File Number: 31067

Supreme Court of Canada

(On Appeal from the Quebec Court of Appeal)

BETWEEN: **DELL COMPUTER CORPORATION**

Appellant/Respondent

AND: **UNION DES CONSOMMATEURS**
OLIVIER DUMOULIN

Respondents/Petitioners

AND : **CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC** & **PUBLIC INTEREST ADVOCACY CENTRE, LONDON COURT OF INTERNATIONAL ARBITRATION**, **ADR INSTITUTE OF CANADA INC.**, **ADR CHAMBERS INC.**

Interveners

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CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC & PUBLIC INTEREST ADVOCACY CENTRE

Supreme Court Rules, R. 37 & 42

Date: September 12, 2006

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TABLE OF CONTENTS

PART I - FACTS

1. The facts of this case are sufficiently stated in the Appellant's and Respondent's factums.[1]

2. The Interveners do not take a stand on the merits of the case and do not pass judgement on the parties' motives.

PART II - QUESTIONS IN DISPUTE

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3. The Interveners, CIPPIC and PIAC, wish to make submissions on three issues:

a) Whether it is against public order to deny consumers their right to institute a class action, through mandatory arbitration clauses in contracts of adhesion;

b) Whether the Appellant properly brought the arbitration clause to the attention of consumers;

c) Whether the court, and not the arbitrator, should decide the issues in this case.

4. The Interveners, CIPPIC and PIAC, submit that the first question should be answered in the affirmative, the second in the negative, and the third in the affirmative.

[1] Appellant's Factum at paras. 1-40; Respondent's Factum at paras. 1-6.

PART III - ARGUMENT

5. In Quebec, as in many other North American jurisdictions, the class action has proved an invaluable tool for the vindication of consumers' rights. This case is about a business that is trying to avoid a class action by inserting an arbitration clause in the standard terms and conditions that it imposes on consumers who place orders through its web site. In short, the Appellant is trying to use arbitration as a "class action stopper." There are two basic reasons why the Appellant should fail. First, the class action is a public order procedure, which means that a consumer cannot waive it in advance. Second, and in the alternative, the Appellant has not obtained a genuine consent to arbitration from the Respondent Dumoulin, in accordance with the provisions of article 1435 C.C.Q.

6. The main fault in the Appellant's argument is that it relies exclusively on one legal doctrine, the autonomy of the will. Yet, the thrust of the evolution of contract law over the last forty years, especially where consumers are involved, has been a move away from the autonomy of the will and towards greater contractual justice through devices such as rules of protective public order, the duty to inform, and the duty to act in good faith.[2]

7. In the main, the Appellant relies on cases involving commercial interests, or "business-to-business" ("B2B") transactions. The principles underlying those judgements cannot be transposed to "business-to-consumer" ("B2C") transactions without regard for the rules of contractual justice that have been developed to protect consumers.[3]

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[2]Jean-Louis Baudouin, Pierre-Gabriel Jobin & N. Vézina, *Les obligations*, 6th ed. (Cowansville: Yvon Blais, 2005) at 131-135; Jacques Ghestin, *Traité de Droit Civil : La formation du contrat*, (Paris: Librairie Générale de Droit et de Jurisprudence, 1993) at 45-56 ; Christian Larroumet, *Les obligations – Le contrat*, tome III, 5th ed., (Paris : Economica, 2004) at 97-109.

[3]See, *e.g.*, *MacKinnon* v. *Instaloans Financial Solution Centres (Kelowna) Ltd.*, [2004] BCCA 473 at para. 33.

Part III – Argument

8. At the outset, the Interveners would like to point out that they favour a solution based on rules of general application rather than on a case-by-case assessment of several factors. In this regard, the Court of Appeal judgement suggests that class actions sometimes prevail over, and sometimes give way to, arbitration. This approach would lead to repeated litigation over the appropriate jurisdiction to hear consumer claims.

9. Consumers must not face a heavy burden each time they want to avail themselves of the remedies the law has specially crafted for them. Thus, the Interveners respectfully ask this Court to decide the case on the basis of their first argument, namely, public order. If this were the case, an arbitration agreement could *never* bar a class action. Class actions could proceed even if the defendant has tried to shield itself behind an arbitration clause and there would be no need to devote scarce resources to identifying the competent jurisdiction.

10. In contrast, if this Court prefers to decide the case on the second issue, that of the external clause, it would make the jurisdiction to hear a consumer claim dependent on the specific facts of each case. E-commerce (or other) class actions would increasingly be met by motions to stay based on an arbitration clause. The outcome would depend on evidence regarding the defendant's web site, the method employed to obtain the consumer's consent and the information provided to the consumer. Such evidence would be specific to the facts of the case and a judgement in one case could not be generalised to other cases. Some evidence might also be specific to one consumer and not be common to all class members, rendering the determination of jurisdiction more problematic. For instance, in this very case, the Appellant is relying on evidence specific to the Respondent Dumoulin, and subsequent to the conclusion of the contract, to deny the jurisdiction of the Superior Court.[4]

A. Public Order, Class Actions and Arbitration Clauses

11. In Quebec law, the concept of "public order" refers to rules that are imperative, rules that one cannot contract out of (art. 9 C.C.Q.). Public order may pertain to substantive rules (such

[4] Appellant's Factum, paras. 31-33.

as most rules found in the Quebec *Consumer Protection Act*), "matters" (such as family matters) or procedures (such as the small claims court).[5]

12. The interaction of arbitration with the first two meanings of public order mentioned above is governed by article 2639 C.C.Q.: parties cannot agree to arbitrate public order "matters," but an arbitrator may apply substantive public order rules. Article 2639, however, does not address the relationship of arbitration with public order *procedures*. That is the subject of the present dispute.

13. The Interveners submit that the class action is one such public order procedure. Because it pertains to public order, the right to bring a class action cannot be waived in advance by a consumer. Public order limits the autonomy of the will in this regard. However, because the nullity attaching to this form of public order is relative, not absolute, consumers may, *once a dispute has arisen*, choose to submit their claim to arbitration (and not to invoke the public order procedure of the class action). In the Interveners' view, invalidating mandatory arbitration clauses, while accepting optional arbitration, adequately reconciles individual autonomy and consumer protection in a way that fosters e-commerce. A similar balance was recently struck by the Ontario legislature in a new law that invalidates mandatory arbitration clauses preventing consumers from accessing the publicly funded justice system, and that confirms consumers' rights to engage in class actions despite any contractual term purporting to prevent such actions.[6]

A.1 *The Class Action is a Public Order Procedure*

14. No provision of the *Code of Civil Procedure*, R.S.Q., c. C-25 (C.C.P.) expressly declares the class action to be a public order procedure. Yet, this Court has recognised that the judiciary may identify rules of public order even in the absence of statutory indication. In doing so, judges will be guided by the purpose of the rule. Public order rules mirror "principles of

[5] *Consumer Protection Act*, R.S.Q. c. P-40.1.
[6] *Consumer Protection Statute Law Amendment Act*, S.O. 2002, c. 30, s. 8.

fundamental law, or rules of community life" or aim at protecting the weak party in a contractual relationship.[7]

15. Protecting the weak party in a contractual relationship is mainly achieved through substantive rules that regulate the formation or the contents of consumer contracts or contracts of adhesion. Yet, those substantive rules would be useless if the consumer could not resort to adequate procedures for their vindication. Over the years, it has become obvious that the ordinary action is unsuited for the resolution of many consumer claims. Thus, legislatures have created specific procedures aimed at ensuring better access to justice for consumers.

16. The class action is a means of improving consumer access to justice. This Court has identified the main purposes of class actions as being judicial economy, the enhancement of access to justice and the encouragement of behaviour modification.[8] In particular, access to justice is improved by "by making economical the prosecution of claims that would otherwise be too costly to prosecute individually."[9] Individual members of a successful class can obtain redress after the fact, without having to lodge their own lawsuits. Class actions also "serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery."[10] These purposes, which relate to the protection of the weak party in a contractual relationship, clearly indicate the public order character of the class action.

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[7] *Goulet v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 719 at para. 42; *Garcia Transport Ltée v. Royal Trust Co.*, [1992] 2 S.C.R. 499 at 522-524.

[8] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 27-29; *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 16 [*Bisaillon*]. See also Pierre-Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, (Montréal: Thémis, 1996) at 338-339; Shelley McGill, "The Conflict between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Can. Bus. L. J. 359 at 366-367; Craig E. Jones, *Theory of Class Actions*, (Toronto: Irwin Law, 2003) at 114-115; John C. Kleefeld, "Class Actions as Alternative Dispute Resolution", (2001) 39 Osgoode Hall L.J. 817 at 826-827.

[9] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 28.

[10] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para 29.

Part III – Argument

17. The fact that the class action is a procedure of public order is further evidenced by the public funding made available to plaintiffs under the *Act respecting the Class Action*, R.S.Q., c. R-2.1. The "Fonds d'aide aux recours collectifs" may grant funding to cover the plaintiff's legal and expert fees.[11] If the claim is successful, the Fonds recoups its costs from the award. If, on the other hand, the claim is dismissed, the Fonds will pay the fees. The system ensures that the costs of a lawsuit do not impede meritorious class actions.

18. Moreover, the C.C.P. subjects the conduct of the proceedings by the representative to the court's control. Thus, the representative may not amend the pleadings (art. 1016), renounce his status as representative (art. 1023) or settle the case (art. 1025), without the leave of the court.
10 This judicial supervision demonstrates that class actions are concerned with more than the autonomy of the will. Public order intervenes to ensure that the rights of unrepresented members are properly defended. Similarly, in the United States, courts closely scrutinise "settlement class actions," *i.e.*, applications to certify a class for the purpose of binding unrepresented parties to a negotiated settlement, to ensure that the proposed settlement is in the interest of all members.[12]

19. If this Court allows businesses to stipulate a waiver of class actions in contracts of adhesion, such a waiver will become a standard contractual term in many industries and the purpose of class action legislation will be defeated, at least with respect to contractual relationships. It is precisely the likelihood that the contractual exclusions of a protective rule
20 would spread that led this Court, in the *Garcia Transport* case, to recognise the public order character of the rule.[13]

20. The *Bisaillon* and *Hamer* cases, in which this Court and the Quebec Court of Appeal held that labour arbitration and income tax matters could not be the subject of a class action, can easily be distinguished. The gist of those cases is that labour arbitration and income tax were

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[11] *Act respecting the Class Action,* R.S.Q., c. R-2.1, ss. 20-34.
[12] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).
[13] *Garcia Transport Ltée v. Royal Trust Co*., [1992] 2 S.C.R. 499 at 526-527 [*Garcia Transport*]. See also Linda J. Demaine and Deborah R. Hensler, ""Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience" (2004) 67 Law & Contemp. Probs. 55 at 62-65; Frederick L. Miller, "Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection," (1999) 78 Mich. B.J. 302 at 303-304.

"matters" within the exclusive jurisdiction of specialised tribunals and entities. In other words, those *matters* of public order were removed from the ambit of the class action as a public order *procedure* (and would be removed from the ambit of commercial arbitration as well). In contrast, the present case, a contractual dispute, clearly falls within the jurisdiction of the ordinary courts and may properly be the subject of a class action (or arbitration, where no class action is instituted).[14]

A.2 *Arbitration Does not Provide an Equivalent Access to Justice*

21. Despite the public order character that attaches to the class action, the Appellant argues that arbitration provides consumers with an access to justice that is a substitute for that afforded by the class action. This comparison does not hold, for arbitration is *individual* and *confidential*, as provided by section 13A of the Appellant's terms and conditions.[15]

22. First and foremost, arbitration is individual. Although there have been some instances of "class arbitration" in the United States, no such thing has ever taken place in Canada. Moreover, the American experience is already attracting criticism.[16] It is also highly speculative whether such a procedure would be compatible with the C.C.P. in its present state or whether it would adequately safeguard the interests of unrepresented members of the class. Moreover, the Appellant specifically stipulated that disputes with consumers must be settled individually, which clearly evinces an intent to escape any form of class proceedings.[17]

23. The individual nature of arbitration compromises the goals of class actions mentioned above. Even assuming lower individual costs in arbitration, claimants will never benefit from the economies of scale associated with class actions. When the value of the claim is very small, few aggrieved consumers will take the pains of initiating arbitration to vindicate their

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[14] *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 46-57; *Hamer v. Québec (Sous-ministre du Revenu)*, [1998] R.D.F.Q. 73 (C.A.) [*Hamer*].
[15] Exhibit ARB-3 of the Appellant's Application for Leave to Appeal.
[16] Shelley McGill, "The Conflict between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Can. Bus. L. J. 359 at 377; Jean R. Sternlight , "As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?" (2000) 42 Wm. & Mary L. Rev. 1 at 44-54.
[17] Appellant's Factum at para. 39.

rights. Moreover, individual consumers who are unaware that their rights have been breached cannot benefit from the representative actions of other similarly situated consumers.[18]

24. The Appellant contends that arbitration brings justice to the consumer at a lower cost. However, published studies on the subject do not reach clear conclusions.[19] Comparisons of the respective cost of arbitration and public justice usually focus on filing fees for individual cases. These comparisons omit significant costs, such as attorneys' fees or expert fees, for which there is a possibility of public funding when a class action is instituted. Moreover, these comparisons usually do not consider the economies of scale flowing from the grouping of many small claims into a class action. In the face of such uncertainty, a consumer resisting the application of an arbitration clause on public order grounds should not bear the burden of bringing evidence concerning compared costs and should benefit from a presumption that the class action is much more economical than individual claims.

25. The other major feature of arbitration is confidentiality. While the source and scope of a duty of confidentiality with respect to arbitration remain controversial, confidentiality is often cited as one of the major reasons why businesses choose arbitration over public litigation. Many arbitration agreements, such as the one in the present case (article 13A), expressly stipulate that the dispute shall remain confidential.

26. In those circumstances, arbitration awards will not be published and will lack any precedential value. The wrongdoing of large corporations will remain unexposed. When a consumer is successful in arbitration, other consumers will most likely remain unaware and will not put forward their own claim. In the result, the deterrent effect associated with the class action is entirely lost.[20]

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[18] Jean R. Sternlight & Elizabeth J. Jensen, "Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse?" (2004) 67 Law & Contemp. Probs. 75, at 88-90.

[19] S. Walt, "Decision by Division: The Contractarian Structure of Commercial Arbitration," (1999) 51 Rutgers L. Rev. 369 at 406-407; Christopher R. Drahozal, ""Unfair" Arbitration Clauses," (2001) U. Illinois L. Rev. 695 at 743.

[20] Shelley McGill, "The Conflict between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Can. Bus. L. J. 359 at 366-367; Jean R. Sternlight, "Creeping Mandatory Arbitration: Is It Just?" (2005) 57 Stanford Law Review 1631 at 1661-1665

Part III – Argument

27. Moreover, it is unrealistic to suggest that consumers weigh the waiver of class action against the advantages that may be offered by a proposed transaction, or that competition between businesses will force them to offer adequate or fair terms. Studies have shown that businesses compete on price and other main features of their products and services, not on ancillary terms of sale or service.[21] As an American author stated:

> Unlike the drafting party, who has […] probably experienced both arbitration and litigation, the adherent is unlikely to have had any such experience and is also unlikely to undertake the time and expense to research the implications of an arbitration clause or obtain legal advice. In her ignorant position, the adherent is most likely to undervalue the right to a judicial forum. All in all, the adherent is in no position to bargain or shop for a better term, even assuming that obtaining a better term is economically rational or even possible. Like adhesive form terms generally, arbitration clauses are not subject to control through the actions of individual contract adherents.[22]

28. In many other jurisdictions, legislatures have adopted specific rules to ensure that arbitration is not used as a "class action stopper." In Canada, Ontario's *Consumer Protection Act* was recently amended to preserve consumers' right to commence class action proceedings despite terms of sale purporting to prevent such proceedings.[23] In British Columbia, the Court of Appeal has indicated that a court should not stay an intended class action because of an arbitration clause. Instead, the court must dispose of the certification application first. The arbitration agreement will become "inoperative" if the court determines that class action is a preferable procedure and that the other requirements for certification are met.[24]

29. The European Union has adopted a directive on unfair terms in consumer contracts, which considers as "*prima facie* unfair" any term "excluding or hindering the consumer's rights to take legal action or exercise any other legal remedy, particularly by requiring the

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[21] Melvin Aron Eisenberg, "The Limits of Cognition and the Limits of Contract," (1994-1995) 47 Stan. L. Rev. 211, at 244.

[22] 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 at 57-58; See also Todd D. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 Harv. L. Rev. 1173 at 1226-27;

[23] *Consumer Protection Act*, S.O. 2002, c.30 at s.8.

[24] *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.*, [2004] BCCA 473 at paras. 49-53.

consumer to take disputes exclusively to arbitration not covered by legal provisions..."[25] A subsequent recommendation of the European Commission has made clear that, under the Directive, "out-of-court alternative[s] may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised."[26]

30. This prohibition on mandatory arbitration clauses in consumer contracts is reflected in the national law of several EU member States:

a) In France, article 2061 of the Civil Code (C. civ.) restricts arbitration to commercial or professional parties only, at least with respect to domestic proceedings.[27]

10 b) In the United Kingdom, the *Arbitration Act* does not apply to claims worth less than £5000.[28] Moreover, in practice, the Office of Fair Trading consistently requires businesses either to delete pre-dispute binding arbitration clauses altogether or to give consumers the option to arbitrate after a dispute arises.[29]

c) In Sweden, the *Arbitration Act (1999)* only upholds consumer arbitration agreements made *after* a dispute has arisen.[30]

d) In Germany, arbitration agreements to which a consumer is a party must be contained in a document which has been personally signed by the parties and which includes only

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[25] EC, *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 1993 at art. 3(3) Annex (q).

[26] 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 at Preamble para. 21 and Principle VI; the content of this recommendation was approved in EC, *Commission Recommendation of 4 April 2001 on the Principles for Out-of-court Bodies Involved in the Consensual Resolution of Consumer Disputes*, [2001] O.J. L. 109/56 at Preamble, para.9.

[27] Philippe Delebecque, "Arbitrage et droit de la consommation", (2002) 104 Dr. et pat. 46 at 50-51; Bernard Hanotiau, "L'arbitrabilité", in *Académie de droit international de La Haye, Recueil des cours 2002* (Paris: Hachette, 2003) at 218-221.

[28] *Arbitration Act* 1996 (U.K.), c. 23, s. 91, online: <http://www.opsi.gov.uk/acts/acts1996/1996023.htm>.

[29] Christopher R. Drahozal and Raymond J. Friel, "Consumer Arbitration in the EU and the US," (2002) 28 N.C. J. Int'l L. & Com. Reg. 357 at 372-373.

[30] *The Swedish Arbitration Act* (SFS 1999/116), s. 6, online: <http://www.chamber.se/arbitration/english/laws/skiljedomslagen_eng.html>

provisions concerning the arbitration.[31] Because of this strict formalism, pre-dispute consumer arbitration clauses are a rare occurence in Germany.[32]

31. Non-European countries also protect consumers from compulsory private arbitration:

a) As does Germany, New Zealand provides protection against mandatory consumer arbitration in its *Arbitration Act* by requiring certification from the consumer in a separate agreement that the consumer understands and agrees to be bound by the arbitration agreement.[33] Moreover, the right to bring an action before public courts is protected by the *Disputes Tribunals Act*.[34]

b) Japan's *Arbitration Act 2003* prohibits mandatory consumer arbitration by allowing consumers (but not businesses) to later cancel any agreement to arbitrate.[35]

c) In Brazil, consumer protection legislation entirely forbids the inclusion of mandatory arbitration clauses in consumer contracts.[36]

32. The situation in the United States is somewhat different. Some States had adopted statutory provisions regulating arbitration clauses in consumer contracts, but the Supreme Court held those statutes to be invalid on division-of-powers grounds.[37] Courts are thus left to assess consumer arbitration clauses on a case-by-case basis, against the standards set by the contract doctrine of unconscionability.[38] Indeed, some state courts have held that a waiver of

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[31] *Bundesrepublik Deutschland, Zivilprozessordnung*, § 1031 as amended byArticle 1, No. 7 of the *Arbitral Proceedings Reform Act: Tenth Book of the Code of Civil Procedure* 1998 (Germany), online: <http://www.dis-arb.de/materialien/schiedsverfahrensrecht98-e.html>.

[32] F. Niggeman, "Chronique de jurisprudence étrangère", [2006] Rev. arb. 225 at 230-231.

[33] *Arbitration Act 1996* (N.Z.), 1996/99 (amendment 1998, No 26), s.11.

[34] *Disputes Tribunals Act 1988* (N.Z.), 1998/110 [An Act to consolidate and amend the Small Claims Tribunals Act 1976], s. 16.

[35] *Arbitration Law* (Japan), 2003/138, s. 3, online: <http://www.law.kuleuven.be/ipr/eng/arbitration/legal%20texts/japanarbitrationlaw.html>; K. Yamamoto, "La nouvelle loi japonaise sur l'arbitrage", [2004] Rev. arb. 829, p. 841

[36] *Còdigo de defesa do Consumidor* (Brazil) 1990/8.078, s. 51(VII), online: <http://www.mj.gov.br/dpdc/servicos/legislacao/cdc.htm>.

[37] *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996).

[38] Christopher R. Drahozal and Raymond .J. Friel, "Consumer Arbitration in the EU and the US," (2002) 28 N.C. J. Int'l L. & Com. Reg. 357 at 374-376; Mathieu Maisonneuve, "Le droit américain de l'arbitrage et la théorie de l'unconscionability", [2005] Rev. arb. 101.

class action is unconscionable.[39] However, for the reasons set forth above, we argue that a case-by-case review is unsatisfactory and imposes too heavy a burden on consumers.

33. The Appellant argues that this Court's decision in *Desputeaux* controls the case.[40] In *Desputeaux*, it was held that section 37 of the *Copyright Act*, which grants concurrent jurisdiction to the Federal Court over copyright matters, did not evince an intent to prohibit arbitration.[41] In other words, section 37 did not set out a procedure of public order. In contrast, the provisions of the C.C.P. regarding class actions are of public order. They cannot be waived in advance and they cannot be set aside by mandatory arbitration clauses.

34. From a policy perspective, allowing optional arbitration (after the dispute arises) while prohibiting mandatory arbitration gives an incentive to businesses and arbitration centres to design arbitration systems and procedures that are fair, inexpensive and efficient. If they succeed, consumers will be attracted to those arbitration systems. Requiring arbitration to be optional and not mandatory will ensure that consumers make an informed and enlightened choice between the procedural avenues before them (arbitration or courts), only when the dispute has arisen, at a moment when they will find valuable to study carefully the merits and drawbacks of each. Public order procedures, such as the class action, will always be available to consumers who believe they are not well served by arbitration.

B. Consent to Arbitration, External Clauses and Article 1435

35. The second question on which the Interveners would like to make submissions is whether the Appellant succeeded in incorporating the arbitration clause (found in its standard terms and conditions) in the contract it concluded with the Respondent, Dumoulin. Answering this question requires a definition, in the context of cyberspace, of two key concepts in article 1435

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[39] Shelley McGill, "The Conflict between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Can. Bus. L. J. 359 at 378-379; Jean R. Sternlight & Elizabeth J. Jensen, "Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse? (2004) 67 Law & Contemp. Probs. 75 at 78-85.

[40] Appellant's factum at paras. 72-74; *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178 [*Desputeaux*].

[41] *Copyright Act*, R.S.C. 1985, c. C-42.

C.C.Q.: (1) “external clause” and (2) the requirement that such clauses be "expressly brought to the attention of the consumer”.

36. The meaning given to those concepts must take into account the purpose of article 1435, laid out in the general rule of article 1399 C.C.Q.: ensuring that consent be free and informed. The interpretation of article 1435 must also be coherent with articles 6, 7 and 1375 C.C.Q. (which ground a general duty to inform, especially in cases of informational imbalance), article 1432 C.C.Q. (which mandates an interpretation favourable to the consumer in case of doubt or ambiguity), and section 9 of the *Consumer Protection Act* (which requires taking into account the condition of the parties, the circumstances in which the contract was entered into and the benefits arising from the contract for the consumer). These principles mandate an inquiry into the *substance* of the information given to the consumer. They also indicate that businesses should take all reasonable steps to ensure that consumers are aware of key terms that businesses are seeking to impose on consumers. In this regard, businesses cannot simply be content to post terms of sale somewhere on their web site and remain passive.

B.1 *A Hyperlinked Web Page is an External Clause*

37. Web pages constitute the basic units of cyberspace. Given that businesses can include any number of hyperlinks on their web pages, and given the considerable and unbounded amount of information that can be included in the web pages so linked, there is no valid analogy between separate web pages connected through hyperlinks and a multi-page paper contract. Thus, a web page referred to in a hyperlink on the page where the consumer concludes a contract constitutes a separate document and falls within the concept of “external clause” in article 1435 C.C.Q., requiring the Appellant to prove actual knowledge and consent on the consumer’s part.

38. This conclusion is reinforced by articles 2640 and 2642 C.C.Q., which prescribe that the arbitration agreement is a separate contract and must be in writing. Requirements as to form

are a tool commonly employed by the civil law to ensure the integrity of consent.[42]

39. This conclusion is not inconsistent with Quebec's *Information Technology Act*.[43] Section 4 of that Act addresses a different problem, *i.e.*, where the information forming a single document is fragmented and placed on different media or storage devices.[44] For instance, the text of a web page might be stored on one server, while its images are stored on a different one. Authors have concluded that section 4 leads to the conclusion that separate pages constitute separate documents.[45]

B.2 *The Appellant did not Bring the Clause to the Attention of Consumers*

40. The requirements of article 1435, al. 2, must be developed in light of the existing case law on the inclusion of external terms, the duty to inform and the necessity of obtaining the consumer's enlightened consent. Courts in Quebec and elsewhere in Canada have been reluctant to impose on consumers terms that were referenced or that appeared in small print in the main contractual document or to presume consent to a signed agreement when the signer of the document was not expected to read it.[46]

41. The relationship between both paragraphs of article 1435 also illuminates the scope of the duty imposed on businesses under the second paragraph. The first paragraph, dealing with ordinary contracts, only requires the presence in the main contract of a "reference clause" signalling the existence of additional contractual terms (the "external clauses") in a distinct document. Under the first paragraph, it is enough that the external clause be available; there is

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[42] Jacques Ghestin, *Traité de Droit Civil : La formation du contrat*, (Paris: Librairie Générale de Droit et de Jurisprudence, 1993) at 341-42.

[43] *Act to establish a legal framework for information technology*, R.S.Q., c. C-1.1, s. 4.

[44] D. Poulin and P. Trudel (eds.), *Loi concernant le cadre juridique des technologies de l'information, texte annoté et glossaire* (Montreal: Centre de recherche en droit public, 2001) online: <http://www.services.gouv.qc.ca/fr/enligne/loi_ti/articles/chap2/art4.asp>.

[45] C. Bouchard et M. Lacoursière, "Les enjeux du contrat de consommation en ligne" (2003) 33 R.G.D. 373 at 397 398.

[46] *Burchmore v. Harold Commuings Ltd.*, [1961] C.S. 220; B. Moore, "À la recherche d'une règle générale régissant les clauses abusives en droit québécois" (1994) 28 R.J.T. 177 at 211; *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (Ont. C.A.); *Superior Propane Inc. v. Nanegkam Housing Corp. of Prince Edward Island*, [1993] 105 Nfld. & P.E.I.R. 230, (1993), 9 B.L.R. (2d) 241 (P.E.I.S.C.A.D.) at 6-8; *1560032 Ontario Ltd. v. Arcuri*, [2006] O.J. No. 2383 (Ont. C.A.); S.M. Waddams, *The Law of Contract* (Aurora: Canada Law Book, 2005) at para. 331-333.

no positive duty on one party to draw the other party's attention to the existence or substance of the external clause. In that context, passivity is acceptable. In contrast, the second paragraph, applicable to consumer contracts and contracts of adhesion, requires more than inserting a "reference clause" in the main contract and making the "external clause" available to the consumer. The contrast between the two paragraphs of article 1435 means that consumers must actively be informed of the substance of external clauses.[47]

42. The requirement to inform consumers of the substance of external clauses is further grounded in the duty to inform that flows from the general duty to act in good faith (art. 6, 7, 1375 C.C.Q.) and that was recognised by this Court in the seminal *Bail* case.[48] As Ghestin says, with respect to French law: "On observe une forte tendance de notre droit positif à faire peser une obligation d'information sur les professionnels quant au contenu des contrats d'adhésion."[49] Even in commercial contracts, the Quebec Court of Appeal has recognised the application of the duty to inform at the pre-contractual stage.[50]

43. Thus, the mere reference to, and inclusion at the bottom of the Appellant's web page of, a fine-print hyperlink to the Appellant's standard terms and conditions amounts only to a "reference clause". This would be effective in a commercial contract, where only the first paragraph of article 1435 applies. In a consumer contract, however, more is required. The Appellant had to take positive steps to inform consumers of the substance of the external terms being imposed upon them. It was not enough to make those terms available on a separate web page. Accepting the Appellant's arguments in this regard would render the second paragraph of article 1435 meaningless.

44. Adherence to this principle is particularly important in cyberspace. Commercial web pages typically contain many hyperlinks and it is not reasonable to expect consumers to

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[47] D. Lluelles, "Le mécanisme du renvoi contractuel à un document externe: droit commun et régimes spéciaux" (2002) 104 R. du N. 11, esp. at 29; *Secrétariat de l'Action catholique de Joliette c. Cyr*, [2000] R.J.D.T. 971 (C.S.) at 976-977, (affirmed in part at [2001] J.Q. no 5235 (C.A.)).

[48] *Bank of Montreal v. Bail ltée*, [1992] 2 S.C.R. 554 at 582, 585-587 [*Bail*].

[49] Jacques Ghestin, *Traité de Droit Civil : La formation du contrat*, (Paris: Librairie Générale de Droit et de Jurisprudence, 1993) at 641.

[50] *87313 Canada Ltée v. F & I Holdings Inc.*, [1996] R.J.Q. 851 (C.A.).

investigate each of them. Moreover, terms and conditions of purchase tend to be very long and drafted in difficult language, especially because the cost of publishing a long electronic document is much lower than that of printing a long paper contract.[51] Authors have concluded that in practice, consumers do not understand the practical effect of the contractual terms that are sought to be imposed upon them.[52]

45. To comply with the requirement of "bringing to the attention of the consumer", in article 1435, on-line businesses must take measures (such as pop-up windows with "print" and "save" options, scroll-through and "click to agree" requirements) to ensure that consumers at least purport to have read and agreed to particular terms and conditions before concluding the sale. They should also indicate clearly to consumers, in easily understandable language, the nature and practical effect of the contractual terms that they wish to impose on consumers.

46. The substantive component of article 1435 C.C.Q. is crucial where complex legal notions are involved or where a business seeks to impose a legal regime markedly different from the one usually applicable to the type of contract considered. For instance, a Quebec Court judged that an arbitration clause in a consumer contract was not drafted in sufficiently precise terms to convey all its implications to the consumer and was therefore an incomprehensible clause.[53] Similar requirements of clarity are found in the French Code de la consommation, s. L-133-2, which states : "Les clauses des contrats proposés par les professionnels aux consommateurs ou aux non-professionnels doivent être présentées et rédigées de façon claire et compréhensible. "[54]

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[51] Vincent Gautrais, "The Colour of E-consent" (2003-2004) 1 U.O.L.T.J. 191 at 195-197.

[52] Vincent Gautrais and Ejan Mackaay, "Les contrats informatiques" in D.-C. Lamontagne et al., eds., *Droit spécialisé des contrats*, vol. 3 (Cowansville, Québec: Yvon Blais, 1999) at 296-298; Alan M. White & Cathy Lesser Mansfield, "Literacy and Contract" (2002) 13 Stan. L. & Pol'y Rev. 233 at 233-235, 261-262, 266; Todd D. Rakoff "Contracts of Adhesion: An Essay in Reconstruction (1983)" 96 Harv. L. Rev. 1174 at 1178-1180; Melvin Aron Eisenberg "The Limits of Cognition and the Limits of Contract" (1994-1995) 47 Stan. L. Rev. 211 at 241–243.

[53] *Lemieux c. 9110-9595 Québec inc., faisant affaire sous le nom de Comspec*, [2004] Q.J. no. 9489 (Q. Ct.).

[54] Online : <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleArticleCode?code=CCONSOML.rcv&art=L1332&indice=0#>

Part III – Argument

47. In the instant case, the Appellant's web site did not convey to consumers the practical effects of its terms and conditions. An ordinary consumer would not have foreseen that the Appellant would now invoke those terms and conditions to deny the consumer's right to apply for a class action. Nor did the Appellant require consumers to indicate that they had read the terms and conditions or understood their substance. Indeed, the terms and conditions were not even displayed to the consumer about to conclude a purchase. They would only be conveyed to consumers who actively sought them out. This is contrary to article 1435, which requires positive action on the part of the business who drafted the contract.

48. It is interesting to note that American case law on the issue is not as one-sided as the Appellant suggests. For instance, a Rhode Island court refused to enforce the Appellant's arbitration clause, because its web site did not give consumers adequate notice of the existence of the arbitration clause.[55] Other American courts have refused to enforce contractual clauses found on web sites where the hyperlink leading to them was not sufficiently visible.[56]

49. It is known that hyperlinks containing a single word or phrase on a web page are not effective to disclose information. Thus, the American Federal Trade Commission specially warns against the use of simple words such as "disclaimer," "more information," "details" or "terms and conditions."[57] A subcommittee of the American Bar Association studied the manner in which consent is expressed in some electronic agreements and suggested strategies aimed at avoiding disputes on the validity of consent.[58] It recommended, as have others, that:

> The User should not have the option of manifesting assent without having been presented with the terms of the proposed agreement, which should either appear automatically or appear when the User clicks on an

[55] *DeFontes v. Dell Computers Corp*., (R.I. Super. Ct. Jan. 29, 2004). See also the comments from Christopher R. Drahozal, "New Experiences of International Arbitration in the United States" (2006) 54 Am. J. Comp. L. 233 at 253.

[56] *Specht v. Netscape Communications Corp*., 306 F.3d 17 (2nd Cir., 2002).

[57] Federal Trade Commission, "Dot Com Disclosures", online: <http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html>.

[58] C.L. Kunz et al., "Click-Through Agreements: Strategies for Avoiding Disputes in Validity of Assent" (2001) 57 Bus. Law. 401 at 401-406. For a similar recommendation, see Francis M. Buono and Jonathan A. Friedman, "Maximizing the Enforceability of Click-Wrap Agreements" (1999) 4 J. Tech. L. & Policy 3, online: <http://grove.ufl.edu/~techlaw/vol4/issue3/friedman.html>.

> icon or hyperlink that is clearly labeled and easily found. *Place the means of assent at the end of the agreement terms, requiring the User at least to navigate past the terms before assenting* (italics added).

C. The Court, not the Arbitrator, Should decide the issue

50. The Appellant also argues that, pursuant to the so-called "competence-competence" principle, the arbitrator should decide the issue of the validity of the arbitration agreement in the first place, subject to later review by the courts, unless the clause is manifestly null. There are several reasons why this approach should not be adopted.

10 51. First, what consumers are asserting in this case is a right not to have their dispute referred to arbitration. It would be absurd to require them to ask an arbitrator to validate that claim, and this additional procedural step would only result in increased costs. In particular, if the class action is a public order procedure, the arbitrator would be compelled to decline jurisdiction and the "competence-competence" principle would only lead to a waste of time and resources.

52. Second, the importation of a standard of "manifest nullity" is unwarranted by the wording of article 940.1 *C.C.P.*, which provides that the court will deny the stay if it finds the arbitration agreement to be null. Moreover, as the Appellant correctly notes, "art. 940.1 *C.C.P.* is based on art. 8(1) of the UNCITRAL Model Law".[59] The Working Group that drafted the Model law deliberately rejected including the words "manifestly null" as this might be viewed
20 as allowing the arbitral tribunal to make the first ruling on its competence.[60]

53. In any event, the Quebec Court of Appeal, in the *La Sarre* case, indicated that a stay should be granted only where the arbitration agreement is "*valable*," implying that the court has full jurisdiction to assess its validity.[61] In the *Kingsway* case, invoked by the Appellant, the

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[59] Appellant's factum at para. 76; *UNCITRAL Model Law on International Commercial Arbitration*, United Nations Commission on International Trade Law, 1985, UN Doc. A/40/17, annex 1.

[60] Working Group on International Contract Practices, *Report on the Fifth Session*, 1983, U.N. Doc. A/CN.9/233 at para. 77.

[61] *Aubé (Gabriel) Inc. v. La Sarre (Ville)* (1991), 43 Q.A.C. 226 at para. 9; See also *Club de hockey Les Nordiques (1979) Inc. c. Lukac*, [1987] R.D.J. 360 (C.A.); *Muroff v. Rogers Wireless inc*., 2006 QCCA 196 [leave to appeal to this Court granted 10 August 2006]

issue referred to arbitration was whether the dispute fell within the wording of the arbitration agreement, the validity of which was not contested.[62] *Kingsway* does not require courts to refer a dispute to arbitration where consent to the arbitration agreement itself is vitiated.

54. The approach suggested here is more consistent with the principle that "a court should not send a dispute to arbitration unless the parties have formed an enforceable contract requiring arbitration of that dispute."[63]

55. Third, this is not only a case of nullity of, or lack of consent to, the arbitration agreement. It is rather a case where an agreement, whether valid or not, becomes ineffective when a public order procedure, the class action, is instituted. Article 8(1) of the *UNCITRAL Model Law*, which should guide the interpretation of article 940.1 C.C.P., expressly provides that a stay should be denied if the arbitration agreement has become "inoperative." According to the British Columbia Court of Appeal, the certification of a class action renders an arbitration agreement inoperative, and the judge must decide this issue in the first place.[64]

56. Fourth, a case where an arbitration agreement becomes null or inoperative because it conflicts with a public order procedure should be considered as a case of "manifest nullity" that, even under the Appellant's interpretation of the "competence-competence" principle, justifies the court to deny a stay of proceedings.

57. Fifth, article 1051 C.C.P. states that inconsistent provisions of other Books of the Code (such as Book VII concerning arbitration) "do not apply to suits for the purposes of which the class action is brought." Thus, the C.C.P. establishes the priority of class actions over other

[62] Appellant's factum at para. 78; *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] J.Q. No. 5922.
[63] E. Brunet et al., *Arbitration Law in America: A Critical Assessment* (New York: Cambridge University Press, 2006) at 90-91, see also n.7.
[64] *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.*, [2004] BCCA 473 at paras. 49-53.

types of procedures, including arbitration. Where a class action is instituted, article 940.1 and the so-called "competence-competence" principle simply become inapplicable.

PART IV - COSTS

58. The Interveners do not ask for costs and ask that no costs be awarded against them.

PART V - CONCLUSIONS

59. The Interveners respectfully ask this Court to dismiss the appeal and to confirm that the class action is a public order procedure the right to which cannot be waived in advance of a dispute arising.

Ottawa, 12 September 2006.

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PART VI - AUTHORITIES

CASES

LEGISLATION

Canadian

Foreign

International Instruments

Part VI - Authorities

DOCTRINE

Part VI - Authorities

Part VI - Authorities

PART VII - STATUTES AND REGULATIONS CITED