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## *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*

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More and more businesses are inserting arbitration clauses into their standard form contracts with Canadian consumers. In so doing, they are denying consumers access to the courts and, in particular, access to class actions. Some businesses are strategically deploying arbitration clauses to give themselves additional advantages. As a result of these business practices, Canadian consumer arbitration law is in a state of flux. If the American experience with pre-dispute consumer arbitration clauses over the past two decades is any indication, this uncertainty in the law may continue for some time to the detriment of individual consumers.

Recent legislation in Ontario and Alberta has prohibited some types of pre-dispute consumer arbitration clauses, but the types each province has banned are different and not all problems with these clauses have been dealt with. The Courts of Appeal in British Columbia and Ontario have taken one approach to the apparent conflict between arbitration legislation and class proceedings legislation, and the Quebec Court of Appeal has taken another. Canadian arbitral organizations have yet to take advantage of the experience of their American counterparts and take action to prevent the abuse of arbitration in the consumer context.

While the courts and arbitral organizations have roles to play, the author argues that a Canada-wide, uniform amendment to provincial arbitration legislation is the best response to the problems posed by pre-dispute consumer arbitration clauses. In her opinion, such clauses should not be effective to deny consumers access to small claims courts or class proceedings or to deny consumers the mandatory legal rights granted to them in the province of their residence.

Un nombre croissant d'entreprises insèrent aujourd'hui une clause d'arbitrage dans leurs contrats d'adhésion avec les consommateurs canadiens. Ce faisant, elles privent ces derniers de leur accès aux tribunaux et, en particulier, de leur accès au recours collectif. De plus, certaines entreprises font un usage stratégique des clauses d'arbitrage afin de s'accorder des avantages supplémentaires. Par conséquent, le droit canadien de l'arbitrage des conflits relatifs à la consommation est instable. Par ailleurs, si l'on se fie à l'exemple américain des vingt dernières années, cette incertitude juridique pourrait se maintenir pendant quelque temps encore, au détriment des consommateurs.

En effet, même si des lois récentes en Ontario et en Alberta ont interdit certains types de clauses compromissoires dans les contrats de consommation, les types de clauses que chaque province a bannis ne sont pas les mêmes, et il demeure toujours des problèmes non résolus relatifs à ces clauses. De leur côté, les Cours d'appel de l'Ontario et de la Colombie-Britannique ont préféré une approche autre que celle qui a été adoptée par la Cour d'appel du Québec sur le conflit apparent entre la législation sur l'arbitrage et la législation sur le recours collectif. Quant aux organisations arbitrales canadiennes, elles n'ont pas encore profité de l'exemple des États-Unis pour prévenir le recours excessif à l'arbitrage dans le contexte de la consommation.

Toutefois, alors que les tribunaux et les organisations arbitrales ont un rôle à jouer dans la prévention des abus, l'auteure soutient que la meilleure solution aux difficultés posées par les clauses compromissoires est d'adopter un amendement, uniforme à travers le Canada, à toute la législation provinciale sur l'arbitrage. Selon l'auteure, les clauses compromissoires ne devraient pas avoir pour effet de bloquer l'accès des consommateurs ni à la Cour des petites créances ni au recours collectif. Ces clauses ne devraient pas non plus leur enlever les droits légaux et obligatoires qui leur sont accordés dans leur province de résidence.

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## Introduction

Consumer arbitration has arrived in Canada. Businesses are increasingly inserting arbitration clauses into standard form contracts. In the event of a dispute, these clauses deny consumers access to the courts, including small claims courts and class proceedings. The costs of arbitrating may effectively deny consumers access to any forum at all. Some businesses abuse arbitration clauses to give themselves other unfair advantages, exacerbating the power imbalance between themselves and consumers.<sup>1</sup> To date, only Ontario<sup>2</sup> and Alberta<sup>3</sup> have addressed arbitration in the consumer context through legislation. Even in those provinces, the legislation renders only some consumer arbitration clauses ineffective.

Arbitration is a “private process of adjudication in which parties in dispute with each other choose decision-makers ... and the rules of procedure, evidence, and decision by which their dispute will be decided.”<sup>4</sup> Arbitration is advertised as an inexpensive, speedy, informal, and private alternative to the judicial system. Some parties find certain aspects of the typical arbitration process disadvantageous, however, including its lack of transparency, lack of reliance on precedent, lack of a right of appeal on the merits, limits on discovery, and the cost of private judges.

Pre-dispute arbitration clauses in standard form consumer agreements have been controversial in the United States for the past two decades.<sup>5</sup> By the mid-1990s, they had become ubiquitous;<sup>6</sup> businesses providing goods and services, lending

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<sup>1</sup> The Law Reform Commission of British Columbia foresaw the dangers of arbitration clauses in 1982, noting that “[W]hen an arbitration clause is used in a contract of adhesion, it is in the interest of the dominant party that any dispute be settled by arbitration” (Law Reform Commission of British Columbia, *Report on Arbitration* (Vancouver: Law Reform Commission of British Columbia, 1982) at 4 [*LRCBC Report*]).

<sup>2</sup> *Consumer Protection Act, 2002*, ss. 7, 8, being Sch. A. of the *Consumer Protection Statute Law Amendment Act, 2002*, S.O. 2002, c. 30 (proclaimed in force 30 July 2005) [*Ontario Consumer Protection Act*]. Section 7 renders invalid any pre-dispute arbitration clause that prevents a consumer from commencing an action in the Superior Court of Justice to enforce his or her rights under the Act. Section 8 invalidates pre-dispute arbitration clauses that prevent consumers from commencing or participating in class actions. See the discussion of these provisions in Part III.A., below.

<sup>3</sup> *Fair Trading Act*, R.S.A. 2000, c. F-2, s. 16 [*Alberta Fair Trading Act*]. Section 16 prevents consumers from suing in court to enforce their rights under the Act if they have agreed in writing to submit their claims to arbitration and the arbitration agreement has been approved by the minister responsible for the Act. See Part III.A., below.

<sup>4</sup> Carrie Menkel-Meadow, “Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not” (2002) 56 U. Miami L. Rev. 949 at 949 [emphasis omitted].

<sup>5</sup> See Ronald J. Adams, “Consumer Reaction Toward Arbitration as a Remedial Alternative to the Courts” (1983) 17 J. Consumer Aff. 172.

<sup>6</sup> See e.g. Stephen K. Huber & E. Wendy Trachte-Huber, “Top Ten Developments in Arbitration in the 1990s” (2000-2001) 55:4 Disp. Resol. J. 24 (describing the “explosion” in consumer arbitration, including the areas of consumer sales and service contracts, insurance claims, medical relationships, attorney-client disputes, and bank-customer agreements at 30).

institutions, credit card companies, and health care providers had inserted them into their standard form contracts.<sup>7</sup> Consumer associations rallied, alleging that arbitration clauses were being used to undermine consumer protection legislation, to defeat class actions, to evade small claims, and to take advantage of a pro-business bias built into the arbitration system.<sup>8</sup> The secondary literature is voluminous and almost all of it is critical.<sup>9</sup> American courts have heard hundreds of cases in which parties have contested the enforceability of pre-dispute arbitration clauses in consumer contracts, including several cases heard by the Supreme Court.<sup>10</sup> Elections have even been fought on the issue.<sup>11</sup>

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<sup>7</sup> Numerous authors have collected examples of consumer arbitration clauses used by banks, credit card companies, hospitals, schools, airlines, and merchants of all sizes and shapes. See *e.g.* David S. Schwartz, "Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration" (1997) *Wis. L. Rev.* 33; Richard A. Bales, "The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration" (2004) *52 U. Kan. L. Rev.* 583.

<sup>8</sup> See *e.g.* Consumer Action, Press Release, "Consumer Action Wins Landmark Ruling Against AT&T over Binding Arbitration Clause" (15 January 2002), online: Consumer Action <[http://www.consumer-action.org/English/PressReleases/2002\\_01\\_15\\_PR.php](http://www.consumer-action.org/English/PressReleases/2002_01_15_PR.php)>; Center for Responsible Lending, "Mandatory Arbitration: Denying Access to Justice", online: <<http://www.responsiblelending.org/practices/arbitration.cfm>>; Public Citizen, "Auto Dealers and Consumers Agree: Mandatory Arbitration Is Unfair", online: <<http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=650>>.

<sup>9</sup> See *e.g.* Michael Z. Green, "Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?" (1993) *5 Loy. Con. Prot. J.* 11; Mark E. Budnitz, "Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection" (1995) *10 Ohio St. J. Disp. Resol.* 267; Jeffrey W. Stempel, "Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent" (1996) *62 Brook. L. Rev.* 1381; Thomas J. Stipanowich, "Punitive Damages and the Consumerization of Arbitration" (1997) *92 Nw. U.L. Rev.* 1; Katherine Van Wezel Stone, "Rustic Justice: Community and Coercion Under the Federal Arbitration Act" (1999) *77 N.C.L. Rev.* 931; Shelly Smith, "Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System" (2001) *50 DePaul L. Rev.* 1191; Cameron L. Sabin, "The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators" (2002) *87 Iowa L. Rev.* 1337; David S. Schwartz, "Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles" (2003) *38 U.S.F. L. Rev.* 49; Margaret L. Moses, "Privatized 'Justice'" (2005) *36 Loy. U. Chicago L.J.* 535.

<sup>10</sup> See *e.g.* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (upholding a consumer arbitration agreement for termite extermination services); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) [*Randolph*] (upholding arbitration for a borrower's truth and non-discrimination in lending statutory claims).

<sup>11</sup> See F.M. Haston, III, "Arbitration in Alabama: Of Road Signs and Reality" (2001) *62 Ala. Law.* 63; Matthew C. McDonald & Kirkland E. Reid, "Arbitration Opponents Barking up the Wrong Branch" (2001) *62 Ala. Law.* 56; Thomas J. Methvin, "Alabama: The Arbitration State" (2001) *62 Ala. Law.* 48; Melissa Briggs Hutchens, "At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama" (2002) *53 Ala. L. Rev.* 599. See also Scott J. Burnham, "The War Against Arbitration in Montana" (2005) *66 Mont. L. Rev.* 139.

The current proliferation of pre-dispute consumer arbitration clauses in Canada is not an unexpected development. Many Canadian companies are subsidiaries of U.S.-based transnational corporations, whose usual arbitration clauses now appear in their standard form agreements with Canadian consumers.<sup>12</sup> However, there is probably a more specific reason for the recent appearance of consumer arbitration clauses in Canada. American commentators speculate that the growth in consumer arbitration in the 1990s was a response to the availability of civil jury trials, punitive damages, and class actions in that country.<sup>13</sup> Similarly, the recent growth in the number of class actions in Canada appears to have spurred the use of consumer arbitration clauses here.<sup>14</sup> After the Ontario Superior Court of Justice held in 2002 that an arbitration clause prevented dissatisfied subscribers from bringing a class action against Rogers Cable Inc.,<sup>15</sup> Canadian corporate and commercial lawyers began recommending consumer arbitration clauses to their corporate clients as part of a “class action risk management strategy”,<sup>16</sup> a type of do-it-yourself law reform.<sup>17</sup>

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<sup>12</sup> See e.g. Dell, “Terms and Conditions of Sale (Canada)” at para. 13, online: <<http://www.dell.ca/legal>> [“Dell Terms of Sale”]. This clause is almost identical to the one in Dell, “U.S. Terms and Conditions of Sale” at para. 13, online: <<http://www.dell.com/policy/legal/termsofsale.htm>>.

<sup>13</sup> See e.g. Stephen J. Ware, “Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury” (2002) 56 U. Miami L. Rev. 865; Richard B. Cappalli, “Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?” (2001) 10 B.U. Pub. Int. L.J. 366 (arguing that “[b]ig firm ‘financial services lawyers’ are promoting the insertion of arbitration clauses into adhesive form contracts for the very purpose of sidestepping class actions” at 379); Eric J. Mogilnicki & Kirk D. Jensen, “Arbitration and Unconscionability” (2003) 19 Ga. St. U. L. Rev. 761 (arguing that the proliferation of arbitration agreements can be explained by the abuse of the class action by plaintiffs and their lawyers at 785-86).

<sup>14</sup> Quebec was the first province to implement rules facilitating class actions with *An Act Respecting the Class Action*, S.Q. 1978, c. 8 (now Book IX C.C.P.). Ontario followed suit more than a decade later with the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*Ontario Class Proceedings Act*]. British Columbia’s *Class Proceedings Act, 1992*, R.S.B.C. 1996, c. 50 [*B.C. Class Proceedings Act*] was the next similar statute to be enacted. As a result of the decision of the Supreme Court of Canada in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, 201 D.L.R. (4th) 385, 2001 SCC 46 [*Dutton* cited to S.C.R.], class proceedings legislation has now been enacted in four more Canadian provinces: see *Class Proceedings Act*, S.A. 2003, c. C-16.5; *The Class Proceedings Act*, S.M. 2002, c. 14, C.C.S.M. c. C-130; *Class Actions Act*, S.N.L., 2001, c. C-18.1; *The Class Actions Act*, S.S. 2001, c. C-12.01.

<sup>15</sup> *Kanitz v. Rogers Cable* (2002), 58 O.R. (3d) 299, 21 B.L.R. (3d) 104, 16 C.P.C. (5th) 84 (Sup. Ct.) [*Kanitz* cited to O.R.]. This case is discussed in greater detail in Part II. A, below.

<sup>16</sup> See e.g. Andrew D. Borrell, “Arbitration and Choice of Law Provisions as Class Action Risk Management Tools” (Vancouver: N.p., 2002), available online: Fasken Martineau, Information Resources: Bulletins by Practice Groups; Class Actions <<http://www.fasken.com>>; Steven H. Leitl, “Ontario Court Forces Proposed Class Action Plaintiffs to Arbitrate Claims” *Vantage: Class Actions Newsflash*, Macleod Dixon LLP (Fall 2002), online: Macleod Dixon <<http://www.macleoddixon.com/content/files/NEWSFLASH.pdf>>; Dalton McGrath, “Avoiding Class Actions in the Oil & Gas Industry” (2002), online: Blake Cassels & Graydon LLP <[http://www.blakes.com/english/publications/bog/BOGSept2006/Environmental\\_Class\\_Actions.asp](http://www.blakes.com/english/publications/bog/BOGSept2006/Environmental_Class_Actions.asp)>.

As yet, there have been only a half-dozen Canadian cases in which courts have considered whether arbitration clauses are effective to deny consumers access to the courts and the usual rights and remedies available to them in that forum. Although the number of cases is small, their profile is high. Three of the cases were heard by provincial courts of appeal, and when the corporate defendants lost at that level, all requested leave to appeal to the Supreme Court of Canada.<sup>18</sup> The American experience, the Supreme Court of Canada's deference to arbitration in *Desputeaux v. Éditions Chouette (1987) Inc.*,<sup>19</sup> and the use of arbitration clauses as corporate class action risk management strategies suggest that we will see more arbitration clauses inserted into standard form agreements with consumers in the future. The pending Supreme Court of Canada appeals may either encourage or curtail this trend.

In this article, I focus on pre-dispute agreements to arbitrate between consumers and businesses providing them with goods and services. Arbitration clauses are also rampant in the American employment,<sup>20</sup> franchise,<sup>21</sup> and securities<sup>22</sup> contexts. While many issues in these contexts are similar to those in the consumer area, the statutory

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<sup>17</sup> Jean R. Sternlight argues that “[o]ne might call [the use of arbitration clauses] the ‘do it yourself’ approach to law reform: the company need not convince any legislature to pass revised laws, nor persuade any judicial body to change court rules, but rather merely choose to eliminate the pesky class action on its own” (“As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?” (2000) 42 Wm. & Mary L. Rev. 1 at 11 [Sternlight, “Mandatory Binding Arbitration”]).

<sup>18</sup> These cases are discussed in Part III.B, below.

<sup>19</sup> [2003] 1 S.C.R. 178, 223 D.L.R. (4th) 407, 2003 SCC 17 [*Desputeaux* cited to S.C.R.]. *Desputeaux* is a particularly strong endorsement of the norm of party autonomy in consensual arbitration and thus deference by courts to the arbitration process. LeBel J. emphasized that “legislative policy ... accepts this form of dispute resolution and even seeks to promote its expansion” and that “decision-making autonomy within the arbitration system” has to be preserved in order to be faithful to the “clear legislative approach and the judicial policy based on it” (*ibid.* at para. 52).

<sup>20</sup> See *e.g.* Katherine Van Wezel Stone, “Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s” (1996) 73 Denv. U.L. Rev. 1017; Samuel Estreicher, “Predispute Agreements to Arbitrate Statutory Employment Claims” (1997) 72 N.Y.U.L. Rev. 1344; Lewis L. Maltby, “Private Justice: Employment Arbitration and Civil Rights” (1998) 30 Colum. H.R.L. Rev. 29; David Sherwyn, J. Bruce Tracey & Zev J. Eigen, “In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process” (1999) 2 U. Pa. J. Lab. & Employment L. 73; Jean R. Sternlight, “Major Ways of Challenging Arbitration ‘Agreements’ in the Non-unionized Employment Setting, Part I” (1999) 10 World Arb. & Mediation Rep. 249; Harry T. Edwards, “Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?” (1999) 16 Ga. St. U.L. Rev. 293; Michael Z. Green, “Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims” (2000) 31 Rutgers L.J. 399; Christine M. Reilly, “Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment” (2002) 90 Cal. L. Rev. 1203.

<sup>21</sup> See *e.g.* Edward Wood Dunham, William A. Darrin, Jr. & Benjamin A. Levin, “Franchisor Attempts to Control the Dispute Resolution Forum: Why the Federal Arbitration Act Trumps the New Jersey Supreme Court’s Decision in *Kubis*” (1998) 29 Rutgers L.J. 237; Jean R. Sternlight, “Protecting Franchisees from Abusive Arbitration Clauses” (2000) 20 Franchise L.J. 45.

<sup>22</sup> See *e.g.* Farah Z. Usmani, “Inequities in the Resolution of Securities Disputes: Individual or Class Action; Arbitration or Litigation” (2001) 7 Fordham J. Corp. & Fin. L. 193.

law governing them is different and they therefore deserve their own examination. Moreover, I do not discuss arbitration agreements entered into after a dispute has arisen; they do not raise the same troubling issues raised by pre-dispute agreements.<sup>23</sup>

In Part I, I discuss how agreements to arbitrate are enforced. All but one of the Canadian cases involved corporations' applications to stay consumer class actions based on arbitration clauses in the corporations' standard form contracts. The legislation governing these stay applications is therefore reviewed. In Part II, I look at the Canadian cases. Two different judicial approaches to the use of pre-dispute consumer arbitration clauses to avoid class actions are evident. The earlier cases decided the stay applications on the basis of the arbitration legislation under which the applications were brought. The later cases did not. Instead, the courts in Alberta, British Columbia, and Ontario sidestepped arbitration legislation that constrained their discretion to refuse to stay the court actions before them. Part III concludes with an assessment of some of the thornier issues yet to be addressed by Canadian courts. In Part IV, I canvass possible responses to the strategic deployment of pre-dispute consumer arbitration clauses, drawing on initiatives in Ontario, the United States, the United Kingdom, and elsewhere. In the Conclusion, I summarize the action I believe is necessary from the provincial and territorial legislatures, from Canadian arbitral organizations, and from the courts. In my opinion, pre-dispute consumer arbitration clauses should not be effective to deny consumers access to small claims courts or class proceedings, nor to deny them the mandatory legal rights granted to them in their provinces of residence.

## I. Arbitration Legislation and Stay Applications

Prior to 1986, almost all Canadian arbitration legislation was based on the United Kingdom's *Arbitration Act, 1889*.<sup>24</sup> Arbitration was unpopular because it commanded very little legislative or judicial deference. For example, judges had complete discretion to stay or to refuse to stay court proceedings and would often refuse to specifically enforce to agreements.<sup>25</sup>

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<sup>23</sup> See Schwartz, *supra* note 7 at 105 (arguing that the arbitration of existing disputes is similar to settlement, where private agreement allows parties to reach binding resolution of their dispute out of court). See also National Arbitration Forum, "The Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers" (2004), online: <[http://www.arb-forum.com/resources/articles/emprcl\\_study\\_04/EmpiricalStudies.pdf](http://www.arb-forum.com/resources/articles/emprcl_study_04/EmpiricalStudies.pdf)> (stating that the empirical evidence indicates that "parties in real life disputes don't use post-dispute agreements to arbitrate" at 13).

<sup>24</sup> (U.K.), 52 & 53 Vict., c. 49 [*U.K. Arbitration Act*]. The arbitration legislation in the Northwest Territories, Yukon Territory, Newfoundland and Labrador, and Prince Edward Island is still based on the *U.K. Arbitration Act*. See *Arbitration Act*, R.S.N.W.T. 1988, c. A-5; *Arbitration Act*, R.S.Y. 2002, c. 8; *Arbitration Act*, R.S.N. 1990, c. A-14; *Arbitration Act*, R.S.P.E.I. 1988, c. A-16 [*P.E.I. Arbitration Act*].

<sup>25</sup> See e.g. *P.E.I. Arbitration Act*, *ibid.*:

The importance of international commercial arbitration to international trade and commerce motivated the modernization of Canada's statutory arbitration framework.<sup>26</sup> Legislative and judicial deference to arbitration was the key change. In 1986, legislation adopting the twenty-eight-year-old *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*<sup>27</sup> and the 1985 *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration*<sup>28</sup> was rushed through Parliament and the provincial and territorial legislatures with unprecedented haste.<sup>29</sup>

With a thoroughly modern framework in place for international commercial arbitration, the impetus to update domestic arbitration legislation led to the Uniform Law Conference of Canada ("ULCC") developing a uniform arbitration act in 1990 based on the *UNCITRAL Model Law*.<sup>30</sup> Modern domestic arbitration legislation anticipating the new hands-off approach had been introduced in British Columbia in 1986.<sup>31</sup> In the same year, Quebec codified this new approach in its *Code of Civil*

7 The court or judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, *may* make an order staying the proceedings [emphasis added].

See generally Paul L. Sayre, "Development of Commercial Arbitration Law" (1928) 37 Yale L.J. 595.

<sup>26</sup> Arbitration is popular with companies active in transnational trade and commerce because they want to avoid both the substantive and procedural laws of foreign states, laws that may be totally alien and unacceptable to one or both of the parties. See Errol P. Mendes, "Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration" (1986) 3:3 J. Int'l Arb. 71 at 81. American courts began deferring to arbitration ten years earlier, in the mid-1970s, characterizing the change as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction" (*Scherk v. Alberto-Culver*, 417 U.S. 506 at 516 (1974)).

<sup>27</sup> 10 June 1958, 330 U.N.T.S. 38 [*New York Convention*]. See also Cecil O.D. Branson, "The Enforcement of International Commercial Arbitration Agreements in Canada" (2000) 16 Arb. Int'l 19.

<sup>28</sup> *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*, 21 June 1985, 24 I.L.M. 1302 [*UNCITRAL Model Law*]. For general commentary on the adoption of the *UNCITRAL Model Law*, see Robert K. Paterson & Bonita J. Thompson, *UNCITRAL Arbitration Model in Canada* (Toronto: Carswell, 1987); Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and Commentary* (Deventer, The Netherlands: Kluwer, 1989).

<sup>29</sup> These events have been thoroughly chronicled. See e.g. Mendes, *supra* note 26; Henry C. Alvarez, "The Role of Arbitration in Canada—New Perspectives" (1987) 21 U.B.C. L. Rev. 247; John E.C. Brierley, "Quebec's New (1986) Arbitration Law" (1987-88) 13 Can. Bus. L.J. 58; Edward C. Chiasson, "Canada: No Man's Land No More" (1986) 3:2 J. Int'l Arb. 67; Paterson & Thompson, *ibid.*

<sup>30</sup> See Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting Held at Yellowknife, Northwest Territories, August 1989*, online: British Columbia Law Institute <<http://www.bcli.org/ulcc/proceedings/1989.pdf>> [*ULCC 1989*]; Uniform Law Conference of Canada, *Uniform Arbitration Act*, online: <<http://www.ulcc.ca/en/us/arbitrat.pdf>>.

<sup>31</sup> *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (enacted as *Commercial Arbitration Act*, S.B.C. 1986, c. 3) [*B.C. Arbitration Act*].

*Procedure*<sup>32</sup> and recognized arbitration agreements in its *Civil Code*.<sup>33</sup> Domestic arbitration legislation in Alberta<sup>34</sup> and Ontario<sup>35</sup> was changed in 1991 to reflect the new uniform law. Saskatchewan<sup>36</sup> and New Brunswick<sup>37</sup> followed suit the next year, as did Manitoba<sup>38</sup> and Nova Scotia<sup>39</sup> a few years later.

Under the new domestic arbitration legislation, courts cannot intervene in arbitration unless a provision in that legislation specifically allows them to do so.<sup>40</sup> If a party to an arbitration agreement brings an action in court based on a dispute that he or she agreed to submit to arbitration, the court in which that action is brought *must*, on application by the other party, stay the court action except in the limited circumstances listed in the legislation.<sup>41</sup> Courts took note of the change, and made the granting of stays mandatory:

[T]he *Arbitration Act*, s. 7 has rewritten the rules for a stay. The court must stay a suit in favour of arbitration when the plaintiff is a party to the contract for arbitration. It has no choice.<sup>42</sup>

The limited circumstances in which courts have discretion to refuse stays are key to understanding the cases discussed below. The modern domestic arbitration legislation in all of the common law provinces, except British Columbia, lists five

<sup>32</sup> Arts. 940-52 C.C.P.

<sup>33</sup> While the source of Quebec arbitration law lies in “old French law” (Brierley, *supra* note 29 at 61), as a practical matter there are no significant differences between Quebec’s regime and those of most of the common law provinces that adhere to the provisions of the *UNCITRAL Model Law* (*ibid.*).

<sup>34</sup> *Arbitration Act*, R.S.A. 2000, c. A-43 [*Alberta Arbitration Act*].

<sup>35</sup> *Arbitration Act, 1991*, S.O. 1991, c. 17 [*Ontario Arbitration Act*].

<sup>36</sup> *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1 [*Saskatchewan Arbitration Act*].

<sup>37</sup> *Arbitration Act*, S.N.B. 1992, c. A-10.1 [*New Brunswick Arbitration Act*].

<sup>38</sup> *The Arbitration Act*, S.M. 1997, c. 4, C.C.S.M. c. A120 (assented to 28 June 1997) [*Manitoba Arbitration Act*].

<sup>39</sup> *Commercial Arbitration Act*, S.N.S. 1999, c. 5 [*Nova Scotia Arbitration Act*].

<sup>40</sup> *Alberta Arbitration Act*, *supra* note 34, s. 6; *B.C. Arbitration Act*, *supra* note 31, s. 32; *Manitoba Arbitration Act*, *supra* note 38, s. 6; *New Brunswick Arbitration Act*, *supra* note 37, s. 6; *Nova Scotia Arbitration Act*, *ibid.*, s. 8; *Ontario Arbitration Act*, *supra* note 35, s. 6; Art. 940.3 C.C.P.; *Saskatchewan Arbitration Act*, *supra* note 36, s. 7.

<sup>41</sup> *Alberta Arbitration Act*, *ibid.*, s. 7; *B.C. Arbitration Act*, *ibid.*, s. 15; *Manitoba Arbitration Act*, *ibid.*, s. 7; *New Brunswick Arbitration Act*, *ibid.*, s. 7; *Nova Scotia Arbitration Act*, *ibid.*, s. 9; *Ontario Arbitration Act*, *ibid.*, s. 7; Art. 940.1 C.C.P.; *Saskatchewan Arbitration Act*, *ibid.*, s. 8.

<sup>42</sup> *International Resource Management (Canada) Ltd. v. Kappa Energy (Yemen) Inc.* (2001), 281 A.R. 373 at para. 12, 92 Alta. L.R. (3d) 25, 2001 ABCA 146. See also *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131, 98 D.L.R. (4th) 509 (Gen. Div.) [*Deluce Holdings* cited to O.R.]:

Whereas prior to the enactment of this legislation the courts in Ontario had a broad discretion whether or not to stay a court action, the focus has now been reversed: the court *must stay* the court proceeding and allow the arbitration to go ahead *unless* the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration (*Deluce Holdings*, *ibid.* at 148).

reasons the court may refuse a stay.<sup>43</sup> Only one of the five grounds is at issue in the cases: the ground that the arbitration agreement is invalid. In British Columbia, the equivalent statutory language mirrors that in the *New York Convention* and the *UNCITRAL Model Law* and provides that a court must stay court proceedings unless it determines the arbitration agreement is “null and void, inoperative or incapable of being performed.”<sup>44</sup> In Quebec, a court must refer the parties to arbitration unless “it finds the agreement null.”<sup>45</sup>

It is important to note that it is the arbitration agreement itself that must be invalid, void, inoperative, incapable of being performed, or null. Arbitration agreements may be stand-alone agreements or clauses within a main contract.<sup>46</sup> In standard form consumer contracts, they are one provision among many. Although none of the cases mentions it, arbitration clauses may be severed from the main contract and may survive even if the main contract is invalid.<sup>47</sup> This principle is known as separability.<sup>48</sup> An interrelated principle is that of competence-competence.<sup>49</sup> The legislation provides that the arbitrator has the authority to determine whether or

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<sup>43</sup> *Alberta Arbitration Act*, *supra* note 34, s. 7(2); *Manitoba Arbitration Act*, *supra* note 38, s. 7(2); *New Brunswick Arbitration Act*, *supra* note 37, s. 7(2); *Nova Scotia Arbitration Act*, *supra* note 39, s. 9(2); *Ontario Arbitration Act*, *supra* note 35, s. 7(2); *Saskatchewan Arbitration Act*, *supra* note 36, s. 8(2). All of these provisions list the following circumstances as those giving the court discretion to stay or refuse to stay the court action: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is invalid; (3) the subject matter of the dispute is not capable of being the subject of arbitration under provincial law; (4) the motion was brought with undue delay; and (5) the matter is a proper one for default or summary judgment.

<sup>44</sup> *New York Convention*, *supra* note 27, art. II(3); *UNCITRAL Model Law*, *supra* note 28, art. 8(1); *B.C. Arbitration Act*, *supra* note 31, s. 15(2).

<sup>45</sup> Art. 940.1 C.C.P.

<sup>46</sup> See *Alberta Arbitration Act*, *supra* note 34, s. 1(1)(a); *Manitoba Arbitration Act*, *supra* note 38, s. 1(1); *New Brunswick Arbitration Act*, *supra* note 37, s. 5(1); *Nova Scotia Arbitration Act*, *supra* note 39, s. 3(1)(a); *Ontario Arbitration Act*, *supra* note 35, s. 5(1); Art. 2642 C.C.Q.; *Saskatchewan Arbitration Act*, *supra* note 36, s. 6(1).

<sup>47</sup> See *Alberta Arbitration Act*, *ibid.*, s. 17(3); *Manitoba Arbitration Act*, *ibid.*, s. 17(3); *New Brunswick Arbitration Act*, *ibid.*, s. 17(2); *Nova Scotia Arbitration Act*, *ibid.*, s. 19(3); *Ontario Arbitration Act*, *ibid.*, s. 17(2); Art. 2642 C.C.Q.; *Saskatchewan Arbitration Act*, *supra* note 36, s. 18(3). The *Ontario Arbitration Act* contains a typical provision:

If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid (*ibid.*, s. 17(2)).

<sup>48</sup> See generally Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004) at paras. 3-60, 5-36; Gary B. Born, *International Commercial Arbitration*, 2d ed. (The Hague: Kluwer, 2001) at 56; W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3d ed. (Dobbs Ferry, N.Y.: Oceana Publications, 2000) (calling the autonomy of arbitration clauses “a conceptual cornerstone of international arbitration” at 48); J. Brian Casey, *International and Domestic Commercial Arbitration*, looseleaf (Toronto: Carswell) at para. 3.2.

<sup>49</sup> See generally Redfern & Hunter, *ibid.* at paras. 5-39 (discussing an arbitrator’s authority to rule on his or her own jurisdiction).

not an arbitration agreement is valid,<sup>50</sup> another important point not mentioned in the cases.

What explains the new legislative and judicial deference to arbitration? In the jurisdictional theory—the explanation underlying the pre-1986 Canadian legislation—arbitrators’ authority was seen as deriving from the recognition accorded arbitration by the state. State interests, as well as the needs of the parties, could legitimately be taken into account because the arbitrator exercised a power that the parties alone were unable to bestow. In the now-ascendant contractual theory, the justification for legislative and judicial deference rests on the principle of freedom of contract and the norm of party autonomy.<sup>51</sup> The arbitrator is seen as deriving his or her legitimacy and power from the parties’ contract, not from the state.<sup>52</sup> Resolution of the dispute is seen as being of interest only to the disputing parties.

## II. Consumer Arbitration Cases

There have been only six reported cases concerning the validity of pre-dispute consumer arbitration agreements: *Kanitz* in 2002; *MacKinnon v. National Money Mart*<sup>53</sup> and *Ayrton v. PRL Financial (Alta.) Ltd.*<sup>54</sup> in 2004; and *Dell Computer Corp. c.*

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<sup>50</sup> See *Alberta Arbitration Act*, *supra* note 34, s. 17(1); *Manitoba Arbitration Act*, *supra* note 38, s. 17(1); *New Brunswick Arbitration Act*, *supra* note 37, s. 17(1); *Nova Scotia Arbitration Act*, *supra* note 39, s. 19(1); *Ontario Arbitration Act*, *supra* note 35, s. 17(1); *Saskatchewan Arbitration Act*, *supra* note 36, s. 18(1). Again, the provision in the *Ontario Arbitration Act* is typical:

An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement (*ibid.*, s. 17(1)).

Art. 2642 C.C.Q. provides:

An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.

<sup>51</sup> See N.Z., Law Commission, *Report No. 20: Arbitration* (Welland, N.Z.: Law Commission, 1991) at 65-67; *LRCBC Report*, *supra* note 1 at 74. The central philosophy of the *UNCITRAL Model Law*, *supra* note 28, on which Canada’s modern domestic arbitration is based, is one of party autonomy. The guiding principles of party autonomy are: (1) parties should be free to design the arbitral process as they see fit, but the arbitral process should be “fair” to both parties; (2) parties who enter into valid arbitration agreements should be held to those agreements; (3) the arbitration tribunal should be neutral and as unbiased as possible, and should be empowered to determine its own jurisdiction; (4) the arbitration should proceed in confidence without substantial intervention by the courts; and (5) the resulting award should be readily enforceable, subject to review only on the basis of a limited and specified list of fatal flaws in form or procedure. See *ULCC 1989*, *supra* note 30.

<sup>52</sup> See *e.g.* Art. 2638 C.C.Q.:

An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.

<sup>53</sup> (2004), 203 B.C.A.C. 103, 2004 BCCA 473 [*MacKinnon* (C.A.)], *rev’g* (2004), 26 B.C.L.R. (4th) 172, 2004 BCSC 136 (S.C. (A.D.)) [*MacKinnon* (S.C.)], leave to appeal to S.C.C. requested.

*Union des consommateurs*,<sup>55</sup> *Stop n Cash 1450 v. Box*,<sup>56</sup> and *Smith v. National Money Mart Co.*<sup>57</sup> in 2005. The Supreme Court granted Dell Computer Corporation leave to appeal *Dell* in January 2006. National Money Mart's request for leave to appeal the *MacKinnon* decision is still pending, but the Supreme Court denied it leave to appeal the decision in *Smith* in March 2006. *Huras v. Primerica Financial Services Ltd.*,<sup>58</sup> an employee class action case decided in 2000, was referred to in *Kanitz*, *MacKinnon*, and *Smith* and therefore will also be considered in this part.

### A. Cases Applying the Stay Provisions of the Arbitration Legislation

Two different approaches are apparent in the case law. The two earliest cases, *Huras* and *Kanitz*, were determined on the basis of the arbitration legislation under which the applications to stay court proceedings were made. A main issue in each was whether the court had discretion to refuse to stay the court actions before them on the basis that the arbitration clauses were unconscionable and therefore invalid. Later decisions would sidestep the stay provisions of the arbitration legislation.

#### 1. *Huras v. Primerica Financial Services Ltd.*

In *Huras*, the plaintiff brought a class action on behalf of employees of Primerica who were required to undergo training without pay prior to commencing employment, contrary to Ontario's *Employment Standards Act*.<sup>59</sup> Primerica applied for a stay of the court proceedings based on an arbitration clause incorporated by reference into the employment contracts.<sup>60</sup> The plaintiff argued that the arbitration

<sup>54</sup> 369 A.R. 235, 2004 ABQB 787 [Ayrton].

<sup>55</sup> [2005] R.J.Q. 1448, 2005 QCCA 570 [*Dell* (C.A.)], aff'g on other grounds [2004] J.Q. No. 155 (Sup. Ct.) (QL) [*Dell* (Sup. Ct.)], leave to appeal to S.C.C. granted, (19 January 2006), No. 31067.

<sup>56</sup> [2005] O.J. No. 1233 (Ct. J. (Gen. Div. Sm. Cl. Ct.)) (QL) [*Box*].

<sup>57</sup> (2005), 258 D.L.R. (4th) 453, 204 O.A.C. 47 [*Smith* (C.A.) cited to D.L.R.], aff'g [2005] O.J. No. 2660 (Sup. Ct. J.) (QL) [*Smith* (S.C.J.)], leave to appeal to S.C.C. refused, (2 March 2006), No. 31233 (QL) [*Smith* (S.C.C.)].

<sup>58</sup> (2001), 55 O.R. (3d) 449, 13 C.P.C. (5th) 108 (C.A.) [*Huras* (C.A.) cited to O.R.], aff'g (2000), 13 C.P.C. (5th) 114 (Sup. Ct.) [*Huras* (S.C.J.)].

<sup>59</sup> R.S.O. 1990, c. E-14, s. 23.

<sup>60</sup> The arbitration clause provided:

Except as otherwise provided in this Agreement or another written agreement between you and a PFS Company, any dispute between you and a PFS Company ... will be settled solely through good faith negotiation (as described in the then current Operating Guideline on Good Faith Negotiation) or, if that fails, binding arbitration. "Dispute" means any type of dispute in any way related to your relationship with a PFS Company that under law may be submitted by agreement to binding arbitration, including allegations of breach of contract, personal or business injury or property damage, fraud and violation of federal, provincial or local statutes, rules or regulations. A PFS Company may exercise rights under this Agreement without first being required to enter into good faith negotiations or initiate arbitration for disputes covered by this section (*Huras* (C.A.), *supra* note 58 at 451-52 [emphasis omitted]).

agreement was invalid under subsection 7(2) of the *Ontario Arbitration Act*. Primerica's application for a stay was dismissed on the basis that the employment agreements were entered into after the training period had ended and the employees had begun full-time employment.

The determination that the dispute was not within the scope of the arbitration agreement was the only point on which the Ontario Court of Appeal upheld the judgment of the chambers judge, Justice Cumming. Justice Cumming had gone on to determine that the arbitration agreement was invalid because it was unconscionable. It was this *obiter* discussion of unconscionability that was relied upon in three of the consumer arbitration cases.

Justice Cumming noted that the agreement signed by the plaintiff was a standard form agreement, with the arbitration clause incorporated by reference. He took judicial notice of the inequality of bargaining power between Primerica and the non-unionized employees. In addition, the arbitration clause was one-sided: Primerica was expressly allowed to exercise its legal rights in court while the employees were required to arbitrate. Individual claims were for small amounts, but the arbitration clause required an expensive three-person arbitration panel, the standard in international commercial arbitration, but two more than usual in domestic arbitrations.<sup>61</sup> Justice Cumming concluded the arbitration clause denied the plaintiff access to *any* dispute resolution forum and was therefore unconscionable:

Two of the normative purposes of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. ... [S]omeone in the plaintiff's position is not as a practical reality going to seek an arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator.<sup>62</sup>

Justice Cumming also noted that, in addition to defeating the public policy objectives of arbitration, enforcing the arbitration clause would defeat the objectives of class actions.<sup>63</sup> While stating that it was not necessary to decide whether defeating

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<sup>61</sup> See *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9, Sch., Art. 10(2), which provides for three arbitrators if the parties fail to specify the number of arbitrators. Compare *Ontario Arbitration Act*, *supra* note 35, s. 9, which specified that the arbitral tribunal shall be composed of one arbitrator if the parties' agreement is silent. The *Ontario Arbitration Act* provides that

54(4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration.

<sup>62</sup> *Huras* (S.C.J.), *supra* note 58 at para. 43.

<sup>63</sup> *Ibid.* at para. 46. Class action legislation has three underlying policy objectives. One goal is to facilitate access to justice for claimants of relatively small amounts of money. A second objective aims at cost efficiencies by providing that common issues be litigated in a single proceeding involving many claimants. Third, class actions act as a mode of regulating business conduct, deterring wrongful

the objectives of the *Ontario Class Proceedings Act* would in itself render the arbitration clause unconscionable, he did find it a “relevant factor.”<sup>64</sup>

## 2. *Kanitz v. Rogers Cable*

*Kanitz* was the first Canadian case to deal with the question of whether the right to pursue a consumer class action could be contracted away by an arbitration clause in a standard form contract. The plaintiffs were former subscribers to Rogers@Home Internet service. Following a series of service disruptions, Rogers amended its @Home user agreement to add an arbitration clause and a waiver of subscribers’ right to commence or participate in a class action against Rogers, and posted the amendment on its website.<sup>65</sup>

The plaintiffs argued unsuccessfully that the arbitration agreement was unconscionable and therefore invalid under subsection 7(2) of the *Ontario Arbitration Act*. Justice Nordheimer acknowledged that there was an inequality of bargaining power between a single consumer and a corporation the size of Rogers. As he noted, there was no bargaining at all; it was a “take it or leave it” contract.<sup>66</sup> However, he rejected the argument that, by itself, the imposition of an arbitration clause that expressly excluded class actions was evidence that Rogers took advantage of its superior bargaining power. He noted that arbitration clauses merely require the parties to seek the same relief in a different forum. Rather than finding that the explicit prohibition against commencing or participating in a class action was a factor indicating the arbitration clause was unconscionable, Justice Nordheimer held that any valid arbitration clause would have the same effect. Neither did the plaintiffs

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conduct (*ibid.* at para. 45). See also *Dutton*, *supra* note 14 at para. 27; *Hollick v. Toronto (City of)*, [2001] 3 S.C.R. 158 at para. 15, 205 D.L.R. (4th) 19, 2001 SCC 68.

<sup>64</sup> *Huras* (S.C.J.), *supra* note 58 at para. 46.

<sup>65</sup> The relevant portion of the arbitration clause reads as follows:

Arbitration. Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to: (a) this Agreement; (b) Rogers@Home; (c) oral or written statements, advertisements or promotions relating to this Agreement or to Rogers@Home or (d) the relationships which result from this Agreement (including relationships with third parties who are not signatories to this Agreement) (collectively the “[ ]Claim”), will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us (*Kanitz*, *supra* note 15 at 302-303).

Rogers’ method of inserting the arbitration clause into subscribers’ user agreement was an issue. The initial user agreement provided that Rogers could amend it by posting notice of an amendment on its website. Subscribers consented to the amended terms with their continued use of the service. Nordheimer J. held that subscribers had a duty to check Rogers’ website to determine if any changes to the user agreement had been made, applying *Rudder v. Microsoft*, (1999) 47 C.C.L.T. (2d) 168, 40 C.P.C. (4th) 394, 2 C.P.R. (4th) 474 (Sup. Ct.).

<sup>66</sup> *Kanitz*, *ibid.* at para. 38.

prove the arbitration clause was improvident. They had argued that the arbitration clause amounted to a waiver of any remedy because no individual subscriber would pursue arbitration for the small amounts involved. Justice Nordheimer found there was no evidence that any subscriber had tried to arbitrate a claim and had been put off from doing so because of the expense.<sup>67</sup> Because the plaintiffs failed to prove the arbitration clause in the user agreement was invalid, the court had no discretion to refuse to stay their proposed class action under the terms of subsection 7(2).

Following the lead of Justice Cumming in *Huras*, the plaintiffs also argued that the prohibition against class actions defeated the public policy objectives behind the *Ontario Class Proceedings Act*.<sup>68</sup> Justice Nordheimer rejected this argument for two reasons. First, Ontario courts had always held that the *Ontario Class Proceedings Act* was a procedural statute only,<sup>69</sup> whereas the arbitration clause in *Huras* denied the plaintiff's mandatory legal rights.<sup>70</sup> Second, Justice Nordheimer noted that there were two public policies at issue: one behind the class proceedings legislation and another embodied in the arbitration statute. He saw no reason to prefer one to the other, nor did he see the two policies as conflicting if approached sequentially: "The *Class Proceedings Act, 1992* was passed after the *Arbitration Act, 1991*. If the legislature had intended that the former was to be given precedence over the latter, it could have so provided."<sup>71</sup>

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<sup>67</sup> On this point, he adopted the observation made by Rehnquist C.J., writing for the majority in a 5:4 decision of the United States Supreme Court in *Randolph*, *supra* note 10 at 90-91. *Randolph* was the first consumer arbitration case in which the court considered whether arbitration is cost prohibitive to low-income consumers. The majority ruled that an arbitration agreement's silence on the costs of arbitration did not render it invalid. The primary focus of Ginsburg J.'s dissenting opinion was that the burden of proof should have been placed on the petitioner, a business that was an arbitration repeat-player, with more knowledge regarding the costs of arbitration proceedings (*ibid.* at 94-97). For critiques of *Randolph*, see *e.g.* Cappalli, *supra* note 13 at 409-13; Lucille M. Ponte, "Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?" (2001) 3 *Tul. J. Tech. & Intell. Prop.* 55 at 698-701; Mark Berger, "Arbitration and Arbitrability: Toward an Expectation Model" (2004) 56 *Baylor L. Rev.* 753 at 773-74.

<sup>68</sup> *Supra* note 14.

<sup>69</sup> A class action is generally viewed as a procedural vehicle, rather than a substantive right, because it provides a new method of resolving disputes but does not change the underlying legal principles. However, the third justification for class actions—the behaviour modification objective—seems to go beyond procedural issues to consider outcome fairness. See John C. Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall L.J.* 817 at 826.

<sup>70</sup> "Mandatory legal rights" are those statutory rights that cannot be waived by the person to whom they are granted. In *Huras*, *supra* note 58, they were the plaintiff's rights under the *Employment Standards Act*, *supra* note 59.

<sup>71</sup> *Kanitz*, *supra* note 15 at para. 52.

## **B. Cases Sidestepping the Stay Provisions of Arbitration Legislation**

Later decisions sidestepped arbitration legislation. The British Columbia *MacKinnon* case started this trend and *Smith* applied *MacKinnon* without considering the difference in the wording of Ontario's stay provisions. *Ayrton* relied exclusively on Alberta's consumer protection legislation. The *Dell* case from Quebec was decided on the basis that there was no arbitration clause in existence to enforce. While the Quebec Court of Appeal acknowledged the conflict between the arbitration and class proceedings legislation, it did not suggest how the conflict might be resolved.

### **1. *MacKinnon v. National Money Mart***

*MacKinnon* has proven to be the most influential on consumer arbitration clauses to date. The decision of Justice Brown in the Supreme Court, as well the decision of Justice Levine writing for a five-judge panel in the Court of Appeal, will therefore be reviewed in detail.

The plaintiff claimed that the payday loans of Money Mart and other alternative financial service providers offended paragraph 347(1)(a) of the *Criminal Code*<sup>72</sup> by exacting loan fees at usurious rates of interest. Some defendants, including Money Mart, had arbitration clauses in their payday loan agreements. Some of these agreements also expressly excluded class actions.<sup>73</sup> Money Mart applied under section 15 of the *B.C. Arbitration Act*<sup>74</sup> for a stay of *MacKinnon*'s action. Two months later, *MacKinnon* applied for certification of his proposed class action under the *B.C. Class Proceedings Act*.<sup>75</sup> Money Mart's stay application was heard as part of

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<sup>72</sup> R.S.C. 1985, c. C-46. For discussions of section 347 (then section 305.1), see *e.g.* Jacob S. Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986) 11 *Can. Bus. L.J.* 233; Stephen Antle, "A Practical Guide to Section 347 of the Criminal Code—Criminal Rates of Interest" (1994) 23 *Can. Bus. L.J.* 323; Sara Smyth, "Criminalizing Usury: The Evolution and Application of S. 347 of the *Criminal Code*" (2001) 7 *Appeal* 24.

<sup>73</sup> Money Mart introduced an arbitration clause into its standard form payday loan agreement in January 2001 and amended it in 2003. Before May 2003, Money Mart's standard arbitration clause provided:

Any claim, dispute or issue whether in contract, tort or otherwise, arising out of or in connection with the Loan or this Loan Agreement or any prior or future loan agreements between the parties, including any issue regarding related fees, advertising, promotion or any oral or written statement or the absence thereof, default of payment, and/or the relationship between the parties shall, upon the election by either party be resolved by binding arbitration in accordance with the Arbitration Act of Alberta as amended (the "Act"). No joinder or consolidation of claims with other persons are permitted without the consent of the parties hereto. In the event of a conflict between this arbitration provision and the Act, the terms of this arbitration provision shall govern (cited in *Smith* (S.C.J.), *supra* note 57 at para. 22).

<sup>74</sup> *Supra* note 31.

<sup>75</sup> *Supra* note 14.

MacKinnon’s certification application. Hearing the two applications together contributed to the result.

Money Mart made the same “sequential approach” argument that had succeeded in *Kanitz*,<sup>76</sup> arguing that the older arbitration statute took priority over the newer class proceedings statute because the legislature could have expressly excluded class proceedings from the purview of the arbitration statute and did not do so. They added that, because an application for a stay must be made before a statement of defence is filed and certification hearings take place after a defence is filed, there is no conflict between the two statutes.

In the British Columbia Supreme Court, Justice Brown held that a stay would not serve the policy objectives of either statute, for many of the same reasons given by Justice Cumming in *Huras*,<sup>77</sup> the decision on which she relied. She rejected the sequential approach, concluding that the two statutes could be read harmoniously by finding that, if a court must certify under the class proceedings legislation, the arbitration clause becomes inoperative.<sup>78</sup> She interpreted “inoperative” to refer to arbitration agreements that, while valid to begin with, later became ineffective.<sup>79</sup>

Justice Levine, in the British Columbia Court of Appeal, also rejected the sequential approach argument. She did so on the basis that it did not consider the entire context or objectives of both statutes. Part of that context was the direction in the *B.C. Class Proceedings Act* to determine whether a class proceeding was a “preferable procedure”.<sup>80</sup> Finding that the objectives of the statutes conflicted and that applications for certification and applications for stays must be heard together because their outcomes are interdependent, she held:

The Legislature has not dealt with the competing statutory mandates directly. In this context, the balancing of public policies and statutory objectives is required. It is not necessary that the court conclude that the arbitration

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<sup>76</sup> See text accompanying note 71.

<sup>77</sup> See *supra* notes 62-63 and accompanying text. Brown J. found the need for an expert’s report on criminal rates of interest would, by itself, make both ordinary litigation and arbitration uneconomical and defeat the cost-saving objectives of both statutes.

<sup>78</sup> *B.C. Class Proceedings Act*, *supra* note 14 provides:

4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

...

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues (*ibid.*, s. 4(1)).

<sup>79</sup> *MacKinnon* (S.C.), *supra* note 53 at para. 32. The court referred to Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989) at 464. Mustill & Boyd write, “The expression ‘inoperative’ has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future” (*ibid.* at 464).

<sup>80</sup> *Supra* note 14, s. 4(1)(d).

agreement is unenforceable because it is “unconscionable”; the test is whether the arbitration agreement is “inoperative” in the face of a procedure that the court finds “preferable”.<sup>81</sup>

The court concluded that Justice Brown’s decision to refuse the stay before deciding whether MacKinnon’s action would be certified was premature. While agreeing that “[i]f a proceeding is certified as a class proceeding, it logically and legally follows that an arbitration agreement is ‘inoperative’,”<sup>82</sup> Justice Levine held the lower court had to first determine whether the proceeding would be certified. That issue was therefore remitted for reconsideration.<sup>83</sup>

It appears that the British Columbia Court of Appeal agreed with Justice Brown’s interpretation of “inoperative” as referring to arbitration agreements that were valid at one time but thereafter ceased to have any effect. The British Columbia statute’s wording tracks that of the *New York Convention* and *UNCITRAL Model Law* and Justice Brown’s interpretation of the term is an accepted one in the international commercial arbitration context.<sup>84</sup> However, the usual examples of events causing such subsequent ineffectiveness are events such as waiver, revocation, failure to comply with time limits, and similar conduct by the parties themselves.<sup>85</sup> In this case, it was the court’s decision to hear the stay and certification applications together and to apply the certification provision of the class proceedings legislation first that made it “logically and legally”<sup>86</sup> follow that the previously valid arbitration agreement became ineffective.

Both courts in *MacKinnon* found that the *B.C. Class Proceedings Act* takes precedence over the *B.C. Arbitration Act*. The former tells the court it has no discretion but to certify the action if the conditions in its section 4 are met. The latter tells the court that it has no discretion but to stay the action unless the arbitration clause is, among other things, inoperative. If you apply the former act first, then certification makes the arbitration clause inoperative. But why should a court determine whether the proceedings meet the criteria for certification first? Why not determine the stay application under the arbitration legislation governing it first? The outcomes of the applications are certainly interdependent, as the Court of Appeal stated, but that does not answer the question of which statute to apply first.

Money Mart also challenged the lower court’s refusal to stay on the basis that it gave insufficient consideration to the policy goal of holding people to their

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<sup>81</sup> *MacKinnon* (C.A.), *supra* note 53 at para. 46.

<sup>82</sup> *Ibid.* at para. 4.

<sup>83</sup> Certification was denied in March 2005 on the basis that MacKinnon had failed to prove common issues (*MacKinnon v. National Money Mart Co.*, 2005 BCSC 271).

<sup>84</sup> See Born, *supra* note 48 at 160.

<sup>85</sup> See *ibid.* See also Redfern & Hunter, *supra* note 48 (stating that an arbitration agreement may be held to be inoperative where the parties fail “to comply with a time-limit” or where they “have by their conduct impliedly revoked the arbitration agreement” at para. 3-71).

<sup>86</sup> *MacKinnon* (C.A.), *supra* note 53 at para. 4.

contracts.<sup>87</sup> Justice Levine agreed that this goal was important, based on “the need for certainty and predictability in the interpretation of arbitration statutes because of their international implications.”<sup>88</sup> Citing *Huras* and *Kanitz*, she noted, however, that these goals have limited applicability when the arbitration clause is inserted into a standard form consumer agreement between parties of unequal bargaining power. She did note that in those two cases and in American jurisprudence, analysis of the validity of arbitration clauses in the face of class proceedings focused on whether the arbitration clauses were “unconscionable.”<sup>89</sup> The court therefore found that jurisprudence of little assistance. It noted the threshold for establishing an agreement as unconscionable was higher than the threshold for establishing it as inoperative.

Unconscionability is typically a reason for finding an arbitration agreement “null and void”, to use the wording in the British Columbia stay provision. Most commentators interpret these same terms in the *New York Convention* and the *UNCITRAL Model Law* as referring to cases where the arbitration agreement is ineffective from the outset. In addition to unconscionability, typical defences that make it so include fraud, duress, illegality, and mistake.<sup>90</sup> The point is not so much that there is a different threshold between “null and void” and “inoperative” as it is that the terms refer to different types of problems.<sup>91</sup>

The British Columbia courts made much of the unique wording in their legislation’s stay provision. Before the decision in *MacKinnon* could be persuasive outside of that province, one might think that the meaning of the term “invalid” used in the legislation of the other common law provinces needs to be addressed. As a substitute for the tripartite language in the British Columbia legislation, does “invalid” include “null and void” and “inoperative” and “incapable of being performed”? Or does it instead refer only to events that make the arbitration agreement invalid from the outset, the equivalent of “null and void”?<sup>92</sup> That question has yet to be answered.<sup>93</sup> *MacKinnon* was applied wholesale in *Smith*. The Superior

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<sup>87</sup> The principle that parties who enter into valid arbitration agreements should be held to those agreements is one of the principles of the modern domestic arbitration legislation. See *supra* note 50.

<sup>88</sup> *MacKinnon* (C.A.), *supra* note 53 at para. 32.

<sup>89</sup> *Ibid.* at para. 37.

<sup>90</sup> See Born, *supra* note 48 at 160; Casey, *supra* note 48 at para. 4.5(b)(i).

<sup>91</sup> The third phrase in the *New York Convention*, *supra* note 27, *UNCITRAL Model Law*, *supra* note 28, and *B.C. Arbitration Act*, *supra* note 31, is “incapable of being performed.” Usually, this expression is interpreted to apply to the narrowest range of events, when agreed upon procedures are physically impossible to follow due to events beyond the control of the parties. Such events include the death of a named arbitrator, or the shutting down of the arbitration provider named to appoint the arbitrator. See Born, *ibid.* at 160; Redfern & Martin, *supra* note 48 at para. 3-71; Casey, *ibid.* at para. 4.5(b)(iii).

<sup>92</sup> Both *Kanitz* (*supra* note 15) and *Huras* (*supra* note 58) treated unconscionability, one of the bases of the “null and void” ground in *UNCITRAL Model Law* terms, as coming within the “invalid” ground for refusing a stay. For further discussion of these concepts, see the text accompanying notes 43 and 44.

<sup>93</sup> See Casey, *supra* note 48 at para. 4.5(a)(i)(B).

Court judge mentioned that the Ontario and British Columbia legislation were “distinguishable”,<sup>94</sup> but did not comment on the effect the difference might have, if any. The Court of Appeal mentioned only that a judge hearing a certification application would want to consider the “slightly different wording”<sup>95</sup> in the *Ontario Arbitration Act*.

## 2. *Smith v. National Money Mart*

Like *MacKinnon*, *Smith* involved a proposed class action against Money Mart, again based on a claim that the interest charges on payday loans were usurious. Money Mart sought a stay to enforce the arbitration clause in its payday loan agreement.<sup>96</sup> That agreement also prohibited participation in class actions and imposed a shortened limitation period of one year.<sup>97</sup>

In the lower court decision in *Smith*, Justice Macdonald held that it was illogical to assume that the legislature, which enacted the *Ontario Class Proceedings Act* after the *Ontario Arbitration Act*, intended to create a legislative scheme that would permit companies to shield themselves from class action legislation.<sup>98</sup> She noted that arbitrators do not have jurisdiction over class proceedings; only the Superior Court of Justice has such jurisdiction.<sup>99</sup> On that basis, Justice Macdonald held that the arbitration clauses in Money Mart’s agreements “cannot be construed to exclude class action claims.”<sup>100</sup>

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<sup>94</sup> *Smith* (S.C.J.), *supra* note 58 at para. 26.

<sup>95</sup> *Smith* (C.A.), *supra* note 58 at para. 15.

<sup>96</sup> The arbitration clause in agreements entered into after May 2003 provided:

In the event that the parties are unable to resolve any such Claim by mediation, the parties agree to have the Claim determined by private and confidential arbitration before a single arbitrator jointly appointed by the parties and the costs of the arbitrator will be paid by Money Mart. The parties may elect to proceed with the arbitration in person, in writing only, or electronically using an Internet or online arbitration service jointly appointed by the parties (cited in *Smith* (S.C.J.), *supra* note 58 at para. 18).

<sup>97</sup> *Ibid.* Section 22(1) of the *Limitation Act, 2002* (Schedule B of the *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24) now provides that the limitation periods set by the act apply despite any agreement to vary or exclude them. The basic limitation period is two years, pursuant to section 4 of the act.

<sup>98</sup> She did not refer to *Kanitz*, in which the court had held the opposite (*supra* note 15 at para. 49). Macdonald J. saw the arbitration provisions of the payday loan agreements with Money Mart “as an attempt on the part of Money Mart to immunize itself from the Class Proceedings Act and more generally the jurisdiction of the Superior Court” (*Smith* (S.C.J.), *ibid.*).

<sup>99</sup> In *Kanitz*, (*ibid.*), Nordheimer J. suggested that class-wide arbitrations might be possible. Subsection 8(5) of the *Ontario Arbitration Act* (*supra* note 35) allows the parties to agree to consolidate arbitrations. On the topic of class-wide arbitrations, see Donald Bisson & Shaun Finn, “A Disputed Alternative to Alternative Dispute Resolution: A Discussion of Class-Wide Arbitration and Its Relevance for Québec Class Action Litigants and Practitioners” (2004) 83 Can. Bar Rev. 309.

<sup>100</sup> *Smith* (S.C.J.), *supra* note 57 at para. 27.

Justice Macdonald followed *MacKinnon* in determining that the proper time and place to consider arbitration is during the application for certification. She noted that the “preferable procedure” criteria in section 5 of the *Ontario Class Proceedings Act* “contemplat[e] an examination by a Superior Court judge of whether a class proceeding or arbitration is the better procedure for resolution of any dispute on a class wide basis.”<sup>101</sup> With respect, arbitration can be considered during the certification proceedings only by ignoring the stay provisions of the *Ontario Arbitration Act*. This is exactly what Justice Macdonald indicated should be done:

I agree that the question of *whether or not there is an enforceable arbitration clause is a matter that is not relevant to the Arbitration Act, 1991* but is relevant to the preferable procedure determinations that will be eventually made in this action under s. 5 of the Class Proceedings Act, 1992.<sup>102</sup>

Justice Macdonald added that, even if arbitration were a preferable procedure for the resolution of the parties’ dispute, she would not grant Money Mart’s application because subsection 7(2) of the *Ontario Arbitration Act* provides that a stay need not be granted where the arbitration agreement is invalid. The plaintiffs had sought a declaration that their payday loan contracts, in their entirety, were void and unenforceable by reason of their illegality. Relying on three dubious precedents—the 1942 House of Lords decision in *Heyman v. Darwins Ltd.*,<sup>103</sup> a 2005 decision of the Supreme Court of Florida that has now been reversed by the United States Supreme Court,<sup>104</sup> and the Small Claims Court decision in *Box*<sup>105</sup>—she then held:

Once issues of illegality are raised, the principles that flow from *Scott v. Avery* ... must be viewed in the context of these issues. Accordingly, I reject the submission of Money Mart that *Scott* and *Avery* clauses are entitled to the

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<sup>101</sup> *Ibid.* at para. 25. The *Ontario Class Proceedings Act*, *supra* note 14, states:

5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

...

(d) a class proceeding would be the preferable procedure for the resolution of the common issues.

<sup>102</sup> *Smith* (S.C.J.), *ibid.* at para. 26 [emphasis added]. Macdonald J. justified ignoring the stay provisions of the *Ontario Arbitration Act* on the basis that “[t]his question has been decided by a five member panel of the British Columbia Court of Appeal in *MacKinnon* ...” (*ibid.*).

<sup>103</sup> [1942] A.C. 356, 1 All E.R. 337 (H.L.) [*Heyman* cited to A.C.]. *Heyman* is a decision under the *U.K. Arbitration Act*, *supra* note 24, that made the granting of a stay a discretionary matter for the courts. It was the leading case on how a court’s discretion should be exercised.

<sup>104</sup> *Cardegna v. Buckeye Check Cashing*, 894 So. 2d 860 (Fla. 2005), rev’d 546 U.S. 440 (2006) [*Cardegna*]. The issue before the Supreme Court was whether it is the arbitrator or a judge who decides whether a contract that contains an arbitration agreement is void. The court held that, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is to be determined by the arbitrator in the first instance. The court relied on *Federal Arbitration Act*, 9 U.S.C. §§1ff (1925) [*Federal Arbitration Act*]. Canada has no equivalent to this federal law, making the use of American precedents in Canada problematic.

<sup>105</sup> *Supra* note 56. See the discussion of *Box* below.

mandatory stay set out in s. 7 of the Arbitration Act, 1991. This may be so as a statement of general principle but the facts as alleged in this case yield a contrary result.<sup>106</sup>

Although the reasoning is not clear, it would seem that Justice Macdonald found the arbitration clause within the allegedly illegal main contract to be invalid. It is the separable arbitration clause itself that must be found to be invalid, however; an arbitration clause may survive a main agreement that is otherwise invalid.<sup>107</sup> Her omission of any discussion of these points and her reliance on three problem precedents make her reasoning on this issue less than persuasive.

The Ontario Court of Appeal's short judgment in *Smith* is actually a decision on Smith's application to quash Money Mart's appeal of Justice Macdonald's judgment on the basis that a decision to issue or refuse a stay cannot be appealed under subsection 7(6) of the *Ontario Arbitration Act*.<sup>108</sup> The simplicity and particularity of this issue may be why the Supreme Court of Canada refused to grant leave to appeal this decision.<sup>109</sup>

We now have two appellate decisions adopting the same approach to the perceived conflict between the objectives behind arbitration and class proceedings legislation. There is a third appellate decision in the consumer arbitration context, the *Dell* case from Quebec, which mentioned the same conflict without suggesting how it might be resolved in that province.

### 3. *Dell Computer Corp. c. Union des consommateurs*

For three days in 2003, Dell's website contained a pricing error for two electronic products. On the third day, Dell posted a correction notice and sent messages to those who had ordered the product, explaining the error and refusing to process their orders.

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<sup>106</sup> *Smith* (S.C.J.), *supra* note 57 at para. 29. In *Scott v. Avery* (1856), 5 H.L. Cas. 811, 10 E.R. 1121, the court held that, when a contract provided that the parties agreed to waive their right of access to the courts and submit their dispute *first* to arbitration, that provision should be enforced and would be a defence to a court action. Under the *Ontario Arbitration Act*, *supra* note 35, s. 5(4), a *Scott v. Avery* clause is an ordinary agreement to arbitrate. Macdonald J.'s emphasis on *Scott v. Avery* clauses is puzzling.

<sup>107</sup> *Ontario Arbitration Act*, *ibid.*, s. 17(2). See the discussion of these provisions in the text accompanying notes 47 and 48, above.

<sup>108</sup> Money Mart had relied on *Huras* (C.A.), *supra* note 58, to argue its appeal should not be quashed. Weiler J.A., writing for a unanimous court, distinguished *Huras* on the basis that the dispute in that case was not within the scope of the arbitration clause and the *Ontario Arbitration Act* was therefore inapplicable. Macdonald J. had not made "a final determination as to whether arbitration was the *appropriate* forum" to resolve the dispute: *Smith* (C.A.), *supra* note 57, at para. 13 [emphasis added]. The motion to quash the appeal was therefore granted.

<sup>109</sup> *Smith* (C.A.), *supra* note 58. Leave to appeal to the Supreme Court of Canada was refused without reasons: *Smith* (S.C.C.), *supra* note 57. It may be that the 30 July 2005 enactment of Ontario legislation invalidating consumer agreement clauses that require arbitration and prevent class actions was a factor. See the discussion of this legislation in Part IV.A. below.

The Union des consommateurs applied to the Quebec Superior Court for permission to commence a class action in the name of all consumers who had tried to purchase one of the erroneously priced products. Dell applied to stay the proposed class action, arguing that the Superior Court was not the proper forum for the interpretation and enforcement of the agreement concluded when the goods were ordered, because the agreement included an arbitration clause. The clause provided that disputes between Dell and its customers were to be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum (“NAF”), headquartered in Minneapolis.<sup>110</sup>

The court dismissed Dell’s application and authorized the class action, holding that under article 3149 C.C.Q. the waiver of jurisdiction of Quebec authorities could not be set up against the consumer.<sup>111</sup> The Court of Appeal dismissed Dell’s appeal, but for different reasons. It held that article 3149 did not apply because NAF rules allowed an arbitration supervised by that provider to be heard in Quebec, applying Quebec law. The arbitration clause could not be set up against consumers, however, because it was an external clause that had not been brought to the consumers’ attention as required by article 1435 C.C.Q.<sup>112</sup>

The Court of Appeal in *Dell* briefly discussed whether an arbitration clause could exclude class actions. It noted that the legislature has recognized both arbitration and class actions as legitimate mechanisms for the resolution of disputes, without any suggestion that one takes precedence over the other. It concluded that disputes about the effect of arbitration clauses on the ability to proceed by way of class action must be considered on a case-by-case basis, but said nothing more on the issue.

It should be noted that in Quebec’s class proceedings legislation, there are no “preferable procedure” criteria to meet in an application to institute a class action.<sup>113</sup>

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<sup>110</sup> The relevant portion of clause 13(c) provided:

Arbitrage. Une réclamation, un conflit ou une controverse ... contre Dell, ... devra être réglé de façon exclusive et définitive par voie d’arbitrage obligatoire organisé par le National Arbitration Forum («NAF») conformément à son code de procédure et aux procédures particulières concernant le règlement de petites réclamations et (ou) de conflits entre consommateurs alors en vigueur (qui peuvent être consultés sur Internet ... ou par téléphone ... ) (*Dell (C.A.)*, *supra* note 55 at para. 11).

This arbitration clause is included in “Dell Terms of Sale”, *supra* note 12.

<sup>111</sup> *Dell* (Sup. Ct.), *supra* note 55.

<sup>112</sup> Art. 1435 C.C.Q. provides that an external clause in a consumer contract is null if, at the time of the formation of the contract, it was not expressly brought to the attention of the consumer. The Dell clause was incorporated by a reference printed in small characters at the bottom of a page, and review of the terms of sale was not a compulsory step prior to making an order. See also *Aspencer1.com Inc. c. Paysystems Corp.*, [2005] J.Q. No. 1573 (C.Q. (Civ. Div.)) (QL) (refusing to give effect to an arbitration clause found in an electronic contract because it had been added after the initial formation of the contract and without the consumer’s consent).

<sup>113</sup> Art. 1003 C.C.P. provides that a court may authorize the bringing of the class action if the court is of the opinion that:

The approach of the Ontario and British Columbia Courts of Appeal therefore appears to be inapplicable in Quebec. It should also be noted that the Quebec courts and the National Assembly have been very much in favour of class actions.<sup>114</sup>

Until the Supreme Court of Canada hears Dell's appeal, and unless the Court decides differently, it appears possible in Quebec that an arbitration clause in a consumer contract may be upheld if the terms of arbitration are expressly brought to the attention of the buyer when the agreement is made. It is also possible that the existence of an arbitration clause may preclude a class action. One issue that might pose problems for the consumer association on this appeal is whether or not Quebec's consumer protection legislation applies to Dell's arbitration clause. As is the case in the common law provinces, the arbitration clause is a separate contract.<sup>115</sup> It is not a contract for the provision of goods or services by the NAF to the consumer, but an agreement between Dell and the consumer that they will submit their disputes to arbitration supervised by a named provider. Standing alone, can it be characterized as a consumer contract?<sup>116</sup>

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- (a) the recourses of the members raise identical, similar or related questions of law or fact;
  - (b) the facts alleged seem to justify the conclusions sought;
  - (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
  - (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

<sup>114</sup> See e.g. Stuart Kugler & Robert Kugler, "Quebec: The Class Action Haven" (2004) 1 Can. Class Action Rev. 155; Christine Carron, "25 Years of Class Actions in Quebec: Time to Take Stock?" (2004) 1 Can. Class Action Rev. 141.

<sup>115</sup> Art. 2642 C.C.Q. provides:

An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.

<sup>116</sup> See e.g. *Consumer Protection Act*, R.S.Q. c. P-40.1. Pursuant to section 8,

The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable (*ibid.*, s. 8).

Section 2, however, provides that the act "applies to every contract for goods or services entered into between a consumer and a merchant in the course of his business" (*ibid.*, s. 2). See also Art. 1437 C.C.Q. "An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced" (*ibid.*). An abusive clause is defined in the same article as "one excessively and unreasonably detrimental to the consumer ..." (*ibid.*). Art. 1384 C.C.Q. states

A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.

#### 4. *Ayrton v. PRL Financial (Alta.) Ltd.*

In *Ayrton*,<sup>117</sup> the court took an approach similar to that taken in *MacKinnon* and *Smith*, but not on the basis of class action legislation. *Ayrton* is the only case dealing with Alberta's regulation of arbitration clauses in consumer contracts. Section 16 of the *Alberta Fair Trading Act*,<sup>118</sup> enacted in 1998, appears to be unique to consumer protection legislation across Canada. It provides:

16 Despite any provision of this Act, neither a consumer nor the Director may commence or maintain an action or appeal under sections 13 to 15 if the consumer's cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister.

Section 16 is worded as a denial of access to the courts.<sup>119</sup> Consumers must arbitrate their claims under the *Alberta Fair Trading Act* if they have agreed in writing to do so and if the Alberta government has approved the arbitration agreement. Nothing in the statute or its regulations indicates the basis on which the minister of government services will approve or disapprove an arbitration agreement. Indeed, the only agreements to arbitrate approved to date—in the eight years since section 16 was enacted—are those under the Canadian Motor Vehicle Arbitration Plan (“CAMVAP”).<sup>120</sup>

Like the cases discussed above, *Ayrton* involved payday loans, allegedly usurious interest rates, and a proposed class action. The plaintiff also claimed that the defendant violated the *Alberta Fair Trading Act* by failing to disclose the total cost of credit. The plaintiff signed a broker fee authorization and a loan agreement and disclosure statement, both of which contained arbitration clauses. The defendant applied for a stay of *Ayrton*'s court action under subsection 7(1) of the *Alberta*

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<sup>117</sup> *Supra* note 54.

<sup>118</sup> *Supra* note 3.

<sup>119</sup> Section 13 of the *Alberta Fair Trading Act*, *ibid.*, provides a consumer with access to the Court of Queen's Bench if the consumer has suffered loss or damage due to an unfair practice in a consumer transaction. Section 14 provides the consumer with access to Alberta's Small Claims Court for the same causes of action. Section 15 allows the director named pursuant to the act to commence an action on behalf of the consumer.

<sup>120</sup> Email from Alberta Government Services to the author (27 September 2005) [on file with the author]. CAMVAP is an arbitration program that resolves disputes between buyers and automobile manufacturers about alleged manufacturing defects and about the manufacturer's interpretation or implementation of its new vehicle warranty. CAMVAP is a corporation whose members include the governments of all the provinces and territories, as well as the Consumers' Association of Canada, Canadian Vehicle Manufacturers' Association, Association of International Automobile Manufacturers of Canada, and Canadian Automobile Dealers' Association. See *Your Guide to CAMVAP* (N.p.: CAMVAP, 2003), online: Canadian Motor Vehicle Arbitration Plan <[http://camvap.ca/eng/consumers\\_guide.htm](http://camvap.ca/eng/consumers_guide.htm)> [*CAMVAP Guide*].

*Arbitration Act*. However, they could not produce evidence that the required ministerial approval had been obtained and so its application to stay was dismissed.<sup>121</sup>

The plaintiff argued that the failure of the defendant to comply with section 16 of the *Alberta Fair Trading Act* rendered the arbitration clauses invalid under paragraph 7(2)(b) of the *Alberta Arbitration Act*. Justice LoVecchio did not find it necessary to decide this question. He held that the application for a stay could “be resolved through the *Fair Trading Act*, a statute that may co-exist with the *Arbitration Act*,”<sup>122</sup> but did not explain how the two might coexist. With respect, the only way the two statutes could do so would be if the failure to comply with section 16 of the *Alberta Fair Trading Act* rendered the arbitration clause invalid under the stay provision of the *Alberta Arbitration Act*.

### 5. *Stop n Cash 1450 v. Box*

*Box* is a March 2005 oral judgment, also involving payday loans. It is the only case involving the jurisdiction of a small claims court and the only case not involving a stay application.<sup>123</sup> It was a simple collection matter. *Box*’s “Client Loan Application” with Stop n Cash 1450 included the following remarkable arbitration clause:

In the event that a customer believes that any charge is unfair, excessive or usurious, the parties agree that the customer will submit the matter to arbitration pursuant to the Arbitration Act, 1991, if in Ontario or pursuant to comparable legislation if outside of Ontario and shall not commence any court proceeding nor participate in any court proceeding nor use as a defense in any court proceeding any allegation that any charge is unfair, excessive or usurious.<sup>124</sup>

Although *Box* was not a stay application, Deputy Judge House noted that an arbitration pursuant to the *Ontario Arbitration Act* would be mandatory if the borrower wanted to challenge the loan charges as usurious in the courts. He found the arbitration clause was “clearly void against public policy ... [because] an aggrieved party cannot be prohibited from pursuing his or her rights with respect to an illegal contract.”<sup>125</sup> The borrower was not actually prevented from pursuing his or her rights

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<sup>121</sup> Apparently the defendant was not aware of section 16 of the *Alberta Fair Trading Act*. LoVecchio J. noted that it had initiated discussions with the minister, seeking approval of its arbitration clause, during the course of its application (*Ayrton*, *supra* note 54 at para. 23). The fact that only one arbitration agreement has been approved may indicate a more general lack of awareness.

<sup>122</sup> *Ayrton*, *ibid.* at para. 22.

<sup>123</sup> The procedure bringing the case to the attention of Ontario’s Small Claims Court was unusual. After a pair of 2004 Small Claims Court rulings found payday loan companies to have charged criminal rates of interest, the judiciary started a review of payday lenders’ collection cases and brought the 34 cases listed in the appendix to *Box* forward. *Box*’s loan served as the representative case in the decision by Deputy Judge House (*ibid.* at paras. 1-3).

<sup>124</sup> *Ibid.* at para. 5.

<sup>125</sup> *Ibid.* at para. 7. On illegal contracts, see generally S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) c. 15.

with respect to the illegal contract, as it could be done in arbitration.<sup>126</sup> The arbitration clause denied the borrower the right to raise the criminal interest rate issue as a defence in a court action against him, such as the small claims collection. Instead, that one issue had to be submitted to arbitration by the borrower and resolved in separate proceedings, out of the public eye. However, it would have been better had he addressed whether or not the one-sided nature of the agreement to arbitrate made it unconscionable and therefore invalid.

### C. Issues Not Addressed

Although the cases reviewed illustrate typical issues raised by pre-dispute consumer arbitration clauses, there are several key matters that the courts have not yet addressed.

#### 1. Invalidity, Separability, and Competence-Competence

The first set of questions revolve around what I will call the “invalidity issue”. Under the stay provisions in issue in the cases, courts have no discretion to refuse to stay court actions unless the arbitration agreement is—depending on the jurisdiction—invalid, null, inoperative, incapable of being performed, or void. By taking the approach that arbitration legislation and class proceedings legislation conflict at the policy level and that the issue of which forum prevails is a matter to be decided under the provisions of the class action legislation on certification applications, the courts in *MacKinnon* and *Smith* dodged the invalidity issue. They gave themselves discretion to decide whether arbitration or class proceedings were preferable as dispute resolution processes. Even in the relatively simple *Ayrton* case, the court refused to deal with whether the failure of the defendant to comply with the *Fair Trading Act* rendered the arbitration clauses invalid within the meaning of the arbitration legislation. Only the court in *Kanitz* and the lower court in *Huras* actually asked if the arbitration clause was the kind the court had discretion to stay.

This is not an endorsement of the sequential approach based on when each statute was enacted. Instead, I merely note, as did the courts in *Kanitz* and *Dell*, that there is no suggestion by the legislatures that one statute takes precedence over the other. Class action statutes are not the only type of legislation that conflicts with arbitration. Builders’ and mechanics’ lien acts also have policy objectives that conflict with those of arbitration and the conflict has been a live issue in law reform circles in recent years.<sup>127</sup> In the case of lien statutes, the conflict is not just at the policy level. A

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<sup>126</sup> *Ontario Arbitration Act*, *supra* note 35, s. 31 obliges an arbitrator to decide a dispute in accordance with law. The parties may, however, vary or exclude this provision and agree that the arbitrator shall decide their dispute on some other basis. Section 31 is not among the six provisions that may be varied or excluded by the parties: see *ibid.*, s. 3.

<sup>127</sup> See e.g. British Columbia Law Institute, *Report on Builders Liens and Arbitration: BCLI Report No. 22* (Vancouver: British Columbia Law Institute, 2002); W.G. Turnbull, “Arbitration and

required procedural step under either process may prejudice a party's rights under the other.<sup>128</sup> Nevertheless, the courts have adopted a contractualist approach, favouring arbitration in the face of protective builders' lien legislation, deferring to the parties' standard form construction agreements by declining jurisdiction over disputes that the parties have agreed to submit to arbitration.<sup>129</sup> The inequality of bargaining power and contracts of adhesion issues are similar in the consumer context, so what justifies the different approach?

It would be better for the courts to confront these issues directly. Are pre-dispute arbitration clauses in standard form consumer contracts invalid? Are they invalid when combined with an explicit prohibition of class actions,<sup>130</sup> or a shortened limitation period, or a prohibition on raising certain types of defences, or some other abuse of arbitration? Are they invalid if the denied alternative is small claims court? Are they invalid if they are contained within an unconscionable agreement, despite the separability of arbitration clauses provided for in all modern domestic arbitration legislation?

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Construction Liens" (ULCC, 1997), online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1997&sub=1997jc>>. To protect labourers and subcontractors who might otherwise be forced to give up their rights under lien legislation in order to obtain work, due to their weak bargaining position at the bottom of the construction pyramid, lien statutes across Canada provide that the protection afforded by the legislation cannot be waived. See *e.g.* *Builders' Lien Act*, R.S.A. 2000, c. B-7, s. 5; *Builders Lien Act*, S.B.C. 1997, c. 45, s. 42; *Builders' Liens Act*, R.S.M. 1987, c. 1991, C.C.S.M. c. B91, s. 11; *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6, ss. 5, 6; *Builders' Lien Act*, R.S.N.S. 1989, c. 277, ss. 4, 5; *Construction Lien Act*, R.S.O. 1990, c. C.30, ss. 4, 5; *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1, s. 99.

<sup>128</sup> Turnbull, *ibid.* at paras. 10, 24-25.

<sup>129</sup> *Ibid.* at para. 9. The ULCC drafted *Liens and Arbitration Provisions*, to be added as a new part to an existing statute of the enacting province or territory that provides for builders' liens. No jurisdiction appears to have adopted these provisions reconciling the two statutes, however. See *Liens and Arbitration Provisions*, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us>>.

<sup>130</sup> In *Kanitz, MacKinnon, and Smith*, the arbitration clause included an express prohibition against class actions. Only *Kanitz* considered whether courts should interpret arbitration agreements that are silent as to class actions as barring such actions, holding there was no debate and arbitration automatically bars class actions. A related issue is that of class-wide arbitrations, a controversial and frequently litigated issue in recent American law, also mentioned briefly in *Kanitz* (*supra* note 15 at para. 55). Although the cases reviewed in this article have tended to treat arbitration and class actions as inimical to one another, there is a growing body of divergent case law on class-wide arbitration in the United States. See generally Lindsay R. Androski, "A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses" (2003) U. Chicago Legal F. 631. The American Arbitration Association ("AAA") issued its *Supplementary Rules for Class Arbitrations* to govern proceedings brought as class arbitrations in 2003. See *Supplementary Rules for Class Arbitrations* (8 October 2003), online: American Arbitration Association <<http://www.adr.org/sp.asp?id=21936>>. For the AAA's current policy on class arbitrations, see *American Arbitration Association Policy on Class Arbitrations* (14 July 2005), online: American Arbitration Association <<http://www.adr.org/classarbitrationpolicy>>.

Interrelated with the invalidity issue is the principle of separability.<sup>131</sup> All modern domestic arbitration statutes state that, for the purpose of determining the arbitrator's jurisdiction to conduct the arbitration, which includes determining the existence and validity of the arbitration agreement, an arbitration clause is to be treated as an independent agreement that may be separated from an otherwise invalid agreement. In *Smith*, it was assumed that if the main contract was illegal, the arbitration clause would be invalid. This assumption is incorrect under the provisions of the relevant legislation.<sup>132</sup> The issue of the invalidity of the separable arbitration clause needs to be addressed directly.

Also interrelated with the invalidity issue and the separability principle is the question of who decides whether the separate arbitration clause is invalid. All modern domestic arbitration legislation provides that an arbitrator may rule on his own jurisdiction to conduct an arbitration and may, in that connection, rule on objections with respect to the existence or validity of the arbitration agreement.<sup>133</sup> The language in the legislation is permissive, suggesting the courts have concurrent jurisdiction. The question of when the courts should take jurisdiction and when they should refer the issues of the existence or validity of the arbitration agreement to arbitration has yet to be addressed.

Who decides whether an arbitration agreement is invalid is currently an extremely controversial issue in the United States.<sup>134</sup> The traditional rule was that courts decide questions related to the existence of the arbitration agreement and whether it should cover a certain type of dispute—"substantive" arbitrability—and arbitrators decide "procedural" arbitrability issues, such as defences to claims and waivers.<sup>135</sup> Over the past two decades, however, the United States Supreme Court has

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<sup>131</sup> See generally Alan Scott Rau, "Everything You Really Need to Know About 'Separability' in Seventeen Simple Propositions" (2003) 14 Am. Rev. Int'l Arb. 1.

<sup>132</sup> See *supra* notes 107-12 and accompanying text.

<sup>133</sup> See *supra* notes 49-50 and accompanying text.

<sup>134</sup> The United States Supreme Court's 2003 plurality decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) [*Bazzle*] attracted a great deal of attention for its empowerment of arbitrators to decide whether or not an arbitration clause allowed for class action proceedings. *Bazzle*, which produced four separate opinions but no majority opinion, is usually understood as holding that an arbitrator is the one who must decide whether class action arbitration is allowed when the arbitration agreement is silent. For discussions of *Bazzle*, see Imre S. Szalai, "The New ADR: Aggregate Dispute Resolution and *Green Tree Financial Corp. v. Bazzle*" (2004) 41 Cal. W.L. Rev. 1; Robert Jason Herndon, "Mistaken Interpretation: The American Arbitration Association, *Green Tree Financial Corporation v. Bazzle*, and the Real State of Class-Action Arbitration in North Carolina" (2004) 82 N.C.L. Rev. 2128. For a discussion of the issue not confined to the United States, see John J. Barceló III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective" (2003) 36 Vand. J. Transnat'l L. 1115.

<sup>135</sup> Kristen M. Blankley, "Arbitrability After *Green Tree v. Bazzle*: Is There Anything Left for the Courts?" (2004) 65 Ohio St. L.J. 697 at 697, 709.

expanded the scope of issues to be decided by arbitrators in the first instance.<sup>136</sup> The notion that an arbitrator may determine his own jurisdiction may have no disturbing implications when coupled with assurances that the parties to the arbitration have consented to his power to do so. In the consumer context, however, actual consent is lacking.

## 2. Costs of Arbitration

A second set of issues revolves around the recurring concern that arbitration is too expensive for consumers. The substantial cost difference between arbitration and small claims court filing fees has yet to be addressed. The monetary jurisdiction of small claims courts is high enough to include most individual consumers' claims.<sup>137</sup> The fees for filing a small claim are modest.<sup>138</sup> Many small claims court systems across Canada also have free mediation services available to litigants.<sup>139</sup>

Arbitration is advertised as an inexpensive method of resolving claims. Its fees, however, can be high and unpredictable, and consumers' inability to share costs can make it much more expensive than litigation. Most arbitration includes a significant fee for arbitrators' time, an additional expense without parallel in the court system.<sup>140</sup>

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<sup>136</sup> See *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) (holding the arbitrator should determine the applicability of statutes of limitation); *Bazze*, *supra* note 134 (holding the arbitrator should decide whether the agreement allows a class action arbitration when the contract is silent on this question); *Cardegna*, *supra* note 104 (holding the arbitrator should decide the validity of the main contract).

<sup>137</sup> The upper limit is \$25,000 in Alberta and British Columbia (*Provincial Court Civil Division Regulation*, Alta. Reg. 329/1989, s. 1.1, as am. by Alta. Reg. 215/2002, s. 2; *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005, s. 1); \$7,500 in Manitoba (*The Court of Queen's Bench Small Claims Practices Act*, R.S.M. 1987 c. C285, C.C.S.M. c. C285, s. 3(1)(a)); \$10,000 in Ontario (*Small Claims Court Jurisdiction*, O. Reg. 626/00, s. 1(1)); \$15,000 in Nova Scotia (*Small Claims Court Act*, R.S.N.S. 1989, c. 430, s. 9, as am. by S.N.S. 2002, c. 10, s. 38); \$7,000 in Quebec (Art. 953 C.C.P.); and \$10,000 in Saskatchewan (*The Small Claims Regulations 1998*, R.R.S. 1998, c. S-50.11, Reg. 1, O.C. 79/1998, s. 3, as am. by Sask. Reg. 147/2005, s. 3).

<sup>138</sup> Usually, the fees are less than \$100 for small claims and less than \$200 for claims at the upper limit of the court's jurisdiction. See *e.g.* *Small Claims Court—Fees and Allowances*, O. Reg. 432/93; *Provincial Court Fees and Costs Regulation*, Alta. Reg. 18/91; *Tariff of Court Fees Applicable to the Recovery of Small Claims*, R.R.Q. 1981, c. C-25, r. 9.02.

<sup>139</sup> For example, in Alberta the Provincial Court Civil Claims Mediation Program operates in Edmonton and Calgary. Mediation is mandated for selected cases and mediators from a roster mediate without charge to the parties. See *Mediation Rules of the Provincial Court—Civil Division*, Alta. Reg. 271/1997. In British Columbia, the Court Mediation Program, funded by the Ministry of the Attorney General, provides mediation services for some small claims disputes. See *Small Claims Rules*, B.C. Reg. 261/93, Sch. C, D, E, as am. by B.C. Reg. 172/2003; B.C. Reg. 373/2003.

<sup>140</sup> There has been no independent empirical study of arbitration fees in Canada. In the United States, a 2004 study by the California Dispute Resolution Institute considered fee data from over 1,400 cases and determined the total average arbitration fee was US\$ 2,256. See California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* (August 2004), online:

In arbitrations supervised by an arbitral organization, administrative costs are added and set according to a fee schedule.<sup>141</sup> Even under expedited hearing rules for one-day administered arbitrations, a consumer's share of the *additional* costs they would incur in arbitration would be \$750 to \$1,300.<sup>142</sup>

The ancillary issue of proving the costs of arbitration was mentioned in *Kanitz*,<sup>143</sup> but there was no indication of what kind of proof would suffice. Would an argument about costs based on the type of publicly available information referred to above be too speculative, as it was for the United States Supreme Court in *Randolph*?<sup>144</sup> Does one have to show actual costs and whether the consumer would bear those costs if he or she arbitrated?<sup>145</sup>

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Mediate.com <[http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf)>. In another study, the cost of claims brought under pre-dispute arbitration clauses were shown to be much higher than similar claims brought under post-dispute agreements, there being no incentive for arbitrators or providers to cut costs under pre-dispute agreements. See Public Citizen, *The Costs of Arbitration* (April 2002), online: Public Citizen <<http://www.citizen.org/documents/ACF110A.PDF>>.

<sup>141</sup> See e.g. *B.C. Arbitration Act*, *supra* note 31.

Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration (*ibid.*, s. 22(1)).

The British Columbia International Commercial Arbitration Centre's ("BCICAC") Shorter Rules for Domestic Commercial Arbitration ("BCICAC Shorter Rules") apply to claims under \$50,000. Arbitration costs include commencement fees of \$500; administration fees of \$150 due six months after arbitration is commenced and every 90 days thereafter until arbitration is completed; any expenses incurred by the centre; and the disbursements and fees of the arbitrator. See "Domestic Commercial Arbitration Fee Schedule" (as amended 1 November 1997), online: British Columbia International Commercial Arbitration Centre <[http://www.bcicac.com/bcicac\\_dap\\_dca\\_fees.php](http://www.bcicac.com/bcicac_dap_dca_fees.php)>. Hourly rates are set by individual arbitrators. An ADR Chambers arbitrator working in the western region has a rate that varies between \$400 per hour and \$650 per hour. See "Arbitration: Western Region" (effective December 2004), online: ADR Chambers <<http://www.adrchambers.com/arbit.htm#west>>. Under the BCICAC Shorter Rules, unless the arbitrator otherwise rules, each party bears its own costs.

<sup>142</sup> For example, at the Canadian Commercial Arbitration Centre ("CCAC"), the fees for expedited arbitration proceedings (claims of \$50,000 or less heard in a single day of seven hours or less) range from \$900 to \$2,000. The CCAC's administrative fee of \$600 is payable by the plaintiff upon opening the file, but the costs of arbitration are to be shared equally by the parties. See "Expedited Arbitral Proceedings", online: Canadian Commercial Arbitration Centre <<http://www.cacniq.org/en/tarif.htm#3>>.

<sup>143</sup> *Supra* note 15 at paras. 41-44.

<sup>144</sup> *Supra* note 10.

<sup>145</sup> For discussions of the difficulties in proving how expensive arbitration is, see e.g. Cappalli, *supra* note 13; Robert W. Abel, "The Unanswered Question from *Green Tree Financial Corp. v. Randolph*: How Much is Too Much Before the Costs of Arbitration Become a Barrier to Due Process?" (2002) 56 U. Miami L. Rev. 1009; Jason Bradley Kay, "The Post-*Green Tree* Evidentiary Standard for Invalidating Arbitration Clauses in Consumer Lending Contracts: How Much Justice Can You Afford?" (2002) 6 North Carolina Banking Institute 545.

### 3. Privatization of Law

Finally, there are broader questions entailed with the privatization of law, issues that seem to hover in the background of the cases. There is a considerable body of secondary literature arguing that adjudication is not just dispute resolution. In a well-known essay beginning the modern debate, Owen Fiss argues that adjudication in itself can be a central part of our democratic life because it is one method by which we articulate public values.<sup>146</sup> He saw other dispute resolution processes as part of a deregulation movement, one that permitted private actors with powerful economic interests to pursue their self-interest, free of community norms. The seven cases reviewed in this paper provide grounds for this type of concern. Fiss concluded that adjudication is more likely to do justice than processes such as arbitration, “precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason.”<sup>147</sup>

### III. Possible Responses

To the extent that voluntariness, choice, and consent are justifications for legislative and judicial deference to arbitration, pre-dispute consumer arbitration clauses in standard form contracts do not fit within the paradigm. If party autonomy is the principal value justifying the state’s facilitation of arbitration, then uses of arbitration where it is coerced are highly problematic.<sup>148</sup> In the United States, the Supreme Court’s expansive interpretation of the *Federal Arbitration Act*<sup>149</sup> has severely restricted states’ ability to regulate potential abuses of arbitration.<sup>150</sup> In

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<sup>146</sup> Owen M. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073. See also David Luban, “Settlements and the Erosion of the Public Realm” (1995) 83 Geo. L.J. 2619; Carrie Menkel-Meadow, “Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)” (1995) 83 Geo. L.J. 2663; Richard C. Reuben, “Democracy and Dispute Resolution: The Problem of Arbitration” (2004) 67:1 Law & Contemp. Probs. 279 (arguing that “the relationship between democracy and arbitration [is] an issue worth considering” and suggesting some implications of his assessment of the democratic character of arbitration at 281).

<sup>147</sup> Owen M. Fiss, “Out of Eden” (1985) 94 Yale L.J. 1669 at 1673.

<sup>148</sup> See Lisa B. Bingham, “Self-Determination in Dispute System Design and Employment Arbitration” (2002) 56 U. Miami L. Rev. 873 (discussing disputant self-determination as one of the core values underlying arbitration at 879-86); Menkel-Meadow, *supra* note 4 (citing “[c]hoice, [c]onsent and [c]oercion” as primary ethical issues at 953-54).

<sup>149</sup> *Supra* note 104.

<sup>150</sup> The U.S. Supreme Court has held that arbitration agreements must be enforced unless there is a ground for non-enforcement that applies to all contracts and not just arbitration agreements. The *Federal Arbitration Act* states that agreements for arbitration are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” (*ibid.*, § 2). For reviews of the interplay between the Supreme Court’s interpretation of the *Federal Arbitration Act* and state legislation, see generally Jean R. Sternlight, “Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration” (1996) 74 Wash. U.L.Q. 637; Stephen L. Hayford & Alan R. Palmiter, “Arbitration Federalism: A State Role in Commercial Arbitration” (2002) 54 Fla. L. Rev. 175; Moses, *supra* note 9.

Canada, in contrast, a wide range of legislative, judicial, and arbitral responses to the strategic deployment of arbitration clauses are possible.

### A. Legislative Reform

One type of response to the potential abuse of pre-dispute arbitration clauses in standard form consumer agreements is legislation banning or regulating their use. In the European Union, for example, a term in a contract that requires consumers to take disputes exclusively to arbitration may be regarded as unfair and therefore of no effect.<sup>151</sup>

The *Ontario Consumer Protection Act*,<sup>152</sup> in force 30 July 2005, is another example of a legislative ban, albeit not as wide-ranging. The new Ontario provisions are comprehensive with respect to access to the courts to exercise rights given by that particular consumer protection statute. Subsection 7(2) provides:

[A]ny term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.<sup>153</sup>

Subsection 7(5) goes on to say that the stay provisions of the *Ontario Arbitration Act* do not apply unless the consumer agrees to submit the dispute to arbitration after the dispute arises.<sup>154</sup> The provisions in section 8 safeguarding class proceedings for disputes arising out of a consumer agreement are parallel to those ensuring access to the Superior Court of Justice.<sup>155</sup>

Alberta's prohibition of certain types of arbitration agreements is less comprehensive than Ontario's.<sup>156</sup> Alberta's legislation applies to a narrower range of claims: ones of unfair practices, which are for the most part what the common law calls misrepresentations. It only applies to actions commenced by or on behalf of consumers. And it does not affect arbitration clauses approved by the government.

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<sup>151</sup> EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] O.J. L. 95/29. See also the Bonino Recommendation, providing that consumers cannot be deprived of the right to bring a claim to the courts unless they expressly agree to arbitration in full awareness of the facts and only after a dispute has arisen (EC, *Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes*, [1998] O.J. L. 115/31).

<sup>152</sup> *Supra* note 2.

<sup>153</sup> *Ibid.*, s. 7(2).

<sup>154</sup> *Ibid.*, s. 7(5).

<sup>155</sup> *Ibid.*, s. 8. The Small Claims Court in Ontario is a branch of the Superior Court of Justice. See *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 22(1).

<sup>156</sup> *Alberta Fair Trading Act*, *supra* note 3, s. 16. The text of section 16 is quoted in Part II.B., above.

Minimum standards legislation, common enough in the consumer protection arena, is an obvious alternative to prohibitions on all or certain types of pre-dispute consumer arbitration clauses. There is currently no legislation of this type in Canada. Minimum standards legislation might require a signature, or the electronic equivalent, on arbitration clauses as the only acceptable proof that such clauses were brought to consumers' attention.<sup>157</sup> Because it is difficult for consumers to intelligently and knowingly waive access to the courts, information describing arbitration procedures and the benefits and drawbacks of arbitration might be required. Arbitration hearings in distant fora might be prohibited, a tactic not yet seen in Canada but common in the United States. Parties could be required to have an equal voice in the selection of arbitrators.<sup>158</sup> Costs of arbitration to the consumer could be limited, and provisions made to accommodate low-income consumers. Arbitrators could be required to follow the law of the province in which the consumer resides and to give reasons for their decisions. Judicial review could be expanded for cases in which it is alleged that arbitrators did not correctly apply the law or did not apply the correct law.<sup>159</sup> Training or certification of arbitrators might be required.<sup>160</sup> The results of arbitration, with identifying information removed, could also be forwarded to consumer ministries or consumer groups, or posted on websites for wide distribution.<sup>161</sup>

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<sup>157</sup> As is apparent from *Dell*, *supra* note 55, and *Aspencer1.com*, *supra* note 112, Quebec law includes a similar but less onerous requirement, not limited to terms in arbitration agreements.

<sup>158</sup> Art. 2641 C.C.Q. already contains such a requirement, providing that "A stipulation which places one party in a privileged position with respect to the designation of the arbitrators is null."

<sup>159</sup> There is, generally, no judicial review of an arbitrator's decision except as specified in the legislative provisions governing the setting aside or annulment of arbitration awards. The grounds for review are mainly procedural. See *Alberta Arbitration Act*, *supra* note 34, s. 45; *B.C. Arbitration Act*, *supra* note 31, s. 30; *Manitoba Arbitration Act*, *supra* note 38, s. 45; *New Brunswick Arbitration Act*, *supra* note 37, s. 46; *Nova Scotia Arbitration Act*, *supra* note 39, s. 49; *Ontario Arbitration Act*, *supra* note 35, s. 46; Art. 947 C.C.P.; *Saskatchewan Arbitration Act*, *supra* note 36, s. 46. There is also no right to appeal an award. The most common statutory provisions specify that appeals may be made concerning questions of law alone, and even then only with leave. See *Alberta Arbitration Act*, *ibid.*, s. 44; *B.C. Arbitration Act*, *ibid.*, s. 31; *Manitoba Arbitration Act*, *ibid.*, s. 44; *New Brunswick Arbitration Act*, *ibid.*, s. 45; *Nova Scotia Arbitration Act*, *ibid.*, s. 48; *Ontario Arbitration Act*, *ibid.*, s. 45; Art. 946 C.C.P.; *Saskatchewan Arbitration Act*, *ibid.*, s. 45. Art. 946 C.C.P. states that an award must be homologated by application to the court in order to be enforced, but Art. 946.2 C.C.P. provides that a court "cannot enquire into the merits of the dispute" on an application for homologation. Grounds for refusing homologation under Art. 946.4 C.C.P. are the same as grounds for annulment.

<sup>160</sup> On the advantages and disadvantages of accrediting or regulating arbitrators and other third parties, see e.g. Catherine Morris & Andrew Pirie, eds., *Qualifications for Dispute Resolution: Perspectives on the Debate* (Victoria: University of Victoria Institute for Dispute Resolution, 1994).

<sup>161</sup> CAMVAP, the Canadian arbitration program resolving disputes between consumers and automobile manufacturers and distributors, posts the results of cases to its Internet site, identifying the make, model, and year of the vehicles, along with the nature of the complaint and the type of award issued by the arbitrator. Consumers are not identified by name. See "Award Statistics" in *CAMVAP Guide*, *supra* note 120. The Cal. Civ. Proc. Code, § 1281.96 requires provider organization reports. The non-consumer party is named, as is the arbitrator. Information on the type of dispute, prevailing

With so much possible variation in the type of legislative response, we may end up with a patchwork of consumer protection across Canada. Two provinces have already legislated in this area, but in very different ways. Choice-of-forum and choice-of-law clauses might be the next items to make their way into arbitration clauses.<sup>162</sup> The new domestic arbitration legislation was a Uniform Law Conference of Canada project. Canada-wide, uniform amendments to provincial arbitration legislation to deal with pre-dispute consumer arbitration agreements should be another project for this organization, preferably as a joint effort with national consumer organizations.

I believe amendments to the current domestic arbitration legislation should be made in order to ensure two things. First, consumers should have access to small claims courts and class proceedings in addition to arbitration. Providing them with the option of other fora should forestall the strategic deployment of arbitration clauses by businesses intent on gaining unfair advantages or avoiding publicity. Second, consumers should be guaranteed the ability to enforce the mandatory legal rights of their province of residence. This guarantee would also forestall the addition of choice-of-law provisions that would be disadvantageous to consumers. Uniform legislation across Canada is required so that advantages cannot be gained by situating the seat of arbitration in a different province or territory.

### **B. Self-Regulation by Arbitration Associations**

A second type of response could come from the various dispute resolution organizations in Canada.<sup>163</sup> In the United States, the outpouring of criticism about the unfairness of pre-dispute consumer arbitration clauses produced efforts at self-regulation by a number of interested organizations.<sup>164</sup> This type of response could work in conjunction with any of the others, and could be available for post-dispute consumer arbitration agreements as well.

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party, dates of filing and disposition, type of disposition, amount of claim, total fees, and the fee allocation between consumer and non-consumer is also provided.

<sup>162</sup> The topic of determining applicable law and forum in cross-border transactions, both international and provincial, is beyond the scope of this paper. The federal and provincial Consumers Measures Committee and the ULCC formed a joint working group in 2001 to address jurisdiction in cross-border transactions. See e.g. ULCC, *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts*, online: Uniform Law Conference of Canada <[http://www.ulcc.ca/en/us/Unif\\_Jur\\_Choice\\_Law\\_Consumer\\_Contracts\\_En.pdf](http://www.ulcc.ca/en/us/Unif_Jur_Choice_Law_Consumer_Contracts_En.pdf)>; ULCC, *Uniform Jurisdiction and Choice of Law Rules in Consumer Protection Act: Preliminary Draft and Commentaries* (Fredericton: N.p., 2003), online: Uniform Law Conference of Canada <[http://www.ulcc.ca/en/poam2/Jurisdiction\\_Choice\\_Law\\_CP\\_En.pdf](http://www.ulcc.ca/en/poam2/Jurisdiction_Choice_Law_CP_En.pdf)>.

<sup>163</sup> Such organizations include BCICAC, CCAC, ADR Chambers, and the ADR Institute of Canada.

<sup>164</sup> See Bingham, *supra* note 148 at 891-92.

In the United States, joint organizational efforts include the *Consumer Due Process Protocol*,<sup>165</sup> adopted in 1998. The *Protocol* attempts to ensure that the proliferation of arbitration clauses in consumer contracts does not result in a denial of a fair process in consumer claims. Its principles outlaw the usual abuses accompanying consumer arbitration clauses.<sup>166</sup> For example, an arbitration clause must permit consumers the option to pursue the claim in small claims court and may not limit statutory remedies otherwise available to consumers. If the arbitration clause violates the *Protocol* and the business refuses to modify it to comply with the *Protocol* after a dispute arises, some arbitration providers reserve the right to refuse to administer the case.<sup>167</sup> Other similar efforts include the National Arbitration Forum *Code of Procedure*<sup>168</sup> and “JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness”.<sup>169</sup>

Some American arbitration organizations have also recently reduced administrative and arbitration fees for consumers.<sup>170</sup> Waivers and deferrals of administrative fees are available and a number of arbitrators are available to serve on a pro bono basis.

Self-regulation is only a partial response. Efforts such as the *Protocol* are limited to those organizations that have signed and approved them. They impose no constraints on companies that decide to give their disputing business to a non-participating arbitrator or arbitration organization. There is also no effective redress if

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<sup>165</sup> See American Arbitration Association, *Consumer Due Process Protocol* (17 April 1998), online: <<http://www.adr.org/sp.asp?id=22019>> [*Protocol*].

<sup>166</sup> The 15 principles of the *Protocol*, *ibid.*, require, *inter alia*, clear and adequate notice of alternative dispute resolution (“ADR”) provisions at the time of contracting, together with a means by which the consumer can obtain more information on the program (*ibid.*, Principle 2). They also require administration by an independent ADR institute if the arbitration is mandatory, and an equal voice for consumers in the selection of arbitrators (*ibid.*, Principle 3); reasonable costs based on the size and nature of the claim and the consumers’ ability to pay (*ibid.*, Principle 6); hearings at reasonably convenient locations (*ibid.*, Principle 7); and brief written explanations of the basis for the arbitrator’s awards (*ibid.*, Principle 15).

<sup>167</sup> See American Arbitration Association, *Supplementary Procedures for Consumer-Related Disputes* (15 September 2005), online: <<http://www.adr.org/sp.asp?id=22014>> [*AAA Supplementary Procedures*].

<sup>168</sup> (1 May 2006), online: National Arbitration Forum <<http://www.adrforum.com/users/naf/resources/20060501CodeofProcedure072106.pdf>>.

<sup>169</sup> (19 February 2005), online: JAMS <[http://www.jamsadr.com/rules/consumer\\_min\\_std.asp](http://www.jamsadr.com/rules/consumer_min_std.asp)>.

<sup>170</sup> For example, the American Arbitration Association (“AAA”) discounted arbitrators’ fees to \$250 for a document-only or telephone hearing and to \$750 per day for in-person hearings. If the consumer’s claim does not exceed \$10,000, the consumer pays one-half of the arbitrators’ fee, to a maximum of \$125. If the claim is \$10,000 to \$75,000, the consumer is responsible for one-half the fee to a maximum of \$375. Consumers are charged administrative fees for claims greater than \$75,000 in accordance with the AAA’s *Commercial Fee Schedule*. See “Arbitration Fees” under *AAA Supplementary Procedures*, *supra* note 167.

an arbitrator or arbitration provider organization breaches its own policies.<sup>171</sup> Compared to the situation in Canada, however, where none of the arbitration organizations has rules or processes specifically aimed at consumers' disputes,<sup>172</sup> self-regulation would be a step in the right direction.

### C. Judicial Responses

The British Columbia Supreme Court and Court of Appeal in the *MacKinnon* case and the Ontario Superior Court of Justice and Court of Appeal in the *Smith* case focused on the conflict between arbitration and class proceedings legislation, giving priority to the latter. I have already indicated that I do not think this type of judicial response is not persuasive.<sup>173</sup> In addition, it is a limited response, dealing only with the denial of access to class proceedings.<sup>174</sup>

Of all the potential contract defences available to support a claim that an arbitration clause is null, void, or invalid, unconscionability is the most promising. In the last decade, it has become the preferred vehicle for striking down arbitration agreements or limiting their enforcement in the United States.<sup>175</sup> However, unconscionability is a developing and uncertain area of law.<sup>176</sup>

A great deal has been written on the subject of unconscionability and I do not propose to add much to that literature in this paper.<sup>177</sup> Nevertheless, some points about

<sup>171</sup> The law also confers substantial protection from civil liability through the doctrine of arbitral immunity for breaches of contractual obligations, negligent performance of professional services, and violations of ethical codes. See Maureen A. Weston, "Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration" (2004) 88 Minn. L. Rev. 449 (proposing a standard of qualified immunity to balance the competing policy goals of protecting arbitrators in their decisional roles and holding the arbitration industry accountable to parties and the public, as well as proposing a system for public oversight of arbitration in order to better ensure process fairness to participants, meaningful enforcement of arbitral codes of conduct, and accountability of the arbitration industry).

<sup>172</sup> CAMVAP, which includes all the Canadian provincial governments among its members, is an exception. See *CAMVAP Guide*, *supra* note 120.

<sup>173</sup> See Part II.C.1, above.

<sup>174</sup> The conflicting legislative objectives approach in *MacKinnon* (*supra* note 53) could also be applied in the small claims court context as these courts are access to justice initiatives. The purpose of the *Small Claims Act* in British Columbia, for example, is "to allow people who bring claims to the Provincial Court to have them resolved and to have enforcement proceedings concluded in a just, speedy, inexpensive and simple manner" (*Small Claims Act*, R.S.B.C. 1996, c. 430, s. 2(1)). If the approach can be justified in the class proceedings context, it should be equally at home in small claims proceedings.

<sup>175</sup> See Jeffrey W. Stempel, "Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism" (2004) 19 Ohio St. J. Disp. Resol. 757 at 761-62.

<sup>176</sup> For a recent review of this conceptually troubled doctrine, see Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171.

<sup>177</sup> See e.g. Bigwood, *ibid.*; Waddams, *supra* note 125, c. 14; G. H. L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 343-58; John-Paul F. Bogden, "On the 'Agreement

the likelihood of its successful application in a stay application must be made. In general, successful unconscionability claims are less likely in the arbitration context due to the separability principle, which requires that the arbitration clause itself be attacked as unconscionable, and because arbitration is viewed as a procedural matter more than a substantive one.

Canadian common law unconscionability cases can be divided into two categories: those in which the entire contract is alleged to be unconscionable, and those in which specific clauses—exclusion or limitation clauses—are said to be unconscionable.<sup>178</sup> While the second category appears to be more analogous, the approaches devised by the courts to address exclusion and limitation clauses do not hold much promise for attacking arbitration clauses.

In the exclusion and limitation clause category of unconscionability cases, there are three basic approaches.<sup>179</sup> The first relies upon the idea of “reasonable notice”; reasonable efforts must be made by the party inserting onerous terms into contracts, especially standard form contracts, to bring them to the attention of the other party.<sup>180</sup>

The second approach is one of strict construction; a contract is interpreted so that a loss does not come within the scope of the exempting or limiting clause. An arbitration clause could be strictly construed so that the parties’ dispute was not within its scope. The description of the type of disputes covered by most arbitration clauses is extremely comprehensive, however, so this approach is unlikely to be successful.<sup>181</sup>

The third approach is the doctrine of fundamental breach. The idea is that some obligations are so essential that they cannot be excluded without destroying the agreement itself. However, exclusion of access to the courts is the whole point of legislatively sanctioned arbitration. It cannot, therefore, be a fundamental breach. In *Kanitz*, Justice Nordheimer found the plaintiffs’ reliance on cases involving exemption clauses misplaced because “an arbitration clause is not at all the same as an exemption clause. The latter serves to remove one contracting party’s liability to the other whereas the former simply requires that the parties seek their relief in a different forum.”<sup>182</sup>

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Most Foul”: A Reconsideration of the Doctrine of Unconscionability” (1997) 25 Man. L.J. 187; J.A. Manwaring, “Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law” (1993) 25 Ottawa L. Rev. 235; David Vaver, “Unconscionability: Panacea, Analgesic or Loose Can(n)on?” (1988) 14 Can. Bus. L.J. 40; Steven R. Enman, “Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law” (1987) 16 Anglo-Am. L. Rev. 191.

<sup>178</sup> See Manwaring, *ibid.* at 256.

<sup>179</sup> See *ibid.* at 263-65.

<sup>180</sup> See *Tilden Rent-A-Car v. Clendenning* (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.), a classic example of the so-called “ticket cases”. The court’s approach resembles that of the Quebec Court of Appeal in *Dell*, *supra* note 55.

<sup>181</sup> See *e.g.* the arbitration clause in *Kanitz*, quoted *supra* note 65.

<sup>182</sup> *Ibid.* at para. 40.

We are therefore left with the category of unconscionability cases in which the whole agreement is alleged to be unconscionable. The question becomes whether the tests devised for this category can be adapted to separable arbitration clauses. Tests from this category of cases were used by the courts in both *Huras*<sup>183</sup> and *Kanitz*.<sup>184</sup> In challenges to entire contracts, one authoritative statement of the doctrine of unconscionability is that of Mr. Justice Davey in *Morrison v. Coast Finance Ltd.*:

On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable ... or perhaps by showing that no advantage was taken ...<sup>185</sup>

This test requires that weaker party prove two things before the onus shifts to the stronger party.<sup>186</sup> The two steps were summarized by Justice La Forest in *Norberg v.*

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<sup>183</sup> In *Huras*, *supra* note 58 at para. 36, Cumming J. used the test formulated in *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231, 9 B.C.L.R. 166 (C.A.) [*Harry* cited to D.L.R.]. In *Harry*, Lambert J.A. stated the test as follows:

In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired ... are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded (*Harry*, *ibid.* at 241).

<sup>184</sup> In *Kanitz*, *supra* note 15 at para. 36, Nordheimer J. used a test formulated in *Rosen v. Rosen* (1994), 18 O.R. (3d) 641, 72 O.A.C. 342 (C.A.) [*Rosen* cited to O.R.]. In *Rosen*, Grange J.A. stated the test as follows:

The question therefore becomes was there an inequality between the parties, a preying of one upon the other which, combined with improvidence, cast the onus upon the husband of acting with scrupulous care for the welfare and interests of the wife. I think not.

We must always remember that it is not the ability of one party to make a better bargain that counts. Seldom are contracting parties equal. It is the taking advantage of that ability to prey upon the other party that produces the unconscionability (*Rosen*, *ibid.* at 645).

<sup>185</sup> (1965), 55 D.L.R. (2d) 710 at 713, [1966] 54 W.W.R. 257 (B.C.C.A.), Davey J.A.

<sup>186</sup> This test was reformulated by McIntyre J.A. in *Harry*, *supra* note 183 as “it must be shown for success that there was inequality [of bargaining power] ... coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable” (*ibid.* at 237). In *Smyth v. Szep*, [1992] 2 W.W.R. 673, 63 B.C.L.R. (2d) 52 (C.A.), however, the court questioned the shift in the onus of proof in the test (*ibid.* at para. 23). As Bigwood notes, if the bargain has already been shown to be substantially unfair, how can the stronger party show the bargain was fair and reasonable? (*supra* note 176 at 180-81).

*Wynrib*:<sup>187</sup> first, “proof of inequality in the positions of the parties” and, second, “proof of an improvident bargain.”<sup>188</sup> Proof of inequality in the positions of the parties should not be an obstacle in the pre-dispute consumer arbitration clause context, even though the unconscionability cases are unclear about the extent of inequality that is required.<sup>189</sup> All consumer protection legislation is based on the idea that “consumer contracts are systematically biased against consumers because consumers do not have the bargaining power to influence the terms of such contracts.”<sup>190</sup>

The real problem will be proof of an improvident or substantially unfair bargain in connection with the separable arbitration clause. Part of the problem with this aspect of the test is a general one: the role the criterion plays in unconscionability is an uncertain one.<sup>191</sup> On this point, the *Kanitz* and *Huras* cases can usefully be compared. In *Kanitz*, Justice Nordheimer rejected the argument that the imposition of a clause mandating arbitration and ousting class proceedings was evidence that Rogers took advantage of its superior bargaining power. It was important that there were no mandatory legal rights involved and there was no evidence that the plaintiffs were denied access to arbitration by its cost. The plaintiff therefore still had a forum for redress. In Justice Cumming’s decision in *Huras*, it was important that the arbitration clause forced only those in the plaintiff’s position to use arbitration, that mandatory legal rights of the plaintiff were in issue, and that the costs of a three-person arbitration panel were prohibitive compared to the small amounts of the plaintiff’s claims. The combined effect was to deny the plaintiff access to either the courts or to arbitration and therefore to deny vindication of the plaintiff’s statutory rights. This made the arbitration clause substantially unfair to the plaintiff and showed that Primerica had used its superior bargaining power to take advantage of its potential employees.

The Canadian doctrine of unconscionability is not principled or stable enough to be able to predict its application with any degree of certainty. Nevertheless, a few tentative conclusions can be drawn from its application in *Huras* and *Kanitz*. It appears that if the only effect of the arbitration clause is to deny a consumer access to the courts, including small claims court and class actions, the arbitration clause will not likely be found to be unconscionable. Arbitration, by definition, excludes the courts. However, if the consumer is also denied access to arbitration due to its cost, the arbitration clause will probably be found unconscionable. The consumer would have no forum for redress and be denied all access to justice. If the arbitration clause

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<sup>187</sup> [1992] 2 S.C.R. 226, 138 N.R. 81 [*Norberg* cited to S.C.R.]. See the discussion of the unconscionability issue in this case in Manwaring, *supra* note 177 at 260-63.

<sup>188</sup> *Norberg*, *ibid.* at 256.

<sup>189</sup> See *Floyd v. Couture* (2004), 349 A.R. 1 at para. 214, 29 Alta. L.R. (4th) 296, 2004 ABQB 238. See also the discussion of the criterion of inequality of bargaining power in Bigwood, *supra* note 176 at 199-203.

<sup>190</sup> Manwaring, *supra* note 177 at 254.

<sup>191</sup> See Bigwood’s discussion of “substantial transactional improvidence” (*supra* note 176 at 204-209).

includes an attempt to thwart the consumer's mandatory legal rights, then it will very likely be held to be unconscionable.<sup>192</sup>

Evaluating the terms of standard form contracts on a case-by-case basis would strain judicial resources and add to uncertainty for contracting parties. However, judicial use of unconscionability and a refusal to stay at the request of one business may have a deterrent effect on other businesses inclined to abuse pre-dispute consumer arbitration, because businesses in specific product markets often use identical or similar contract terms. The decision in *MacKinnon*, for example, dampened enthusiasm for arbitration clauses as a means to avoid class actions in British Columbia.<sup>193</sup> Until legislatures act, judicial scrutiny of the misuse and abuse of arbitration clauses in the consumer context on the grounds of unconscionability is the next best response.

## Conclusion

As the seven cases reviewed in this paper make clear, some businesses take advantage of their superior economic power, information resources, and incentives when inserting arbitration clauses into their standard form contracts with consumers. Like their counterparts in the United States, some Canadian companies have agreements requiring consumers to submit their claims to arbitration while leaving the company free to litigate, forbidding class actions, requiring expensive three-person arbitral panels, shortening limitation periods, and banning the use of certain defences in court.

Canadian consumer arbitration law is currently in a state of flux. Two provincial legislatures have acted, but they have prohibited different types of pre-dispute consumer arbitration clauses and do not address all of the abuses. The Courts of Appeal in British Columbia and Ontario have taken one approach to the apparent

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<sup>192</sup> In the United States, the courts are split on when an arbitration agreement is egregious enough to merit not being enforced. Clauses that deprive claimants of adequate access to a forum or that deny claimants relief to which they would ordinarily be entitled are among those provisions courts are most likely to strike down as unconscionable. See Sternlight, "Mandatory Binding Arbitration", *supra* note 17 at 105-108; Bales, *supra* note 7 at 585.

<sup>193</sup> See David Neave & Jennifer Spencer, "Recent Developments in Class Proceedings—The 'Unenforceability' of Mandatory Arbitration Clauses" *Blakes Bulletin on Litigation* (December 2004), online: Blake, Cassels & Graydon LLP <<http://www.blakes.com/english/publications/bdr/december2004/classproceedings.asp>>, asserting that the

British Columbia and Ontario approaches run counter to American jurisprudence which supports the enforcement of mandatory arbitration provisions in consumer agreements notwithstanding that they may effectively bar determination by way of class action or class arbitration. With consumer contracts on both sides of the border increasingly including mandatory arbitration clauses, this divergence in the jurisprudence is somewhat troubling, particularly for clients whose business straddles multiple jurisdictions (*ibid.*).

conflict between arbitration legislation and class proceedings legislation, and the Quebec Court of Appeal another.

Canadian arbitration organizations have yet to provide any consumer-specific rules or procedures, perhaps because there has not yet been a sufficient volume of consumer arbitrations or outpouring of criticism. Nevertheless, these Canadian organizations would do well to learn from the self-regulation efforts of the American arbitration providers, and the reasons for those efforts, before being compelled to do so.

In the judicial system, use of the unconscionability doctrine would allow case-by-case determinations of the unconscionability of pre-dispute consumer arbitration clauses, geared to each particular set of circumstances. Directly tackling the issue of the validity of pre-dispute arbitration clauses within the terms of the relevant arbitration legislation is preferable to the current judicial approaches that ignore legislative stay provisions. Even as an interim measure, however, judicial policing of arbitration clauses is impracticable. The doctrine of unconscionability is still developing. Success in attacking arbitration clauses on the basis that they are unconscionable is also uncertain. Doubts about the enforceability of arbitration clauses may induce consumers and consumer organizations to abandon claims altogether, or induce lawyers to refuse to act for potential class action plaintiffs. Statutory consumer protection rights may not be enforced and the law's capacity for influencing commercial behaviour may be reduced. Uncertainty could also jeopardize many of the traditional benefits claimed for arbitration, such as its low cost, speedy resolution, and confidentiality.

Resort to a legislated rule, uniform across Canada, is the best response to the strategic use of pre-dispute arbitration clauses in consumer standard form contracts. Based on the type of consumer arbitration abuses seen to date in Canada and the American experience, domestic arbitration legislation should be amended in order to ensure that consumers retain access to small claims courts and class proceedings and have the ability to enforce the mandatory legal rights of their province of residence.

The contractualist justifications for legislative and judicial deference to arbitration are considerably weaker in the consumer context than in arbitration's traditional commercial context. Deference to arbitration is largely based on freedom of contract and the value of personal autonomy. How can such values come into play in contracts of adhesion where that autonomy is only exercised by one of the parties? There is no reason to defer to businesses that seek to advance only their own self-interests and evade laws not to their liking.

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