N° 31067

IN THE SUPREME COURT OF CANADA
(IN APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

DELL COMPUTER CORPORATION

Appellant
(Respondent)

AND:

UNION DES CONSOMMATEURS

and

OLIVIER DUMOULIN

Respondents
(Petitioners)

AND:

THE LONDON COURT OF INTERNATIONAL ARBITRATION,

THE CANADIAN INTERNET POLICY, PUBLIC INTEREST CLINIC AND PUBLIC INTEREST ADVOCACY CENTRE,

ADR CHAMBERS INC.

and

THE ADR INSTITUTE OF CANADA

Interveners

FACTUM OF THE INTERVENER THE LONDON COURT OF INTERNATIONAL ARBITRATION

(Rule 42 of the *Rules of the Supreme Court of Canada*)

Ogilvy Renault LLP
1981 McGill College Avenue, Suite 1100
Montréal, Quebec H3A 3C1
Pierre Bienvenu
Azim Hussain
Tel: (514) 847-4452
Fax: (514) 286-5474
Email: pbienvenu@ogilvyrenault.com
and **Frédéric Bachand**
Counsel for the Intervener, the
London Court of International Arbitration

Ogilvy Renault LLP
45 O'Connor St., Suite 1600
Ottawa, Ontario K1P 1A4
Sally Gomery
Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sgomery@ogilvyrenault.com

Agent for the Intervener, the
London Court of International Arbitration

ORIGINAL TO THE REGISTRAR, SUPREME COURT OF CANADA

COPIES TO:

Osler, Hoskin & Harcourt LLP
(Mahmud Jamal, Anne-Marie Lizotte
and Dominic Dupoy)
1000 de la Gauchetière St. W., Suite 2100
Montréal, Quebec H3B 4M5
Tel: (514) 904-5381
Fax: (514) 904-8101
E-mail: mjamal@osler.com

Counsel for the Appellant, Dell Computer Corp.

Osler, Hoskin & Harcourt LLP
(Patricia J. Wilson)
50 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 6L2
Tel: (613) 787-1009
Fax: (613) 235-2867
Email: pwilson@osler.com

Agent for the Appellant

Lauzon Belanger
(Yves Lauzon)
511 Place d'Armes, Suite 200
Montréal, Quebec H2Y 2W7
Tel: (514) 844-4646
Fax: (514) 844-7009
Email: ylauzon@lauzonbelanger.qc.ca

Counsel for the Respondents, Union des consommateurs and Olivier Dumoulin

Bergeron, Gaudreau, Laporte
(Richard Gaudreau)
167 Notre-Dame-de-l'Ile Street
Gatineau, Quebec J8X 3T3
Tel: (819) 770-7928
Fax: (819) 770-1424
Email :bergeron.gaudreau@qc.aira.com

Agent for the Respondents

University of Ottawa
(Mistrale Goudreau)
Fauteux Hall, Room 200
57 Louis-Pasteur Street
Ottawa, Ontario K1N 6N5
Tel.: (613) 562-5800 Ext: 3673
Fax: (613) 562-5121
Email: mistrale.goudreau@uottawa.ca

Counsel for the Intervener, the Canadian Internet Policy, Public Interest Clinic and Public Interest Advocacy Centre

Baker & McKenzie
(J. Brian Casey)
BCE Place, P.O. Box 874
181 Bay Street, Suite 2100
Toronto, Ontario M5J 2T3
Tel.: (416) 865-6979
Fax: (416) 863-6275
Email: j.brian.casey@bakernet.com

Fraser Milner Casgrain LLP
(Stefan Martin)
1 Place Ville Marie, Suite 3900
Montréal, Quebec H3B 4M7
Tel.: (514) 878-5832
Fax: (514) 866-2241
Email: stefan.martin@fmc-law.com

Counsel for the Intervener, ADR Chambers Inc.

Gowling Lafleur Henderson LLP
(Brian A. Crane, Q.C.)
2600 - 160 Elgin St
Box 466 Station D
Ottawa, Ontario K1P 1C3
Tel.: (613) 786-0107
Fax: (613) 788-3500
Email: Brian.Crane@gowlings.com

Fraser Milner Casgrain LLP
(Thomas A. Houston)
99 Bank Street, suite 1420
Ottawa, Ontario K1P 1H4
Tel.: (613) 783-9600
Fax: (613) 783-9690
Email: tom.houston@fmc-law.com

Agents for the Intervener, ADR Chambers Inc.

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PART I – FACTS

1. The London Court of International Arbitration (the "**LCIA**") supports none of the principal parties in the present appeal. Its purpose in intervening is to offer to this Court an independent and unbiased comparative law perspective as a complement to the arguments provided by the parties.

PART II – QUESTIONS IN ISSUE

2. In seeking to assist the Court in its determination of whether this dispute should be referred to arbitration, the LCIA addresses the following questions:

   A. What is the role of a Court seized of an application made by a defendant who seeks the referral of the action to arbitration?

   B. Are arbitration clauses in consumer contracts enforceable?

PART III – ARGUMENT

Overview

3. The LCIA has been authorized to present submissions on two of the main issues raised in this appeal.

4. The first issue concerns the proper role of the court when seized of an application, in the present case by way of a declinatory exception, seeking the referral of an action to arbitration. Should the court deal *comprehensively* with the objections to arbitral jurisdiction that are being raised by the plaintiff; or should it rather refer the matter to arbitration upon being satisfied that the defendant has made a *prima facie* case that the action was commenced in breach of an arbitration agreement?

5. In the present case, both the Superior Court and the Court of Appeal took for granted that it was open to them to deal comprehensively with the objections raised to arbitral jurisdiction, specifically, the Respondents' contentions that the arbitration clause in question had not been validly consented to and that the clause is unenforceable in the context of a class action involving consumer claims.

6. The LCIA submits that a "*prima facie* review" of arbitral jurisdiction is more consistent with the structure and objectives of the 1985 *UNCITRAL Model Law on International Commercial Arbitration*[1] (the "**Model Law**"), on which the relevant provisions of the Quebec *Code of Civil Procedure*[2] (the "**C.C.P.**") are based.

7. The second issue in respect of which the LCIA presents submissions concerns the enforceability of arbitration clauses in consumer contracts and in the context of class actions. Are such clauses inherently unfair and thus unenforceable against the consumer in all cases, including in class actions; or should courts assess the enforceability of such clauses on a case-by-case basis?

8. The LCIA submits that courts ought to assess the enforceability of arbitration clauses contained in consumer contracts on a case-by-case basis and in the light of relevant rules relating, for example, to abusive or unconscionable contractual provisions. The LCIA further submits that arbitration clauses should not *ipso facto* be held unenforceable when invoked in the context of class actions.

A. The Role of the Court and the Extent of its Review of Arbitral Jurisdiction when Seized of a Referral Application

9. As in many jurisdictions, the legislative provisions that govern arbitration in Quebec are silent as regards the extent of the review of arbitral jurisdiction that may be performed by the court when seized of an application to refer an action to arbitration.[3] While Article 940.1 C.C.P. provides in relevant part that "[w]here 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 [...] it finds the agreement null," nowhere does the *Code of Civil Procedure* articulate the actual standard or extent of review that the court should apply in deciding a referral application.

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[1] U.N. Doc. A/40/17 (1985), Annex I.
[2] R.S.Q., c. C-25.
[3] A notable exception to this rule is France, which has explicitly enshrined the *prima facie* approach in its arbitration law: Article 1458 of the *Nouveau Code de procédure civile.*

1. The New York Convention

10. As this Court noted in *GreCon Dimter Inc.*,[4] the interpretation of domestic legislative provisions dealing with arbitration must necessarily be harmonized with the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "**New York Convention**" or the "**Convention**"), which is currently in force in more than 135 countries and has been implemented throughout Canada. Such an interpretive approach is consistent with the Convention's basic objective to harmonize key aspects of the international arbitration regime and by Canada's stated choice to take part in this global harmonization effort as manifested by its accession to the Convention in 1986.

11. Article II(3) of the New York Convention, from which Article 940.1 C.C.P. and its analogous provisions in other jurisdictions are derived, provides as follows:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

12. As with the *Code of Civil Procedure*, neither Article II(3) nor any other provision of the Convention deals explicitly with the extent of the review of arbitral jurisdiction to be performed by the court seized of a referral application. The Convention's *travaux préparatoires* are also silent on the issue. This silence is in keeping with the Convention's main purpose, which is to ensure the enforcement of arbitration agreements and arbitral awards, not to allocate responsibilities as between courts and arbitral tribunals with respect to objections to arbitral jurisdiction. Furthermore, it has been noted that the explicit adoption of the *prima facie* approach in some New York Convention

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[4] *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] 2 S.C.R. 401 at para. 39ff.

countries, such as France and Switzerland,[5] has not generated objections from contracting states.[6]

2. The Model Law

13. When, in 1986, Quebec adopted the current provisions of the *Code of Civil Procedure* governing arbitration, it expressed its desire to take part in an important international harmonizing initiative as represented not only by the New York Convention, but as well by the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law ("**UNCITRAL**") in 1985. The new arbitration provisions of the *Code of Civil Procedure* were said to constitute an accurate reflection of the Model Law (*le "reflet fidèle" de la Loi type*),[7] and courts were and remain specifically instructed, in Article 940.6 C.C.P., to give due regard to the Model Law and its *travaux préparatoires* "where matters of extraprovincial or international trade are at issue in an arbitration."

14. Similar to the New York Convention, the Model Law does not explicitly address the nature and extent of the review of arbitral jurisdiction to be performed by the court seized of a referral application. Referral applications are governed by Article 8(1) of the Model Law, which, in substance, parallels Article II(3) of the Convention. Article 8(1) reads as follows:

> 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 on 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.

15. Notwithstanding the lack of a clearly articulated standard of review for determining referral applications, the Model Law does provide guidance with respect to the issue and,

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[5] In the case of Switzerland, the *prima facie* approach applies when the seat of the arbitration is in Switzerland, J.-F. Poudret and S. Besson, *Droit comparé de l'arbitrage international* (Zurich: Schulthess, 2002) at 456-459 (paras. 502-504).

[6] Poudret & Besson, *ibid.* at 443-444 (para. 491); F. Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22 Arb. Int. 463 at 471-472.

[7] Québec, Assemblée nationale, *Journal des débats* (October 20, 1986) at 3674.

as explained more fully below (see paras. 20 ff), evidences a preference for the *prima facie* approach.

3. Decisions of State Courts and the Academic Literature

16. Courts in Model Law jurisdictions have not adopted a consistent position with respect to the applicable standard of review of arbitral jurisdiction in the context of referral applications. While certain decisions support the proposition that the court seized of a referral application should review comprehensively the existence, validity and scope of the arbitration clause at issue, many courts have expressed a firm preference for the *prima facie* approach. This divergence can be observed in Canada itself: while the *prima facie* approach prevails in British Columbia[8] and Ontario,[9] it has not been adopted by the Federal Courts, which favour a more comprehensive review of arbitral jurisdiction,[10] and it is applied in Quebec only when what is at issue is the scope of the arbitration clause as opposed to its existence or validity.[11] A divergence of opinion also exists in the academic literature.[12]

4. The *Prima Facie* Approach and the Comprehensive Approach Both Seek to Promote Efficiency

17. Both approaches share a common objective, that is, to foster the efficiency of international commercial arbitration. At its core, the question is how best to achieve this objective.[13]

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[8] See *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, (1992) 66 B.C.L.R. (2d) 113 (C.A.), the leading British Columbia case on this point.
[9] *Dalimpex v. Janicki*, (2003) 228 D.L.R. (4th) 179 (Ont. C.A.).
[10] See *e.g.*: *Thyssen Canada Ltd. v. Mariana Maritime S.A.*, [2000] 3 F.C. 398 (C.A., leave to appeal to the Supreme Court of Canada denied); *Stella-Jones Inc. v. Hawknet Ltd.*, [2002] F.C.J. (Quicklaw) No. 777 (C.A.).
[11] See *Kingsway Financial Services Inc. v. 118997 Canada Inc.*, REJB 1999-15989 (Que. C.A.).
[12] J.D. Lew, L.A. Mistelis & S.M. Kröll, *Comparative International Commercial Arbitration* (Kluwer: The Hague, 2003) at 349 (para. 14-61) (Article 8(1) of the Model Law calls for full-fledged review of objections to arbitral jurisdiction); L.Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy' " (2001) 80 Can. Bar Rev. 143 at 146 (courts seized of referral applications under Article 8(1) should only review jurisdictional objections on a *prima facie* basis).
[13] See generally: W.W. Park, "An Arbitrator's Jurisdiction to Determine Jurisdiction", Paper presented at the 18th Congress of the International Council for Commercial Arbitration, Montreal, June 1st, 2006.

18. Advocates of a comprehensive judicial review of arbitral jurisdiction at the referral application stage invoke an "economy-of-means" rationale. They argue that time and money should not be expended in having a case referred to an arbitral tribunal whose very jurisdiction is challenged by one of the parties. The court should therefore have the power and even the duty to rule on a jurisdictional objection as soon as possible after it is raised. As concisely stated in a recent decision of the High Court of Justice (Chancery Division) of England:

> [A full review] is the only cost-effective thing to do. To send the matter off to the arbitrators now would require the extra cost of the constitution of the arbitral body (three arbitrators), a mechanism for the determination of the points by them (whether by an oral hearing or not), and a possible appeal back to this court at the end. That hardly seems sensible.[14]

19. Proponents of the *prima facie* approach focus, rather, on the prevention of dilatory tactics. In most jurisdictions, judicial review of an arbitral tribunal's jurisdiction in the context of a referral application can take months, if not years. Allowing for immediate and full-blown judicial consideration of the tribunal's jurisdiction, it is said, affords a recalcitrant party the opportunity to delay unduly the commencement or progress of the arbitration. A *prima facie* approach prevents such conduct while preserving the court's power to assert jurisdiction immediately over a claim that is manifestly not subject to the arbitration clause in question.[15]

5. The Model Law Gives Precedence to the *Prima Facie* Approach as the Means to Ensure Efficiency

20. A preference for the *prima facie* approach can be discerned by considering how the Model Law governs an objection to arbitral jurisdiction raised not by the plaintiff in the context of a referral application but rather by the defendant against whom an arbitration has been commenced.

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[14] *Law Debenture Trust Corporation Plc v. Elektrim Finance B.V.,* [2005] EWHC 1412 (Ch.).

[15] E. Gaillard, "L'effet négatif de la compétence-compétence", in J. Haldy, J.-M. Rapp & P. Ferrari (eds), *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret* (Faculté de droit de l'Université de Lausanne, 1999) at 387.

21. If the Model Law gave precedence to an "economy-of-means" rationale, it would be expected that a respondent in an arbitration who considers that the arbitral tribunal lacks jurisdiction would be afforded the opportunity to submit its jurisdictional objection to the court immediately, prior to its taking any further steps in the arbitral proceedings. However, two essential features of the Model Law operate to deny a respondent in an arbitration such an opportunity.

22. First, none of the Model Law's provisions allow a party to an arbitration to submit any such objection directly to a court. Moreover, Article 5 of the Model Law, which provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law," explicitly precludes the court from intervening in an arbitration, even on the basis of its inherent powers or its general power to issue injunctions and declaratory judgments.[16]

23. Second, Article 16 of the Model Law specifically addresses objections to arbitral jurisdiction in terms that give precedence to the objective of preventing dilatory tactics over the economy-of-means rationale. The relevant provisions of Article 16 read as follows:

> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. [...]
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. [...] A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. [...]
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision

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[16] On this key provision of the Model Law, see: *Compagnie nationale Air France v. MBaye*, [2003] R.J.Q. 1040 (Que. C.A.). See also: F. Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international*, pref. Ch. Jarrosson (Paris: L.G.D.J./Cowansville: Éditions Yvon Blais, 2005) at 105-114 (paras. 159-175), 117-127 (paras. 182-195) and 131-141 (paras. 199-212).

> shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

24. The regime adopted in Article 16 obliges a respondent to submit any jurisdictional objection, in the first instance, to the arbitral tribunal. Only if the tribunal dismisses the objection can the respondent ask a court, while the arbitration proceeds, to consider whether the tribunal properly asserted its jurisdiction.[17]

25. The Model Law's *travaux préparatoires* confirm in unambiguous terms that the regime of Article 16 reflects a desire to have objections to arbitral jurisdiction first dealt with by the arbitral tribunal *in order to prevent dilatory tactics by unscrupulous parties*. In a section of the *travaux préparatoires* which explains the reasons for the removal from an earlier draft of a provision—the former Article 17—which would have allowed a respondent to bring an objection to the tribunal's jurisdiction before the court at any time after the commencement of the arbitration, the following is stated:

> The prevailing view was in favour of deleting article 17 since it might have adverse effects throughout the arbitral proceedings by opening the door to delaying tactics and obstruction and because it was not in harmony with the principle underlying article 16 that it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control.[18]

26. This demonstrates that, faced with a choice between ensuring that time and resources not be wasted in a potentially defective arbitration (by allowing jurisdictional objections to be brought immediately before a court) and preventing dilatory and obstructive tactics (by requiring that jurisdictional objections be determined first by the tribunal) the drafters of the Model Law consciously opted for the latter approach.

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[17] The respondent will do so either pursuant to Article 16(3), if the tribunal has chosen to treat the objection as a preliminary question, or pursuant to Article 34, if the tribunal has instead chosen to join the jurisdictional objection to the merits.

[18] *Report of the Working Group [on International Contract Practices] on the Work of its Seventh Session* (A/CN.9/246, 6 March 1984), (1984) XV UNCITRAL Yearbook 189 at 195 (para. 55) [Emphasis added.]

6. The *Code of Civil Procedure* Embodies the Precedence Given to the *Prima Facie* Approach Discernable in the Model Law

27. The import of the drafters' choice for the issue under consideration in the present case is significant.

28. The provisions of the *Code of Civil Procedure* in question in this case are based squarely on and reflect faithfully the analogous provisions of the Model Law. For its part, the Model Law reflects a deliberate policy that favours the prevention of delaying and obstructionist tactics over an economy-of-means objective. That policy is consistent with the *prima facie* approach to the determination of arbitral jurisdiction; it is inconsistent with the comprehensive approach to determining arbitral jurisdiction.

B. The Enforceability of Arbitration Clauses in Consumer Contracts, and in the Context of a Class Action

1. International Instruments Recognize the Right of States to Limit the Enforceability of Arbitration Agreements for Reasons of Public Policy

29. Neither the New York Convention nor the Model Law explicitly addresses the enforceability of arbitration clauses, whether in consumer matters generally or in the particular context of class actions. This reflects a desire to preserve the state's autonomy to determine for itself those areas in which public policy justifies limitations on the enforceability of arbitration agreements.

a) The New York Convention

30. The Convention acknowledges this national prerogative in several of its provisions. For example, Article II(1) of the Convention obliges contracting states to give effect to arbitration agreements, but only where they concern "a subject matter capable of settlement by arbitration." As leading commentators have pointed out, in no way does this provision seek to create public international rules relating to "subject matter[s] capable of settlement by arbitration." On the contrary, "[e]ach state decides which

matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy." [19]

31. This approach is further evidenced by the fact that Article V(2) of the Convention, which deals with the recognition and enforcement of awards, expressly states that whether or not the subject matter of a dispute is "capable of settlement by arbitration" is to be assessed in light of domestic rules:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*; [...]" (Article V(2) [Emphasis added.]

b) The Model Law

32. The Model Law is no different. Not only does it repeat—in substance—the New York Convention's provisions on the enforcement of arbitration agreements and the recognition and enforcement of arbitral awards, Article 1(5) of the Model Law further provides that "[t]his Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration [...]."

33. The Model Law arguably goes further in that its ambit, and thus the ambit of national arbitration laws that are based on the Model Law, is limited to "commercial matters".[20] Although the second footnote to the Model Law provides that "the term 'commercial' should be given a wide interpretation," the term would likely not be interpreted, in most jurisdictions, as encompassing consumer transactions.

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[19] A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London, Thomson/ Sweet & Maxwell, 2004) at 138 (para. 3-13)); A.J. van den Berg, *The New York Convention of 1958—Towards a Uniform Judicial Interpretation* (The Kluwer: Hague, 1981) at 152-154.
[20] Article 1(1).

2. There is no International Consensus that Arbitration Clauses in Consumer Contracts Should *Ipso Facto* be Unenforceable

34. No consensus can be discerned among the several legal systems where the issue of the enforceability of arbitration clauses against consumers has arisen.

35. In some jurisdictions, arbitration clauses are considered inherently unfair in consumer settings and are thus always unenforceable against consumers. One such example is Ontario, where the *Consumer Protection Act, 2002*[21] was recently amended to address this very question. Section 7(2) of that Act now provides that:

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

36. Additional illustrations of national laws that render arbitration clauses unenforceable in consumer settings can be found in France, which, prior to 1993, prohibited the use of arbitration clauses in consumer contracts (developments in the European Union post-1993 are discussed below), and Japan, whose 2004 arbitration law provides that arbitration clauses are unenforceable against consumers. English law adopts this solution as well, but only partially—and indirectly—by rendering unenforceable arbitration clauses with respect to claims that do not exceed £5000.[22]

37. A different approach can be observed in many jurisdictions—notably the United States and, since 1993, the European Union. In such jurisdictions, arbitration clauses are not considered to be necessarily unfair and systematically unenforceable against consumers. Instead, the enforceability of the clause is considered case-by-case, and issues such as unconscionability or unfairness are addressed against the backdrop of the circumstances

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[21] S.O. 2002, c. 30.

[22] Ch. Jarrosson, note following the December 7, 1994 decision of the Paris Court of Appeal in *Société V2000 v. Société Projet XJ 220 ITD*, [1996] Rev. arb. 250 at 250-251 (para. 1); K. Yamamoto, "La nouvelle loi japonaise sur l'arbitrage" [2004] Rev. arb. 829 at 840 ("Un consommateur qui est partie à une clause compromissoire peut unilatéralement la résilier de manière discrétionnaire, sauf s'il a engagé une procédure arbitrale sur le fondement de cette clause".); C.R. Drahozal and R.J. Friel, "Consumer Arbitration in the European Union and the United States" (2002) 28 N.C.J. Int'l L. & Com. Reg. 357 at 371-373 (on English law).

relevant to the particular transaction in question. As Professors Drahozal and Friel have written, commenting on U.S. law:

> [T]here remain two grounds on which courts may invalidate or limit the enforceability of pre-dispute agreements to arbitrate consumer disputes. First, for federal statutory claims, even if the claim is one that generally is subject to arbitration, a court may permit a consumer to bring the claim in court if the procedures in arbitration 'preclude [the] litigant... from effectively vindicating her federal statutory rights in the arbitral forum.' Thus, if arbitration costs are too high, or if the arbitration agreement attempts to waive a nonwaivable statutory remedy, courts may refuse to enforce the arbitration agreement in whole or in part. Second, parties can raise general contract law defenses to defeat the enforceability of agreements to arbitrate. One such defense is unconscionability: that a certain provision of the arbitration agreement is so unfair that the provision, or the arbitration agreement as a whole, is unenforceable. *Under both grounds, however, there is no across-the-board rule that pre-dispute consumer arbitration agreements are unenforceable. Instead, courts police the fairness of consumer arbitration agreements on a case-by-case basis, and the fact that a consumer contract contains a pre-dispute binding arbitration clause alone is not enough to make it unenforceable.*[23] [Emphasis added.]

38. In 1993, the European Union adopted the *Unfair Terms in Consumer Contracts Directive*[24] (the "**European Directive**" or the "**Directive**"), which reflects a solution similar to the U.S. approach for determining the enforceability of arbitration agreements in consumer contracts. The Directive operates so as to render unenforceable contractual terms that have not been individually negotiated and that are found to cause "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" in a manner that is "contrary to the requirement of good faith" (Article 3(1)). An Annex to the Directive sets forth "an indicative and non-exhaustive list of the terms which may be regarded as unfair" (Annex, Article 1) including a list of provisions that may be so regarded because of their effect in "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions" (Annex, Article 1(*q*)).

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[23] Drahozal & R.J. Friel, *ibid.* at 376 [References omitted.]
[24] Council Directive 93/13/EEC, 1993 O.J. (L 095) 29.

39. While the combined effect of Article 3 of the Directive and Article 1(*q*) of its Annex is not entirely clear,[25] the European Directive, like the U.S. approach, rejects the idea that consumer arbitration clauses are unfair in all cases and thus systematically unenforceable against consumers. On the contrary, the Directive provides that, *depending on the circumstances*, an arbitration clause *may* be found to be unfair to consumers, in which case it is unenforceable. The following has been observed about the Directive:

> Le droit de la consommation n'interdit généralement pas le recours à l'arbitrage, mais prévoit d'autres mécanismes destinés à protéger le consommateur. Ainsi, la Directive 93/13 CEE du 5 avril 1993 concernant les clauses abusives dans les contrats conclus avec les consommateurs range certaines conventions d'arbitrage parmi les clauses qui 'peuvent être déclarés abusives' (art. 3 et annexe 1et. q) et de ce fait inopposables aux consommateurs (art. 6 ch. 1).[26]

> En France, la loi du 1er février 1995 concernant les clauses abusives est venue intégrer la Directive de 1993 dans le droit français [...]. C'est ainsi que le nouvel article L. 132-1 du Code de la consommation vise une liste de clauses pouvant se révéler abusives. Au sein de cette liste on trouve les clauses ayant pour objet ou pour effet de: 'Supprimer ou d'entraver l'exercice d'actions en justice ou des voies de recours par le consommateur, notamment en obligeant le consommateur à saisir exclusivement une juridiction d'arbitrage non couverte par des dispositions légales'. [...] [O]n relèvera, comme cela a déjà été fait [...], que la loi de 1995 est en sensible retrait par rapport à l'art. 2061 C. civ., *puisque ce serait au juge de décider au cas par cas si la clause est ou non abusive*".[27]

> In summary, the Directive clearly confers a power upon the court to invalidate any term in a consumer contract it considers to be unfair. A pre-dispute arbitration clause, which has not been individually negotiated, appears prima facie to be void under the Directive, but only where the arbitration is not covered by legal provision. Where an arbitration is covered by legal provision, then it may still fall foul of the Directive, but the onus rests with the consumer to demonstrate that it is unfair in that it imbalances the rights of the parties to the detriment of the consumer and contrary to the principles of good faith".[28]

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[25] There remains an uncertainty as to the meaning of the expression "arbitration not covered by legal provisions".
[26] Poudret & Besson, *supra* at 333 (para. 366) [References omitted.].
[27] Ch. Jarrosson, *supra* at 255-256 (para. 19) [Emphasis added.].
[28] Drahozal & Friel, *supra* at 376 [References omitted.].

3. The Protection of Consumers Likely does not Require a Total Ban on Consumer Arbitration

40. No matter whether arbitration clauses are considered *ipso facto* unenforceable against consumers or whether the issue is addressed on a case-by-case basis, it is generally accepted that, since such clauses purport to deprive parties of the right to commence an action in court, arbitration clauses pose special risks for consumers, whose access to justice is in any event notoriously problematic. Undeniably, these risks justify the existence of legal rules protecting consumers from unfair clauses. However, it is submitted that rendering arbitration clauses systematically unenforceable against consumers is unnecessary.

41. Hypothetically, a wholesale prohibition on the enforceability of arbitration clauses against consumers could be justifiable in two scenarios. The first such scenario would be where it could be demonstrated that enforcing arbitration clauses in consumer contracts would inevitably reduce consumers' access to justice; in other words, by showing that—as a matter of fact—such clauses always operate unfairly. The second scenario would be where it could be shown that the wholesale prohibition of consumer arbitration is—in fact—the only way to protect consumers from those particular arbitration clauses that do reduce access to justice.

42. The first such justification for the systematic refusal to enforce arbitration clauses against consumers does not withstand reasonable scrutiny. Although it is not difficult to imagine circumstances (perhaps many circumstances) in which arbitration is undoubtedly unfair to consumers, this is not necessarily the case in all consumer transactions or disputes. On the contrary—and as one commentator has recently sought to illustrate—there are circumstances under which arbitration can actually increase a consumer's access to justice:

> [I]magine a damage claim in the amount of $15,000 asserted by a consumer against a car manufacturer, and imagine that the claim falls within the ambit of an arbitration clause that i) provides for a sole arbitrator, ii) limits the consumer's liability as to costs to a few hundred dollars, iii) guarantees that any hearing will take place in a location that is convenient for the consumer, and iv) provides that the arbitration will be administered by an experienced

> and competent institution. Under such circumstances, arbitration will appear to most reasonable consumers—and in most legal systems—to be a much faster and cheaper way of obtaining, from an independent adjudicative body, a final and binding decision than resorting to courts. Even when the value of a consumer's claim is sufficiently low to give him or her access to small claims courts ($7,000 or less in Québec), a clause that contains sufficient safeguards as to costs and venue could increase the consumer's access to justice by allowing him or her to obtain a decision much faster than if the claim had been brought before a small claims court.[29]

43. The second justification for refusing to enforce all arbitration clauses in consumer contracts is equally unconvincing. Critics of consumer arbitration fail to demonstrate why the issue of unfairness (which lies at the heart of all arguments against such arbitration) cannot effectively be addressed, on a case-by-case basis, under existing and widely accepted rules relating to unconscionability (in common law jurisdictions) and the doctrine of abusive clauses (in civil law jurisdictions[30]). In other words, proponents of a systematic ban on consumer arbitration should be required to show the necessity of the sweeping rule which they advocate since consumers can clearly benefit from arbitration.[31]

44. Consumers already enjoy the protection afforded by legal doctrines and rules specifically designed to operate in situations—such as consumer transactions—where parties are at particular risk of being treated unfairly. In such situations, the courts are empowered to introduce fairness-based considerations into the determination of whether and in what manner contracts are to be enforced. Absent a demonstration that these existing regimes do not provide sufficient consumer protection, it is difficult to see why they must be superseded by a total ban on consumer arbitration.

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[29] F. Bachand, Comment on the May 30, 2005 decision of the Quebec Court of Appeal in *Union des consommateurs v. Dell Corporation*, forthcoming in [2006] 1 Stockholm Int. Arb. Rev. at para. 5.

[30] *E.g.:* Article 1437 of the *Civil Code of Québec.*

[31] In *Allied-Bruce Terminix Companies, Inc. et al. v. Dobson et al.*, 513 U.S. 265 (1995), the U.S. Supreme Court stated, "Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation".

45. In sum, consumer arbitration is not unfair in all circumstances, and in those circumstances in which it is unfair, the law already protects consumers by rendering unfair arbitration clauses unenforceable.

46. For these and other reasons, it has been argued that in addition to generating economic benefits to consumers—in the form of reduced prices—the enforcement of arbitration clauses in appropriate circumstances has the potential actually to promote, rather than hinder, consumers' access to justice. In circumstances where enforcing an arbitration clause would in fact constitute a denial of justice, the doctrine of unconscionablility and the rules relating to abusive clauses arguably provide courts and arbitral tribunals with effective tools to prevent such injustice and ensure that consumers are able to bring their claims to court notwithstanding the inclusion of an arbitration clause in a consumer contract.[32]

4. Arbitration Clauses are not Necessarily Inimical to the Right Protected by Class Action Legislation

47. In the present case, the Superior Court of Quebec allowed the action to proceed on a class-wide basis. Pursuant to Article 1010 C.C.P., its decision on that point is not subject to appeal. The question, as it arises here, is therefore the following: what effect does the Superior Court's decision have on the enforceability of the arbitration clause invoked to refer the matter to arbitration?

a) The Argument against Class Arbitration

48. The argument that an otherwise valid arbitration clause should in all cases be considered unenforceable once an action has been allowed by the competent court to proceed on a class-wide basis, rests on the idea that the courts' jurisdiction over class actions ought to be considered exclusive and mandatory because of the public policy nature of class action legislation.

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[32] S.J. Ware, "Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)" (1998) 29 McGeorge L. Rev. 195; S.J. Ware, "The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees" (2006) 5 J. of Am. Arb. 251.

49. The argument would posit that since class action legislation is essentially designed to increase access to justice for particularly vulnerable groups, such legislation confers a procedural right that cannot be waived by contract, including contractual provisions calling for binding arbitration. This position has been implicitly adopted by the British Columbia Court of Appeal when it ruled that a court's decision to allow an action to proceed on a class-wide basis renders an otherwise applicable arbitration clause inoperative.[33]

50. However, even if it were conceded, *arguendo*, that class action legislation does indeed confer a public policy right that cannot be waived by contract, it would be incorrect to assume that the enjoyment and exercise of this right would necessarily be hindered by an arbitration clause.

b) The Right Protected by Class Action Legislation

51. Crucial to the analysis is the exact nature of the right conferred by class action legislation. Under one view the right at issue is not merely a right to sue on a class-wide basis, but rather a right to sue on a class-wide basis *before the courts*. From that perspective, arbitration clauses inevitably conflict with class action rights.

52. A different view, however, holds that the right conferred by class action legislation is simply a right to proceed on a class-wide basis. From this perspective, it is not necessarily inimical to the legislation's public policy objectives that class actions proceed before arbitral tribunals as opposed to courts.

c) The Experience in the United States

53. The experience and practice in the United States may be instructive. Numerous class-wide arbitrations have been conducted in that country in recent years, mostly under rules of the American Arbitration Association designed specifically to accommodate class claims while ensuring that the rules generally applicable to class actions are complied

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[33] *MacKinnon v. National Money Mart Co.*, [2004] B.C.J. (Quicklaw) No. 1961 (C.A.).

with.[34] The U.S. experience suggests that the public policy right underlying class action legislation can be adequately protected by class consumer claims being brought before arbitral tribunals in accordance with class arbitration rules.[35]

54. This Court's decision in *Desputeaux v. Éditions Chouette (1987) Inc.*[36] rejected the notion that arbitration is an inadequate means of resolving a particular type of disputes merely because they happen to be sensitive or complex. It is that very idea that had led the United States Supreme Court, in 1985, in a landmark decision that has had international influence, to conclude that arbitration was an appropriate means of resolving complex anti-trust disputes involving the application and interpretation of the *Sherman Act*.[37]

55. Canada and the other parties to the North American Free Trade Agreement ("**NAFTA**") acknowledged the suitability of arbitration to resolve complex and sensitive disputes when they agreed, in Section B of Chapter 11 of the NAFTA, to provide for the arbitration of claims against them by foreign investors.[38] Most of these cases are complex and raise highly sensitive issues which are of great interest to the general public. Newfoundland and Nova Scotia, for their part, have recently agreed to refer to arbitration a maritime border dispute[39] which also raised important issues of public interest.[40]

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[34] These rules were adopted following the U.S. Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which acknowledged the possibility of a class-wide arbitration.

[35] For a list of the class-wide arbitrations administered by the AAA, see online : http://www.adr.org/Classarbitrationpolicy.

[36] [2003] 1 S.C.R. 178.

[37] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[38] See generally: H. Alvarez, "Arbitration Under the North American Free Trade Agreement" (2000) 16 Arb. Int. 393.

[39] *Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the* Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act *and the* Canada-Newfoundland Atlantic Accord Implementation Act – *Award of the Tribunal in the Second Phase*, Ottawa, March 26, 2002.

[40] See further: F. Bachand, "L'exception d'arbitrage soulevée dans le contexte d'un recours collectif: quelques réflexions sur le rôle de l'ordre public", forthcoming in *Journées Maximilien-Caron 2006 – La justice en marche : du recours collectif à l'arbitrage collectif* (Montréal: Éditions Thémis, 2006) at para. 12 [References omitted.]; see also American Arbitration Association, *Supplementary Rules for Class Arbitrations* (2003) as well as the California Supreme Court's seminal decision in *Keating v. Superior Court*, 31 Cal. 3d 584 (1982) (reversed in part, but on other issues, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984)) at 609ff.

5. Arbitration Clauses that Purport to Preclude Class-Wide Claims are Potentially Problematic

56. Arbitration clauses that include provisions designed to prevent claims from being adjudicated on a class-wide basis (so-called "stipulations against class actions") pose a unique, and potentially insurmountable, problem: such clauses would seem to conflict squarely with the basic right conferred by class action legislation (no matter whether that right is conceived as the right to bring class-wide claims, or the right to bring such claims *before courts*). While the LCIA takes no position on this issue, the following observations are submitted for this Court's consideration.

57. One obvious solution to the problem is to consider such stipulations to be inherently invalid. Whether and how this might affect the validity of the remainder of the arbitration clause would be determined on the facts of each case and in the light of the applicable rules regarding the severability of contractual provisions.[41]

58. An alternative, and perhaps more nuanced approach, consists in assessing a stipulation against class actions as a relevant but not necessarily determinative circumstance in the overall analysis of the validity or enforceability of the entire arbitration clause. Under such an approach, adopted in certain recent U.S. cases, a prohibition on class action contained in a consumer arbitration clause would only be held invalid—as being unconscionable or against public policy—if its effect is to force consumers to arbitrate on an individual basis and under conditions that would significantly hinder their access to justice. By contrast, a stipulation against class action would be enforceable if, despite depriving consumers of their right to proceed on a class-wide basis, the arbitration clause nevertheless offered them a sufficiently accessible adjudicative forum. For example, commenting on the arbitration clause found on Dell's U.S. website, a U.S. federal district court recently stated the following in respect of the contention, put forward on behalf of a consumer, that the impugned clause contained an unfair stipulation against class actions:

> … the parties' arbitration provision and class action waiver are not substantively unconscionable under Texas law as they have features that are

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[41] F. Bachand, *ibid.* at 17-20.

very beneficial to Mr. Provencher. His filing fee with the NAF is only $35 or less, and if he decides he wants an in-person hearing before the arbitrator, one will be scheduled near his residence in California, instead of Dell's home office in Texas. Clearly, arbitration before the NAF is an inexpensive, efficient, and convenient method for Mr. Provencher to resolve his disputes with Dell. In any event, it is certainly not so one-sided as to be unconscionable from Mr. Provencher's standpoint".[42]

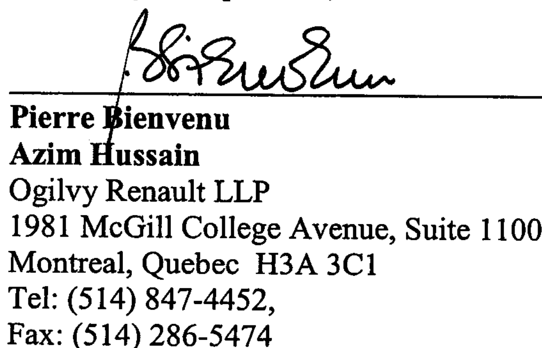
PART IV – COSTS

59. The LCIA seeks no order as to costs.

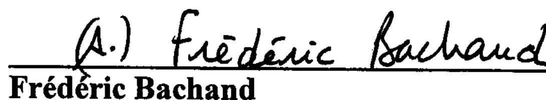
PART V – ORDER SOUGHT

60. The LCIA takes no position as to the disposition of the appeal.

DATED in Montreal, Province of Quebec, this 14th day of September, 2006.



Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP
1981 McGill College Avenue, Suite 1100
Montreal, Quebec H3A 3C1
Tel: (514) 847-4452,
Fax: (514) 286-5474



Frédéric Bachand

Counsel for Intervener,
London Court of International Arbitration

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[42] *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196 (C.D. Cal. 2006) at 1206.

PART VI – AUTHORITIES

Case Law

Description	Paragraphs
Allied-Bruce Terminix Companies, Inc. et al. v. Dobson et al., 513 U.S. 265 (1995)	43
Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act *and the* Canada-Newfoundland Atlantic Accord Implementation Act – *Award of the Tribunal in the Second Phase*, Ottawa, March 26, 2002	55
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Dalimpex v. Janicki, (2003) 228 D.L.R. (4 th) 179 (Ont. C.A.)	16
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GreCon Dimter Inc. v. J.R. Normand Inc., [2005] 2 S.C.R. 401 at para. 39ff	10
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Gulf Canada Resources Ltd. v. Arochem International Ltd., (1992) 66 B.C.L.R. (2d) 113 (C.A.)	16
Keating v. Superior Court, 31 Cal. 3d 584 (1982)	55
Kingsway Financial Services Inc. v. 118997 Canada Inc., REJB 1999-15989 (Que. C.A.)	16
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MacKinnon v. National Money Mart Co., [2004] B.C.J. (Quicklaw) No. 1961 (C.A.)	49
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)	54
Provencher v. Dell, Inc., 409 F. Supp. 2d 1196 (C.D. Cal. 2006) at 1206	58
Southland Corp. v. Keating, 465 U.S. 1 (1984) at 609ff	55
Stella-Jones Inc. v. Hawknet Ltd., [2002] F.C.J. (Quicklaw) No. 777 (C.A.)	16
Thyssen Canada Ltd. v. Mariana Maritime S.A., [2000] 3 F.C. 398 (C.A.)	16

Government documents

Description	Paragraphs
Québec, Assemblée nationale, *Journal des débats* (October 20, 1986) at 3674	13

International Materials

Description	Paragraphs
American Arbitration Association, *Supplementary Rules for Class Arbitrations* (2003)	55
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")	10,11, 12, 13, 14, 29, 30, 31, 32
NAFTA, Section B of Chapter 11	55
Report of the Working Group [on International Contract Practices] on the Work of its Seventh Session (A/CN.9/246, 6 March 1984), (1984) XV UNCITRAL Yearbook 189 at 195 (para. 55)	25
UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985), Annex I	6, 13, 14, 20, 21, 22, 23, 24, 25, 26, 28, 29, 32, 33

Laws of Foreign Jurisdictions

Description	Paragraphs
Code de la consommation, France, Art. L. 132-1	39
Code civil, France, Art. 2061	39
Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29	38, 39
Nouveau Code de procédure civile, France, Art. 1458	9

Doctrine

Description	**Paragraphs**
H. Alvarez, "Arbitration Under the North American Free Trade Agreement", (2000) 16 Arb. Int. 393	55
F. Bachand, Comment on the May 30, 2005 decision of the Quebec Court of Appeal in *Union des consommateurs v. Dell Corporation*, forthcoming in [2006] 1 Stockholm Int. Arb. Rev. at para. 5	42
F. Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22 Arb. Int. 463 at 471-472	12
F. Bachand, "L'exception d'arbitrage soulevée dans le contexte d'un recours collectif: quelques réflexions sur le rôle de l'ordre public", forthcoming in *Journées Maximilien-Caron 2006 – La justice en marche : du recours collectif à l'arbitrage collectif* (Montréal: Éditions Thémis, 2006) at paras. 12, 17-20	55, 57
F. Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international*, pref. Ch. Jarrosson (Paris: L.G.D.J./Cowansville: Éditions Yvon Blais, 2005) at 105-114 (paras. 159-175), 117-127 (paras. 182-195) and 131-141 (paras. 199-212)	22
C.R. Drahozal and R.J. Friel, "Consumer Arbitration in the European Union and the United States" (2002) 28 N.C.J. Int'l L. & Com. Reg. 357 at 371-373, at 376	36, 37, 39
L.Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy' " (2001) 80 Can. Bar Rev. 143 at 146	16
E. Gaillard, "L'effet négatif de la compétence-compétence", in J. Haldy, J.-M. Rapp & P. Ferrari (eds), *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret* (Faculté de droit de l'Université de Lausanne, 1999), at 387	19
Ch. Jarrosson, note following the December 7, 1994 decision of the Paris Court of Appeal in *Société V2000* v. *Société Projet XJ 220 ITD*, [1996] Rev. arb. 250 at 250-251 (para. 1), 255-256 (para. 19)	36, 39
J.D. Lew, L.A. Mistelis & S.M. Kröll, *Comparative International Commercial Arbitration* (Kluwer: The Hague, 2003) at 349 (para. 14-61)	16
W.W. Park, "An Arbitrator's Jurisdiction to Determine Jurisdiction", Paper presented at the 18th Congress of the International Council for Commercial Arbitration, Montreal, June 1st, 2006	17

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A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London, Thomson/ Sweet & Maxwell, 2004) at 138 (paras. 3-13) 30

A.J. van den Berg, *The New York Convention of 1958—Towards a Uniform Judicial Interpretation* (The Kluwer: Hague, 1981) at 152-154 30

S.J. Ware, "Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)" (1998) 29 McGeorge L. Rev. 195 46

S.J. Ware, "The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees" (2006) 5 J. of Am. Arb. 251 46

K. Yamamoto, "La nouvelle loi japonaise sur l'arbitrage" [2004] Rev. arb. 829 at 840 36

PART VII – STATUTES RELIED UPON

	Paragraphs
CODE OF CIVIL PROCEDURE, R.S.Q., chapter C-25	**6, 9, 11, 12, 13, 28,47**

BOOK VII ARBITRATIONS

TITLE I ARBITRATION PROCEEDINGS

CHAPTER I

GENERAL PROVISIONS

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.

1986, c. 73, s. 2.

940.6. Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration

1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985;

2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from 3 to 21 June 1985;

3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

1986, c. 73, s. 2.

CODE DE PROCÉDURE CIVILE, L.R.Q., chapitre C-25

LIVRE VII DES ARBITRAGES

TITRE I DE LA TENUE DE L'ARBITRAGE

CHAPITRE I

DISPOSITIONS GÉNÉRALES

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.

1986, c. 73, a. 2.

940.6. Dans le cas d'un arbitrage mettant en cause des intérêts du commerce extraprovincial ou international, le présent Titre s'interprète, s'il y a lieu, en tenant compte:

1° de la Loi type sur l'arbitrage commercial international adoptée le 21 juin 1985 par la Commission des Nations-Unies pour le droit commercial international;

2° du Rapport de la Commission des Nations-Unies pour le droit commercial international sur les travaux de sa dix-huitième session tenue à Vienne du 3 au 21 juin 1985;

3° du Commentaire analytique du projet de texte d'une loi type sur l'arbitrage commercial international figurant au rapport du Secrétaire général présenté à la dix-huitième session de la Commission des Nations-Unies pour le droit commercial international.

1986, c. 73, a. 2.

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CODE OF CIVIL PROCEDURE, R.S.Q., chapter C-25

BOOK IX CLASS ACTION

TITLE II AUTHORIZATION TO INSTITUTE A CLASS ACTION

1010. The judgment dismissing the motion is subject to appeal *pleno jure* by the applicant or , by leave of a judge of the Court of Appeal, by a member of the group on behalf of which the motion had been presented. The appeal is heard and decided by preference.

The judgment granting the motion and authorizing the exercise of the recourse is without appeal.

1978, c. 8, s. 3; 1982, c. 37, s. 20.

CODE DE PROCÉDURE CIVILE, L.R.Q., chapitre C-25

LIVRE IX LE RECOURS COLLECTIF

TITRE II L'AUTORISATION D'EXERCER LE RECOURS COLLECTIF

1010. Le jugement qui rejette la requête est sujet à appel de plein droit de la part du requérant ou, avec la permission d'un juge de la Cour d'appel, de la part d'un membre du groupe pour le compte duquel la requête a été présentée. L'appel est instruit et jugé d'urgence.

Le jugement qui accueille la requête et autorise l'exercice du recours est sans appel.

1978, c. 8, a. 3; 1982, c. 37, a. 20.

Paragraphs
43

CIVIL CODE OF QUEBEC, S.Q. 1991, c. 64

DIVISION V

EFFECTS OF CONTRACTS

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.

1991, c. 64, a. 1437.

CODE CIVIL DU QUÉBEC, L.Q. 1991, c. 64

SECTION V

DES EFFETS DU CONTRAT

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.

1991, c. 64, a. 1437.

Paragraphs

CONSUMER PROTECTION ACT, 2002**,** S.O. 2002, c. 30, Sched. A, s. 7(2) **35**

PART II
CONSUMER RIGHTS AND WARRANTIES

No waiver of substantive and procedural rights

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary. 2002, c. 30, Sched. A, s. 7 (1).

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act. 2002, c. 30, Sched. A, s. 7 (2).

LOI DE 2002 SUR LA PROTECTION DU CONSOMMATEUR**,** L.O. 2002, chap. 30, Annexe A, art. 7(2)

PARTIE II
DROITS ET GARANTIES ACCORDÉS AU CONSOMMATEUR

Aucune renonciation aux droits substantiels et procéduraux

7. (1) Les droits substantiels et procéduraux accordés en application de la présente loi s'appliquent malgré toute convention ou renonciation à l'effet contraire. 2002, chap. 30, annexe A, par. 7 (1).

Restriction de l'effet d'une condition exigeant l'arbitrage

(2) Sans préjudice de la portée générale du paragraphe (1), est invalide, dans la mesure où elle empêche le consommateur d'exercer son droit d'introduire une action devant la Cour supérieure de justice en vertu de la présente loi, la condition ou la reconnaissance, énoncée dans une convention de consommation ou une convention connexe, qui exige ou a pour effet d'exiger que les différends relatifs à la convention de consommation soient soumis à l'arbitrage. 2002, chap. 30, annexe A, par. 7 (2).