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)

- and -

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

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DELL'S REPLY TO THE INTERVENER, CIPPIC/PIAC

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TABLE OF CONTENTS

DELL'S REPLY TO THE INTERVENER, CIPPIC/PIAC

A. THE CLASS ACTION PROCEDURE DOES NOT CHANGE THE SUBSTANTIVE RULES OF SUBJECT-MATTER JURISDICTION

1. CIPPIC argues that the class action is a "public order procedure" that cannot be waived. CIPPIC properly accepts that an individual consumer claim may be arbitrated, but asserts that an aggregation of individual claims – that is, a class action – cannot (para. 20). CIPPIC says that the commencement of a class action changes everything, vesting the court with a subject-matter jurisdiction that simply cannot be removed until after the dispute has arisen. The argument does not appear to be limited to consumer claims, but rather applies to *all* class actions. CIPPIC's approach is based on several flawed premises and directly contradicts this Court's recent decision in *Bisaillon v. Concordia* (released after Dell filed its main factum).[1]

(a) Exercising the right to arbitrate cannot be against public order

2. First, and most fundamentally, CIPPIC presumes that the exercise of a substantive right granted by the *Civil Code of Québec* – the right to arbitrate under art. 2638 *C.C.Q.* – can be against public order. The Québec Court of Appeal has called arbitration a *fundamental right* in Québec.[2] How can the exercise of such a fundamental right be against public order? CIPPIC's argument views arbitration as an inferior form of justice, a view soundly rejected by the courts.

(b) CIPPIC's argument conflicts with *Bisaillon*

3. Second, CIPPIC's argument conflicts with *Bisaillon* and circumvents the rules of subject-matter jurisdiction through the capacious back door of "public order". The Court in *Bisaillon* was unanimous in ruling that the class action procedure cannot affect substantive rights. LeBel J. for the majority ruled that a procedural vehicle such as a class action cannot affect substantive rights or change the legal rules of subject-matter jurisdiction. As LeBel J. ruled:

> The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights [...] It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so[.] [...]
>
> [...] Thus, unless otherwise provided, the substantive law continues to apply as it would in a traditional individual proceeding.

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1 *Bisaillon v. Concordia University*, 2006 SCC 19.

2 *La Laurentienne-vie, compagnie d'assurance Inc. v. L'Empire, Compagnie d'assurance vie*, [2000] R.J.Q. 1708, paras. 23-39, 80 (C.A.), Thibault J.A.

> [...] recourse to this procedural vehicle [of a class action] does not change the legal rules relating to subject-matter jurisdiction. [...]
>
> In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights.[3]

4. LeBel J. ruled that the correct approach is to first determine the jurisdiction over an individual claim. If an individual claim is within the arbitrator's jurisdiction (in *Bisaillon*, a labour arbitrator), then merely bringing a motion for authorization to institute a class action cannot change that result.[4] Even Bastarache J. (dissenting in the result) agreed with this approach, stating: "although the respondent Bisaillon started this case as a class action, this cannot affect the substantive rights of those implicated therein".[5]

5. CIPPIC's argument is inconsistent with *Bisaillon*. Arbitration is a substantive right under the *C.C.Q.*, and indeed it is trite that the rules of subject-matter jurisdiction, such as those providing for arbitration, are themselves of public order.[6] Yet CIPPIC argues that this substantive right in the *C.C.Q.* and the accompanying public order rules of subject-matter jurisdiction are somehow changed by the procedural vehicle of the class action in the *C.C.P.* CIPPIC's further claim that individual consumer disputes are arbitrable, but that a class action of such disputes is not, also directly conflicts with *Bisaillon*.

6. CIPPIC brushes aside *Bisaillon* and the Québec Court of Appeal's decision to the same effect in *Hamer v. Québec (Sous-ministre du Revenu)*,[7] by noting that labour arbitration and tax disputes are "matters" within the exclusive jurisdiction of specialized tribunals and entities (para. 20). This is a distinction without a difference. Arbitration is similarly a matter removed from the subject-matter jurisdiction of the courts. Neither the *Labour Code* in *Bisaillon* nor the *Taxation Act* in *Hamer* expressly precluded class actions, but instead simply provided ordinary rules of subject-matter jurisdiction precluding recourse to the Superior Court. These rules were

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3 *Bisaillon*, paras. 17, 18, 19, 22, LeBel J.

4 *Id.*, paras. 22, 49.

5 *Id.*, para. 66, Bastarache J.

6 *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, pp. 545, 549-50; *V.L. v. B.S.*, J.E. 2002-2066, para. 17 (Qué. C.A.)("La compétence *ratione materiae* (compétence d'attribution ou matérielle) est cependant d'ordre public"); and *Laprise v. Boisclair*, REJB 2002-35673 (C.A.), confirming J.E. 2001-1145, paras. 17-18 (Qué. S.C.).

7 *Hamer v. Québec (Sous-ministre du Revenu)*, J.E. 98-1033 (Qué. C.A.).

nevertheless sufficient to preclude the class action procedural vehicle before the Superior Court. The arbitration provisions in the *C.C.Q.* are to the same effect, vesting exclusive subject-matter jurisdiction with an arbitrator. In *Bisaillon*, the arbitrator's jurisdiction was triggered by the collective agreement; here, it is triggered by the arbitration agreement in the Terms and Conditions of Sale. In short, CIPPIC's argument cannot stand alongside *Bisaillon*.

(c) CIPPIC is asking the Court to legislate

7. CIPPIC notes that a number of EU member states and non-European countries preclude mandatory arbitration clauses in consumer contracts (paras. 30-31). These examples have no bearing on this case. Québec has adopted its own solution in art. 2639 *C.C.Q.* – a broad approach to arbitrability with a narrow class of public order exceptions. In Québec, at least, consumer disputes are arbitrable, even if they are not in some other countries.

8. The only example CPPIC cites of a jurisdiction that has legislated to preclude class action waiver before a dispute has arisen is Ontario, which recently amended its *Consumer Protection Act* to that effect. CIPPIC urges this Court to adopt a similar solution by way of a blanket ban on class action waiver. CIPPIC urges "a solution based on rules of general application rather than a case-by-case assessment of several factors" (paras. 8, 28). This is nothing less than an entreaty for the Court to legislate – to pick up the legislator's pen and write the Ontario solution into the *Civil Code of Québec* or the Québec *Consumer Protection Act*.

9. It will be open to the National Assembly in the future to adopt the Ontario solution if it wishes, but to date it chosen not to do so. The class action procedure was introduced into Québec's *C.C.P.* in 1978. In 1986, Québec reformed the law of arbitration in the *Civil Code of Lower Canada* and took a broad approach to arbitrability, without providing any exemption for class actions. This approach was retained again in 1994, with the adoption of the *Civil Code of Québec*. In short, the legislature has spoken and consistently decided not to ban arbitration agreements that waive the use of the class action procedural vehicle.

(d) The autonomy principle applies to adhesion contracts

10. CIPPIC argues that principles relating to the autonomy of the will do not apply to adhesion contracts, and thus the principles articulated by this Court in *GreCon Dimter* and *Desputeaux* are irrelevant (para. 6). This argument is without merit. The Québec Court of Appeal recently applied the autonomy principles articulated in *GreCon Dimter* and *Desputeaux* to an

adhesion contract.[8] Moreover, adhesion contracts – which reduce transactions costs by saving both parties the time and money of negotiating individual transactions – are founded on consent, the fundamental expression of a party's autonomy and free-will. To take the case at bar, here Mr. Dumoulin, a sophisticated computer user, expressed his autonomy in numerous ways: (a) by choosing to buy a handheld computer on-line; (b) by choosing to order from Dell in particular because of the reputation of the Dell brand, despite the many options available to him in the highly competitive retail computer marketplace; (c) by choosing to follow a deep-link into Dell's website to order an Axim handheld; (d) by choosing to customize the Dell handheld computer to suit his needs and installing an English operating system; and (e) by choosing to invoke the Terms and Conditions against Dell. Thus, even though the parties did not negotiate the contract terms, Mr. Dumoulin's autonomy had ample room for expression.

(e) Art. 9 *C.C.Q.* does not apply in the circumstances

11. CIPPIC does not argue that art. 2639 *C.C.Q.* precludes arbitration of consumer disputes. Such an argument would fail, given this Court's broad approach to arbitrability in *Desputeaux* and its narrower conception of public order under art. 2639 *C.C.Q.*[9] Instead, CIPPIC relies on art. 9 *C.C.Q.*, which it claims protects "rules that one cannot contract out of" (para. 11). CIPPIC claims that the class action procedure is one such a rule. Art 9 provides:

9. Dans l'exercice des droits civil, il peut être dérogé aux règles du présent code qui sont supplétives de volonté; il ne peut, cependant, être dérogé à celles qui intéressent l'ordre public.	**9.** In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

12. On its face, art. 9 *C.C.Q.* does not apply in the circumstances. A class action is not itself a "civil right", but rather a *procedure* for exercising civil rights. In addition, art. 9 *C.C.Q.* prohibits derogation from only the public order rules "of this Code" (emphasis added). It does not apply to the *C.C.P.*, where the class action procedure resides.[10] Finally, the National Assembly specifically dealt with the exceptions to arbitrability in art. 2639 *C.C.Q.* It would be anomalous

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[8] *United European Bank and Trust Nassau Ltd. v. Duchesneau Inc.*, 2006 QCCA 652, paras. 38-62, Dufresne J.A.

[9] See Dell's main factum, paras. 91-93. See also P.-C. Lafond, L. Néel and H. Piquet, "L'émergence des solutions de rechange à la résolution judiciaire des différends en droit québécois de la consommation: fondement et inventaire", in *Mélanges Claude Masse, En quête de justice et d'équité*, Cowansville, Les Éditions Yvon Blais, 2003, p. 200 ("il est permis de soumettre un litige de consommation à l'arbitrage"); *Acier Leroux v. Tremblay*, [2004] R.J.Q. 839 (C.A.) (oppression remedy arbitrable).

[10] See *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc.*, [2006] 1 S.C.R. 27, paras. 110, 157, 170, LeBel J., dissenting on other grounds.

if, having rejected a broad approach to public order in a specific provision such as art. 2639, a broad approach were nevertheless permitted through a more general provision such as art. 9. In sum, CIPPIC's approach fails to read the *C.C.Q.* as a coherent whole.

13. CIPPIC also relies on this Court's decision in *Garcia Transport Ltée v. Royal Trust Co.*[11] in support of its public order argument. However, *Garcia* considered the circumstances in which a substantive right under the *Civil Code of Lower Canada* could be of public order, in accordance with what is now art. 9 *C.C.Q.* It does not purport to derogate from the rules of subject-matter jurisdiction or to allow a procedural vehicle to trump substantive rights.

(f) The specific rules relating to abusive clauses are more appropriate than the general principles of public order

14. In any event, the more appropriate and focussed approach is to ask whether, in the circumstances of this case, the waiver of class actions in Dell's Terms and Conditions of Sale is abusive, contrary to art. 1437 *C.C.Q.* If the waiver of class actions is not abusive in the circumstances, it cannot be against public order.

15. Dell's position remains that unless the Court can decide this issue on a *prima facie* basis, it should be left to the arbitrator to decide in the first instance, subject to later court review.[12] Dell submits that its arbitration agreement is not manifestly abusive - indeed, it is not abusive at all - and therefore the dispute should be referred to arbitration.

16. Art. 1437 *C.C.Q.* defines an abusive clause as "a clause which is excessively and unreasonably detrimental to the consumer", one which "so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract". The test is very high. Art. 1437 *C.C.Q.* is directed at truly shocking and not merely regrettable practices.[13] The provision aims to prevent a stronger party from exploiting a weaker

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[11] *Garcia Transport Ltée v. Royal Trust Co* [1992] 2 S.C.R. 499, L'Heureux-Dubé J.

[12] See the recent decision in *Compagnie des chemins de fer nationaux du Canada v. Agence Métropolitaine de transport*, 2006 QCCS 4595, paras. 18, 21, which correctly applies the *prima facie* approach and rules that even the question of the validity of the contract is for the arbitrator to decide in the first instance.

[13] J.-L. Baudouin & P.-G. Jobin, *Les Obligations*, 6th ed. (2005), p. 159 ("On se rappellera que le législateur lutte ici contre les pratiques véritablement choquantes, les stipulations qui s'écartent manifestement des pratiques contractuelles généralement acceptées par la société, et non pas celles qui sont seulement regrettables").

party.[14] In making this assessment, the court must apply a contextual approach that examines the nature and object of the contract.[15]

17. There is nothing shocking about arbitrating disputes between a computer retailer and consumer and in waiving class actions. Arbitration agreements are a commonplace when buying goods and services in the North American marketplace. Arbitration avoids costly litigation before the courts and allows the parties to resolve their disputes quickly and efficiently. Moreover, rational people regularly choose to accept a contract and submit speculative future claims to arbitration in exchange for getting products and services at the low price they want. Arbitration before the National Arbitration Forum, in particular, has been praised as a low cost arbitration forum and provides Dell customers with a relatively quick, informal and inexpensive means of resolving small consumer disputes. Nor does the arbitration agreement exploit Dumoulin, who can hardly be considered a weak party preyed upon by Dell. Nobody forced Dumoulin to order a Dell computer. If Dumoulin did not want to arbitrate his claims, there were many other options available to him in the highly competitive marketplace. Thus, since Dell's arbitration agreement is not abusive in the circumstances, it cannot be against public order.

(g) Arbitration and modern civil procedure have sufficient flexibility to provide access to justice

18. CIPPIC argues that arbitration does not provide the same access to justice as a class action, largely because arbitration is individual and confidential (para. 21). These are policy arguments which, whether valid or not, do not themselves permit the class action procedure to change the rules of subject-matter jurisdiction or to affect the substantive right to arbitrate.

19. In any event, both arguments lack merit. With respect to the individual nature of arbitration and the claimed loss of economies of scale, similar policy arguments were rejected by the Court in *Bisaillon*. LeBel J. ruled that "there are a number of tools of civil procedure that can be used to resolve the problems caused by multiple proceedings [...] modern civil procedure is flexible". LeBel J. stated that the options include: (1) submitting the various disputes to a single arbitrator; and (2) proceeding with one test case, which would indirectly affect the other cases such that they would, in practice, become moot.[16] Moreover, the *NAF Code* specifically permits

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[14] *Québec (Procureur général) v. Kabakian-Kechichian*, [2000] R.J.Q. 1730, paras. 52-53 (C.A.).

[15] *United European Bank and Trust Nassau Ltd. v. Duchesneau Inc.*, 2006 QCCA 652, para. 66, Dufresne J.A.

[16] *Bisaillon*, paras. 60-63.

procedural flexibility in cases that raise "a common question of fact or law arising from the same or related transaction or occurrence", where "such a proceeding promotes fairness, efficiency or economy".[17] An arbitral tribunal applying the *NAF Code* thus has the jurisdiction and discretion to adopt a sensible procedure that promotes fairness, efficiency and economy. These are the very goals promoted by the class action procedural vehicle.

20. CIPPIC's argument about the secrecy and confidentiality of NAF arbitration is also wrong. CIPPIC alleges that "arbitration awards will not be published and will lack any precedential value. The wrongdoing of large corporations will remain unexposed" (para. 26). However, Dell's arbitration agreement expressly states that any arbitration award "may be entered as a judgment in any court of competent jurisdiction".[18] In addition, Rule 4 of the *NAF Code* provides that "Arbitration Orders and Awards are not confidential and may be disclosed by the Parties".[19] Thus, the arbitration procedure in this case addresses all of CIPPIC's concerns.

21. Finally, CIPPIC asserts that the evidence about the costs of arbitration is equivocal and that consumers should benefit from a presumption that the class action is much more economical than individual claims (para. 24). This is again overstated. Not all arbitration institutions are the same, just as not all courts are the same. The NAF has been praised by the U.S. Supreme Court and other U.S. federal courts for the fairness of its cost and fee structure and its appropriateness for consumer claims.[20] The NAF provides for a complete or partial waiver of fees for financially challenged litigants.[21] In addition to the low cost, the NAF provides for very speedy adjudication: arbitrators are to submit their awards *within 20 days of the hearing*.[22] This is far speedier and more efficient justice than can be expected from most courts. The NAF also allows for the filing of claims by e-mail and gives parties the option of documentary or participatory hearings.[23] For the vast majority of individual consumer claims, the NAF is thus an optimal forum, and indeed is even speedier and more economically accessible than a small claims court.

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17 *NAF Code*, Rule 19B: AR III, p. 400.

18 Dell's Terms and Conditions of Sale, Exh. ARB-3, art. 13C: AR III, p. 384.

19 *NAF Code*, Rule 4: AR III, p. 390 (emphasis added).

20 See Dell's main factum, footnote 114; see also, recently, *Sherr v. Dell, Inc.*, 2006 WL 2109436 *5 (S.D.N.Y.).

21 *NAF Code*, Rule 45: AR III, p. 418.

22 *NAF Code*, Rule 37: AR III, p. 413.

23 NAF Code, Rules 7, 25 and 26: AR III, pp. 393, 404-5.

B. THE CONSUMER IN THIS CASE CONSENTED TO ARBITRATION

22. CIPPIC argues that the Terms and Condition of Sale are external, and further, that Dell did not take adequate steps to bring them to Dumoulin's attention. Both arguments lack merit.

(a) In context, Dell's Terms and Conditions of Sale were not external

23. CIPPIC argues that hyperlinked terms of sale on a merchant's webpage are necessarily external clauses (para. 37). The issue of whether contract terms are external necessarily requires a careful attention to the facts and context of the particular case. Dell's position remains that unless the court can determine the issue on a *prima facie* basis, the matter should be referred to the arbitrator to determine in the first instance. The court will then have the benefit of a fuller record and the arbitrator's findings when reviewing its decision under art. 943.1 *C.C.Q.*

24. If the issue is examined, then the question is whether Dell's Terms and Conditions were external when they were hyperlinked in blue on *every* shopping page of the website, and were placed at the foot of every page according to the *universal industry standard* and consistent with the recommendations of Industry Canada.[24] Québec doctrine views a hyperlink as not external where it is functional and evident. Dell's Terms satisfied both conditions: the hyperlink was functional, and, given its location according to industry norms and with a contrasting blue hyperlink, was manifestly evident (see Dell's main factum, para. 110).

25. Another way of approaching the issue is to ask whether Dell's Terms and Conditions were in the consumer's possession at the relevant time. If they were, the Terms and Conditions were not external. Dell's Terms surely were in Dumoulin's possession. They were not buried deep within Dell's website, but rather were on every shopping page, including the Configurator Page, and in the universally accepted location according to industry norms. It must not be forgotten that Dumoulin is also a sophisticated computer user who chose to conduct business on a website. As Professor Bachand has recently written: "where the web site on which the standard terms are set out is the very web site through which the consumer is expressing the intention to contract, the analogy with the multipage written contract is compelling".[25] In this case, at least,

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[24] Industry Canada, Office of Consumer Affairs, "Your Internet Business: Earning consumer trust", p. 10: on-line: dsp-psd.pwgsc.gc.ca/Collection/C2-419-1999E.pdf.

[25] F. Bachand, "The Legal Effectiveness, in a Class Action Context, of an Arbitration Clause Found in a Consumer Contract Concluded on the Internet", forthcoming in [2006] 1 Stockholm Int. Arb. Rev., at pp. 10-11 of manuscript, citing J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed., 2005), para. 205 ("[un] document annexé au contrat et remis immédiatement à chaque partie et la stipulation inscrite au verso de l'*instrumentum* ne constituent pas des clauses externes").

Dell's Terms were functional, evident, and firmly within Dumoulin's possession – he even invoked them against Dell – and as such were not external.

(b) Dell took reasonable steps to bring the Terms to Dumoulin's attention

26. CIPPIC also asserts that "businesses cannot simply be content to post terms somewhere on their website and remain passive" (para. 36). This argument again fails to take a contextual approach and ignores critical facts in this case. Dell's Terms and Conditions were not "somewhere on the website". They were on every page, in the universal location. They were also again brought to Dumoulin's attention just below the "Add to Cart" button, and even Dumoulin invoked them – facts which CIPPIC totally ignores. Here, Dell did not remain passive.

27. CIPPIC is, however, correct to note that the obligation under art. 1435 *C.C.Q.* is only to take "reasonable steps" (para. 36). Likewise, as the Intervener, ADR Institute notes, the obligation is one of diligence (para. 44). It is also trite that the merchant's obligation to reasonably inform goes hand in hand with the consumer's obligation to take reasonable steps to be informed. As this Court has noted, "the obligation to inform must not be defined so broadly as to obviate the fundamental obligation which rests on everyone to obtain information and to take care in conducting his or her affairs".[26] The duty to inform protects against situational illegality, not a party's own foolishness or negligence.[27]

28. The question, then, is whether Dell took reasonable steps to bring the Terms and Conditions to Dumoulin's attention. Clearly, it did. In addition, when transacting on the internet, Dumoulin was under a duty to reasonably inform himself. Any failure to do so is his own fault.

29. CIPPIC also asserts that Dell should have used a pop-up window or a click-through (para. 45). However, the issue is whether, on the facts of this case, the Terms and Conditions were reasonably brought to Dumoulin's attention. Pop-ups and click-throughs may be useful, but legal rules such as art. 1435 *C.C.Q.* cannot be pigeonholed around particular technologies that may (or may not) be in use at any given time. Further, Industry Canada recommends a hyperlink footer.

30. CIPPIC says that Dell should have required "consumers to indicate that they had read the terms and conditions or understood their substance" (para. 47). Whatever the policy merit of CIPPIC's suggestion, art. 1435 *C.C.Q.* imposes no such requirement.

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[26] *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, p. 587, Gonthier J. for the Court.

[27] ADR Institute Factum, para. 41.

31. Finally, CIPPIC cites two U.S. cases which it says support its position. The first, *DeFontes v. Dell*, is an unpublished Rhode Island decision which, under Rhode Island procedural rules, has "no precedential effect" and may not even be cited as an authority within that state.[28] The second, *Specht v. Netscape*, was not a consumer case, but rather involved the downloading of free software, and has no bearing on this appeal.[29]

C. THIS CASE SHOULD BE REFERRED TO ARBITRATION FIRST

32. Finally, CIPPIC asserts that the court, not the arbitrator, should decide the issue of the validity of the arbitration agreement. This point is already addressed sufficiently in Dell's main factum. As noted, the *UNCITRAL Model Law* and Québec's *C.C.P.* entail a rule of chronological priority, allowing the arbitrator to rule on jurisdictional issues first, subject to prompt review by the court thereafter. In addition, the arbitration agreement in Dell's Terms and Conditions specifically vests the arbitrator with jurisdiction to determine the "validity" of the agreement.[30]

33. CIPPIC, however, asserts that the *travaux préparatoires* for the *UNICTRAL Model Law* rejected the "manifest nullity" standard, "as this might be viewed as allowing the arbitral tribunal to make the first ruling on its competence" (para. 52). CIPPIC's position is incomplete and indeed wrong. Prof. Bachand has recently reviewed what he calls "the Model Law's (Somewhat Misleading) legislative history". He notes that while the "manifest nullity" standard was originally rejected, such that the court should initially review jurisdictional objections, "a year later, the drafters changed their mind and abandoned the idea that economy of means considerations ought to prevail". Prof. Bachand concludes that the complete legislative history "clearly demonstrate[s] that the system ultimately adopted in Article 16 of the Model Law is founded on the general idea that the arbitral tribunal ought to have the opportunity to make the first ruling on any objection to the arbitration agreement's validity or applicability".[31] As such, CIPPIC's position is without merit. This dispute should be referred to arbitration first.

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[28] *DeFontes v. Dell Computers Corp.* (unpublished) (R.I. Sup. Ct., Jan. 29, 2004); Rhode Island Rules of Appellate Procedure 16(j) -- "(j) *Unpublished orders.* Unpublished orders will not be cited by the Court in its opinions and such orders will not be cited by counsel in their briefs. Unpublished orders shall have no precedential effect." On-line: http://www.courts.state.ri.us/Supreme/pdf-files/Rules-Appell_Proc-rev8-19-05.pdf. *DeFontes* is currently under appeal to the Rhode Island Supreme Court.

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

[30] Dell's Terms and Conditions of Sale, Exhibit ARB-3, art. 13C: AR III, p. 384.

[31] F. Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review the Arbitral Tribunal's Jurisdiction", (2006) 22 Arb. Int. 463, pp. 471-473. Québec case law and doctrine also support the manifest nullity standard: see Dell's main factum, para. 78, footnote 72.

All of which is respectfully submitted,

September 22nd, 2006

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LIST OF AUTHORITIES

Cases

Doctrine

Other Materials