

Arbitration and Class Litigation: To what extent does the Belgian Class Action Bill anticipate on Pitfalls under the US System?

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Abstract²

This Article was presented at the AIA's conference on the introduction of class actions in Belgium (25th March 2011 - Brussels Palace of Justice) in the presence of the Belgian Minister of Justice, The Belgian Minister of Climate, Energy and Consumer Affairs, the European Commission, the Belgian Bar Associations, the Creators of the Bill, Representative Bodies from the market (Industry & Commerce, Banking, Insurance), the Belgian Consumer Association and other stakeholders.

This Article will first present the interface between class litigation and arbitration in the US. In this way, the author will illustrate US practices and identify a number of existing pitfalls under that system. Subsequently, the author will investigate how the current draft of the Belgian class action Bill anticipates on these pitfalls. Lastly, the author will make a few suggestions for further amendments to the Belgian class action Bill.

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² This Article presents the ideas of the author and should not be considered as representing the AIA's perspective.

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1. Introduction

Class actions have an injunctive or remedial character, meaning that they may seek injunctive reliefs as well as damages. In practice, class actions are mainly applied in the consumer and the employment context.

Currently, class actions are still rather 'unknown' in civil law countries, especially as compared to certain common law jurisdictions. However, a recent evolution is taking place in Europe, under which several (civil-law) Member States have taken to incorporate some form of collective redress mechanism into their national legislations. The ways in which these Member States have adopted such form of collective redress mechanisms varies in scope and conditions.

Moreover, it seems that not only individual Member States adopted collective redress mechanisms or have placed them on their agendas, but that also on the European Community level evolutions take place. Indeed, the European Commission has issued papers and requests for consultations on the introduction of a collective redress mechanism within the context of its competition law policy.

The changing political and legal landscape of collective redress mechanisms in Europe is therefore evident. However, what is crucial is to verify how this landscape should change, which examples are to be followed and which are to be avoided. Hereby, the US class action system is often referred to as a 'bad practice' and as not to be duplicated in Europe.

This Article will depart from the US system to evaluate the Belgian class action Bill. The author will only focus on the interface between arbitration and class action treatment, meaning that other forms of ADR and class litigation exceed the scope of this article.

In particular, the author will first present the US class action – arbitration interface. This will enable the reader to identify several pitfalls under the US system. Subsequently, the author will analyze to what extent the Belgian class action Bill anticipates on those pitfalls. Where the Bill would, according to the author, not sufficiently have foreseen these, the author will suggest further amendments to be made.

2. Features of arbitration

In arbitration, parties agree that a private tribunal (as opposed to ordinary courts and tribunals) composed of one or more arbitrators will terminate one or more existing or potential dispute(s) by rendering a binding ruling upon the parties to the arbitration proceedings. Arbitration, just like ordinary litigation, is an adversarial procedure in which the arbitrator(s) will render an award to terminate a dispute.

There exist numerous reasons why parties opt to arbitrate instead of litigating their dispute(s), e.g. the rapidity of the process, the higher level of confidentiality of the arbitration proceedings and the arbitral award, the possibility to appoint their commonly trusted person to become their 'private judge', the expertise of the arbitrator, the enforceability of arbitral awards abroad under the New York Convention, lower costs, and so on.

Arbitration, being an alternative (exception) to the principle of ordinary court litigation, requires the parties' consent to follow this 'alternative' road. The parties' consent can be given prior to the dispute, e.g. by means of an arbitration clause in the contract, or after the dispute has arisen, e.g. by means of an *ad hoc* agreement to arbitrate.

Although arbitration of commercial disputes is commonplace and the fact that there exist numerous advantages in arbitration over litigation, arbitration of consumer and employment disputes is still less widespread in Europe. The reason for this is that individuals are not sufficiently aware of the existence and advantages offered by Alternative Dispute Resolution methods. The consequence is that ordinary courts and tribunals face an unnecessary judicial backlog.

3. The arbitration – class litigation interface in the US

3.1 Introduction to US individual and class arbitration

Individual arbitration in the US is regulated by the Federal Arbitration Act and by further State-law rules. This type of arbitration is well-developed and commonly used.

Class arbitration, on the other hand, is a relatively recent phenomenon in the US. However, the number of class arbitration cases is expanding at a rapid rate, especially since recent evolutions in case law and the adoption of institutional rules on class arbitration by AAA and JAMS (see further under point 3.3). Practice learns that most class arbitration cases are between domestic parties and within the context of consumer disputes, employment disputes or competition law.

In the US, the interface between arbitration (be it individual or in class) and class litigation is not sufficiently regulated by law and the conditions and formalities in place have therefore gradually been developed by case law. The following titles will elaborate on these interfaces.

3.2 The possibility to conduct individual arbitration next to class litigation

Most US courts are 'easy' to move to enforce arbitration agreements (e.g. in contracts of adhesion), even if the arbitration clause is in small print and incorporated in inconspicuous locations in standard form contracts, employee handbooks or related documents, flyers included in the post with bills or other statements, packaging that arrives with a computer, or medical consent forms.

However, with regard to the binding effects of those arbitration clauses when they co-exist with class litigation and especially if they were entered into prior to the dispute at hand, numerous claimants have tried to argue that, despite the undisputed validity of these clauses, arbitration cannot be undertaken as it would deprive them of their right to proceed by way of a class action in the ordinary court.

Generally, this argument has not been successful. Indeed, according to most courts, the mere fact that a suit is designated as a class action does not exclude it from being referred to arbitration.

Hereby it must be noted that there is no consensus in US case law when exactly a case is to be referred to arbitration. Indeed, no uniform answer exists on the question whether or not the *existence* of an arbitration clause should in principle suffice to conclude that parties did '*opt out*' from class litigation;

- Where the mere existence of the clause would in principle not suffice to compel to arbitration, it is not clear which additional requirements may exist before concluding that a given party can no longer join class litigation proceedings.
- Also, where the mere existence of the clause would in principle suffice to compel to arbitration, it is not clear which conditions amount to an exception of this principle.

Not every judge is sufficiently wary of risks for abuses, e.g. where one party wants to set aside class litigation by compelling to individual arbitration. Moreover, it seems that courts provide different 'answers' to given facts and possible 'abuses', depending on the case at hand. The practice (however divided) is similar to the practices described under points 3.3.1 and 3.3.2 below.

3.3 The interface between US class arbitration and US class litigation

Nowadays, class arbitration does exist in the US and becomes even increasingly popular. Historically, it was not always clear which adjudicator (the arbitrator or the judge) should assess the arbitrability of class actions.

For instance; in California it was held that this task belongs to the Court, while in Pennsylvania, such task was reserved to the arbitrator.

In line with the kompetenz-kompetenz principle, the US Supreme Court established since the *Green Tree* Decision (see point 3.3.2.b) that it is up to the arbitrator to assess the matter of arbitrability.

When assessing class arbitrability, the arbitrator must make a distinction between;

- (1) Situations where an arbitration agreement exists authorizing class arbitration;
- (2) Situations where an arbitration agreement exists that prohibits all class action or only class litigation; and
- (3) Situations where an arbitration agreement exists that is silent on the point of class arbitration.

Under the following sub-titles the paper will go on to verify the conditions for class arbitrability in each of these 3 situations. Where conditions have been subject to evolutions in case law, these evolutions will be presented.

3.3.1 Situations where an arbitration agreement exists that authorizes class arbitration

Under the US system, if an arbitration agreement authorizing class arbitration exists, such agreement should be respected. Indeed, parties' consent to their agreement urges to enforce the agreement in accordance with its terms.

It must be noted that the consent should clearly express the parties' intention to submit the dispute to arbitration, therefore an arbitration agreement that provides for class arbitration should discard any doubts on interpretation.

In practice however, these agreements rarely exist, as arbitration provisions tend to be used by companies for other purposes, i.e. in their attempts to set aside class treatment.

3.3.2 Situations where an arbitration agreement that prohibits all class action or only class litigation

US companies have often used and continue to use arbitration provisions as a tool to set aside the US class litigation system. In order to also try to avoid any class action, they formulate the concerned dispute resolution clause in such a way that it also excludes any form of class arbitration treatment of disputes with their counterparts.

Most courts used to enforce these class-treatment waivers, guided by the strong pro-arbitration policy of the Federal Arbitration Act. However, since recent years evolutions have taken place in US case law.³ In assessing these evolutions, the following key-points are crucial:

a) Interpretation

The way in which an arbitration clause is formulated is very important, as the formulation will help to determine whether or not parties have agreed to exclude all class action treatment or only class action treatment in the forum of litigation.

Hereby, it must be said that different approaches have been taken by courts and tribunals when interpreting arbitration clauses. This makes that existing case law is divided into pro-class treatment-oriented cases on the one hand and contra-class treatment-oriented case law on the other hand;

- *Pro-class treatment interpretations:* For instance, in *Orea v. Tavistock Restaurants*⁴ an arbitrator had to determine whether an arbitration clause in terms of “you” and “your” limited the claimant’s ability to bring a class action in the arbitration forum, and whether it was thereby relevant or not that the defendant was contractually bound to bear the arbitration costs. In this case, the arbitrator found that neither of these elements precluded class action arbitration and stated that “*had the drafters intended a specific exclusion of class-action participation, they had the obligation clearly to articulate the exclusion*”. The arbitrator also held that language providing “*you...will have the same remedies available in arbitration as those available in a court of law*”, suggested that “*there would be no contractual impediment to proceed as a class action*”. Moreover, the arbitrator did not accept the argument that an implied limitation on class actions would exist if the clause calls for the employer to bear the cost of any arbitration.
- *Contra-class treatment interpretations:* In the case of *Doyle v. Finance America*⁵ a clause was found to effectively prohibit any class treatment. In this case, the claimant had argued that, although he would be required to arbitrate an individual claim, he could proceed outside arbitration with the class action that he had filed because the arbitration clause barred class actions only in that forum. The court did not follow this argument and held that

³ See also; *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

⁴ LLC, AAA Case No. 11-160-01982-06 (Mar. 2, 2007).

⁵ A. 2d, 2007 WL 765211 (Md. App. Mar. 15, 2007).

“the plain language of the agreement requires that any dispute arising out of or in any way related to the loan shall be resolved by arbitration (if either party so elected)”. In such manner, the Maryland Court of Special Appeals held that if an arbitration agreement bars the filing of a class action claim in arbitration, there can be no filing of a class treatment at all.

b) Binding nature

In principle, class action waivers in arbitration are binding (see, for instance; *Caley v. Gulfstream*⁶, *Randolph v. Green Tree*⁷, etc).

Only in certain occasions and/or under certain conditions a class action waiver would not be binding on the parties (see further under point e).

c) Acceptance (consensus)

Where no public policy infringement or unconscionability exists (see under point e), US courts tend to easily find the required consent to arbitrate and to waive class litigation.

For instance, in the *Milligan case*⁸, where no arbitration clause was written into the contract signed by the consumers, a cable provider nevertheless succeeded in moving to compel its subscribers to arbitrations. The provider pointed out that it had posted an “*arbitration notice*” (after the contracts were signed) along with the subscribers’ bill, stating that, unless the subscriber “*opted out*” of the arbitration clause, it would be bound by the arbitration agreement. The notice also stated that continued use of the cable service constituted acceptance of the new arbitration agreement. Consequently, the Court enforced the arbitration agreements holding that the subscribers’ failure to opt out of the agreement created a valid arbitration agreement.

⁶ 428 F. 3d 1359, 1378 (11th Cir. 2005).

⁷ 244 F. 3d 814, 819 (11th Cir. 2001).

⁸ *Milligan v. Comcast Corp.*, No. 7:06-CV-00809-UWC, 2007 WL 4885492 (N.D. Ala. Jan. 22, 2007).

d) Timely (re)action

The viability of a class action waiver should be invoked in *limine litis*, i.e. as a first argument at the beginning of the case.

Besides this, *Events Marketing and Products Inc v. Comcast Spotlight Inc*⁹ and other case law demonstrate that a claimant who raises only individual claims in the first complaint cannot amend the complaint to allege class claims after the defendant seeks to compel arbitration.

e) Public policy and unconscionability

Case law demonstrates that class arbitration can be validly excluded, unless;

- 1) Such clause violates public policy; and/or
- 2) Unconscionability (material or procedural) exists.¹⁰

When a company attempts to impose on its customers a dispute resolution agreement that precludes the use of class actions in any forum, such agreement will most likely be considered unenforceable by the court, either on the basis of the unconscionability theory, or because it contravenes the terms, legislative history or purpose of a specific statute and/or public policy.

However, there exists a grey zone of differing case law on unconscionability. The following subsections illustrate aspects of unconscionability and demonstrate how the outcomes may differ on a case-by-case basis. Thereby, it is important to note that public policy and unconscionability are concepts that are interpreted differently from place to place and from court to court and are subject to constant evolution.

⁹ So. 3d, 2010 WL 624136 (Fla. 3d DCA Feb. 24, 2010).

¹⁰ *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App.1999) and *Ramirez v. Circuit City Stores*, 90 Cal. Rptr. 2d 916 (Cal. Ct. App. 1999) *review granted*, 94 Cal. Rptr, 2d 1 (Cal. 2000), *review dismissed and case remanded*, 101 Cal. Rptr. 2c1 199 (Cal. 2000).

i. Case-driven approach

Whether or not unconscionability exists depends on the case at hand. It is therefore dangerous to set out *a priori* a category of facts that render an arbitration provision unconscionable, as it should be applied on a *per case* basis and requires a fact-sensitive analysis therein.

In conducting such analysis, case law may often be divided and several courts may give a very wide content to the scope of 'unconscionability'. This decreases legal certainty.

However, standardization may not be in place, as unconscionability assessment remains a case-driven investigation and the 'whole picture' of every individual case should be taken into account.

For instance; customers often argue that by waiving their rights to bring a class action they would effectively have waived their rights to any remedy, because no attorney would take a case as theirs. This statement is to be assessed per case and may be followed, especially where a small amount of damages was involved for a single individual and no attorney fees were recoverable.

There are some typical situations in which one may find a given clause unconscionable; e.g. if the exclusion of class litigation implies at the same time an exclusion of class arbitration (class action waiver) or if class litigation is economically speaking the most feasible remedy.¹¹

Besides this, in *Dale v. Comcast Corp*¹² the Court listed a number of other factors, which it emphasized were non-exclusive, which would be important in analyzing, in each case, whether a waiver would be unconscionable. These were: (1) the fairness of the provisions, (2) the cost to an individual plaintiff of vindicating the claim when compared to his potential recovery, (3) the ability to recover attorney's fees and other costs and thus obtain legal representation to prosecute the underlying claim, (4) the practical effect the waiver would have on the company's ability to engage in unchecked market behavior, and (5) related public policy concerns.

Moreover, the ongoing Supreme Court case *AT&T Mobility v Concepcion*¹³ is expected to further determine the parameters to be used.

¹¹ *Alabama Supreme Court case, Leonard v. Terminex Int'l Co.*, 854 So. 2d 529 (Ala. 2002).

¹² F. 3rd, 2007 WL 2471222 (11th Cir. Sept. 4, 2007).

¹³ See: <http://www.scotusblog.com/case-files/cases/att-mobility-v-concepcion>;
http://www.scotuswiki.com/index.php?title=AT%26T_Mobility_v_Concepcion;
<http://pubcit.typepad.com/clpblog/concepcion>;
<http://www.lawmemo.com/supreme/case/Concepcion>;

The case-driven approach also learns that off-setting factors may exist. Even in the above-mentioned situations, certain case law did not find unconscionability, as it took into account the following `off-setting` contractual provisions that are arguably in favor of consumers; (1) the fact that the company would pay the costs of arbitration, (2) the fact that the company waived its rights to claim attorney fees, (3) the fact that attorneys representing customers have the potential to collect double attorneys fees if the arbitrator issues an award to the customer higher than the last settlement offer from the company, etc.

In this way, by looking at the background of the case, courts may decide that a factor which would usually lead to unconscionability may be offset by other circumstances of the case.

For these reasons, situations exist in which, if an agreement between parties excludes class action court proceedings, the clause at hand may still be declared valid and enforceable.¹⁴

ii. Procedural and material unconscionability

Unconscionability is divided into two subcategories, i.e. procedural unconscionability and material (or substantive) unconscionability.

This distinction was, for instance, applied in *Gatton v. T-Mobile USA Inc*¹⁵. In this case, the court found that a minimal showing of procedural unconscionability was counterbalanced by a sufficiently strong showing of substantive unconscionability.

Such finding is usually referred to with the term `sliding scale`, meaning that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to find the term unconscionable. This case demonstrates that procedural and material unconscionability may influence one another.

The same distinction was made in *Scott v. Cingular Wireless*¹⁶. In this case, the court found that an agreement to reimburse a successful complainant's attorney's fees was insufficient to overcome the substantive unconscionability of the class action waiver. The Washington Supreme Court found substantive unconscionability in this case, because;

¹⁴ B. Hanotiau (2011), "A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration", Kluwer law International, 17 p.

¹⁵ 152 Cal. App. 4th 571 (Cal. App. 2007). See also: *Discover Bank v. Superior Court*, 113 P. 3d 1100 (Cal 2005).

¹⁶ P. 3d, 2007 WL 2003404 (Wash. July 12, 2007).

- a) without class actions many meritorious, albeit small, claims under Washington's Consumer Protection Act would never be brought and therefore the provision would violate the state's policy to protect the public and foster honest and fair competition; and
- b) the provision would effectively exculpate one party from liability where the cost of pursuing an individual consumer's claim outweighs that party's potential recovery.

It is important to note that in this case, after having found substantive unconscionability, the court did not find it necessary to address the question of procedural unconscionability.

Subsequently, the court looked at the arbitration provision and found that the class action waiver was not severable from the remainder of the provisions. Subsequently, it held that the entirety of the arbitration clause was null and void.

iii. Sector-driven approach

It must also be said that, for certain sectors such as employment and consumer affairs, different thresholds for (un)conscionability apply.

For instance, with regards to employment disputes, the California Supreme Court determined in *Gentry v. Superior Court*¹⁷ the circumstances in which class action waivers in an employment arbitration agreement could be enforced;

- The Court concluded that class action waivers in employment arbitration agreements should not be enforced if a trial court determines that class arbitration would be more effective than individual arbitration in vindicating employee rights;
- The Court enumerated factors to consider, including whether individual recovery sums sufficiently incentivized litigation, the risk of retaliation to employees, and the likelihood that other employees would be unaware of alleged illegal conduct; and
- The Court also held that, in determining whether an arbitration agreement was unenforceable, procedural unconscionability could be found in employment arbitration agreements even when employees were given an opportunity to opt-out of arbitration.

¹⁷ (2007) (S141502).

The latter point is a marked departure from federal court authority finding that an opportunity to opt out was almost a complete guarantee that an agreement would not be procedurally unconscionable.

This decision significantly limits an employer's ability to use class action waivers in employment arbitration agreements.

iv. Arbitrability

It must also be noted that certain US rules exclude specific matters from the scope of subjects that can be arbitrated. Such is the case in, for instance, the securities industry, the Truth in Lending Act, the Electronic Funds Transfer Act, etc.¹⁸

Subsequently, (a number of) courts have applied these rules as meaning that claimants can only litigate such claims or arbitrate them individually. Moreover, case law provides no uniform answer to the question whether such claims can be arbitrated at all.¹⁹

v. No nationwide certification

In assessing the unconscionability of an arbitration clause, both the Federal Arbitration Act and local state law must be taken into account.

In *S.D.S. Autos*²⁰, a Florida trial court found that defenses to contract enforcement generally applicable under state law can render arbitration clauses invalid without offending the Federal Arbitration Act.

It must also be noted that the laws and policies differ from state to state. Indeed, in *Lozano v. AT&T Wireless Services Inc*²¹ it was said that class action waivers need to be assessed on a state-by-state basis.

¹⁸ E.g. see: *Johnson v. Tele-cash, Inc.*, 82 F. Supp. 2d 264 (D.Del. 1999), at 267 (quoting *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1120 (D. Haw. 1976)); *Thompson v. Illinois Title Loans, Inc.*, 2000 WL 45493 at*3 (N.D. Ill. Jan 11, 2000); *Segal v. First USA Bank N.A.*, 69 F. Supp. 2d 627, 632 (D. Del. 1999); *Randolph v. Green Tree Fin. Corp.-Ala.*, 991 F. Supp. 1410, 1418-20 (M.D. Ala. 1997), *rev'd and remanded* 178 F.3d 1149.

¹⁹ E.g. see: *Nielsen v. Piper, Jaffrey & Hopwood*, 66 F.3d 145,148 (7th Cir. 1995); *O/de Discount Corp. v. Hubbard*, 4 F. Supp. 2d 1268, 1271 (D. Kan. 1998), *aff'd*, 172 F.3d 879 (10th Cir. 1999); *Martens v. Smith, Barney, Inc.*, 181 F.R.D. 243, 252 (S.D.N.Y. 1998); *In re Regal Communications Corp. Sec. Ogg.*, 1995 WL 550454 at *11, Fed. Sec. L. Rep. P98,871 (E.D. Pa. Sept 14, 1995); *Scher v. Equitable Life Assurance Soc'y of the United States*, 866 F. Supp. 776, 777 (S.D.N.Y. 1994); *Berger v. E*Trade Group, Inc.*, 2000 WL 360092 at *1 (N.Y. Sup. Mar. 28, 2000).

²⁰ *S.D.S. Autos, Inc. v. Chrzanowski*, Nos. 1D06-4293, 1D06-4294, 2007 WL 414522 (Nov. 26, 2007).

This makes that the differences among states in a given unconscionability analysis of a class action arbitration waiver excludes nationwide class certification.

vi. Differing consequences of unconscionability

The consequences of finding unconscionability vary between different states.

Following the finding of unconscionability in a class action waiver, some courts will investigate whether remaining parts of the clause should be upheld or whether the selection of the arbitration forum should be upheld, whereas other courts would rule that the entire arbitration provision should (quasi-automatically) be considered as invalid;

- In *Caban v. J.P. Morgan Chase & Co*²², applying Delaware law, the southern District of Florida ruled that a class action waiver was unconscionable because it effectively precluded individual suits where a single claimant's recovery would be minimal. The court did, however, uphold the mandatory arbitration provision and sent the case to arbitration to be determined on a class-wide basis.
- This case is in contrast with certain other courts that, when finding unconscionability, have often found that the entire arbitration provision becomes (quasi-automatically) invalid and therefore have compelled the matter for litigation before trial courts.

Besides this, certain courts tend to consider that (certain/all) unconscionability automatically amounts to a public policy infringement, while other courts maintain a separation between the two;

- In *Homa v. American Express Co*²³ the federal District court, after a New Jersey Supreme Court held that a class-arbitration waiver in a consumer arbitration agreement was unconscionable²⁴, held that this previous ruling did not establish a fundamental public policy against such waivers.
- The approach in this case may well be different in California, where class arbitration waivers are likely considered to be public policy infringements.

²¹ F.3rd, 2007 WL 2728758 (9th Cir. Sept. 20, 2007).

²² 2009 WL 890392 (S.D. Fla. Mar. 23, 2009).

²³ F. Supp. 2007 WL 1585168 (D.N.J. May 31, 2007).

²⁴ *Muhammad v. County Bank*, 912 A 2d 88 (H.J. 2006).

- The (ongoing) advancement is certainly such that; (1) Federal circuits typically hold that a clause prohibiting class arbitration is not per se against public policy;²⁵ (2) Federal courts have increasingly begun to find such prohibitions unconscionable;²⁶ and (3) Following the *Green Tree decision* (see further under point 3.3.3.b), several state courts, in what appears to be an emerging majority, have even held that such no-class-action clauses are against the public policies of their respective states.²⁷

3.3.3 Situations where an arbitration agreement is silent on the point of class arbitration

Where an arbitration agreement is silent on the point of class arbitration, reference should be made to a few landmark decisions of the US Supreme Court. These landmark decisions are made against the backdrop of differing tendencies set out by local courts and tribunals.

In the following subsections the author will present the differing tendencies set out by local courts and tribunals and will demonstrate how landmark decisions of the US Supreme Court have given further shape to this field.

a) Prior to US Supreme Court landmark decisions: From the Champ Decision (1995) to the Connecticut General Life Insurance Decision (2000)

²⁵ *Jenkins v. First Am. Cash Advance of GA, LLC*, 400 F.3d 868 (11th Cir. 2005); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018 (N.D. Cal. 2007); *Livingston v. Asters Pin, Inc.*, 339 F.3d 553, 558 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin Corp-Ala.*, 244 F.3d 814, 818–19 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000).

²⁶ E.g. see: *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007); *Rollins, Inc. v. Garrett*, 176 Fed. Appx. 968, 968 (11th Cir. 2006); *Muhammad v. County Bank of Rehobeth Beach*, 912 A.2d 88 (N.J. 2006); *Kristian v. Comcast Corp.*, 446 F.3d 25, 53–61 (1st Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003).

²⁷ E.g. see: *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002); *Gentry v. Superior Court*, 64 Cal. Rptr. 3d 773 (Cal. Ct. App. 2007); *Gasston v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007); *In re Cingular Cases*, No. D047608, 2007 WL 93229 (Cal. Ct. App. Jan. 16, 2007); *Firchow v. Citibank* (South Dakota), N.A., No. B187081, 2007 WL 64763 (Cal. Ct. App. Jan. 10, 2007); *Mandel v. Household Bank* (Nevada), 129 Cal. Rptr. 2d 380 (Cal. Ct. App. 2003); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003); *Betts v. McKenzie Check Advance of Fla.*, Case No. CL 01-320 AI (Fla. Cir. Ct. 2008); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 820 (Ill. App. Ct. 2005); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 313–14 (Mo. Ct. App. 2005); *Muhammad v. County Bank of Rehobeth Beach*, 912 A.2d 88 (N.J. 2006); *Tillman v. Commercial Credit Fla. Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006); *Lytle v. Citifinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *W. Va. ex rel Dunlap v. Berger*, 567 S.E.2d 265, 278–79 (W. Va. 2002), *cert. denied*, 527 U.S. 1087 (2002); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (Wis. 2006).

Before the US Supreme Court issued a number of landmark decisions, US courts were divided into those that were not in favor of arbitration (the ‘Naysayers’) and those that were (the ‘proponents’). There was also no set rule as to who decided on class arbitrability. On occasion it was the arbitrator(s), and at others it was the judge(s).

i. The Naysayers

In *Champ v. Siegel Trading Co* the Appeal Court for the Seventh Circuit affirmed a lower court decision which referred the plaintiff to arbitration and refused to certify an arbitral class action.²⁸

In this case, the Seventh Circuit prohibited class arbitration in the absence of an express grant of authority to conduct class arbitrations in the arbitration clause.

The reasoning of the court was based on the Federal Arbitration Act interpretation that the parties' agreement must be enforced as they wrote it. The court held that;

“Section 4 of the Federal Arbitration Act forbids federal judges from ordering class arbitration where the parties’ arbitration agreement is silent on the matter.”

Hereby, the court held that the Federal Arbitration Act’s concern must be given priority over efficiency reasons.

Subsequently, the court drew a parallel with federal case law which held that a trial court lacks power to consolidate arbitral proceedings when the parties' arbitral agreement does not explicitly allow for consolidation.

The *Champ* decision has been followed by many courts.²⁹ For instance, in *Med Center Cars, Inc v. Smith Trading*³⁰, the Alabama Court held that class arbitration was ‘improper’.

²⁸ 55 F. 3d 269 (7th Cir. 1995).

²⁹ Other cases in which it was held that a court cannot grant a motion to consolidate separate arbitration proceedings unless the contract on which the arbitration is founded expressly authorizes consolidation: *Glencore, Ltd. v. Schnitzer Steel Products Co.*, 189 F.3d 264 (2d Cir. 1999); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 71-74 (2d Cir. 1993); *American Centennial Ins. Co. v. National Casualty Co.*, 951 F.2d 107 (6th Cir. 1991); *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989) (per curiam); *Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984).

³⁰ 727 SO.2d9 (Ala. Sup. 1998).

ii. The proponents

Some courts have been receptive to allow arbitrators the authority to decide class arbitrations. In *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada a.o.*³¹ it was held that a silent and ambiguous agreement could be interpreted to allow consolidation.

When analyzing US case law, it seems that the California and Pennsylvania courts were the first proponents of class arbitration and that the California Supreme court was the first to opine that; (1) arbitration should be considered a full alternative to litigation and (2) class arbitration should be possible where many individual arbitration cases would fail to achieve goals of efficiency.

In *Dickler v. Shearson Lehman Hutton Inc.*³², the Supreme Court of Pennsylvania held that “*there is no policy reason so paramount in this state which would preclude class action proceedings from being imposed on an arbitration agreement*”.

Both California and Pennsylvania court decisions have in such way demonstrated a tendency to rule that consumers subjected to arbitration should not be deprived of bringing class actions in the arbitration forum.

b) The Green Tree Decision

In the 2003 *Green Tree decision*³³, the US Supreme Court reviewed a decision of the Supreme Court of South Carolina, which had to examine “*whether class-wide arbitration is permissible, when the arbitration agreement between the parties is silent regarding class actions*”.

The arbitration agreement read as follows:

“[claims] relating to this contract . . . will be resolved by binding arbitration by an arbitrator selected by [us] with the consent of [you]”

³¹ 2010 F. 3d 771, NOS.99-4085, 99-4106 (7th Cir. 2000).

³² 596 A. 2d 860 (Pa. Super. 1991).

³³ *Green Tree Fin. Corp. v. Bazzle*, No. 02-634, decision of June 23, 2003.

There was no specific reference to class arbitration. The Supreme Court of South Carolina held that such arbitration agreement was ambiguous and therefore interpreted its wording as permitting class arbitration.

The Supreme Court of South Carolina expressed the view that the question whether class arbitration was permissible under the relevant clause was a matter of contract interpretation under state law. In this respect, the court decided that class arbitration could be ordered when the arbitration agreement was silent, if it would serve efficiency and equity, and would not result in prejudice.

According to the Court's reasoning, "*if [we] enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement.*"

The defendant appealed to the US Supreme Court, raising the question as to whether an arbitration clause under the Federal Arbitration Act (being the law governing the arbitration agreement), which didn't clearly provide for class arbitration, could be interpreted as an acceptance for class arbitration.

i. Class arbitrability to be decided by the arbitrator

The majority opinion in this case concluded that an arbitration agreement provides broad powers to the arbitral tribunal and leaves the clauses' interpretation to arbitrators.

Therefore, according to the Court's decision:

"...Under the terms of the parties' contracts, the question whether the agreement forbids class arbitration is for arbitrator to decide. The parties agreed to submit to the arbitrator "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." . . . And the dispute about what the arbitration contract in each case means . . . is a dispute "relating to this contract" and the "resulting relationships". Hence the parties seem to have agreed that the arbitrator, not a judge, would answer the relevant question."

Subsequently, the United States Supreme Court remanded the case to the arbitrator to decide the arbitration clause's meaning, i.e. whether an arbitration clause that was silent on the issue of class arbitration availability, did or did not allow class arbitration as a means of dispute resolution.

This ruling was however rendered with including a dissenting opinion of Justice Rehnquist;

According to this dissenting opinion, class arbitration was inconsistent with the arbitration clause's requirement that disputes "*shall be resolved ,.. by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]*". The dissenting opinion further provides the following: "*Each contract expressly defines "us" as petitioner and "you" as the respondent or respondents named in that specific contract. And the contract also specifies that it governs all disputes arising from this contract or the relationships which result from this contract*".

The dissenting view opines that these provisions mean that the petitioner should select, and each buyer should agree to, a particular arbitrator for disputes between the petitioner and that specific buyer. In other words the petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right would be denied if the same arbitrator was imposed on the petitioner to resolve all the other claims as well. Besides this, the petitioner may want to choose different arbitrators for some or all of these other disputes and as such would avoid concentrating all of the risk damages awards in the hands of a single arbitrator. In summary, under the dissenting opinion, Arbitration under the Federal Arbitration Act is a matter of consent and not coercion.

This ruling was also rendered with including a dissenting *dictum* of Justice Stevens opining that it was up to the court and not the arbitrator to decide on the question as to whether class arbitration was possible.

ii. Creating a landmark

Subsequently, the position that it is up to the arbitrator to determine whether class arbitration is possible or not has been followed by other courts. For instance;

- In *Redman Home Builders Co v. Lewis*³⁴ the district court concluded that because the arbitration agreement was silent as to the issue of class action arbitration, the arbitrator and not the court must resolve the issue of whether the arbitration agreement nevertheless permits class action arbitration.
- The same conclusion was drawn in *Fastfunding the Company v. Betts*³⁵, where the court stated that the arbitrator must determine whether, under Florida law, the arbitration may proceed as a class action.

The *Green Tree decision* can therefore be considered a landmark ruling, as before this US federal ruling, the vast majority of federal circuit courts had held that arbitrations could not be consolidated in the absence of an express agreement among all the parties.³⁶ However, a number of state court decisions, mostly in California, had already held that an arbitration silent on the point of class arbitrability did not bar class arbitrations.³⁷

Nevertheless, it must be noted that nuances still exist, e.g. depending on the applicable rules;

- In *Clark v. First Union Securities Inc*³⁸, the Court of Appeal found that NASD rules permit either the Court or arbitrators to make the arbitrability decision, and that, by dismissing the claims, the arbitrators had not intended to foreclose the trial court from considering them afterwards.
- In *Sutter v. Oxford Health Plans*³⁹ it was held that, under the AAA Rules, an arbitrator's decision on class certification is immediately appealable to court. These rules are silent on the standard of review that should be applied. Therefore it was held that the parties did not agree to a standard different from those in the Federal Arbitration Act, and accordingly, the typical highly deferential standard of review would apply.

³⁴ Case No. 2:07 –cv)107 WL 1559932 (S.D. Ale. May 29, 2007).

³⁵ 951 So. 2d 116 (Fla. 5th DCA March 16, 2007).

³⁶ E.g. see: *Gov't of U.K.*, 998 F.2d at 74. See also, *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 207, 108 (6th Cir. 1991); *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193, 1194 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987). But see *Pedcor Mgmt. Co. v. Nations Pers. of Tex.*, 343 F.3d 355, 363 (5th Cir. 2003); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *Deiulemar Compagnia di Navigazione Spa v. M/V Allegra*, 198 F.3d 473, 482 (4th Cir. 1999); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *Deiulemar Compagnia di Navigazione Spa v. M/V Allegra*, 198 F.3d 473, 482 (4th Cir. 1999).

³⁷ E.g. see: *Blue Cross of Cal. v. Superior Court of L.A. County*, 67 Cal. App. 4th 42, 60 (Cal. Ct. App. 1998); *Keating v. Southland Corp.*, 31 Cal. 3d 584, 609 (Cal. 1982).

³⁸ Cal. Rptr. 3d, 2007 WL 1346188 (Cal. Ct. App. May 9, 2007).

³⁹ LLC, 2007 WL 625625 (3rd Cir. Feb. 28, 2007).

iii. Ripeness test in court review of class arbitration award

After the Green Tree decision, it was also to be determined which court review practice should be adopted after the arbitrator renders its decision on the point of arbitrability and/or renders its class arbitration award.

In *Dealer Computer, Inc v. Dub Herring Ford*⁴⁰ the Sixth Circuit emphasized the importance of relying on a three-factor ripeness test in review of class arbitration awards.

In this case, the arbitration panel had issued a partial final (class/non-class) determination award, denying class certification.

The claimant moved the district court to confirm the class determination award. In its ruling, the district court determined that the arbitration panel's denial of class certification did not pose a likelihood of harm to the claimant.

A three factor ripeness standard required the court to examine:

- (1) The likelihood that the harm alleged by the party would come to pass,
- (2) The hardship to the parties if judicial relief were denied, and
- (3) Whether the factual record was sufficiently developed.

Subsequently, the court found that, because the class was not certified, the potential harm to the claimant involved in defending against class arbitration would not occur.

c) The Stolt-Nielsen Decision

A second landmark decision was rendered in the *Stolt-Nielsen case*⁴¹ in 2010. The case reached the US Supreme Court concerning the issue of availability of class arbitration. The Supreme Court reversed and remanded a decision of the US 2nd Circuit of Appeals.

The latter decision permitted arbitrators to certify that a certain group of people constituted a class under the Federal Arbitration Act, where the arbitration clause would be silent on the issue of class arbitration.

⁴⁰ No. 09-1848, 2010 WL 4008141 (6th Cir. Oct. 14, 2010).

⁴¹ *Stolt-Nielsen S.A., et al v. Animal Feeds International Corp*, No. 08-1198, decision of April 27, 2010.

In procedures prior to the Supreme Court stage, the defending party (*AnimalFeeds*) argued that an arbitration clause that does not expressly mention class arbitration as a means of dispute resolution should be read as allowing class arbitration. The defendant based its argumentation on the above-mentioned *Green Tree decision*.

The appellant party (*Stolt-Nielsen*) argued that class arbitration should be precluded, as the arbitration agreement was silent on it.

The U.S. Supreme Court held by a majority of 5-3 that class arbitration was inconsistent with the Federal Arbitration Act. In particular it would infringe article 9 U.S.C. §§ 1-16, which provides:

“A party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so”

The Supreme Court added that:

“...the Federal Arbitration Act imposes certain rules of fundamental importance, including the basic concept that arbitration is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they may see fit. Just as they may limit by contract the issues which they will arbitrate so too may they specify by contract the rules under which that arbitration will be concluded.”⁴²

Consequently, an arbitration agreement which is silent on a class arbitration mechanism should not be interpreted as allowing class arbitration. In other words, silence does not amount to the required consent for class arbitration.

d) Effects on institutional arbitration

The above-mentioned *Green Tree* and *Stolt-Nielsen* landmark cases have led to new arbitration practices and various arbitration centers enacting new internal rules of procedure.

⁴² See also Gary Born, *‘International Commercial Arbitration: commentary and materials’*, Kluwer Law International and Transnational Publishers, 2nd edition, at 688

i. American Arbitration Association

Only a few weeks after the *Green Tree decision*, the **American Arbitration Association (AAA)** issued a policy and developed Supplementary Rules on class arbitration. This was done mainly to address the fact that the arbitrator, and not the court, must decide whether class relief is permitted.

Subsequently, the AAA administers demands for class arbitration if:

- (1) The underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and
- (2) The agreement is silent with respect to class claims, consolidation or joinder of claims.

The AAA is currently not accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the AAA.⁴³

Under the AAA rules, class arbitrations shall proceed in separate stages:

- 1) *Construction of the arbitration clause*: Rule 3 provides that, as a threshold matter, the arbitrator(s) shall determine in a reasoned partial final award whether the applicable arbitration clause permits the arbitration to proceed on behalf of a class. This clause construction award is then published under the name of the case on the AAA's online Class Arbitration Case Docket. Hereafter, any party will have thirty days to appeal the clause construction award if it wishes to do so.
- 2) *Class certification*: Rule 5 provides that, if the matter remains alive after any appeal, or after the time to appeal has lapsed without any party lodging appeal, the arbitrator(s) shall take evidence and issue a second, reasoned partial final award determining whether the case meets the standards for proceeding as a class action.⁴⁴ This second

⁴³ In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law.

⁴⁴ The standards are set forth in Rule 4, which are similar to the standards established by Rule 23 of the Federal Rules of Civil Procedure for class action proceedings in a court.

award can be posted on the AAA's website, and either party is again given thirty days to appeal.

- 3) *Final Award*: Rule 7 provides that, if the case remains alive after this stage, the arbitrator(s) shall issue a final award on the merits, which shall be reasoned and shall define the class with specificity. The final award is posted online, and the parties have the normal right to appeal.

Arbitration awards are usually confidential. This makes that discussion exists as to what extent the nature of class arbitration requires the AAA to post each of the awards on its website. In this regard, the author believes that the public interest related to class arbitrations and the fact that these procedures often affect a large number of potential class members beyond the named class representative who purports to represent their interests, justifies the applied level of disclosure to the public.

ii. JAMS

JAMS, a second major US arbitration center also responded to the above-mentioned landmark decisions by developing a policy and rules for class arbitration. These rules are known as the JAMS Class Arbitration Procedures.

The JAMS Procedures provide for stages of class arbitration similar to the AAA rules;⁴⁵

- 1) *Construction of the arbitration clause*: In the clause construction stage, the arbitrator shall determine (as a threshold matter) whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.
- 2) *Class certification*: Subsequently, in the Class Certification stage, the arbitrator is guided to allow the class certification only where the arbitral clause was deemed to allow class arbitrations or where a court has ordered that class arbitration may be maintained.⁴⁶ Notice to the certified class is required, and the guidelines for said notice are modelled after the notice required by Rule 23 of the Federal Rules of Civil Procedure, with the

⁴⁵ The JAMS Class Arbitration Procedures allow time for "*immediate court review*" after each stage.

⁴⁶ JAMS class certification requires satisfaction of rules that, like the AAA's Rules, are based on Rule 23 of the Federal Rules of Civil Procedure.

additional condition that the identities of and biographies of arbitrators, class representative(s), and class counsel shall be included in the said notice.

- 3) *Final Award*: The final award shall be on the merits and reasoned, and it shall contain a specified definition of the class and a description of: (1) those to whom notice of the action was directed; (2) those that the arbitrators have determined comprise the class; and (3) those that had opted out of the class.

Finally, Rule 6 of the JAMS Procedures delineates the procedures and guidelines for arbitrators' approval of settlements, voluntary dismissals, and compromises between the parties.

iii. Differing review practices?

The scope of judicial review of arbitral awards under the Federal Arbitration Act is, in principle, very limited. However, this scope can be extended depending on the formulation of the parties' clause and/or the procedural rules of the arbitral institute. Nevertheless, one should note that also on this point, US cases may differ between each other.

The statutory grounds for *vacatur* and modification in the courts are set out in the Federal Arbitration Act §§ 10 and 11.

The Federal Arbitration Act § 10 allows *vacatur* in the following instances:

- 1) In case of corruption, fraud, or undue means in the procurement of the award;
- 2) In case of evident partiality or corruption of an arbitrator;
- 3) If the rights of a party are prejudiced by an arbitrator's misconduct; and
- 4) If an arbitrator exceeds its powers or failed to submit its final award.

Federal Arbitration Act § 11 provides grounds for modification or correction of an award in the following instances:

- 1) If there is an evident material miscalculation of figures or material mistake in the description of anything referred to in the award;
- 2) If an arbitrator rules on a matter that was not submitted to arbitration; and
- 3) If an award is imperfect in a matter or form not affecting the merits of the controversy.

With regards to the parts in underscore (above), different review practices exist where courts have interpretation freedom due to the way in which the clause and/or the rules of the arbitral institute have been formulated or where parties extended (or are considered to have done so) the scope of court review, or where parties limited/extended (or are considered to have done so) the scope of arbitrable matters.

- For instance, Rule 3 of the AAA Supplementary Rules for Class Arbitrations was interpreted by the Michigan federal district court (in *Dealer Computer Services Inc v. Dub Herring Ford*)⁴⁷ as plainly evincing the intent that matters are properly reviewed by a federal district court, even though a final result had not yet been reached, subsequently allowing the district court to review the arbitrator's clause construction award.
- In *Dickler v. Shearson Lehman Hutton Inc.*,⁴⁸ the Pennsylvania Superior Court stated that the trial court not only needs to interfere in class certification to ensure that proper notice is provided and to review any proposed settlement, but also has to deal with eventualities such as conflicts between multiple class representatives as to selection of arbitrators.

In addition to (1) the statutory grounds for review, (2) influences caused by parties' drafting of the clause and (3) procedural rules set up by institutes, there exists a common law ground for *vacatur* for "*manifest disregard for the law*".⁴⁹ The test is very stringent. By way of illustration, the Second Circuit required showing that:

- 1) The tribunal had actual knowledge of a governing legal principle and refused to apply it; and
- 2) The governing legal principle is well-defined, explicit, and clearly applicable to the instant case.⁵⁰

⁴⁷ F. Supp. 2d, 2007 WL 1560204 (E.D. Mich. May 29, 2007).

⁴⁸ 596 A. 2d 860 (Pa. Super. 1991).

⁴⁹ *Wilko v. Swan* 346 U.S. 427, 74 S.Ct. 182 (1953). However, recent case law may disregard this additional ground for review. See, for instance, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

⁵⁰ See also, *Duferco Int'l. Steel Trading v. T. Klaveness Shipping A/S*, 333 F.2d 383 (2d Cir. 2003); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200 (2d Cir. 2002); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28, (2d Cir. 2000); *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 74–75 (1st Cir. 2008); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 878–79 (9th Cir. 2007); *B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F. 3d 905, 910 (11th Cir. 2006).

Some arbitrators have suggested that courts should consider the possibility of expanding the level of review in these unique circumstances in order to give arbitrators guidance as to whether they are correctly deciding clause construction and class certification issues.⁵¹

On March 25, 2008, the Supreme Court eliminated this possibility by its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*⁵². The issue before the Court was whether parties could contractually expand judicial review of arbitral decisions. The Court held that in actions subject to the Federal Arbitration Act, Sections 10 and 11 of the Federal Arbitration Act provide the exclusive grounds for *vacatur* or modification of an award.

Against this background, authors take different positions as to the arbitrator's tasks and the related scope of review. These authors can be divided into those who take a so-called 'maximalist' approach and those who support a 'minimalist' approach:

- *The maximalists say:* The implementing of so-called 'hybrid' class action arbitrations should be advocated, under which courts retain the responsibility of resolving all of the major action issues, e.g. deciding that the matter can proceed as a class action, define the class, approve the notice to the class, etc. In cases where the suit settles, the court should approve the settlement. The court may even resolve all discovery issues and motions. Indeed, without court supervision of the formation and treatment of the arbitral class action, the absent class members may find themselves bound by the ruling of an arbitrator they had no role in selecting. Also, the certification process and the notice process may in some cases require the use of subpoena powers to be reserved for courts.
- *The minimalists say:* There should be a high level of confidence in the arbitrator's capabilities and the arbitral panel can perform all these different functions. Experienced arbitrators should be as well equipped as courts to guarantee the protection of due process rights in all circumstances and, consequently, the role of the courts in class arbitration should be reduced to a minimum, as in any other arbitration conducted on an individual basis. It is beyond doubt that class actions are complex procedures, but arbitrations in general tend to be more and more intricate, yet this increasing complexity has not raised insurmountable problems for arbitration experts.

⁵¹ *Scher v. Oxford Health Plans, Inc.*, AAA Case 11 193 00548 05 (Mar. 7, 2006).

⁵² *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

4. Mostaza Claro, setting the parameter to arbitrate consumer claims in Europe

In the *Mostaza Claro case*⁵³, The European Court of Justice decided that when a national court is seized of an action for the annulment of an arbitration award, it must determine whether the arbitration agreement is void and it must annul the award if the arbitration agreement contains an unfair term. Thereby it is not relevant that the consumer raised the issue of unfairness only in the action for annulment and that he did not raise this point beforehand in the arbitration proceedings.

In these proceedings the court applied Article 3(1) of Council Directive 93/13/EEC of April 5th, 1993 on unfair terms in consumer contracts, which provides:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

The annex to this Directive contains an indicative list of unfair terms. This annex includes terms which have the object or effect of:

“excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.”

Subsequently, the Court ruled:

“Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.”

⁵³ Case C-168/05 *Mostaza Claro v. Centro Móvil*.

In this way, the Court concluded that the nature and importance of public interest underlying the protection which Directive 93/13/EEC confers on consumers, justify the national court being required to assess of its own motion whether a contractual term is unfair.

Therefore, with regards to consumer cases, both legal grounds and case law exist for the application of a 'fairness-test'. This fairness test can be considered a European form of the aforementioned US conscionability doctrine.

5. The arbitration – class litigation interface in Belgium under the class action Bill

5.1 The Draft Bill: Interface between class litigation and arbitration

Article 6 of the Draft Bill and the explanatory memorandum to the Draft Bill explains that as soon as someone is considered to be a member of the Class, such person can no longer initiate the same individual claim in an arbitration procedure.

This clarifies that;

1. Being a member of the class litigation precludes the right to initiate the same individual claim again later in arbitration proceedings. This is, in fact, the normal application of the '*non bis in idem*' principle, meaning that one cannot bring the same claim twice before an adjudicator.
2. Where a valid arbitration clause exists, the party can still become and remain a member of the class litigation, until and unless such party would have "*initiated*" their individual claim in the arbitration forum. Indeed, when parties previously entered into an arbitration agreement this previously engaged arbitration clause would not *per se* amount to the parties' 'opting out' of class litigation.

These points are also demonstrated by Article 8 of the proposed Bill when taken together with the explanatory memorandum to this Article, which provides:

"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 Group/Class if,

within such term, this person did not submit conclusions at the clerk office to waive its individual claim.” (translation)

The proposed draft mentions “*clerk office*”, which suggests that this article would only refer to ordinary court proceedings. However, it clearly results from the explanatory note to the draft Bill that the referred term “*individual claim*” entails also arbitration procedures.

Therefore, the mere fact that a party had previously entered into an arbitration agreement should not *per se* exclude such aggrieved party from becoming a member of a Class in the litigation forum. Indeed, under the current draft of the Bill, the determining factors of knowing whether or not such party opted out of class litigation, is to (1) verify whether such party initiated its claim in the arbitration forum, and (2) verify whether, after having initiated its claim in the arbitration forum, such party did or did not submit a conclusion to waive its individual claim prior to the end of the option term.

In such way, the creators of the Draft Bill anticipated on the above-mentioned US practice, under which certain companies use arbitration clauses as a tool to prevent class litigation. In Belgium it would not be possible to preclude class litigation by means of a previously agreed arbitration clause.

On the other hand, if parties want to arbitrate their dispute, it seems that a mere agreement to arbitrate would not suffice to effectively opt out of class action litigation, but that, in order to effectively opt out, it is necessary that the party opted out in the ‘usual’ way or had initiated its claim in the arbitration forum prior to the lapse of the option term.

The author suggests that the wording “*aggrieved person who initiates an individual claim against the same defendant(s)*” be interpreted in a teleological manner, i.e. meaning that if the target Company of class litigation is a claimant to the arbitration procedure, this would not prevent the defendant from being considered as having opted out of class litigation if such defendant initiated a counterclaim or submitted its conclusion in the arbitration forum prior to the lapse of the option term. *A contrario*, if such aggrieved defendant would not act during the initiated arbitration proceedings (e.g. a default award), such defendant should not be considered as having waived its right to be a member of the class in the litigation forum. In order to avoid conflicting decisions, e.g. a default award in the arbitration forum and a class litigation ruling in the litigation forum, arbitrators should always verify whether a class litigation initiative exists regarding parties to the arbitration proceedings and, if appropriate, suspend the rendering of

their awards to the moment in which the option term lapses. In this respect, the author advocates for a central database to be developed in which one can easily ascertain whether or not a class action initiative exists in relation to a given party.

Some ADR practitioners, including the author, propose to replace the proposed system by one that distinguishes between arbitration agreements entered into prior to the date of the request for class litigation certification on the one hand and arbitration agreements entered into after the date of the request for class litigation certification on the other hand. The first category of arbitration cases should then be governed by the system currently set out in the Draft Bill, while in the second category of arbitration agreements, parties should automatically be considered as validly having opted out of class litigation as of the moment in which they entered into a valid arbitration agreement.

5.2 The Draft Bill: Impossibility to file class arbitration

Article 15 of the Draft Bill provides that the initiation of class action litigation does not offset the possibility for the entire group of aggrieved persons or for part of this group to purport an amiable settlement of the dispute.

The explanatory memorandum to the Draft Bill clarifies that:

1. This article 15 is to be interpreted as referring merely to amiable settlement proceedings, with the exclusion of arbitration. Arbitration would, according to the explanatory memorandum, already be governed by the aforementioned Articles 6 and 8;
2. The class representative cannot represent members of the class in attempts to resolve disputes in (such) an alternative manner.

None of the Articles of the Draft Bill provide for a written legal basis for class arbitration in Belgium. It is therefore not clear to what extent the 'class-certification judge' or a consensus with the class representative(s) or any other cause could form a sufficient basis for class arbitration proceedings.

5.3 Suggestions for further amendment to the class action Bill

It seems that, just like the legislator in the US, the Belgian Legislator would not issue legal rules on the possibility and conditions for class arbitration. The US practice, as demonstrated above, shows us that this choice results in differing case law and related legal uncertainty.

At the same time, class arbitration is not to be overlooked or excluded. The market's willingness to use class arbitration is demonstrated by the fact that, since the adoption by AAA and JAMS of procedural rules on class arbitration in the US, both arbitral institutions administered numerous class arbitration cases and continue to receive an ever increasing demand to provide class arbitration services.

The author therefore advocates adding to the class action Bill provisions explicitly enabling class arbitration and that set out the conditions to do so. Arbitration has nowadays become a fully-fledged alternative to litigation and, as such, should be able to play an equal role in class treatment.

One should also recognize that there exist a number of typical reasons why parties prefer to go for arbitration as opposed to litigation, such as e.g. the rapidity of the procedures in the alternative forum, the reputation of the appointed arbitrator(s), the expertise of the arbitrator, the neutrality of the alternative forum, lower costs, etc.

Excluding the arbitration forum from class treatment would make that the class action Bill may overcome practical issues (e.g. requiring individual mandates) in the forum of court litigation, while leaving the same issues existent for those groups of parties which prefer their claims to be dealt with in the forum of arbitration. Moreover, such choice would be a missed opportunity to further deal with the existing judicial backlog.

For these reasons, and in light of the above-mentioned US practice and the pitfalls identified under it, the author advocates including in the class action Bill:

1. An explicit possibility for the certifying judge to allow class arbitration treatment. This task should, at least for the time being, be reserved to the trial court, in order to adhere to some maximalist ideology tendencies that may still exist in Belgium.

The certifying judge could, for instance, appoint a 'delegate judge' to report to it on the developments of the class arbitration procedure. This delegate judge would then have a function similar to the function of a monitoring trustee under the (recently developed) practice of arbitration commitments (i.e. a type of behavioral remedy in EU merger review).⁵⁴

When enabling the trial judge to allow class arbitration, the legislator may want to distinguish between the following situations:

- Situations where an arbitration agreement exists authorizing class arbitration (-> *this agreement should, in principle, be respected*);
- Situations where an arbitration agreement exists prohibiting class action/class arbitration (-> *This agreement should be considered null and void, at least to the extent that it would try to exclude class treatment in both the litigation forum and the forum of arbitration*); and
- Situations where an arbitration agreement exists which is silent on the point of class arbitration (-> *Here, the certifying judge should, in principle, have the possibility to permit class arbitration treatment if the class representative enters into a class arbitration agreement with the opponent*)

As under the class action Bill it would be up to the certifying judge to rule on the matter of class arbitrability; this would create a nuance in the principle of the arbitrator's competence to rule on its own competence (kompetenz-kompetenz doctrine). Therefore, should the Belgian legal landscape be/become such that it is ready to adopt a minimalist approach to class arbitration, the Belgian Legislator may want react to this by allocating the competence to conduct class arbitrability assessments with the arbitrator (with possibly setting a certain level of court review afterwards), in such a way so as to exclude the maintenance of an unnecessary exception to the commonly known and accepted principle of competence-competence.

⁵⁴ To find out more about arbitration commitments, see: P. Billiet, R. Croce and N. Dimopoulos, (2009), "Arbitration Commitments under EC Merger Procedures: a hybrid and successful form of Arbitration", In Touch, AIA, July 2009. (http://www.ipgnetwork.org/data/cms_uploads/module_community/publications/Newsletter-AIA-July_2009.pdf)

2. For where class arbitration is applied, the Belgian Legislator may want to incorporate a provision in the class action Bill, ensuring that a written form of the arbitration agreement will exist. Such provision would facilitate recognition and enforcement of final class action awards under the auspices of the New York Convention.
3. For where class arbitration is applied, the Belgian Legislator may want to incorporate a provision in the class action Bill, clarifying that the class will be represented by the class representative(s). In this way the Belgian Legislator would adhere to the commonly accepted consensus-requirement for arbitration procedures.

6. Conclusion

The creators of the Belgian class action Bill have delivered a high standard of work in drafting the proposed class action instrument for Belgium. It seems that this instrument anticipates on existing pitfalls in the US that are in relation to arbitration.

However, it is unfortunate to find that the current draft of the class action Bill is silent on the point of class arbitrability or may even exclude the arbitration forum from class treatment. This choice demonstrates a strong maximalist approach towards arbitration, supporting the (mistaken) belief that arbitrators would not be sufficiently capable of handling class arbitrations.

Undeniably, there seems to be no valid reason as to why a maximalist approach should be supported. Indeed, practice indicates that parties often prefer to have their disputes be dealt with through arbitration instead of ordinary court litigation. These parties have particular reasons to do so and their choice helps to deal with the judicial backlog.

The class action Bill should consequently be further amended to exclude the situation where an existing problem would be solved in one forum of court litigation but remains extant in the forum of arbitration.