S.C.C. File No. 31067

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

B E T W E E N:

DELL COMPUTER CORPORATION

Appellant
(Appellant)

- and -

UNION DES CONSOMMATEURS and OLIVIER DUMOULIN

Respondents
(Respondents)

FACTUM OF APPELLANT, DELL COMPUTER CORPORATION

OSLER, HOSKIN & HARCOURT LLP
1000 de La Gauchetière Street West
Suite 2100
Montréal, Québec H3B 4W5

Mahmud Jamal
Anne-Marie Lizotte
Dominic Dupoy

Tel: (416) 862-6764 / (514) 904-5381/5772
Fax: (416) 862-6666 / (514) 904-8101

Counsel for Appellant,
Dell Computer Corporation

OSLER, HOSKIN & HARCOURT LLP
50 O'Connor Street
Suite 1500
Ottawa, Ontario K1P 6L2

Patricia J. Wilson

Tel: (613) 787-1009
Fax: (613) 235-2867

Ottawa Agent for Appellant,
Dell Computer Corporation

TO: **THIS HONOURABLE COURT**

AND TO: **LAUZON BÉLANGER**
511, Place d'Armes
Bureau 200
Montréal, Québec, H2Y 2W7

Yves Lauzon

Tel. (514) 844-4646
Fax (514) 844-7009

Counsel for Respondents,
Union Des Consommateurs and
Olivier Dumoulin

BERGERON, GAUDREAU, LAPORTE
167, rue Notre-Dame-de-l'Île
Gatineau, Quebec J8X 3T3

Richard Gaudreau

Tel: (819) 770-7928
Fax: (819) 770-1424

Ottawa Agent for Respondents,
Union Des Consommateurs and
Olivier Dumoulin

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PART I – BRIEF STATEMENT OF FACTS

A. OVERVIEW

1. This case involves the *lex electronica* – the *lex mercatoria* of cyberspace. It raises issues at the crossroads of E-commerce, commercial arbitration and consumer class actions.

2. Over a weekend in April 2003, Dell had a price glitch on its website: a single page deep within Dell's website showed prices for its Axim line of handheld computers that were about a fifth of the correct price. Except for this one page, all the other pages showed the correct price. When Dell learned of the error it immediately erected an electronic barrier to block access to this page. However, some enterprising consumers managed to circumvent the barrier and connect directly to the blocked page through a "deep-link", a direct hyperlink that by-passes the homepage. Dell did not advertise or make this deep-link available to anyone. Over the weekend and into Monday morning orders from these computer-savvy consumers came pouring in. Instead of the usual weekend orders of between 1 and 3 Axim computers in Québec, that weekend 509 computers were ordered in Québec, more than 170 times the usual volume. Many people tried to order several Axim computers – and at least one person tried to order 40.

3. Dell immediately issued a correction notice and offered these consumers a substantial price discount, but refused to accept their orders based on the incorrect and unreasonably low price. One Québec consumer, the plaintiff Olivier Dumoulin, responded by starting this class action. Dumoulin insisted that Dell honour its Terms and Conditions of Sale ("Conditions de vente") that appeared on its website. Those Terms and Conditions include a contractual arbitration agreement providing that any claims against Dell would be referred exclusively and finally to binding arbitration. Dell therefore responded to the proposed class action by raising a declinatory exception to the Québec Superior Court's jurisdiction *ratione materiae* and asked the court to refer the dispute to arbitration. The Superior Court dismissed Dell's motion, as did the Québec Court of Appeal, but for altogether different reasons.

4. The issue now comes before this Court for final adjudication and for guidance on whether companies like Dell who do business on-line will face a barrage of lawsuits in the courts whenever there is a computer glitch, even though their on-line terms of sale make crystal clear that disputes are to be resolved by arbitration.

5. Dell respectfully submits that this appeal should be allowed and the dispute referred to arbitration. Dell's on-line Terms and Conditions of Sale, which Dumoulin invoked, unambiguously state that disputes are to be resolved by arbitration. There is nothing to suggest that these Terms and Conditions are on their face absolutely null or contrary to fundamental principles of public order under Québec law. It will therefore be for the arbitrator to decide in the first instance whether any of Dumoulin's challenges to the arbitration agreement should be sustained, subject to later review by the courts. This is a sufficient basis to allow this appeal.

6. The Court of Appeal's only basis for dismissing Dell's declinatory exception was its conclusion that the Terms and Conditions of Sale were "external" to the contract and thus pursuant to art. 1435 *C.C.Q.* Dell was required to show that the Terms were expressly brought to Dumoulin's attention or that he otherwise knew of them. The Superior Court had made no factual findings on this issue. The Court of Appeal therefore made its own factual findings on appeal by reviewing the transcripts and appeal record.

7. Dell respectfully submits that the Court of Appeal erred: (1) by failing to remit the issue of externality to the arbitrator to decide in the first instance; (2) by making its own factual findings on appeal; (3) in any event, by concluding that the Terms and Conditions of Sale were external; and (4) by failing to appreciate that the Terms and Conditions of Sale were expressly brought to Dumoulin's attention in several ways that were wholly appropriate and sufficient for the electronic environment in which Dumoulin chose to participate. For these reasons, the appeal should be allowed with costs.

B. BACKGROUND FACTS

(a) Dell Computer Corporation

8. Dell is one of the world's leading computer manufacturers and retailers. A pioneer of the digital economy, Dell does not sell its computers in stores; they are available only by telephone from Dell call centres or over the Internet. Dell's website, whose Canadian address is www.dell.ca ("Website"), is one of the highest volume E-commerce sites in the world. Dell has a registered business office in Montréal and its Canadian head office in Toronto.[1]

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[1] Appellant's Record ("AR"), II, pp. 46, 50; Testimony of Shane Cameron (Sept. 17, 2003), pp. 20, 175: AR II, p. 75; AR III, p. 230.

(b) Dell's line of Axim Handheld computers

9. While Dell sells its full line of computer products on the Website, this appeal concerns only Dell's Axim brand of pocket or handheld computers (the "Axim Handhelds"). Axim Handhelds are like personal computers except on a smaller scale, allowing users to e-mail, store and play audio and video files, take dictation and surf the Internet, among other functions.[2]

(c) Ordering an Axim Handheld on Dell's Website

10. To understand what happened in this case it is helpful to compare the usual order process with the highly unusual process the plaintiff followed. The following therefore reviews: (a) the usual shopping process for a consumer wishing to order an Axim Handheld and how Dell repeatedly and unavoidably brings to the consumer's attention its standard Terms and Conditions of Sale, which include an arbitration agreement; (b) the pricing error that occurred briefly over a weekend in April 2003, how Dell immediately erected an electronic barrier to block the order path for Axim Handhelds, and how the plaintiff and others managed to circumvent this barrier by "deep-linking" into the Website to place an unusually large numbers of orders. These intrepid consumers unambiguously had Dell's Terms and Conditions of Sale brought to their attention in at least two places; and (c) how Dell offered these consumers a substantial price discount, which the plaintiff rejected in favour of this class action lawsuit, to which Dell responded by asking the courts to refer this dispute to arbitration.

11. ***Dell's homepage:*** In the ordinary course a consumer shopping for a Dell computer first navigates to Dell's homepage, www.dell.ca, where they have a choice of proceeding in English or French. At the bottom of the homepage is a blue hyperlink to Dell's "Terms and Conditions of Sale" (the "Conditions de vente" on the French Website), the standard contractual terms by which Dell offers its products. These Terms reappear on every shopping page of the Website.[3]

12. The uncontradicted evidence was that "universally, terms and conditions on most sites are written at the bottom of the page" and indeed this is the "industry standard". The hyperlink becomes underlined in blue if a cursor is moved over it, indicating that more information is available by clicking. Clicking immediately pulls up the full text of the Terms and Conditions.[4]

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2 Testimony of Shane Cameron (Sept. 17, 2003), pp. 154-155: AR III, pp. 209-210.

3 Testimony of Shane Cameron (Sept. 17, 2003), pp. 21, 24, 25-26, 157: AR II, pp. 76, 79, 80-81; AR III, p. 212.

4 Testimony of Shane Cameron (Sept. 17, 2003), pp. 23-4, 30-31: AR II, pp. 78-79, 85-86.

13. ***Click to the Home and Home Office page:*** Dell's homepage offers the consumer the choice of ordering "home" or "business" computer systems. Since an Axim Handheld is a "home" system, a consumer considering this model clicks "Home and Home Office", which takes the consumer to a variety of personal computer products including the Axim Handheld. Like the homepage the "Home and Home Office" page contains another hyperlink to Dell's Terms and Conditions of Sale in the usual place.[5]

14. ***Click to the Axim Series Page:*** From the "Home and Home Office" page a consumer who clicks on "Axim Handheld" is taken to a page listing all the different models and base-model prices in the Axim series (the "Axim Series Page"). Throughout the weekend in question the Axim Series Page listed the correct prices for Axim Handhelds. The Axim Series Page contains yet another blue hyperlink to Dell's Terms and Conditions of Sale.[6]

15. ***Click to the Axim Product Page:*** From the Axim Series Page a consumer who clicks on a particular Axim model is taken to a "product page" containing more detailed information about that particular product (the "Axim Product Page"). Each Axim Product Page lists the same price for the particular model as listed on the Axim Series Page. Throughout the weekend in question the Axim Product Page also listed the correct prices for Dell's Axim products. And again, each Axim Product Page contains a blue hyperlink to Dell's Terms and Conditions of Sale.[7]

16. ***Click to the Configurator Page:*** A consumer can customize an Axim model to suit their needs from either the Axim Series Page or the Axim Product Page by clicking "Customize It". This takes the consumer to what is known as the "Configurator Page" for each Axim Handheld model, which allows the consumer to "configure" or customize the product by adding or deleting options by clicking or unclicking the relevant option. The options include memory, keyboard, wireless cards, cable, carrying case, warranty, second battery and other accessories. After selecting (or de-selecting) the relevant options the consumer clicks "Update Price" on the

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5 Testimony of Shane Cameron (Sept. 17, 2003), pp. 26-28, 157: AR II, pp. 81-83; AR III, p. 212.

6 Testimony of Shane Cameron (Sept. 17, 2003), p. 28, 157-8: AR II, p. 83; AR III, pp. 212-13.

7 Testimony of Shane Cameron (Sept. 17, 2003), pp. 35, 159: AR II, p. 90; AR III, p. 214.

Configurator Page, which updates the price based on those options. The Configurator Page is linked to a U.S. database containing pricing information for each option.[8]

17. If the consumer decides to order the Axim Handheld based on the selected options and price, he or she clicks "Add to Cart", the electronic shopping cart. When the consumer's order is complete he or she clicks "Check Out", which links to an electronic check-out at which the consumer provides shipping, billing and credit card information.[9]

18. ***Notices on the Configurator Page:*** Like all the preceding pages the Configurator Page contains a blue hyperlink to Dell's "Terms and Conditions of Sale". In addition, to be absolutely sure that the consumer does not overlook the many manifestly apparent references to Dell's Terms and Conditions of Sale throughout the Website, the Configurator Page also has text just below the "Add to Cart" button specifically bringing to the consumer's attention that "All purchases subject to [...] Dell's standard terms of sale". The Configurator Page also advises the consumer that "Prices and specifications are subject to error and change without notice".[10]

(d) The price error in April 2003

19. It should come as no surprise that computer glitches sometimes occur on E-commerce sites. Despite the best efforts, mistakes happen. But what is perhaps surprising is how a brief glitch over a weekend in April 2003 spawned this class action lawsuit.

20. Between the late afternoon of Friday, April 4, 2003 and the early morning of Monday, April 7, 2003, Dell's Configurator Page contained a pricing error for the Axim X5 300 MHz and 400 MHz models. The Configurator Page – and only the Configurator Page – showed incorrect prices for these models of $89 and $118, respectively, instead of the correct prices of $379 and $549.[11] However, both the Axim Series Page and the Axim Product Page continued to list the correct prices of $379 and $549.[12]

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[8] Exhibit R3A, Configurator Page for Axim X5 400 MHz: AR III, pp. 354-5; Exhibit R3A, Configurator Page for Axim X5 300 MHz: Exhibit R3A: AR III, pp. 356-8; Testimony of Shane Cameron (Sept. 17, 2003), pp. 12, 23, 35-37, 38, 160, 161, 162: AR II, pp. 67, 78, 90-92, 93; AR III, pp. 215, 216, 217.

[9] Testimony of Shane Cameron (Sept. 17, 2003), p. 163: AR III, p. 218.

[10] Exhibit R3A, Configurator Page for Axim X5 400 MHz: AR III, p. 355; Exhibit R3A, Configurator Page for Axim X5 300 MHz: Exhibit R3A: AR III, p. 357; Testimony of Shane Cameron (Sept. 17, 2003), pp. 23, 38, 162: AR II, pp. 78, 93; AR III, p. 217.

[11] Reasons of Langlois J., paras. 7, 12: AR I, pp. 3, 4.

[12] Testimony of Shane Cameron (Sept. 17, 2003), pp. 164, 188: AR III, pp. 219, 243.

21. The root of the problem was that the Configurator Page listed the base prices by adding up the prices of the components for each model. This pricing information was provided *via* a third party's database in the United States, which incorrectly listed the price for one of the Axim components as $0, resulting in a total price that was much lower than the correct list price. However, since the Axim Series and Products Pages did not depend on this pricing information from the U.S. database they continued to list the correct prices.[13]

22. Users who navigated through the Website in the ordinary way would have noticed the anomaly, and indeed it was a customer who brought this error to Dell's attention on the morning of Saturday, April 5, 2003. Dell immediately set about fixing the problem. By 9:30 a.m. Dell's technical personnel had begun troubleshooting. Since at first they could not identify the problem, by about 10:30 a.m. they decided to block the buying path for Axims – they simply cut off the links to the Configurator Pages for Axim models from within the Website.[14] The motion judge, Madam Justice Langlois, found as a fact that Dell took immediate steps to make access to the Configurator Page "impossible".[15] Dell's on-line marketing manager, Shane Cameron, explained to the court how this had been Dell's top priority:

> So our first step to addressing the problem was to remove the ability to come to this page by shopping on our site. Someone who came to dell.ca would be able to see the information regarding an Axim and be able to learn about it, decide which one is right for them, but they would not be able to buy it on-line.[16]

23. After cutting off this link Dell's technical personnel contacted the U.S. pricing database provider, who also began troubleshooting. By Monday morning, April 7th, the U.S. provider had identified the problem and had corrected the price for the relevant Axim part. Back in Canada Dell then ran a "data refresh" to correct the prices on the Website, which took about an hour. By 9:30 a.m. on Monday, April 7th, the problem was fixed and by 2:30 p.m. Dell was able to unblock the buying path so that consumers could link to the Axim Configurator Pages from within the Website.[17]

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13 Testimony of Shane Cameron (Sept. 17, 2003), pp. 164-7: AR III, pp. 219-222.

14 Testimony of Shane Cameron (Sept. 17, 2003), pp. 40-41, 166, 167-9: AR II, pp. 95-6; AR III, pp. 221, 222-4.

15 Reasons of Langlois J., para. 13: AR I, p. 4: "L'erreur est découverte par Dell le samedi 5 avril 2003. Dès lors, Dell prend les mesures afin que tout usager accédant au site par l'adresse électronique usuelle ne puisse avoir accès au site de magasinage du produit Axim X5, en rendant l'accès à la page de configuration impossible".

16 Testimony of Shane Cameron (Sept. 17, 2003), pp. 167-8: AR III, pp. 222-3.

17 Testimony of Shane Cameron (Sept. 17, 2003), pp. 167, 172-3, 184: AR III, pp. 222, 227-8, 239.

(e) Dumoulin tries to take advantage of the price error

24. But linking to the Configurator Page was not "impossible". Despite Dell's best efforts some intrepid customers were still able to access them by "deep-linking" into the Website.[18]

25. ***Dumoulin "deep-links" to the blocked order path:*** On Monday, April 7, 2003, at 7:30 a.m. the proposed representative plaintiff, Olivier Dumoulin, a 23-year-old from Saint-Laurent, bypassed the blocked order path and placed an order for an Axim 400 MHz. Dumoulin got to the Configurator Page with a deep-link that had been e-mailed to him earlier that morning by "somebody". When asked who this "somebody" was, Dumoulin would only say that it was "an acquaintance he had". Dumoulin's "acquaintance" apparently advised him that this was a very good offer and that it was appropriate to take advantage of it.[19]

26. The motion judge, Langlois J., found as a fact (and the plaintiff's motion to authorize the class action pleaded) that Dumoulin and the class members used the following two deep-link addresses to penetrate the Website:

> **For the Axim 400 MHz:**
> http://configure.dell.com/dellstore/config.aspx?c=ca&cs=CADHS1&I=en&oc=
> OCAXIM5 DHS400
>
> **For the Axim 300 MHz:**
> http://configure.dell.com/dellstore/config.aspx?c=ca&cs=CADHS1&I=en&oc=
> OCAXIM5 DHS300.[20]

27. The uncontradicted evidence was that Dell does not provide, advertise or recommend these deep-links to any members of the public and that it was "unusual" for these deep-links to be used to access the Website.[21]

28. ***Dumoulin orders a customized Axim 400 MHz:*** Dumoulin testified that he decided to order an Axim Handheld because of the reputation of the Dell brand. Once he had deep-linked to

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[18] Argument of Me McGowan, p. 228: AR III, p. 283. On deep-linking, see Michael Geist, *Internet Law in Canada* (3rd. ed., 2002), pp. 491-2; Jeffrey R. Kuester and Peter A. Nieves, "Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis" (1998), 38 Idea: J. L. & Tech. 243, at p. 263; Mathieu Comeau and Sébastien Roy, "Sites Web contrefacteurs: les dangers de l'application rigoriste de la *Loi sur le droit d'auteur*", (2002) 15 Les Cahiers de propriété intellectuelle 653 at p. 677 ("les hyperliens en profondeur").

[19] Testimony of Olivier Dumoulin (Sept. 17, 2003), pp. 139-140: AR II, pp. 194-5. "J'ai été référé à ce lien-là par quelqu'un [...] une connaissance que j'ai". "C'était écrit qu'il y a une très bonne offre puis que ce serait approprié de prendre avantage de cette offre-là. C'était la recommendation de mon ami".

[20] Reasons of Langlois J., para. 9: AR, p. 3; Requête Amendée pour autorisation d'exercer un recours collectif et pour être représentant, June 11, 2003, para. 2.11a): AR II, p. 29.

[21] Testimony of Shane Cameron (Sept. 17, 2003), pp. 171-2, 180-181: AR III, pp. 226-7, 235-6.

the Configurator Page for the Axim 400 MHz he customized this model by installing an English operating system (he is fluently bilingual) and removing several of the base options. As a result of the price error the total price came down to $89 or approximately one-fifth the correct price of $549.[22] Dumoulin claimed that he went straight to the Configurator Page *via* the deep-link and that he did not navigate to any of the earlier pages listing the correct price.[23]

29. ***Others try to capitalize on the price error:*** Dumoulin was not alone in trying to take advantage of the price error by deep-linking. That weekend in Québec alone 354 people tried to order 509 Axim Handhelds, which is a massive increase over the usual 8 to 10 Axim Handhelds ordered Canada-wide or the usual 1 to 3 units ordered in Québec. Many people tried to order several Axim Handhelds and at least one person tried to order 40.[24]

30. ***Dell issues a Correction Notice:*** By 9:30 a.m. on Monday, April 7, 2003 – 2 hours after Dumoulin had placed his order – Dell corrected the price error. By 2:30 p.m. it was again possible to order Axim Handhelds on the Website, at which time Dell posted the following Correction Notice on its Website:

> **CORRECTION NOTICE**
>
> Dell has become aware of a pricing error on our website for our Dell Axim X5 handhelds. The incorrect pricing of $89.00 for the 300 MHz model and $118 for the 400 MHz model resulted from a technical issue with one of our database systems. We endeavour to provide current and accurate pricing information at all times on our website. Nevertheless, such errors do occur. The actual pricing for the 300 MHz and 400 MHz models is $379 and $549 respectively, exclusive of shipping and applicable taxes. Accordingly, all orders for Dell Axim X5 handhelds with incorrect pricing will not be processed. If your credit card has already been charged, we will issue a credit to your credit card account in the amount of the charge. Please note that individual bank policies will dictate when this amount is credited to your account. Dell is not obligated to sell products based on pricing errors on our website. Dell will endeavour to contact all customers directly who have placed an order to notify them of the current situation and inform them that their orders have not been processed.
> We apologize for the error and any inconvenience this may have caused. We thank you for your patronage.[25]

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[22] Testimony of Olivier Dumoulin (Sept. 17, 2003), pp. 136-7, 143: AR II, pp. 191-2, 198; Reasons of Langlois J., para. 8: AR I, p. 3.

[23] Testimony of Olivier Dumoulin (Sept. 17, 2003), pp. 140-141, 151-152: AR II, pp. 195-6, 206-7.

[24] Testimony of Shane Cameron (Sept. 17, 2003), pp. 173-5: AR III, pp. 228-230.

[25] Exhibit R-3: AR III, p. 352. Testimony of Shane Cameron (Sept. 17, 2003), pp. 172, 173: AR III, pp. 227, 228. Reasons of Langlois J., para. 15: AR I, p. 4.

31. ***Dell contacts Dumoulin to explain the error:*** On April 8, 2003, Dell e-mailed Dumoulin to advise him that his order based on the price error would not be processed. Dumoulin e-mailed Dell back the same day to say that "I am very disappointed that Dell's policy is to make it's [*sic*] customers pay for errors dell [*sic*] is 100% responsible for. I will take this into consideration on my next purchase of equipment".[26]

32. ***Dell offers Dumoulin a substantial price discount:*** On April 11, 2003, Dell e-mailed Dumoulin to explain how the price error occurred. It noted that while "the advertised prices for these units were clear and correct, data entry issues elsewhere on the English version of our web site applied a price to the units that was an obvious error". As a goodwill gesture Dell offered Dumoulin $150 (27.3%) off the regular $549 price for the Axim Handheld he had ordered.[27]

33. ***Dumoulin insists Dell honour its Terms and Conditions of Sale:*** On April 17, 2003, Dumoulin e-mailed Dell to advise that he had contacted the Union des consommateurs ("Union"), which had apparently advised him that Dell had breached the Québec *Consumer Protection Act* ("*C.P.A.*"). Dumoulin's email, which was written in both French and English, then "demanded" that Dell send him an Axim 400 MHz based on the pricing error – and critically – "aux conditions de vente annoncées en ligne lors de mon achat" / "at the conditions that appeared on your website at the moment of my purchase" (emphasis added). Dumoulin threatened legal action if Dell did not comply with his demand that Dell honour the "conditions de vente" within 10 days:

> Je vous met [*sic*] en demeure de me faire parvenir l'appareil commandé et ce aux conditions de vente annoncées en ligne lors de mon achat. À défaut de respecter ma demande dans les dix jours de réception de la présente, des procédures judiciaires pourront être intentées contre vous, sans autre avis ni délai. [...]
>
> I demand that you send me the article I ordered and at the conditions that appeared on your website at the moment of my purchase. If you do not comply, appropriate legal action may be taken against you, without further notice or delay.
>
> Olivier Dumoulin[28]

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[26] Exhibit R-4: AR III, pp. 360, 361.

[27] Exhibit R-4: AR III, pp. 362-364.

[28] Exhibit R-5: AR III, p. 366 (emphasis added).

(f) Dumoulin and Union commence a class action

34. In June 2003, Dumoulin and Union filed a motion with the Québec Superior Court seeking authorization to commence a class action against Dell on behalf of Québec consumers who had placed orders based on the price error. They claimed: (a) an order requiring Dell to supply Axim Handhelds based on the price error; (b) compensatory damages of $100 for each class member, plus interest; and (c) punitive damages of $1,000 for each class member.[29]

35. Dell responded to the motion by raising a declinatory exception to the Superior Court's jurisdiction *ratione materiae*, asking the Court to refer the matter to arbitration pursuant to the arbitration agreement in Dell's Terms and Conditions of Sale or Conditions de vente. These are the same "Conditions de vente" that Dumoulin had insisted upon in this email.[30]

(g) Dell's Terms and Conditions of Sale ("Conditions de vente")

36. The motion judge found that each page of the Website advised that "All purchases subject to [...] Dell's standard terms of sale."[31] As noted, the Terms and Conditions of Sale or Conditions de vente appear in full by blue hyperlink on each and every shopping page on the Website, including on the Configurator Page, and were also referred to specifically on the Configurator Page below the "Add to Cart" button.[32]

37. ***Immediate reference to the DISPUTE RESOLUTION CLAUSE:*** The Terms and Conditions of Sale advise customers in block capitals that they apply to any purchase from Dell and immediately draw the consumer's attention to arbitration agreement:

> PLEASE READ THIS DOCUMENT CAREFULLY! IT CONTAINS VERY IMPORTANT INFORMATION ABOUT YOUR RIGHTS AND OBLIGATIONS, AS WELL AS LIMITATIONS AND EXCLUSIONS THAT MAY APPLY TO YOU. THIS DOCUMENT CONTAINS A DISPUTE RESOLUTION CLAUSE.
>
> This Agreement contains the terms and conditions that apply to your purchase from Dell Computer Corporation, a Canadian corporation ("Dell", "our" or "we") that will be provided to you ("Customer") on orders for computer systems and/or other products and/or services and support sold in Canada. By accepting delivery of the computer systems, other products and/or services and support

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29 Requête Amendée pour autorisation d'exercer un recours collectif et pour être représentant, June 11, 2003, para. 9: AR II, p. 33.

30 Motion to Refer the Present Proceedings to Arbitration, Sept. 8, 2003: AR II, pp. 39-43.

31 Reasons of Langlois J., para. 10: AR I, pp. 3-4.

32 Motion to Refer the Present Proceedings to Arbitration, paras. 11-19: AR II, pp. 40-41.

> described on the invoice, Customer agrees to be bound by and accepts these terms and conditions.[33]

38. ***Other essential contractual terms:*** The Terms and Conditions of Sale also advise customers that "Orders are not binding upon Dell until accepted by Dell" (Dell did not advise Dumoulin that it had accepted his order), and address other essential contractual terms such as: payment terms, orders, quotes, charging of interest on overdue accounts, shipping charges, taxes, transfer of title and acceptance by Dell of the risk of loss during shipping, warranties, software, return policies, exchanges, limitation of liability, service and support and *force majeure*.[34]

39. ***The comprehensive contractual arbitration provision:*** The Dispute Resolution provision (art. 13) in the Terms and Conditions of Sale states: "The parties [...] acknowledge and agree that it is preferable to resolve all disputes between them confidentially, individually, and in an expeditious and inexpensive manner. The parties accordingly acknowledge and agree that private dispute resolution is preferable to court actions". It also includes the following comprehensive arbitration agreement:

> **Arbitration.** ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS CAPABLE IN LAW OF BEING SUBMITTED TO BINDING ARBITRATION) AGAINST DELL, its agents, employees, officers, directors, successors, assigns or affiliates (collectively for purposes of this paragraph, "Dell") arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships between the parties, whether pre-existing, present or future, (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), Dell's advertising, or any related purchase SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM ("NAF") under its Code of Procedure and any specific procedures for the resolution of small claims and/or consumer disputes then in effect (available via the Internet at http://www.arb-forum.com/, or via telephone at 1-800-474-2371). The arbitration will be limited solely to the dispute or controversy between Customer and Dell. Any award of the arbitrator(s) shall be final and binding on each of the parties, and may be entered as a judgment in any court of competent jurisdiction. Information may be obtained and claims may be filed with the NAF at P.O. Box 50191, Minneapolis, MN 55405, or by e-mail at file@arb-forum.com, or by online filing at http://www.arb-forum.com/.[35]

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[33] Dell's Terms and Conditions of Sale, Exhibit ARB-3: AR III, pp. 375-385 (emphasis added).

[34] Dell's Terms and Conditions of Sale, Exhibit ARB-3: AR III, pp. 375-385.

[35] Dell's Standard Terms of Sale, Exhibit ARB-3, arts. 13A, 13C: AR III, p. 384 (emphasis added).

40. ***Arbitration provision is not external to the contract:*** Critically, the arbitration agreement is physically within and not external to the Terms and Conditions of Sale – all the Terms and Conditions of Sale form part of the same contractual document.

C. DECISIONS OF THE QUÉBEC COURTS

(a) Québec Superior Court

41. Langlois J. dismissed Dell's declinatory exception. She found that since the arbitration agreement provided that the arbitration would be administered by the National Arbitration Forum ("NAF"), a U.S.-based arbitral institute that provides arbitration administration services, the agreement purported to derogate from art. 3149 *C.C.Q.*, which provides that the waiver of the jurisdiction of Québec authorities cannot be set up against a consumer. Langlois J. concluded that because the NAF is situated in the United States, art. 3149 *C.C.Q.* was engaged and accordingly Dell's declinatory exception had to be dismissed.[36] Langlois J. reached this conclusion even though Dell had conceded that the arbitration would be governed by Québec law and, under the terms of the *NAF Code of Procedure* (the "*NAF Code*"), would take place in Québec before an arbitrator chosen by the parties, in the language of their choice; the *NAF Code* also provides that it is to be interpreted in accordance with the local arbitration legislation of the relevant country.[37] Langlois J. appears to have accepted the erroneous submission made by the respondents' counsel that the arbitration agreement required Dumoulin to submit to an American arbitrator according to a unilingual American code of procedure.[38]

42. After refusing to refer the dispute matter to arbitration, Langlois J. authorized Dumoulin and Union to commence a class action against Dell (equivalent to certification of the class).[39]

(b) Québec Court of Appeal

43. Rochon J.A. granted leave to appeal to the Québec Court of Appeal,[40] at which point L'Office de la protection du consommateur intervened to support Dumoulin's position.

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[36] As Langlois J. ruled: "Le NAF est situé aux États-Unis. [...] En l'espèce, la clause d'arbitrage concernée a pour effet de soustraire de la compétence des autorités québécoises tout litige relié au contrat de consommation, dont il est question, intervenu avec Dell et cela ne peut être opposable à Dumoulin. En conséquence, le moyen déclinatoire présenté par Dell afin de référer la procédure à l'arbitrage sera rejeté". See Reasons of Langlois J., paras. 32, 36-37: AR I, pp. 8, 9.

[37] Transcript, pp. 77, 81, 96: AR II, pp. 132, 136, 151. See *NAF Code of Procedure*, Rule 48A: AR III, p. 420.

[38] Submissions of Me Gareau, Sept. 17, 2003, pp. 79, 82-83: AR II, pp. 134, 137-138.

[39] Reasons of Langlois J., paras. 38-60: AR I, pp. 9-12.

44. Lemelin J. (*ad hoc*) dismissed the appeal on behalf of the Québec Court of Appeal but for altogether different reasons than the Québec Superior Court.[41]

45. Dell submits that Lemelin J. reached the correct conclusion in respect of three issues she considered but erred in respect of a fourth. First, Lemelin J. correctly overturned Langlois J.'s conclusion that Dumoulin had renounced the jurisdiction of the Québec authorities and therefore art. 3149 *C.C.Q.* did not render the arbitration agreement null. Lemelin J. noted that the parties agreed that their dispute would be governed by Québec law and that the seat of the arbitration would be in Québec. Lemelin J. held that Langlois J. had confused the location of the arbitral institute (the NAF) with the governing law and the seat of the arbitration.[42]

46. Second, Lemelin J. correctly concluded that an arbitrator is not precluded from deciding a dispute dealing with the *C.P.A.* as nothing in that legislation precludes arbitration of consumer disputes.[43]

47. Third, Lemelin J. correctly accepted that an arbitration clause can bar a class action. She noted that the Legislature had accepted that both arbitration and class actions are means for vindicating rights and nothing express in Québec law to give precedence or priority to one means over the other.[44]

48. However, Lemelin J. erred by failing to consider Dell's argument that the analysis of the claimed impact and application of art. 1435 *C.C.Q.* was for the arbitrator to decide in the first instance. Lemelin J. erroneously concluded that the Terms and Conditions were an "external clause" pursuant to art. 1435 *C.C.Q.* and as such was "null" unless Dell proved that they had been specifically brought to Dumoulin's attention or that Dumoulin otherwise knew of them at the time of contract formation.[45] Lemelin J. proceeded to consider this issue – for which there are no factual findings in the Superior Court's decision – and not the issue of whether the

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40 Reasons of Rochon J.A. granting leave to appeal: AR II, pp. 52-55.

41 Reasons of Lemelin J. (*ad hoc*): AR I, pp. 17-26.

42 Reasons of Lemelin J. (*ad hoc*), paras. 24-29: AR I, pp. 20-21.

43 Reasons of Lemelin J. (*ad hoc*), para. 52: AR I, p. 25: "[L]a LPC ne permet pas de déduire que le législateur a voulu écarter l'arbitrage".

44 Reasons of Lemelin J. (*ad hoc*), paras. 54, 59: AR I, pp. 25, 26: "Le législateur a reconnu la validité de ces avenues, l'arbitrage et le recours collectif, pour permettre aux justiciables de régler leurs conflits. Il n'y a aucune mention expresse de la préséance d'un recours sur l'autre."

45 Reasons of Lemelin J. (*ad hoc*), paras. 30-36: AR I, pp. 21-22.

undertaking to arbitrate was sufficient to refer the dispute to arbitration according to this Court's decision in *Zodiak International Productions Inc. v. The Polish People's Republic*, [1983] 1 S.C.R. 529, Chouinard J.

49. Since Langlois J. at first instance had made no evidentiary findings with respect to art. 1435 *C.C.Q.*, Lemelin J. proceeded to make them on appeal. She noted that the appreciation of the evidence on this point was particularly important.[46] Based on her independent review of the trial record Lemelin J. concluded that Dell had not proven that the Terms and Conditions had been brought to Dumoulin's attention. Lemelin J. gave four reasons for this conclusion (which have been rejected in substance by Canadian and U.S. courts, discussed at paras. 112-115 below).

50. First, Lemelin J. noted that the hyperlink to the Terms and Conditions was in small font at the bottom of the page.[47] Lemelin J. appears to have ignored: (i) the uncontradicted evidence that locating a hyperlink to the Terms and Conditions at the bottom of the page is the universal industry standard: this is exactly where any consumer would expect to find them; (ii) that the Configurator Page specifically brings the Terms and Conditions to the consumer's attention by referring to them just below the Add to Cart button; (iii) whether the use of the hyperlink was merely analogous to a multi-page written contract where the consumer merely has to turn the electronic page (*i.e.*, to click the hyperlink); and (iv) how Dell brought the arbitration agreement to the customer's attention within the Terms and Conditions of Sale by immediately advising in block capitals that "THIS DOCUMENT CONTAINS A DISPUTE RESOLUTION CLAUSE".

51. Second, Lemelin J. noted that Dell did not provide a "pop-up" window stating that Dumoulin would have to accept the Terms and Conditions of Sale to complete the purchase.[48] Lemelin J. appears to have ignored (and certainly did not refer to) Dumoulin's bilingual e-mail to Dell in which he insisted upon Dell's "Conditions de vente" (Terms and Conditions of Sale) – which included the arbitration agreement – as they appeared on the Website.

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[46] Reasons of Lemelin J. (*ad hoc*), para. 37: AR I, p. 22 ("[l]'appréciation de cette preuve est particulièrement importante en l'espèce").

[47] Reasons of Lemelin J. (*ad hoc*), para. 39: AR I, p. 22.

[48] Reasons of Lemelin J. (*ad hoc*), para. 40: AR I, p. 23 ("Le site ne prévoit pas l'affichage d'une fenêtre dans laquelle serait énoncée la clause d'arbitrage dont l'utilisateur doit accepter les conditions avant d'effectuer son achat").

52. Third, Lemelin J. noted that Dell had provided only a hyperlink to the *NAF Code*, purportedly making these provisions external.[49] Lemelin J. again failed to consider whether the consumer merely had to turn the electronic page by clicking. As such the *NAF Code* was not external. In any event, Lemelin J. failed to consider whether this would merely render these procedural rules null without affecting the substance of the arbitration agreement.

53. Fourth, Lemelin J. noted that Dell failed to prove that Dumoulin was aware of the Terms and Conditions of Sale containing the contractual arbitration agreement.[50] This finding is impossible to reconcile with Dumoulin's specific invocation in his e-mail of the "Conditions de vente" as they appeared on the Website. Further, Dell brought the Terms and Conditions to Dumoulin's attention through the notice below the "Add to Cart" button and through the hyperlink located at the bottom of the page according to the universal industry standard. In any event, Lemelin J.'s finding begs the question of whether the Court should have referred the dispute to arbitration in accordance with the *Zodiak* test. The arbitrator could then have determined the validity of the arbitration provision on the basis of a proper evidentiary record in the first instance subject to ultimate review by the courts.

PART II – QUESTIONS IN ISSUE

54. Should this dispute be referred to arbitration?

PART III – ARGUMENT

A. THE CONTEXT OF THIS APPEAL

55. This appeal arises in the critical context of E-commerce and raises the important question of whether the courts will respect the choice of marketplace participants to resolve E-commerce disputes by arbitration. The Court's task is to adapt existing legal rules to the challenges posed by this relatively new – yet now commonplace – commercial environment.

56. ***E-Commerce:*** E-commerce is vital to the Canadian economy. Industry Canada reports that the dollar value of Canadian E-commerce grew almost seven-fold between 1999 and 2004,

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[49] Reasons of Lemelin J. (*ad hoc*), para. 41: AR I, p. 23.

[50] As Lemelin J. (*ad hoc*) found: "L'appelante n'a présenté aucune preuve pertinente sur cette question. Elle n'a jamais démontré non plus que l'intimé Dumoulin a pris connaissance des «conditions de vente» contenant la convention d'arbitrage et du règlement de la NAF": Reasons of Lemelin J. (*ad hoc*), para. 43: AR I, p. 23.

from $4.2 billion in 1999 to $28.3 billion in 2004.[51] Over this period Statistics Canada estimates that Canadian household spending on E-commerce grew more than twelve-fold, from $417 million in 1999 to between $6.6 billion and $8.5 billion in 2004. In 2003, an estimated 3.2 million Canadian households actively participated in E-commerce (up from 2.8 million in 2002), placing a total of 21.1 million orders (up from 16.6 million in 2002). E-commerce continues to grow. The majority of the spending (about 70%) is on Canadian websites. The highest growth areas are consumer electronics (up 86%), videos and DVDs (up 68%).[52] This appeal thus lies at the heart of the New Economy.

57. ***New legal challenges posed by the Internet:*** This Court has recently highlighted the new legal challenges posed by the Internet: "E-commerce is growing. Internet liability is thus a vast field where the legal harvest is only beginning to ripen". The Court has justly described the Internet as one of the "great innovations of the information age" whose "use should be facilitated rather than discouraged".[53] The Court is also acutely aware that "[t]he Internet provides fertile ground for sowing the seeds of unlawful conduct on a borderless scale".[54]

58. As elaborated below the Québec Court of Appeal's decision will stifle rather than facilitate the development of E-commerce. While pricing error in a shop can be easily corrected, this is much harder in cyberspace. Websites such as Dell's operate 24/7: customers can and do enter them at any time from anywhere. Once a computer glitch is detected by enterprising consumers it spreads faster than wild-fire, just as it did here. Legal rules must be sensitive to this context to ensure that they remain commercially reasonable and fair to all parties.

59. ***Importance of commercial arbitration:*** Commercial arbitration is likewise an important and growing form of alternative dispute resolution, especially for E-commerce. In an age where markets, business and finance have become borderless, arbitration fosters predictability, certainty and consistency between jurisdictions in the resolution of commercial disputes. Arbitration is not

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[51] Industry Canada, *The Digital Economy In Canada*, "Highlights from the 2004 Survey of Electronic Commerce and Technology", based on data from Statistics Canada: http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/gv00316e.html.

[52] Statistics Canada, "E-commerce: Household Shopping on the Internet": http://www/statcan.ca/Daily/English/040923/d040923a.htm.

[53] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, paras. 40-41, Binnie J.

[54] *R. v. Hamilton*, [2005] 2 S.C.R. 432, para. 30, Fish J.

a preliminary step in judicial proceedings; it is instead a private system of adjudication intended to provide a substitute for the judicial resolution of an ever expanding category of disputes.[55]

B. THE NATURE OF THE ISSUE AND THE LEGISLATIVE FRAMEWORK

60. Against this backdrop, this appeal raises the interaction of two groups of provisions in the *Civil Code of Québec* ("*C.C.Q.*") and the Québec *Code of Civil Procedure* ("*C.C.P.*").

61. ***Provisions promoting the autonomy of the parties to resolve disputes by arbitration:*** The first group of provisions (arts. 2638, 3148 *C.C.Q.* and 940.1 and 943 *C.C.P.*), invoked by Dell, seek to promote the autonomy of contracting parties in accordance with international norms to agree to resolve their disputes by arbitration to the exclusion of the courts: (a) art. 2638 *C.C.Q.* defines an arbitration agreement as an agreement to submit a dispute to arbitration to the exclusion of the courts; (b) art. 3148, para. 2 *C.C.Q.* provides in relevant part that Québec authorities have no jurisdiction over certain personal actions where the parties have agreed to submit their disputes to an arbitrator; (c) art. 940.1 *C.C.P.* states that a court shall refer parties with an arbitration agreement to arbitration unless the case has been inscribed on the roll or it finds the agreement null; and (d) art. 943 *C.C.P.* provides that arbitrators may decide the matter of their own competence; art. 943.1 *C.C.P.* adds that if the arbitrators declare themselves competent, a party may apply to the court for a decision on the matter within 30 days thereafter.

62. ***Provisions invoked to constrain the parties' autonomy:*** The second group of provisions (arts. 1435, 1437, 2639 and 3149 *C.C.Q.*), invoked by the respondents, seek to constrain the parties' autonomy in the particular context of the on-line consumer contract in this case: (a) art. 2639 *C.C.Q.* states that while certain fundamental public order matters (personal status, capacity and family matters) may not be submitted to arbitration, an arbitration agreement may not be opposed on the ground that the dispute involves rules of public order; (b) art. 1435 *C.C.Q.* provides that while external clauses referred to in a contract are binding on the parties, an external clause in a consumer contract is null unless it was expressly brought to the consumer's attention or the consumer otherwise knew of it; (c) art. 1437 *C.C.Q.* states that an abusive clause in a consumer contract (*i.e.*, one that is excessively and unreasonably detrimental to the consumer) is null; and (d) art. 3149 *C.C.Q.* provides that a Québec authority has jurisdiction over

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[55] L. Yves Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: "Beware, My Lord, of Jealousy" (2001) 80 Can. Bar Rev. 143, pp. 143-4, 147.

consumer and employment disputes if the domicile or residence of the consumer or worker is in Québec; the waiver of such jurisdiction may not be set up against a consumer or a worker.

63. As this Court recently noted in *GreCon Dimter v. J.R. Normand inc.* – released after the decision of the Court of Appeal at bar – such codified civil law rules must be interpreted as a coherent whole based on their wording, the principles underlying them, and the particular legal framework of commercial arbitration, which seeks to foster the parties' autonomy and the legal certainty of commercial transactions.[56]

64. In a nutshell, Dell's position is that the first group of provisions is sufficient to refer this dispute to arbitration. The second group of provisions is either inapplicable or should have been referred to the arbitrator to decide in the first instance, subject to later review by the courts.

C. THE PRIMACY OF THE AUTONOMY OF THE PARTIES AND THE COMPETENCE-COMPETENCE PRINCIPLE

65. Two fundamental principles can be distilled from the case law and doctrine reviewed below. First, this Court has ruled that as a matter of public policy arbitration agreements must be respected and even encouraged to foster certainty and foreseeability in commercial relations.

66. Second, in promoting this important public policy Québec law has adopted a robust version of the "competence-competence" principle of commercial arbitration law. This principle holds that an arbitral tribunal has the authority to determine the existence and scope of its own jurisdiction before any court intervention, provided that the arbitration agreement is not "manifestly null" and does not violate fundamental principles of public order. If a court is asked to refer a dispute to arbitration it must limit itself to a *prima facie* review of whether the arbitration agreement is manifestly null or violates fundamental public order rules. If the court cannot decide this on a *prima facie* basis it should refer the dispute to the arbitrator to decide in the first instance, subject to later court review. Québec's robust adoption of the competence-competence principle provides that where the parties have an arbitration agreement the courts lack jurisdiction *ratione materiae* over the dispute.

1. The Primacy Of The Autonomy Of The Parties

67. ***GreCon Dimter:*** In *GreCon Dimter Inc.*, LeBel J. for the Court affirmed the primacy of the autonomy of contracting parties to choose in advance the forum for resolving their disputes.

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[56] *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, para. 19, LeBel J. for the Court.

While the case involved a choice of forum clause the Court drew extensively on arbitration principles and law as both choice of forum and arbitration clauses are addressed in art. 3148, para. 2 *C.C.Q.* – in the face of either clause a Québec authority simply has "no jurisdiction".

68. The Court stated that art. 3148 *C.C.Q.* attaches "considerable importance to the principle of the autonomy of the parties". This provision is "more than a simple paragraph of limited scope" but rather has "played a predominant role in the development of the rules governing the jurisdiction of the Québec courts"; it "constitutes the cornerstone of a legislative policy of respect for the autonomy of the parties" by implementing "the broader principle of achieving legal certainty in international transactions". Arbitration agreements, the Court held, "foster certainty and foreseeability in international commercial relations, because they enable the parties to provide in advance for the forum to which they will submit their dispute". The Court noted that it has "often stressed the importance of such clauses and the need to encourage them".[57]

69. A key influence on this philosophy of encouraging the parties' autonomy to choose arbitration was the international movement towards harmonizing the rules of jurisdiction.[58] In 1986, Canada became the first country in the world to enact arbitration legislation based on the *Model Law on International Commercial Arbitration* proposed by the United Nation Commission on International Trade Law ("UNCITRAL") ("*UNCITRAL Model Law*"), which closely follows the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("*New York Convention*").[59] That same year Québec reformed and modernized its arbitration rules based on the *UNCITRAL Model Law*.[60]

70. This Court in *GreCon Dimter* noted that Québec's 1986 arbitration reforms aimed to "facilitate the enforcement of arbitration agreements by ensuring that effect is given to the parties' express intention to seek arbitration". They "oust an authority's jurisdiction [...] to ensure that the intention of the parties is respected in order to achieve legal certainty". The "interpreter must therefore encourage arbitration clauses, and facilitate their enforcement"; doubts should be resolved in favour of ensuring that arbitration agreements are binding. By providing for the use of arbitration clauses to foster forseeability and certainty in commercial

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[57] *Id.*, paras. 21, 22, 35.

[58] *Id.*, paras. 23, 39.

[59] U.N. Doc. A/40/17 (June 21, 1985), Ann. I. See Fortier, above, note 55, p. 143.

[60] 330 U.N.T.S. 3.

transactions, the Legislature has acknowledged the "existence and legitimacy of the private justice system, which is often consensual and parallel to the state's judicial system".[61]

71. The Court also noted that one of the new provisions, art. 940.1 *C.C.P.*, "gives an arbitration clause precedence over the jurisdiction of a Québec authority". This provision was modelled on 8(1) of the *UNCITRAL Model Law* and art. II(3) of the *New York Convention*, which "recognize that a judge is obliged to apply a valid arbitration agreement". The Court emphasized that in Québec "the application of art. 940.1 *C.C.P.* is mandatory where the requirements are met. A court has no choice but to apply it".[62]

72. ***Desputeaux:*** In the same vein, in the earlier case of *Desputeaux v. Éditions Chouette (1987) inc.* this Court affirmed its liberal approach to the interpretation of arbitration agreements. LeBel J. for the Court upheld the arbitrability of copyright disputes despite provisions in the *Copyright Act* vesting jurisdiction with the federal and provincial courts. The Court held that "parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding"; "[s]ince the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally". The Court noted that "the trend in the case law and legislation [...] for several decades [has been] to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems, both common law and civil law". Both Parliament and the provincial legislatures have "themselves recognized the existence and legitimacy of the private justice system, often consensual, parallel to the state's judicial system". "Arbitration is now part of the justice system in Québec". The "*Civil Code* recognizes the existence and validity of arbitration agreements".[63]

2. Québec Adopts A Robust Version Of The Competence-Competence Principle

73. ***Avoid pre-emption of the arbitration process:*** The Court in *Desputeaux* warned against excessive judicial pre-emption of the "validity" or "interpretation" of contracts containing

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[61] Above, note 56, paras. 38, 43, 45. Indeed, Québec courts have long accepted that arbitration agreements must be approached positively and purposefully and receive a large and liberal interpretation. Arbitration has been found to be a fundamental right in Québec and an expression of the parties' contractual freedom: see *La Laurentienne-vie, compagnie d'assurance Inc. v. L'Empire, Compagnie d'assurance vie*, [2000] R.J.Q. 1708, paras. 23-29, 80 (C.A.), Thibault J.A.

[62] *Id.*, paras. 42, 44. See also *Condominiums Mont St-Saveur Inc. v. Constructions Serge Sauvé Ltée*, [1990] R.J.Q. 2783, at p. 2785 (C.A.), Monet J.A., describing the 1986 reforms as having metamorphosed Québec law.

[63] *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, paras. 22, 35, 38, 40, 42, 43, 45, 48, LeBel J. (emphasis added).

arbitration agreements, directing that such issues should be left to the arbitrator to decide in the first instance: "The contrary solution would result in a multiplicity of proceedings in cases where a dispute related to both the interpretation of the clauses of the contract and the validity of the contract. That solution would offend one of the fundamental principles of arbitration, which is designed to provide parties to a contract with an effective and efficient forum for resolving their disputes."[64]

74. ***The competence-competence principle:*** The Court in *Desputeaux* thus implicitly acknowledged the fundamental "competence-competence" principle of arbitration law, which has two components: (1) the arbitrator is empowered to determine the existence and scope of the arbitrator's jurisdiction; and (2) questions as to the existence and scope of the arbitrator's jurisdiction are for the arbitrator to decide in the first instance, subject to subsequent review by the courts.[65] The competence-competence principle is endorsed in arts. 8 and 16 of the *UNCITRAL Model Law* and in arts. 940.1 and 943 *C.C.P.*

75. *Fouchard, Gaillard and Goldman on International Commercial Arbitration* note that these two components of the competence-competence rule are equally important and seek to promote arbitration. Positively, the competence-competence rule allows the arbitrators to rule on their own jurisdiction. Negatively, it allows the arbitrators "to be not the sole judges, but the first judges of their jurisdiction". It is a rule of "chronological priority", directing the courts to refrain from hearing substantive argument as to the arbitrator's jurisdiction (including as to the validity of the arbitration agreement) until such time as the arbitrators have had the opportunity to do so – "arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts". The two policy rationales for the rule are to prevent

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64 *Id.*, para. 64, citing *Compagnie nationale Air France v. Mbaye*, [2000] R.J.Q. 717 (Sup. Ct.), at p. 724.

65 Fortier, above, note 55, p. 145; Louis Marquis, "La compétence arbitrale: une place au soleil ou à l'ombre du pouvoir judiciaire" (1990), 21 R.D.U.S. 303, at pp. 309-316; Sabine Thuilleaux and Dean M. Proctor, "L'application des conventions d'arbitrage au Canada: une difficile coexistence entre les compétences judiciaire et arbitrale" (1992), 37 McGill L.J. 470, at pp. 480-481; Sabine Thuilleaux, *L'arbitrage commercial au Québec* (1991), pp. 56-62; *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, edited by Emmanuel Gaillard and John Savage (1999), p. 401 ("the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts"); Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2005), pp. 143-4 ("Modern international commercial arbitration without this [competence-competence] principle is unthinkable, since the arbitrator's right to rule on his own jurisdiction is one of the reasons why arbitration has flourished so greatly over the past decades").

delaying tactics and to centralize litigation,[66] principles which this Court had strongly endorsed in *Desputeaux*.[67]

76. ***Mandatory referral to arbitration:*** To give effect to the competence-competence principle, art. 940.1 *C.C.P.* provides that where an action is brought regarding a dispute covered by an arbitration agreement the court shall refer the parties to arbitration unless the arbitration agreement is "null". Art. 940.1 *C.C.P.* is based on art. 8(1) of the *UNCITRAL Model Law*, which provides for the same "negative" effect of an arbitration agreement.[68]

77. Thus, Québec law permits an arbitrator to adjudicate his or her own competence, subject to court review.[69] In prior cases the validity of an arbitration clause has properly been left to the arbitrator to decide in the first instance,[70] as have issues as to its scope.[71] Indeed, as discussed below (para. 103), contrary to the decision of the Court of Appeal at bar prior cases have allowed the arbitrator to determine whether an arbitration provision is external under art. 1435 *C.C.Q.*

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66 *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, pp. 401 (emphasis added).

67 *Desputeaux*, above, note 63, para. 64 ("one of the fundamental principles of arbitration [...] to provide parties to a contract with an effective and efficient forum for resolving their disputes").

68 *UNCITRAL Model Law*, art. 8(1): "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement of the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed". See UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, p. 23; *Compagnie Nationale Air France v. Mbaye*, [2003] R.J.Q. 1040, para. 48 (C.A.), Mailhot J.A.; Louis Marquis, "L'influence du modèle juridique français sur le droit québécois de l'arbitrage conventionnel (1993), R.I.D.C. 577, at pp. 613.

69 Arts. 943 and 943.1 *C.C.P.*; *Condominiums Mont Saint-Sauveur Inc. v. Constructions Serge Sauvé Limited.*, [1990] R.J.Q. 2783, at p. 2790 (C.A.), Rothman J.A.; *Opron Inc. v. Aerosystem Engineering Inc.*, [1999] R.J.Q. 757, p. 793 (S.C.), Kennedy J.; *Simbol Test Systems Inc. v. Gnubi Communications Inc.* (6 March 2002), Montréal 550-17-000632-016 (C.S.) at para. 46.

70 *Simbol Test Systems inc. v. Gnubi Communications inc.*, A.E./P.C. 2002-1270, paras. 43-46, 57 (Qué. S.C.), Isabelle J. ("Le tribunal est d'opinion que seul l'arbitre choisi par les parties a compétence pour se prononcer sur la validité de la clause d'arbitrage et c'est devant lui qu'elles devront faire valoir leur prétentions"); *Opron*, p. 793; *Sonox Sia v. Albury Grain Sales Inc.*, [2005] Q.J. No. 9998, paras. 25-27 (S.C.), Buffoni J. (where a defect of consent is alleged "arbitrators must rule on own jurisdiction first"); and Sabine Thuilleaux, *L'arbitrage commercial au Québec : Droit interne – Droit international privé*, p. 67 ("le juge étatique ne peut pas se livrer à un examen de l'arbitrabilité même de la convention d'arbitrage").

71 *Condominiums Mont St-Saveur Inc. v. Constructions Serge Sauvé Ltée*, [1990] R.J.Q. 2783, pp. 2789-90 (C.A.), Rothman J.A.; *Compagnie Air France v. MBaye*, [2003] R.J.Q. No. 2783, paras. 32-35 (C.A.), Mailhot J.A.; *A. Bianchi S.R.L. v. Bilumen Lighting Ltd.*, [1990] R.J.Q. 1681, p. 1686 (S.C.), Ryan J.; *Les immeubles Ahuntsic inc. v. Patry*, J.E. 87-886, pp. 6-8 (S.C.), Lafontaine J.; *Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.*, [2001] AZ-01021616, paras. 25, 36-43 (Qué. S.C.), Rayle J.C.S. ("courts should refrain from intervening prematurely: the intent of the Legislature is that the arbitrators decide issues of competence in the first place"); *Prévost Silk Screen v. Produits Franco Inc.*, (1980) J.E. 80-298, pp. 2-3 (S.C.), Reeves J. (``S'il s'agit là d'une clause compromissoire valide, non seulement la Cour n'a pas à se prononcer sur la nature du document qui fait l'objet du litige ou sur le bien-fondé des dommages réclamés, mais encore elle ne peut décider si la dispute entre les parties se situe à l'intérieur de la juridiction attribuée à l'arbitre").

78. ***Québec law limits the court to a prima facie review of whether the arbitration agreement is null:*** In deciding whether to refer a dispute to arbitration judicial involvement is limited to a *prima facie* review of whether the arbitration agreement is null on its face. Québec courts have generally limited such *prima facie* review to assessing whether the arbitration agreement is "manifestly null" or constitutes a flagrant violation of the rules of public order. If the matter requires proof of facts it should be left to the arbitrator to decide.[72]

79. Québec courts also give effect to the negative aspect of the competence-competence rule by requiring parties to first exhaust proceedings before the arbitrator before the court will rule on the matter. The courts are mindful that excessive judicial involvement undermines the efficacy of the arbitration process and perpetuates the view that "arbitrated justice is second class justice".[73]

80. *Fouchard, Gaillard and Goldman on International Commercial Arbitration* note that an allegation of defective consent concerning an arbitration agreement would probably require more than a *prima facie* examination and should therefore be left to the arbitrator to decide in the first instance:

> **526.** Where a party challenges the validity of its consent to arbitration on grounds that it was in some way vitiated, the first question to arise is procedural: should the allegedly vitiated consent be examined, initially at least, by the arbitrators or by the courts? The answer is that, under the "competence-competence" principle, the matter must initially be decided by the arbitrators.

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[72] *Opron*, above, note 69, pp. 785, 793-4, citing Sabine Thuilleaux, *L'arbitrage commercial au Québec* (1991), p. 67. Thuilleaux notes that court intervention is limited to manifest nullity ("la nullité manifeste"), which requires a showing that the nullity must be proven directly, unequivocally and immediately ("doit pouvoir faire l'objet d'une appréhension directe, univoque, sinon immédiate"). The review is limited to a *prima facie* analysis to assess whether the agreement suffers from absolute nullity or flagrantly violates the rules of public order ("la nullité apparente ou formelle de l'acte, ou bien une violation flagrante de l'ordre public par la convention d'arbitrage"). The courts should refer the matter to arbitration if it requires proof of facts ("les tribunaux de droit commun devront décliner leur compétence s'il s'avère nécessaire de procéder à une analyse par induction, comparaison ou interprétation complexe de cet acte")(p. 68). See also *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] J.Q. No. 5922, paras. 32-37 (C.A.), Rousseau-Houle J.A.; Thuilleaux and Proctor, above, note 65, pp. 475, 487, 508-509 (*prima facie* review should be limited to respect the jurisdiction of the arbitrator to rule on its own jurisdiction).

[73] *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] J.Q. No. 5922, para. 32 (C.A.), Rousseau-Houle J.A.; *Compangnie Air France v. Mbaye*, [2003] R.J.Q. 1040, paras. 70, 74 (C.A.); *Rousseau v. Rousseau*, J.E. 2002-886, paras. 33-34 (S.C.), Lemelin J., lv. to appeal dismissed (C.A., 2002-07-18); André Dorais, "L'arbitrage commercial – Développements législatifs" (1987), R. du B. 273, pp. 286-7; Thuilleaux and Proctor, above, note 65, p. 498. French courts likewise strongly defer to the arbitrator's jurisdiction by limiting the scope for preliminary judicial intervention to *prima facie* review: see Arts. 1458 and 1466 *Nouveau Code de Procédure Civil*; *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, pp. 407-8 (French courts "very strict" in applying competence-competence; limit themselves to "*prima facie* review"; intervene only if arbitration agreement is "patently void"); Jean Robert, *L'arbitrage* (6th ed., 1993), pp. 134-5 (court on a *prima facie* review under French law limited to assessing whether the arbitration agreement is manifestly null («manifestement nulle»); Louis Marquis, "L'influence du modèle juridique français sur le droit québécois de l'arbitrage conventionnel (1993), R.I.D.C. 577, at pp. 608-9; Fortier, above, note 55, p. 146.

> Otherwise, a mere allegation of defective consent, probably leading to factual inquiries beyond a *prima facie* examination, would suffice to delay the constitution of the arbitral tribunal. That is precisely what the "competence-competence" rule seeks to avoid. [...] That is not to say that the arbitral tribunal will have the last word on the matter, as the existence of a valid arbitration agreement will be reviewed, in fact and law, by the courts in the course of any enforcement procedure or action to set aside.[74]

81. ***Québec law removes the court's subject-matter jurisdiction:*** Québec law arguably goes further than the arbitration laws of many common law jurisdictions by expressly removing the court's subject-matter jurisdiction in the face of an arbitration agreement. Art. 2638 *C.C.Q.* defines an arbitration agreement as one providing for arbitration "to the exclusion of the courts". Correlatively, art. 3148 *C.C.Q.* provides that where the parties have an arbitration agreement "a Québec authority has no jurisdiction" (emphasis added).

82. Indeed, Québec case law accepted a robust, jurisdiction-limiting form of the competence-competence rule even before the 1986 reforms expressly directed that result.[75] In 1983, in *Zodiak International Productions Inc. v. Polish People's Republic* this Court swept aside the traditional judicial hostility towards arbitration by confirming the validity and enforceability of agreements to refer future disputes to arbitration (« *la clause compromissoire* »). Chouinard J. for the Court held that "[t]he effect of an undertaking to arbitrate is to remove the dispute from the ordinary courts of law". The Court ruled that "since the case is one of lack of jurisdiction *ratione materiae*, the mere presence of an undertaking to arbitrate suffices to bar [an] action in the Superior Court".[76] This principle has been consistently followed by Québec courts.[77]

83. ***The court may conduct a full review if and when the arbitrators declare themselves competent:*** Like art. 16(3) of the *UNCITRAL Model Law*, art. 943.1 *C.C.P.* provides that if the arbitrators declare themselves competent a party may within 30 days of being notified thereof apply to the court for a decision on the matter. Court intervention is thus contemplated only after

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[74] *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, para. 526, p. 308 (emphasis added).

[75] *An act to amend the Civil Code and Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73, amending the former *Code of Civil Procedure*, arts. 940-951.

[76] *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, pp. 545, 552, Chouinard J. (emphasis added).

[77] *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée.*, [1990] R.J.Q. 2783, at p. 2789 (C.A.), Rothman J.A. ("In *Zodiak*, the Supreme Court held [...] that the existence of [an arbitration] clause was sufficient to remove the dispute from the jurisdiction of the courts"); *Compagnie d'assurance Standard Life v. Boulianne*, [1999] R.L. 341 at p. 343 (C.A.), Baudouin J.A.; and *Simbol Test Systems Inc. v. Gnubi Communications Inc.* (6 March 2002), Montreal 550-17-000632-016, paras. 30-33 (C.S.), Isabelle J.

the arbitrator has first had an opportunity to rule on the matter. One of the world's most esteemed arbitrators, Yves Fortier, describes such subsequent judicial review as "one of the essential conditions for the development of an effective system of arbitral justice" which "makes it acceptable for arbitrators to rule on their own jurisdiction". He notes that it is "*because* the courts have a role to play in enforcing arbitral awards that judges can, and do, refrain from interfering in arbitral proceedings during the conduct of an arbitration". "Viewed in this manner, the availability of judicial recourse in limited circumstances is far from antithetical, but is, rather, essential to the well-being of what is otherwise a purely private process".[78]

84. This devolution of decision-making authority and jurisdiction to the arbitrator under consensual arbitration obviously parallels the devolution to statutory arbitrators and administrative tribunals under Canadian law. These entities are recognized by law as being first in line to adjudicate disputes within their spheres, including jurisdictional disputes. The courts will generally intervene only after all adequate alternative remedies have been exhausted.[79]

85. ***Different approach in common law provinces:*** Québec's approach differs from that of Canada's common law provinces, whose arbitration statutes direct the court to "stay" the judicial proceedings but do not expressly remove the courts' subject-matter jurisdiction.[80] Common law courts will, however, often reach the same result by referring to arbitration all cases where the arbitration agreement is *prima facie* valid and, correlatively, refusing to stay court proceedings only where the arbitration agreement is "clearly invalid".[81] Nevertheless, Canada's common law

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78 Fortier, above, note 55, pp. 147-8 (emphasis in original).

79 *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (exclusive jurisdiction of statutory arbitrators in disputes involving a collective agreement); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (adequate alternative remedy principle of administrative law); *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Northern Telecom Ltd. v. Communications Workers of Canada (No. 2)*, [1983] 1 S.C.R. 733 (tribunals have jurisdiction to adjudicate issues relating to their jurisdiction); David Mullan, *Administrative Law* (2001), pp. 80-81.

80 *Commercial Arbitration Act*, R.S.C. 1985, ch. 17 (2nd supp.); *Commercial Arbitration Act*, R.S.B.C., 1996 ch. 55, s. 15; *Arbitration Act*, R.S.A. 2000, c. A-43, s. 7; *Arbitration Act*, 1992, S.S. 1992, c. A-24.1, s. 8; *Arbitration Act*, C.C.S.M. c. A120, s. 7; *Arbitration Act*, R.S.Y. 2002, c.8, s. 9; *Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 10; *Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 7; *Arbitration Act*, R.S.N.S. 1989, c. 19, ss. 7, 9; *Arbitration Act*, R.S.P.E.I., 1988, c. A-16, s. 7; *Arbitration Act*, R.S.N.L. 1990, c. A-14, s. 4.; see also *Bridgepoint International*, above, note 71, para. 43 ("Once the [Québec] court comes to the decision that the parties should be referred to arbitration, it no longer has jurisdiction to 'suspend' or stay the action").

81 J. Brian Casey and Janet Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), pp. 64-65; J. Kenneth McEwan and Ludmila B. Herbst, *Commercial Arbitration in Canada* (2004), ¶¶5:50, 5:60; *Gulf Canada Resources v. Arochem International* (1992), 43 C.P.R. (3d) 390, at p. 397 (B.C.C.A.), Hinkson J.A., cited in *GreCon Dimter*, para. 44; *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.*, [1993] B.C.J. No. 1662, paras. 30-31 (C.A.), Hollinrake J.A.; *City of Prince George v. A.L. Sims & Sons Ltd.*, [1995] 9 W.W.R. 503, para. 53 (B.C.C.A.), Cumming J.A.; *Cooper v. Duggan* (2003), 16 B.C.L.R. (4th) 248, para. 10 (C.A.),

provinces remain somewhat influenced by English arbitration law and practice, which was traditionally more hostile towards arbitration and provided (and continues to provide) for more extensive judicial involvement in the arbitral process.[82] As Fortier notes, "[c]ommon law courts [...] were arguably more wary of arbitration agreements than their civil law cousins, given that such agreements can be viewed as ousting considerable aspects of the court's 'inherent' jurisdiction".[83] Common law authorities must therefore be read with some caution.

3. Application To The Present Case

86. The foregoing principles can be applied to the present case in a simple and straightforward manner. As a matter of judicial policy, the Québec Court of Appeal's decision is fundamentally inconsistent with promoting the autonomy of contracting parties to choose arbitration in the manner espoused by this Court in *GreCon Dimter* and *Desputeaux*. The Court of Appeal's decision will not foster certainty and foreseeability in commercial transactions, but rather will tend to deprive parties of the ability to choose arbitration in advance. Its decision will also discourage rather than encourage arbitration agreements and hamper rather than facilitate their enforcement. The Court's ruling also interprets the arbitrator's mandate restrictively, not liberally. In short, the Court of Appeal's decision will undermine the existence and legitimacy of the private justice system and halt the judicial momentum of encouraging respect for arbitration.

Newbury J.A.; *Dawson (City) v. TSL Contractors Ltd.* (2003), 23 C.L.R. (3d) 242, para. 14 (Y.C.A.), Hall J.A.; *Dalimpex Ltd. v. Janicki* (2003), O.R. (3d) 737, paras. 22, 38 (C.A.), Charron J.A. (as she then was)("in cases where it is not clear, it may be preferable to leave any issue related to the 'existence or validity of the arbitration agreement' for the arbitral tribunal to determine in the first instance"); *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1986), 135 D.L.R. (4th) 130, pp. 133-4 (Ont. Div. Ct.), Adams J. (under Ontario law courts and arbitrators have concurrent jurisdiction to rule on validity of arbitration agreements); *Rio Algom Ltd. v. Sammi Steel Co.* (1991), 47 C.P.C. (2d) 251, paras. 14-15 (Ont. Gen. Div.), Henry J. ("the Model Law reflects an emphasis in favour of arbitration in the first instance [...] jurisdiction and scope of authority are for the arbitrator to determine in the first instance"); *G. v. G.*, [2000] 7 W.W.R. 363, paras. 20-23 (Alta. Q.B.), Hart J. ("onus of showing that a case is inappropriate for arbitration falls to the party opposing the stay [...] the clear policy thrust of the legislation is to limit court intervention and promote arbitral autonomy"; "clear compelling evidence" required to refuse a stay; "if the motions judge believes this is a triable issue, it should be left to the arbitrators to try it"); see also Pierre Bienvenu, "The Enforcement of International Arbitration Agreements and Referral Applications in the NAFTA Region" (1999) 59 R. du B. 705.

82 *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, pp. 71-73 ("the long tradition of arbitration in England was founded on legislation that gave the English courts broad powers to intervene in the conduct of arbitration proceedings and the revision of arbitral awards [...] idiosyncratic English tradition subsists in certain respects: the powers of intervention of the courts remain substantial"); Thuilleaux, above, note 65, pp. 66-68; Thuilleaux and Proctor, above, note 65, pp. 476-80. In a similar vein, U.S. statutory arbitration law while generally very supportive of arbitration does not recognize the competence-competence principle, which thus often invites the use of dilatory tactics: see Thomas E. Carbonneau, *The Law and Practice of Arbitration* (2004), p. 102, and *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, pp. 83-85.

83 Fortier, above, note 55, p. 145.

87. As a matter of legal doctrine, the only issue before the Superior Court in Dell's motion was whether the arbitration agreement in Dell's Terms and Conditions of Sale is *prima facie* valid. Since on a *prima facie* basis the agreement is unquestionably valid the dispute should have been referred to arbitration. Any arguments relating to the invalidity of the arbitration agreement flowing from arts. 1435 or 1437 *C.C.Q.* do not involve manifest or absolute nullity or flagrant violations of the rules of public order; at best, as set out below, they involve issues of relative nullity and should therefore have been left to the arbitrator to decide in the first instance, subject to review by the courts. This is a sufficient basis to allow this appeal.

D. IS THE ARBITRATION AGREEMENT NULL?

88. ***Introduction:*** As noted, the respondents rely on a second group of provisions in the *C.C.Q.* (arts. 2639, 1435, 1437 and 3149) to constrain the parties' autonomy and to declare the arbitration agreement "null" within the meaning of art. 940.1 *C.C.P.* Before the Québec Court of Appeal the respondents advanced four arguments based on these provisions. The Court of Appeal correctly rejected three of them but erred in accepting the fourth, which raised the issue of whether the Terms and Conditions of Sale was an external clause and hence null unless specifically brought to the consumer's attention (art. 1435 *C.C.Q.*).

89. Dell submits that each of the respondent's four arguments is without merit: (1) the arbitrator is clearly entitled to apply the public order rules in the *C.P.A.* without infringing art. 2639 *C.C.Q.* Arbitrators can (and frequently do) apply such rules; (2) the Terms and Conditions of Sale and the arbitration agreement within it are not external to but rather form part of the contract and therefore do not run afoul of art. 1435 *C.C.Q.* In any event, the Terms and Conditions of Sale were expressly and prominently brought to Dumoulin's attention in numerous places on the Website, and in no less than two places on the page from which Dumoulin placed his order; (3) just because the arbitration agreement entails waiver of class actions does not make it abusive contrary to art. 1437 *C.C.Q.* Arbitration and class actions are merely different ways of enforcing substantive rights; and (4) Dumoulin cannot raise the spectre of being forced to arbitrate in the U.S. contrary to art. 3149 *C.C.Q.* Here, the parties agree that Dumoulin's dispute will be arbitrated in Québec according to Québec substantive law. The arbitrator will therefore be a "Québec authority" within the meaning of art. 3149 *C.C.Q.* Each of these four arguments is addressed in turn.

1. Arbitrators May Apply Rules Of Public Order Such As The *CPA* (Art. 2639 *C.C.Q.*)

90. The Québec Court of Appeal correctly held that an arbitrator can apply the public order rules in the *C.P.A.* without running afoul of art. 2639 *C.C.Q.* This position is amply supported by *Desputeaux*.[84] There can be no doubt that consumer disputes are arbitrable and indeed that encouraging arbitration of consumer E-commerce disputes is good public policy.

91. ***Broad conception of public order rejected:*** In *Desputeaux*, this Court held that legislation "cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec". The Court held that copyright matters are arbitrable because the *Copyright Act* does not expressly exclude arbitration. The Court decided that except in certain fundamental matters an arbitrator may dispose of matters relating to the rules of public order since they may be the subject matter of an arbitration agreement. As LeBel J. ruled for the Court: "The arbitrator is not compelled to stay his or her proceedings the moment a matter that might be characterized as a rule or principle of public order arises in the course of the arbitration".[85]

92. The Court also noted that "a broad interpretation of the concept of public order in art. 2639, para. 1 *C.C.Q.* has been expressly rejected by the legislature". The purpose of enacting art. 2639, para. 2 *C.C.Q.* was "clearly to put an end to an earlier tendency by the courts to exclude any matter relating to public order from arbitral jurisdiction". Courts must therefore avoid extensive application of the concept of public order so as to respect the parties' autonomy to choose arbitration and clear legislative policy supporting it.[86]

93. Such judicial restraint is particularly appropriate given what the Court in *Desputeaux* called the "variable, shifting or developing nature of public order [which] sometimes makes it extremely difficult to arrive at a precise or exhaustive definition of what it covers". This allows "for a considerable amount of judicial discretion in defining the fundamental values and principles of a legal system". An arbitrator's decision applying rules of public order is thus entitled to deference from the courts unless the outcome of the arbitration is "in conflict with the

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[84] Reasons of Lemelin J. (*ad hoc*), paras. 47-52: AR I, pp. 24-25.

[85] *Desputeaux*, above, note 63, paras. 42, 53. Other public order disputes found to be arbitrable include, for example, bankruptcy (*Experts en traitement de l'information (ETI) Montréal inc. (Syndic de)*, 2005 QCCA 1257, paras. 42-52 (C.A.), Dussault J.A.) and construction and building code matters (*Condominium Mont-St-Saveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783, at p. 2789 (C.A.), Rothman J.A.).

[86] *Id.*, paras. 52-53.

relevant fundamental principles of public order". The contrary view would perpetuate the stereotype that arbitration is inferior to justice from the courts.[87]

94. ***Consumer disputes are arbitrable:*** There is nothing in either the *C.P.A.* or the *C.C.Q.* that expressly excludes arbitration of consumer disputes. While art. 271, para. 3 *C.P.A.* provides for the jurisdiction of "the court" ("le tribunal") to declare a contract null in certain circumstances at the instance of a consumer, the Court of Appeal correctly held that this merely defines the jurisdiction *ratione materiae* of the courts without expressly excluding arbitration.[88]

95. In the absence of any express preclusion, consumer disputes clearly are arbitrable. Arbitration is now a firmly embedded fixture of Québec's justice system. Indeed, Québec courts have consistently found that an arbitrator can be "an independent and impartial tribunal" for the purpose of applying fundamental rights protected under the Québec *Charter of human rights and freedoms*.[89] Arbitrators and statutory tribunals charged with the duty of applying the law can also apply the *Canadian Charter of Rights and Freedoms*. As McLachlin C.J. has stated, "the *Charter* is not some holy grail which only judicial initiates of the superior courts may touch".[90] Surely this applies *a fortiori* to the C.*P.A.*

96. Nor are the public order rules in the *C.P.A.* remotely comparable to the fundamental public order matters enumerated in art. 2639, para. 1 *C.C.Q.*, such as the status and capacity of persons and family matters, which are outside the jurisdiction *ratione materiae* of the arbitration system. Consumer protection deals with the economic relations between consumers and merchants, and like copyright, is "very far removed" from fundamental questions relating to the

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87 *Id.*, paras. 52, 54, 65-66.

88 Reasons of Lemelin J. (*ad hoc*), paras. 51-52: AR I, p. 25, citing *Desputeaux*, para. 42. See also Claude Marseille, "L'arbitrage et le recours collectif en droit civil québécois, Canadian Institute (February 2006), paras. 128-131.

89 *Québec Charter of human rights and freedoms*, arts. 23, 56(1). See *Sport Maska v. Zittrer*, [1988] 1 S.C.R. 564, at p. 581, L'Heureux-Dubé J. (similarity between functions of a court and an arbitrator); *Beauchemin v. Association de bienfaisance et de retraite des policiers de la Communauté urabine de Montréal*, [2001] J.E. 2001-1060, at para. 25 (C.A.), Pelletier J.A.; *Syndicat de la fonction publique du Québec v. Gagnon*, [1995] AZ-95029113, at p. 5 (S.C.), Boisvert J.

90 *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, para. 70, dissenting, but later adopted by the full Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, para. 29, Gonthier J. for the Court.

status and capacity of persons or to family matters.[91] This is particularly so given this Court's finding that the legislature expressly rejected a broad conception of public order.

97. ***Consumer arbitration good public policy:*** This result is also justified on policy grounds. Consumer arbitration reduces the transaction costs associated with litigation in the courts. U.S. law, for example, operates on the presumption that "everyone wins by referring disputes to arbitration" because consumer adhesion contracts lower the costs of selling, thereby making products more affordable for everyone in a competitive marketplace. An esteemed U.S. commentator has noted that it is "virtually impossible to avoid arbitration if you are buying goods or services in the American marketplace. Accepting them is necessary to individual participation in the marketplace".[92] Indeed, in January 2006 a U.S. federal court examined Dell's on-line arbitration clause and concluded that "consumers actually benefit [from Dell's arbitration provision] in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration provision in its contracts". The Court ruled that provisions such as Dell's "benefit society by encouraging innovation and lowering consumer prices".[93]

98. In a similar vein the Law Commission of Canada notes that with the phenomenal growth of E-commerce comes the potential for a massive increase in the number of disputes, which parties are increasingly seeking to have resolved through arbitration and other ADR forms (such as "on-line dispute resolution" or "ODR"). The message from the Law Commission is that if parties cannot chose arbitration their disputes will flood the already clogged courts.[94]

99. ***Application to the present case:*** Dumoulin clearly has no fundamental right to have his dispute involving a handheld computer adjudicated in the courts. Arbitrators can and do regularly adjudicate such consumer E-commerce disputes. There is nothing against public order in any of

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91 *Desputeaux*, above, note 63, para. 58. See also Claude Masse, *Loi sur la protection du consommateur* (1999) at pp. 963-964, noting that any nullity associated with a breach of the *CPA* involves only relative nullity and not absolute nullity. On relative and absolute nullity, see below, footnote 97.

92 Thomas E. Carbonneau, *The Law and Practice of Arbitration*, Juris Publishing, pp. 225-226.

93 *Provencher v. Dell*, 409 F.Supp. 2d 1196, n.9 (Dist. Ct. Cal. 2006).

94 Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, Chapter 3, "Participatory Justice in a Non-criminal Context: Consensus-based Justice", pp. 90-91, noting: "Estimates of commercial activity emanating from the Internet are currently in the hundreds of billions of dollars with growth projected upwards to trillions of dollars within a few years. Consider the electronic revitalization of the old-fashioned auction through E-bay, where an estimated four million items are offered for sale each day. With increased economic traffic comes increased consumer and business complaints. [...] In turning to commercial arbitration, private judging, and ODR services, commercial agents express their frustrations with the adequacy and sufficiency of the traditional civil justice system" (emphasis added).

this. To the contrary, it actually promotes good public policy: it respects the parties' autonomy, promotes judicial economy and lowers the price of goods for everyone in the marketplace.

2. The Arbitration Agreement Is Not External To The Contract (Art. 1435 *C.C.Q.*)

(a) Introduction

100. The Court of Appeal's only basis for dismissing Dell's declinatory exception was the Court's finding that the arbitration agreement was "null" pursuant to art. 1435 *C.C.Q.* The Court concluded that the Terms and Conditions of Sale and the *NAF Code* were "external" to the contract and thus art. 1435 *C.C.Q.* required that Dell prove that they were expressly brought to Dumoulin's attention or that he otherwise knew of them. Since the Superior Court made no evidentiary findings on this issue, the Court of Appeal made its own factual findings by reviewing the transcripts and appeal record.

101. Dell submits that the Court of Appeal erred by: (1) failing to remit the issue of externality to the arbitrator to decide in the first instance; (2) making its own factual findings on appeal when this issue was not addressed by the Superior Court; (3) in any event, concluding that the Terms and Conditions of Sale and the arbitration agreement were external; and (4) by failing to appreciate that the Terms and Conditions of Sale and arbitration agreement were expressly brought to Dumoulin's attention in a number of ways that were wholly appropriate for the electronic environment in which Dumoulin chose to participate.

(b) Issue should have been left to the arbitrator

102. Dell's main submission is that the issue of compliance with art. 1435 *C.C.Q.* should have been left to the arbitrator to decide in the first instance, as required by art. 940.1 *C.C.Q.* and the competence-competence rule. Whether a contractual provision is external and, if so, was expressly brought to the attention of the consumer cannot be determined on a *prima facie* basis, but rather necessarily requires proof of facts.[95] This inquiry is within the arbitrator's domain.

103. Put differently, while art. 940.1 *C.C.Q.* requires the court to assess whether the contract is "null", this is a limited inquiry that involves only an assessment of absolute nullity and not

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[95] Benoît Moore, "À la recherche d'une règle générale régissant les clause abusives en droit québécois" (1994), 28 R.J.T. 1, p. 212 (issues of art. 1435 C.C.Q. must be judged "in concreto" and require evidence); Didier Lluelles, "Le mécanisme du renvoi contractuel à un document externe: droit commun et régimes spéciaux", (2002) 104 R. du N. 11, pp. 30-32.

relative nullity.[96] Absolute nullity can be determined by the court on a *prima facie* basis; relative nullity cannot. The nullity in art. 1435 *C.C.Q.* is relative nullity and requires evidence, which should be presented to the arbitrator in the first instance. Indeed, Québec courts have previously referred such issues to an arbitrator to decide.[97]

(c) The Court of Appeal erred in making new factual findings on appeal

104. If the Court concludes that the Court of Appeal was not required to refer issues under art. 1435 *C.C.Q.* to the arbitrator, then Dell submits that the Court erred in law by undertaking its own inquiry of these factual issues on appeal when the Superior Court made no findings on the point. The Court of Appeal should have remitted the case below for the necessary evidentiary findings to be made.

(d) The Terms and Conditions of Sale and Arbitration Agreement are not external

105. Alternatively, if the Court of Appeal was free to undertake this inquiry, Dell submits: (1) the Terms and Conditions of Sale and arbitration agreement were not external; and (2) in any event, were expressly brought to Dumoulin's attention in numerous ways.

106. While *C.C.Q.* does not define an external clause the clear purpose of art. 1435, para. 2 *C.C.Q.* is to distinguish between the main contract and other clauses external to it. Its purpose is to relieve the consumer from terms that did not form part of the main contract and were thus unknown to the consumer when the contract was formed. If a merchant wishes to rely on such terms they must be expressly brought to the consumer's attention.[98]

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[96] The *C.C.Q.* provides that a contract is absolutely null where the condition of formation sanctioned is necessary for the protection of the general interest, and may be invoked by any person having present or actual interest in doing so, or by the court on its own motion. A contract is relatively null where the condition of formation sanctioned is necessary for the protection of an individual interest, such as where the consent of the parties of one of them is vitiated. Relative nullity may only be invoked by one of the contracting parties, and not by the court on its own motion. See arts. 1417-1421 *C.C.Q.*; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed., 2005), pp. 421-425; and Didier Lluelles, "Le mécanisme du renvoi contractuel à un document externe: droit commun et régimes spéciaux", (2002) 104 R. du N. 11, p. 15 (noting that art. 1435 *C.C.Q.* involves relative nullity).

[97] *Simbol Test Systems Inc. v. Gnubi Communications Inc.* (6 March 2002), Montréal 550-17-000632-016 (C.S.), paras. 27, 55-57, Isabelle J., citing *Automobile Duclos Inc. c. Ford du Canada Ltée*, [2001] R.J.Q. 173, p. 179 (S.C.), Dubois J.

[98] J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed., 2005), no. 205, p. 267; B. Moore, above, note 96, pp. 211-214; Didier Lluelles, "Le mécanisme du renvoi contractuel à un document externe: droit commun et régimes spéciaux", (2002) 104 R. du N. 11, p. 12. Examples of external contract terms include clauses: (a) incorporated by reference in a contract (*e.g.*, by referring to a clause in an earlier contract); (b) included on a billboard or sign (*e.g.*, an exclusion of liability at a ski hill or a parking lot); and (c) included after contract formation (*e.g.*, exclusion of liability on a receipt rendered after the contract is formed).

107. In the present case, neither the Terms and Conditions of Sale nor the arbitration agreement were external clauses. The arbitration agreement was in the body of Dell's Terms and Conditions of Sale, which appeared in numerous places on the Website. If Dell's arbitration agreement is external, so too is the entirety of the contract, comprising all of Dell's Terms and Conditions. This view, apparently endorsed by the Court of Appeal, rests on the fallacy that Dumoulin had a binding contract with Dell simply by completing an order on the Configurator Page and that the terms of that contract somehow did not include all the essential elements in the Terms and Conditions. This view in effect requires Dell to make its computers available to the public without any conditions; removes Dell's express right to accept or refuse any order; and leaves the parties in limbo about such fundamental issues as payment terms, taxes, price quotes, interest on overdue accounts, shipping charges, transfer of title and risk of loss during shipping, warranties, software, return and exchange policies, limitations of liability, service and support and the many other issues addressed in the Terms and Conditions of Sale. With respect, this is an exceptionally narrow, artificial and commercially unreasonable conception of the parties' "contract".

108. The Court of Appeal's view also fails to appreciate the specific context of E-commerce. In the paper context it is trite that neither a document physically annexed to a contract nor an arbitration agreement on the back of a contract is external.[99] The rules should be the same in the electronic context. A website is simply a group of electronic HTML pages.[100] A user who clicks on a contract available by hyperlink on a webpage is merely turning an electronic HTML page. Clicking on a hyperlink is in fact the only way of turning the pages of a website – the ability to jump to other webpages in this way is the very essence of the "web". As explained by authors Kuester and Nieves in their article "Hyperlinks, Frames and Meta-tags":

> One type of HTML tag is the hyperlink, often represented as bolded or underlined text, or as an image. By "clicking" a mouse or other pointing device on a hyperlink, the contents of another Web page referenced by the hyperlink are then displayed by the Web browser. This "jump" to another Web page is the essence of the Web. Hyperlinking enables a Web surfer to connect to other Web pages and retrieve information within seconds and without having to perform

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[99] D. Lluelles and B. Moore, *Manuel de Doctrine sur le régime des obligations* (2005), vol. 1, p. 26, note 73 and accompanying text; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed., 2001), p. 2001, p. 421 n. 808.

[100] Hyper Text Mark-Up Language ("HTML") is the standard language in which web pages are written. In HTML, a word, a block of text, or an image can be linked (called a "hyperlink") to another file on the web and are viewed by a web browser: see *Oxford English Dictionary*, "HTML"; Kuester and Nieves, above, note 18, pp. 245-6.

> new searches and other complex tasks. The extensive use of these interconnections between Web pages is why the medium is termed a "web".[101]

109. A consumer who fails to turn the pages of, or read, a paper contract is nevertheless bound by the contract. The same should be true on the Internet, especially where a consumer is given clear notice of the contract terms but chooses not to turn or read the electronic pages.

110. ***Québec doctrine:*** In this vein, several Québec authors have adopted the practical and commercially reasonable approach that contract terms available by hyperlink are not external where the hyperlink is functional and evident.[102] Here, the hyperlink to the Terms and Conditions of Sale was both functional and evident on numerous places on the Website, including the Configurator Page: it was placed at the bottom of each page consistent with the universal industry practice. As such, the Terms and Conditions were not external.

111. ***International instruments and domestic legislation:*** Also to the same effect, international instruments and Québec domestic law seek to foster and enhance the enforceability of electronic contracts containing hyperlinks. The *UNCITRAL Model Law on Electronic Commerce*, art. 5 *bis*, affirms the validity of electronic incorporation by reference.[103] Québec (like the federal Parliament and several other provinces) has enacted legislation influenced by the *Model Law on Electronic Commerce*. Québec's *Act to establish a legal framework for information technology* upholds the integrity and unity of a single webpage containing a variety of hyperlinks.[104] Thus, the whole thrust and momentum of international and domestic law is to embrace new technology by giving legal effect to contract terms available by hyperlink. Yet the Court of Appeal's decision halts and even reverses that momentum.

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[101] Kuester and Nieves, above, note 18, p. 246 (emphasis added).

[102] Serge Parisien, "La protection accordée aux consommateurs et le commerce électronique", in *Guide juridique du commerçant électronique* (2001), 176 at p. 177-8; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed., 2005), p. 267.

[103] *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998*, art. 5 *bis*: "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message."

[104] *Act to establish a legal framework for information technology*, R.S.Q., chapter C-1.1, s. 4, para. 1: "A technology-based document, even when the information it contains is fragmented and dispersed in one or more media at one or more locations, is considered to form a whole if its logical structuring elements allow the fragments to be connected, directly or by reference, and if such elements ensure both the integrity of each fragment and the integrity of the document reconstituted as it existed prior to its fragmentation and dispersal". For commentary, see Sylvette Guillemard, *Le droit international privé face au contrat de vente cyberspatial*, Doctoral Thesis (January 2003), Laval University, ch. 2.

112. ***Canadian and U.S. courts:*** Canadian and U.S. courts have similarly refused to apply contract rules to E-commerce in the technical, artificial and antiquated way suggested by the Court of Appeal. For example, in *Rudder v. Microsoft* Winkler J. of the Ontario Superior Court took a commercially reasonable approach to enforcing a forum selection clause available on Microsoft's website by rejecting a narrow view that would lead to "commercial absurdity":

> [...] the plaintiffs argue [that the forum selection clause on Microsoft's website] should be treated as if it were fine print in a contract which must be brought specifically to the attention of the party accepting the terms. Since there was no specific notice given, in the plaintiffs' view, the forum selection clause should be severed from the Agreement which they otherwise seek to enforce.
>
> The argument advanced by the plaintiffs relies heavily on the alleged deficiencies in the technological aspects of electronic formats for presenting the terms of agreements. In other words, the plaintiffs contend that because only a portion of the Agreement was presented on the screen at one time, the terms of the Agreement which were not on the screen were essentially "fine print".
>
> I disagree. [...]
>
> It is plain and obvious there is no factual foundation for the plaintiffs' assertion that any term of the Membership Agreement was analogous to "fine print" in a written contract. What is equally clear is that the plaintiffs seek to avoid the consequences of specific terms of their agreement while at the same time seeking to have others enforced. Neither the form of this contract nor its manner of presentation to potential members are so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument would, rather than advancing the goal of "commercial certainty" [...] move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium.[105]

113. Similarly, in *Kanitz v. Rogers Cable*, Nordheimer J. of the Ontario Superior Court stayed a class action in the face of an arbitration agreement after finding that notice of the arbitration provision *via* Roger's Cable's website was sufficient. The Court held:

> I am also mindful [...] of the fact that we are dealing in this case with a different mode of doing business than has heretofore been generally considered by the courts. We are here dealing with people who wish to avail themselves of an electronic environment and the electronic services that are available through it. It does not seem unreasonable for persons who are seeking electronic access to all manner of goods, services and products, along with information, communication, entertainment and other resources, to have the legal attributes of their relationship with the very entity that is providing such electronic access, defined and communicated to them through the same electronic format.[106]

114. The Québec Court of Appeal's approach was recently rejected in substance by the Illinois Court of Appeal in *Hubbert v. Dell*, released in August 2005, after the Québec Court's decision.

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[105] *Rudder v. Microsoft Corp.* (1999), 40 C.P.C. (4th) 394, paras. 10-12, 16 (Ont. S.C.J.), Winkler J.

[106] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299, para. 32 (S.C.J.), Nordheimer J. (emphasis added).

In the face of Dell's identical arbitration provision, the Illinois Court of Appeal ruled that a dispute between Dell and consumers should be referred to arbitration rather than proceed as a class action. The Illinois Court of Appeal rejected the consumers' argument that Dell's Terms and Conditions of Sale were "not adequately communicated" to them merely because they were made available by blue hyperlinks. The Illinois Court of Appeal found that since Dell's Terms and Conditions were available by blue hyperlinks they "should be treated as same as a multipage written paper contract [...] Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink". The Court held that the notice on Dell's website that "All sales are subject to Dell's Term[s] and Conditions of Sale" would "place a reasonable person on notice that there were terms and conditions attached to the purchase and that it would be wise to find out what the terms and conditions were before making a purchase". The dispute was therefore referred to arbitration.[107]

115. Likewise, in *Grant v. Dell* the South Carolina Court of Common Pleas enforced Dell's arbitration agreement and ruled that a consumer cannot use a website to order a computer and at the same time ignore the Terms and Conditions of Sale clearly posted on that website – a consumer who chooses not to click on the Terms and Conditions is still bound by them:

> The Terms and Conditions were made available to Plaintiff in multiple ways. First, Dell's Terms and Conditions are hyperlinked in blue text on every screen that Plaintiff must access to place her order through Dell's website, and Plaintiff ordered her computer using this website. [...]
>
> In this case, Dell provided the complete terms and conditions at the time of sale on every screen that Plaintiff accessed in the ordering process. Plaintiff cannot use a website to order, but ignore the terms and conditions plainly reflected on that very same website [...]. The law will not permit Plaintiff to sue over the contents of Dell's website while attempting to disregard the actual statements, terms, and conditions that are also provided on that website.
>
> Finally, [plaintiff] Grant does not dispute that he simply could have clicked on the provided hyperlinks and learned every detail about Dell's Terms and Conditions, including the full text of the arbitration agreement. That she chose not to read the contract does not render the contract unmade. By choosing to transact business through the internet, customers cannot insulate themselves from the fundamental presumption that a contracting party exercises diligence and reads the contract. Consumers who can read are bound to read the terms of their purchase agreement.[108]

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[107] *Hubbert v. Dell*, N.E. 2d, 2005 W.L. 1968774 (Ill. 5th Dist., Aug. 12, 2005).

[108] *Grant v. Dell*, Civil Action No. 04-CP-40-3610, pp. 4, 7 (S.C., Richland Co.).

(e) The Terms and Conditions of Sale were expressly brought to Dumoulin's attention

116. In the alternative, Dell submits that the Terms and Conditions of Sale were expressly brought to Dumoulin's attention in several ways that are wholly appropriate for the electronic context in which Dumoulin chose to participate: (1) the Terms and Conditions of Sale were located by hyperlink on each and every shopping page of the Website, including the Configurator Page to which Dumoulin had deep-linked. Consistent with the universal industry practice they were located at the bottom of the page, which is where a consumer such as Dumoulin would expect to find them; and (2) the Configurator Page states clearly that "All purchases subject to [...] Dell's standard terms of sale [...] Copies available on request or at www.dell.ca". This notice is located just below the "Add to Cart" button and therefore amply brings these Terms and Conditions to Dumoulin's attention at the point of order.

117. It tests credulity for a computer-savvy user like Dumoulin to deep-link past Dell's protective barrier and into the Website, to customize and then order a handheld computer on-line and to insist that Dell honour the "Conditions de vente" appearing on its website, yet in the same breath to claim to be relieved of the contractual arbitration agreement located within the Conditions de vente. With respect, Dumoulin is not entitled to cherry pick contractual terms to suit his fancy. All the Terms and Conditions of Sale were expressly brought to his attention and as such this dispute should have been referred to arbitration.

3. The Arbitration Agreement Is Not Abusive For Providing Class Action Waiver (Art. 1437 *C.C.Q.*)

118. The Québec Court of Appeal correctly concluded that Québec law permits an arbitration agreement to bar a class action and is not necessarily abusive contrary to art. 1437 *C.C.Q.* Arbitration and class actions are simply different vehicles for obtaining civil justice.[109] The *C.C.P.* does not preclude parties from agreeing to pursue their rights by arbitration instead of a class action. By comparison, Ontario now has legislation expressly providing that a consumer may commence a class action despite an arbitration provision to the contrary.[110]

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[109] *Tremaine v. A.H. Robins Canada Inc.* (1990), R.D.J. 500, at p. 507 (Qué. C.A.), Bisson C.J.; *Carrier v. Rochon*, J.E. 2000-1807, at para. 55 (Qué. C.A.), Gendreau J.A.; Kathleen Delaney-Beausoleil, "Le recours collectif" in *Précis de procédure* civile (4th ed., 2003), vol. 2, p. 876; *Hollick. v. Toronto*, [2001] 3 S.C.R. 158, at para. 15, McLachlin C.J.

[110] *Ontario Consumer Protection Act, 2002*, S.O. 2002, c. 30, s. 8(1) (in force as of July 30, 2005). Before this legislation, Ontario courts had ruled that consumers could contract out of class actions by choosing arbitration: *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299, paras. 50-55 (S.C.J.), Nordheimer J.; see also *Rudder v.*

119. Arbitration is firmly entrenched and a fundamental right in Québec and must not be viewed as inherently subordinate to the class action procedure. Québec courts have held that where legislation or a collective agreement provides for arbitration, or for resolution of a dispute before an administrative tribunal, a class action before the courts may not be pursued.[111] The result should be the same where the parties have a contractual arbitration agreement. Since the motion to refer to arbitration raises an issue of the court's jurisdiction *ratione materiae*, it must be resolved before the court rules on whether a class proceeding should be authorized under the *C.C.P.*[112]

120. While not necessary to dispose of this argument, it is noteworthy that several U.S. courts have held that Dell's arbitration provision providing for class action waiver is not unconscionable.[113] Arbitration administered by the NAF has also been uniformly praised by U.S. courts, including the U.S. Supreme Court, as providing a fair, efficient and cost-effective means for resolving consumer disputes.[114] Nor does arbitration necessarily preclude class-wide resolution of disputes before the arbitrator.[115] U.S. courts have viewed this issue as boiling down

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Microsoft Corp. (1999), 40 C.P.C. (4th) 394, paras. 8-17 (Ont. S.C.J.), Winkler J. (precluding Ontario class action by giving effect to forum selection clause).

111 *Carrier v. Rochon*, J.E. 2000-1807 (Qué. C.A.), Gendreau J.A. (class action precluded where *Health Insurance Act* provides for arbitration); *Pérès v. A.G. Québec*, J.E. 2004-600, at paras. 59-70 (Qué. S.C.), Courteau J. (class action by public employees precluded because issues to be decided by arbitrator under collective agreement); *Syndicat canadien de la fonction publique, section locale 2601 v. Ville de Mont-Royal*, J.E.98-2165 (Qué. S.C.), Barbeau J. (class action by municipal employees precluded as dispute to be decided by arbitrator under collective agreement); *Cliche v. Commission administrative des régimes de retraite et d'assurances*, D.T.E. 97T-1072, at p. 9 (Qué. S.C.), Gervais J. (class action relating to public pension fund precluded as dispute to be submitted to arbitration under legislation governing the pension fund); *Vena v. Montréal (Ville de)*, J.E. 2002-1799 (Qué. C.A.)(class action dismissed where Municipal Court has exclusive jurisdiction over matters related to municipal by-law); *Hamer v. R.*, J.E. 98-1033, at p. 4 (Qué. C.A.)(class action dismissed where jurisdiction resided with the Tax Court of Canada); *Laprise v. Boisclair*, J.E. 2001-1145, at para. 38 (Qué. S.C.), Taschereau J., appeal dismissed 200-09-003644-017 (C.A.) (class action dismissed where jurisdiction resided with the Tribunal administratif du Québec).

112 *Laprise v. Boisclair*, J.E. 2001-1145, at paras. 7-8 (Qué. S.C.), Taschereau J., appeal dismissed 200-09-003644-017 (C.A.); *Nutri-Mer inc. v. Avantage Link inc.*, [2003] R.J.Q. 1944, at paras. 16-18 (C.S.); Claude Marseille, "L'arbitrage et le recours collectif en droit civil québécois" (Canadian Institute, February 2006), para. 126.

113 *Provencher v. Dell*, 409 F.Supp. 2d 1196 (Dist. Ct. Cal. 2006); *Stenzel v. Dell, Inc.*, 2005 ME 37, 870 A.2d 133 (Me. 2005); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 296 Ill. Dec. 258 (Ill.App. 2005); *Falbe v. Dell Inc.*, 54 UCC Rep Serv 2d 239, at pp. 245-6 (N.D.Ill. 2004); see also *Dell, Inc. v. Muniz*, 163 S.W.3d (Tex.App. 2005).

114 *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, at p. 95 n.2 (2000), Ginsburg J. (NAF has developed "models for fair cost and fee allocation"); *Provencher v. Dell*, 409 F.Supp. 2d 1196 (Dist. Ct. Cal. 2006)(NAF "without question an inexpensive, efficient, and convenient forum for resolving commercial disputes"); *In re Currency Conversion Fee Antitrust Litigation*, 265 F. Supp. 2d 385, at p. 412 (S.D.N.Y. 2003)("fee schedule in the *NAF Code* has been upheld as adequate and fair by numerous courts [...] This Court agrees").

115 See Donald Bisson and 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) 34

to a question of what kind of arbitration procedure the parties have agreed to, an issue that is "for the arbitrator to decide" in the first instance.[116]

4. The Arbitrator Is A "Québec Authority" (Art. 3149 *C.C.Q.*)

121. Finally, the Québec Court of Appeal correctly concluded that the arbitration agreement did not purport to waive the jurisdiction of a "Québec authority" to adjudicate this consumer dispute and that the Superior Court erred in ruling to the contrary.[117] Merely because the NAF (the arbitral institution) is located in the United States does not run afoul of art. 3149 *C.C.Q.* Like other arbitral institutions around the world,[118] the NAF merely provides arbitration administration services but will not itself arbitrate the dispute. As the Court of Appeal correctly held, pursuant to the *NAF Code* Dumoulin's arbitration must be held in Québec because this is a dispute with a Québec consumer and Dell does business in Québec.[119] In addition, the contract is deemed to have been concluded in Québec and is governed by Québec law,[120] which the

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Can. Bar Rev. 309 at pp. 349-351; *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299, paras. 50-55 (S.C.J.), Nordheimer J.

[116] *Green Tree v. Bazzle*, 539 U.S. 444 (2003), at pp. 452-3, Breyer J. See also Thomas E. Carbonneau, *The Law and Practice of Arbitration*, Juris Publishing, pp. 239 (*Bazzle* holds that "the interpretation of the content of the arbitration agreement was a matter for the arbitrator. The ruling, therefore, ignored the consumer arbitration question by focussing upon the jurisdictional question of 'who decides what and when'").

[117] Reasons of Lemelin J. (*ad hoc*), paras. 24-29: AR I, pp. 20-21; Reasons of Langlois J., paras. 32-37: AR I, pp. 8-9.

[118] Such as the International Chamber of Commerce ("ICC") in Paris; the American Arbitration Association ("AAA") in New York; or the Canadian Commercial Arbitration Centre ("CCAC") in Montreal.

[119] *NAF Code*, Rule 32A: AR III, p. 409: "An In-Person Participatory Hearing shall be held where the Arbitration Agreement designates or where the Parties agree or, in the absence of an agreement and for all Consumer cases, at a reasonably convenient location within the United States federal judicial district or other national judicial district where the Respondent to the Initial Claim resides or does business. A Respondent entity does business where it has minimum contacts with a Consumer" (emphasis added).

[120] *C.P.A.*, arts. 2, 21.

arbitrator must apply.[121] The arbitration award will be entered in Québec,[122] and may be homologated or annulled before the Québec courts pursuant to the Québec *C.C.P.*[123]

122. It is also clear under Québec law that an arbitrator is a "Québec authority" within the meaning of art. 3149 *C.C.Q.* The purpose of this provision is to avoid forcing a Québec consumer or employee to arbitrate in a foreign jurisdiction. Where, as here, the arbitration will take place in Québec, art. 3149 *C.C.Q.* is simply not engaged.[124] Dumoulin therefore cannot resist arbitration by raising the spectre of being forced to arbitrate in the United States.

PART IV – ORDER SOUGHT

123. Dell respectfully asks for this appeal to be allowed and the dispute referred to arbitration, with costs here and below.

All of which is respectfully submitted,

May 12th, 2006

Mahmud Jamal

Anne-Marie Lizotte

Dominic Dupoy

Osler, Hoskin & Harcourt LLP,
Counsel for Dell Computer Corporation

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[121] *NAF Code*, Rule 20D: AR III, p. 401 ("An Arbitrator shall follow the applicable substantive law..."); Rule 48A (*NAF Code* to be interpreted in conformity with "the applicable law of other countries in order to provide all participants in the arbitration with a fair and impartial proceeding and an enforceable Award or Order").

[122] *NAF Code*, Rule 39A: AR III, p. 414 ("An award shall be entered in the state, country, or other jurisdiction provided for a Hearing in Rule 32, which shall appear on the award"). This provision also confirms that the *NAF Code* specifically contemplate hearings in countries other than the United States; see to the same effect Rule 9E: AR III, p. 394 ("For arbitration hearings to be held outside the United States...").

[123] Arts. 946, 947 *C.C.P.*; *NAF Code*, Rule 39E: AR III, p. 414 ("An Award may be confirmed, entered or enforced as a judgment in any court of competent jurisdiction"); Rule 5K ("An Award may be enforced in any court of competent jurisdiction").

[124] *Dominion Bridge Corp. v. Knai*, [1998] R.J.Q. 321 (C.A.), at pp. 324-5 (Beauregard J.A.), p. 325 (Rothman J.A.); Gérald Goldstein and Ethel Groffier, "Droit international privé, tome II, Règles spécifiques", *Traité de droit civil sous la direction de Paul-A. Crépeau*, Éditions Yvon Blais, 2003, p. 640. Note that the NAF Code also provides for in-writing, telephone and on-line hearings: *NAF Code*, Rules 25, 26: AR III, pp. 404-5.

PART V – LIST OF AUTHORITIES

Cases		Para. No.
1.	*ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1986), 135 D.L.R. (4th) 130 (Ont. Div. Ct.)	85
2.	*A. Bianchi S.R.L. v. Bilumen Lighting Ltd.,* [1990] R.J.Q. 1681(Qué. S.C.)	77
3.	*Automobile Duclos Inc. c. Ford du Canada Ltée,* [2001] R.J.Q. 173 (S.C.)	103
4.	*Beauchemin v. Association de bienfaisance et de retraite des policiers de la Communauté urabine de Montréal,* [2000] J.E. 2001-1060 (Qué. C.A.)	95
5.	*Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.,* [2001] AZ-01021616 (Qué. S.C.)	77, 85
6.	*Canadian Pacific Ltd. v. Matsqui Indian Band,* [1995] 1 S.C.R. 3	84
7.	*Carrier v. Rochon,* J.E. 2000-1807 (Qué. C.A.)	118, 119
8.	*City of Prince George v. A.L. Sims & Sons Ltd.,* [1995] 9 W.W.R. 503 (B.C.C.A.)	85
9.	*Cliche v. Commission administrative des régimes de retraite et d'assurances du Quebec,* D.T.E. 97T-1072 (Qué. S.C.)	119
10.	*Compagnie Air France v. Mbaye,* [2000] R.J.Q. 717 (Sup.Ct.); [2003] R.J.Q. 1040 (C.A.)	73, 76, 77, 79
11.	*Compagnie d'assurance Standard Life v. Boulianne,* [1999] R.L. 341 (C.A.)	82
12.	*Condominiums Mont St-Saveur Inc. v. Constructions Serge Sauvé Ltée,* [1990] R.J.Q. 2783 (C.A.)	71, 77, 82, 91
13.	*Cooper v. Canada (Human Rights Commission),* [1996] 3 S.C.R. 854	95
14.	*Cooper v. Deggan* (2003), 16 B.C.L.R. (4th) 248 (C.A.)	85
15.	*Dalimpex Ltd. v. Janicki* (2003), O.R. (3d) 737 (C.A.)	85
16.	*Dawson (City) v. TSL Contractors Ltd.* (2003), 23 C.L.R. (3d) 242 (Y.C.A.)	85

Cases **Para. No.**

Cases **Para. No.**

Cases

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Doctrine

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International Instruments

Legislation

PART VI – RELEVANT PROVISIONS OF QUÉBEC CODE OF CIVIL PROCEDURE & CIVIL CODE OF QUÉBEC

(a) *Code of Civil Procedure*

940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.	**940.1** Tant que la cause n'est pas inscrite, un tribunal, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention d'arbitrage, renvoie les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate la nullité de la convention. La procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue tant que le tribunal n'a pas statué.
943. The arbitrators may decide the matter of their own competence.	**943.** Les arbitres peuvent statuer sur leur propre compétence.
943.1 If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter. While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.	**943.1** Si les arbitres se déclarent compétents pendant la procédure arbitrale, une partie peut, dans les 30 jours après en avoir été avisée, demander au tribunal de se prononcer à ce sujet. Tant que le tribunal n'a pas statué, les arbitres peuvent poursuivre la procédure arbitrale et rendre leur sentence.

(b) ***Civil Code of Québec***

1435. An external clause referred to in a contract is binding on the parties. In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.	**1435.** La clause externe à laquelle renvoie le contrat lie les parties. Toutefois, dans un contrat de consommation ou d'adhésion, cette clause est nulle si, au moment de la formation du contrat, elle n'a pas été expressément portée à la connaissance du consommateur ou de la partie qui y adhère, à moins que l'autre partie ne prouve que le consommateur ou l'adhérent en avait par ailleurs connaissance.
1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.	**1437.** La clause abusive d'un contrat de consommation ou d'adhésion est nulle ou l'obligation qui en découle, réductible. Est abusive toute clause qui désavantage le consommateur ou l'adhérent d'une manière excessive et déraisonnable, allant ainsi à l'encontre de ce qu'exige la bonne foi; est abusive, notamment, la clause si éloignée des obligations essentielles qui découlent des règles gouvernant habituellement le contrat qu'elle dénature celui-ci.
2638. 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.	**2638.** La convention d'arbitrage est le contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel à la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux.
2639. Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration. An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.	**2639.** Ne peut être soumis à l'arbitrage, le différend portant sur l'état et la capacité des personnes, sur les matières familiales ou sur les autres questions qui intéressent l'ordre public. Toutefois, il ne peut être fait obstacle à la convention d'arbitrage au motif que les règles applicables pour trancher le différend présentent un caractère d'ordre public.

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where 1) the defendant has his domicile or his residence in Québec; 2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec; 3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; 4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship; 5) the defendant submits to its jurisdiction. However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.	**3148.** Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants: 1° Le défendeur a son domicile ou sa résidence au Québec; 2° Le défendeur est une personne morale qui n'est pas domiciliée au Québec mais y a un établissement et la contestation est relative à son activité au Québec; 3° Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée; 4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé; 5° Le défendeur a reconnu leur compétence. Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.
3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.	**3149.** Les autorités québécoises sont, en outre, compétentes pour connaître d'une action fondée sur un contrat de consommation ou sur un contrat de travail si le consommateur ou le travailleur a son domicile ou sa résidence au Québec; la renonciation du consommateur ou du travailleur à cette compétence ne peut lui être opposée.