



**THE INTRODUCTION
OF CLASS ACTIONS
IN BELGIUM**



ARBITRATION AND CLASS LITIGATION:

To what extent does the Belgian Class Action Bill anticipate on Pitfalls under the US system?

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Presentation

- 1) **Definition of Arbitration**
- 2) **The US arbitration - class litigation interface**
- 3) **The European parameters**
- 4) **The arbitration - class litigation interface under the Belgian Class action Bill**
- 5) **Proposed amendments**

! Question to keep in mind !: To what extent can a company effectively set aside the class litigation system by inserting an arbitration clause in its general terms and conditions in an attempt to compel its counterparts to (individual) arbitration?

Definition of arbitration

Arbitration is a form of Alternative Dispute Resolution in which parties agree that a private tribunal (as opposed to an ordinary trial court), composed of one or more arbitrators, will terminate identified existing or potential dispute(s) by rendering a binding and final award upon the parties to the arbitration proceedings.

=> Consensus is crucial!

- Arbitration clause prior to dispute/ arbitration agreement afterwards
- Consensus easily found (cfr question – flyers, standard forms, non-contested bills,...)

The US system (1) - Introduction

- **Individual arbitration and class arbitration exist**
- **Individual arbitration:**
 - Sufficiently regulated
 - Well-developed
 - Commonly used
- **Class arbitration:**
 - (Relatively) recent phenomenon
 - Increasingly popular (AAA & JAMS)
 - Competition law, consumer & employment disputes
 - Insufficiently regulated (practice shaped by case law)
 - Differing case law
 - Evolutions in case law

The US system (2) - Arbitration next to class litigation

- **The arbitration clause :**
 - Does not harm parties' right of access to court;
 - Binding (exceptions: e.g. unconscionability or public policy infringement);
- **The arbitrability decision :**
 - History of chaos
 - Reserved to arbitrator (*Green Tree Decision* - 2003)
 - Success JAMS & AAA
- **The award review:**
 - *Minimalist vs maximalist*
- **Distinguish:**
 - Arbitration clause authorizing class arbitration
 - Arbitration clause prohibiting all class action or class litigation
 - Arbitration clause silent on class treatment

The US system (3) – Types of clauses

i. Arbitration clause authorizing class arbitration

- > *Agreement to be respected*
- > *Rarely existing...*

ii. Arbitration clause prohibiting class action /class litigation

Used to be enforced >< Recent case law;

- > *Binding (unless e.g. unconscionable or against public policy)*
- > *Usually not enforceable if excludes all class action treatment*

Unconscionability assessment;

- > *Case driven (cfr facts) & sector driven (e.g. employment)*
- > *Proponents >< naysayers*
- > *Different policies in different states (=> no nationwide certification)*
- > *Usually assessed: fairness, economic sense, costs for recovery, lawyers' fees, ...*
- > *offsetting factors: e.g. company bears procedural costs, claims no lawyer fees, customer can claim double of lawyer fees, ...*

=> Legal uncertainty ?

The US system (4) – Types of clauses

iii. Arbitration clause silent on class treatment:

Evolution in case law:

- Class arbitration not possible if no express authority (e.g. *Champ Decision* - 1995)
- Silence allows consolidation (e.g. *Connecticut Decision* - 2000)
- Silence does not amount to the required consent (e.g. *Stolt -Nielsen Decision* - 2010)
- ... ?

The US system (5) – Detected pitfalls

- 1) **Lack of rules setting out parameters on the interface between arbitration and class litigation**
- 2) **Differing and changing case law results in legal uncertainty**
- 3) **It cannot totally be excluded that a company compels customers to arbitration to set aside class litigation/class treatment... (However, in practice more and more likely to be found unconscionable/infringing public policy)**

The European parameters

- **No European rules on collective redress mechanisms (yet)**
- **Arbitration clause cannot contain unfair terms (consumer contracts - *Mostaza claro*)**
=> 'fairness test' (cfr unconscionability doctrin)

The Belgian Class action Bill (1)

Article 6 => As soon as someone is considered to be a member of the class, such person can no longer initiate the same individual claim in arbitration.

=> *Non bis in idem* with priority to litigation

=> When valid arbitration clause exists, party can still become member to the class, until and unless it initiates its claim in the arbitration forum. (= *teleological interpretation*)

=> Existing arbitration clause does not amount to an automatic opt-out from the class.

=> No risk for companies' abuse of arbitration clauses

The Belgian Class action Bill (2)

Article 8: “The aggrieved person who initiates an individual claim against the same defendant(s) as to the class action, for the same damage and the same cause, is presumed, at the lapse of the option term, to have expressed its will not to take part of the class if, within such term, this person did not submit conclusions at the clerk office to waive its individual claim”(+ Explanatory note: “individual claim” includes arbitration forum)

=> Customer wanting to arbitrate, opted out if, prior to the lapse of the option term:

1) He/she initiated his/her claim in the arbitration forum; and

2) He/she did not submit a conclusion to waive his/her individual claim in the arbitration forum

⇒ Anticipation on possible abuse of arbitration clauses as in principle opted in, unless customer/employee/... actively opts for arbitration forum...

The Belgian Class action Bill (3)

No basis for class arbitration!?!

⇒ Issues addressed by the Bill in one forum (litigation) may not be addressed in the other (arbitration)

⇒ Risk for legal uncertainty as to whether practice will allow class arbitration (cfr US system)

The Belgian Class Action Bill – Proposed amendments

Regarding ‘opt out’ through arbitration;

-> Distinguish arbitration clauses (Article 8) from arbitration agreements entered into after dispute/class action filing (*per se* opt out)?

Regarding possibility fo class arbitration;

- JAMS & AAA’s successes suggest demand
- Arbitration became FULL alternative to litigation
- Typal reasons to arbitrate (judicial backlog, costs, time, expertise, neutrality,...)

⇒ **Suggestion:** Enable certification judge /arbitrator to allow class arbitration

How?: 1) With feedback on arbitration proceedings from a delegate judge (cfr. monitoring trustee in arbitration commitments in EU merger review)

2) *Clause allowing class arbitration* -> to be respected

Clause prohibiting class arbitration -> null and void

Clause silent on class arbitrability -> parameters to follow by judge/ arbitrator

The Belgian Class Action Bill – Proposed amendments

Regarding enforceability (abroad) of class arbitration awards:

- > **Suggestion 1:** Class representative should be considered by law as representative of class to the class arbitration agreement and subsequent procedures => ‘authority to bind’
- > **Suggestion 2:** Include legal written form requirement for the class arbitration agreement (e.g. Signed by group representative - cfr New York Convention)

THANK YOU FOR YOUR ATTENTION

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