judicial decisions striking down commercial regulation . . . ." Elizabeth Sepper, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453(2015), pp.1459-1460

8) laissez-faire means "allow to do" in French; the policy of minimum governmental interference in the economic affairs of individuals and society; see Britannica, https://www.britannica.com/topic/laissez-faire, last visited in Feb. 8, 2017

9) Louise A. Halper, Christopher G. Tiedeman, "Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age, 51 Ohio St. L.J. 1349, 1362–63 (1990)

10) Consumer Product Safety Act of 1972 (15 U.S.C. § 2051); Federal Trade Commission Act (15 U.S.C. § 58); Food, Drug, and Cosmetic Act (21 U.S.C. § 301); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (11 U.S.C. §§ 101-1532); Consumer Leasing Act (15 U.S.C. § 1601); Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) (15 U.S.C. § 7701.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Titles X and XIV. (12 U.S.C. § 5301); Fair Packaging and Labeling Act, (15 U.S.C. § 1451.); and many others laws exist to protect small individual consumers.

2. Adhesion Contract and class action

Most of the consumer contracts are composed through general terms and conditions, and international consumer contracts are no exception and even more likely so. While consumers hardly pay attention to the terms and conditions of their purchases, the contractual liabilities and rights of consumers are defined by the general terms and conditions; however, consumers are not even aware that they are making contracts. Consumers do not only sign the contract without awareness, but they have little bargaining power when disputes occur. It is a nature of adhesion contracts and creates more lack of parity between the parties. Thus, in most of jurisdictions, consumer contracts are subject to public policy protection. Companies' freedom and power to compose their general terms and conditions are limited within the public policy of the society. Thus, in international consumer contracts, multinational companies cannot compel their general terms to the consumers in other states against their public policy. Now that Korean society has reviewed if Korean civil law is being a proper instrument to landscape Korean consumers' rights, it could be more useful and urgent to have a close look at dispute clauses in current international consumer contracts with basic principles of adhesion contract besides adapting new remedies of punitive compensation in Korean civil law.

Class action in the U.S. jurisdiction is designed out of the necessity to protect individuals with weaker bargaining power. Although class action does not exist in many jurisdictions including Korea, it is well-known that U.S. common law and federal and various states' civil procedure allow it. Some cases[12] including pharmaceutical drugs, security fraud, credit card abuse, and unhealthy products have gained worldwide fame with typical stories that small individuals[13] did not pay a penny for the lawsuit but eventually won a huge amount of remedies.

In the meantime, in international commercial contracts, international arbitration is undoubtedly recognized as the most efficient dispute resolution method with obvious reasons: enforceability, neutrality between the parties from different jurisdictions, procedural efficiency, and party autonomy. Hence, class action in arbitration can work as a highly

11) https://www.ftc.gov

12) Anderson v. Pacific Gas & Electric Co. settlement; Tobacco Master Settlement Agreement; Roe v. Wade, 410 U.S. 113, 114, 93 S. Ct. 705, 708, 35 L. Ed. 2d 147 (1973); Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 299, 75 S. Ct. 753, 755–56, 99 L. Ed. 1083 (1955); etc.

13) "Small individuals" means normal lay people, who are individual parties with weaker bargaining powers and small claims.

efficient option to protect individual consumers' rights. Maybe because of this advantage to consumers, companies tend to compose their general terms and conditions with arbitration clause that waives class action. The question is if this waive clause is legitimate and valid under the freedom of contract or under the consumer protection public policy.

Ⅲ. Definition and Practical Impact of Class Action in Arbitration

Class arbitration started in California in the United States of America based upon the jurisprudence of adjudicative class action in litigation and expanded to other jurisdictions including some civil law jurisdictions. As Korean law does not have class action in litigation, here is briefly introduced class litigation in the U.S. law before discussing class arbitrations.

1. Class Action in the U.S. Litigation

Class action in litigation was an authentic concept in common law. It originated from "representative actions" in old English case law,[14] but class action recognized in this contemporary society is a different and recent concept. Although representative actions have been recognized in various forms since the earliest days of English law,[15] class actions as we recognize them today developed as an exception to the formal rigidity of the "necessary parties rule in equity,"[16] as well as from the bill of peace, as an equitable device for combining multiple suits.[17] The necessary party rule in equity mandated that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill, ought to be made parties to the suit, however numerous they may be."[18] Because that rule would have at times unfairly denied recovery to the party before the court, however, equity developed exceptions: "where the parties are numerous and the court perceives that it will be almost impossible to bring them all before the court; or where

14) Ortiz v. Fibrebroard Corp., 527 U.S. 815, 832, 119 S.Ct. 2295, 2308(1999)
15) See S. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987); See also Marcin, Searching for the Origin of the Class Action, 23 Cath. U.L.Rev. 515, 517 - 524 (1973)
16) See Hazard, Gedid, & Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L.Rev. 1849, 1859 - 1860 (1998)
17) See Z. Chafee, Some Problems of Equity 161 - 167, 200 - 203 (1950)
18) West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I.1820)

the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole...."[19] From these roots, modern class action practice emerged in the 1966 revision of Rule 23 of U.S. Federal Civil Procedure. In drafting Rule 23(b), the Advisory Committee sought to catalogue in "functional" terms "those recurrent life patterns which call for mass litigation through representative parties."[20]

The purpose of this authentic form of litigation is to bring a proper and practically possible resolution method for small individuals with relatively small amounts of merits.[21] It gives better legal protection to a class of small individuals, as well as efficiency to the procedure.[22] When the class is so numerous that the joinder of all members is impracticable, when common facts and laws apply to the class, and when the claims or defenses of the representative parties are typical of the claims or defenses of the class, the Federal Rules allow and govern class action.[23]

It is "an exception to the usual rule that litigation is conducted by and on behalf of the individually named parties only.[24] Class action permits representative-plaintiffs (also called "named plaintiffs" or "class representatives") to litigate claims of members of the class who are not actually before the court (also called "unnamed" or "absent" plaintiffs). Adjudication of a class action binds all members of the certified class except those who "opt out."[25] Class action aims (1) to avoid multiplicity of actions and (2) to enable persons to assert

19) Id at 722; Supra note 14 Ortiz; See also J. Story, Commentaries on Equity Pleadings § 97 (J. Gould 10th rev. ed. 1892); F. Calvert, A Treatise upon the Law Respecting Parties to Suits in Equity 17–29 (1837)

20) Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497 (1969); Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–33, 119 S. Ct. 2295, 2308, 144 L. Ed. 2d 715 (1999)

21) One purpose of class action is to provide remedy for those who have been injured by fraudulent course of conduct but who, because of their economic situation or ignorance, are unable to protect themselves by separate lawsuits. Moscarelli v. Stamm, E.D.N.Y.1968, 288 F.Supp. 453.; the purpose of the section of class action rule authorizing certification where adjudications with respect to individual members of the class would be dispositive of the interests of other members not parties to the adjudications or substantially impairing or impeding their ability to protect their interests, aims to protect plaintiffs in situations where separate lawsuits might exhaust a defendant's resources such that earlier plaintiffs might recover at the expense of later plaintiffs. In Paxil Litigation, C.D.Cal.2003, 212 F.R.D. 539, class actions serve three essential purposes: to facilitate judicial economy by avoidance of multiple suits on the same subject matter; to provide feasible means for asserting the rights of those who would have no realistic day in court if class action was not available; and to deter inconsistent results, assuring uniform and singular determination of rights and liabilities. Buford v. H & R Block, Inc., S.D.Ga.1996, 168 F.R.D. 340, affirmed 117 F.3d 1433.

22) One purpose of class action is to achieve economies of time and effort. Buford v. American Finance Co., N.D.Ga.1971, 333 F.Supp. 1243.

23) Federal Rules of Civil Procedure Section 23 (a)

24) Wal-Mart Stores, Inc. v. Dukes (2011) 564 US 338

25) California Practical. Guide Federal. Civil. Procedure. Before Trial Ch. 10-C

small claims that could not be litigated individually and whose costs would far outweigh any recovery.[26] Thus, it gives small individual parties practical justice without the risk of inconsistency and establishes incompatible standards of conduct for the party opposing the class. The benefit is not only to save resources by permitting litigating multiple and related claims more efficiently and economically than individual lawsuits. In addition, where the defendant has engaged in a systematic pattern of wrongdoing, a plaintiff's class action can provide a group remedy without the additional cost and delay of multiple separate lawsuits and the attendant risk of inconsistent judgments.[27] Moreover, it reduces the risk of adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.[28] As such, class action provides better opportunity for efficiency and justice, with consistent result for the disputes derived from the common significant facts and substantive law.

Nevertheless, this idea is not in accordance with the fundamental principle of modern German civil law jurisprudence: private autonomy.[29] Thus, the legitimacy and the inherent risks of class action need further explanation especially to civil law jurisdiction. The basic question is on how class action works regarding parties having a choice on their dispute resolution methods and managing the procedure as they wish. This is the main reason most civil jurisdictions do not have class action in their civil procedures. This concern is reflected in the U.S. Federal Rules, which regulate the due process of class action in a certain way. The rules focus to ensure adequacy of representation at the outset of a class action through a class certification process and to alleviate the danger of disadvantaging the absent class members. Proper individual notices to most of the possible subjectives, if not all, must be met,[30] and the agreement shall be made at least through letters. Parties who do not want to resolve the conflict with that representative, nor in that suit can choose to opt out from the action. Moreover, it requires that a class action be superior to other available methods to fairly and efficiently adjudicate the controversy.[31]

Not only on theoretical legitimacy but also on a practical matter, a criticism has arisen

26) Crown, Cork, & Seal Co. v. Parker (1983) 462 US 345, 349, 103 S.Ct. 2392, 2395; Rand v. Monsanto Co. (7th Cir. 1991) 926 F2d 596, 599

27) Supra note 25

28) Federal Rules of Civil Procedure. 23 (b) (1)

29) Proprietarianism, private autonomy, and responsibility for own actions are publicly known as basic principles of modern German civil law jurisprudence; Supra note 13

30) Federal Rules of Civil Procedure 23(c) (2)

31) Federal Rules of Civil Procedure 23(b) (3)

that class actions often provoke a massive response by the opposing party: immediate and aggressive discovery; motions and procedures to block certification; appeal or writs to challenge adverse rulings; and efforts aimed at making it as difficult as possible for a plaintiff to get the case to trial.[32] Moreover, as most disputes are settled in the U.S., one of the big disadvantages of class actions is being difficult to settle (although only few actually go to trial in the end). Class actions cannot be compromised or dismissed without notice to the class members and without formal court approval.[33] These concerns against class arbitration are fair and understandable, but for small individuals with little bargaining power in international contracts, these criticisms can be advantages. Individuals certainly have difficulties to practically seek for adjudicative methods against a big company, and it is even more difficult when the consumer contract is international. Class action can be practically the only possible method for individuals in some cases not only for the ones who can't afford their own lawsuit, but also for the ones who are not even aware of their legal rights violated under the disputes. Notice in class action procedure can awaken individuals to their rights, so as to prevent the defendants, the big companies, from cheating on small individuals' rights. The nature of being difficult to settle could be restated that small individuals have very little power alone in settlement, and class action gives possibility to negotiate with the big companies.

2. Class Action in Arbitration

2.1 Development of Class Arbitration in the U.S.

The current form of class arbitration started in the U.S. in the 1980s as a "uniquely American device" [34] based on their concept of class action in litigation and is legislated in the Federal Arbitration Act. Now the U.S. legal system has reached the American Arbitration Association publishing the guideline of Supplementary Rules for Class Arbitration. The Federal Arbitration Act has no provision to regulate class arbitration but fully respects party autonomy in choosing their dispute resolution method.

32) Supra note 25
33) Id
34) The President and fellows of Harvard college against JSC Surgutneftegaz, 770 PLI/LIT. 127, 155 (2008)

Federal Arbitration Act Section 2[35)]

"§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as existing at law or in equity for the revocation of any contract."

Besides Supplementary Rules for class arbitration, no legal statutes either in state or federal level was legislated to standardize class arbitration.

The main characters of class action in arbitration are 1) one or more lead claimants who assert legal claims on behalf of a group of unnamed claimants in a representative capacity, and 2) not all of the unnamed claimants may be identified or identifiable at the outset of the arbitration,[36)] and 3) like the litigation, it is developed as an opt out base through the USA common law. The class arbitration mechanism was first used during the 1980s [in the U.S.] when a few state courts began to order arbitrations that would be conducted on a class basis, permitting claims brought by one party on behalf of large numbers of similarly-situated claimants (usually consumers), all having identical arbitration agreements with the same defendant. For a time, class arbitration seemed destined to remain a niche phenomenon, largely confined to state courts in California.[37)]

Class arbitrations seem to have rather passionate followers and strong critics rather than neutral moderates. Some invoke that class arbitration is the sensible, efficient alternative to cumbersome class litigation, while others oppose it variously as a means of denying consumers the procedural rights they would enjoy in litigation or as an unworkable combination of the worst of both litigation and arbitration.[38)] U.S. Supreme Court also

35) 9 USCS § 2

36) S. I. Strong, Class, Mass, and Collective Arbitration in National and International Law, pp. 2.25-2.120

37) Gary Born & Claudio Salas, The United States Supreme Court and Class Arbitration: A Tragedy of Errors, 2012

38) Supra note 38 Gary Born and Claudio Salas; Thomas Stipanowich, The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration, available at http://ssrn.com/abstract=1919936; Thomas Doyle, Protecting Nonparty Class Members in Class Arbitration, 25 A.B.A. J. LAB. & EMP. L. 25, 26-27 (2009); David Clancy & Matthew Stein, An Uninvited Guest:Class Arbitration and the Federal Arbitration Act's Legislative History, 63 BUS. LAW. 55, 62-63, 67 (2007); S.I. Strong, The Sounds of Silence: Are the U.S. Arbitrators Creating Internationally Enforceable Awards in Cases of Contractual Silence or Ambiguity, 30

seemed to have various opinions before the Court, building up the philosophy on the class action in arbitration. The first U.S. Supreme Court case which recognized class arbitration is Green Tree Financial Corp. v. Bazzle[39] in 2003 ruling that the question whether arbitration agreement permitted class arbitration was an issue that arbitrators, not courts, were to decide. This case is widely and understandably interpreted as giving both arbitral tribunals and courts to order arbitrations on a class-wide basis.[40] However, 7 years later the Supreme Court overruled Bazzle and closed the door on class arbitration under the Federal Arbitration Act in Stolt-Nielsen S.A. v. Animal Feeds Int'l. Corp.[41]

In the meantime, the California court has shown its consistent attitude on class arbitration. The first recognized case on class arbitration in California Supreme Court is Keating v. Superior Court.[42] The Supreme Court of California recognized the class arbitration award holding that "for all its difficulties, [class arbitration] may offer a better, more efficient, and fairer solution than bilateral arbitration and may be justified in cases where gross unfairness would result from the denial of opportunity to proceed on a class-wide basis."[43] The court is considered to establish certain common law statutes for class arbitration, which last for around twenty years in Keating.[44] The court also stipulated the conditions for class arbitration that [a]s an order for class-wide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship. The members of the class subject to class-wide arbitration would all be parties to an agreement with the party against whom their claim is asserted. Each of those agreements would contain substantially the same arbitration provision, and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so.[45] This case made the opening to class arbitration in various states including California, Pennsylvania, and South Carolina. However, still, some other jurisdictions such as Alabama, Delaware, and Washington declined to adopt class arbitration. Further, the Federal Arbitration Act itself does not narrate the provisions to regulate class arbitration either, although the law does not prohibit class arbitration.

MICH. J. INT'L L. 1017, 1048-49 (2009)

39) Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)

40) Supra 38

41) Stolt-Nielsen S.A. v. Animal Feeds Int'l. Corp. 130 S.Ct. 1758 (2010)

42) Keating v. Superior Court, 645 P.2d 1192; supra note 36 S.I. Strong, pp.1.14 – 1.19

43) Id Keating at 1209

44) William H. Baker, Class Action Arbitration, 10 Cardozo J. Conflict Resolution 335, 346 – 47 (2009)

45) Supra note 42 Keating at 1207

Later the Southern Carolina Supreme Court held in the Green Tree Financial Corp. v. Bazzle[46] that it is not the court but the arbitral tribunal that is to decide and certify the class action,[47] ruling that class-wide arbitration may be ordered if it would serve efficiency and equity and would not result in prejudice following the California Supreme Court. As this ruling influenced immediately the dispute resolution mechanism,[48] the American Arbitration Association established the Supplementary Rules for class arbitration. Also, although the court in Bazzle did not explain that class arbitration could arise in cases involving implicit as well as explicit consent, the case is considered to build on the notion that implicit consent can justify for the commencement of class arbitration.[49] This case brought in the U.S. the possibility of class arbitration even if there was no express class arbitration provision in the contract.[50]

Commentators and practitioners view that courts in the U.S. have not established consistent logic and conclusions yet toward class arbitration.[51] Nonetheless, this paper sees and wants to show that class arbitration has developed in a way that protects small individuals' rights, bringing practically more approachable resolutions to small parties. It is not only an ongoing evolution in the U.S., but it also extends to the civil jurisdictions[52] whether through consumers' international purchases or legislations.

2.2 Practical Reality of International Arbitration

Efficiency and justice in practice are the main well-known merits of class action in litigation. The core goal and the *raison d'etre* of arbitration also are to improve efficiency and to bring practical justice more than traditional adjudicative methods at least in one way or another. In this sense, class actions pursue the same purpose as arbitrations do. The complexity of the formality in the U.S. litigation is well-recognized as much as it has lead development of the alternative dispute resolution system such as mediation in the U.S. Only some of the U.S. attorneys are trained as litigators while many others focus their carriers on transactional works, and among these attorneys, even a smaller portion of

46) Green Tree Finance Corp. v. Bazzle 569 S.E. 2d 349, (The case is later vacated by the U.S. Supreme Court 539 U.S. 444 (2003)

47) The scope of this research paper is limited to the efficiency and benefit of class action in arbitration. It deliberately excludes the debate on the authority of arbitral tribunal and of the court over the legitimacy of arbitration.

48) S.I. Strong supra note 36, pp. 1.20 – 1.22

49) Id pp.1.22

50) Id

51) Id pp. 1. 24

52) Columbia, Canada, Spain, and Germany have legislated provisions for class arbitration.

litigators recognize and practice international litigation. It is needless to say that Korean attorneys are neither trained for the U.S. litigation system nor are they well-aware of it as much. In other words, small individual consumers in Korea necessarily face a huge obstacle to find an attorney for international lawsuit with U.S. multinational corporations regardless of how serious their legal issues are.

International arbitration has been recognized as an alternative to complex U.S. litigation for parties outside of the States. The formality of dispute resolution can be decided by the parties in arbitration. However, it is still doubtful if international arbitration is now being practically helpful for weaker parties such as Korean consumers. Even for a few individuals who dare to fight against big companies across the border, requesting arbitration is another big challenge for lay individual consumers. Considering that international arbitration is not a common method, it is difficult to have small individuals well-advised enough about the complex international arbitration mechanism. Approachable attorneys for small lay individuals are likely unaware of international commercial arbitration. Arbitration is not a traditional dispute resolution which all lawyers need to learn in order to pass the bar qualification. Big international law firms dominate the field and the knowledge. The bigger injustice is that lawyers in more advanced states and such as the United States of America and Western European countries know and are far more experienced in arbitral procedures while attorneys in developing country do not even know the existence of the New York Convention[53] and the UNCITRAL Model Law[54] and Rules.[55] On top of that, it is needless to say that multinational companies compose the consumer contracts with attorneys who are the best experts in international arbitration, and individual consumers cannot but agree on it when they buy the products.

International arbitration experts in Korea are not easily available for lay consumers. In spite of the theoretical benefits of the arbitration, arbitration has been recognized and practiced mainly among rich and powerful parties in advanced countries. While knowing arbitration in international disputes makes a great difference for the legal rights of the small weaker parties, "*mafias*"[56] in rich countries dominate the fields for prestigious clients. Individual consumers do not know where and how to bring which dispute resolution method to which tribunal.

Power asymmetricity is not a new issue. It has been a sad reality in traditional dispute

53) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
54) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
55) UNCITRAL Arbitration Rule (as revised in 2010)
56) In international commercial arbitration field, the key arbitration attorneys and arbitrators are called "*mafias*."

resolutions, too, that rich and powerful parties have better access to better lawyers and more efficient dispute resolutions. However, in international conflicts and in international arbitration, asymmetricity of power has become even wider. The arbitration clause is a double-edged sword. It gives real and practical possibility to enforce foreign awards in order to resolve the disputes not only in theory and in law, but also in practice. On the other hand, for small individual signatories in consumer contracts, it can work as a fundamental obstacle to ban any dispute resolution method against the opposing global companies.

Bearing in mind this reality, class arbitration can bring much difference for consumers in reality. It gives a practical chance for lay individual consumers under international consumer contracts to recognize the rights, and the dispute resolution by notice of the class action, and to have actual bargaining power to fight for them. As all or majority of the parties who have the same substantial facts precede their claim in one case, it saves cost, effort, and time. Although some criticisms fall on the issue that class arbitration takes more time, cost, and effort because of its complexity, it is likely that the sum of all the efforts and time of all the possible individual arbitrations is substantially higher than one complex class arbitration. Arbitration tends to be confidential, so finding out cases with similar facts and taking precedents are not as easy as litigation cases. This can lead to different results on the materially same facts of arbitrations between a big corporation and many weaker small individuals. Class arbitrations notify the consumers who do not realize their rights, violations by the opposing companies, and the possibility of resolution. Afterwards, class arbitrations bring one single resolution for all the parties, giving consistency of results for both claimants and defendants, which is not only beneficial to claimants but also to the defendant.

2.3 Revival of Lochnerism in International Consumer Contracts

What makes arbitration with final binding effects possible is the principles of freedom of contract. As long as parties reach a mutual agreement, the contract can have as much freedom as the public policy of the society allows. Parties are free to choose or prohibit arbitration, litigation, and waive class action in litigation. In accordance, parties should be free to choose to have arbitration clause and to waive class action. However, it is worth studying if this principle should apply in consumer contracts as the same.

Because of the successful GATT regime, customer contracts apply across the border to more and more small individual parties in various jurisdictions and more lay individuals

have dispute resolution clause with general terms and conditions of global corporations. As for Korean consumers agreeing on international contracts, the iPhone can be a good example. iPhone is the second most purchased smartphone in Korea, as well as in the world. Before having the substantial terms reviewed, the first point to address is that consumers do not even realize how many general terms and conditions they are agreeing on when they buy an iPhone. Sales terms, service terms, iOS software general conditions, and Game Center general conditions are required to be agreed upon when buyers initially set up the phone. Without thorough reviews, consumers tick the box "AGREE" in the paper or through the websites. How about visiting the Web site of iPhone? People do not even have to be Apple users. At the moment they visit the Web site, they are deemed to agree on the general terms. See what Korean iPhone users agree on when they visit Apple's Web site. Below is the governing law and dispute resolution clause in the general terms and conditions of the Apple Inc. Web site.

> **Governing Law; Dispute Resolution**[57]
>
> You agree that all matters relating to your access to or use of the Site, including all disputes, will be **governed by the laws of the United States and by the laws of the State of California without regard to its conflicts of laws provisions.** You agree to the personal jurisdiction by and **venue** in the state and federal courts in **Santa Clara County**, California, and **waive any objection to such jurisdiction or venue**. The preceding provision regarding venue does not apply if you are a consumer based in the European Union. If you are a consumer based in the European Union, you may make a claim in the courts of the country where you reside. Any claim under these Terms of Use must be brought within one (1) year after the cause of action arises, or such claim or cause of action is barred. Claims made under the separate terms and conditions of purchase for goods and services are not subject to this limitation. No recovery may be sought or received for damages other than out-of-pocket expenses, except that the prevailing party will be entitled to costs and attorneys' fees. In the event of any controversy or dispute between Apple and you arising out of or in connection with your use of the Site, the parties shall attempt, promptly and in good faith, to resolve any such dispute. If we are unable to resolve any such

57) http://www.apple.com/legal/internet-services/terms/site.html last visited on Feb 10, 2017

> dispute within a reasonable time (not to exceed thirty (30) days), then either party **may submit** such controversy or dispute to **mediation**. If the dispute cannot be resolved through **mediation, then the parties shall be free to pursue any right or remedy available to them under applicable law.**[58]

These terms tell that 1) the governing law is California law (governed by the laws of the United States and by the laws of the State of California), 2) Korean Private International Act is exempted (without regard to its conflicts of law provisions), 3) the venue is Santa Clara County in California, U.S. (venue in the state and federal courts in Santa Clara County) 4) consumers waive the rights under the Korean Private International Act regarding the venue, and 5) mediation is allowed before pursuing remedy under the applicable law (either party may submit such controversy or dispute to mediation).

Do Korean lay consumers agree on this term by their free will? These conditions are simply and absolutely favorable to Apple Inc.. First of all, this clause waives all the possible benefits that Korean laws can bring in to the case exempting the Korean Private International Act. The governing law and venue are all across the Pacific Ocean from the Korean peninsula, which are foreign to Korean consumers and makes Korean lawyers unqualified and Korean law useless. What about meditation? The terms say that parties may submit the dispute to mediation. Mediation is a totally new concept to Korean legal society while most of the disputes are resolved through mediations in the States. Nevertheless, in theory, nothing violates the contract principles and public policy of the U.S. or of Korea. The governing law and the venue are typical areas to allow party autonomy in international contracts. Further, mediation is one of the most common ADRs in the U.S. jurisdictions especially in California. What is more interesting is that these terms try to exempt the rights of Korean consumers under the Korean Private International Act. As the Korean Private International Act allows party autonomy to prevail in most of the areas which the Act regulates, technically no question on legal legitimacy arises under these terms and conditions. Therefore, even though it is dubious that these terms are substantially fair to Korean consumers, it is valid under the presumption that parties in this agreement agreed on this term by their free will. Neither U.S. nor Korean public policy can protect Korean consumers from this unfair terms.

From time to time, Apple Inc. offers and asks the users to upgrade their iOS software

58) Emphasis added by author

in iPhones, and every time iPhone users upgrade the gazettes, users have to agree on the general terms and conditions. Do they freely agree on those terms? Party autonomy on the dispute resolution clause in international contracts is allowed when parties are free to choose for their interest. Long after that Lochnerism was modified in consumer contracts with the recognition of lack of parity, liberalism suddenly gets back to arbitration clause in consumer contracts with no justifiable explanation.

Arbitration clause prohibits lawsuit. On the other hand, the constitutional right to have their disputes before the court[59] is waived and modified into parties' own ways. Therefore, among all others, agreeing on the arbitration clause must be made with full awareness of what it is and the freedom to agree. Do we have to ask an old question to which we all know the answer (i.e., Are consumers free to agree or disagree on arbitral clause in consumer contracts?

Ⅳ. Prohibition of Class Arbitration in Consumer Contracts

1. Arbitration Clause with class action waiver

Despite all the core benefit favoring small individual consumers stipulated above, in America, many general terms have the arbitration clause which prohibits class arbitration.

Here is an example of practical guides for arbitration clause which waives class arbitration commonly used in consumer contracts:

> "Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration. The tribunal shall have the power to rule on any challenge to its own jurisdiction or to the validity or enforceability of any portion of the agreement to arbitrate. The parties agree to arbitrate solely on an individual basis, and that this agreement does not permit class arbitration or any claims brought as a plaintiff or class member in any class or representative arbitration proceeding.

59) Korean Constitution, Article 27, Section 1.

> The arbitral tribunal may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. [Notwithstanding the tribunal's power to rule on its own jurisdiction and the validity or enforceability of the agreement to arbitrate, the tribunal has no power to rule on the validity or enforceability of the agreement to arbitrate solely on an individual basis.] In the event the prohibition on class arbitration is deemed invalid or unenforceable, then the entire agreement to arbitrate will be null and void".[60]

2. U.S. Courts on the Class Action Waiver Clause

The U.S. common laws have been mounting dynamic cases on class action waiver in arbitration clause in consumer contracts, but the U.S. courts seem not to have reached the unified common regime on the validity of the prohibition of class arbitration.[61] California supreme court has continuously found the waiver of class arbitration was unconscionable, but U.S. Supreme Court overruled and nullified Californian rulings. Here are introduced several representative cases and the attitudes of the courts.

2.1. Direct TV v. Imburgia[62]

Despite the practical impact of the waiver clause that this paper studies, Supreme Court of United States ruled class action waiver clause to consumer claims in DirecTV, Inc. is valid on December 14, 2015, reversing the California Appellate court judgment. This judgment ended the long debates between Federal Courts and Californian courts on class action waiver arbitration clause.

The case started as two consumers of DirecTV brought a lawsuit in California for damages for early termination fees. The general terms included an arbitration clause with class action waiver, and DirecTV argued that the case should be sent to arbitration. The terms also stated that if the "law of your state" made the waiver unenforceable, then the entire arbitration provision was unenforceable. The trial court denied the argument of DirecTV based on the case law of Discover Bank v. Superior Court[63] which rendered

60) An example of Class Arbitration Waiver (US) Clause composed by Hagit M. Elul, Hughes Hubbard & Reed LLP with Practical Law Arbitration, Practical Law Standard Clauses 3-518-9047

61) Michael A. Clithero, Is Your Arbitration Clause Prohibiting Class Arbitration Enforceable?, Journal of the Missouri Bar, July-August 2013, pp.220 – 224

62) Direct TV v. Imburgia 136 S.Ct. 463 (2015)

63) Discover Bank v. Superior Court 36 Cal. 4th 148 (2005)

class arbitration waiver was unenforceable.

When the case was still pending in California trial court, the U.S. Supreme Court ruled AT&T Mobility LLC v. Concepcion[64] that the Federal Arbitration Act preempted Discover Bank case law nullifying the Discover Bank ruling. Nevertheless, later on appeal of DirecTV, California Court of Appeal ruled that class action waiver was unenforceable despite AT&T Mobility LLC("AT&T Mobility") reasoning that by including the terms "law of your state" in the arbitration agreement, the parties selected California law to govern the contract, even if it was invalid because Supreme Court overturned the ruling of the case. California state court made strong efforts to show that California state courts have clearly seen that class action waiver is unconscionable under California state law.

Interestingly, on the same issue with the same arbitration clause, the Ninth Circuit[65] court came to the opposite conclusion in Murphy v. DirecTV, Inc.[66] that the class action waiver clause is valid and enforceable[67]. The court held that as much as Murphy stipulated Sections 2[68] and 4[69] of the Federal Arbitration Act, it deferred the Supreme Court ruling in the precedents on the enforceability of arbitration clauses respecting AT&T Mobility ruling. The court stated that "pursuant to Section 2 of the Federal Arbitration Act", "Section 4 of the FAA authorizes district courts to compel parties to arbitrate their disputes pursuant to their written arbitration agreements", "however, the Supreme Court has repeatedly confirmed that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit".

As of opposite results on the very same contract clause, the Supreme Court granted certiorari and reversed the California Court of Appeal's decision, focusing on whether the state decision was consistent with the FAA. The U.S. Supreme Court stated that this California court's ruling was based on a creative interpretation of language in the parties' arbitration agreement specifically aimed at arbitration rather than contract interpretation generally and that this

64) AT&T Mobility LLC v. Concepcion 563 U.S. 333 (2011)

65) This is a federal court where California belongs.

66) Murphy v. DirecTV, Inc. 724 F.3d 1218 (9th Cir. 2013)

67) Id

68) 9 U.S.C. § 2. [a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

69) 9 U.S.C. § 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [of the United States Code], in a civil action ... between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

creative interpretation of language “law of your state” did not give due regard to the federal policy favoring arbitration. So the Court ruled that, this interpretation was, therefore, preempted by the Federal Arbitration Act. Through its analysis, it determined that the phrase ″law of your state″ should mean in the limit of ‘valid state law’, rather than invalid state law such as that of Discover Bank. Although the Supreme Court noted that California law incorporates the California legislature’s power to change the law retroactively under general contract principles and the Court normally defer to a state court’s application of state contract law, it held that because the FAA preempts the Court of Appeal’s interpretation, the California Court of Appeal must enforce the class action waiver contained in the arbitration agreement.

2.2 Discover Bank v. Superior Court[70)]

California courts certainly wanted to keep Discover Bank as their valid case law while US Supreme Court explicitly labeled it “invalid”. It is worth reviewing the rationale and the ruling of Californian Supreme Court in Discover Bank and the reason why Supreme Court overturned it.

This paper views that in 2013, Supreme Court of California tried to build the principle of the validity of class action waiver clause in Discover Bank v. Superior Court that the subject prohibition clause in consumer contract is unconscionable when it involves small damages and to cheat consumers’ small money stating as below:

> “**We don’t hold that all class action waivers are necessarily unconscionable**; but **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 [28] 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.**” (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[71)]”

70) Discover Bank v. Superior Court, 36 Cal. 4th 148
71) Id at 162-163

The court agreed and stated that class action waiver can be valid, and Federal Arbitration Act section 2 preempts state case law on the facts where the arbitration clause and enforceability of class action waiver clause are at issue. However, it held that the subject clause is unconstitutional because it bars the practical bargaining power of small individual consumers in consumer contracts. Also, the court stipulates that for the validity, revocability, and enforceability of contracts, FAA does not prevail over California State law.[72] The court fairly applied the same principle to class actions in arbitration and in litigation stating that "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements"[73].

This paper could not agree more with this. This ruling sees class action waiver clauses' impact to small lay consumers. It brings more justice for weaker parties because 1) the same principle was applied to the prohibition of class arbitration and of class litigation, 2) the ruling stipulated that not all prohibition clause is unconscionable but certain conditions make the clause unconscionable, and 3) the court respected the rights of weaker parties, was aware the lack of parity between the company and the consumers, and concerned the practical possibility to bring an individual legal resolution behind the party autonomy of dispute resolution clause. The court concluded that the effective denial of class-wide remedies would "substantially diminish the rights of California residents[74]. Regarding this logics and sensible rationale of the ruling, it is very plausible that California court wants to have this ruling as the "law of your state" in DirecTV. It is a pity that Supreme Court labeled it "invalid case law".

2.3 AT&T Mobility LLC v. Concepcion[75]

Now what is the reasoning of the ruling of AT&T Mobility LLC on which U.S. Supreme Court overturned Discover Bank? To sum up the background, this is another consumer contract case which started in Ninth Circuit federal district court. AT&T Mobility is a cell phone service carrier, and its consumer contract has a mandatory arbitration clause that prohibited consumers from bringing a class action against the carrier. The District court and

72) Id at 150
73) Id
74) Id
75) Supra note 66

Court of appeal in Ninth Circuit ruled that this clause was unconscionable and thus unenforceable under California law. Yet, the Supreme Court overturned and held that "[California law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (original citation omitted), California's Discover Bank rule is preempted by the FAA"[76]

Grant certiorari

In the process of making case law, the first discretion of the Supreme Court is whether to grant certiorari or not. When the Supreme Court does not grant certiorari, the cases with the same facts remain in different holdings among states and federal courts. No case preempts another in another jurisdiction and even in the same jurisdiction if among the same instances. As such, Supreme Court can choose not to make a case law of the United States. Later, cases with the similar substantial facts would be reviewed and judged by their own tribunals with their own case laws. In AT&T Mobility, even though the District Court and Court of Appeal in Ninth Circuit reached the same ruling, Supreme Court granted certiorari. This can be the first step of Supreme Court's willingness to make the case law on the validity of class arbitration waiver clause, and thus unify all the rulings of all courts around the United States.

Unconscionability

The holding of AT&T Mobility is simple: California Discover Bank case law conflicts with FAA and FAA preempts California law. The Supreme Court pointed out that "the primary substantive provision of the Act" is Section 2[77], and Section 2 was the subject provision of the case, especially the last part.

> 9 U.S.C. § 2.
> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract**."[78]

76) Id at 333
77) Id at 339
78) Emphasis added by author

Supreme Court "describe[d] this provision as reflecting both a "liberal federal policy favoring arbitration" (original citation omitted) and the "fundamental principle that arbitration is a matter of contract," (original citation omitted). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, (original citation omitted), and enforce them according to their terms (original citation omitted)".[79] This view of Supreme Court is clearly based on Lochnerism. However, as studied above in this paper, Lochnerism is long gone in consumer contracts and it is not true that parties are equal in power and free to choose their dispute resolution clauses in international consumer contracts.

About the last part of section 2, while the Supreme Court explained that "this saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability"[80], the Court did not agree with California on what is unconscionable. California court in Discover Bank as stated above, clearly explained that when the waiver clause works as a scheme of party who has a superior bargaining power to deliberately cheat large numbers of consumers out of individually small sums of money, the clause is unconscionable and thus can be the ground of revocation under the Section 2 of FAA, and the court ruled to refuse to enforce the unconscionable waiver clause based on the Section 1670.5 (a) of California Civil Code[81]. This California case law was clear and easy: under the certain influence, class arbitration waiver clause is unconscionable; FAA and California Civil Code allow the courts to refuse and revoke the unconscionable clause; the subject clause is unconscionable, and so the court refuses to enforce the subject waiver clause. It seems that the Supreme Court have the same opinion that when the subject clause is unconscionable, the court can revoke or refuse to enforce the clause. The only part in California case law that the Supreme Court cannot agree on is unconscionability. When is the contract unconscionable in the Supreme Court? Why is it still conscionable when the arbitration clause cheated on consumers' rights?

Supreme Court did not show at all its thorough review regarding 1) if the subject waiver clause can make the influence that the party with a superior bargaining power cheats

79) Id at 339

80) Id at 339

81) California Civil Code Section 1670.5

§ 1670.5. Unconscionable contract or clause of contract; finding as matter of law; remedies

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

consumers' rights, 2) if so, that is unconscionable as a general defense for the contract, which is a ground of revocation under FAA. The Court classified unconscionability in the two categories: procedural unconscionability which requires oppression or surprise due to unequal bargaining power, and the substantive element of unconscionability which needs overly harsh or one-sided results. The Court did not examine the facts of the case into its classification how the practical influence of the subject clause is and if the influence can be oppression or surprise due to unequal bargaining power, or overly harsh or one-sided results. Considering consumer contracts are adhesion contracts, signing the consumer contract not aware of the influence of the class arbitration waiver clause can have the possibility enough to be 'surprise due to unequal bargaining power' or 'overly harsh or one-sided results'. The Court merely put that those elements can be consisted of unconscionable contract, but no explanation or application of the facts was given. Instead, Supreme Court explained the drawbacks of class arbitration in a long full length in part III, B of the case[82]. The point should be not on the pros and cons of class arbitration itself, but on the practical impact of the waiver clause which prohibits individual consumers from choosing class arbitration at all with their criteria of unconscionability and the application of the facts. Drawbacks of class arbitration cannot and do not make unconscionable waiver clause any justifiable.

Supreme Court recognized that California court underlined the consumer contract was adhesive stating that "California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud"[83]. Nonetheless, the Court explained "the times in which consumer contracts were anything other than adhesive are long past"[84] and in the footnote 6, "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms"[85]. Although Supreme Court realized the lack of parity in consumer contracts, it put FAA over the consumer protection norm. It defined the Discover Bank as "a particular type of claim"[86] and "said that a court may not "rely on the uniqueness of an agreement to arbitrate

82) Supra note 80 at 348-351
83) Id at 334
84) Id at 346-47
85) Id at 347

as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot."[87] "Agree[ing] with Brief For Respondents that California law is a mere preference for procedures that are in incompatible with arbitration and would wholly eviscerate arbitration agreements", Supreme Court held that "although Section 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives[88]" Through the review of Supreme Court's reasoning, it is found that the only ground that Discover Bank is nullified is in order to promote purpose of FAA. It did not give any explanation why the the class action waiver clause was not unconscionable although it cheated on the consumers rights. Supreme Court's reasoning seems to be based on "uniqueness" that California state law is an obstacle to the accomplishment of the FAA's objectives, while California's reasoning is based on common sense.

Purpose of FAA

It is interpreted that the main point in AT&T Mobility is to promote the purpose of FAA. Here is the definition of the purpose of FAA by Supreme Court.

> The principle purpose of the FAA is to "ensure that private arbitration agreements are enforced according to their terms. (original citation omitted) this purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" **as written** (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "**in accordance with the terms of the agreement**"; and § 4 requires courts to compel arbitration "**in accordance with the terms of the agreement**" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure ... to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, (original citation omitted) to arbitrate according to specific rules, (original citation omitted) and to limit with whom a party will arbitrate its disputes (original citation omitted).[89]

86) Id at 341
87) Id
88) Id at 343

It reads that Supreme Court highly respect the parties' discretion. It put class arbitration waiver clause as parties' discretion saying that "The point of affording parties discretion in designing arbitration process is to allow for efficient, streamlined procedures tailored to the type of dispute"[90] and "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of disput e"[91]. The Court viewed that section 2 of the FAA "reflecting both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contrac t"[92]. In other words, Supreme Court overruled Discover Bank in order to promote federal policy favoring arbitration because arbitration is a parties' agreement, not because Discover Bank has any flaw in reasoning. When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA[93]. Here it shows that Lochnerism rules the consumer contracts under the name of arbitral federalism. The primary goal of the FAA Supreme Court defined is to ensure that private arbitration agreements are to be enforced according to their terms in the expeditious resolution of claims. Yet, this can be legitimate only the terms is made by parties free wills. It is already clearly seen that consumers and companies are not the same in power and that consumers might have not agreed if they were aware of the meaning of the waiver clause. The dissenting opinion rightly pointed out that the overriding goal of the Arbitration Act was not to promote the expeditious resolution of claims but to ensure judicial enforcement of privately made agreements to arbitrate[94]. There is no legitimate excuse that promoting arbitration and the goal of FAA can sacrifice consumers constitutional rights. There is no explanation why Lochnerism suddenly has revived in consumer contracts with FAA.

2.4 American Express v. Italian Colors Restaurant[95]

This is another Supreme Court case before DirecTV that class action waiver was an issue. In 2013, American Express v. Italian Colors Restaurant ("American Express"), the Supreme Court held that class arbitration waivers must be enforced under the FAA, even

89) Id at 344, emphasis added by author
90) Id at 344
91) Id at 344
92) Id at 339
93) Id at 341
94) Id at 345
95) American Express v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)

if a party cannot otherwise vindicate her rights through an individual arbitration. In earlier 2011, the Supreme Court had held that FAA requires courts enforce arbitration agreements according to their terms in AT&T Mobility[96], and so the state law could not allow class arbitration if the agreement otherwise precluded it. The Court, accordingly, concluded that the FAA does not allow courts to invalidate a contract's class arbitration waiver on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

Department of Justice submitted Amicus Curiae that the waiver of class action arbitration ought to be unenforceable and urged the U.S. Supreme Court to affirm the Second Circuit's decision in In re American Express Merchants' Litigation, 2012 WL 284518 (2d Cir. Feb. 1, 2012[97]). In this case, the Second Circuit had held that a class action arbitration waiver was unenforceable because individual claims to vindicate federal antitrust statutory rights, rather than a class action, were shown to be financially unfeasible. The Department of Justice noted that the respondents had carried the burden of invoking the effective-vindication exception, by establishing that the costs of expert assistance in substantiating the antitrust claims would greatly exceed the amount any named plaintiff could hope to recover in bilateral arbitration.

Both California courts and Department of Justice understand the practical influence of class action waiver in arbitration clause in consumer contracts and concern that it is unconscionable. However, the Supreme Court does not bother to analyze the practical influence and to argue against the reasoning of California and of Department of Justice. The Court just put promoting arbitration before consumers' rights. Federal arbitralism is not a unique concept in the States. Favoring and promoting arbitration is a worldwide trend. However, pro-arbitration is to protect more rights of parties in the end. Public policy and mandatory rules are not nullified because parties chose arbitration instead of litigation. California and Ninth Circuit courts analyzed and found that consumers' legal rights to fight for their rights are substantially violated with arbitration clause which waives class action. When the customer contract realistically bans the consumers from fighting for their legal rights, that contract is unconscionable, unconstitutional, and against the public policy. There is no reason that arbitration can be promoted despite all the injustice for consumers' rights.

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96) Supra note 66

97) Appellate Court decision of American Express v. Italian Colors Restaurant

V. Conclusion

Lochnerism in contract law has been modified with the realization of the lack of parity. A consumer contract is a well known representative contract for lack of parity between the parties, and United States has developed consumer protection public policy over the freedom of contract not only in substantive law but also in procedural law. When the general terms and conditions suppress consumers' rights, the public policy rules over the freedom of contract and nullify the wrongful terms. Consumer protection norms prevent companies from cheating consumers and taking advantages.

Through the review of the debates between California and Federal Supreme Courts, it is acknowledged that Federal Supreme Court tends to promote arbitration very strongly. When consumer contracts have arbitration clause with class action waiver, Supreme Court vindicate the clause according to the basic principle, freedom of contract. Before class arbitration waiver clause emerged as an issue, consumer contracts have respected the nature of adhesive contract with lack of parity. With the purpose of FAA, Supreme Court suddenly applied Lochnerism and assumed that the arbitration clause was made by parties' free will. Thus, in order to promote the purpose of FAA, it is not unconscionable even if the practical influence of the arbitration clause is to sacrifice consumers' rights.

As much as international arbitration has benefits in international commercial disputes, it is very difficult for lay individual consumers to conduct the international arbitration. Class arbitration can be the most effective resolution method for lay consumers as it promotes the *raison d'être* of international arbitration and of class action. It should be parties' free choice to choose class action or not. As class action can make an enormous difference to protect consumers in international consumer contracts, it should not be the discretion of big companies. Banning the possibility of class action but requiring arbitration instead of litigation can have consumers in other countries impossible to fight against the companies. Nonetheless, U.S. Supreme Court strongly has vindicated the validity and enforceability of arbitration clause with class action waiver composed solely by big compunies sturdily ignoring California and Ninth Circuit courts.

The United States and the Republic of Korea are both members of WTO and US-Korea FTA is in force. Korean consumers have signed many general terms and conditions with

U.S. companies without awareness of signing out the dispute resolution methods. The asymmetricity of power between big companies in the States and Korean lay consumers can be bigger in international arbitration than in national litigation. Case law of United States is not a mere foreign law but materially related with Korean consumers. The arbitration clause with class action waiver can materially ban practical possibility to bring any fight against big American companies. And that is absolutely a breach of constitutional rights of Korean consumers[98]. However, the Korean consumer protection public policy[99] does not recognize and prepare for the practical impact of this class action waiver in arbitration clause. Merely, there is no protection device for Korean consumers against this U.S. case law, while more and more Korean consumers buy goods and services, and step into Web sites of American companies day by day. U.S. Supreme Court deems Korean consumers agree on the dispute resolutions with their free wills in all of these terms and conditions.

As Korean legal society shed light on the international disputes and protecting the legal rights of Korean small individual parties against multinational companies, not only substantive law such as remedies for punitive compensation but also procedural law should be studied. Rather than waiting for this class arbitration waiver clause becomes to be an crucial issue and defending for consumers in front of arbitration tribunal or arguing to nullify the arbitral award, it is much wiser and easier to thoroughly contemplate the implication of the rulings above of U.S. Supreme Court and develop the strategy to prevent Korean consumers from being victims of “American Federal Arbitralism”.

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98) Constitution of Republic of Korea, Article 27 (1) All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act.

99) Korea regulates consumer protection norm with several laws such as Framework act on consumers, Act on the Consumer protection in electronic commerce, etc., and Act on the regulation of terms and conditions.

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ABSTRACT

Arbitration Clause Prohibiting Class Action in Consumer Contracts

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For recent years, several disputes between Korean consumers and multinational companies have arisen. Since the disputes were big and material that children's safety was at issue, a question started if Korean law properly has protected consumers' rights against multinational companies. While the Korean legal society tried to legislate punitive compensation with this concern, the U.S. Supreme Court reached an interesting case law regarding consumer contracts. A recent trend on consumer contracts in the United States shows that general terms have arbitration clause with class action waiver. As much as international arbitration has worked as the most effective resolution in international commercial disputes, the concept is still foreign and the experts are not approachable to lay individual consumers. However, class action in arbitration can hugely help for lay individual consumers to bring a case before arbitration tribunal. California courts consistently showed the analysis that the practical impact of prohibiting class action in arbitration clause is to ban lay individual consumers from fighting for their rights. However, the Supreme Court held that the arbitration clause shall be enforced as parties agree even if consumers practically cannot fight for their rights in the end. Even though consumer contracts are a typical example of lack of parity and of adhesive contract, the Supreme Court still applies liberalism that parties are equal in power and free to agree. This case law has a crucial implication since Korean consumers buy goods and services from the U.S. and other countries in everyday life. Accordingly, they are deemed to agree on the dispute resolution clauses, which might violate their constitutional right to bring their cases before the adjudication tribunal. This issue could be more important than adopting punitive compensation because consumers' rights are not necessarily governed by Korean law but by the governing law of the general terms and conditions chosen and written by the multinational companies. Thus this paper studies and analyzes the practical reality of international arbitration and influence of arbitration clause with class action waiver with the U.S. Supreme Court and California case laws.

Key Words : Class Action, Class Action in Arbitration, Consumer Contracts, General Terms and Conditions, Dispute Resolution Clause in General Terms, ADR, Arbitration, Adhesive Contract, Lack of Parity, Lochnerism, Basic Principle of Contract, US Supreme Court, US Case Law, Procedural Justice